

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 April 2017

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

Decision (including any steps ordered)

1. The complainant has made two information requests for statistical data relating to numbers of drug finds in English prisons from the Ministry of Justice (the "MoJ"). The MoJ refused to provide this on the basis of sections 22 (information intended for future publication) and 44(1)(a) (prohibitions on disclosure) of the FOIA. The Commissioner's decision is that neither exemption is engaged.
2. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
 - disclose the requested information or issue a fresh response which does not rely on section 22 or 44(1)(a).
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.

Background

4. The Statistics and Registration Services Act 2007 ("SRSA") is:

"An Act to establish and make provision about the Statistics Board; to make provision about offices and office-holders under the Registration Service Act 1953; and for connected purposes¹".

Request and response

5. On 1 July 2016 the complainant wrote to the MoJ and requested information in the following terms:

"Please provide the following under the Freedom of Information Act:

1. The total number of monthly 'drug finds' reported for each adult prison in England for the 2014 calendar year.

2. The total number of monthly 'drug finds' reported for each adult prison in England.

If the request is rejected on the grounds of time, please only provide an answer for question 1, relating to the 2014 calendar year".

6. On 1 August 2016 the complainant also made the following request:

"Please provide the following under the Freedom of Information Act:

How many incidents of confiscation of spice were there were in prisons in England and Wales in:

a) 2014

b) 2015

c) 2016 to date?".

7. The MoJ responded to the first request on 15 July 2016. It refused to provide the requested information, citing sections 22 and 44(1)(a) of the FOIA. It responded to the latter request on 18 August 2016, also citing these sections.
8. Following an internal review in which it covered both requests, the MoJ wrote to the complainant on 26 September 2016. It maintained its position.
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¹ <http://www.legislation.gov.uk/ukpga/2007/18/contents>

Scope of the case

9. The complainant contacted the Commissioner on 5 October 2016 to complain about the way his request for information had been handled. He did not accept the citing of section 22 as no publishing date had been provided. He did not specifically query the citing of section 44, however, as this is an absolute exemption, the Commissioner will necessarily consider it as she would be unable to order disclosure were there a statutory bar preventing this.

Reasons for decision

Section 44 – prohibitions on disclosure

10. Section 44(1)(a) of the FOIA says that information is exempt information if its disclosure (otherwise than under the FOIA) by the public authority holding it is prohibited by or under any enactment.
11. Section 44 is an absolute exemption; that is, if it is properly engaged it is not subject to any public interest test.
12. The MoJ is relying on sections 11 and 13 of the Statistics and Registration Services Act 2007 (SRSA) to forego disclosure.
13. In its refusal notice the MoJ explained to the complainant that the information he had requested was:

“... a subset of finds of mandatory reportable items in prison establishments data, held in its final form, which we have pre-announced the intention to routinely publish as Official Statistics. 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 Statistics and Registration Service Act 2007 (SRSA).

It may be helpful to explain further that NOMS and the MoJ produce official statistics under the standards set by the UK Statistics Authority (the Authority). The Authority is obliged under section 7 of the SRSA to promote and safeguard the production and publication of official statistics that serve the public good, with particular reference to good practice and quality. The Authority achieves this through the Code of Practice for Official Statistics (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.

We can confirm that NOMS will publish information on drug finds in prison establishments as part of Official Statistics. Therefore, I consider that to disclose that information now in response to your FOI request, would undermine the provisions of section 7 of the SRSA and violate the Pre-Release Access Order to Official Statistics 2008 and as such engages the exemption under section 44(1)(a)".

14. The Commissioner accepts that that SRSA and the Pre-release Access to Official Statistics Order may provide a 'statutory bar' in some cases but that this needs to be considered on a case-by-case basis. It is first necessary to consider whether the information which has been requested constitutes 'official statistics'.
15. Under Section 6 SRSA, 'official statistics' are variously defined. As they can include statistics produced by a government department or other person acting on behalf of the Crown (see section (1)(a)(ii) and (vi)), ie the MoJ in this instance, it is possible that the information requested may fall to be considered as official statistics.
16. In this particular case, the MoJ has said that it has pre-announced that it intends to routinely publish information, which is to include the requested information, as 'official statistics'. As it was not clear when the 'pre-announcement' for this disclosure was made, the Commissioner asked the MoJ to evidence this. In responding it advised:

"MoJ didn't officially pre-announce this data release as it was an expansion of an existing publication, so no changes were required to the MoJ release calendar on gov.uk. However, a series of FOIs and PQs went out stating our intention to publish this data and the Minister also told the Justice Select Committee at the end of November 2016 that this was our intention. The intention to publish was driven by a number of factors – it was the final stage of a long project to improve the reporting of incidents in prisons. This was so that the data could be published, to increase transparency in the workings of government, to meet Parliamentary and public need and interest due to the quantity of PQs and PQs received in the subject and to meet the request from the Justice Select Committee in its role to hold MoJ to account on performance and safety".

17. The Commissioner notes that the MoJ has stated above that it had advised the Justice Select Committee at the end of November 2016 that it was their intention to publish this data. However, the Commissioner notes that this post-dates the request, which was made in August 2016, so no such pre-announcement appears to have been made at the time of the request.

18. The Commissioner also made enquiries to establish whether the information which the MoJ holds, and intends to publish, is actually what has been requested. For example, would it be publishing the total number of monthly 'drug finds' reported for each adult prison in England and would it be specifically reporting on confiscation of spice as a separate item? In response the Commissioner was advised:

"MoJ does hold the data requested. A final decision on exactly how the data would be presented had not been taken, but at the time of answering this was expected to be annual data on Mandatory Reportable items by prison establishment, with an option to present quarterly or monthly data. Within each overarching category (e.g. drug finds, weapons) some additional breakdowns would be provided (e.g. type of drug – spice, cannabis etc). Data of good quality is only held from October 2015 when NOMS implemented an enhanced reporting system to collect more robust data. Publication of data prior to this date was being considered for a Management Information release rather than as Official Statistics. The final decision on this was dependent on resource availability in the months leading up to publication as it is very resource intensive to compile and with potentially questionable data quality".

19. It therefore seems evident that the MoJ is not sure whether or not there is an intention to publish data in the exact format that has been requested as the format had yet to be decided. Furthermore, as the data held is not all of 'good quality' it is unclear whether the data held would actually be able to satisfy the requests. The above response also contradicts the MoJ's earlier position by indicating that the data from before October 2015 was not intended to be published as 'official statistics', rather as 'management information'.
20. As the MoJ had also indicated that it holds 'incomplete' data the Commissioner asked for further explanation on this point and was advised:

"At the time of the reply the full set of data was not complete and subject to the rigorous data cleaning and quality assurance process required for publication. In addition it would have needed to include statistical commentary and the full time series intended for publication so that there was a full context in which the data are being considered".

21. For the statutory bar to be engaged, the Commissioner considers that the requested information must be held by the MoJ in its final form and that there must be a pre-announced intention to publish all of the data that has been requested. From the explanations provided above these criteria have clearly not been met.

22. The Commissioner is therefore satisfied that the exemption at section 44(1)(a) is not engaged.

Section 22 – information intended for future publication

23. During the Commissioner's investigation, the MoJ advised as follows:

"At the time of all our responses (FOI, IR and ICO) the data was intended for publication in the NOMS Annual Digest on 27 July 2017. This intention no longer exists and there is currently no plan for publishing this data. Whilst the decision made at the time of the request and our follow up responses is maintained if [the complainant] was to submit a new request for this information section 22 and 44 would not be applied due to the withdrawal of the decision to publish. We would welcome any new request for this information".

24. However, as per section 1(4) of the FOIA, in considering a complaint the Commissioner must take into account the circumstances at the time that a request is received. She will therefore necessarily consider the MoJ's citing of this exemption.
25. The MoJ originally argued that the statistics are exempt from disclosure under Section 22 of the FOIA because they will be published at some date in the in the future.
26. Section 22(1) of the FOIA says that information is exempt from disclosure if (a) the public authority holds it with a view to it being published by the authority or any other person, at some future date (whether determined or not); (b) the authority held the information with a view to such publication at the time the request was made; and (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in (a).
27. Section 22(1) is subject to the public interest test.

Future publication

28. For the exemption in Section 22 to apply, the MoJ must have had a settled expectation at the time of the request that the information would be published at some future date. This intention to publish must pre-date the request.

Publishing the same information as the request

29. A general intention to publish some information in the future will not be sufficient to engage Section 22. The MoJ must show that the information it intends to publish is the specific information the complainant requested, ie all of the statistics specified in the request.

No fixed publication date

30. Although the public authority must hold the information at the time of the request with a view to its publication, the exemption does not require it to have a set publication date in place. It therefore follows that a public authority may still be able to apply the exemption if:

- there is a publication deadline, but publication could be at any date before then;
- publication will take place once other actions have been completed;
- publication will take place by reference to other related events; or
- there is draft publication schedule that hasn't been finalised.

'Publication' can have a wide meaning

31. The term 'publication' requires the information to be made available to the general public. It is not sufficient if a public authority (or another person) only intends to make the information available to a particular, restricted audience.

Reasonable to withhold the information prior to publication

32. It is incumbent on a public authority when applying Section 22 to consider whether it is reasonable, in all the circumstances, to withhold information until the date of publication.

The exemption can't apply post-publication

33. Once the information has been published, the exemption in Section 22 will no longer apply to any of the same information contained in either earlier draft versions or in other documentation.

The public interest test

34. As Section 22 is a qualified exemption, it follows that, if the requested information falls within it, the public authority must carry out a public interest test.

Application of Section 22 to the current case

35. In its refusal notices the MoJ advised the complainant that drug finds in each prison establishment for the years stated were planned for publication in due course. It did not state whether this would be at a monthly rate, as requested, or whether it would specifically cover 'spice' as a category.

36. In its internal review the MoJ added:

“The information requested is a subset of finds of mandatory reportable items in prison establishments data, held in its final form, which are intended for routine publication as Official Statistics. These subsets sum to figures which are exempt under section 22 of the FOIA”.

37. However, it is clear from the analysis of Section 44 above that the data held is not actually 'official statistics'. In its own submissions the MoJ has also advised that the data held is incomplete, a final decision on exactly how the data would be presented had not been taken and it is therefore not clear whether all of the information requested was intended for publication in the specific format requested.
38. Based on the above, the Commissioner is not persuaded by the arguments put forward by the MoJ that Section 22 of the FOIA has been successfully applied. It has not produced any evidence to demonstrate that, at the time of the request in August 2016, it had a settled intention to publish all of the requested information at some future date, or indeed that it actually holds all of the requested information.
39. As the Commissioner has found that the requested information does not fall within the exemption under Section 22 she has not gone on to consider the public interest test.

Right of appeal

40. 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

41. 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.
42. 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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