

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 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 computer virus issues recorded by the IT department at Grimsby Magistrates court within a specified timeframe. The Ministry of Justice (MoJ) ultimately neither confirmed nor denied holding the requested information citing section 31(3) (law enforcement) of the FOIA.
2. The Commissioner's decision is that the MoJ was entitled to rely on section 31(3) FOIA as the basis for not complying with the duty to confirm or deny whether it held the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 12 June 2016, the complainant wrote to the MoJ using the WhatDoTheyKnow website and requested information in the following terms¹:
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¹ https://www.whatdotheyknow.com/request/legal_document_served_and_refuse

"Below is contained in correspondence dated 2 March 2016 from Grimsby Magistrates' court in relation to an information served by email attachment.

"I note that you have attached a document to your e-mail. I have been advised by a member of the IT department not to open the attachment, due to the fact that an attachment in a previous email contained a virus."

I would like disclosing all instances of computer virus issues recorded by the IT department at Grimsby Magistrates' court between December 2015 and March 2016 with a brief description of each threat".

5. The MoJ responded on 21 June 2016 and refused to provide the requested information citing section 31(1)(a) of the FOIA (law enforcement). It told the complainant that releasing the requested information would be likely to prejudice the prevention or detection of crime.
6. Following an internal review the MoJ wrote to the complainant on 5 July 2016 maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 7 July 2016 to complain about the way his request for information had been handled. He disputed the MoJ's application of section 31, in particular its view that it was not in the public interest to disclose the requested information.
8. As is the Commissioner's practice, during the course of her investigation, the MoJ was invited to revisit the request.
9. In its submission, the MoJ confirmed that although it had originally cited section 31(1)(a), it should have neither confirmed nor denied (NCND) holding the requested information in accordance with section 31(3) of the FOIA.
10. The Commissioner accepts that a public authority is able to raise a new exemption or exception either before the Commissioner or the First-tier Tribunal and both must consider any such new claims. It follows that she accepts that, in a case such as this, where a public authority has withheld information under an exemption, they are not prevented from subsequently changing their position to NCND. This position is in line with a series of Upper Tribunal and First-tier Tribunal decisions that have

established the right of public authorities to make late claims of Part I and Part II exemptions.

11. The analysis below considers the MoJ's application of section 31(3) to the requested information.

Reasons for decision

Section 31 law enforcement

12. Section 31 of the FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. That means that, in order to engage the exemption, there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.

13. Section 31(1)(a) states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under the Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime".

14. Section 31(3) states that:

"The duty to confirm or deny does not arise if, or to the extent that compliance with section 1(1)(a) would or would be likely to, prejudice any of the matters mentioned in subsection (1)".

15. In other words, section 31(3) provides an exclusion from the requirement to confirm or deny whether information described in a request is held if to do so would, or would be likely to, prejudice any of the functions in sections 31(1). The relevant matters in this case are those set out at section 31(1)(a), the prevention and detection of crime.

16. When considering a prejudice-based exemption the Commissioner will:

- identify the applicable interests within the relevant exemption;
- identify the nature of the prejudice and that the prejudice claimed is real, actual and of substance;
- show that there is a causal link between disclosure and the prejudice claimed; and,
- decide whether prejudice would or would be likely to occur.

17. Confirming or denying whether or not it held the requested information about the named Magistrates Court would effectively disclose whether or not the MoJ experienced computer virus incidents between the dates specified. It argued that whether or not the IT department had suffered from any computer virus issues would provide information which could be used maliciously against its systems.
18. As such, the Commissioner accepts that this relates to the prevention or detection of crime and that this is an applicable interest.
19. The Commissioner has next considered whether issuing a confirmation or denial in response to the request would be likely to result in a real and significant likelihood of prejudice to the prevention or detection of crime.
20. In that respect, the MoJ told the complainant:

"We believe that details of whether the IT department at Grimsby Magistrates' Court has suffered, or has not suffered, from any computer virus issues would provide information which could be used maliciously against our systems. It could also prejudice both the prevention and detection of a crime".
21. The MoJ argued that confirming or denying whether it held the requested information would assist those who want to attack its IT systems. It explained that if it were to confirm or deny whether it held the requested information, that would enable attackers to determine if their actions had gone undetected or not. Similarly, it told the Commissioner that confirmation or denial in this case could compromise measures to protect its systems, leaving them vulnerable to attack.
22. The Commissioner accepts that confirming whether an incident had, or had not, taken place within a given time period may assist someone in determining the level of effectiveness of detecting and defending against such attacks.
23. In the circumstances of this case, having considered the submissions of both parties, and mindful of the sensitivity of any information about incidents of computer virus issues relating to the MoJ's IT systems, the Commissioner accepts that compliance with section 1(1)(a) would be likely to assist a determined attacker, and consequently, that the risk to the MoJ's IT systems as a result, is real and significant. It follows that she is satisfied that to confirm or deny holding the requested information would be likely to prejudice the matters identified at section 31(1)(a).
24. She is therefore satisfied that the exemption at section 31(3) is engaged.

The public interest test

25. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in confirming or denying.

Public interest arguments in favour of confirming or denying

26. The complainant made submissions in relation to what appeared to be his personal interest in this information being disclosed, arguing that it is in the public interest that the public have confidence in the administration of the courts.
27. The MoJ acknowledged that transparency and accountability are important public interest considerations. It also recognised the public interest in knowing that a public authority has measures in place to protect information in its possession and to mitigate the impact of a malware attack.

Public interest arguments in favour of maintaining the exemption

28. In favour of neither confirming or denying in this case, the MoJ argued strongly that it was not in the public interest to disclose any information that would make its computer systems more vulnerable to interference, for example from a targeted electronic attack.

Balance of the public interest

29. While the Commissioner accepts that the complainant may have personal reasons for wanting access to the requested information, the exclusion at section 31(3) is subject to the public interest test set out in section 2(1)(b) of the FOIA. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exclusion from the duty to confirm or deny in section 31(3) outweighs the public interest in confirming or denying whether the MoJ held information within the scope of the request.
30. The Commissioner agrees that there is a public interest in the MoJ being transparent about, and accountable for, its cyber security programme. The public should be confident in the ability of the MoJ to protect itself.
31. However, there is also a significant public interest in not publishing information which might expose the MoJ's operations to cyber attacks.
32. In that respect, the Commissioner considers that appropriate weight must be given to the public interest inherent in the exemption – that is the public interest in avoiding likely prejudice to the MoJ's ability to

prevent or detect crime. The Commissioner considers that it is clear that there is a substantial public interest in avoiding that prejudice and that this is a strong public interest factor in favour of maintaining the exemption.

33. On that basis, the Commissioner accepts that, in all the circumstances of the case, the public interest arguments in favour of maintaining the refusal to either confirm or deny whether information is held outweigh those in favour of the MoJ issuing such a confirmation or denial.
34. The MoJ was therefore entitled to refuse to comply with the duty set out in section 1(1)(a) on the basis of the exclusion in section 31(3).

Right of appeal

35. 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

36. 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.
37. 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
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