

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 July 2017

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

Decision (including any steps ordered)

1. The complainant requested a copy of the Tarbiyah programme, an Islamic education course. The Ministry of Justice (MoJ) refused to provide the requested information citing section 31(1)(f) of the FOIA (law enforcement – the maintenance and security of good order in prisons).
2. The Commissioner's decision is that the MoJ concluded incorrectly that the exemption provided by section 31(1)(f) was engaged in relation to some of the information. However, she found that the remaining information was correctly withheld on the basis of the exemption contained at section 31(1)(f) of FOIA.
3. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
 - disclose the PowerPoint presentation and student's workbook.
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 8 June 2016, the complainant wrote to the MoJ and requested information in the following terms:

"Please provide me with a copy of the Islamic Tarbiyah programme.

Please provide me with a list of the Offender Behaviour Programmes or other related programmes available to prisoners in the High Security estate.

Please provide me a list of the reports/information documents/statistics published by the Ministry of Justice in the past two years."

6. The MoJ responded on 13 July 2016. It confirmed it held the requested information. It provided the information requested at the two latter parts of the request. With respect to the first part of the request, the MoJ responded to that part of the request outside of the FOIA saying that it could arrange for the complainant to see the Programme.
7. The complainant requested an internal review of the MoJ's handling of the first part of the request on 17 July 2016. In that correspondence he said:

"I see no reason why this request should be dealt with outside the scope of the Freedom of Information Act I repeat my request for a copy of the programme together with the Annexes".
8. The MoJ treated his correspondence as a new request. It responded on 17 August 2016, refusing to provide the requested information citing section 31(1)(f) (law enforcement) of the FOIA.
9. The MoJ provided an internal review on 7 October 2016 in which it upheld its application of section 31(1)(f).

Scope of the case

10. The complainant contacted the Commissioner on 28 October 2016 to complain about the way his request for information had been handled.
11. During the course of her investigation, the MoJ told the Commissioner that the Tarbiyah programme (the Programme) is an Islamic education course. The MoJ also provided the Commissioner with a copy of the withheld information. That information comprised the teacher's manual, a PowerPoint presentation and a student's workbook.
12. The analysis below considers the MoJ's application of section 31(1)(f) of the FOIA to that information.
13. With due consideration to her role as regulator, the Commissioner makes the following observations about the approach she adopted in conducting her investigation into the complaint in this case:

- given the amount of withheld information she has taken a proportionate approach, involving sampling of the withheld information;
- she is satisfied that the sampling she has undertaken is representative of the withheld information.

Reasons for decision

Section 31 law enforcement

14. Section 31 of the FOIA creates an exemption from the right to know if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
15. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:
 - first, the actual harm which the public authority alleges would, or would be likely to, occur if the disputed information was disclosed, has to relate to the applicable interests within the relevant exemption.
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility: rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
16. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

17. In this case, the MoJ is relying on section 31(1)(f) of the FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.
18. The Commissioner considered that, in its correspondence with the complainant, the MoJ relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis. It was not until her investigation that the MoJ explained why it considered the exemption was engaged.

The applicable interests

19. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity mentioned in section 31(1)(f) – in this case the maintenance of security and good order in prisons.
20. As noted above, in its correspondence with the complainant, the MoJ appears to have relied to a large degree on the requested material being self-evidently exempt concentrating its analysis on the public interest factors.
21. However, in its submission to the Commissioner, the MoJ provided evidence in support of its view that disclosure would be likely to prejudice the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.
22. The Commissioner is satisfied that the prejudice the MoJ is envisaging in this case is relevant to the particular interest that the exemption is designed to protect.

The nature of the prejudice

23. The Commissioner next considered whether the MoJ demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(f) is designed to protect. In her view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.
24. In its correspondence with the complainant, albeit in relation to the public interest test, the MoJ told him that there are sensitivities around the management of extremism and radicalisation in prison.
25. The MoJ also explained to him that:

"Tarbiyah, whilst not a deradicalisation programme, is designed to protect people from distorted views of Islam. It is due to be

rewritten given the fact it is five years old but significant parts of the programme may be retained...".

26. It said that having an old version alongside the new version "*would significantly impair the delivery of the revised programme*" and could lead to confusion among course participants.

27. It also argued that having a facilitator present to explain and support understanding is vital to the success of a facilitated programme.

28. The MoJ told the complainant:

"Release of the requested material could allow the goals and content of the course to be misconstrued, and taken out of context which, in the prison setting in particular has the potential to inflame and potentially impact negatively on good [order] and discipline".

29. In its submission to the Commissioner, the MoJ confirmed that the course is currently being revised and that some parts are being rewritten. With respect to the requested information, it told her:

"In our view, the release of the programme material (intended to be delivered by knowledgeable and trained facilitators) could lead to significant misunderstandings including about the content and aims of the programme. In the wrong hands and out of context, misunderstandings can occur which in NOMS view can be both dangerous, misleading and divisive".

30. In support of its application of section 31, the MoJ also told the Commissioner:

"Disclosure to the world at large under the FOI Act would likely undermine the usefulness of the course in preventing extremism in prisons by enabling those who would seek promote [sic] extremist views (and thereby undermine the good order and security of prisons) the opportunity to formulate an alternative narrative to the teachings of the course. This would be detrimental to the effectiveness to [sic] the course and limit the Imam's influence in maintaining positive values promoted by the course".

31. With respect to some of the programme material, the MoJ told the Commissioner that:

"...in the wrong hands, and taken out of context, release of the teacher's manual could lead to significant misunderstandings about its [the Programme's] aims and content. This has the potential to inflame, and... to be divisive and dangerous to the smooth running of the prison...".

32. It further explained that, in light of the complexities around the subject matter, it did not consider that an explanatory note would be sufficient to mitigate this risk if it were to disclose the information.
33. Throughout its submission, the MoJ emphasised the importance, in the prison context, of people of different faiths and races being able to live closely side by side.

The likelihood of prejudice

34. In correspondence with the Commissioner, the MoJ variously used the terms 'would be likely to' and, 'would'.
35. The Commissioner did not consider that this gave a clear indication of whether the risk of any prejudice occurring was considered to be one that 'would be likely to' occur, or whether the risk met the higher test of 'would occur'. However, she noted that the MoJ told the complainant that prejudice would be likely to result - rather than would result - if the information was released.
36. In light of the above, and in the absence of clear evidence that the MoJ was relying on the higher threshold that prejudice 'would' occur, the Commissioner considered that the lower threshold of 'would be likely to' occur was intended.

Is the exemption engaged? Would disclosure be likely to prejudice the maintenance of security and good order in prisons?

37. As is her practice, during the course of her investigation the Commissioner asked the MoJ to revisit its handling of the request and to respond to her with respect to its application of the exemption. She also asked the MoJ to explain about the Programme, including when the course was first introduced and how many prisoners had been on the course.
38. The MoJ confirmed that the Tarbiyah course was first introduced in February 2011 and that, since then, "*some 3,000 Muslim prisoners have been on the course*".
39. In correspondence with the Commissioner, the MoJ also confirmed that participants on the course have access to the student's workbook and see the PowerPoint presentation as the course is delivered. It subsequently confirmed that:

"Those on the course retain their student workbooks after each session and at the end of the course".
40. In a case such as this, it is not enough for the information to relate to an interest protected by section 31(1)(f), its disclosure must also at

least be likely to prejudice that interest. The onus is on the public authority to explain how that prejudice would arise and why it is likely to occur.

41. From the evidence she has seen, and having considered the arguments put forward by the MoJ in relation to the withheld PowerPoint presentation and student's workbook, the Commissioner was not satisfied that the MoJ had demonstrated that there was a causal link between disclosure of that information and prejudice occurring.
42. This was on the grounds that the course had run for some time and had been delivered to a not insignificant number of individuals within the prison population – who by default had seen the PowerPoint presentation and used, and retained, the student workbook.
43. As the Commissioner was not satisfied that the MoJ's representations demonstrated how that information would be likely to cause the prejudice claimed, she did not find the exemption engaged in respect of the PowerPoint presentation and student workbook.
44. With respect to the remaining withheld information – the teacher's manual - the Commissioner was satisfied that the MoJ's arguments were relevant to section 31(1)(f).
45. The Commissioner was satisfied that the prejudice alleged by the MoJ is real and of substance, and there is a causal relationship between the disclosure of the withheld teacher's manual and the prejudice which the exemption is designed to protect.
46. The Commissioner's finding was that it was plausible that the release of the information at issue could be used by interested parties to prejudice the maintenance of security and good order in prisons and that the exemption provided by section 31(1)(f) was engaged.

The public interest test

47. As a qualified exemption, section 31 is subject to the public interest test which is set out in section 2(2)(b) of the FOIA. Section 2(2)(b) provides that such an exemption can only be maintained where:

" .. in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information".

48. While the Commissioner understands the complainant may have personal reasons for wanting access to the information, she must consider the wider public interest issues.

Public interest arguments in favour of disclosing the requested information

49. In correspondence with the MoJ, the complainant said:

"Given the statement given by the Secretary of State on 22 August 2016 I suggest that the public interest into Islam, extremists and radicalisation in prison, is greater than you appear to believe".

50. He also explained his particular interest in the requested information.

51. The MoJ acknowledged the public interest in the information at issue. For example it told the complainant that disclosure would improve transparency in the operations of Government and understanding of religious education provision in prisons.

52. It also acknowledged that there is a public interest in releasing the materials of the Programme to understand and assess the content, methodology and process of delivery of the course.

Public interest arguments in favour of maintaining the exemption

53. In favour of maintaining the exemption, the MoJ stressed the sensitivities around the management of extremism and radicalisation in prison.

54. It stated that it would not be in the public interest to disclose information which had the potential to inflame and impact negatively on the security, good order and discipline of the prison.

Balance of the public interest

55. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

56. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.

57. As well as the general public interest in transparency, which is always an argument for disclosure, the Commissioner acknowledges the legitimate public interest in the subject the information in this case relates to, namely religious education in the prison estate.

58. The Commissioner accepted that the argument that disclosure could inform debate and improve the public's confidence given the current

sensitivities around the management of extremism and radicalisation in prison should be attributed some weight.

59. However, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to the maintenance of security and good order in prisons.
60. The Commissioner considers it clear that there is a very substantial public interest in avoiding that outcome and that this is a public interest factor of considerable weight in favour of maintenance of the exemption.
61. Having taken the above into account, the Commissioner was satisfied that, in the particular circumstances of this case, the public interest in maintaining the exemption outweighs that in disclosing the requested teacher's manual.

Right of appeal

62. 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

63. 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.

64. 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

**Gerrard Tracey
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