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23 January 2019

Dear Mr Wilson,

**Freedom of Information Act (FOIA) Request – 181221028**

Thank you for your request dated 21 December 2018 in which you asked for the following information from the Ministry of Justice (MoJ):

**I'd be interested to know how many conditionally-discharged patients have:**

- 1. A condition that they can't leave without an escort.**
- 2. A condition that they can't leave without permission.**
- 3. Conditions that are considered to amount to confinement for Article 5 purposes.**
- 4. Capacity to consent to abide by the conditions.**

**These are just (overlapping) examples of the information you might hold – feel free to answer in whatever way you currently structure your data.**

Your request has been handled under the FOIA. I have numbered your questions for ease of reference.

I can confirm that the MoJ holds some of the information that you have requested and I have provided it below.

1. Following review of the current 2712 Conditionally Discharged patients' conditions we have identified 39 cases where the patient has a condition that states s/he cannot go into the community unless s/he is "escorted" or "accompanied" by staff.
2. The above review did not yield any patients with a condition of this precise nature (or one similar to it).
3. It is anticipated that the majority of the 39 conditions identified above that do not allow the patient to go into the community without an escort, or unless they are accompanied, will amount to confinement for Article 5 purposes (i.e. a deprivation of liberty, as described in the *Cheshire West*<sup>1</sup> case). However, until each case is examined, in discussion with the responsible clinician, this cannot be known for certain.

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<sup>1</sup> *P v Cheshire West & Chester Council* [2014] UKSC 19

This information is not held by the Ministry of Justice and will be based on a clinical assessment. Where the Ministry of Justice may hold information about an assessment of lack of capacity for an individual patient, detailed in a report from the responsible clinician, that information is only correct as at the time of assessment. We are therefore not able to provide this information.

The FOIA does not oblige a public authority to create information to answer a request if the requested information is not held. The duty is to only provide the recorded information held.

Caveats:

These figures have been drawn from administrative IT systems which, as with any large scale recording system, are subject to possible errors with data entry and processing. The cases were identified by searching for key words “escort” and “accompanied”. There were no results for a search using the word “permission”.

It should be noted that the MoJ anticipates that there may be more cases than the 39 identified thus far, as the wording of conditions varies considerably. It should also be noted that where the conditions do not suggest that there is a deprivation of liberty, there are likely to be some cases where the care plan itself includes arrangements that amount to a deprivation of liberty. It is not possible for the MoJ to identify such cases, but responsible clinicians or other professionals working with such patients have been asked to contact the MoJ to seek advice if they consider that a care plan may involve an unlawful deprivation of liberty.

Outside the scope of the FOIA and on a discretionary basis, further to the *MM* judgment in November 2018 and the subsequent judgment in the case of *AB*<sup>2</sup>, the Ministry of Justice has developed guidance setting out the Secretary of State’s position in relation to conditions that amount to a deprivation of liberty. This will be published on 16 January 2019 and a copy is attached to this letter for ease. The aim of this operational policy is to ensure that, where appropriate, restricted patients do not need to remain in hospital beds and can continue their rehabilitation in a community-based setting, while on a long-term escorted leave of absence under section 17(3) Mental Health Act. This will ensure affected patients are managed safely, detained in an appropriate setting, detained in accordance with a procedure prescribed by law and are subject to the safeguards of a detained patient.

## **Appeal Rights**

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

[data.access@justice.gov.uk](mailto:data.access@justice.gov.uk)

Disclosure Team, Ministry of Justice, 10.38, 102 Petty France, London, SW1H 9AJ

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<sup>2</sup> *Hertfordshire County Council v AB* [2018] EWHC 3103 (Fam)

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

Paris Fry  
Mental Health Casework Section  
Public Protection Group  
Her Majesty's Prison & Probation Service