

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 2019

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

Decision (including any steps ordered)

1. The complainant has requested figures relating to bail applications made to the First-tier Tribunal (Immigration and Asylum Chamber) in 2016, and bail applications considered by the First-tier Tribunal Judge [name redacted] who regularly sits at [information redacted] in 2016.
2. The Commissioner's decision is that section 31(1)(c) is not engaged. She requires the Ministry of Justice (MoJ) to take the following steps to ensure compliance with the legislation:
 - disclose the figures requested in part 2 of the request.
3. 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

4. On 18 May 2017, the complainant wrote to the MoJ and requested information in the following terms:

"I am writing to request the following information under the Freedom of Information Act 2000:

- 1. How many applications for bail were made to the First-tier Tribunal (Immigration and Asylum Chamber) in 2016? If you cannot provide*

figures for 2016, then provide the figures for the latest annual period, or shorter or longer period, for which figures are available?

- 1. What proportion of those applications for bail were successful?*
- 2. What proportion of those applications for bail were withdrawn?*
- 3. What proportion of those applications for bail were unsuccessful?*
- 2. How many applications for bail were considered by the First-tier Tribunal Judge [name redacted] who regularly sits at [information redacted] in 2016? If you cannot provide figures for 2016. Then provide the figures for the latest annual period, or shorter or longer period, for which figures are available.*
 - 1. What proportion of those applications for bail were successful?*
 - 2. What proportion of those application for bail were withdrawn?*
 - 3. What proportion of those applications for bail were unsuccessful?"*
7. The MoJ responded on 13 June 2017. It provided information in relation to part 1 of the request but refused to provide information in relation to part 2 of the request citing the section 31(1)(a) exemption of the FOIA.
8. Following an internal review the MoJ wrote to the complainant on 26 June 2018. It stated that it had reviewed its decision and decided that the application of section 31(1)(a) was incorrect and instead cited section 31(1)(c) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on the 26 June 2018 to complain about the way his request for information had been handled.
10. The Commissioner has considered whether the MoJ was entitled to rely on the section 31(1)(c) exemption of the FOIA to refuse the second part of the complainant's request.

Reasons for decision

Section 31 – law enforcement

11. Section 31 of the FOIA provides a prejudice-based exemption which protects a variety of law enforcement interests. Consideration of this exemption is a two-stage process. Firstly, in order for the exemption to

be engaged it must be at least likely that disclosure would, or would be likely to, prejudice one of the law enforcement interests protected by section 31 of the FOIA. Secondly, the exemption is subject to a public interest balancing test. The effect of this is that the information should be disclosed if the balance of the public interest favours this, even where the exemption is engaged.

12. The relevant part of section 31(1) of the FOI provides that:

"(1) Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

(c) the administration of justice..."

13. In order to engage a prejudice-based FOIA exemption, such as section 31, there must be at least a 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 withheld information was disclosed has to relate to the applicable interests within the relevant exemption (in this case, the administration of justice);
- secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie whether disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

14. Consideration of the exemption at section 31 of the FOIA is a two-stage process. Even if the exemption is engaged, the information should still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

15. In this case the MoJ is relying on the section 31(1)(c) exemption of the FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the administration of justice.

16. The relevant applicable interests cited in this exemption are those for the administration of justice. The Commissioner accepts that the arguments made to her by the MoJ and set out below address the prejudice at section 31(1)(c) of the FOIA in relation to the administration of justice.
17. The Commissioner has considered whether the MoJ 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 her view, disclosure must be at least likely to harm the relevant interest in some way, ie have a damaging or detrimental effect on it.
18. The MoJ explained to the Commissioner that if the information were to be disclosed it could lead to unfair criticism of specific Judges who might be seen as being "*too hard*" or "*too soft*" in the legal, local or national media. It explained that unfair criticism of this form would undermine public confidence in the Judiciary and would prejudice the administration of justice. The MoJ also stated the following in its submission to the Commissioner:

"The administration of justice requires that, in so far as possible, Judge should be supported in deciding the case in accordance with the law, free from inappropriate influence. Knowledge that their individual success rates may be made public is a potential inappropriate influence, and could result in forum shopping: applicants (as individuals or through their Legal Representatives) would try to be listed in front of Judges thought to be "soft", and could also lead to unnecessary but nevertheless time consuming recusal applications (with a Judge being asked to stand-down on the basis that their track record demonstrated them to be "biased" towards applicants or defendants), adding to the workload of the Court."

19. The MoJ explained to the Commissioner that the disclosure of the individual statistics for a specific Judge could result in transfer/ adjournment requests being received so that the application is dealt with by a Judge who has a better success rate than another. It stated that this would cause more work for the Tribunal and possibly extend the timeframe in which an application is to be determined.
20. During the Commissioner's investigation questions were raised as to whether an individual or legal representative could submit an application to transfer or adjourn, and if this is the case whether there are specific criteria for the application as well as how likely it would be that an application would be successful, resulting in it being dealt with by another Judge. The MoJ provided the following reasoning:

"There is a real and significant risk that applicants (who will be detained alongside other former applicants for bail) or their representatives will request a withdrawal of their bail application."

"The rate of withdrawals is higher than adjournments because applicants have to request and obtain permission to adjourn whereas they don't require permission to withdraw. One of the reasons that SSHD [Secretary of State for the Home Department] introduced the 28 Day repeat application for bail in the Immigration Act 2014¹ was to limit the ability of Applicants repeatedly trying to present their same application repeatedly to the Tribunal in hope that they would get a favourable decision from a different judge."

21. As stated above, the MoJ must be able to demonstrate that a causal relationship exists between the disclosure of the figures in question and the prejudice envisioned. Furthermore, the alleged prejudice must be real, actual or of substance.
22. The Commissioner has considered the MoJ's arguments in relation to its application of section 31(1)(c) and finds that it has failed to demonstrate, to the Commissioner's satisfaction, that if the information requested were to be disclosed, it would assist an applicant to target specific judges viewed to be "soft".
23. Having considered the arguments put forward by the MoJ, the Commissioner finds that the MoJ has failed to demonstrate a causal relationship between the potential disclosure of the withheld information and the prejudice which the exemption is designed to protect – the administration of justice.
24. The Commissioner contacted the MoJ several times during the investigation and considers that it has had sufficient opportunity to demonstrate the required causal link. During this investigation the MoJ was provided with guidance on how the Commissioner handles complaints and on its opportunity to provide further justification.²

¹ http://www.legislation.gov.uk/ukpga/2014/22/pdfs/ukpga_20140022_en.pdf

² <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/>

25. It follows that the Commissioner finds that the MoJ has failed to establish engagement of the section 31(1)(c) exemption of the FOIA.
26. Since her finding is that the exemption was not engaged, she did not go on to consider the balance of the public interest.

Right of appeal

27. 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

28. 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.
29. 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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