

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 21 August 2017

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant submitted a multi-part request to the Ministry of Justice (MoJ) requesting information about meeting the needs of older prisoners.
2. The MoJ stated that it was unable to establish whether it held this information within the cost limit and therefore refused the request under section 12(2) of the FOIA (cost of compliance exceeds appropriate limit).
3. The Commissioner has investigated the MoJ's handling of parts (2) and (4) of the request.
4. The Commissioner's decision is that the MoJ misinterpreted the request and failed to properly establish whether it held the actual information requested at those parts of the request. Therefore it has not complied with the duty at section 1(1)(a) of the FOIA.
5. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
  - provide reasonable advice and assistance to the complainant pursuant to the duty provided by section 16 of the FOIA. The advice and assistance should be given with a view to clarifying what is being asked for within parts (2) and (4) of the request. It should then issue a fresh response.
6. The MoJ must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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7. On 24 October 2016 the complainant wrote to the MoJ and made a multi part request for information relating to meeting the needs of older prisoners:

*"(1) In Command Paper (CM8739) dated November 2013 was the Government's response to the Justice Committee's Fifth Report of Session 2013-14. At page 5 the response of the Secretary of State was that a "formal analysis of the estate" was required and the assessment would be completed by the end of 2014. Please provide me with a copy of that analysis/ assessment.*

*(2) At page 6 of CM 8739 the response states "We will commit to ensure that older prisoners with identified needs and those with disabilities should not be sent to unsuitable accommodation". The Secretary of State said he would "commit to ensure that this only happen in extenuating circumstances". Please provide me with the data that informs this commitment.*

*(3) At paragraph 134 the Justice Committee states that "PSI 32/2011 does not sufficiently provide for the minimum standards of care and treatment that re [sic] determined by their needs". What steps have NOMS taken (or propose to take) to improve/ amend the PSI?*

*(4) At page 6 of CM 8739 the response of the Secretary of State was that "NOMS will ensure that older prisoners are not allocated to an establishment that cannot meet their needs". In addition, the response stated that "We will consider our approach for the allocation of older and disabled prisoners to prisons that cannot meet their needs".*

*Please provide me with the data that describes and confirms that NOMS did take steps to "ensure that older prisoners are not allocated to an establishment that cannot meet their needs".*

*In addition please provide me with the data relating to the consideration given to the allocation of older and disabled prisoners*

*...*

*I would be interested in any information held by the Ministry regarding my request... If you need further clarification please contact me at the address above...".*

8. The MoJ responded on 11 January 2017. It refused to confirm whether it held the requested information citing section 12(2) of the FOIA.

9. Following an internal review the MoJ wrote to the complainant on 20 February 2017 maintaining its original position.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 27 February 2017 to complain about the way his request for information had been handled.
11. He disputed the MoJ's handling of parts (2) and (4) of the request.
12. In response to the request, the MoJ told the complainant that it would need to contact over 100 prisons and ask them to search local records in order to confirm whether or not it held all the information he had requested.
13. In contrast, the complainant described parts (2) and (4) of his request as relating to the provision of specific directives or instructions.
14. During the course of her investigation, the Commissioner asked the MoJ to respond with respect to its application of section 12(2) of the FOIA. Given the basis of his complaint, she also asked the MoJ to respond with respect to the complainant's view that parts (2) and (4) of his request were not about local records.
15. The analysis below considers the MoJ's handling of the request, specifically whether it handled parts (2) and (4) appropriately based on the wording of the request.

### **Reasons for decision**

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#### *Section 1 general right of access*

16. Section 1(1) of the FOIA says that an individual who asks for information from a public authority is entitled to (a) be informed whether the authority holds the information and, (b) if the information is held, to have that information communicated to them.
17. Section 1(3) of the FOIA says that a public authority is not obliged to comply with section 1(1) of the FOIA where it has asked the applicant to supply further information about the request in order to identify and locate the requested information, and has not received this further information.

#### *The complainant's view*

18. Having received its response to his request for information, the complainant wrote to the MoJ expressing dissatisfaction with its application of section 12(2) of the FOIA.
19. With respect to part (2) of the request, the complainant told the MoJ:

*"It is clear that I am asking for the terms of his [the Secretary of State's] commitment and not local records.... In other words, what were the steps taken by the Secretary of State/NOMS? /Did he issue a Prison Service Instruction or any other directive? If not, how was the commitment of the Secretary of State enacted?"*

20. Similarly, he told the MoJ in respect of part (4) of his request:

*"I am asking the steps taken by NOMS not 100 prisons [sic]"*.

21. In correspondence with the Commissioner the complainant described the information he was requesting as:

*"... the information that confirmed the commitment given to the Justice Committee by the then Secretary of State. Did the then Secretary of State authorise the issue of a Prison Service Instruction or any other directive? If not, then how was the commitment of the Secretary of State enacted or conveyed to the 100 or so prisons?"*

22. With respect to part (2) of the request, he stated that:

*"It has nothing to do with surveying 100 or so prisons to see what they may or may not have done. If any of those prisons did anything ... it would be pursuant to a directive from Headquarters..."*

23. With respect to part (4) of the request he argued that he was seeking to know what directive/guidance/instruction NOMS gave to ensure that older prisoners are not allocated to an establishment that cannot meet their needs.

#### *The MoJ's view*

24. The MoJ told the complainant that in order to respond to parts (2) and (4) of his request it would need to contact over 100 prisons and ask them to search local records - which could include manual records and paper documents. As a result, it estimated that it would exceed the cost limit to confirm whether or not it held all the information he had requested.
25. In its submission to the Commissioner, the MoJ provided further arguments in support of its application of section 12(2) in this case.

26. However, despite being asked to respond about the complainant's view as to the nature of the information he was seeking, the MoJ did not provide any arguments in relation to its compliance with section 1 of the FOIA.

*The Commissioner's view*

27. The Commissioner accepts that a public authority can refuse a request if deciding whether it holds the information would mean it exceeded the cost limit, for example, because it would require an extensive search in a number of locations.
28. However, the Commissioner's guidance on section 1 of the FOIA<sup>1</sup> makes it clear that public authorities must interpret information requests objectively and avoid reading into the request any meanings that are not absolutely clear from the wording.
29. When an authority receives an unclear or ambiguous FOIA request its duty under section 16 of the FOIA to provide advice and assistance will be triggered and it must go back to the requester to ask for clarification.
30. The Commissioner accepts that the MoJ did not seek clarification in this case when it first received the request. However, she considers that the reasons the complainant put forward for requesting an internal review clearly suggested that he disagreed with the MoJ's interpretation of his request.
31. The internal review process provides the opportunity for a public authority to reconsider its handling of the request when an applicant complains about the authority's response to his or her request and it should respond to these concerns accordingly.
32. In this case, the Commissioner considers that best practice would suggest that, if the reasons the complainant put forward for requesting an internal review raised doubt over the type and amount of information within the scope of his request, the MoJ should have contacted him to clarify whether or not the material, on which they had based their initial refusal, was in fact the subject of his request.
33. The Commissioner considers that, in this case, the MoJ failed to bring the two parties together in a common understanding of the scope of the request. It follows that she is not satisfied that it complied with the duty at section 1(1)(a) in respect of the request. In line with section 16 of the

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

FOIA, she therefore now requires the MoJ to engage with the complainant and establish clearly what he requires in respect of parts (2) and (4) of his request. It should then provide a fresh response.

## Right of appeal

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34. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504  
Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Jon Manners  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**