

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 November 2020

Public Authority: Ministry of Justice (MOJ)

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information from the MOJ regarding confiscation of knives from people entering family courts in London during certain time periods. The MOJ refused to disclose the requested information, citing sections 31 and 38 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that neither section is engaged and therefore the MOJ is not entitled to rely upon either exemption.
3. The Commissioner requires the MOJ to take the following steps to ensure compliance with the legislation:
 - disclose the requested information to the complainant.
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.

Request and response

5. On 4 July 2019, the complainant wrote to the MOJ and requested information in the following terms:

"A...How many knives were confiscated from people entering family courts in London, from Jan - June 2019. Please break down by court.

And if no cost overrun - move to B...

B...How many knives were confiscated from people entering family courts in London, from Jan - June 2018. Please break down by court.

And if no cost overrun - move to C

C. How many knives were confiscated from people entering family courts in in London from Jan - June 2017? Please break down by court."

6. The MOJ responded to the complainant on 1 April 2019, stating that it held the requested information but refusing to disclose it, citing sections 31 and 38 of the FOIA as a basis for non-disclosure. The complainant sought an internal review of the MOJ's decision on 31 July 2019, to which he received a response from the MOJ on 29 August 2019. The reviewer upheld the original decision. The complainant then contacted the Commissioner on 24 September 2019 to complain about the MOJ's response to his request.

Scope of the case

7. The complainant contacted the Commissioner on 24 September 2019 to complain about the way his request for information had been handled.
8. The Commissioner has considered the MOJ's handling of the complainant's request, in particular its application of the specified FOIA exemptions.
9. The MOJ has informed the Commissioner that sometimes 'family' courts are held in courts which are not specifically designated for that purpose. In that case, the MOJ would not be able to differentiate statistically between the number of weapons confiscated from people entering 'family' courts as opposed to those entering those courts for the purposes of any other type of legal proceedings.
10. The Commissioner has interpreted the complainant's request as being for the number of weapons confiscated from those entering courts which are specifically Family Courts and has made her decision on that basis.

Reasons for decision

Section 31-law enforcement

11. 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.
12. 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.
13. 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.
14. 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.

15. 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.
16. The Commissioner considered that, in its correspondence with the complainant, the MOJ did not make any effort to explain why it considered that each of the separate limbs of the exemption at section 31 of the FOIA applied to the requested information.
17. In relation to the actual prejudice which it alleged would, or would be likely to occur if the requested information were to be disclosed, the MOJ merely stated in its initial response to the complainant that disclosure of the requested information would, or would be likely to, prejudice law enforcement, i.e. the prevention or detection of crime, the apprehension or prosecution of offenders, and the administration of justice.
18. In its internal review response to the complainant, the MOJ failed to provide any further clarity regarding potential prejudice to the three law enforcement purposes it considered relevant in this case.
19. In its submission to the Commissioner, the MOJ stated that disclosure of the requested information *"could encourage individuals to attempt to circumvent security by bringing banned or illegal items to Court buildings. Such attempts to circumvent court security might prejudice the administration of justice, by hampering the proceedings of the court generally, or, by design, inhibiting particular court proceedings. Disruption to court proceedings could prejudice the fairness of a hearing."*
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. The phrases "could" or "might" in relation to potential prejudice, without any supporting evidence, are not strong enough to meet the prejudice threshold even for the lower "would be likely" level of prejudice.

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 apprehension or prosecution of offenders, or the administration of justice, the Commissioner finds that the MOJ failed to establish engagement of any of the three specified limbs of the section 31 exemption in respect of the information it holds in scope of the request.
22. The Commissioner next considered the MOJ's application of section 38(1)(b) to the same information.

Section 38-health and safety

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

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

(b) endanger the safety of any individual."

24. In her guidance on section 38 of the FOIA, 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.
25. Section 38 is a qualified exemption and is therefore subject to the public interest test.
26. In this case, the MoJ considered that section 38(1)(b) applied. In that respect, it told the complainant that it considered that disclosure in this case:

"... would be likely to endanger the safety of individuals that attend our court venues".

27. 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.
28. In its correspondence with the complainant, albeit in relation to the public interest test, the MOJ said that the requested information:

"...could be used to infer potential weaknesses in the security measures HMCTS takes within court buildings and encourage individuals to

attempt to circumvent security by bringing banned or illegal items to particular court buildings."

29. The complainant disputed that view. He told the MOJ in his request for internal review that:

"It is tenuous to suggest that the number of knives seized would somehow be used to infer weaknesses in security measures. It is clear that the number of knives seized is not a reflection of court security measures but the local situation and area. Any more than more knives being seized in a particular street would be a reflection of the weaknesses of local policing in that area.

The fact that HM courts are seizing knives indicates not that there are weaknesses but that the system is working and it is important that the public are aware of this.

Equally, the fact that there are fewer knives seized at a particular court would not by any stretch indicate that that court has better detection in place."

30. The Commissioner's guidance on section 38¹ 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. 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."

31. Given that the MOJ considered that 38(1)(b) applied, the Commissioner asked the MOJ to explain why disclosure of the information would endanger, or be likely to endanger, the safety of an individual.

32. In its submission, the MOJ told the Commissioner:

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

"Whilst we are not able to factually prove that releasing this specific data would result in a danger to any individual adult or child, we believe that it 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. Aggrieved litigants and parties could be tempted to target courts with lower rates of confiscations than others. The threat of physical violence to court users is significant. The procedures for security search of persons at any facility cannot be 100% effective as they are not totally reliant on technical solutions but require the need for human operational intervention to identify and confiscate prohibited items. There is an inevitable element of human error in the process. HMCTS should not disclose information which may encourage aggrieved parties to breach security controls at a court. Those controls are in place to protect the safety of court users."

33. The Commissioner recognises that the requested information comprises the numbers of weapons seized, broken down by court location. She acknowledges that the number of weapons seized varies from location to location.
34. She also notes that the MOJ considered that the lower threshold – *"would be likely to endanger"* – applied in this case. The Commissioner considers that the term *"would be likely to endanger"* means that there is a real and significant risk of such endangerment.
35. 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.
36. 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 Family Court buildings, she has not seen any evidence to support this view.
37. 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)(b) is not engaged.

Right of appeal

38. 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

39. 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.
40. 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

Deirdre Collins
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