



**IN THE FIRST-TIER TRIBUNAL
(GENERAL REGULATORY CHAMBER)
[INFORMATION RIGHTS]**

EA/2016/0123

ON APPEAL FROM:

**Information Commissioner's Decision Notice: FS50606264
Dated: 11 April 2016**

Appellant: SIMON PRICE

Respondent: THE INFORMATION COMMISSIONER

Date of hearing: 13 September 2016

Date of Decision: 19 September 2016

Date Promulgated: 21 September 2016

Before

Annabel Pilling (Judge)

Subject matter:

FOIA – Cost of compliance – s.12(1)

Representation:

For the Appellant:

Simon Price

For the Respondent:

Elizabeth Kelsey

Decision

For the reasons given below, the Tribunal allows the appeal. This decision should be regarded as a substitute Decision Notice.

Reasons for Decision

Introduction

1. This is an appeal against a Decision Notice issued by the Information Commissioner (the 'Commissioner') dated 11 April 2016.
2. The Decision Notice relates to a request made on 20 July 2015 by the Appellant under the Freedom of Information Act 2000 (the 'FOIA') to the Ministry of Justice (the MOJ) for information regarding the work of Rabbi Michael Binstock and concerning Jewish prisoners:

"Please provide me with the following information

In respect of Question 1 I would like to be provided with the full details of the terms of employment/conditions of the post held by Rabbi Michael Binstock. In short, what is he supposed to do? Does he have an office in the Ministry? In what specific areas has he provided advice in the last five years? Is there any documentary record of any advice so given?

1. *What are the terms of employment of the post held by Rabbi Michael Binstock?*
2. *How many years has Rabbi Michael Binstock been in post*
3. *The pay scale that applies to Rabbi Binstock*
4. *Please list the prisons in High Security estate prison that Rabbi Binstock has visited in the last five years*
5. *Please list the prisons in High Security estate prisons (other those in the High Security estate) that Rabbi Binstock has visited in the last five years [sic]*

6. *At what prisons did Rabbi Binstock meet and talk/daven with prisoners?*
 7. *What advice, of any, has Rabbi Binstock sought/given regarding the security of Jewish prisoners in the High Security estate where almost all prisoners convicted of terrorist offences are located?*
 8. *The number of prisoners in England and Wales registered as Jewish*
 9. *The number of prisons holding Jewish prisoners*
 10. *The number of prisons where Rabbis attend to the needs of Jewish prisoners*
 11. *The number of prisons where Jewish faith workers attend to the needs of Jewish prisoners”*
3. The MOJ replied on 28 September 2015, considerably after the requirement to respond within 20 working days imposed by section 17 FOIA. It confirmed that it holds some of the requested information but refused to disclose the information relying on section 12(1) FOIA, on the basis that the cost of complying with the request would exceed the appropriate limit. It indicated that to provide the Appellant with the information requested for question one would require the MOJ to contact 130 prison establishments and each prison would have to check prisoner records and also make enquiries with various departments in the prison, and need to make similar enquiries with units within NOMS headquarters. It advised that it might be able to answer a refined request within the cost limit.
 4. The Appellant complained to the Commissioner who investigated the way the request had been dealt with by the MOJ. He concluded that the MOJ had correctly applied section 12 FOIA.

The appeal to the Tribunal

5. The Appellant appeals against the Commissioner’s decision.

6. As the issue for appeal is section 12 FOIA this is an appeal that can be heard by a Judge sitting alone.
7. The Tribunal was provided in advance of the hearing with an agreed bundle of material, and written submissions from the parties. The Commissioner chose not to attend the hearing. The MOJ was aware of the appeal but not made a party and took no part in the appeal.
8. During the course of the hearing, the Appellant requested that I hear an appeal against the case management decision of the Registrar to refuse his application for a witness summons for Mr Binstock, or an alternative named individual, to attend the hearing and provide information. I refused the application on the basis that to summons Mr Binstock to answer questions as sought by the Appellant would be to circumvent the appeal process. The appeal concerns a consideration of whether the Commissioner was correct to conclude that the MOJ was entitled to rely on section 12(1) of FOIA on the basis of its estimated cost of complying and Mr Binstock would not be able to assist with the basis of those calculations.

The legal framework

9. Under section 1(1) of FOIA, any person making a request for information to a public authority is entitled, subject to other provisions of the Act, (a) to be informed in writing by the public authority whether it holds the information requested, and (b) if so, to have that information communicated to him.

10. Section 12 of FOIA provides as follows:

(1) 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.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) “the appropriate limit” means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) 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

(5) The Secretary of State may by regulations make provision for the purposes of this section as to the costs to be estimated and as to the manner in which they are to be estimated.

11. A public authority may still choose to provide information where the cost of complying exceeds the appropriate limit but it is not obliged to do so.

12. The Secretary of State has made regulations that prescribe the appropriate limit, namely The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the ‘Regulations’). Regulation 3 prescribes that the appropriate limit for public authorities listed in Schedule 1 of the Regulations is £600 and for all other public authorities is £450. The MOJ is a government department and therefore a public body in Schedule 1; accordingly the appropriate limit in this appeal is £600.

13. The Regulations also specify that the cost of complying with the request must be calculated at the rate of £25, effectively imposing a time limit of 24 hours in this case.

14. Regulation 4(3) provides that in estimating the cost of complying with a request, a public authority may take account only of the costs it

reasonably expects to incur in 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. Regulation 5(2) requires that requests which can be aggregated must relate “to any extent” to the same or similar information. There is no dispute that the MOJ was entitled to aggregate the 11 parts of the request for information when considering whether the cost of complying would exceed the appropriate limit.

The issues for the Tribunal

15. The question for the Tribunal is whether the MOJ was correct to claim that the cost of complying with the request would exceed the appropriate limit. The Tribunal will review the evidence and make a finding on the balance of probabilities.
16. The Commissioner asked the MOJ to provide more detail in respect of its application of section 12, including a description of the work that would need to be undertaken in order to provide the requested information. The MOJ expanded upon the explanation given to the Appellant and explained that to answer the question in respect of what specific areas Mr Binstock provided advice in the last five years would require NOMS to contact every prison establishment in England and Wales, of which there were 121 and 2 NOMS operated immigration removal centres. Each of those establishments would need to search all prison records over the last five years. In addition, prisons would need to check other documents for such advice. The business units at NOMS headquarters would all need to check electronic and paper records. NOMS made a conservative estimate of one hour per prison, which equates to £3000 and exceeds the cost limit.
17. The Commissioner concluded that from the evidence seen during the course of his investigation, and in consideration of the aggregation of the multiple parts of the request, he is satisfied that the MOJ has demonstrated that it would exceed the appropriate limit to locate,

retrieve and extract the requested information.

18. The Appellant submits that it is unreasonable for the MOJ to base the estimate of the cost of complying with his request by reference to contacting every prison in England and Wales. He submits that the holder of the information would be Mr Binstock, an employee of the MOJ and that there is no reasonable basis to calculate the cost of complying with the request by reference to asking for a huge number of establishments to trawl through their records as opposed to approaching him. He accepts that FOIA makes no obligation on a PA to “create” information but says that in this case it is obvious that Mr Binstock would hold the information. He submits that it was wrong for the MOJ and the Commissioner to conclude that the cost of complying with the request would exceed the appropriate limit because it is apparent the MOJ has not asked the most obvious holder of the information.

19. The estimate for the cost of complying was based upon an estimate of the cost of complying with part of the preamble to question 1 of the request, namely “in what specific areas has Mr Binstock provided advice in the last five years.” This request relates to a named individual, employed by the MOJ. Although there is a suggestion that there is information explaining why the request could not be fulfilled simply by asking Mr Binstock whether he held the information requested, that explanation is not before me in either the agreed bundle or as a result of any closed material procedure. There are emails between the Chaplaincy HQ of NOMS and the DACU-Communication and Information Directorate of the MOJ that suggest that in or about August 2015 Mr Binstock had been approached “*for his consent to disclose any of the information requested*” and that he “*does not agree to any personal data about him being disclosed in this case*”. This conflates two issues; the issue of whether Mr Binstock held the information with the issue of whether there might be an exemption from disclosing that information under FOIA. There is no evidence before me that Mr Binstock did not hold the information referred to by the MOJ such as would necessitate over 120 separate establishments or

departments being asked what material each holds falling within the scope of that particular part of the request as a reasonable alternative.

20. I agree with the Appellant and on the balance of probabilities conclude that the MOJ used an unreasonable basis upon which to estimate the cost of complying with the request. The suggested route to locate the information, identified as “in what specific areas has Mr Binstock provided advice in the last five years”, was artificial and rendered the estimate excessive.

21. The Commissioner was wrong to conclude that the MOJ correctly applied section 12 and I therefore allow this appeal.

22. This does not automatically mean that the cost of complying with the request would not exceed the appropriate limit, simply that the basis of the reliance on section 12(1) by MOJ and the decision of the Commissioner were predicated upon an unreasonable estimate. The MOJ will now need to consider the Appellant’s request afresh.

Judge Annabel Pilling

19 September 2016