

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 10 September 2015

**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' Incentives and Earned Privileges ('IEP') status from the Ministry of Justice (the 'MOJ'). This request was refused by the MOJ on the basis that the cost of compliance with the request would exceed the appropriate limit under section 12(1) of FOIA.
2. The Commissioner has investigated and has found that the MOJ correctly relied on section 12(1) in refusing to provide the requested information. However, the MOJ failed to provide its refusal to respond within the statutory 20 working days framework and thereby breached section 17(1) of FOIA. He does not require the MOJ to take any further steps.

#### Background

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3. The MOJ has explained that the IEP policy ensures that prisoners can earn privileges if they engage with their rehabilitation, demonstrate good behaviour and help others. Where prisoners do not meet these requirements, they can receive warnings or have their IEP level reviewed.
4. In this case, the MOJ said the complainant's IEP status was downgraded in error, for which it had apologised and explained to the complainant that the downgrading was an administrative mistake and "*an isolated incident*". The MOJ said that this matter had resulted in further correspondence outside the FOIA.

## **Request and response**

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5. On 26 April 2015 the complainant wrote to the MOJ and requested information in the following terms:
  - "1. *The number of African and African-Caribbean prisoners who have had their IEP status downgraded from enhanced to entry level upon their arrival at HMP High Down.*
  2. *The number of Caucasian (white) prisoners who have had their IEP status downgraded from enhanced to entry level upon their arrival at HMP High Down.*"
6. The MOJ responded on 4 June 2015. It refused to provide the requested information on the basis of cost (section 12(1) of FOIA). It did, however, on a discretionary basis and outside FOIA, provide some details about the 'workings' of the IEP status at HMP High Down for new prisoners.
7. Following an internal review the MOJ wrote to the complainant on 25 July 2015. It maintained that section 12(1) applied to the request.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 22 June 2015 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the MOJ properly applied the cost exclusion at section 12(1) to the complainant's request.

## **Reasons for decision**

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### **Section 12 – the cost limit**

10. Section 12(1) states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.
11. The appropriate limit in this case is £600, as laid out in section 3(2) of the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 ("the Fees Regulations"). This must be calculated at the rate of £25 per hour, providing an effective time limit of 24 hours' work.

12. When estimating whether disclosing the requested information would exceed the appropriate limit, a public authority may take into account the costs it reasonably expects to incur in disclosing the information. The estimate must be reasonable in the circumstances of the case. It is not necessary to provide a precise calculation.
13. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
  - determining whether the information is held;
  - locating the information, or a document which may contain the information;
  - retrieving the information, or a document which may contain the information; and
  - extracting the information from a document containing it.
14. The MOJ explained that the requested information is not recorded centrally and can only be located, identified and extracted through the search of individual prisoner records. It said that records of IEP reviews are kept on individual prisoner records only. Whilst it confirmed there is a collective monitoring of IEP numbers for the purposes of monthly equality meetings, the MOJ confirmed that this only measures trends.
15. Additionally the MOJ clarified that the information requested by the complainant is not recorded or measured as part of these statistics, as he specifically asks for a breakdown by African/African Caribbean and Caucasian prisoners regressed on reception to HMP High Down from their previous IEP level.
16. The MOJ has therefore confirmed that the only way of collating this information would be to examine all prisoner records of prisoners as their IEP status and ethnicity is recorded on their file.
17. In addition, the MOJ told the Commissioner that prisoner IEP levels are reviewed at various stages, and that such reviews are recorded on paper and on its prisoner system database. It said that although there are records of IEP reviews, there are no routine reviews of IEP status for prisoners transferring into HMP High Down, and that the IEP policy requires that prisoners retain their IEP status on transferring.
18. In order to establish the number of prisoners in each ethnic group that have been exceptionally downgraded for any period of time, the MOJ said it would be necessary to examine the record of every prisoner transferring in during a given period to establish (1) whether they were or were not downgraded and (2) what their ethnicity was recorded as. It said that the task of locating and collating this information is further

complicated by the fact that prisoners transfer in, transfer out and are released on a daily basis. As such, the MOJ said it would also be necessary to access records of prisoners who are no longer located at HMP High Down in order to answer the request.

19. The MOJ set out the following 'task list' which it said it would need to undertake in order to respond to the request:

- Establish the names of all prisoners transferring into the prison for any given period (which was not specified in the request).
- Establish where each prisoner is located at the time this information has been extracted.
- Access the prisoner database record of each of the prisoners identified to see if there is any record of IEP being downgraded on reception into the prison. For each of these prisoners, the ethnicity of the prisoner would also need to be noted from the record. The MOJ explained that records vary in length depending on the time the prisoner has spent in prison and the number of events and entries recorded. It clarified that since records of IEP changes are manually entered, there is no guarantee that this information will have been recorded in all of the relevant cases.
- Access the hard copy 'core' record of each prisoner. For those prisoners still located at HMP High Down, this is held in a central paper storeroom. For those prisoners who have since transferred to other prisons, this is held at their current location. For those prisoners who have since been released from prison, the records are held in the central records store located in [place redacted]. In each case a member of staff would need to examine the record to locate any entry that records that IEP status has, exceptionally, been changed and for each of these cases, note the ethnicity of the prisoner.
- The data extracted would then need to be input into a spreadsheet and totals calculated.

20. The MOJ explained that there are in excess of 1100 prisoner records at this prison and that to locate and check each manual file would take an estimated five minutes. Based on this estimate, it would take 92 hours to check those 1100 individual prisoner records which would exceed the cost limit. The MOJ also said its estimate of five minutes per file was "conservative".

*Conclusion*

22. The Commissioner is satisfied that the above estimate is a reasonable one. Based on the MOJ's explanation set out above, he accepts that it is necessary for the MOJ to review the manual files in order to respond to the request and that this is the most efficient means of doing so. As there are 1100 prisoner files and as the Commissioner considers that an estimate of five minutes per file is a reasonable estimate, he is satisfied that the MOJ has correctly applied section 12(1), as compliance with the request would significantly exceed the appropriate cost limit. The MOJ was therefore correct to apply the exclusion in section 12(1) of FOIA to the complainant's request.

**Section 16 - advice and assistance**

23. If the public authority estimates the cost of determining whether the information is held as being above the appropriate limit, it is not required to conduct searches but should consider providing advice and assistance. In this case, the MOJ advised the complainant that the way the information is held would likely make even the smallest time period cost prohibitive because of the requirement to search 1100 prisoner files. The Commissioner is therefore satisfied that the MOJ provided advice and assistance in accordance with section 16 of FOIA.

**Procedural issues – section 17(1) breach – late refusal notice**

24. Section 1(1) of FOIA states:

*(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.*

25. Section 10 of FOIA states:

*(1) Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.*

*...*

*(3) If, and to the extent that –*

*(a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or*

*(b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,*

*the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.*

26. Section 17(1) of FOIA states:

*(1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –*

*(a) states that fact,*

*(b) specifies the exemption in question, and*

*(c) states (if that would not otherwise be apparent) why the exemption applies.*

27. If, as in this case, the MOJ decides that information should be withheld it has an obligation to provide a requester with a refusal notice within 20 working days of receipt of the request. The MOJ failed to issue its refusal notice within the statutory timeframe, thereby breaching section 17(1) of FOIA.

## **Other matters**

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28. As well as finding above that the MOJ is in breach of the FOIA, the Commissioner has also made a record of the delay in this case. This may form evidence in future enforcement action against the MOJ should evidence from other cases suggest that there are systemic issues within the MOJ that are causing delays.

The MOJ accepts that the additional responses sent locally in this case may have inadvertently confused the complainant; however the Commissioner is satisfied that in respect of the response handled under FOIA the MOJ has complied with the requirements of the Act with the exception of the delay.

## Right of appeal

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29. 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)

30. 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.
31. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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