

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 April 2021

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

Decision (including any steps ordered)

1. The complainant has requested information relating to offenders over the age of 25 who, whilst on licence committed a serious further offence of murder, manslaughter or rape in 2018 and 2019. The Ministry of Justice (the 'MOJ') ultimately refused to provide the information for the remaining nine months of 2019.
2. The Commissioner's decision is that the MOJ has correctly applied section 44(1)(a) of the FOIA to the information for the remaining nine months of 2019.
3. The Commissioner does not require the MOJ to take any steps as a result of this notice.

Request and response

4. On 2 April 2020, the complainant wrote to the MOJ and requested information in the following terms:

"For the data you currently have, could you please provide me the number of offenders who, whilst on licence and over the age 25, committed a serious further offence of murder or manslaughter or rape in each of 2018 and 2019? What were their index offences?"
5. The MOJ responded on 21 April 2021 and confirmed that it held the information requested, however it refused to provide it citing section 44(1)(a) of the FOIA stating the following:

"...the information is exempt from disclosure under section 44(1)(a) of the FOIA, because it is a subset of published data and the information is prohibited from disclosure by the Statistics and Registration Services Act 2007 and the Pre-release Access to Official Statistics Order 2008. We publish information in financial years and the information for 2018/2019 is due for publication in October 2020 while 2019/2020 is due for publication in October 2021. Following publication you could submit a further request for the extracted information under FOIA. The current data can be accessed via the following link:

<https://www.gov.uk/government/statistics/serious-further-offences>"

6. Following an internal review the MOJ wrote to the complainant on 22 May 2021 maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 27 May 2020 to complain about the way her request for information had been handled.
8. The complainant stated the following within her complaint to the Commissioner:

"... the MOJ are citing pre-release provisions but their publication is a long way away (October 2021) and it is not likely that they are just about to publish their statistics requiring pre-release adherence."

9. The Commissioner initially set out to consider whether the MOJ has properly relied on section 44(1)(a) for all parts of the request. During the investigation the MOJ wrote to the Commissioner stating the following:

"I should explain that we interpreted [name redacted] FOI request as a request for conviction data. For an offender to have 'committed' a SFO [Serious Further Offence] there would had to have been a successful prosecution.

The National SFO Team publishes an annual bulletin which includes information on the total number of convictions arising from Serious Further Offences (SFOs) as notified under the SFO Procedures. The data is published in financial years. We recently published a bulletin on 29 October 2020 and it contained data on convictions for 2018/2019 as well as updated figures for the preceding years. The latest publication covers a period up to 31 March 2019. The reason for the delay in publishing data for each year is to allow for cases to complete the criminal justice process.

In response to your letter, we contacted [name redacted] to explain that, given the passage of time and the publication of the SFO Bulletin 2020, we were able to provide her with the data she requested in April for 2018 and the first three months of 2019 and we still consider that providing data for the remaining nine months of 2019 prior to publication in October 2021 is prohibited from disclosure by the Statistics and Registration Services Act 2007 and the Pre-release Access to Official Statistics Order 2008 and exemption under Section 44(1) (a) of the FOIA was appropriately applied. [name redacted] did not respond and on the advice of MoJ disclosure specialist we sent this information on 6 November 2020"

10. The MOJ stated that it still considers that providing data for the remaining nine months of 2019 prior to publication in October 2021 is prohibited from disclosure by the Statistics and Registration Services Act 2007 and the Pre-release Access to Official Statistics Order 2008 and exemption under section 44(1)(a) of the FOIA was appropriately applied.
11. The Commissioner contacted the complainant on the 2 December 2020 asking if she was satisfied with the response provided or would wish for the Commissioner to continue to investigate the complaint. She explained she was still dissatisfied with the response as she was concerned the MOJ may withhold the information until publication in 2022. She also stated that the information requested is not something the MOJ publish or that can lead her to know in advance what figures will be published. The complainant explained that she felt the MOJ were misapplying the pre-release arrangements in the official statistics code of practice and stated the following:

"The part of the stats code of practice they reply on applies only to statistics in their final form, as in having been finalised, signed off and ready for publication. But it does not seem they would have the statistics in their final form ready for publication and sit on it until 2021/2022 to publish."
12. The Commissioner has, therefore considered whether the MOJ was entitled to rely on section 44(1)(a) of the FOIA at the time of the request to refuse to provide the remaining part of the information requested.

Reasons for decision

Section 44(1)(a) – Prohibitions on disclosure

13. Section 44(1)(a) of the FOIA provides that:

"(1) Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it –

(a) is prohibited by or under any enactment.

(b) Is incompatible with any EU obligation, or

(c) would constitute or be punishable as a contempt of court."

14. Section 44 is a class based exemption which means if the requested information falls within the class of information described in section 44(1)(a), the exemption is engaged. As section 44(1)(a) is also an absolute exemption, it is not subject to any public interest considerations.

Is disclosure prohibited by or under any enactment?

15. Information is exempt information under section 44(1)(a) if its disclosure would breach any of the following:

- Primary legislation (an Act of Parliament); or
- Secondary legislation (a Statutory Instrument).

16. In its response to the Commissioner's investigation the MOJ explained that the enactment in question is the Statistics and Registration Service Act 2007 (The SRS)¹.

17. The MOJ explained that section 11(2), (4), (5) and (6) of The SRS² provides for the creation of The Pre-release Access to Official Statistics Order 2008³ (The Pre Release Order) and Section 13(1) of The SRS⁴

¹ <https://www.legislation.gov.uk/ukpga/2007/18/contents>

² <https://www.legislation.gov.uk/ukpga/2007/18/section/11>

³ <https://www.legislation.gov.uk/uksi/2008/2998/contents/made>

⁴ <https://www.legislation.gov.uk/ukpga/2007/18/section/13>

compels producers of National Statistics to comply with the Code of Practice for Statistics (The Code)⁵. Section 11(3) of the SRS regards The Pre-Release Order as being contained within The Code, thus requiring all producers of National Statistics to comply with the provisions of The Pre-release Order. Compliance with The Code and with The Pre-release Order are therefore both legally binding under The SRS.

18. The MOJ explained that Section T3.4 of The Code states the following:

"The circulation of statistics in their final form ahead of their publication should be restricted to eligible recipients, in line with the rules and principles on pre-release access set out in legislation for the UK and devolved administration. The details of those granted access should be recorded, together with clear justifications for access. No indication of the statistics should be made public and the statistics should not be given to any other party without prior permission for access. The list of recipients should be reviewed regularly and kept to a minimum."

19. The MOJ argued that at the time of the complainants request the information was withheld as it would provide an indication of the statistics published in the SFO bulletin⁶.

20. The MOJ explained to the Commissioner that during its investigation it had provided the complainant with the information requested for 2018 and the first three months of 2019 contained in the SFO bulletin. It explained that the statistics contained in this publication are designated as National Statistics and provided the Commissioner with a copy of the withheld information to demonstrate how disclosure would provide an indication of the statistics for the next year's publication.

21. The MOJ explained that, at the time of the request, the only statistics that had been published covered the period up to 31 March 2018. The request asked for data for 2018 and 2019 which were due for publication on October 2020 an October 2021 and therefore subject to the provisions of The Code relating to the release of statistics prior to publication.

22. The MOJ highlighted the fact that The Code specifies that *"No indication of the statistics should be made public and the statistics should not be*

⁵ <https://code.statisticsauthority.gov.uk/>

⁶ <https://www.gov.uk/government/statistics/serious-further-offences>

given to any other part without prior permission for access.” The MOJ argued that in addition to the specific wording around an “*indication*” of the statistics, the clear overall intention of section T3 of The Code (‘Orderly Release’)⁷ is to ensure that National Statistics are made available to all users simultaneously upon publication. It said that should a decision notice rule in favour of disclosure, then any user wishing to obtain advances sight of unpublished statistics would be able to use the FOIA to request and obtain a statistic in advance of publication, as long as the request is broken down in a way that is not due to be published. It said that this would clearly be contrary to the intention of the provisions of section T3 of The Code, as well as the specific wording around an “*indication of the statistics*”. As a result, to have provided the information requested would have breached The Code, The Pre-release Order, and by extension The SRS.

23. In her complaint to the Commissioner, the complainant argued that The Code relates to “*statistics in their final form*” and that the MOJ stated to her that the reason for the delay in publishing data for each year is to allow for cases to complete the criminal justice process. She argued that because the MOJ had stated the data is live and changing that the information provided may not be the same when it is published in October 2021.
24. Having examined the submissions of both parties, including a copy of the withheld information provided by the MOJ, the Commissioner is satisfied that the withheld information would provide an indication of the statistics in their final form ahead of the official publication.
25. It is important to remember that a disclosure under the FOIA is effectively a disclosure to the world at large. In the MOJ’s and the Commissioner’s view, the provision of the statistics ahead of the publication of the annual bulletin would allow any member of the public to acquire the statistics in advance of their official publication, and would breach the provisions of The Code, The Pre-release Order and by extension the SRS.

⁷ <https://code.statisticsauthority.gov.uk/the-code/trustworthiness/t3-orderly-release/>

26. The Commissioner is satisfied that the information for the remaining nine months of 2019 in this case was subject to a statutory prohibition on disclosure, provided in the Statistics and Registration Services Act 2007 and The Pre-release Access to Official Statistics Order 2008. Therefore the information was exempt from disclosure under the FOIA by virtue of the absolute exemption at section 44.

Right of appeal

27. 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

28. 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.
29. 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

Laura Tomkinson
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