

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 April 2020

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

Decision (including any steps ordered)

1. The complainant requested information relating to a claim concerning alleged historic abuse at the St William's Approved School near Market Weighton.
2. The Ministry of Justice (MoJ) refused to provide the requested information, citing section 31(1)(c) (law enforcement) of the FOIA as its basis for doing so.
3. The Commissioner's decision is that the MoJ was entitled to rely on the exemption at section 31(1)(c) of the FOIA and that the public interest favoured maintaining the exemption.
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. According to media reports¹ more than 240 men have made claims over abuse at St William's residential school in Market Weighton, East Yorkshire in the 1970s and 80s.

¹ <https://www.bbc.co.uk/news/uk-england-humber-43863173>

6. The Commissioner understands that there had been other correspondence between the complainant and the MoJ, regarding this subject matter, prior to the request for information in this case.

Request and response

7. Following earlier correspondence, on 24 January 2019 the complainant wrote to the MoJ and requested information in the following terms:

"... can you tell me how much money was spent on legal aid for all of the claimants involved in the case that you have records for on the aforementioned list between the months of January 2004 and January 2018. I do not require any personal information relating to the individual claimants. I would only like to know how much money in total was spent on the cases that have now been discontinued..."
8. The MoJ responded on 21 February 2019. It refused to provide the requested information, citing section 31(1)(c) (law enforcement) of the FOIA as its basis for doing so.
9. Following an internal review, the MoJ wrote to the complainant on 16 May 2019, maintaining its original position.

Scope of the case

10. The complainant provided the Commissioner with the relevant documentation, on 5 September 2019, to complain about the way her request for information had been handled.
11. She disputed that section 31(1)(c) applied in this case. She told the Commissioner:

"In the absence of any reasoning or evidentiary basis for the claims that have been made, the MoJ's arguments are merely speculative, particularly considering that the requested information is an aggregate amount over 14 years (I do not wish to know individual costings/information relating to individual cases) and the proceedings are now largely discontinued"
12. With respect to the nature of the requested information, the complainant acknowledged:

"... that the requested information is an aggregate amount over 14 years..."

13. As is her practice, at the start of her investigation the Commissioner asked the MoJ to provide her with the information she required in order to make a decision in this case. That information included a copy of the withheld information.
14. The Commissioner accepts that the MoJ did provide her with a figure for the withheld information, but notes that there was a delay before it was provided to her.
15. During the course of her investigation, the Commissioner found it necessary to serve the MoJ with an Information Notice (IN), requiring it to provide clarification of its response.
16. In response to the IN, the MoJ provided the required clarification in relation to the withheld information, telling the Commissioner:

"For the avoidance of doubt, the figure cited in this response relates to legal aid claimed under legal aid certificates".
17. The analysis below considers the MoJ's application of section 31(1)(c) of the FOIA to the requested information.
18. The Commissioner acknowledges that she is required to consider the situation as it was at the time the request was received.

Reasons for decision

Section 31 law enforcement

19. 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.
20. 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.

21. 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.

22. In this case, the MoJ is relying on section 31(1)(c) of the FOIA. That subsection states that information is exempt if its disclosure would, or would be likely to, prejudice:

(c) the administration of justice.

23. The Commissioner considered that, in its initial 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 the section (c) limb of the exemption applied.

24. However, she accepts that in its internal review correspondence it explained why it considered the exemption applied.

25. In its submission to the Commissioner, the MoJ explained the background to the case:

"To put matters in context, claimants in the St William's case are engaged in adversarial litigation with the representatives of the Diocese of Middlesbrough, who operated the school in question. These claimants are represented with the benefit of legal aid, whereas the respondents are represented from private funds".

The applicable interests

26. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity mentioned in section 31(1)(c) – in this case the administration of justice.

27. In support of its view that section 31 applied in this case, the MoJ told the complainant:

"The Information Commissioner's Office's guidance in relation to the application of section 31 of the FOIA states that prejudice [to] the administration of justice includes "the requirement to conduct proceedings fairly", which I consider would extend to disclosure of detailed information in respect of the amount spent on legal representation would be prejudicial to the position of the relevant party or parties involved, and this would not be in the interests of justice".

28. With regard to her view that "the proceedings are now largely discontinued", the MoJ confirmed to the complainant:

"In fact, the group litigation is ongoing, settlement discussions have taken place in some cases and the remainder are proceeding to trial".

29. The Commissioner accepts that 'the administration of justice' is a broad term. Amongst other interests, she considers that the exemption will protect information if its disclosure would undermine particular legal proceedings.
30. The Commissioner is satisfied that the prejudice the MoJ is envisaging in this case is relevant to the particular interest that the exemption is designed to protect.

The nature of the prejudice

31. 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.
32. In its correspondence with the complainant, the MoJ told her that, in the circumstances of this case, where there are two parties in litigation and one is publicly funded and one is not, disclosure of the information would be to the world at large and could be used by the opponent to their advantage.
33. It explained:

"... where one party is under no obligation to disclose their litigation costs, I consider that the release of the requested information would be likely to prejudice the requirement to conduct proceedings fairly, on the basis that, should information about the amount of legal aid provided to solicitors acting for the claimants be disclosed,

then this disclosure would be to the world at large and therefore could be used by the opponent to assess at what point the case may become uneconomic (in terms of cost benefit) and exploit that to attack the level of legal aid funding, rather than defeat the case in court and/or agree a settlement, and therefore I am satisfied that the exemption under section 31(1)(c) of the FOIA is engaged”.

The likelihood of prejudice

34. The MoJ variously told the complainant that it considered that disclosure of the requested information *would be likely* to have the stated detrimental effect and *would* be prejudicial.

35. Similarly, in its submission to the Commissioner, the MoJ stated both:

*“In this instance, the LAA [Legal Aid Agency] considers that the administration of justice **would be prejudiced** by the information [being disclosed]...”*

and

*“It is for these reasons that the LAA concluded that release of this information **would be likely** to cause prejudice to the administration of justice”.*

36. The Commissioner considers that the MoJ failed to give 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’.

37. 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? Would disclosure be likely to prejudice the administration of justice?

38. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is ‘real, actual or of substance’.

39. In this case, the Commissioner is satisfied that the prejudice alleged by the MoJ is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect.

40. The Commissioner’s finding is that it was plausible that the release of the information at issue – namely the legal aid costs paid to solicitors acting for the claimants – could be used by interested parties to

prejudice the administration of justice and that the exemption provided by section 31(1)(c) is engaged.

Public interest test

41. Section 31 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 31(1)(c) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

42. Arguing in favour of disclosure, the complainant told the Commissioner:

"... it is in the public interest to understand the expenditure of public funds by the LAA over the past 14 years in circumstances where the cases have culminated in discontinuances".

43. She also cited the public interest in accountability and transparency, and promoting openness *"which is in the spirit of the FOI Act"*.
44. The MoJ accepted that disclosure would be consistent with the Government's commitment to transparency. It also recognised that there is legitimate public interest in the operation of the legal aid scheme.

Public interest arguments in favour of maintaining the exemption

45. The MoJ emphasised the timing of its consideration of the public interest test. In its submission to the Commissioner it stated:

"The application of section 31(1)(c) on this occasion is time-sensitive... The question when applying the public interest test is therefore not simply whether on balance the information should be disclosed, but: 'does the public interest favour the information being disclosed now?'"

46. In that respect, the Commissioner notes that the MoJ told the complainant:

"In terms of the requirement to conduct proceedings fairly – we will be able to disclose the information sought once the proceedings are concluded and the risk of prejudice has expired"

and

"You may wish to resubmit your request when the litigation has finally concluded".

47. The MoJ provided the Commissioner with further arguments in support of its view that disclosure at the time of the request was not in the public interest. The Commissioner considers that those arguments relate to *"the effect of putting information of this type into the public domain"* while there remains *"a pool of cases which are continuing ..."*.
48. Arguing in support of maintaining the exemption, the MoJ explained to the complainant that its position *"must be an impartial one"*.
49. While recognising the public interest in the issue under consideration, the MoJ told the Commissioner:

"... it is also in the public interest that litigation, costs apportionment, funding decisions and offers to settle are all conducted fairly, and that an imbalance in the position of parties is not created by the release of information under the FOIA prior to the conclusion of such matters".

50. The MoJ told the Commissioner:

"Parties who are dependent upon legal aid to bring their claim as opposed to having the resources of private funds ought not to be placed in a more disadvantageous position merely because the terms of their funding are within the scope of the FOIA regime. Any public interest in such information can be addressed by the reconsideration of the position as to disclosure once the risk of prejudice has subsided."

51. In correspondence with the complainant, the MoJ told her that existing legislation provides what interested parties are entitled to be informed of in relation to either live, or proposed, proceedings.
52. In its submission to the Commissioner, the MoJ expanded on that argument, providing further information in regard to the legislation it considered relevant and referring the Commissioner to the Civil Legal Aid (Procedure) Regulations 2012.

Balance of the public interest

53. The Commissioner has weighed the public interest in avoiding prejudice to the administration of justice against the public interest in openness and transparency. She has also taken into account the arguments advanced by both parties.
54. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest.

55. She also acknowledges the public interest arguments in favour of openness and transparency, and of scrutiny of how public monies are being spent in relation to legal aid matters.
56. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to the administration of justice.
57. In that respect she is mindful that the MoJ confirmed that, at the time of the request, the litigation in question remained ongoing.
58. Where the withheld information is relevant to ongoing legal proceedings, the Commissioner considers that no party should be placed at an advantage over the other by virtue of the provisions of the FOIA.
59. Accordingly, in the circumstances of this case, the Commissioner considers that the public interest in maintaining the exemption outweighs the public interest in disclosing the information. It follows that the MoJ was entitled to rely on section 31(1)(c) of the FOIA to refuse to disclose the requested information.

Other matters

60. The Commissioner is disappointed to note the substantial delay that was caused to her investigation by the MoJ's reluctance to provide her with the information she required in order to make her decision in this case.
61. The Commissioner expects the MoJ to ensure that it co-operates fully with her investigations in the future.

Right of appeal

62. 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

63. 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.
64. 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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