

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 January 2022

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

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the number of individuals testing positive for Covid-19 working at, or entering the grounds of, a specified prison.
2. The Ministry of Justice (MoJ) confirmed it held some information within the scope of the request but refused to provide it, citing section 40(2) (personal information) of FOIA.
3. The Commissioner's decision is that section 40(2) did not apply.
4. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
  - disclose the withheld information to the complainant.
5. The MoJ must take this step 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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6. On 23 October 2020, the complainant wrote to the MoJ and requested information in the following terms:

*"Can you advise me how many staff/admin/contractors/prison officers have tested positive for COVID 19 whom have worked [at] or entered the grounds of HMP LEYHILL during the pandemic".*

7. The MoJ responded in correspondence dated 'November 2020'. It confirmed it held some of the requested information, namely information about the number of directly employed staff that have declared to HMPPS [HM Prison & Probation Service] that they have tested positive for Covid-19. However, it refused to provide that information, citing section 40(2) (personal information) of FOIA.
8. The MoJ also confirmed that it did not hold any other information within the scope of the request.
9. The complainant wrote to the MoJ again on 20 March 2021. He received a response dated 31 March 2021. That response confirmed that his request for information has already been responded to and included a copy of the MoJ's correspondence dated 'November 2020'.
10. The complainant expressed dissatisfaction with that response on 6 April 2021.

### **Scope of the case**

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11. The Commissioner received correspondence from the complainant on 20 May 2021 in which he complained about the way his request for information had been handled.
12. He disagreed that he had requested any personal data. Accordingly, he disputed that section 40(2) of FOIA applied in this case.
13. He told the Commissioner that, in his view, the requested information is not exempt from disclosure, and should have been provided as it does not contain personal data. The complainant argued that, in any event, given the passage of time since he made his request, and the size of the workforce at HMP Leyhill, identification of any individual would have been impossible.
14. In support of his complaint, he claimed that other prisons had published their data regarding Covid-19 cases. He also cited a report by the Chief Inspector of Prisons on a scrutiny visit to HMP Leyhill arguing that it contained information relevant to his request. The Commissioner understands that the HM Inspectorate of Prisons report he referred to was published on 7 April 2021.
15. The Commissioner does not consider that the complainant's references set a precedent for disclosure under FOIA. Furthermore, in a case such

as this, whether low numbers in statistics are personal data has to be considered on a case by case basis.

16. Given the history of this request for information, the Commissioner exercised his discretion to accept the complaint without an internal review having been carried out.
17. Following the Commissioner's intervention, the MoJ wrote to the complainant on 17 December 2021. It confirmed that, while it had not previously received a request for internal review from him, it had now reconsidered its handling of the request. It maintained its view that the number of individuals that HMPPS was aware had tested positive at the time of the request was exempt from disclosure.
18. Acknowledging the passage of time, as a gesture of goodwill the MoJ provided the complainant with *'the most recent information held'*, namely the number of staff at HMP Leyhill testing positive for Covid-19 up to 31 October 2021.
19. In correspondence dated 5 January 2022, the complainant confirmed that he remained dissatisfied and requested that the Commissioner conclude matters formally by way of a decision notice.
20. The MoJ confirmed that it did not wish to make any further submissions.
21. The analysis below considers the MoJ's application of section 40(2) of FOIA to the withheld information. That information comprises the number of directly employed staff at Leyhill Prison that, at the time of the request, had declared to HMPPS that they had tested positive for Covid-19 during the pandemic.
22. The Commissioner is mindful that, while the wording of the request included the phrase *'during the pandemic'*, it did not specify actual dates. On the basis that the UK went into lockdown on 23 March 2020, and in the absence of any other descriptors, the Commissioner considers the timeframe of the request to be 23 March 2020 to 23 October 2020.

## Reasons for decision

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### *Section 40 personal information*

23. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

24. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
25. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
26. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

*Is the information personal data?*

27. Section 3(2) of the DPA defines personal data as:

*"any information relating to an identified or identifiable living individual".*

28. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
29. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
30. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
31. The Commissioner is satisfied that information about an individual's positive Covid-19 test result undoubtedly relates to them.
32. The second part of the test is whether an individual can be identified from the information.
33. The Commissioner's guidance<sup>1</sup> states:

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2619056/s40-personal-information-section-40-regulation-13.pdf>

*"The DPA defines personal data as any information relating to an identified or identifiable living individual. If an individual cannot be directly identified from the information, it may still be possible to identify them".*

34. In that respect, the Commissioner acknowledges that, in correspondence with the complainant, the MoJ told him that, if a request is made for information and the total figure amounts to five people or fewer, the MoJ must consider whether this could lead to the identification of individuals and whether disclosure of the information would be in breach of its statutory obligations.
  35. With reference to the requested information in this case, MoJ told the complainant:

*"... given the small number of individuals that HMPPS was aware had tested positive at the time of your request (between one and five) it would have been possible to combine the true figure (if disclosed) with other information sources (eg local knowledge of staff absence at HMP Leyhill) in order to identify any or all of those individuals".*
  36. In its submission to the Commissioner, the MoJ argued that such an exercise could have been carried out by any person with the appropriate local knowledge at the prison, including a prisoner.
  37. Having viewed the withheld information, the Commissioner accepts that the numbers within the scope of the request are low.
  38. The Commissioner is also mindful that the issue to be considered in a case such as this is whether disclosure to *a member of the public* would breach the data protection principles.
  39. He accepts that different members of the public may have different degrees of access to the *'other information'* needed for re-identification to take place.
  40. A test used by both the Commissioner and the First-tier Tribunal in cases such as this is to assess whether a *'motivated intruder'* would be able to recognise an individual if he or she was intent on doing so. The *'motivated intruder'* is described as a person who will take all reasonable steps to identify the individual or individuals but begins without any prior knowledge. In essence, the test highlights the potential risks of
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reidentification of an individual from information which, on the face of it, appears truly anonymised.

41. The ICO's Code of Practice on Anonymisation<sup>2</sup> notes that:

*"The High Court in [R (on the application of the Department of Health) v Information Commissioner [201] EWHC 1430 (Admin)] stated that the risk of identification must be greater than remote and reasonably likely for information to be classed as personal data under the DPA".*

42. In summary, the test is whether the withheld information can identify an individual with a degree of certainty when it is combined with any additional information which is reasonably likely to be accessed and used to aid identification.
43. In order to progress his investigation, the Commissioner asked the MoJ to explain how disclosure in this case would risk the identification of the individuals concerned. In order to provide context to the request, he also asked the MoJ to confirm how many directly employed staff worked at HMP Leyhill at the time of the request.
44. With regard to the risk of re-identification, the MoJ re-iterated what it had told the complainant, namely that it would have been possible to combine the requested number with other information sources.
45. With respect to the other sources of information available, in its submission to the Commissioner the MoJ gave the same example it had provided to the complainant – local knowledge of staff absence.
46. With regard to his question about the size of the workforce, the MoJ advised the Commissioner that, while it does not have a figure readily available for the time of the request, the closest published statistics show that 146 staff were employed at HMP Leyhill on 31 December 2020.
47. The Commissioner has considered the subject matter of the request – namely how many staff at HMP Leyhill tested positive for Covid-19 – and whether such information would attract the attentions of a motivated intruder.

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

48. With respect to the situation at the time of the request, he accepts that there continued to be concerns about Covid-19. From his research, he understands that a three-tier system of restrictions was in place in England at the time of the request, with a second lockdown in England announced soon after<sup>3</sup>, on 31 October 2020.
49. Taking account of concerns in general about Covid-19, and about the impact of an outbreak of Covid-19 within the prison estate, in particular, the Commissioner considers the requested information attractive to a motivated intruder.
50. He also accepts that, in a scenario involving staff employed in a named prison establishment, it is reasonably likely that additional information would be available to, and used by, a motivated intruder to aid identification.
51. The Commissioner has therefore considered whether, after combining the withheld information – a number acknowledged by the MoJ to be between one and five - with available additional information, an individual could be identified with a degree of certainty?
52. While the Commissioner acknowledges that the MoJ argued that it would have been possible to combine the requested figure with other information sources, the MoJ did not advance any basis beyond that on which individuals could be identified from the data. It simply asserted it to be the case.
53. With respect to the MoJ's example of local knowledge of staff absence, the Commissioner considers its arguments amount to little more than an assertion that individuals could be identified, without explaining why.
54. The Commissioner considers that the MoJ failed to cover aspects that he would have expected to see in order to explain how disclosure of the withheld number, when combined with local knowledge of staff absence, would enable the identification of staff.
55. For example it did not provide any contextual information about staff absence rates during the period under consideration. Nor did it explain the extent to which it would be apparent from local knowledge that any staff absence was due to sickness, and more specifically due to a

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<sup>3</sup> <https://www.gov.uk/government/speeches/prime-ministers-statement-on-coronavirus-covid-19-31-october-2020>

positive Covid-19 test, as opposed to any other reason such as shift patterns or annual leave.

56. The Commissioner acknowledges that MoJ has a policy in relation to handling requests where low numbers are involved. However, while such a policy provides a starting point to protecting information, decisions about withholding information need to be made on a case by case basis, considering all relevant circumstances. In a case such as this the MoJ needs to be clear about how identification of the individuals concerned can be achieved.
57. From the evidence he has seen, it is not obvious to the Commissioner how disclosure of the requested information would identify any or all of the members of staff who tested positive for Covid-19 during the timeframe the request relates to.
58. In the circumstances of this case, the Commissioner is not satisfied that the MoJ has demonstrated how disclosure of the withheld number would identify those who had tested positive for Covid-19 as opposed to those who were absent from work for another reason.
59. As it is not clear how an individual would be identifiable from the data requested (together with any other data available), the Commissioner cannot be satisfied that the withheld information both relates to **and** identifies the individuals concerned. This information therefore does not fall within the definition of 'personal data' in section 3(2) of the DPA.
60. Having found that the requested information did not constitute personal data because disclosure would not permit individuals to be identified, it follows that section 40(2) cannot apply.

## **Other matters**

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### *Receiving and responding to a request for information*

61. The complainant told the MoJ that he was not aware of the 'November 2020' correspondence until he was provided with a copy of it on 31 March 2021.
62. The Commissioner would remind public authorities that all staff should be trained in how to recognise a request, what to do when a request is received and their role in meeting the requirements set out under FOIA.

### *Internal review*

63. The Commissioner cannot consider a public authority's response to an internal review in a decision notice because such matters are not a



formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.

64. The code of practice suggests that public authorities should distinguish between a request for an internal review, which seeks to challenge either the outcome or the process of the handling of the initial response, and a general complaint, which should be handled as general correspondence.
65. In the circumstances of this case, the Commissioner understands that, despite the complainant endeavouring to send correspondence to the MoJ, the internal processes that were followed meant that it was not received by, and responded to, by the MoJ as a formal request for review.
66. The Commissioner commends the code of practice to the MoJ.

## Right of appeal

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67. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

68. 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.
69. 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 .....**

**Laura Tomkinson  
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SK9 5AF**