

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 February 2020

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

Decision (including any steps ordered)

1. The complainant made a four-part request relating to the Court Security Officers (Designation) Regulations 2005. The Ministry of Justice (the 'MOJ') initially cited section 21 for parts one to three (information accessible to applicant by other means) but revised its position at internal review, and provided the requested information. For part four, the MOJ cited section 31(1)(c) (law enforcement) of FOIA and advised that the public interest test favoured withholding the information.
2. The Commissioner's decision is that the MOJ was not entitled to rely on section 31(1)(c) for the majority of the withheld information, which is a template letter. Her full position is set out in a confidential annex which will be provided to the MOJ only. However, she finds that one sentence within the template letter did engage the exemption and that the balance of the public interest favoured maintaining section 31(1)(c).
3. The Commissioner requires the MOJ to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information with the exception of one sentence as set out in the confidential annex.
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.

Background

5. In response to the Commissioner's enquiry, the complainant confirmed he had submitted two related requests on 22 March 2019, via the *WhatDoTheyKnow.com* website¹, which the MOJ had amalgamated and responded to jointly on 9 May 2019. For ease of reference, the Commissioner has mirrored the MOJ's layout and numbering of the two amalgamated requests in setting out the request below (as employed by the MOJ in its response to the complainant).
6. The complainant has expressed no objections to the MOJ combining his two requests and responding to them together.
7. Her Majesty's Courts and Tribunals Service ('HMCTS') falls within the MOJ's remit.

Request and response

8. On 22 March 2019, the complainant wrote to the MOJ and requested information in the following terms:

"I write pursuant to the Court Security Officers (Designation) Regulations 2005 and request the following information;

- 1. Copies of the procedures for designation of court security personnel*
- 2. Date(s) when the procedures became effective*
- 3. Procedure for recording designation status if separate from the designation process*
- 4. Any template letters of designation provided to security personnel in HMCTS or it's [sic] predecessor HMCS once the Lord Chancellor has been satisfied with the training requirement schedule of the Court security officer (Designation) regulations 2005"*

9. On 23 April 2019, the MOJ wrote to the complainant advising that it required additional time to consider the public interest test. On 9 May 2019, the MOJ provided its substantive response. For parts one to three
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¹ https://www.whatdotheyknow.com/request/designated_court_security_office and https://www.whatdotheyknow.com/request/court_security_officer_letter_ofe

of the request, it confirmed it held the information but cited section 21 because it said the information was reasonably accessible; it provided the associated weblinks.

10. For part four, the MOJ cited section 31, the exemption for law enforcement, specifically section 31(1)(c), because it said that disclosure would, or would be likely to, prejudice the administration of justice. It advised that the public interest test favoured withholding the information.
11. The complainant requested an internal review on 16 May 2019, receipt of which was acknowledged by the MOJ on 6 June 2019. However, the MOJ did not provide its internal review until 2 September 2019 (see 'Other matters' section at the end of this notice).
12. Following the internal review, the MOJ partly revised its position and overturned the decision for parts one to three; it said it agreed with the complainant's view that the links provided were to the legislative framework and instead now provided the requested information. However, the MOJ maintained that section 31(1)(c) applied to part four of the request but "*outside the scope of the Act and on a discretionary basis, in [sic] interest of being helpful*", it provided the complainant with some explanatory details about this part of his request.

Scope of the case

13. The complainant contacted the Commissioner, on 5 September 2019, to complain about the handling of part four of his request for information. He submitted the following grounds of complaint:

"As you will see from the linked response below², HMCS have claimed that in response to FOI query 4 the release of a 'template' letter of designation may result in fraudulent use of this template and have therefore refused to release this information.

This is clearly a preposterous suggestion as there is no benefit to an individual 'faking' such a letter from HMCS as they have a central register against which 'genuine' letters of designation can be checked should the need arise.

² https://www.whatdotheyknow.com/request/court_security_officer_letter_of

To prevent release of this template is [sic] breach of FOI. I would request your review of this matter."

14. The Commissioner has considered whether the MOJ was entitled to cite section 31(1)(c), the exemption for law enforcement, in relation to part four of the request.

Reasons for decision

Section 31 – law enforcement

15. The MOJ has cited section 31(1)(c) of FOIA, in relation to the information withheld for part four of the request, which states:

"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,"

16. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
17. In order to be engaged, the following criteria must be met:
- 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);
 - 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,
 - 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.
18. The withheld information in this case consists of a template letter of designation given to appointed HMCTS security personnel. The template includes references to applicable legislation and other details relevant to court security personnel.

The applicable interests

19. The first point for the Commissioner to consider is whether the arguments provided by the MOJ relate to the relevant applicable interests, namely the administration of justice.
20. The complainant's view is as set out in the 'Scope' section of this notice.
21. The MOJ provided the Commissioner with further arguments to support its citing of subsection 31(1)(c), which she has set out in a confidential annex available to the MOJ only. This is because the arguments submitted by the MOJ would reveal details about the withheld information that the MOJ is seeking to withhold in this case. Her deliberations about this are therefore limited as further details would reveal the content of the withheld information.
22. The Commissioner is satisfied that the arguments provided by the MOJ do relate to the applicable interests stated, so the first limb of the three part test outlined above is met.

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)(c) 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. The MOJ provided the following submissions to the Commissioner which she is able to reproduce below:

"The document is not in the public domain..."

and

"... designated security officers ... are employed by third party contractors across over 340 sites".

25. The MOJ also advised that its:

"Security Officers are designated under the Court Security Act 2003, following a criterion check. Designation gives a Security Officer specific powers, for example to physically restrain, exclude or remove a person from a court building (only the Police and Border Forces have these type of powers). The letter is a unique confirmation to the security officer of their designation, what it means and the fact they are cleared to perform the full role. Its purpose goes beyond the vetting of appointed officers."

26. The remainder of the MOJ's submissions have been set out in the confidential annex. 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 majority of the withheld information, which she considers to be generic in nature, and the prejudice which the exemption is designed to protect, ie the administration of justice.
27. The Commissioner does not consider that the arguments provided in this case demonstrate that the harm in disclosure of the majority of the template letter is real, actual or of substance. For the reasons set out in the confidential annex, she therefore concludes that this exemption is not engaged in relation to the majority of the requested information in part four of the request and the MOJ is required to disclose this information.
28. However, there is one sentence within the template letter (as set out in the confidential annex) where the Commissioner does consider the MOJ is able to properly demonstrate a causal relationship, which is real, actual or of substance, and this is therefore further considered below.

The likelihood of prejudice

29. In correspondence with the Commissioner, the MOJ variously used the terms 'could' and 'would'.
30. 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'.
31. 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 considers that the lower threshold of 'would be likely to' occur was intended.

Is the exemption engaged?

32. In a case such as this, it is not enough for the information to relate to an interest protected by section 31(1)(c), 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.
33. In relation to one sentence in the template letter, the Commissioner is satisfied that the prejudice alleged by the MOJ is real and of substance, and that there is a causal relationship between its disclosure and the prejudice which the exemption is designed to protect.

34. The Commissioner's finding for this part of the template letter is that it was realistic that its content could be used by interested parties to prejudice the administration of justice, and that the exemption provided by section 31(1)(c) is therefore engaged.

Public interest test

35. Section 31 is a qualified exemption. The Commissioner must now consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31(1)(c) of FOIA outweighs the public interest in disclosing the remaining one part of the information.
36. The Commissioner is mindful that the MOJ's public interest submissions related to the template letter as a whole; however, she will consider them here in relation to the one sentence within the template letter which the Commissioner has found to engage section 31(1)(c) of FOIA.

Public interest considerations favouring disclosure

37. In support of disclosure, the MOJ said:

"We recognise that disclosure in full would provide greater transparency and enable the public to have confidence in the operation of security measures within HMCTS."

Public interest considerations favouring withholding the information

38. The MOJ submitted the following arguments:

"There is a serious possibility that any template letter could be fraudulently copied or reproduced to include information relating to a person who is not entitled to such a letter."

This could result in the circumventing of court security and prejudicing the administration of justice."

Balance of the public interest arguments

39. The Commissioner acknowledges the public interest in openness and transparency and of having confidence in HMCTS' security measures in relation to its court security personnel.
40. In relation to the one sentence under consideration, the Commissioner is mindful of the submissions set out in the confidential annex and has concluded that the release of this part of the withheld template could adversely affect, ie prejudice, the administration of justice. She is unable to further elaborate on her position without disclosing details of the information itself.

41. She therefore concludes that the MOJ was entitled to rely on section 31(1)(c) of FOIA for this one sentence within the template letter and does not require the MOJ to disclose it.

Other matters

42. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
43. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
44. The Commissioner is concerned that it took almost four months for an internal review to be completed.
45. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

46. 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

47. 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.
48. 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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