

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2021

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information comprising a report, complaints procedure and quarterly management statistics. The Ministry of Justice (MoJ) denied holding the requested information relating to the complaints procedure, but provided a copy of the report. It refused to provide the requested statistics, citing sections 21 (information accessible to applicant by other means) and 14 (vexatious request) of the FOIA.
2. The Commissioner investigated the MoJ's application of sections 14 and 21 to the requested statistics.
3. The Commissioner's decision is that the MoJ has not demonstrated that the request was vexatious and was therefore not entitled to rely on section 14(1) to refuse it.
4. Nor has the MoJ demonstrated that the information was reasonably accessible to the applicant and was therefore not entitled to rely on section 21(1) to refuse it.
5. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
 - provide the information within the scope of part (3) of the request.
6. 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

7. On 15 March 2020, the complainant wrote to the MoJ, requesting information in the following terms:

"PLEASE NOTE I DO NOT HAVE ACCESS TO THE INTERNET.

1. Please provide me with [a] copy of the report entitled A Draft Target Operating Model for the Future of the Probation Service in England and Wales.

2. If the Crown Prosecution Service falls under the auspices of the Ministry of Justice please provide me with full details of the complaints procedure and to whom complaints regarding maladministration and CPS caseworkers should be addressed.

3. The Information Commissioner has required the Ministry of Justice Statistics unit to provide me with latest current Quarterly Management Statistics as set out below. The unit has not done so. To whom can I complain?

Proven Re-offending Statistics Quarterly Bulletin

Prison Population Tables including escapes

Offenders in prison/supervised in the community (including prison population as of latest date)

Safety in custody statistics

Deaths in Prison custody

Assaults and Self Harm

Costs per place and costs per prisoner by individual prison

Offenders convicted of terrorism (TACT) offences.

I would be interested in any information held by the Ministry regarding my request".

8. The MoJ responded on 8 October 2020, citing reference 200910008 and quoting the above request but thanking the complainant for his request for information dated 10 September 2020.
9. The Commissioner understands that, due to the pandemic, the request, which was posted to the MoJ, was only retrieved and logged on 10 September 2020.

10. The MoJ provided the information requested at (1), denied holding information within the scope of (2) and cited section 14(1) (vexatious request) of the FOIA with regard to the information requested at (3).
11. The complainant wrote to the MoJ on 30 October 2020, quoting reference 200910008, and requested a review of its handling of part (3) of the request. He made no reference to the fact that the MoJ had not addressed the part of the request that asked "*To whom can I complain?*". Rather, he told the MoJ that he did not accept that his request for the data was vexatious. He confirmed that he could not download the data from the internet and referred to having previously been supplied with similar data in hard copy format (albeit without confirming the nature of the hard copy format).
12. Following an internal review, the MoJ wrote to the complainant on 30 November 2020. It confirmed its application of section 14(1) and additionally cited section 21 (information accessible to applicant by other means). It also stated that it did not consider the MoJ had an obligation under section 11 (means by which communication to be made) of the FOIA.
13. The Commissioner acknowledges that the correspondence contains references to the request for information in this case having been made on various different dates. However, she is mindful that, when the complainant contacted her to complain about the MoJ's handling of his request, he cited the MoJ reference number 200910008.
14. For the purposes of this decision notice, therefore, she considers the date of the request for information was 15 March 2020. It follows that the information within the scope of the request comprises the latest version of the requested statistics that had been published at that time.

Scope of the case

15. The complainant contacted the Commissioner, in correspondence dated 2 December 2020, to complain about the way part (3) of his request for information had been handled. That correspondence was received on 21 December 2020.
16. The complainant disputed that his request is vexatious. He also confirmed that he does not have access to the internet due to his particular circumstances and that the MoJ is aware of this. It is accepted that, at the time of the request, and subsequent complaint, he was in prison.

17. Furthermore he disputed that the requested information could not be provided to him on disc, which the MoJ had refused to do in response to this request.
18. The complainant also provided the Commissioner with documentation that he considered supported his position.
19. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the FOIA.
20. The analysis below considers the MoJ's application of sections 14 and 21 of the FOIA to the information within the scope of part (3) of the request.
21. In light of the arguments provided by the complainant, the Commissioner considers the disputed information within the scope of that part of the request to be the Quarterly Management Statistics, and not information about who any complaint should be addressed to.
22. Of relevance to the request in this case, the Commissioner understands that quarterly offender management data is published covering the timeframes January – March, April – June, July – September and October to December¹.
23. The Commissioner acknowledges that the terms 'applicant', 'requester' and 'complainant' are variously used within this decision notice to refer to the individual who made the request and subsequent complaint.
24. The Commissioner is mindful that the MoJ referenced section 11 (means by which communication to be made) of the FOIA in its correspondence. She addresses the relevance of that section in 'Other matters' below.

Reasons for decision

25. In this case, the MoJ has cited both a procedural section and an exemption, section 14(1) and section 21(1) respectively, in relation to the same information.
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¹ <https://www.gov.uk/government/collections/offender-management-statistics-quarterly>

26. The Commissioner has first considered its application of the procedural section.

Section 14 vexatious request

27. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
28. The term 'vexatious' is not defined in the FOIA. The Upper Tribunal considered the issue of vexatious requests in the case of the *Information Commissioner v Devon CC & Dransfield*. The Tribunal commented that vexatious could be defined as the "*manifestly unjustified, inappropriate or improper use of a formal procedure*". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
29. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff), (2) the motive of the requester, (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
30. The Upper Tribunal did, however, also caution that these considerations were not meant to be exhaustive. Rather, it stressed the:
- "...importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests"* (paragraph 45).
31. The Commissioner has published guidance on dealing with vexatious requests². That guidance includes a number of indicators that may apply in the case of a vexatious request. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of the case will need to be considered in reaching a judgement as to whether or not a request is vexatious.

² <https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

32. As discussed in the Commissioner's guidance, the relevant consideration is whether the request itself is vexatious, rather than the individual submitting it. However, a public authority may also consider the context of the request and the history of its relationship with the requester when this is relevant.

33. In that respect, the Commissioner's guidance states:

"The context and history in which a request is made will often be a major factor in determining whether the request is vexatious, and the public authority will need to consider the wider circumstances surrounding the request before making a decision as to whether section 14(1) applies".

34. Sometimes it will be obvious when a request is vexatious, but sometimes it may not be. On that point, the Commissioner's guidance states:

"In cases where the issue is not clear-cut, the key question to ask is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress".

35. It is for a public authority to demonstrate to the Commissioner why the exemption at section 14 applies.

The MoJ's view

36. Referring to the indicators within the Commissioner's guidance, the MoJ told the complainant that it considers the request to be vexatious for the following reasons:

- Burden on the authority
- Intransigence.

37. It argued that the requested material was designed to be viewed electronically and is not suitable to be printed. It told him:

"Even where it is theoretically possible to print such material in a usable or semi-usable form, the work involved in doing so to render them legible and/or usable...is so oppressive in terms of the strain on time and departmental resources, that the MoJ cannot reasonably be expected to comply with supplying you with hard copies of all these documents referenced in this part of your request".

38. Emphasising the amount of work required to provide him with the information in hard copy format, the MoJ subsequently told him:

"The total amount of work would be sufficiently disruptive to MoJ that your request could be deemed to be vexatious".

39. Having conducted an internal review of its handling of the request, the MoJ told him that to provide the files on disc would incur a cost to the department because, for example, it would require staff to request modifications to their IT equipment.

40. In considering the burden of his request, the MoJ also took into account the past history of requests from the complainant. It told him that the regularity of his requests:

"... increases the need to consider the overall burden on the department and therefore the argument in favour of this request being judged vexatious".

41. Acknowledging that the information is available in the public domain, it also told him:

"... that the level of burden on the department is disproportionate when compared with the possibility of obtaining all of the requested information without imposing any burden at all on the department".

42. While recognising that the complainant had explained why he wanted access to the information, namely for educational purposes, the MoJ nevertheless considered that the value in providing him with the information does not outweigh the burden that doing so would place on the MoJ.

43. With respect to intransigence, the MoJ referred to its response to an earlier request in which the complainant asked for the same information, albeit for a different timeframe.

44. In its submission to the Commissioner, the MoJ emphasised the burden of complying with the request. It told her:

"This relates to [the complainant's] request to have the information provided to him on disc which we consider would have an unjustified or disproportionate effect on MoJ as a public authority".

45. It also confirmed:

"The impact of complying with this request is in the financial and staffing cost of complying with such a request".

46. The MoJ provided the Commissioner with an estimate of the financial and staffing costs involved. It told her:

"We recognise that these costs are relatively low, and certainly under the threshold for the information to be considered exempt under Section 12. However, the application of Section 14(1) is not based on the absolute cost of compliance, but whether that cost is unjustified or disproportionate".

47. Noting that the requested information is available in the public domain, the MoJ argued that there is no wider public benefit to providing information to the complainant on disc: the only beneficiary is the complainant himself.
48. It therefore argued that, despite the relatively low cost of compliance, it is still disproportionate.
49. The MoJ acknowledged that it had previously provided the complainant with printed copies of statistical reports. It told the Commissioner that it did not consider that set a precedent. Rather, it considered the excessive burden previously incurred in responding to his FOIA requests is a contributing factor in finding the latest requests to be vexatious.
50. Recognising that the complainant has previously requested similar information on a number of occasions, the MoJ considered that the burden of complying with this request would be regularly incurred by the department. In those circumstances:

"...the low cost of complying with a single request would accumulate to a much larger burden over time".

51. Furthermore, the MoJ told her that, since September 2017 (the earliest case in its departmental enquiries database), the complainant has submitted 106 FOI requests to the department. Arguing that this gave weight to its application of section 14 in this case, the MoJ told the Commissioner:

"We believe that the overall impact of [the complainant]'s series of FOIA requests, both for statistical information alone, and particularly when considering the large number of requests made overall, is placing a significant strain on the MoJ's resources and that this is sufficient to determine these FOIA requests to be vexatious".

The Commissioner's view

52. The Commissioner acknowledges that there are many different reasons why a request may be vexatious, as reflected in her guidance. There are no prescriptive 'rules', although there are generally typical characteristics and circumstances that assist in making a judgement about whether a request is vexatious. A request does not necessarily

have to be about the same issue as previous correspondence to be classed as vexatious, but equally, the request may be connected to others by a broad or narrow theme that relates them.

53. In her guidance on dealing with vexatious requests, the Commissioner recognises that the FOIA was designed to give individuals a greater right of access to official information with the intention of making public bodies more transparent and accountable.
54. While most people exercise this right responsibly, she acknowledges that a few may misuse or abuse the FOIA by submitting requests which are intended to be annoying or disruptive or which have a disproportionate impact on a public authority.
55. The Commissioner recognises that dealing with unreasonable requests can place a strain on resources and get in the way of delivering mainstream services or answering legitimate requests. Furthermore, these requests can also damage the reputation of the legislation itself.
56. The Commissioner does, however, recognise that public authorities must keep in mind that meeting their underlying commitment to transparency and openness may involve absorbing a certain level of disruption and annoyance.

Burden imposed by the request

Does the purpose and value justify the impact on the public authority?

57. The Commissioner acknowledges that the MoJ told the complainant that the requested statistical bulletins encompass "*a huge amount of statistical information on the respective topics they cover*".
58. The Commissioner is mindful of the MoJ's argument that printing would be a substantial burden. However, she also recognises that, in its submission, the MoJ told her that the reason it considered the request to be exempt under section 14 was in relation to providing the information on disc.
59. From the evidence she has seen, it is not clear where the complainant requested the information to be provided on disc. However, given the nature of the information, the Commissioner accepts that it was appropriate for the MoJ to consider providing it to him in that form.
60. The Commissioner recognises that the MoJ's arguments relate not only to the request under consideration in this case, but also take into account that the complainant has requested quarterly management statistics information in the past, and that the MoJ anticipates that similar requests will be received from him in the future.

61. The Commissioner accepts that a request may be so grossly oppressive in terms of the resources and time demanded by compliance as to be vexatious. In this case, she recognises that the MoJ has taken into account the past behaviour of the complainant, and likely future behaviour, in relation to its consideration of the burden in terms of resources and time.
62. With regard to the purpose and value of the request, the Commissioner accepts that the request will be of little wider benefit to the public, as the information is already in the public domain. This restricts its value, despite any serious purpose behind the request, such as educational purposes.
63. While the Commissioner accepts that value of the request is limited, she does not consider that the MoJ has demonstrated that the request would impose a significant burden in terms of the financial and staffing cost of compliance.

Context and history

64. The Commissioner's guidance on section 14 includes a section on 'Making a case to the ICO'. Within that section, the Commissioner states:

"Where the authority believes that the context or history strengthens their argument that the request is vexatious, then we would also expect them to provide any relevant documentary evidence or background information to support this claim.

If the authority will be providing a sample of the vexatious material as supporting evidence, then it should ensure that this sample is representative".

65. In support of its application of section 14 in this case, the MoJ noted the number of previous requests made by the complainant. It considers that the burden of complying with the request under consideration in this case is aggravated by those previous requests and by the likelihood of further requests in the future.
66. The Commissioner recognises that the MoJ considers that the volume of previous requests strengthens its argument that the request in this case is vexatious. It argued both that the complainant has made similar previous requests for quarterly data and that he has made requests for copies of other documents published by the MoJ.
67. However, while accepting that the number of previous requests is high, and acknowledging that the MoJ has referred to the complainant having requested similar information on previous occasions, from the evidence

she has seen, those previous requests for quarterly statistics only account for a small proportion of the 106 requests for information cited by the MoJ. Nor has the MoJ provided relevant information about the subject matter of those 106 previous requests or the way they were responded to such as to evidence that the requester is abusing the right of access to information.

68. The Commissioner acknowledges that the MoJ considers that the complainant will continue to make similar requests for information and thus the burden of complying with this request would be regularly incurred.
69. In support of that argument, the MoJ cited the complainant having made requests for quarterly data once in 2017, once in 2018, four times in 2019 and twice in 2020.
70. However, in light of the statistics being published quarterly, the Commissioner does not consider the MoJ has evidenced how the complainant's past history of requesting such information makes the request in this case unjustified.
71. Nor has the MoJ explained why any costs that may be incurred in modifying IT equipment in order to respond to the request in this case would be likely to be repeated in the event of a similar request in the future.

Conclusion

72. In reaching a decision in this case, the Commissioner has taken into account that section 14(1) of FOIA is designed to protect public authorities by allowing them to refuse any requests which have the potential to cause a disproportionate or unjustified level of disruption, irritation or distress.
73. She has also considered, in light of the previous dealings between the complainant and the MoJ, whether, at the time, the request crossed the threshold of what was reasonable.
74. The Commissioner recognises that there has been previous engagement between the two parties and that this engagement has been ongoing for a number of years.
75. She also acknowledges that compliance with the request in this case will involve the MoJ in absorbing a certain level of disruption and cost.
76. However, on the basis of the evidence provided, and taking into account the findings of the Upper Tribunal in Dransfield that an holistic and broad approach should be taken in respect of section 14(1), the

Commissioner is not satisfied that the MoJ has demonstrated that the request was a manifestly unjustified and improper use of the FOIA such as to be vexatious for the purpose of section 14(1).

77. Accordingly, she was not satisfied that, at the time of the request, the MoJ was entitled to apply section 14(1) of the FOIA.

78. As the Commissioner has not found section 14 engaged, she has next considered the MoJ's application of section 21 to the same information.

Section 21 Information reasonably accessible to the applicant by other means

79. Section 21(1) of the FOIA provides that a public authority does not need to provide information under section 1 of the FOIA if that information is reasonably accessible to the applicant by other means.

80. Section 21 provides an absolute exemption. This means that if the requested information is held by the public authority, and it is reasonably accessible to the applicant by other means, it is not subject to the public interest test.

81. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of the FOIA. In addition, for section 21 to apply, it is necessary to consider whether the entirety of the information is reasonably accessible to the applicant.

82. The Commissioner's guidance³ on the subject explains that, unlike consideration of most other exemptions in the FOIA, a public authority can take the individual circumstances of the applicant into account as the information must be reasonably accessible to the particular applicant.

83. By way of example, the Commissioner states⁴:

³ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

⁴ <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

"This exemption applies if the information requested is already accessible to the requester. You could apply this if you know that the requester already has the information, or if it is already in the public domain. For this exemption, you will need to take into account any information the requester gives you about their circumstances. For example, if information is available to view in a public library in Southampton, it may be reasonably accessible to a local resident but not to somebody living in Glasgow. Similarly, an elderly or infirm requester may tell you they don't have access to the internet at home and find it difficult to go to their local library, so information available only over the internet would not be reasonably accessible to them".

84. During the course of the Commissioner's investigation, the MoJ confirmed that the information within the scope of part (3) of the request is all published online.

Is the information reasonably accessible to the applicant?

The MoJ's view

85. The MoJ acknowledged that, given his circumstances, the complainant did not have immediate access to the requested information. However, in correspondence with the complainant, it suggested ways in which it considered he could access the information and therefore that section 21 applied. For example, it suggested that a third party contact may be able to download the information and provide it to him.
86. In that respect the MoJ told the complainant that the information was available to any member of the public and so, although he personally may not have access to the internet, he was able to request that the information is accessed and sent to him by someone else.
87. In its submission to the Commissioner, the MoJ acknowledged.

"[The complainant]'s contention is that his personal circumstances – that he does not have internet access because he is in prison – mean that the information is not reasonably accessible to him".

88. In that respect, it told the Commissioner:

"However, MoJ have considered the qualification of 'reasonably accessible', within section 21, and we take this to mean that a requester does not necessarily need to have completely unrestricted access to information in order for Section 21 to apply, but rather that additional arrangements might reasonably be made to access the information".

89. It argued that there were steps the complainant could take in order to obtain the requested information that is publically available online. It considered those steps "*to be reasonably surmountable*" and therefore that the information was reasonably accessible to the applicant.

The complainant's view

90. The complainant confirmed that he is not allowed access to the internet and therefore cannot access data that is only available online.
91. In correspondence with the MoJ he argued that he should have access to the internet. He referred to the provision, within a Prison Service Instruction, for access to the internet for educational or resettlement purposes.
92. He told the MoJ:

"Given that I require the data for post doctoral research I clearly should have access to the internet. I do not".

The Commissioner's view

93. The Commissioner is mindful of the basis of the complainant's arguments. However, it is outside the Commissioner's remit to determine whether, and, if so, on what basis, the Prison Service has an obligation to provide a prisoner with access the internet.
94. The issue for her to decide in this case is whether the MoJ has demonstrated that section 21 of the FOIA applies.
95. Having been provided with the links to the requested information by the MoJ, the Commissioner is satisfied that the requested statistics are available online. She is therefore satisfied that the information, in its entirety, is reasonably accessible to the general public.
96. However, the fundamental principle underlying section 21 is that, in order to be exempt, information must be reasonably accessible to the applicant. In that respect, the Commissioner's guidance states:

"Note the importance of the phrase "to the applicant" – in effect a distinction is being made between information that is reasonably accessible to the particular applicant and information that is available to the general public. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA".

97. With regard to whether or not requested information is reasonably accessible to the particular applicant who requested it, her guidance cautions:

"However, this is not to say that all the specific circumstances of an individual requester can override the test of reasonable accessibility.

... although section 21 allows a public authority to consider the circumstances of the individual applicant, it is important to note that the use of the word "reasonable" qualifies what information can be considered to be "accessible" to the applicant".

98. The Commissioner acknowledges that, in accordance with her guidance, the MoJ took the individual circumstances of the applicant into account. However, she is not satisfied that the ways of obtaining the information suggested by the MoJ, some of which relied on other criteria also being met, demonstrate that the requested information is reasonably accessible to the applicant in this case.
99. The purpose of the section 21 exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route.
100. In the circumstances of this case, the Commissioner finds that section 21 is not engaged.

Other matters

Section 11 means by which communication to be made

101. The Commissioner is mindful of the MoJ's reference to section 11 of the FOIA in this case.
102. In accordance with her guidance⁵, section 11 is relevant when a public authority is providing information to a requester in response to a FOIA request. If the public authority is not providing the information because of an exemption, it is not relevant.

⁵ <https://ico.org.uk/media/for-organisations/documents/1163/means-of-communicating-information-foia-guidance.pdf>

103. Her guidance also states:

"A public authority is only obliged to comply with a requester's preference for the means of communication if the requester expresses it when they make their FOIA request".

104. In this case, from the evidence she has seen, the requester had not expressed a preference for the means of communication at the time of their request. Nor was the MoJ providing the requested information.

Right of appeal

105. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

106. 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.

107. 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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