

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 September 2019

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the number of weapons confiscated at individual Crown Court locations in England in the last two years.
2. The Ministry of Justice (MoJ) refused to provide the requested information, citing sections 38(1)(a) and (b) (health and safety) and 31(1)(a), (b) and (c) (law enforcement) of the FOIA.
3. The Commissioner investigated its application of sections 31 and 38. She finds that neither section is engaged and therefore the MoJ is not entitled to rely on either exemption.
4. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
 - disclose the requested information to the complainant.
5. 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

6. Following earlier correspondence, on 7 March 2019, the complainant wrote to the MoJ and requested information in the following terms:

"For each individual Crown Court building in England (excluding Wales and excluding magistrates courts, tribunals etc) (details broken down by individual named building please):

1) The number of knives, blades, or other weapons seized at security gates in calendar year 2018,

2) The number of knives, blades, or other weapons seized at security gates in calendar year 2017".

7. The MoJ responded on 26 March 2019. It confirmed it held the requested information but refused to provide it, citing the following exemptions of the FOIA:
 - section 38(1)(a) and (b) (health and safety)
 - section 31(1)(a), (b) and (c) (law enforcement)
8. Following an internal review, the MoJ wrote to the complainant on 18 April 2019 maintaining its original position.

Scope of the case

9. The complainant contacted the Commissioner on 30 May 2019 to complain about the way her request for information had been handled. She considered that the request had been refused on "*flawed and invalid grounds*".
10. Although the Commissioner understands from the complainant that other public authorities would appear to have complied with similar requests, she does not consider that this sets an automatic precedent for disclosure under the FOIA. In the Commissioner's view, each case must be considered on its merits.
11. During the course of her investigation, the MoJ provided the Commissioner with a copy of the withheld information and confirmed its application of sections 38 and 31 of the FOIA.
12. The analysis below considers the MoJ's application of sections 31 and 38 of the FOIA to the requested information. That information comprises the overall number of items seized (rather than an itemised breakdown of the number of knives seized, number of blades seized, number of weapons seized etc), broken down by individual named Crown Court building in England.

Reasons for decision

Section 31 law enforcement

13. Section 31 of the FOIA creates an exemption from the right to know if disclosing 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.
14. 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.
15. 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.
16. In this case, the MoJ is relying on sections 31(1)(a), (b) and (c) of the FOIA. Those subsections state that information is exempt if its disclosure would, or would be likely to, prejudice:
 - (a) the prevention or detection of crime;
 - (b) the apprehension or prosecution of offenders;

(c) the administration of justice.

17. 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. Nor did it attempt to explain why each of the separate limbs of the exemption applied.
18. With regard to the actual harm which it alleged would, or would be likely to occur, the MoJ told the complainant, albeit in respect of the public interest test, that disclosure of the information *'might prejudice the administration of justice'* and *'could prejudice the "prosecution"/processing of an alleged offender'*.
19. In its submission to the Commissioner, the MoJ failed to provide any further clarity regarding prejudice to the three law enforcement purposes it considered relevant in this case.
20. From the evidence she has seen, the Commissioner is not satisfied that the MoJ has demonstrated how the various law enforcement interests protected by section 31 would be likely to be harmed by the disclosure of the requested information.
21. As she is not satisfied that the MoJ evidenced that there would be a real and significant likelihood of prejudice to the prevention or detection of crime, the Commissioner finds that the MoJ failed to establish engagement of the section 31(1)(a) exemption in respect of the information in scope of the request.
22. Similarly, as she is not satisfied that it evidenced that there would be a real and significant likelihood of prejudice to the apprehension or prosecution of offenders, she finds that the MoJ failed to establish engagement of the section 31(1)(b) exemption. As she is not satisfied that the MoJ evidenced that there would be a real and significant likelihood of prejudice to the administration of justice, the Commissioner also finds that the MoJ failed to establish engagement of the section 31(1)(c) exemption in respect of the information in scope of the request.
23. The Commissioner next considered the MoJ's application of section 38(1) to the same information.

Section 38 health and safety

24. Section 38(1) of the FOIA states that:

"Information is exempt information if its disclosure under this Act, would, or would be likely to –

(a) endanger the physical or mental health of any individual, or

(b) endanger the safety of any individual."

25. In her guidance on section 38¹, the Commissioner's view is that the use of the term 'endanger' equates to 'prejudice' and that section 38 is subject to the prejudice test. Accordingly, in order to be engaged, it must meet the criteria set out in paragraph 14 above.
26. Section 38 is a qualified exemption and is therefore subject to the public interest test.
27. In this case, the MoJ considered that both limbs of section 38(1) applied. In that respect, it told the complainant that it considered that disclosure in this case:
- "... would be likely to endanger the physical health, mental health, or safety, of individuals that attend our court venues".*
28. The MoJ considered that the types of person likely to be endangered included staff, the judiciary, and members of the public attending court for hearings.
29. In its correspondence with the complainant, albeit in relation to the public interest test, the MoJ said that the disputed information:

"...could be used to infer potential weaknesses in the security measures HMCTS takes within Crown Court buildings, and place at risk the health, safety and security of individuals attending them ... by potentially leading individuals to believe that those security measures could be circumvented".

30. The complainant disputed that view. She told the MoJ:

"... I believe the opposite would be the case: disclosure would alert court visitors to the fact that security gates are in operation and (where relevant) hazardous items are found. There is nothing in the information requested that would show precisely how checks are carried out or how security measures could be circumvented".

31. The Commissioner's guidance on section 38 states:

"In order to engage this exemption the public authority must demonstrate that there is a causal link between the endangerment and disclosure of the information.

¹ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

The public authority must also show that disclosure would, or would be likely to, have a detrimental effect on the physical or mental health of any individual, or the safety of any individual. The effect must be more than trivial or insignificant”.

32. As is her practice in a case such as this, and given that the MoJ considered that both limbs of the exemption applied, the Commissioner asked the MoJ to explain:

- why disclosure of the information would endanger, or be likely to endanger, the physical or mental health of an individual; and
- why disclosure of the information would endanger, or be likely to endanger, the safety of an individual.

33. She also asked the MoJ to confirm the level of likelihood – ‘would’ or ‘would be likely to’ – in the case of each limb of the exemption.

34. In its submission, the MoJ told the Commissioner:

“[Disclosure] would increase the likelihood that those seeking to threaten court users would attempt to bring in prohibited items, such as knives, to harm court users”.

35. It argued that, if the information was disclosed, this would tempt individuals to target courts with lower rates of confiscations than others.

36. In support of that view, it argued that the threat of physical violence to court users is significant. It told the Commissioner:

“We believe the likelihood would increase the risk of workplace violence against court users”.

37. The Commissioner recognises that the withheld information comprises the numbers of weapons seized, broken down by venue. She acknowledges that the number of weapons seized varies from venue to venue.

38. However, in order to engage the exemption, the public authority must be able to show a connection between the disclosure and the endangerment that section 38 is designed to protect.

39. She also notes that the MoJ considered that the higher threshold – “would endanger” – applied in this case. The Commissioner considers that the term “would...endanger” means that it is more likely than not to occur (ie a more than 50% chance).

40. In this case, having considered the arguments put forward by the MoJ in support of its application of section 38, the Commissioner does not find that the MoJ has demonstrated how disclosure of the specific

information requested would lead to the endangerment which the exemption is designed to protect. While she accepts that the MoJ has argued that disclosure would increase the likelihood of individuals attempting to take prohibited items into Crown Court buildings, she has not seen any evidence to support this view.

41. Given that the Commissioner's view is that the MoJ has not demonstrated any causal relationship between the potential disclosure of the requested information and the prejudice which section 38 is designed to protect, she considers that section 38(1)(a) and (b) are not engaged.

Right of appeal

42. 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

43. 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.
44. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF