

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2016

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 clinical override guidance document. The Ministry of Justice (MoJ) provided some information within the scope of the request but refused to provide the remainder citing section 38(1)(b) (health and safety) of the FOIA.
2. The Commissioner's decision is that section 38(1)(b) is not engaged.
3. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
 - disclose the withheld information to the complainant.
4. The MoJ 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 18 January 2016, the complainant wrote to the MoJ and requested information in the following terms:

"Under the Freedom of Information Act 2000, I am making a request for the following:

- *The Sex Offenders Treatment Program Clinical Override Guidance document*

As I understand it, this is a guidance document to be used with the Interventions Services Custody Referral and Selection Guide (male prisoners)".

6. The MoJ responded on 19 February 2016. It confirmed that it holds the requested information but refused to provide it citing section 38(1)(b) of the FOIA (health and safety) as its basis for doing so
7. Following an internal review the MoJ wrote to the complainant on 31 March 2016 upholding that position.

Scope of the case

8. The complainant contacted the Commissioner on 11 April 2016 to complain about the way his request for information had been handled. He disputes the MoJ's application of section 38 to the withheld information.
9. In correspondence with the Commissioner, the MoJ advised that:

"The document in scope of the request is used by treatment managers to assist them in making clinically informed decisions when identifying the most appropriate ways in which to address the risk of further sexual offending".
10. During the course of the Commissioner's investigation, the MoJ reviewed its handling of the request and concluded that section 38 does not apply to the document in its entirety.
11. Accordingly, the MoJ disclosed some information to the complainant, but withheld the remainder. The MoJ told him:

"In this case, we believe that releasing the full content of pages 10 – 15 of the document you have requested would be likely to endanger the safety of any individual member of the public (section 38 (subsection 1)(b)) of the FOIA), and so we have redacted content from only these pages and provided the rest of the document to you".
12. The analysis below considers the MoJ's application of section 38(1)(b) of the FOIA to the withheld information in pages 10 – 15 of the document.

Reasons for decision

Section 38 health and safety

13. Section 38(1) of the FOIA states that information is exempt if its disclosure would, or would be likely, to:

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

(b) endanger the safety of any individual”.

14. The MoJ considers that section 38(1)(b) of the FOIA applies in this case. This section provides that information is exempt from the requirement to disclose if to do so would, or would be likely to, endanger the safety of any individual. Consideration of this exemption involves two stages: first the exemption must be engaged as a result of endangerment to safety being at least likely to result. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The endangerment test

15. In order to engage this exemption the public authority – in this case the MoJ - must demonstrate that there is a causal link between the endangerment and disclosure of the information.

16. The MoJ must also show that disclosure of the withheld information in this case would or would be likely to have a detrimental effect on the safety of any individual. The effect must be more than trivial or insignificant.

17. Acknowledging that some of the information within the document was suitable for disclosure – and had therefore been provided – the MoJ reiterated that the risk of disclosure of the remaining information:

“..is to the individuals taking part in the programme and the possible risk to the public through reoffending”.

18. In support of that view, the MoJ explained that disclosure of the withheld information could result in a prisoner accessing a programme for which they were not suitable which in turn could result in an increase in the risk of harm to that individual and increase the risk to the public upon release/after completion through an increased risk in reoffending.
19. With respect to the likelihood of endangerment arising from disclosure, the MoJ told the complainant:

*"In this case we believe that releasing the information **would be likely** to endanger the safety of any individual member of the public".*

Is the exemption engaged?

20. 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.
21. The Commissioner considers that not all of the submissions the MoJ provided in support of its reliance on section 38(1)(b) were relevant to section 38(1)(b). Of those that were, she considers them to be generic arguments that failed to explain why disclosure of the withheld information would be likely to endanger the safety of any individual.
22. 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.
23. It follows that she does not find the exemption engaged.
24. As the exemption at section 38(1)(b) is not engaged the Commissioner has not gone on to consider the public interest test in respect of the exemption.

Right of appeal

25. 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

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

26. 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.
27. 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
Cheshire
SK9 5AF