

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 August 2012

Public Authority: The Ministry of Justice
Address: 106 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about the number of prisoners being held by HM Prison Service, on a specified date, who have been sentenced to life imprisonment or an Indeterminate Sentence for Public Protection (IPP) and who have served their 'tariff'. The Ministry of Justice (MoJ) ultimately responded stating that it does not hold the requested information.
2. The Commissioner does not accept that the information is not held.
3. The Commissioner requires the public authority to either comply with section 1(1) of the FOIA (by confirming that the requested information is held and disclosing it) or issuing a refusal notice compliant with section 17. For the sake of completeness, the Commissioner notes that the complainant has specified that figures be broken down into those serving life sentences and those with an IPP. For each of these categories separate figures should be provided for those who have been released by the Parole Board and then been recalled and those who have never been released.
4. The public authority 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

5. The complainant wrote to the Ministry of Justice (MoJ) on 4 December 2011 and requested information in the following terms:

"I would like to know how many prisoners are being held by HM Prison Service on today's date (4 December 2011), or where that is not available the closest date available, who have been sentenced to life imprisonment or an Indeterminate Sentence for Public Protection (IPP) and who have served their 'tariff' (i.e. the minimum period of time that the offender must spend in prison before being eligible [sic] for release by the Parole Board) as determined by the sentencing court.

For the purposes of this request figures should be separated [sic] for those serving a term of life imprisonment and for those serving an IPP sentence. Prisoners falling into either category who have been released by the Parole Board and then recalled should be provided as a separate [sic] figure from those who have served their tariff and never been released on licence by the Parole Board".

6. The MoJ responded on 20 December 2011. It confirmed that it held information within the scope of the request but that it was exempt from disclosure, citing section 21 (information accessible by other means). The MoJ provided the complainant with a link to the MoJ report entitled "*Provisional figures relating to offenders serving indeterminate sentence of imprisonment for public protection (IPPs)*".
7. That report provides provisional management information figures for March 2011. The accompanying notes explain that the figures relate to prisoners in custody, including those in institutions other than prisons, eg secure hospitals, but exclude IPPs who have been recalled.
8. While describing that information as "interesting and helpful", the complainant expressed dissatisfaction with the MoJ's response. He raised a number of issues, including that he expected that more recent figures would exist.
9. Following an internal review the MoJ wrote to the complainant on 20 January 2012. It stated that it considered it was correct to provide a link to the March 2011 figures - the most recent figures publically available. However, it stated that the incorrect exemption had been cited. Instead, it sought to rely on section 22 (information intended for future publication).

Scope of the case

10. The complainant contacted the Information Commissioner (the Commissioner) to complain about the way his request for information had been handled. He summarised his complaint as follows:

- "...
 - *That by providing a link to information from March 2011 that is described as provisional that the Ministry of Justice failed to comply with sections 1(1)(a) and 1(1)(b) of the FOIA. This is on the basis that the figures might not be accurate and/or that it is reasonable to expect that more recent figure were held;*
 - *that the Ministry of Justice were wrong to exempt information under section 22 of the FOIA because the information being exempted did not fall within the ambit of the request for information and thus failed to comply with section 1(1) of the FOIA; and*
 - *that the Ministry of Justice has failed to comply with section 1(1)(b) by failing to provide, after the internal review, the number of IPP and life sentenced prisoners held by HM Prison Service who have been recalled to custody or applied an exemption within part 2 of the FOIA".*

11. Regarding the complainant's concern that the March 2011 figures might not be accurate, the Commissioner notes that the right under FOIA is to information which is held - not to information which is accurate.

12. The Commissioner has set out below the key correspondence between his office, the complainant and MoJ.

13. During the course of his investigation, the MoJ told the Commissioner:

"The MoJ does not, for the purposes of FOIA, hold information in a way that would enable us to answer [the complainant's] request in full".

14. It also told him:

"Our response at internal review stated that we should have quoted section 22 in our response. I can confirm that this was incorrect as we did not hold the information for the purpose of FOIA, and were not therefore in a position to exempt it. Instead our response should have made clear that the only information we held relevant to [the request] was the 31 March publication".

15. During the course of the Commissioner's investigation, having re-considered its handling of his request, the MoJ advised the complainant:

"The FOI Act does not require public authorities to create information in order to respond to FOI requests, and in the case of your request, we would have needed to create information in order to provide you with the information you requested".

16. The complainant told the Commissioner he was dissatisfied with the MoJ's response:

"I contend that the information is held by the MoJ, although in an obscure form that is not easily retrieved. I am not convinced that by extracting the information it would constitute the creation of new data".

17. In light of the above, and taking into account the MoJ's submissions during the course of his investigation and the complainant's views, the Commissioner considers the scope of his investigation to be whether the MoJ held the requested information at the time of the request.

Reasons for decision

Section 1 General right of access to information held by public authorities

18. Section 1 of FOIA states that any person making a request for information is entitled to be told whether the public authority holds the information requested and, if held, to be provided with it.
19. During the course of the Commissioner's investigation, in correspondence with the complainant, the MoJ accepted that its original response:

"should have been clearer in explaining why it was that we were not disclosing to you all of the information in the level of detail you requested, nor for the date you asked for".

20. The MoJ explained that, although it holds information about prisoners and their sentences, including information relating to specific days, it would be required to create information in order to satisfy the complainant's request.
21. The MoJ told the complainant that the only instance in which it would hold relevant data for the purposes of FOIA:

"is where we have already created the data".

22. The MoJ explained that, each quarter, it creates some of the information relevant to the request, ahead of publication on the Justice website. It told the Commissioner:

"At the time of [the complainant's] requestthe only data held were the provisional figures for 31 March 2011".

23. The Commissioner understands that the MoJ publishes information on the 'Justice' website on a quarterly basis, and that that information includes information relevant to the request in this case.
24. The request in this case is for a breakdown of information about the number of prisoners being held on 4 December 2011. As this information has not been collated already, the issue the Commissioner has addressed is whether or not, at the time the request was made, the MoJ held information within the scope of the request in such a way as to be able to respond to the complainant without creating new information.

Is the information or any part of it held by the MoJ?

25. The Commissioner accepts that FOIA does not require a public authority to create information. However, in his view, a public authority is not creating new information where:
- it presents information it holds in the form of a list or schedule;
 - it compiles an answer to a request involving simple manual manipulation of information held in files; or,
 - it extracts information from an electronic database by searching it in the form of a query.

Can the information be extracted or compiled from existing information?

26. In this case, the Commissioner has considered it appropriate to look at whether or not the request can be complied with either by the manipulation of information held in files or by extracting information from an electronic database. In his view, the simple manipulation of information on record would not normally amount to the creation of new information but simply the collation of information held in a variety of sources.
27. The MoJ argued that it cannot provide the requested information *"without undertaking a complex data manipulation exercise"* of two separate databases. The MoJ explained that this is because:

"tariff details are held separately to details about the daily population of IPP and lifer prisoners".

28. It also confirmed that *"there is no automated query that can be run on the database that would provide the information requested"*.

29. It argued that:

"because of the complexity of this process, the exact information requested is not held by the MoJ for the purposes of FOIA".

30. The Commissioner asked the MoJ to explain the process involved in combining the two sets of data in order to provide a response to the complainant. In addressing this point, the MoJ provided a description of the manner and extent of the process - a process that includes database extracts and manual intervention - that it would need to undertake in order to comply with the request.

31. With respect to information held electronically, the Commissioner considers that, by their very nature, electronic databases are designed to make use of the information recorded in them. The Commissioner therefore considers that all information held in electronic databases is held for the purposes of FOIA. Furthermore, he considers that queries that can be made of a database amount to retrieval and extraction of information and not the creation of new information.

32. In this case the Commissioner has not been provided with any evidence to suggest that any new information needs to be collected in order to obtain the requested information. In other words, the Commissioner understands that the MoJ have all the building blocks from which it can compile the requested information.

33. He acknowledges, however, that the process to manipulate the recorded information comprises multiple steps, some of which require manual intervention.

Simple collation or skill and judgement required?

34. The Commissioner has considered whether or not the steps needed to compile the requested information involve a simple collation of data or require the application of skill and complex judgement. The Commissioner notes that, while FOIA does not require public authorities to create information, there is a difference between extracting or compiling existing information and creating new information. In his view:

"What amounts to a simple rather than a complex calculation depends on the level of skill and judgement required to carry out the task. If extracting the information relevant to the request requires a high level of skill and judgement, this would amount to creating new information not already held".

35. Generally the Commissioner is likely to find that a public authority holds requested information albeit that it would require a reasonable level of judgement to determine either what 'building blocks' are required to compile it or what needs to be done to the 'building blocks' once they have been collated. However, where that level of judgement goes beyond reasonable and becomes complex (perhaps based on specialist knowledge) or where complicated mathematical formulae is required he is unlikely to conclude that the information is held.
36. In describing the process involved in combining the two sets of data to comply with the request in this case, the MoJ variously used the terms "expert user", "detailed knowledge of the dataset" and "good judgement".
37. In other words, in its view, the level of skill and judgement required to comply with the request is such that it amounts to the creation of new information not already held.
38. In compiling information from records that need to be examined manually, in the Commissioner's view, the complexity of the calculation is a factor to take into account when considering whether information is held.
39. The Commissioner accepts that obtaining the requested information in this case will require some skill and judgement. However, having considered the explanation provided by the MoJ in its submission to him, the Commissioner is not satisfied that the MoJ has demonstrated sufficiently that the data manipulation required in order to comply with the request would require complex judgement involving the application of specialist knowledge and expertise. The information at issue in this case relates to numbers and dates. The Commissioner considers these to be factual rather than subjective matters. Whilst acknowledging that the process required to comply with the request involves several steps and is time consuming, the Commissioner does not accept that the MoJ has evidenced that the manipulation of the raw data by its expert users would involve levels of skill and judgement significant enough that it would amount to the creation of new information not already held. He therefore does not accept that the MoJ does not hold information within the scope of the request.

Right of appeal

40. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

41. 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.
42. 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

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