



**First-tier Tribunal
(General Regulatory Chamber)
Information Rights**

Appeal Reference: EA/2020/0084

ON APPEAL FROM:

The Information Commissioner's Decision Notice No: FS50873354

Dated: 27 January 2020

Date of Hearing: 10 December 2020 by CVP - video hearing

**Before
JUDGE ROBERT GOOD**

Between

MS CAROLYNE WILLOW ON BEHALF OF ARTICLE 39

Appellant

And

THE INFORMATION COMMISSIONER

First Respondent

And

MINISTRY OF JUSTICE

Second Respondent

Subject Matter:

Freedom of Information Act 2000 (FOIA) - Section 12(1) (Exemption for cost)

DECISION OF THE FIRST-TIER TRIBUNAL

For the reasons set out below the tribunal dismisses the appeal.

REASONS FOR DECISION

Factual background

1. The appellant, Ms Willow, requested information from the Ministry of Justice (MoJ) concerning the use of Minimising and Managing Physical Restraint (MMPR) pain-inducing techniques in Young Offender Institutions (YOI) and Secure Training Centres (STC).
2. Ms Willow is the Director of, and acting on behalf of, Article 39, a charity which fights for the rights of children living in state and privately-run institutions. These include the subject of the request, children in either YOIs or STCs.
3. The initial request, made on 16 May 2019, comprised of 7 elements. For the purpose of this appeal, the only relevant request is request 7:
“Please provide the recorded reasons for the 260 uses of MMPR pain-inducing techniques in juvenile young offender institutions and secure training centres in 2017/2018. Please provide a breakdown by the following institutions.
Cookham Wood YOI
Feltham YOI
Medway STC
Parc YOI
Rainsbrook STC
Werrington YOI
Wetherby YOI

4. The MoJ provided some advice and assistance in respect of refining the other requests, which resulted either in the requested information being provided or the request being withdrawn.
5. The MoJ response confirmed that it holds the information but stated that to provide it would exceed the cost limit set out in FOIA. That limit, as it applies to the MoJ, is £600 calculated at the rate of £25 per hour. This equates to 24 hours of time.
6. Following an unsuccessful review Ms Willow complained to the Information Commissioner (ICO). She investigated. The MoJ informed the ICO that in its estimation it would take 85 hours to comply with the request, which in the opinion of the MoJ would involve reading and analysing 260 incident reports. This estimate would provide for about 20 minutes per recorded incident. The ICO decided that, even if the estimate was on the high side, the MoJ had demonstrated that it would exceed the limit by locating, retrieving and extracting the requested information. The ICO decided on 27 January 2020 that Section 12(1) applies and that the MoJ is not required to comply with the request.
7. In her appeal, Ms Willow describes the introduction of the current MMPR system in 2012 following the death in custody of two children, one during the application of restraint and the other who committed suicide after receiving a pain-inducing technique, referred to as 'nose distraction'. The current policy document of 2015 'Minimising and Managing Physical Restraint' is in the appeal papers.
8. Ms Willow states that the policy sets out that the use of pain-inducing restraint is reviewed by a central team so the information must be held centrally. The appeal takes issue with the view that to comply with the request, the

information would have to be retrieved from individual institutions. The appeal states “We asked for the recorded reasons, that is information which the MoJ already collects and holds centrally in accordance with its own published MMPR safeguarding policy.” It maintains that the ICO has failed to establish whether the MoJ holds the data requested, that the ICO was wrong to accept MoJ’s assumption that the request was for a detailed account of each incident and failed to establish the role and responsibilities of the National MMPR team.

The Hearing

9. The MoJ was joined as the second Respondent. The ICO stated that she was not going to be represented at the hearing. Ms Willow represented herself and two colleagues from Article 39 attended as observers, Ms Kamena Dorling and Ms Karolina Koziowicz. Ms Cecilia Ivimy of counsel represented the MoJ. In attendance for the MoJ was her instructing solicitor, Ms Ffion Bevan from the Government Legal Department. Two senior officers involved with MMPR from HMPPS, Mr Stephen Hubbard and Mr Ian Vandersluys attended as observers. Ms Susan Wolf from the tribunal also attended as an observer as part of her training.
10. The hearing was conducted by video because of restrictions to face to face hearing due to the Covid-19 pandemic. It was conducted without any significant connections of communication difficulties. The hearing was recorded. There were no witnesses and the hearing consisted of submissions.
11. The appeal bundle consists of 169 pages. There is no closed bundle. In addition, Ms Ivimy provided a skeleton argument, which referred to a first-tier tribunal decision *Cruelty Free International v ICO EA/2015/0154*. Ms Ivimy understands that this decision does not create any precedent. It is provided as

a useful summary of relevant issues and other authorities on Section 12 exclusions.

12. Ms Willow provided the Court of Appeal decision of R(C) and Secretary of State for Justice [2008] EWCA Civ 882.

Findings, Reasons and Conclusions

13. Ms Ivimy's skeleton argument uses the three issues set out by Ms Willow at the end of her appeal. The first issue is that the MoJ did not say whether it holds the information. Ms Ivimy refers to the references in the appeal papers where the MoJ states that it holds the information.
14. This is an apparent disconnect. Ms Willow's assertion is about whether the MoJ accepts that it holds the information centrally. The MoJ's statement is that it holds the information but in the individual institutions.
15. The second disconnect is the different understanding of the actual request. The request, as understood by the MoJ, and also accepted by the ICO, was that Ms Willow wanted the reasons for the 260 uses of MMPR pain-inducing techniques and the reasons are found in the narrative accounts of the incidents which led to use and type of pain-inducing techniques. Those narrative accounts are not held centrally and the information on them can only be extracted by reading the accounts. Hence the cost exceeding the statutory limit.
16. Ms Willow states that this was not her request. Her request was for the reasons recorded centrally and which, if that was the case, could presumably be disclosed within the cost limit.
17. The third element of the appeal, as set out by Ms Willow, is the failure of the ICO to properly investigate the role and responsibility of the National MMPR

team and whether this role includes data collection and analysis in accordance with the MMPR safeguarding policy. Ms Ivimy argues that this beyond the remit of the ICO.

18. It is Ms Willow's contention that the safeguarding and monitoring policy requires the National MMPR to collect the information she seeks and therefore it should be held centrally and, if it is not so held, then that is in contradiction of the policy document.
19. Ms Willow understands and accepts that the tribunal is concerned with what information is held and where it is held. The tribunal is not concerned with what information should be held.
20. Ms Willow told the tribunal that she had only seen email correspondence in March and April 2020 between the ICO and MoJ when she received the appeal bundle. The emails contained information she was unaware of. It appears that in preparing her response to the appeal, the ICO had further questions for the MoJ. In one reply to these questions dated 18 March 2020, the MoJ sets out that "the MMPR department is NOT central, there is one in each establishment. Each MMPR department has its own mailbox where it collates returns. The MMPR national team collate some SIWS details for training purposes only. While the technique used in an incident is recorded, the specific circumstances of incidents are not held or collected". In this context, held or collected refers to held or collected centrally.
21. The ICO also asked the following question - does the National MMPR team analyse incident report forms where pain-inducing techniques have been used? The reply for the MoJ is "No at present it does not routinely analyse these incidents but will if a serious injury has occurred to a child or a member of staff or a child displays a Serious Injury Warning sign or symptom."

22. These answers prompted further clarification questions from the ICO. These further questions and the answers are set out in an email from the MoJ of 30 March 2020 (p109) and the answers to the final set of questions in an email of 27 April 2020 (p112).
23. From this information, and the submissions from Ms Willow and Ms Ivimy the tribunal understands that the recording process is as follows. Every incident requires the completion of a form, called a Use of Force Form. The form comprises of two parts. Part 1 is itself divided into parts A and B. Part A has a section "Reason(s) why force was used (tick all relevant boxes)." It gives 6 options and, in any incident, which may involve more than one child and more than one officer, more than one box may be ticked. A further question is MMPR techniques employed. It lists 8 techniques and a further 5 pain inducing techniques. Again, it is possible and likely that in any incident more than one technique will be used and recorded. Part B is completed where there are either serious injuries to either a child or officer or the child displays warning signs or symptoms. In these cases, a different recording process is followed.
24. The information from Part 1 of the form is taken and forms a monthly return from each institution, which is sent to the Youth Custody Service (YCS). These returns are the basis of the statistics which are published. It is from this published data that Ms Willow's request is made. The statistics show that in 2017/2018 there were 181 incidents involving the use of 260 pain inducing techniques. She wishes to know the recorded reason for the 260 uses of MMPR pain-induced techniques. Part 1 of the Use of Force Form does record the reasons and does list all the techniques used. What the form does not do is link the reasons to the actual technique used. For example, an incident may record 3 reasons for why force was used, and it may list 5 MMPR techniques, 2 or which were pain inducing techniques. The form does not link the specific techniques to a particular reason.

25. The detail of the incident, the sequence, the reason why a particular pain inducing technique was used is contained in Part 2 of the form. This provides a narrative description of the incident. Part 2 of the form is kept in the institution.
26. Ms Willow accepts, or at least didn't seek to challenge, that the collection of the information from the part 2 of the form would involve reading and extracting the information from narrative accounts and that process would take considerably longer than 24 hours work. As the ICO comments, whether, or not the estimate of 85 hours is correct, it is clear it is in excess of 24 hours. To stay within this limit would mean that on average each record would have to be read and the information extraction in under 8 minutes.
27. Ms Willow suggested in the hearing that provision of the number of incidents where only pain inducing techniques were used and the recorded reasons for the use, recorded on Part 1, would be useful. It is not clear whether this information can be extracted from the national statistics. However, the tribunal is satisfied this was not her request and her request for the recorded reasons are the reasons recorded in part 2 of the form which are not held nationally.
28. Ms Willow's concern is that the information she seeks should be collected and reviewed by the MMPR National team. In her appeal she quotes from page 14 of the MMPR safeguarding policy, which is entitled 'Central data collection and analysis'. In the list of areas of practice reviewed by the MMPR national team is the use of pain-inducing techniques. The document states "There will be a higher level of scrutiny and wider information gathering of incidents that involve these issues, and a more in-depth analysis of this information by appropriately qualified professionals, ie those with necessary medical and

operational experience.” Her understanding from this policy is that the information she seeks should be collected and reviewed nationally.

29. Ms Ivimy stated that the MoJ is compliant with the policy, but understandably declined to go into detail because she did not have instructions on the way in which the policy is being complied with.
30. Although, as the Director of Article 39, the implementation of the policy to avoid future tragic incidents to children in custody is at the core of the charity’s aims, it is not within the remit of this tribunal.
31. The tribunal is only concerned with whether the cost of providing the information requested is such that the information is exempt under S.12(1). The tribunal is satisfied that Ms Willow is seeking the reasons for the use of pain inducing techniques and the reasons are those contained in part 2 of the Use of Force form. That information is in narrative form and extracting the information requested would exceed the cost limit.
32. The tribunal accepts the ICO’s decision that complying with the request would exceed the cost limit. The tribunal upholds the ICO’s decision and dismisses the appeal.

R Good
Judge of the First-tier Tribunal

Date: 15 December 2020

Date Promulgated 22 December 2020