

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 January 2015

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

Decision (including any steps ordered)

1. The complainant requested information, including requests made on 12 May 2014 and 21 May 2014, about restrictions on reading materials in prisons. The Ministry of Justice (MoJ) aggregated the requests and advised that to comply with them would exceed the appropriate limit.
2. The Commissioner's decision is that MoJ was correct to aggregate the requests and that it was entitled to rely on section 12(1) (cost of compliance exceeds appropriate limit). He requires no steps to be taken.

Background

3. FOIA only applies to those bodies defined as 'public authorities' in schedule 1¹. An individual prison is not a public authority as defined by FOIA and therefore does not have a duty to respond to information requests.
4. Chapter 11 of the Public Protection Manual provides guidance to governors and directors of contracted out prisons when dealing with the accessibility and possession by prisoners of inappropriate materials.

¹ <http://www.legislation.gov.uk/ukpga/2000/36/schedule/1>

5. PSI 45/2011 is the prison service instruction relating to the provision of an effective library service in a prison establishment. Paragraph 2.8 states:

"Governors may restrict an individual's access to some material, on a case-by-case basis".

Request and response

6. The Commissioner understands that in May 2014 and June 2014 the complainant made freedom of information requests to every prison in England and Wales requesting information about restricted publications/materials. Those requests were for:

"1. A copy of the local policy setting out which publications are restricted in each prison in accordance with paragraph 4 of chapter 11 of the Public Protection Manual.

2. A list of materials/publications which have been restricted in respect of individuals within your prison over the past 12 months in accordance with paragraph 2.8 of PSI 45/2011".

7. Further to those requests to individual prisons, on 12 May 2014, the complainant wrote to MoJ and requested information in the following terms:

"Could you please supply me with a list of the books that have been banned in each prison, including private prisons".

8. The complainant also wrote to MoJ on 21 May 2014 requesting:

"In relation to every prison in England and Wales, please provide us with:

A copy of the local policy setting out which publications are restricted in each prison in accordance with paragraph 4 of chapter 11 of the Public Protection Manual

A list of materials/publications which have been restricted in respect of individuals within your prison over the past 12 months in accordance with paragraph 2.8 of PSI 45/2011.

Please note that we have written to each individual prison under the Freedom of Information Act 2000 to request the above, on the basis that they hold their local policies, but each establishment has responded advising us to direct this enquiry to you. Please

therefore provide us with the local policies requested as well as the list of materials/publications”.

9. MoJ provided a single response on 4 July 2014. It acknowledged receipt of the requests and advised that, in line with section 12(4) of FOIA, it had aggregated them for the purpose of estimating whether the cost of compliance would exceed the appropriate limit. It confirmed that it holds the requested information in respect of public sector prisons. However, MoJ advised that it does not hold the requested information in relation to contracted, or private, prisons. It confirmed the names of those 14 establishments, explaining that they are not included in Schedule 1 of FOIA.
10. In respect of the information it holds, MoJ said that it considered that the cost of compliance with the requests would exceed the appropriate limit of £600 - citing section 12 of FOIA (cost of compliance exceeds appropriate limit).
11. The complainant requested an internal review on 24 July 2014. It confirmed that its request is in relation to books which are presently banned. It also clarified that, in relation to individual prisoners, its request is time limited by 12 months.
12. Following an internal review MoJ wrote to the complainant on 19 August 2014. It upheld its original position both about the decision to aggregate the requests and about its application of section 12. It also clarified that its conclusions do not apply in respect of private prisons.

Scope of the case

13. The complainant contacted the Commissioner on 5 November 2014 to complain about the way their requests for information had been handled. The complainant raised a number of issues.
14. For example, they considered the fact that they had received no response from the majority of the prisons they had contacted was unacceptable. They also said that, in their view, the most appropriate response is for each prison to supply a copy of its own individual policy.
15. However, an individual prison is not a public authority as defined by FOIA. Therefore an individual prison does not have a duty to respond to information requests. In this context, MoJ is the authority responsible for public sector prisons.
16. With respect to the concerns raised by the complainant which are the subject matter of this decision notice, the Commissioner considers the

scope of his investigation to be whether MoJ handled the requests – those made to the individual public sector prisons and those made directly to MoJ - in accordance with the FOIA. Specifically, he will consider whether MoJ is entitled to aggregate the requests and whether it is entitled to rely on section 12 as a basis for refusing to provide the requested information.

17. The Commissioner has also considered MoJ's compliance with section 16 – the duty to provide advice and assistance.

Reasons for decision

Section 12 cost of compliance

18. Section 12(1) of the FOIA states that:

"Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit".

19. This limit is set in the fees regulations at £600 for central government departments and £450 for all other public authorities. The fees regulations also specify that the cost of complying with a request must be calculated at the rate of £25 per hour, meaning that section 12(1) effectively imposes a time limit of 24 hours in this case.

20. Section 12(4) of the FOIA states that:

"The Secretary of State may by regulations provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign, the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them".

21. In other words, when a public authority is estimating whether the appropriate limit is likely to be exceeded, it can include the costs of complying with two or more requests if the conditions laid out in regulation 5 of the Fees Regulations can be satisfied.
22. Regulation 5(2) of the Fees Regulations requires that the requests which are to be aggregated relate 'to any extent' to the same or similar information.

23. The Commissioner's guidance on requests where the cost of compliance exceeds the appropriate limit² acknowledges that public authorities can aggregate two or more separate requests. It also recognises that multiple requests within a single item of correspondence are separate requests for the purpose of section 12.
24. In this case, MoJ explained that it had aggregated the requests as they were deemed to be requesting similar information. It told the complainant:

"Your original request to prisons was for a copy of each one's local policy setting out which publications it had restricted under ch.11 of the Public Protection Manual, plus a list of materials that had been banned for individuals in the previous 12 months. Your request to MoJ was for a list of the books that had been banned in each prison, including private prisons. These were aggregated into a single response".

25. The Commissioner is satisfied that, as an individual prison is not a public authority as defined by FOIA, MoJ was entitled to consider the requests made to individual prisons in conjunction with those made directly to MoJ itself.
26. Having considered the wording of each of the requests the Commissioner is satisfied that the requests in this case relate to the same or similar information.
27. He is therefore satisfied that the MoJ was entitled to aggregate the requests when considering whether complying with them would exceed the appropriate limit.

Would complying with the request exceed the appropriate limit?

28. In estimating whether complying with a request would exceed the appropriate limit, regulation 4(3) states that an authority can only take into account the costs it reasonably expects to incur in:

- determining whether it holds the information;

² https://ico.org.uk/media/for-organisations/documents/1199/costs_of_compliance_exceeds_appropriate_limit.pdf

- locating the information, or a document containing it;
 - retrieving the information, or a document containing it; and
 - extracting the information from a document containing it.
29. The four activities are sequential, covering the retrieval process of the information from the public authority's information store.
30. In response to their requests, MoJ told the complainant:
- "In relation to the question about prisons' local policies, we would need to ask each of over one hundred public-sector prisons to check what publications it treated as restricted".*
31. In relation to the question about restrictions in respect of individual prisoners, MoJ explained that any prisoner at all may have access to particular publications restricted on a case-by-case basis. It went to say:
- "In order to provide a list of them all, we would need to ask every prison to look through every individual prisoner's record to determine what publications, if any, were restricted for each of them".*
32. Given the wording of the request in relation to restrictions over the last 12 months, MoJ told the complainant that not only would it have to determine what is currently prohibited but also what might have been prohibited in the past, for either serving or past prisoners.
33. With respect to the number of serving prisoners MoJ clarified the position during the Commissioner's investigation. In correspondence with Commissioner it said:
- "The population of public-sector prisons at the end of June 2014 (the nearest to the date of our reply) was 69,876".*
34. In its substantive submission, the MoJ provided the Commissioner with further arguments in support of its citing of section 12. For example it confirmed that manual searching of prisoner files is the only method of gathering the requested information. It told the Commissioner:
- 'In order to answer the request, every prisoner's individual file would need to be located and checked in order to determine whether any restrictions applied, then any such restrictions would need to be extracted for the response'.*
35. In providing an estimate of the work involved, MoJ told the Commissioner:

"Our estimate for locating, determining and extracting the information is 10 minutes per file. Ten minutes for each of 69,876 records would take more than 11,600 hours. At £25 per hour this would bring the estimated cost to £290,000"

36. MoJ also explained that, given the turnover of the prison population, the number of records within the scope of the request that would need to be checked would be significantly higher.

37. In requesting an internal review, the complainant told MoJ:

"we cannot understand how requesting this information from local prisons would cost over £600, given that each prison should have a local policy and have records of which books are banned in respect of individual prisoners as required under this policy".

38. When dealing with a complaint to him under FOIA, it is not the Commissioner's role to make a ruling on how a public authority deploys its resources, on how it chooses to hold its information, or the strength of its business reasons for holding information in the way that it does as opposed to any other way. Rather, in a case such as this, the Commissioner's role is simply to decide whether or not the requested information can, or cannot, be provided to a requestor within the appropriate cost limit.

39. In this case, MoJ explained that, as there is no operational need to do so, prisons are not required to maintain a central record of restrictions applied at individual prisoner level.

40. The Commissioner acknowledges that, in the complainant's view, the approach taken by MoJ in respect of the requested information is not in accordance with the spirit of FOIA. However, from the evidence he has seen during the course of his investigation, and in consideration of the aggregation of the requests, the Commissioner is satisfied that the MoJ has provided adequate explanations to demonstrate that it would exceed the appropriate limit to locate, retrieve and extract the requested information. Section 12(1) does therefore apply and the MoJ is not required to comply with the requests.

Section 16 advice and assistance

41. Where a public authority claims that section 12 is engaged, it should, where reasonable, provide advice and assistance to help the requestor to refine the request so that it can be dealt with under the appropriate limit.

42. Paragraph 14 of the section 45 Code of Practice states that where a public authority is not obliged to comply with a request because it would exceed the appropriate limit to do so, then it:

"...should consider providing an indication of what, if any, information could be provided within the cost ceiling. The authority should also consider advising the applicant that by reforming or refocussing their request, information may be able to be supplied for a lower, or no, fee."

43. In cases where it is reasonable to provide advice and assistance in the particular circumstances of the case, the minimum a public authority should do in order to satisfy section 16 is:

- either indicate if it is not able to provide any information at all within the appropriate limit; or
- provide an indication of what information could be provided within the appropriate limit; and
- provide advice and assistance to enable the requestor to make a refined request.

44. The Commissioner notes that while the MoJ told the complainant it considered that their aggregated requests are covered by section 12, it said that it may be able to answer a refined request. For example, it suggested that the complainant may wish to consider limiting the number of prisons that are the subject of the enquiry. However, MoJ advised the complainant:

"with the average prison holding well over 500 prisoners, it is unlikely that a request about individual prisoners in respect of even one prison could be responded to within the cost limit".

45. Having reviewed the evidence before him, the Commissioner considers that MOJ had taken reasonable steps to provide advice and assistance in accordance with section 16(1) FOIA.

Right of appeal

46. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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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