

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 March 2020

**Public Authority:** Prisons and Probation Ombudsman  
**Address:** 10 South Colonnade  
London  
E14 4PU

### Decision (including any steps ordered)

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1. The complainant has requested from the Prisons and Probation Ombudsman ('the PPO') information about the management of staff with illnesses, injuries and grievances, and information about staff turnover. The PPO said that it did not hold the information described in the request, explaining that, for the purposes of the FOIA, human resources information about its staff is held by the Ministry of Justice ('the MOJ').
2. The Commissioner's decision is that the PPO does not hold the information described in the request. However, by failing to notify the complainant that it did not hold the requested information by the completion of the internal review or the statutory time for compliance, the PPO breached section 1(1)(a) of the FOIA.
3. The Commissioner requires no steps as a result of this decision.

### Request and response

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4. On 21 May 2019, the complainant wrote to the PPO and requested information in the following terms:

*"Under the FOIA we request the following information:*

*Details of all extensions to sick pay granted at PPO either at full pay rate or half pay rate made at PPO since 1st January 2012; including grounds by which these were agreed or refused?*

*Details of any injury at work applications and the injuries stated*

*(whether successful or not) since 1st January 2012.*

*Details of any staff relocation where staff have been moved from the PPO to other positions within the civil service (not through resignation) on the grounds of transfer for any reason whether that was a managed move; compassionate transfer; performance related move; facilitated move; reasonable adjustment; or developmental move since 1st January 2012.*

*Details of all ACAS pre-conciliation processes and employment tribunals initiated against PPO since 1st January 2012, including any current outstanding matters or proposed tribunals yet to be heard.*

*Information outlining the number of formal grievances and reasons for the grievance being submitted within PPO by employees since 1st January 2012.*

*Details of the number of staff dismissed since 1st January 2012 and the reasons for dismissal*

*Details of the number of staff who have resigned since 1st January 2012."*

5. The PPO responded on 19 June 2019. It disclosed that 105 people had left the PPO between 1 January 2012 and 21 May 2019 (this was not what had been requested). It would neither confirm nor deny ("NCND") whether it held the information specified in the request, stating that it was exempt under section 40(5) (personal information) of the FOIA.

6. On 20 June 2019, the complainant clarified his request:

*"...we are making a FOI request for this information which we expected to be provided as numerical data only, further broken down into loose categories where indicated. We do not require any personal information at all to be disclosed under this request. Therefore this request does not breach any data protection principles. Please can you now provide the number of people/occasions each event has taken place, with a breakdown under categories where possible, as clarified below:*

*Under the FOIA we request the following information:*

- Number of applications for extension to sick pay made to PPO (at full pay rate or half pay rate) and the number which were granted or refused since 1st January 2012; including breakdown of numbers under categories of why they were agreed or refused as per the grounds within the MOJ sick pay policy for accepting or refusing such requests*

- *Number of injury at work applications submitted, and numbers which were successful or not, since 1st January 2012*
  - *Number of staff who have been relocated from the PPO to other positions within the civil service (not through resignation) on the grounds of transfer for any reason whether that was a managed move; compassionate transfer; performance related move; facilitated move; reasonable adjustment; or developmental move since 1st January 2012, including a breakdown of numbers under each category of move*
  - *Number of ACAS pre-conciliation processes and employment tribunals initiated against PPO since 1st January 2012, including those currently outstanding matters or proposed tribunals yet to be heard; including a breakdown of these under subject category (e.g. categories might include discrimination, unfair dismissal, etc)*
  - *Number of formal grievances submitted within the PPO by employees since 1st January 2012; including a breakdown of these under subject categories (e.g. categories might include management decision, pay related, bullying, etc)*
  - *Number of staff dismissed since 1st January 2012 and a breakdown of these under subject categories (e.g. categories might include performance related, criminal activity, non-attendance, etc)*
  - *Number of staff who have left the PPO through resignation since 1st January 2012."*
7. On 24 June 2019, the PPO notified the complainant that it was maintaining its application of section 40(5) of the FOIA in respect of the clarified request and invited him to request an internal review if he remained dissatisfied.
8. On 28 June 2019, the complainant requested an internal review. The PPO provided the outcome of the internal review on 14 August 2019. It upheld its application of section 40(5) of the FOIA to NCND holding the information specified in the clarified request.

### **Scope of the case**

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9. The complainant initially contacted the Commissioner on 4 August 2019 to complain that he had not received a response to his request for an internal review. On receipt of the internal review, on 28 August 2019 he

complained to the Commissioner that he disagreed with the PPO's decision. He also complained about the PPO's failure to complete the internal review within 20 working days.

10. During the course of the Commissioner's investigation, the PPO amended its response. It said that it did not hold the requested information. It said that the information was in fact held by the MOJ, which is a separate public authority for the purposes of the FOIA. This late revision to the PPO's position has not been put to the complainant, to forego any further delay in the investigation.
11. The analysis below considers whether the PPO was entitled to refuse the request on the grounds that it did not hold the requested information. The Commissioner has commented on the PPO's handling of the internal review in the "Other matters" section at the end of this decision notice.

## Reasons for decision

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### Section 1 – general right of access

12. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds that information and, if so, to have that information communicated to him.
13. In this case, the PPO has explained to the Commissioner that it does not hold the requested information. It says that, because of the way in which the PPO is set up, the people who work for it are employees of the MOJ and that it is the MOJ which holds the information described in the request.
14. Section 3(2) of the FOIA sets out the circumstances in which information is considered to be 'held' by a public authority for the purposes of the FOIA:

*"For the purposes of this Act, information is held by a public authority if –*

*(a) it is held by the authority, otherwise than on behalf of another person, or*

*(b) it is held by another person on behalf of the authority."*
15. The Commissioner has therefore considered whether the requested information is held by the PPO.

16. In her consideration of this point, the Commissioner has consulted the ICO's guidance "*Information held by a public authority for the purposes of the Freedom of Information Act*"<sup>1</sup>.
17. The guidance outlines a number of factors that would indicate that information is not held by or on behalf of a public authority:
- *"the authority has no access to, use for, or interest in the information; access to the information is controlled by the other person;*
  - *the authority does not provide any direct assistance at its own discretion in creating, recording, filing or removing the information; or*
  - *the authority is merely providing storage facilities, whether physical or electronic."*
18. As countervailing factors, the guidance also sets out a number of factors that would indicate that information is held by or on behalf of a public authority:
- *the authority provides clerical and administrative support for the other person, whether legally required to or not;*
  - *the authority controls access to the information;*
  - *the authority itself decides what information is retained, altered or deleted;*
  - *the authority deals with enquiries about the information; or*
  - *costs arising from holding the information are included in the authority's overall budget."*
19. The PPO has explained to the Commissioner that human resources ('HR') information of the type described in the request, is uploaded to a database known as 'SOP'. Individual managers at the PPO have access to and control over some SOP information about their current members of staff. However, if a staff member leaves the PPO, the manager's access to their SOP record is then disabled. It explained:

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<sup>1</sup>[https://ico.org.uk/media/fororganisations/documents/1148/information\\_held\\_by\\_a\\_public\\_authority\\_for\\_purposes\\_of\\_foia.pdf](https://ico.org.uk/media/fororganisations/documents/1148/information_held_by_a_public_authority_for_purposes_of_foia.pdf)

*"The PPO is an Arm's Length Body of the Ministry of Justice and uses the HR database SOP to log all HR data. The system uses hierarchies so that managers can update on HR information for their current staff only. The only member of staff that has access to see HR information for all current staff is the Ombudsman herself.*

*Once a member of staff leaves, their SOP profile is no longer visible to staff at the PPO as the system is managed by SSCL – our outsourced HR shared services.*

*Therefore, we only have sight of data for current staff in the organisation anyone [sic] has left the organisation (either by dismissal or resignation for example) would have not have a live record on SOP. There is also no requirement for us to keep a backup copy on a spreadsheet for example as all data is loaded on to SOP. Therefore, the subjects making this FOI request would have to write directly to SSCL to request the information."*

20. The PPO subsequently clarified that SSCL holds and processes the information on behalf of the MOJ, and that any request for access to it, should be directed to the MOJ.
21. The PPO said that as the request asked for data from January 2012, it was unable to answer it, since it only had access to data regarding current members of staff. It said that, *"In hindsight we should have been clearer that we didn't have access to the data."*
22. It explained that it had been able to identify the total number of people who had left the PPO between January 2012 and the date of the request (which it had disclosed in its initial response), because:

*"This data was available as headcount data is provided on a monthly basis to the Ministry of Justice. This includes details of staff exiting the organisation. The data was still available from 2012 as it is classed as finance data, which has to be kept for 7 years."*

23. The Commissioner also asked the PPO whether it had conducted any searches of its databases, to verify that no relevant information was held separately from the SOP database. The PPO provided a detailed response, setting out the searches it had conducted, the search terms used and explaining why they might be expected to return any information held. It confirmed that no such information was located.

24. The Commissioner has considered the PPO's response carefully. She has also read the Protocol between the MOJ and the PPO<sup>2</sup>, which "*...sets out at a high level the role of each organisation in relation to the other, and the responsibilities of the principal individuals in running, sponsoring and overseeing the office of the PPO.*"
25. The Protocol goes into some detail regarding the precise responsibilities of the MOJ with regard to supporting the PPO. The Commissioner considers the following sections of the Protocol to be particularly relevant:

**"ORGANISATION MANAGEMENT**

**13. Staff**

*13.1 The PPO is a Ministerial public appointment but staff appointed by the PPO are civil servants, employed by the MoJ, and are subject to MoJ pay and conditions (including issues relating to pensions, redundancy and compensation) and policies relating to the management of staff.*

...

**14. Corporate services**

*14.1 A number of support functions will be provided to the PPO by the MoJ. Such functions will include:*

- *Information and Communications Technology (ICT);*
- *Human Resources;*
- *Finance;*

...

**Human Resources**

*14.7 The MoJ will provide quality specialist HR support and access to HR business professionals as required by the PPO. This will include advice on the use of contractors/call-offs and support for occupational health.*

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<sup>2</sup> [https://s3-eu-west-2.amazonaws.com/ppo-prod-storage-1g9rkhjhkimgw/uploads/2019/03/190301\\_MoJ\\_PPO-Protocol\\_Final.pdf](https://s3-eu-west-2.amazonaws.com/ppo-prod-storage-1g9rkhjhkimgw/uploads/2019/03/190301_MoJ_PPO-Protocol_Final.pdf)

### **Access**

*15.3 The MoJ will have a right of access to all the PPO's financial and personnel records".*

26. The Commissioner contacted the MOJ and put the PPO's account of its relationship with the MOJ to it, particularly the PPO's apparent lack of control over, and access to, the data of former members of staff. In response, the MOJ confirmed to the Commissioner that, for the purposes of the FOIA, it is the MOJ which holds the information described in the request.
27. With regard to the points at paragraphs 17 and 18, above, the Commissioner considers that the PPO has indicated that individual managers have some level of access to, and control over, some information about current members of staff, and that this suggests that such information might be "held" by the PPO, for the purposes of the FOIA (although the Commissioner has not made a decision on that point).
28. However, it is necessary to have regard to the particular wording of the request in this case. For each category of information, the request asks for a total figure to be provided for the period 1 January 2012 to the date of the request. The Commissioner considers that the PPO has demonstrated that it would not be able to provide a total figure as it does not hold information about the 105 staff that left the organisation between January 2012 and the date of the request.
29. Taking all the above into account, the Commissioner's decision is that the PPO was entitled to assert that it does not hold the information described in the request, by virtue of the fact that it does not hold information about former staff.
30. However, in order to comply with the duty at section 1(1)(a) (the duty to confirm or deny whether information is held) of the FOIA, it is necessary for a public authority to establish whether or not it holds the specific information described in a request, prior to making any decision as to whether the information is exempt from disclosure.
31. In this case, by failing to inform the complainant that it did not hold the requested information by the completion of the internal review or the statutory time for compliance, the PPO breached section 1(1)(a) of the FOIA.



## Other matters

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32. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

### *Internal review*

33. The Commissioner cannot consider the way in which a public authority conducted an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
34. The code of practice sets out, in general terms, the procedure that should be followed. The code states that reviews should be conducted promptly and within reasonable timescales.
35. The Commissioner has interpreted this to mean that internal reviews should take no longer than 20 working days in most cases, or 40 in exceptional circumstances.
36. The complainant asked for an internal review of the outcome on 28 June 2019. The PPO did not provide the results of its review until 14 August 2019, 33 working days later.
37. Although she notes that the PPO has said that the delay was due to a member of staff involved in responding to the request, leaving the organisation, the Commissioner does not consider that the request was unduly complex and she notes that the outcome of the review was that it simply upheld the position previously communicated to the complainant.
38. The Commissioner would therefore remind the PPO of her recommended timescale for responding to internal reviews.
39. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy<sup>3</sup> to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

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<sup>3</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

through targeting of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy<sup>4</sup>.

*Access to the information*

40. If the complainant still wishes to pursue access to the information described in the request, he may wish to re-submit the request to the MOJ.

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<sup>4</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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41. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

42. 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.
43. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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