

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 May 2022

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

Decision (including any steps ordered)

1. The complainant requested a copy of a specific prison service order and a copy of an instructor's manual.
2. The Ministry of Justice (MoJ) provided some information within the scope of the request but refused to provide the remainder, citing sections 21 (information accessible to applicant by other means) and 31(1)(f) (law enforcement – the maintenance and security of good order in prisons) of FOIA.
3. The Commissioner investigated its application of section 31 to the requested manual.
4. The Commissioner's decision is that the MoJ correctly withheld information relating to the requested manual on the basis of the exemption contained at section 31(1)(f) of FOIA.
5. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

6. On 17 December 2021, the complainant wrote to the MoJ and requested information in the following terms:

"I require a copy of PSO [Prison service order] 1300 and use of force instructors manual. Both of these unredacted".

7. The MoJ responded on 23 December 2021. It confirmed that it held the requested information, but refused to provide it citing the following exemption as its basis for doing so:
 - section 21 (information accessible to applicant by other means).
8. It provided a link to where the requested information could be found.
9. Following an internal review the MoJ wrote to the complainant on 19 January 2022. It appears that the complainant's request for internal review led the MoJ to interpret his request in a different way in that it revised its position with regard to the requested manual. It confirmed it holds the Use of Force Training Manual, but refused to disclose it in full, citing section 31(1)(f) (law enforcement) of FOIA. It did, however, disclose a redacted copy of the manual.
10. With respect to the requested prison service order, the MoJ confirmed its application of section 21.

Scope of the case

11. The complainant contacted the Commissioner on 14 February 2022 to complain about the way his request for information had been handled. He disputed the MoJ's application of redactions to the training manual and explained that he had issues using the link provided by the MoJ to download PSO 1300.
12. Following the Commissioner's intervention, the MoJ took steps that resolved the difficulty the complainant had accessing PSO 1300.
13. During the course of his investigation, the MoJ provided the Commissioner with an unredacted version of the requested training manual. It also provided him with a redacted version of the manual, as disclosed to the complainant.
14. By way of background, the MoJ told the Commissioner:

"The objective of the manual is to act as an aid to those training prison officers in the various techniques described. The redacted version of this manual names all those techniques but advice on how they should be applied is redacted, including photographs".
15. The analysis below considers the MoJ's application of section 31(1)(f) to the withheld information within the requested training manual.

Reasons for decision

Section 31 law enforcement

16. Section 31 of FOIA creates an exemption from the right to know if releasing 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.
17. In this case, the MoJ is relying on section 31(1)(f) of FOIA to withhold elements of the requested training manual.
18. Section 31(1)(f) 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”.
19. In order to engage a prejudice based exemption such as section 31, there must be the likelihood that disclosure would, or would be likely to, 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 withheld 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 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,
 - 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.
20. 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.

The applicable interests

22. 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)(f) – in this case the maintenance of security and good order in prisons.

23. In its correspondence with the complainant, the MoJ referred him to paragraph 1.2 of PSO 1600 which states:

“The Use of Force Training Manual (formerly Prison Service Order 1601) is used when training staff in the use of force, including Personal Safety and Control and Restraint techniques. The Training Manual is issued as a CD Rom to all Governors and local C&R [control and restraint] instructors.”

24. In its submission to the Commissioner, the MoJ said:

“There is no doubt that disclosure of the redacted material in the Use of Force manual relates directly to our ability to maintain security and good order in prisons”.

25. The MoJ described the requested training manual as “a very comprehensive document which goes into all aspects of prisoner management during conflict situations”.

26. It told the Commissioner:

“As its name suggests, this document has been produced as an aid to prison officers who are training other prison officers in the appropriate use of force against prisoners, in circumstances when such force is necessary”.

27. 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

28. 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)(f) is designed to protect. In his view, disclosure must at least be capable of harming the interest in some way, ie have a damaging or detrimental effect on it.

29. In its correspondence with the complainant, albeit in relation to the public interest test, the MoJ argued that disclosure of the requested information – information that would reveal its techniques and tactics - would be likely to be used by some individuals to subvert the effectiveness of its current measures for maintaining the security and good order of prisons.
30. While the MoJ acknowledged that the complainant has a personal interest in obtaining the requested information, it also recognised that disclosure under FOIA is disclosure to the world at large.
31. In that respect it told the Commissioner:

“This is significant because information made available to our staff in order to enable them to do their jobs effectively is necessarily restricted from the general public who may use it for other means, in this case to subvert security arrangements in prisons”.
32. It argued that providing prisoners and others with line-by-line advice on the techniques it uses “enables them to establish and practice their own techniques for resisting ours”.
33. In support of its application of section 31, the MoJ also told the Commissioner that the advice in the manual needs to be accompanied by thorough training as getting the techniques wrong could lead to injury. It also argued that the need for tougher techniques against those prisoners who had developed techniques for resisting them could result in serious injury.
34. It therefore considered that there is “a very real link between disclosure of this information, the potential for serious injury and the public’s confidence in our ability to maintain security and good order in prisons”.

The likelihood of prejudice

35. In correspondence with the both the complainant and the Commissioner, the MoJ variously used the phrases ‘would’, ‘would be likely to’, ‘the likelihood of the prejudice is very high’ and ‘would, or would be likely to’.
36. In the absence of clear evidence that the MoJ was relying on the higher threshold that prejudice ‘would’ occur, the Commissioner considered that the lower threshold of ‘would be likely to’ occur was intended.

Is the exemption engaged? Would disclosure be likely to prejudice the maintenance of security and good order in prisons?

37. In cases such as this, it is not enough for the information to relate to an interest protected by section 31(1)(f)), its disclosure must also at least be likely to prejudice the interests that sub-section is designed to protect. The onus is on the public authority to explain how that prejudice would arise and why it would occur.

38. In his guidance on section 31¹, the Commissioner states:

“The term “security and good order” will include, but is not limited to, both external and internal security arrangements. It will also protect any information likely to prejudice the orderly running of these institutions from disclosure. Conceivably this could include information that has the potential to inflame an already volatile atmosphere amongst the prison population”.

39. From the evidence he has seen, and having considered the arguments put forward by the MoJ in relation to the redactions applied to the training manual, 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 withheld information and the prejudice which the exemption is designed to protect.

40. He considers it plausible that the release of the information at issue could be used by interested parties to establish and practice their own techniques for resisting those set out in the manual, and thus prejudice the maintenance of security and good order in prisons. He therefore finds that the exemption provided by section 31(1)(f) is engaged.

The public interest test

41. As a qualified exemption, section 31 is subject to the public interest test set out in section 2(2)(b) of FOIA. Section 2(2)(b) provides that such an exemption can only be maintained where:

“ .. in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information”.

¹ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

42. In his guidance on the public interest test², the Commissioner states:

“FOIA section 2(2) refers to the public interest; furthermore, disclosures of information under FOIA are in effect to the world at large and not merely to the individual requester. So the requester’s private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest”.

Public interest arguments in favour of disclosing the requested information

43. In favour of disclosing the requested information, the MoJ recognised that disclosure in full would provide greater transparency and enable the public to be made aware of the full extent of the techniques used in prisons. It acknowledged that this could increase the public’s operational understanding of how prisons maintain good order and security in prisons.

44. It told the complainant:

“The public interest in maintaining public confidence in the high standards of security and good order of prisons is a key concern and one that is recognised by the MoJ. It is acknowledged that this might be enhanced by the release of the requested information insofar as this would broadly further interests of transparency and accountability”.

Public interest arguments in favour of maintaining the exemption

45. In favour of maintaining the exemption, the MoJ stressed the likely threat to the good order and security of prisons and, in turn, the implications of this for prisoners and staff.

46. It explained that maintaining effective control of the prison is key to protecting the safety of all those who live and work within it, and in turn the safety of the public. It told the complainant:

“Prisons have a duty of care to ensure the safety of all prisoners, staff, and visitors to prisons. They are required to manage threats

² https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

to security and order which impact directly on the safety and well-being of individuals in our custody and the staff working in our prisons. By releasing the information requested it is my judgement that this would indicate our tactics used, and therefore undermine this effective control”.

47. The MoJ also considers there is an increased risk of harm to individuals if the techniques described in the manual are used without appropriate training.
48. In its submission to the Commissioner, the MoJ argued that there is a public interest in ensuring that there are safe and robust procedures for ensuring the safety of prisoners and staff.
49. It considered that it would not be in the public interest to disclose information – information relating to prisoner management in a conflict situation - which had the potential to inflame an already volatile atmosphere amongst the prison population.

The balance of public interest

50. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
51. The Commissioner recognises that the complainant explained his personal reasons for wanting access to an unredacted copy of the manual. However, while the Commissioner understands the complainant has personal reasons for wanting access to the information, he must consider the wider public interest issues.
52. The Commissioner accepts that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest.
53. As well as the general public interest in transparency, which is always an argument for disclosure, the Commissioner acknowledges the legitimate public interest in the subject the information in this case relates to, namely safety and security in prisons.
54. The Commissioner accepts the argument that disclosure could inform debate and improve the public’s confidence in prisoner management during conflict situations.

55. However, 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 maintenance of security and good order in prisons.
56. The Commissioner considers it clear that there is a very substantial public interest in avoiding that outcome and that this is a public interest factor of considerable weight in favour of maintenance of the exemption.
57. Having taken the above into account, the Commissioner is satisfied that, in the particular circumstances of this case, the public interest in maintaining the exemption outweighs that in disclosing the requested training manual.

Right of appeal

58. 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

59. 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.

60. 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

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