

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 January 2016

**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 about prisoners and IT access at a named prison during a specified time period in 2014. The Ministry of Justice (the 'MOJ') provided top line figures but refused to provide any further breakdown on the basis of section 40(2), personal information, as it said identification of individual prisoners would be likely.
2. The Commissioner's decision is that the MOJ has incorrectly applied the exemption for personal data at section 40(2) of the FOIA as the withheld information is sufficiently anonymised to take it out of the definition of personal data.
3. The Commissioner therefore requires the MOJ to take the following steps to ensure compliance with the legislation.
  - Disclose the withheld information as provided to the Commissioner.
4. 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.

#### **Background**

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5. The Commissioner understands that the complainant first requested information about prisoners and IT access at HMP Channings Wood on 18 June 2014. He finally received a response on 9 January 2015 in

which the MOJ said it did not hold the information. The complainant requested an internal review on 20 January 2015. The MOJ responded on 11 March 2015 stating that it would cost too much to provide the information as it was not in the required format.

6. The complainant wrote again to the MOJ on 11 March 2015 advising that he would be satisfied with a reduced 'population' of prisoners, and limited his request to sex offenders rather than all prisoners. This was accepted and the MOJ then advised him to make a new FOIA request. The complainant submitted his request on 13 March 2015, and it is that request which is the subject of this notice.
7. The Commissioner is aware that a prisoner known to the complainant is in HMP Channings Wood and would fall into scope of the request. He understands that the requester is wishing to ascertain whether prisoners with the same offences were being treated in the same manner in terms of IT access.
8. The request refers to the term 'Index Offence'. The MOJ's document "Proven Re-Offending: statistics and definitions"<sup>1</sup> states:

*"Index offence: offences are only counted as an index offence if the offence is:*

- *recordable (see below)*
- *committed in England and Wales*
- *prosecuted by the police*
- *not a breach offence*

*There are around 3,000 offence codes on the Police National Computer. These have been classified into 21 groups: violence (non serious), violence (serious), robbery, public order or riot, sexual, sexual (child), soliciting or prostitution, domestic burglary, other burglary, theft, handling, fraud and forgery, absconding or bail offences, taking and driving away and related offences, theft from vehicles, other motoring offences, drink driving offences, criminal or malicious damage, drugs import/export/ production/supply, drugs possession/small scale supply and other".*

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<sup>1</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/218471/proven-reoffending-definition-measurement-260112.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/218471/proven-reoffending-definition-measurement-260112.pdf)

## Request and response

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9. On 13 March 2015, the complainant wrote to the MOJ and requested information in the following terms:

*"A breakdown by index offence of the number of prisoners who were allowed IT access versus the number of prisoners denied IT access. I am happy for this to be limited to sex offenders at HMP Channings Wood during the period 25/03/14 to 25/06/14."*

10. The MOJ responded on 13 April 2015 and provided summary numerical information about the numbers of sex offenders whose IT access was and was not restricted during the three month period in question.
11. The complainant wrote to the MOJ on 14 April 2015, pointing out that the information provided did not include how many sex offenders had unrestricted IT access and how many had had IT access removed by 'index offence'.
12. As a result, the MOJ issued a further reply on 30 July 2015, which referred to the complainant having clarified his request. The MOJ applied section 40(2) to the request on the basis that revealing any numbers less than five could lead to individuals being identified.
13. The complainant then requested an internal review on 31 July 2015 in which he specified that he would like a breakdown by 'index offence' of the sex offenders at the named prison. The internal review outcome was provided on 21 September 2015 where the MOJ maintained that section 40(2) was engaged.

## Scope of the case

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14. The complainant contacted the Commissioner on 7 September 2015 to complain about the way his request for information had been handled. He disputed the MOJ's position that revealing numbers less than five could lead to individuals being identified.
15. Having contacted him to clarify the terms of his request, the Commissioner is satisfied that the complainant only requires a breakdown by 'index offence' and not any further breakdown into the offence codes. The Commissioner has therefore considered whether the MOJ has properly applied section 40(2) to the clarified request.

## Reasons for decision

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16. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
17. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 1998 (the 'DPA'). If it is not personal data then section 40 cannot apply.
18. 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 data protection principles under the DPA. The Commissioner notes in this case that the MOJ considers that disclosure would breach the first data protection principle.
19. In order to rely on section 40(2) the requested information must constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as:

*"...data which relate to a living individual who can be identified*

*a) From these data, or*

*b) From those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."*
20. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. From the definition above, it follows that information or a combination of information, that does not relate to and identify an individual, is not personal data.

## **Is the information personal data?**

22. The first question for the Commissioner to consider is whether the requested information is personal data as defined in section 1 of the DPA.

### *The MOJ's view*

23. The MOJ clarified that the data in question is the number of sex offenders in HMP Channings Wood who had their access to IT restricted for three months in 2014 following two serious IT security breaches. It said that the complainant wanted the data broken down by offence, not just distinguishing sex offenders from other prisoners.
24. In this case the MOJ initially provided top line figures in response to the request, disclosing that 102 risk assessments had been carried out and that 73 sex offenders had no additional restrictions placed on them, whilst 29 did. During the Commissioner's investigation, the MOJ revised one of the figures from 29 to 27, explaining that two offenders had been included in error whose offences were not sex offences.
25. Additionally, the MOJ highlighted that there are almost 90 sexual offences listed in Schedule 15 to the Criminal Justice Act 2003; it said that there are more offences listed in other legislation. It therefore advised that breaking down the 27 offenders into so many possible offences inevitably results in all of them falling into groups of five or less.
26. The MOJ has argued that the information is personal data because disclosure of the requested information broken down by offence for the prison's population of sex offenders could lead to the identification of individuals, where that figure equates to five or less.
27. Further, the MOJ said that it considers the information in question to be sensitive personal data in line with section 2(g) of the DPA which covers the "*commission or alleged commission by him of any offence.*"

### *The Commissioner's view*

28. 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 re-identification of an individual from information which, on the face of it, appears truly anonymised.

29. 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".*

30. In summary, the motivated intruder test is that if the risk of identification is "*reasonably likely*" the information should be regarded as personal data.
31. The requested information in this case relates to the numbers of sex offenders and IT access by index offence over a three month period – not individual prisoners' names, nor the reasons why prisoners have or have not had their IT access restricted.
32. The Commissioner is mindful of the timeframe of the request and the fact that the information is now over 18 months old. Having had the opportunity to review the withheld numbers, he accepts that some of the numbers within the scope of the request are low.
33. However, even where the number may be low, the Commissioner does not consider that this in itself means that the information is personal data.
34. In this case, the withheld information is broken down, by index offence, by sex offenders whose IT access was restricted during the three month period, and by those sex offenders whose IT access was not restricted during the same period. The MOJ has advised that only the prisoner's main offence is recorded on the IT risk assessment. Having searched for details about these index offences on line, the Commissioner has been unable to reconcile them with any publication made by the MOJ covering its use of index offence codes. Many of the 'index offences' as recorded by the MOJ in the withheld information in this case seem to potentially overlap, for example, "sex act with a female/child", "sex act with a female under 16/child abduction", "sexual assault on female under 13" "sex act with a child" and "sex act with under 16 year old" could all refer to a similar offence.

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

35. The Commissioner also recognises that, in addition to what appear to be vague and overlapping index offences utilised by HMP Channings Wood, prisoner turnover which can occur daily, means that it is difficult to identify an individual from the withheld information. When asked how many sex offender prisoners there were at HMP Channings Wood during the requested three month period the MOJ advised the Commissioner:

*"The number of sex offenders there during that period is a variable. The number can change each day depending on discharges, transfers out and transfers in. Therefore, it is not possible to provide this figure".*

35. If the MOJ itself is unable to be more definite about this then the Commissioner fails to see how a motivated intruder would be more successful in identifying who was in the prison at any particular time.
36. Furthermore, the figures provided are undated so it is not known at what point the risk assessments were undertaken during the three month period and the prison population is too fluid to be able to be certain who was, or was not there, during that period.
37. Whilst it is technically possible that an individual prisoner within HMP Channings Wood may be able to identify himself from the disclosure of the withheld information, because he knows what was put on the risk assessment form for his particular application for IT access, together with the main offence he has been imprisoned for, the Commissioner is satisfied that that individual prisoner would already know that information.
38. In light of the above, and having considered the withheld information, the Commissioner does not consider that any individual prisoner could be identified from the withheld information.
39. Consequently, he has decided that the withheld information does not constitute personal data and that the exemption in section 40(2) is not applicable.

## **Other matters**

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40. The MOJ's initial internal review response of 11 March 2015 in which it relied on the cost exclusion to refuse the request did not advise or assist the complainant, in accordance with section 16 of FOIA, as to how he might refine his request to potentially bring it under the cost limit. The complainant, however, chose to narrow the scope of his request from 'all prisoners' to 'sex offenders' during the three month period in question. The Commissioner would remind the MOJ of its obligation to offer advice

and assistance to future requests particularly where it seeks to rely on section 12(1).

41. The request of 13 March 2015 was answered within the requisite 20 working days laid down by FOIA; however the complainant's letter of 14 April 2015, in which he highlighted that the response given did not include the requested index offence breakdown, was not responded to until 30 July 2015. As the complainant had expressed dissatisfaction with the response, the Commissioner's view is that the MOJ should have carried out an internal review at that stage. It chose instead to issue a further response on 30 July 2015.
42. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
43. In both its handling of the internal reviews for the original request (internal review request 20 January 2015 and review outcome 11 March 2015), and the refined request (internal review request 31 July 2015 and review outcome 21 September 2015), the MOJ failed to complete the internal reviews within 20 working days. The Commissioner has logged these delays.

## Right of appeal

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44. 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)

45. 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.
46. 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 .....**

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**