

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2020

Public Authority: Ministry of Justice

Address: 102 Petty France

London

SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information about mortgage possession claims and related details, broken down by specified criteria in a five-part request. The Ministry of Justice (the 'MOJ') ultimately refused to provide the information for parts 1-4 of the request by virtue of section 44(1)(a) (prohibitions on disclosure) and said it did not hold the information requested in part 5. The complainant subsequently advised that he was only concerned with the MOJ's reliance on section 44 of the FOIA.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 44(1)(a) for parts 1-4 of the request for the reasons set out in this notice.
3. She does not require the MOJ to take any steps as a result of this notice.

Background

4. With reference to the request set out below, the MOJ has explained that:

*"...although the request opens by asking about **mortgage** claims, warrants, orders and repossessions, it then requests a breakdown by landlord type. In the case of mortgage repossession claims there is no landlord, so the request as written can either be viewed as asking for total mortgage claims and separately landlord claims split by type, or it could be viewed that the reference to mortgages was an error or*

misunderstanding, and the requester was actually interested in landlord claims only.

While we could have sought to clarify this point with [the complainant], the response would have been the same in either case ... and so we deemed it unnecessary”.

5. The URL links to the relevant legislation cited in this case can be accessed via the footnotes on pages 6 and 7 of this notice.

Request and response

6. On 27 March 2020, the complainant wrote to the MOJ and requested information in the following terms:

“I would like to request the daily number of mortgage possession claims, orders, warrants, and repossessions by county court bailiffs from 1 January.

I would like the data to be as up to date as possible and show numbers for each day.

1. *I would like the claims be broken down into: Social landlord, private landlord, accelerated procedure.*
2. *I would like the orders be broken down into: Social landlord, private landlord, accelerated procedure.*
3. *I would like the warrants be broken down into: social landlord, private landlord, accelerated procedure.*
4. *I would like the repossessions by county court bailiffs be broken down into: social landlord, private landlord, accelerated procedure.*
5. *I would also like to know the number of repossessions by High Court enforcement officers for each day.”*

7. The MOJ responded on 2 April 2020 and confirmed some of the requested information was held (specifically for parts 1-4 of the request). However, it refused to provide it citing section 44(1)(a) (prohibitions on disclosure) of the FOIA. The information requested in part 1 was additionally withheld under section 22 (information intended for future publication). In relation to section 44, the MOJ said:

“In this case, the information you are seeking is prohibited by the Statistics and Registration Services (SRS) Act 2007 and the Pre-release Access to Official Statistics Order 2008.”

8. The MOJ denied holding the requested information for part 5 of the request. It provided the complainant with contact details for the non-FOIA organisation it believed would hold this information.
9. Following an internal review the MOJ wrote to the complainant on 4 May 2020. It maintained its original position both in relation to section 44(1)(a) and to the information not held. The MOJ explained it had identified that the future publication would not include the daily figures requested in part 1, so it removed its reliance on section 22 of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 4 May 2020 to complain about the way his request for information had been handled.
11. The Commissioner initially set out to consider whether the MOJ had properly relied on section 44(1)(a) for parts 1-4, and whether, on the balance of probabilities, it held the information requested in part 5 of the request.
12. During the latter stages of the Commissioner's investigation, the MOJ advised that the May 2020 quarterly statistics had been published. As a result, the MOJ said it would now be able to provide the requested daily figures to the complainant. It asked the Commissioner to consider whether the provision of the requested daily statistics to the complainant might negate the need for a decision notice and resolve his complaint.
13. On 30 November 2020, the Commissioner contacted the complainant to discuss this suggested way forward. The complainant stated he did not consider that section 44 could apply to parts 2, 3 and 4 because he said the information was not held in the way he had requested it. Following her discussion with the complainant, it was agreed that the Commissioner would ask the MOJ to provide him with the now available daily statistics for his consideration.
14. The MOJ provided the requested daily statistics for January to March 2020 to the complainant on 4 December 2020. It explained that as the quarterly statistics had now been published, it no longer wished to rely on section 44(1)(a) for parts 1-4 of the request.
15. On 4 December 2020, the complainant wrote jointly to both the MOJ and the Commissioner as follows:

"Many thanks for getting in touch with me with this information.

I really fail to see how the [sic] Section 44 would apply.

This data that you sent me and that I requested is not actually routinely published so it seems clear to me that the exemption does not apply to this data.

Because of the delay in getting this data to me it is now out of date.

I would like to have an ICO decision on this because I think it has been a misuse of the exemption."

16. He also made a new request to the MOJ for the same information up to 4 December 2020.
17. Following consultation with the complainant, in which he confirmed he was only concerned with the MOJ's reliance on section 44(1)(a) at the time of his request, the Commissioner has disregarded part 5 of the request. She has, however, included a comment under 'Other matters' given that the complainant's original grounds of complaint raised concern about the MOJ's lack of advice and assistance.
18. The Commissioner has, therefore, considered whether the MOJ was entitled to rely on section 44(1)(a) at the time of the request to refuse to provide the requested information for parts 1-4 of that request.

Reasons for decision

Section 44 – Prohibitions on disclosure (Parts 1-4 of the request)

19. Section 44(1)(a) of the FOIA provides:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it – (a) is prohibited by or under any enactment."

20. Section 44 is a class based exemption which means if the requested information falls within the class of information described in section 44(1)(a), the exemption is engaged. As section 44(1)(a) is also an absolute exemption, it is not subject to any public interest considerations.

Is disclosure prohibited by or under any enactment?

21. Information is exempt under section 44(1)(a) if its disclosure would breach any of the following:
 - primary legislation (an Act of Parliament); or
 - secondary legislation (a Statutory Instrument).

22. In its response to the complainant's request the MOJ advised:

"The information you have requested is a subset of the Mortgage and Landlord Possession Statistics data held in its final form which we routinely publish. Data for Quarter 1 (January to March) 2020 is intended for publication on 14 May 2020. As such we are required to consider your request in a manner compliant with the Pre-release Access to Official Statistics Order 2008 further to sections 11 and 13 of the (SRS Act 2007).

The MoJ is obliged under section 13 of the SRS Act to continue to comply with the Code of Practice for Official Statistics (the Code) for statistics designated as National Statistics. Section 11(3) of the SRS Act regards the Pre-Release Access to Official Statistics Order as being included in the Code. Protocol 2 of the Code reflects the requirements of the Pre-Release Access to Statistics Order. Specifically, it requires producers of official statistics to ensure that no indication of the substance of a statistical report is made public, or given to the media or any other party not recorded as eligible for access prior to publication. I can confirm that the MoJ does publish information on Mortgage and Landlord possession statistics, including the breakdowns you request, for 2020, as part of National Statistics. Therefore, to now disclose as part of your FOI request, will violate the provisions of section 13 of the SRS Act and the Pre-Release Access Order to Official Statistics 2008 and as such engages the exemption under section 44(1)(a) of the FOIA."

23. As part of its internal review, where the MOJ maintained that section 44 applied to parts 1-4 of the request, the MOJ told the complainant the following:

"Although the information requested is not intended for publication in the exact breakdown requested, I can confirm that to provide this information would in itself constitute the publication of an 'indication' of the statistics that are published as part of the Mortgage and Landlord Possession National Statistics publication as they form a subset of published data. This would therefore be in breach of the Code of Practice and consequently the SRS.

As a result, I judge that to provide the information requested in questions 1-4 would be in breach of the SRS and therefore is exempt from disclosure under Section 44(1)(a) of the FOIA."

24. In response to the Commissioner's investigation the MOJ explained:

"The enactment in question is the Statistics and Registration Service Act 2007 (The SRS)¹. Section 11(2), (4), (5) and (6) of The SRS provides for the creation of Pre-release Access to Official Statistics Order 2008 (The Pre-Release Order)² and Section 13(1) of the SRS, compels producers of National Statistics to comply with the Code of Practice for Statistics (The Code)³. Section 11(3) of the SRS regards The Pre-Release Order as being contained within The Code, thus requiring all producers of National Statistics to comply with the provisions of The Pre-release Order. Compliance with The Code and with The Pre-release Order are therefore both legally binding under The SRS.

Section T3.4 of The Code states:

The circulation of statistics in their final form ahead of their publication should be restricted to eligible recipients, in line with the rules and principles on pre-release access set out in legislation for the UK and devolved administrations. The details of those granted access should be recorded, together with clear justifications for access. No indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access. The list of recipients should be reviewed regularly and kept to a minimum."

25. The MOJ said that the information requested was withheld as it would provide an indication of the statistics published in the Mortgage and Landlord Possession Statistics on a quarterly basis⁴. It explained that the statistics contained in this publication are designated as 'National Statistics' and gave the Commissioner specific examples of tables where disclosure of the requested information would provide an indication of the statistics contained therein.
26. The MOJ explained that these tables include the quarterly total number of mortgage and landlord possession claims, orders, warrants, and repossessions and that one of the tables additionally breaks these down by type of procedure and landlord – the breakdown requested by the complainant.

¹ <https://www.legislation.gov.uk/ukpga/2007/18/contents>

² <https://www.legislation.gov.uk/uksi/2008/2998/made>

³ <https://code.statisticsauthority.gov.uk/>

⁴ <https://www.gov.uk/government/collections/mortgage-and-landlord-possession-statistics>

27. The MOJ argued that, at the time of the request, these quarterly statistics had only been published covering the period up to December 2019. It said:

"The request asked for daily figures from 1 January 2020. Data for January - March 2020 were due for publication on 14 May 2020 and so were subject to the provisions of The Code relating to the release of statistics prior to publication.

As detailed above, The Code specifies that 'No indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access.' Had the requested information been provided on a daily basis up to the date of the request, [the complainant] would have simply been able to add up the daily figures provided to then know the total figures from 1 January – 27 March 2020. This would have given him a clear indication of the figures due for publication as National Statistics on 14 May 2020, covering the period 1 January – 31 March 2020.

In addition to the specific wording around an 'indication' of the statistics detailed above, the clear overall intention of section T3 of The Code ('Orderly Release')⁵ is to ensure that National Statistics are made available to all users simultaneously upon publication. We understand that [the complainant's] contention is that the Section 44 exemption is not applicable to his request because the publication was not due to contain the exact breakdown of data requested (daily rather than quarterly). However, if this were the case, then any user wishing to obtain advanced sight of unpublished statistics would be able to use the FOIA to request and obtain a statistic in advance of publication, as long as they requested it broken down in a way that is not due to be published. This would clearly be contrary to the intention of the provisions of section T3 of the Code, as well as the specific wording around an "indication of the statistics" highlighted above.

As a result, to have provided the information requested would have breached The Code, The Pre-release Order, and by extension The SRS."

28. The critical question is whether the statutory provisions outlined above apply here, given that the complainant has requested a 'daily'

⁵ <https://code.statisticsauthority.gov.uk/the-code/trustworthiness/t3-orderly-release/>)

breakdown as opposed to the 'quarterly' statistics which were due to be published in May 2020.

29. On 9 November 2020 (prior to the disclosure of the daily figures to the complainant), and having reviewed the links to the SRS and associated legislation, the Commissioner asked the MOJ if it could verify whether the legislation captures associated statistics including those on the same subject matter but with a different frequency.
30. In reply, the MOJ said:

"To summarise, he [the complainant] is claiming that his request can't be exempt under Section 44 because he's asked for daily figures and we only publish quarterly figures. However, our argument is that if we gave him daily figures for the quarter, he would simply have to add them together and he would know the quarterly figure – as the quarter he's requesting isn't yet published, it would breach pre-release access to National Statistics.

We're basing our argument on Section T.3.4 of the Code of Practice for Statistics:

<https://code.statisticsauthority.gov.uk/the-code/trustworthiness/t3-orderly-release/> which states that "No indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access." The ICO seem to be saying that they think it only applies to the exact information published (ie. the same as Section 22), but the phrase 'no indication' is clearly much broader than this."

31. In addition, the MOJ offered to contact the Office for Statistics Regulation for further verification; the Commissioner asked it to do so.
32. Subsequently, the Office for Statistics Regulation's Head of Policy and Standards advised the following:

"As regards the full data set from which data tables and statistics will be produced as part of an official statistic as covered by the Code of Practice for Statistics. The Code directs statistics producers to restrict access to the information being used to compile official statistics prior to their public dissemination. It requires that no indication of the statistics be made public and that the statistics should not be given to any other party without prior permission for access. This set of requirements is an essential element of ensuring equality of access – that the official statistics are freely available to all at the point of release.

A situation in which a finer breakdown of a data set is requested to be shared prior to the release of the official statistics, from a dataset from which the official statistics will be produced, would compromise this standard of equality of access. The example of a request for daily data from an official statistic quarterly release prior to publication would enable the recipient to produce the figures that would be subsequently published in the release of official statistics. That would undermine the official statistics and confidence in the statistics producer. Equality of access is a fundamental principle both in the UK and internationally."

33. The MOJ has advised that its understanding that the complainant's view is that because the publication only includes the quarterly total, figures for the individual days within that quarter are not National Statistics. It argued:

"However, we see the two as the same 'information'. The National Statistics classification covers the entire dataset from which those published quarterly figures are produced and therefore also includes the daily figures. This was also confirmed in the statement [as set out above] from [name redacted], the Head of Policy & Standards at the Office for Statistics Regulation. Indeed, disclosing figures for each individual day of a quarter also effectively discloses the quarterly total anyway – the quarterly total simply being a sum of the individual days within it."

34. Having viewed the disclosed daily figures (post publication of the National Statistics quarterly publication in May 2020) which were provided to the complainant on 4 December 2020, the Commissioner is satisfied that once totalled by the complainant, they would reveal the quarterly totals in advance of the official publication of the quarterly statistics.
35. It is important to remember that a disclosure under the FOIA is effectively a disclosure to the world at large. In the MOJ's and the Commissioner's view, provision of the daily figures in advance of the publication of the quarterly statistics would allow any member of the public to acquire the quarterly statistics in advance of their official publication (by adding up the daily figures), and would breach the provisions of The Code, The Pre-release Order and by extension the SRS.

Conclusion

36. The Commissioner is satisfied that the requested information in this case was subject to a statutory prohibition on disclosure, provided in the Statistics and Registration Services (SRS) Act 2007 and the Pre-release

Reference: IC-39663-W7C4



Access to Official Statistics Order 2008. Therefore it is exempt from disclosure under FOIA by virtue of the absolute exemption at section 44.

Right of appeal

37. 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@justice.gov.uk

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

38. 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.
39. 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

Carolyn Howes
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