

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 October 2021

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

#### Decision (including any steps ordered)

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1. The complainant requested copies of various guidance documents relating to court security.
2. The Ministry of Justice (MoJ) confirmed it held the requested information but refused to provide it, citing sections 31(1)(a) and (c) (law enforcement) of FOIA.
3. The Commissioner's decision is that the MoJ was entitled to rely on section 31(1)(a) and (c) and that the public interest favoured maintaining the exemption.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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5. On 14 September 2020, the complainant wrote to the MoJ and requested information in the following terms:

*"I refer to the following letter which mentions the following guidance documents;*

[link to letter of appointment]

*Guidance on section 52 (CA2003) [Courts Act 2003] - Powers of Search*

*Guidance on section 53 (CA2003) - Powers to exclude, remove or restrain persons*

*Guidance on sections 54 – 56 (CA2003) - Surrender and Seizure of articles and Retention (including guidance on how the Coroners and Justice Act changes the implementation of section 55 CA2003).*

*Please provide copies of these documents and if changes have been made since 2005, any variations of the guidance documents”.*

6. The request was made using the 'whatdotheyknow' website.
7. The MoJ responded on 10 October 2020. It confirmed it holds the requested information but refused to provide it, citing section 31(1)(c) (law enforcement) of FOIA.
8. Following an internal review the MoJ wrote to the complainant on 18 November 2020, maintaining its original position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 14 December 2020 to complain about the way his request for information had been handled. He was dissatisfied that:

*“...HMCTS [HM Courts and Tribunal Service] have refused to provide the requested published guidance, even in a redacted form”.*
10. During the course of the Commissioner's investigation, the MoJ confirmed its application of section 31(1)(c), and additionally cited section 31(1)(a). It also confirmed that both exemptions apply to all the withheld information.
11. The Commissioner is mindful that, throughout the correspondence between the parties, there are references to terms such as 'guidance', 'security procedures' and 'detailed search processes and procedures'. She is also aware that the complainant described the requested information as 'published guidance'.
12. With respect to whether references to procedures and guidance documents refer to the same, or different, information, the MoJ confirmed to the Commissioner:

*“...that the operating procedure is our guidance document”.*
13. Mindful of the context of the request and the basis of the complaint, the Commissioner asked the MoJ to confirm whether the requested

information, namely the Guidance on sections 52, 53 and 54-56 (CA2003) is, or ever has been, sent out with the letter of appointment. The MoJ confirmed that it has never been sent out with the letter of appointment.

14. During the course of her investigation, the MoJ provided the Commissioner with a copy of the withheld information, describing it as:

*"Copies of Guidance instructions 52-55 ... [and] copies of all historical versions of these documents that MoJ / HMCTS has been able to recover after making all best efforts and taking into account MoJ Record Retention and Disposition schedules".*

15. The analysis below considers the MoJ's application of section 31 to that information.

## Reasons for decision

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### *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 sections 31(1)(a) and (c) of FOIA to withhold the requested information.
18. Sections 31(1)(a) and (c) state:

*"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-*

  - (a) the prevention or detection of crime,*
  - (b) ...*
  - (c) the administration of justice,".*
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 complainant's view*

22. The complainant disputed the MoJ's refusal to disclose the requested information. He told the MoJ:

*"You have refused my request on the grounds that disclosure of these procedures in some manner places security personnel at risk of harm and would allow hostile individuals to circumvent security measures, I do not accept this proposition".*

*The MoJ's view*

23. Describing the withheld information, the MoJ told the complainant:

*"These documents form part of an appointment letter between the Chief Executive of Her Majesty's Courts and Tribunals Service and a designated Court & Tribunal Security Officer..."*

24. The MoJ confirmed that the letter of appointment is private to a named individual and is not in the public domain. It also confirmed that the

requested documents form part of the conditions under which that individual performs their duties.

25. In its submission to the Commissioner the MoJ confirmed that, while the individuals have access to the information, they are not provided with copies.

26. With respect to the law enforcement interests protected by section 31, the MoJ told the complainant, albeit with respect to the public interest test, that disclosing information related to security procedures:

*"... will, without doubt, make anyone attending Court, public or officials and Judiciary, more vulnerable to crime..."*

27. With respect to section 31(1)(a) (the prevention or detection of crime), the MoJ argued that there could be an increased risk of violence, aggression and harm within Court buildings as a result of disclosure. It told the complainant that the information that is the subject of this request:

*"... could be used to infer potential weaknesses in the security measures HMCTS takes within Court buildings, and encourage individuals to attempt to circumvent security by bringing weapons, banned or illegal items to Court buildings"*

28. It considered that publication of, for example, detailed search processes and procedures, would undoubtedly provide opportunities for circumventing such processes and procedures and significantly increase the risk of criminal or terrorist activity at key judicial sites.

29. With respect to section 31(1)(c), (the administration of justice), the MoJ told the complainant:

*"There is a serious possibility that any release of this information could result in an attempt to circumvent court security by a hostile individual and prejudice the administration of justice by putting in to the public domain details of how Security Officers are required to act in specific circumstances"*

30. It also argued that release of the documents into the public domain:

*"... could result in Security Officers being placed at unnecessary risk under particular circumstances. This could inhibit the administration of justice through security officers not being fully able to carry out their duties"*

*The likelihood of prejudice*

31. As evidenced from the arguments provided to the complainant, the MoJ variously cited the terms 'could', 'would' and 'would be likely' in relation to the level of prejudice it envisaged occurring in this case.
32. However, in its submission to the Commissioner, the MoJ confirmed that the requested guidance documents are not in the public domain. It also put forward arguments regarding its security measures, the present UK threat level and the likelihood of an attack on the courts.
33. On the basis of those arguments, it told the Commissioner:

*"We therefore believe that the threshold of likelihood that applies to the releasing of this information into the public domain is that disclosure would have a prejudicial effect."*

*Is the exemption engaged?*

34. The Commissioner recognises, in her published guidance<sup>1</sup>, that section 31(1)(a) will cover all aspects of the prevention and detection of crime. She accepts that the exemption can be used to withhold information that could make anyone more vulnerable to crime.
35. She also accepts, with respect to section 31(1)(c), that the administration of justice is a broad term, and that it applies to the justice system as whole.
36. In light of the subject matter of the request in this case, the Commissioner is satisfied that the prejudice the MoJ is envisaging is relevant to the particular interests that those limbs of the exemption are designed to protect.
37. The Commissioner is also satisfied that the MoJ has demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that sections 31(1)(a) and (c) are designed to protect.
38. With respect to the likelihood of prejudice, her guidance<sup>2</sup> states:

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

<sup>2</sup> [https://ico.org.uk/media/for-organisations/documents/1214/the\\_prejudice\\_test.pdf](https://ico.org.uk/media/for-organisations/documents/1214/the_prejudice_test.pdf)

*"If an authority claims that prejudice would occur they need to establish that either*

*• the chain of events is so convincing that prejudice is clearly more likely than not to arise. This could be the case even if prejudice would occur on only one occasion or affect one person or situation; or*

*• given the potential for prejudice to arise in certain circumstances, and the frequency with which such circumstances arise (ie the number of people, cases or situations in which the prejudice would occur) the likelihood of prejudice is more probable than not".*

39. Although restricted in what she is able to say without disclosing the content of the withheld information, having duly considered the arguments put forward by the MoJ, the Commissioner's view is that the MoJ has demonstrated sufficiently that prejudice 'would', as opposed to 'would be likely to', be caused by disclosure.
40. She therefore finds the exemption engaged in relation to the information withheld by virtue of sections 31(1)(a) and (c).

*The 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 outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosing the requested information*

42. In favour of disclosing the requested information, the complainant told the MoJ:

*"Transparency is of significant importance, and release of the guidance is proper in the interests of that transparency. Not least in providing the public the reassurance that there is proper and professional training of court security personnel and assuring the public of their safety when attending public court buildings".*

43. The MoJ also recognised that disclosure would provide greater transparency and enable the public to have confidence in the operation of security measures within HMCTS.
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*Public interest arguments in favour of maintaining the exemption*

44. In support of maintaining the exemption, the MoJ argued that it was not in the public interest if security officers were not fully able to carry out their duties or if court proceedings were hampered, or disrupted, by attempts to circumvent court security.

45. In correspondence with the complainant, the MoJ told him:

*"I would further add that, regarding information that is already available to the public, the Courts Act 2003, Section 4, clearly sets out the powers that are vested in Court Security Officers concerning regarding [sic] these matters. It is my opinion that there is no public interest to be served by releasing internal instructions as to how to implement those powers that form part of the conditions under which that individual performs their duties".*

46. Similarly, in its submission to the Commissioner, it told her:

*"The Courts Act 2003 (Part 4) clearly puts into the public domain the powers and responsibilities of Court Security Officers in order to ensure that the administration of justice can take place in a safe and secure environment. Also included in the Act are the restrictions and controls over those powers".*

47. It considered that the Courts Act 2003 *"is accessible and clear about those parameters"* and re-iterated what it had told the complainant, namely that there is no value to be added by putting into the public domain detailed instructions about how those powers are to be applied.

48. It also considered that placing security operating procedures into the public domain had the potential to increase vulnerability of the courts to terrorism and other threats:

*"... by allowing hostile threat actors a detailed insider's view of security procedures at all courts".*

49. The MoJ argued that the procedures that are the subject matter of this request are in place to protect the safety of court users. It told the Commissioner that good security relies on an element of deterrent, and that disclosure of the requested information would severely compromise that element of deterrent, which would, in turn, significantly increase safety risks to court users.

*Balance of the public interest arguments*

50. When balancing the opposing public interests in a case, the Commissioner must decide 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. In reaching a view on where the public interest lies in this case, the Commissioner has weighed the public interest in avoiding prejudice to the prevention or detection of crime and the administration of justice against the public interest in openness and transparency.
52. The Commissioner acknowledges the public interest arguments in favour of openness and transparency. However, with respect to assuring the public of their safety when attending public court buildings, she has taken into account that there is information in the public domain about the requirements when entering court and tribunal buildings. She acknowledges that such information explains, for example, that you must go through security every time you enter a court or tribunal building and that there are rules on what items you can take in.
53. The Commissioner recognises that there is a very strong public interest in protecting the law enforcement capabilities of public authorities. The Commissioner considers that appropriate weight must be afforded to the public interests inherent in the exemptions applied in this case – that is, the public interest in avoiding prejudice to the prevention or detection of crime and the administration of justice.
54. In that respect, the Commissioner is mindful that the MoJ expressed concern that disclosure of the requested information would be likely to facilitate criminal activity which would, in turn, prejudice the prevention or detection of crime and the administration of justice.
55. Clearly, disclosing information that may make an individual, or society, more vulnerable to those seeking to commit crime, or disrupt the administration of justice, is not in the public interest.
56. The Commissioner is mindful that the withheld information comprises security and safety operating procedures. She accepts that the purpose of those procedures is to ensure the safety and security of court and tribunal buildings and those attending them.
57. While the Commissioner recognises that disclosure would promote accountability and understanding of the MoJ's safety and security procedures, she finds that there is a stronger public interest in ensuring that they are not disclosed: safety and security procedures can only be properly effective when not made available to those who would seek to take advantage of such knowledge to the detriment of the wider public.

58. As she had found that the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information, it follows that the MoJ was entitled to rely on sections 31(1)(a) and (c) of FOIA to refuse to disclose the requested information.

## Right of appeal

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59. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

60. 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.

61. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Cheshire**  
**SK9 5AF**