

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 January 2014

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

Decision (including any steps ordered)

1. The complainant requested information about a high security prison, including information about 'lockdowns'. The MoJ provided some information within the scope of the request, refusing the remainder on the basis that it considered sections 31(1)(f) (law enforcement) and 40 (personal information) of the FOIA applied.
2. The Commissioner has investigated and his decision is that most of the information was correctly withheld. However, he does not find the section 31 exemption engaged in respect of a small amount of information, namely, Annex A (Searching of Living Accommodation), paragraphs 1-4 inclusive and paragraph 8, and; Annex G of Annex I (Notice to prisoners). It follows that he orders disclosure of that information.
3. The public authority 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

4. On 24 November 2012 the complainant wrote to the MoJ and requested information about Long Lartin, a designated High Security prison:
 1. *"How many incidents or lockdowns lasting more than 12 hrs have there been at HMP Long Lartin between since Simon Cartwright was appointed governor and 8 November 2012?"*

2. *What were the reasons for each lockdown*
 3. *How long did each separate lock down last?*
 4. *On how many occasions has this resulted in prisoners being refused exercise?*
 5. *On what grounds can a prisoner be refused exercise for more than 48 hours?*
 6. *Please provide the details of any statutory authority that authorises the refusal of exercise*
 7. *What steps are taken during lock down to ensure that the friends or family of a prisoner are contacted to provide reassurance?"*
5. The MoJ responded on 20 December 2012. It provided some information within the scope of the request – with some being provided on a discretionary basis - but refused to provide the remainder. It cited the section 31(1)(f) and 40(2) exemptions of FOIA as its basis for refusing to provide the information requested at point (2). Those exemptions relate to law enforcement and personal information respectively.
 6. The complainant requested an internal review on 15 January 2013. The MoJ sent him the outcome of its internal review on 18 February 2013, confirming its citing of sections 31(1)(f) and 40(2) in relation to the information requested at part (2) of the request. The MoJ revised its response in respect of part (1) of the request, clarifying the number of lockdowns in the period specified. It also confirmed and clarified that the information provided in respect of points (3), (4), (5), (6) and (7) should have been provided under FOIA and not on a discretionary basis.

Scope of the case

7. The complainant contacted the Commissioner on 25 May 2013 to complain about the way his request for information had been handled. By way of explanation, he told the Commissioner that a 'lockdown':

"is where prisoners are kept locked in their cells without any access to exercise or showers or telephones. Prisoners are served meals at the cell door and in cells without internal sanitation required to urinate and defecate in containers in their cells".
8. Complaining about the application of exemptions in this case, he stated that the exemptions applied in the MoJ's original response and internal

review are "*inappropriate and invalid*". Specifically with respect to section 31 he considers the application of that exemption:

"is entirely inappropriate given the length of time that had elapsed since the dates in question.

....

*I point particularly to the fact that these lockdowns have happened: they are in the past. Where, **now**, is the justification for the exemption?"*

9. Citing a statement from the MoJ's correspondence to him, he also told the Commissioner:

"I entirely fail to see how disclosing the reasons for incarcerating up 650 prisoners for 7 days in sordid conditions can 'prejudice the ability of the department to maintain the level of security needed' in a high security prison".

10. While the Commissioner understands the complainant's reasons for wanting access to the information held by the MoJ, in reaching a decision in this case the Commissioner has to take into account the fact that neither the identity of the applicant nor the purpose of the request is relevant to the consideration of a freedom of information request. He must consider whether or not it is appropriate for the withheld information to be released to the general public.
11. During the course of his investigation, as a result of the Commissioner's intervention, the MoJ provided the complainant with some additional information within the scope of part (2) of the request. That information comprised the recorded generic reason or purpose for the lockdown action that occurred at Long Lartin on six specific dates.
12. Having corresponded with the complainant about the scope of his complaint, the Commissioner considers the scope of his investigation to be the MoJ's application of section 31 to the remaining withheld information that falls within the scope of part (2) of the request.

Reasons for decision

Section 31 law enforcement

13. 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.

14. 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.
15. 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.
16. In this case, the MoJ is relying on section 31(1)(f) of FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.

The applicable interests

17. 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.

18. In correspondence with the complainant, the MoJ made reference to the disclosure of information "*about intelligence-led searching*". It also referred to "*providing details of the rationale for searches*". However, in the Commissioner's view these arguments were made in relation to its consideration of the public interest test rather than its explanation for the application of the exemption. In his view, the MoJ appears to have relied to a large degree on the requested material being self-evidently exempt, concentrating its analysis on the public interest factors.
19. In correspondence with the Commissioner, the MoJ described the withheld information as comprising information about "*the circumstances that led to the lockdowns*". It also provided further evidence in support of its view that disclosure would be likely to prejudice the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.
20. Having had the opportunity to view the withheld information, 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

21. The Commissioner has next considered whether the MoJ has 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.
22. Having considered the content of the withheld information, the Commissioner is not satisfied that there is a causal link between disclosure of a small amount of the information and prejudice occurring. This is on the grounds that he considers that similar information is available in the public domain in a Prison Service Instruction (PSI) or was produced for issue to prisoners. For the purposes of this decision notice, the Commissioner will refer to that information as 'procedural information'.
23. With respect to the remaining information, the Commissioner accepts the arguments put forward by the MoJ in relation to the nature of the prejudice that could occur if the requested information was to be disclosed into the public domain. For example it said that, if released, the information would be likely to prejudice the gathering of intelligence and compromise the effective use of such intelligence. Accordingly, he is satisfied that there is a causal link between disclosure of that information and prejudice occurring.

The likelihood of prejudice

24. With respect to the level of likelihood of prejudice, the MoJ confirmed that it considers that prejudice would be likely to result - rather than would result - if the information was released.

Is the exemption engaged?

25. The information which the Commissioner describes as 'the procedural information' can be found in the information that the MoJ provided to him for the purposes of his investigation.
26. Specifically, he considers the 'procedural information' can be found as follows in the information provided to him:
- Annex A (Searching of Living Accommodation), paragraphs 1-4 inclusive and paragraph 8; and
 - Annex G of Annex I (Notice to prisoners).
27. With respect to the 'procedural information', as he is not satisfied that the MoJ has evidenced a causal link the Commissioner does not find the exemption engaged. Accordingly he orders disclosure of that information.
28. With respect to the remainder of the information at issue, having viewed the withheld information and considered the MoJ's arguments about the effect of disclosure, the Commissioner is satisfied that it has demonstrated how prejudice to the maintenance of security and good order in prisons could arise. He is also satisfied that there is a real possibility of this occurring. He therefore finds the exemption at section 31(1)(f) engaged in respect of that information.

The public interest test

29. As a qualified exemption, section 31 is subject to the public interest test which is set out in section 2(2)(b) of the 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".

Public interest arguments in favour of disclosing the requested information

30. In bringing his complaint to the Commissioner's attention, the complainant expressed the view that "*transparency is a necessity in all public services*". He told the Commissioner:

"To explain the reasons why lengthy lockdowns are taking place so frequently at HMP Long Lartin alone after the event can only be in the public interest. How else can the public know what is happening?"

31. He also said:

"It is my view that given the relevant circumstances the exemption does not apply and that even if it did in the past it is not now in the public interest for it to be applied".

32. The MoJ acknowledged the public interest in the public being informed of policies or actions taking place at individual prisons – and the reasons for them. Accordingly, it told the complainant that disclosure of the information at issue:

"would provide further transparency related to the actions taken by Long Lartin prison during the period in question".

33. In that respect it recognised that disclosure could improve confidence:

"that Long Lartin, being a designated High Security prison, has appropriate security measures in place to manage those for whom conditions of high security are deemed necessary".

Public interest arguments in favour of maintaining the exemption

34. In favour of maintaining the exemption, the MoJ stated that it would not be in the public interest to disclose information which might lead to security issues for the operation of the prison. It told the complainant:

"Providing specific reasons for the imposition of security measures at Long Lartin and the action taken in consequence would be, in our opinion, likely to undermine the very steps prisons have in place to address such problems should they arise".

35. With reference to the security measures in place at the establishment in question, the MoJ told the complainant:

"It would not be in the public interest to release information which could create the very real risk that means could be developed to counter these arrangements and to render them ineffective".

36. By way of an example, it cited the risk that disclosure of details of the rationale for searches would enable prisoners to actively test the systems in place, thus confirming whether particular actions precipitate a lock-down search.

Balance of the public interest

37. 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.
38. Section 31 is a prejudice based exemption: the Commissioner considers that there is a public interest inherent in prejudice-based exemptions in avoiding the harm specified in that exemption. In his view, the fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it. He has taken this into account in reaching his decision in this case.
39. 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.
40. 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 good order in prisons. Both the MOJ and the complainant noted the importance of the public's confidence in the prison system in general and in the regimes used by those responsible for the operation of individual prisons, including high security establishments.
41. In correspondence with the Commissioner, the MoJ acknowledged the public interest in understanding how a prison operates:
- "so that the public can be reassured that the welfare of prisoners and staff is given due regard by the Prison Service".*
42. It also acknowledged that disclosure of the information at issue in this case could improve transparency and confidence amongst the public that high security prisons have appropriate security measures in place. It therefore recognised that it was in the public interest to keep the public informed:
- "about how they are being protected from offenders and the steps being taken to ensure security and good order within prisons".*
43. With respect to the complainant's observation that the withheld information relates to incidents that occurred in the past, the Commissioner accepts that, generally speaking, the public interest in maintaining an exemption will diminish over time. This is on the basis

that the issue the information relates to becomes less topical or sensitive and the likelihood or severity of the prejudice diminishes

44. However, while it is not disputed that the incidents specified in the request occurred in the past, the Commissioner considers that the complainant's arguments in favour of disclosure do not carry significantly strong weight in light of the content of the information.
45. The Commissioner recognises that disclosure in this case would improve transparency in relation to the public's knowledge of good order and security in prisons, specifically with respect to lock-downs. However, while the withheld information may relate to past incidents, in this case it relates to security measures and intelligence-led searching. In the Commissioner's view, the information continues to have relevance and this adds weight to the public interest argument in favour of non-disclosure.
46. The Commissioner acknowledges the public interest in disclosure of information about lock-downs in a high security prison in order to inform debate about concerns around this issue. However, in the particular circumstances of this case, he considers that the public interest in the maintenance of security and good order in prisons significantly outweighs this.

Right of appeal

47. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

48. 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.
49. 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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