

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 May 2020

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

Decision (including any steps ordered)

1. The complainant requested the release times of prisoners from a specified prison in March 2019, together with emails between 16 and 23 March 2019 concerning the release of a named prisoner from that prison. The Ministry of Justice (the 'MOJ') initially cited section 40(2) – personal information in relation to the release times and provided copies of the requested emails with redactions for personal information. The complainant confirmed his complaint centred only on the prisoner release times. Ultimately, the MOJ revised its position and provided him with some of the requested times for March 2019, but withheld the remainder, citing sections 31(1)(f) (the maintenance of security and good order in prisons) and 38(1)(a) (health and safety) of FOIA.
2. The Commissioner's decision is that neither section 31(1)(f) nor section 38(1)(a) is engaged in relation to the remaining withheld information. Her position is set out in a confidential annex which will be provided to the MOJ only.
3. The Commissioner requires the MOJ to take the following step to ensure compliance with the legislation.
 - Disclose the withheld information (ie the remaining prisoner release times for March 2019).
4. The MOJ must take this step 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. The Commissioner understands that the complainant had submitted an earlier request on 26 March 2019, which was refused by the MOJ on 25 April 2019 on cost grounds (section 12 of FOIA). On 28 April 2019 the complainant refined the timeframe for part 1 of that request from a year to the month of March 2019, and submitted his refined request as set out below.

Request and response

6. On 28 April 2019, the complainant wrote to the MOJ and requested information in the following terms:

"Between March 1 2019 and March 31 2019, what time was every prisoner released from HMP Moorland near Doncaster? This data should relate to prisoners who are being released either on licence or having completed their custodial sentences. It should not refer to prisoners who are being transferred to another prison facility, nor should it refer to those detained at the YOI at Moorland. Please provide the times – to the nearest hour, if necessary - the prisoner left Moorland, and if there were any special circumstances surrounding them being released.

Question 2 will remain unchanged as this was not cited as being outside the scope of the Act. 2) Please provide all internal email correspondence involving Ministry of Justice press officers between March 16 2019 and March 23 2019 regarding the release of [name redacted] who was released on Friday March 22 2019 from HMP Moorland having served three years of a six-year jail term for child sex offences. Names of MOJ employees should be redacted."

7. The MOJ responded on 24 May 2019. For part 1 it refused to provide the requested information citing section 40(2) of FOIA, the exemption for personal information.
8. For part 2, it provided some information within the scope of the request, specifically the emails from MOJ Press Officers from the relevant press logs. The MOJ told the complainant that:

"The "To", "From" and "cc" lines in the e-mails have been removed and other personal information that is exempt from disclosure under section 40(2), has also been redacted, in accordance with data protection principles..."

9. The complainant requested an internal review on 24 June 2019, for part 1 of his request, saying he would be prepared to accept the times only. The MOJ provided an internal review, late, on 23 October 2019 in which it maintained that section 40(2) applied to part 1 of the request.

Scope of the case

10. The complainant contacted the Commissioner on 6 January 2020 to complain about the way part 1 of his request for information had been handled. He submitted the following grounds of complaint:

"My appeal with the ICO is that providing the release times of all prisoners from HMP Moorland during a one-month period would not itself be enough to identify a prisoner.

I would further submit that the MOJ has already identified a particular prisoner – the widely known [name and former occupation redacted], whose release from prison was well publicised – as evidenced by its disclosure in part two of the original FOI release (see [name redacted] press office 24 5 19 PDF¹ attached), therefore putting information into the public domain.

Please note, I do not seek the names of any prisoners, just the release times."

11. The Commissioner initially commenced her investigation into the MOJ's reliance on section 40(2) for part 1 of the request, highlighting the above grounds of complaint to the MOJ.
12. On 26 March 2020, the MOJ revised its position and disclosed some of the requested information. It advised the complainant as follows:

"I apologise on behalf of the MOJ for incorrectly refusing Question 1 of your request under section 40(2) (personal information) of the Act and for not reconsidering your request in light of the clarification you provided in your request for an Internal Review (that you were only interested in the times prisoners were released).

I can confirm the MOJ holds some of the information that you requested in Question 1 and I am happy to provide it to you in

¹ This is an internal MOJ document and therefore no URL link is available.

Annex A. Please be aware that the times are in no particular order and the times are not necessarily the exact time when the prisoner was released, as it may be the time the member of staff enters it onto the system. This is, however, reliable information in relation to the question, since the times recorded are usually within 10 minutes of the actual release time.

Some of the information is exempt from disclosure under Section 31(1)(f) of the Act, since its release would be likely to prejudice the security and good order in both HMP Moorland and across the prison estate. It has also been withheld under section 38(1)(a) of the Act, as its disclosure could compromise the mental or physical health of any individual."

13. In addition, the MOJ wrote to the Commissioner separately with its submissions and public interest test considerations in relation to the remaining withheld information. It also provided her with a copy of the disclosed and withheld prisoner release times.

14. The MOJ's revised response to the Commissioner included the following point, which it additionally relayed to the complainant:

"In his ICO complaint, [the complainant] queried why we released information in response to Question 2 as it identifies an individual. The information provided was as a result of the information that was requested. The information provided is effectively already in the public domain, and therefore there was none or low prejudice to the person named in that part of the response."

15. The Commissioner contacted the complainant for his view following the disclosure of some of the requested information. He said that in order for him to be able to put the disclosed information into context, he needed to know how many prisoner release times had been withheld.

16. The complainant advised that he had, therefore, now submitted a new request to the MOJ for the number of times which had been withheld from him in 'Annex A'. He said that he would be willing to compromise in that if the MOJ were to provide the number of times withheld, he would no longer pursue disclosure of the actual times themselves.

17. This suggested compromise also formed the subject of a discussion between the Commissioner and the MOJ, with a view to informally resolving the current complaint. The MOJ declined to release any further information for the reasons set out in the confidential annex.

18. In light of the above, there followed an exchange between the Commissioner and the complainant as to whether he wished her to continue her investigation into the current complaint for the remaining

times. After some consideration, the complainant confirmed that he would like the investigation into the existing complaint to continue.

19. The Commissioner has therefore considered the MOJ's reliance on sections 31(1)(f) and 38(1)(a) in relation to the remaining withheld information in part 1 of this request.

Reasons for decision

Section 31 – law enforcement

20. Section 31 of FOIA 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-

(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained..."

21. 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.
22. 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 maintenance of security and good order in prisons, etcetera);
 - 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.

23. The complainant has disputed that section 31 could be applied to withhold this information on the grounds set out under the 'Scope' section of this notice.
24. The MOJ provided the Commissioner with further arguments to support its citing of section 31(1)(f), which she has set out in a confidential annex available to the MOJ only. This is because the release of these arguments may inadvertently result in disclosure the requested information.
25. The first point for the Commissioner to consider is whether the arguments provided by the MOJ relate to the relevant applicable interests, namely the maintenance of security and good order in prisons.
26. The MOJ's arguments as to how the withheld information relates to the applicable interests in section 31(1)(f) have been set out in the confidential annex.
27. 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.
28. As stated above, the MOJ must be able to demonstrate that a causal relationship exists between the disclosure of the remaining times and the prejudice envisioned. Furthermore, this alleged prejudice must be real, actual or of substance.
29. The Commissioner has considered all the MOJ's arguments in relation to its application of section 31(1)(f), as set out in the confidential annex attached to this notice.
30. However, in the Commissioner's view, any possible vulnerability at any particular prison would not be revealed by the disclosure of the remaining release times. The times would be of little use retrospectively to those with criminal or other intent, particularly as they are times without any further detail or context. Her further considerations have been set out in the confidential annex.
31. Having considered the arguments put forward by the MOJ, the Commissioner finds that it 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 maintenance of security and good order in prisons.
32. The Commissioner does not consider that the arguments provided in this case demonstrate that the harm in disclosure of the remaining prisoner release times is real, actual or of substance. She therefore concludes that this exemption is not engaged in relation to the remaining requested information for part 1 of the complainant's request.

33. Since the Commissioner's finding is that the exemption was not engaged, it has not been necessary for her to go on to consider the balance of the public interest. She must next consider whether the undisclosed prisoner release times can be withheld under section 38(1)(a) of FOIA.

Section 38 - health and safety

34. Section 38(1) of 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."

35. In her guidance on section 38², 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 22 above. Section 38 is a qualified exemption and is therefore subject to the public interest test.
36. In this case, the MOJ considered that subsection 38(1)(a) applied. In that respect, it told the complainant that it considered that disclosure in this case:

"... could compromise the mental or physical health of any individual".

37. 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.

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".

38. The MOJ's brief submission in support of section 38(1)(a) to the Commissioner is set out in the confidential annex.

² <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

39. The withheld information in this case comprises the remaining prisoner release times for March 2019.
40. 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.
41. 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.
42. 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) is not engaged.
43. Consequently, the Commissioner is not obliged to consider the associated public interest test.

Other matters

Internal review

44. 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.
45. 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.
46. The Commissioner is concerned that it took 87 working days for an internal review to be completed in this case.

47. 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

48. 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

49. 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.

50. 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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