

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2014

Public Authority: Ministry of Justice
Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to a security incident at a named court. The MoJ confirmed that it holds relevant information but refused to disclose it citing sections 31 (law enforcement), 38 (health and safety) and 40 (personal information) of FOIA.
2. The Commissioner's decision is that the MoJ correctly applied section 40 to most of the information withheld by virtue of that exemption. However, he does not find the exemptions at sections 31 and 38 to be engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose to the complainant the information incorrectly withheld by virtue of sections 31, 38 and 40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 January 2013, the complainant requested the following information:

"I would like to make an application for information under the Freedom of Information Act. On June 18, 2012 a prisoner already serving life [name redacted] attended Kingston County Court regarding a family matter. He escaped and was caught by security officers. I would like to know if there are any reports, investigations, internal inquiries, memos, letters, emails, or any other communication records relating to this incident, to which the Ministry has access. I do not limit this request to documents of the above nature created by Ministry employees. If Ministry employees have communicated with outside entities regarding this matter - police, contractors, court employees, Kingston Council - please consider this within the scope of my request. Please provide me with copies of the above in electronic format".

6. The MoJ responded on 14 February 2013. It confirmed that it held information within the scope of the request but refused to provide it, citing the following exemptions as its basis for doing so:
 - section 31(1)(c) law enforcement; and
 - section 38(1)(a) and (b) health and safety.
7. Following an internal review, the MoJ wrote to the complainant on 30 April 2013 upholding its original position.

Scope of the case

8. The complainant contacted the Commissioner on 5 July 2013 to complain about the way her request for information had been handled.
9. She told the Commissioner:

"The organisation has never accepted accountability for what happened or even apologised. No details have ever been released as to how this was able to happen, not even details with some parts omitted. There has never even been a statement".
10. During the course of his investigation, the MoJ told the Commissioner it was satisfied that, in addition to sections 31 and 38, some aspects of the withheld information also engage section 40(2) of FOIA (personal information).
11. In his analysis of this case, the Commissioner notes that, when requesting an internal review, the complainant told the MoJ that she was not asking for:

"a detailed floor plan of the court or exact security arrangements or procedures – I am happy for these to be left out..."

12. The Commissioner has therefore excluded such information from the scope of his investigation. For the avoidance of doubt, that information is specified in a confidential annex to this decision notice which will be provided to the public authority only. The Commissioner's investigation has been with respect to the MoJ's application of sections 31, 38 and 40 to the remaining withheld information.

Reasons for decision

Section 40 personal information

13. The Commissioner notes that, in correspondence with the complainant, the MoJ provided her with information about section 40 – namely extracts from the legislation and some of the guidance it uses when applying it. However, as he understands it, the MoJ did not cite section 40 in its correspondence with the complainant. It appears that it was not until the Commissioner had commenced his investigation that the MoJ confirmed that it considers that section 40 applies to a small amount of the withheld information.
14. The Commissioner accepts that a public authority is able to raise a new exemption either before the Commissioner or the First Tier Tribunal and that both must consider any such new claims.
15. Section 40(2) of FOIA provides an exemption from the disclosure of personal 'data' where the information is the personal information of a third party and its disclosure would breach one of the data protection principles of the Data Protection Act (DPA).

Is the information personal data?

16. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the DPA. If it is not personal data, then section 40 cannot apply.
17. Personal data is defined in section 1(1) of the DPA as:

"data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data

controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

18. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.

19. The MoJ told the Commissioner that the withheld information contains a description:

"of the actions, comments and opinions of various named individuals regarding the incident....if released the individuals mentioned.... will be identified by the public".

20. Having viewed the withheld information, the Commissioner is satisfied that those parts which have been indicated by the public authority constitute personal data.

Would disclosure contravene a data protection principle?

21. Having accepted that some of the information requested constitutes the personal data of living individuals other than the applicant, the Commissioner must next consider whether disclosure would breach one of the data protection principles.

22. In this case, the Commissioner understands that the MoJ considers that the main principle at issue is principle 1. This principle deals particularly with the privacy rights of individuals and the balance between those rights and other legitimate interests in processing personal data. It states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

(a) at least one of the conditions in schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

23. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be fair, lawful and meet one of the DPA Schedule 2 conditions (and Schedule 3 conditions if relevant). If

disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

24. In considering the fairness element of the first data protection principle, the Commissioner takes into account a number of factors depending on the circumstances of each case. In this case, he has considered:

- whether the information is sensitive personal data;
- the reasonable expectations of the data subjects, the nature of the information, the circumstances in which it was obtained, whether the information has been or remains in the public domain; and
- any legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the individuals who are the data subjects.

Is the information sensitive personal data?

25. Sensitive personal data is defined in section 2 of the DPA. In this case, the Commissioner is satisfied, having viewed the information withheld by virtue of section 40(2), that some of the requested information satisfies the definition of sensitive personal data under sections 2(e) and 2(g). Those sub-sections relate, respectively, to :

- his physical or mental health or condition; and
- the commission or alleged commission by him of any offence.

Reasonable expectations

26. In considering whether a disclosure of personal information is fair, the Commissioner has taken account of whether such disclosure would be within the reasonable expectations of the individual.

27. The Commissioner notes that, in view of the wording of the request, and the MoJ's confirmation that it holds relevant information, the MoJ confirmed that the prisoner involved in the incident was male. It follows that that information is in the public domain. Therefore disclosure of some of the redacted information cannot be unfair.

28. For the avoidance of doubt, the Commissioner has described the information that the MoJ redacted incorrectly in the confidential annex to this decision notice.

29. With respect to the sensitive personal data, the Commissioner accepts that disclosure of such information is likely to be unfair as it comprises information that individuals will regard as the most private. In this case, the Commissioner is satisfied that the data subject would have an expectation that their sensitive personal data would not be disclosed.
30. With respect to the remaining personal data within the scope of the request, the Commissioner acknowledges that the MoJ confirmed that none of the individuals concerned have given their consent for its disclosure.
31. In assessing what information third parties should expect to have disclosed about them, the Commissioner considers a distinction should be drawn on whether the information relates to the third party's public or private life. Where the information relates to the individual's private life (ie their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (ie their public life).
32. Where information relating to an individual's public life is concerned, in the Commissioner's view, what is a reasonable expectation will depend on both the seniority and responsibilities of the role and the nature of the information.
33. In the circumstances of this case, and taking into account the nature of the information, the Commissioner is satisfied that the individuals concerned are not likely to have reasonably expected their personal information would be disclosed.

Legitimate interests

34. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to provide the information if there is an overriding legitimate interest in disclosure to the public. Under the first principle, the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
35. However, in the circumstances of this case, given the nature of the withheld information and the reasonable expectations of the data subjects, the Commissioner considers that any legitimate interest in disclosure would be outweighed by the harm to the rights and interests of the data subjects concerned. In his view, there is no legitimate interest in disclosing the information that would justify an intrusion into

the lives of the individuals whose personal data falls within the scope of the request.

36. The Commissioner has therefore concluded that, as disclosure of the personal data at issue in this case would be unfair and breach the first data protection principle, the section 40(2) exemption is engaged. This is an absolute exemption, which means that if, as in this case, the condition is satisfied, there is no additional public interest test to consider.

Section 31 law enforcement

37. The Commissioner has next considered the MoJ's application of section 31 of FOIA. That section provides a prejudice based exemption which protects a variety of law enforcement interests. In this case, the MoJ has cited section 31(1)(c) – the subsection that relates to the administration of justice.
38. Consideration of the section 31 exemption is a two-stage process. First, the exemption must be engaged as a result of prejudice occurring or being likely to occur. Secondly, the exemption is qualified by the public interest, which means that, unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure, the information should be disclosed.
39. When responding to her request for information, the Commissioner notes that the MoJ told the complainant:

"We have provided below additional information about Section 31 of the Freedom of Information Act. We have included some extracts from the legislation, as well as some of the guidance we use when applying it. We hope you find this information useful".
40. Although unable to say whether or not the complainant found the information useful, in the Commissioner's view it did not explain the basis on which the MoJ considers the exemption is engaged. In its correspondence with the complainant, the MoJ appears to have relied to a large extent on the exemption being self-evidently engaged. Rather than explain why it considers that disclosure in this case would, or would be likely to, cause prejudice to the administration of justice, it concentrates instead on the public interest arguments - an issue which properly falls to be considered when, or after, the decision has been taken that the exemption is engaged.

The prejudice test

41. The Commissioner has followed the approach as set out in his guidance with respect to the prejudice test, namely to:
- identify the applicable interests within the relevant exemption;
 - identify the nature of the prejudice; and
 - decide on the likelihood of the occurrence of prejudice.

Applicable interests

42. The relevant applicable interest in this exemption is the administration of justice.
43. In the Commissioner's view, *'the administration of justice'* is a broad term. He considers that it applies to the justice system as whole. Amongst other interests, he accepts that the exemption will protect information if its disclosure would undermine particular proceedings.
44. The MoJ explained to the Commissioner how disclosure of the information would compromise the administration of justice. For example it said that disclosure of the information at issue could result in an interruption to Court proceedings and consequently have a negative impact on the administration of justice.
45. Having viewed the withheld information, the Commissioner is satisfied that the prejudice the MoJ is envisaging in this case is relevant to the particular interest the exemption is designed to protect.

The nature of the prejudice

46. The Commissioner has next considered whether the MoJ has demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(c) is designed to protect. In his view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.
47. In correspondence with the Commissioner, the MoJ said that it considered that releasing the withheld information:
- ".. would be likely to prejudice the administration of justice (section 31(1)(c) of the Act) as the material in question relates to the operation and security of the Court".*
48. The Commissioner acknowledges that the information at issue relates to a security incident at a named court. He accepts that any person

unaware of that incident would be made aware of it through this information. However, he also notes that the MoJ has confirmed such information does exist and, thereby, that the event occurred.

49. The MoJ told the complainant that any unplanned interruption in court proceedings will increase the associated costs of a case.
50. The MoJ also said that it considered that disclosure would reduce the confidence of potential witnesses that they would be secure in court premises and thus they would be less likely to be willing to act as witnesses. The Commissioner accepts that a general reduction of willingness to appear as a witness at a court hearing would prejudice the administration of justice and so agrees that this argument is relevant to the matter mentioned in section 31(1)(c).

The likelihood of prejudice

51. With respect to the level of likelihood of prejudice, the MoJ told the complainant:

"In this case, we believe that releasing the information would be likely to prejudice Section 31 (1) (c), the administration of justice".

52. In correspondence with the Commissioner, it confirmed that it considers that prejudice would be likely to result - rather than would result - if the information was released.

Is the exemption engaged?

53. In order to engage this exemption, in the Commissioner's view, the prejudice that the public authority envisages must be real, actual or of substance. The disclosure must at least be capable of harming the interest in some way, that is have a damaging or detrimental effect on it. If the consequences of disclosure would be trivial or insignificant, there is no prejudice.
54. He also considers that the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice. If the authority cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.
55. The information in question provides a report of the incident. In summary the MoJ's view is that disclosure of this information would be likely to result in an interruption to court proceedings and in a reduction in confidence of potential witnesses that they would be secure in court premises.

56. Having duly considered the arguments, and viewed the withheld information itself, the Commissioner does not find that the MoJ has evidenced that prejudice to the administration of justice is a real and significant likelihood as an outcome of disclosure.

57. It follows that he does not find the exemption engaged.

Section 38 health and safety

58. The Commissioner has next considered the MoJ's application of section 38 to the same information.

59. Section 38(1) of the FOIA provides that:

"Information is exempt information if its disclosure under this Act, would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual."

60. In correspondence with the complainant, the MoJ told her that it considers sub sections 38(1)(a) and (b) apply in this case. It said that releasing the information at issue:

"would be likely to endanger the physical health of HMCTS employees, court users and judicial office holders".

61. It told her that, in its view, the public interest:

"is better served by withholding this information under Section 38(1)(b) of the Act at this time".

62. During the course of the Commissioner's investigation, the MoJ confirmed that it considers that subsections 38(1)(a) and (b) both apply in this case.

63. As in the case of its application of section 31, the MoJ provided the complainant with general guidance about the application of section 38. However, in the Commissioner's view, it again failed to explain why it considers section 38 applies in this case, concentrating instead on the public interest considerations.

The applicable interest

64. The Commissioner accepts that the arguments put forward by the MoJ – albeit in the course of its public interest considerations – that the

outcome of disclosure in this case would be likely to be counter to the physical or mental health of an individual, or the safety of an individual, are relevant to the prejudice described in sections 38(1)(a) and (b).

The nature of the prejudice

65. The MoJ told the complainant:

"The release of this information may impact on the public confidence within courts and also impact on the confidence of members of the judiciary on the security within their 'workplace'".

66. In correspondence with the Commissioner, it presented similar, generic, arguments. However, it did not provide any evidence, medical or otherwise, in support of its view that an individual's physical or mental health or their safety would be likely to be affected by disclosure in this case.

Likelihood of prejudice or endangerment

67. The Commissioner takes the view that the phrase 'would or would be likely' to endanger means that there should be evidence of a significant risk to the physical or mental health of an individual.

68. During the Commissioner's investigation, the MoJ confirmed its view with respect to the likelihood of prejudice, citing the lower level of likelihood.

Is the exemption engaged?

69. In order to engage the section 38 exemption, a public authority must be able to evidence a causal relationship between the potential disclosure and the identified prejudice.

70. Although he cannot provide an expert opinion on this matter, having considered the arguments put forward by the MoJ, alongside the withheld information itself, the Commissioner is not satisfied that the MoJ has demonstrated a causal link between the potential disclosure and endangerment.

71. It follows that he does not find the exemption engaged.

Right of appeal

72. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

73. 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.
74. 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

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