



IN THE FIRST-TIER TRIBUNAL  
GENERAL REGULATORY CHAMBER  
INFORMATION RIGHTS

Appeal No. EA/2014/0241

ON APPEAL FROM Information Commissioner's Decision Notice

Dated 7<sup>th</sup> August 2014

BETWEEN

Mr Simon Price

Appellant

And

The Information Commissioner

Respondent

Determined at an oral hearing at Leicester Magistrates Court on 13<sup>th</sup> January 2015

The Appellant attended by way of video-link and represented himself

The Commissioner chose not to be represented.

Date of Decision: 9th March 2015

BEFORE

Fiona Henderson (Judge)

Anne Chafer

And

Dave Sivers

Subject matter: S12 FOIA – the costs limit  
S16 FOIA – Advice and Assistance

**Decision: The Appeal is Refused**

## REASONS FOR DECISION

### Introduction

1. This appeal is against the Information Commissioner's Decision Notice dated 7<sup>th</sup> August 2014 which held that the Ministry of Justice had correctly applied s12 FOIA.
2. The Appellant wrote to the Ministry of Justice asking for<sup>1</sup>:
  1. *Excluding those prisoners classified as "provisional Category A" would you please tell me how many Category A prisoners in 2013 were recommended for a downgrade in classification to Category B by the Local Advisory Panel [LAP] at:  
  
[5 named prisons]*
  2. *With specific reference to each of the aforementioned prisons how many of the LAP recommendations were rejected by the Director of High Security?*
  - 3 (i) *Can the figures in 1 and 2 above be broken down into mainstream: [vulnerable prisoners]?*
  - 3 (ii) *How many Category A prisoners were downgraded by the Director on his own initiative?*
  - 4(i) *On average/on any fixed date how many prisoners were categorised as Category A in 2013?*
  - 4(ii) *With regard to Category A prisoners is there information available as to:  
  
a) length of time spent on Category A  
  
b) types of offences  
  
c) offenders' age*

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<sup>1</sup> The Appellant's original request included two requests numbered 3 and two requests numbered 4. The Tribunal has renumbered the requests 3(i), 3(ii), 4(i) and 4(ii) for ease of reference within this decision.

*5. If the answer to 4[iii] is no, is there any research ongoing/planned for such data to be made available?*

3. The Ministry of Justice responded on 10<sup>th</sup> March 2014 confirming that it holds the information but refusing to provide it because the cost of compliance exceeded the appropriate limit. They did however, provide the Appellant with some information stating that it was released outside the scope of FOIA and on a discretionary basis. An internal review on 1<sup>st</sup> May 2014 upheld the decision on the same grounds.
4. The Appellant's complaint to the Commissioner was accepted on 22<sup>nd</sup> May 2014. In its submissions to the Commissioner, the MOJ confirmed that contrary to their assertion in the internal review, the cost limit was not exceeded responding to s3(i) alone but they relied upon the aggregated cost of answering 3(i) and 4 (ii). Following an investigation the Commissioner upheld the MOJ's reliance on s12 in relation to the aggregated request.

### **The Appeal**

5. The Appellant appealed on 21<sup>st</sup> September 2014 on the grounds that manual searching of paper records was not the only method of gathering the requested information, and that the MOJ was over-estimating the number of records that would require searching. He confirmed that the MOJ had provided some answers to questions 1, 2, 3(ii) and 4(i)<sup>2</sup> so that the issue outstanding for the Appeal related to questions 3(i) 4(ii) and 5.
6. The Tribunal heard oral submissions and evidence by video link from the Appellant. The MOJ did not apply to be joined and the Commissioner was not represented at the oral hearing, relying upon his decision notice and his response to the Appeal. The Tribunal was provided with an open bundle comprising some 89 pages.

### **Scope**

7. The Appellant argued before the Tribunal and in his witness statement that the questions posed in elements 4(ii) and 5 of his request were phrased in such a way that they required a "yes" or "no" answer<sup>3</sup>. He relies upon question 5 being phrased

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<sup>2</sup> 37, 21, none and 1023 respectively p45. Although the MOJ revised their response to element 3i before the commissioner stating that this information was not held as "the department confirmed it had no record of the Deputy Director of Custody downgrading Category A prisoners on his own initiative" p83

<sup>3</sup> *is there information available..?*

*“if the answer is “no”...”* in support of this construction of the request. We are satisfied that whether the request in element 4(ii) was asking whether the data was held or for the data itself, if the data were not held the answer would be “no” in both cases and that therefore this does not inform the construction of element 4(ii).

8. Whilst we are satisfied that an information request should be read objectively and the public authority should not try to second guess what it believes is behind the request, it must also be read reasonably. In his oral submissions to the Tribunal the Appellant explained that what he wanted to obtain was a pre-prepared data set as he would have expected the retrieval of the information to be a lengthy process. However, whilst that might have been his intention, that was not specified in the wording of the request.
9. The Tribunal accepts that it is possible to read the questions as asking whether the information detailed is held or not but we are satisfied that it would be an overly restricted and unhelpful reading of the question likely to prompt an immediate request for the actual data if it is held. It is also an unnecessary question for a data requestor to ask since any person asking for data is entitled to be told whether the information is *held or not*: s1(1) FOIA provides:

- (1) *Any person making a request for information to a public authority is entitled -*
  - (a) *to be informed in writing by the public authority **whether it holds information of the description specified in the request, and***
  - (b) *if that is the case, to have that information communicated to him.*

Consequently asking whether information is held but not asking for it would serve no purpose and militates against reading a request phrased in the terms “*is “x” available?*” restrictively and overly literally.

10. We are supported in this construction by the Appellant’s position in relation to element 3(i); whilst he emphasised the part of the question stating “*Can the figures... [be broken down]?*”<sup>4</sup> in his written submissions, it was apparent from the rest of his submissions that despite the way the question was phrased he was expecting to be provided with the actual figures and not to be provided with a “yes/no” answer. The public authority must be consistent in its construction of requests.
11. We are satisfied that a reasonable construction of:

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*is there any research ongoing/planned...?*

<sup>4</sup> p18 Bundle paragraph 8

- *“Is there information available...”* in this context equates to “please give me...”. and
- *Can the figures in 1 and 2 above be broken down into mainstream: [vulnerable prisoners]? is equivalent to “Please would you break the total into 2 data sets if you hold the information in that way”.*

In light of the detail in all the other questions and the fact that they were asking for numerical data, it was reasonable to construe the outstanding elements of the request as being requests for the data referred to in the questions.

### The costs limit

12. S12 provides 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”.*

13. The limit applicable to the MOJ as a branch of central Government is £600 which when calculated at the rate specified in the regulations of £25 per hour equates to a time limit of 18 hours. Regulation 5(2) allows requests which to any extent relate to the same or similar information to be aggregated. The Appellant accepts that aggregation is applicable<sup>5</sup> and we are satisfied that it was permissible under the regulations.

14. In determining whether complying with the request would exceed the appropriate limit the MOJ are limited to the time spent:

- Determining whether it holds the information,
- 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.

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<sup>5</sup> Paragraph 19 witness statement

15. The MOJ conceded before the Commissioner that contrary to the information provided to the Appellant in their internal review, answering question 3(i) would require the review of 37 files and that this would not on its own exceed the costs limit. The MOJ's evidence to the Commissioner was that in relation to element 3(i) the information is not held centrally and "*manual searching of prisoner files is the only method of gathering the information, therefore it is the quickest... a sampling exercise was carried out by NOMS High Security on prisoner files and it is estimated that it would take approximately 25 minutes to locate this information for each prisoner*".
16. The Appellant disputes that answering this question would require the inspection of any files at all because he asserts that every day each prison completes a roll call in which the Category A and B prisoners are listed separately and that the vulnerable prisoners would appear on logs relating to specific wings because they are kept separate from the mainstream Category A prisoners for their own protection. He argues that the records of these logs would provide the information. In addition we express surprise at the length of time assessed as necessary to find a single fact (namely whether a prisoner is classed as vulnerable or not) which is said to take 25 minutes whereas the MOJ's estimate of the time taken to find a more complex piece of information (namely whether a prisoner has been downgraded and then re-categorised) was estimated to take only 15 minutes<sup>6</sup>. However, in light of our findings in relation to element 4(ii) and the MOJ's concession that this element of the request would not exceed the costs limit if considered alone we have not found it necessary to obtain further evidence upon this point.
17. In relation to element 4(ii) we are satisfied that the data being requested is the length of time each individual category A prisoner has spent on Category A, the type of offence(s) that they were convicted of and their age<sup>7</sup>. Whilst it appears that some data relating to age and offence type might be readily available<sup>8</sup> the MOJ asserted that the length of time a prisoner had spent as Category A is not recorded centrally but located within the individual prisoner files and requires manual searching as the only method to locate this information. They note that the search is complicated because in some instances a prisoner may have been downgraded and then re

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<sup>6</sup> P85 bundle

<sup>7</sup> In his oral evidence the Appellant explained that he would have wanted the information relating to category A prisoners from 2011-13 although this was not specified as the Appellant's intention was to find out if a prepared data set existed and then if it did to request it subsequently.

<sup>8</sup> P49 bundle

categorised back to category A. They estimate that this would take 15 minutes per file and that taking the figure of 1,030<sup>9</sup> category A prisoners would amount to over 250 hours. Whilst the Appellant is surprised that the information is not computerised, he conceded for the purposes of the appeal that the information sought had to be retrieved from paper files. He also accepted that the time it would take to retrieve the information from paper files would significantly exceed the cost allowance.

18. We are satisfied on a balance of probabilities that the information has to be retrieved from the paper files and that 15 minutes was a reasonable estimate of the time required to locate each file and to retrieve the information from it especially as there was an element of calculation involved. In light of the number of files that would have to be reviewed in relation to element 4(ii) the costs limit would be exceeded. Since the MOJ were entitled to aggregate the request they were entitled to apply s12 costs limit to the whole request.

Advice and Assistance

19. S16 FOIA provides that

*(1) It shall be the duty<sup>10</sup> of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.*

20. The MOJ sought to argue before the Commissioner that the information provided to the Appellant was assistance in accordance with the scheme<sup>11</sup>. They did not purport to provide it on that basis in their letter of refusal at the time that the information was given; stating that it was on a “discretionary basis” outside the scope of FOIA<sup>12</sup>. The Appellant has noted that the information they provided in relation to elements 1 and 2 was provided as a collective number when it had been requested in relation to 5 prisons. The Tribunal observes that it is likely that when it was received it came from the individual prisons and the reason for not providing it in that form is not clear,

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<sup>9</sup> This is the number of category A prisoners said to be held at the date of the request p85 Bundle, although 1,023 was given as the answer to the average number of prisoners in this category

<sup>10</sup> Emphasis added

<sup>11</sup> P85 bundle

<sup>12</sup> P45

especially as the equivalent data relating to previous years had been provided on a prison by prison basis<sup>13</sup>.

21. The Tribunal endorses the Commissioner's comments reminding the MOJ of their duty under s16 to provide advice and assistance which in our judgment has still not been complied with although it now appears that all of the request could be answered within the cost limit (subject to clarification of the time frame for 4(ii) b and c) apart from element 4(ii)(a) but this was not made apparent to the Appellant by the MOJ. The position was further obscured by the MOJ's erroneous calculation that answering element 3(i) alone would exceed the cost limit.

#### Other Matters

22. The Appellant is in his third year of doctoral research for a literature based PhD examining the work of the High Security Prison Group, Category A prisoners and psychology based Offender Behaviour Programmes. The Tribunal is aware that the Appellant has made requests for information relating to prisoners in the past and the MOJ response has often been to engage the s12 exemption but to offer "discretionary" information in response to some of the requests. In their internal review the MOJ included a paragraph stating:

*"The MOJ can decline to deal with a customer where that customer's correspondence or dealings with the department place unreasonable demands or pressures upon its staff... Please be aware that we will consider engaging section 14 if you continue with correspondence regarding these matters"*<sup>14</sup>

23. The Tribunal observes that in a case where the MOJ have provided incorrect information in relation to their use of s12 (wrongly asserting that the cost limit was exceeded in relation to element 3(i) alone), and has failed to offer advice and assistance in accordance with their duty under s16 to enable an Appellant to frame their request in such a way as to come within the costs limit; it does not consider it appropriate to attempt to limit further correspondence with the threat of treating a request as vexatious, when the further correspondence arises in part out of the MOJ's unhelpful handling of the request.

#### Conclusion

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<sup>13</sup> P87

<sup>14</sup> P50



24. For the reasons set out above we refuse the appeal. Our decision is unanimous.

Dated this 9th day of March 2015

Fiona Henderson

Tribunal Judge