

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2023

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

Decision (including any steps ordered)

1. The complainant requested a prison related guidance document from 2018, namely the Category A Report Writing Guidelines. The Ministry of Justice (the 'MOJ') initially refused to provide the document, citing section 31(1)(f) of FOIA, (the exemption for the maintenance of security and good order in prison or in other institutions where persons are lawfully detained). However, during the course of the Commissioner's investigation, the MOJ revised its position and disclosed some parts of the guidance document, withholding the remaining information under sections 31(1)(f) and 38(1)(a) and (b) (health and safety) of FOIA. Subsequently, the MOJ also cited section 40(2) of FOIA (personal information) for some parts of the guidance document.
2. The Commissioner's decision is that the MOJ was entitled to rely on section 31(1)(f) and section 40(2) of FOIA to withhold the remaining information within the requested guidance. As he has found the MOJ can rely on these FOIA exemptions, he has not deemed it necessary to consider its reliance on sections 38(1)(a) and (b).
3. No steps are required as a result of this notice.

Background

4. As set out within the disclosed part of the requested guidance, the purpose of the requested document:

“is to provide guidance for the structure of risk assessment reports written by Prison Service staff working within the HMPPS [His Majesty’s Prison and Probation Service]. It also provides the new template for staff to use. This guidance and the Category A template have been specifically developed for the purpose of Category A report writing and should therefore not be applied to the recategorisation of offenders in general or for the purpose of parole. Staff must prepare the reports using the guidance provided in this document...This policy should be read alongside the Prison Service Instructions (PSI) 09/2015 specifically relating to the categorisation of offenders”.

Request and response

5. On 23 February 2023, the complainant wrote to the MOJ (by post) and requested information in the following terms:

“I would like access to the Category A Guidance (2018) document. I believe this is it’s [sic] name. It is the guidance document that was sent round to prisoners relating to (amongst other things) category A reviews.”

6. The MOJ wrote to the complainant acknowledging receipt of the request on 13 March 2023, which included the wording of the request.
7. On 15 March 2023, the MOJ wrote again to the complainant seeking clarification of his request in terms of what the guidance relates to. This letter was received by the complainant on 19 March 2023.
8. On 17 March 2023,(before receiving his reply to his letter of 15 March 2023 as above), the complainant wrote to the MOJ to advise that his request should have said:

“It is the guidance document that was sent round to **prisons** [as opposed to prisoners] relating to (amongst other things) category A reviews.”

9. On 20 March 2023, the complainant replied to the MOJ advising that, to the best of his knowledge, the guidance document was sent by the Category A team to psychologists/psychology departments in the High Security Estate.
10. The MOJ provided its substantive response to the clarified request (of 17 March 2023) on 11 April 2023. It refused to provide the requested information citing Section 31(1)(f) – the FOIA exemption for the maintenance of security and good order in prisons. The MOJ said that the associated public interest test favoured maintaining the exemption.

11. The complainant requested an internal review on 2 May 2023. Following its internal review the MOJ wrote to the complainant on 18 May 2023 and maintained that section 31(1)(f) applied to the requested information in its entirety.
12. In addition, it said it had considered whether the document could be partially disclosed under FOIA and advised the complainant as follows:

"After liaising with the author of the document, the Psychology department and the Category A team, providing you with a redacted version or the index of the document would be detrimental. Not only are some of the terms open to misinterpretation, but points prisoners in the direction of what is being looked at to determine current risk and it could be seen as been [sic] used to manipulate meaningful observation and the wider process. I can also assure you that the guidance document is not overruling PSI 08/2013¹ [Prison Service Instruction for reviewing the security classification of high security prisoners] as you state in your letter and is only to assist staff in writing their reports."

Scope of the case

13. The complainant contacted the Commissioner by post on 27 May 2023 to complain about the way his request for information had been handled. His grounds of complaint included some non-FOIA concerns which the Commissioner has addressed in the 'Other matters' section at the end of this notice.
14. During the course of the Commissioner's investigation, the MOJ revised its position. On 31 July 2023, it disclosed some parts of the Category A report writing guidelines, but maintained that the remaining information was exempt under section 31(1)(f) of FOIA. The MOJ also applied sections 38(1)(a) and (b) of FOIA to most of the same information that was withheld under section 31(1)(f); Section 4 and Annex C of the guidelines were exempted under section 31(1)(f) only.
15. Following the partial disclosure and the recent application of sections 38(1)(a) and (b), the Commissioner wrote to the complainant on 31 July 2023 seeking his view.

¹ <https://www.gov.uk/government/publications/reviewing-the-categorisation-of-high-security-prisoners-psi-082013>

16. The complainant replied in a letter dated 11 August 2023 (received by the Commissioner on 24 August 2023), detailing his remaining concerns, which the Commissioner has taken into account. His key points include that:
- The requested document is guidance for the published PSI 08/2013.
 - The Executive Summary of the partially disclosed document makes it clear that the MOJ intended it to be read by HMP [His Majesty's Prison] staff only.
 - HCR-20 [Historical Clinical and Risk Management which the Commissioner understands to be the most widely used violence risk assessment tool in the world]² guidelines and guidance commentary are made available to all parties including prisoners.
 - Only prison psychologists have access to the requested guidance; the MOJ is attempting to conceal this document from non-prison psychologists.
17. During the course of the Commissioner's investigation, the MOJ also cited section 40(2) of FOIA for the small amount of personal information contained within the requested guidance. The MOJ wrote to the complainant and the Commissioner on 2 October 2023 to inform both parties of this.
18. The Commissioner has reviewed the unredacted guidance in full and has considered whether the MOJ was entitled to apply sections 31(1)(f), 38(1)(a) and (b) and 40(2) to the remaining withheld information.

Reasons for decision

19. As section 31(1)(f) of FOIA has been applied to the majority of the redactions within the partially disclosed guidance document, the Commissioner has first considered the MOJ's reliance on this exemption.

Section 31 - Law enforcement

20. Section 31(1)(f) of FOIA provides an exemption from the right to know where disclosure of the relevant information would, or would be likely
-

² <https://criminal-justice.iresearchnet.com/forensic-psychology/hcr-20-for-violence-risk-assessment/>

to, prejudice the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained.

21. The Commissioner's guidance on section 31³ states the following regarding section 31(1)(f):

"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."

22. Section 31(1)(f) is a prejudice-based exemption. In order to engage it, the potential prejudice envisaged must relate to the maintenance of security and good order in prisons. There must also be a causal relationship between disclosure and the potential prejudice described. Furthermore, the potential prejudice that is envisaged must be real, actual or of substance.
23. Consideration of the exemption at section 31 is a two-stage process. Even if the exemption is engaged, the information must be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The applicable interests

24. 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) – ie the maintenance of security and good order in prisons.
25. The MOJ has argued that the full disclosure of the requested guidance would reveal information about managing and assessing Category A prisoners which could be used by individuals seeking to undermine or resist prison security.
26. Having viewed the withheld information, the Commissioner is satisfied that the prejudice the MOJ envisages is relevant to the particular interests that section 31(1)(f) is designed to protect.

³ <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

The nature of the prejudice

27. The Commissioner next considered whether the MOJ has demonstrated a causal relationship between disclosure of the withheld information and the prejudice that section 31(1)(f) is designed to protect against. In his view, disclosure must at least be capable of harming the interest in some way, ie it must have a damaging or detrimental effect on it.
28. The MOJ told the Commissioner that disclosure of the information withheld under section 31(1)(f) would likely be used by some individuals to influence how they behave when being assessed. Knowledge of the specifics of what is assessed could result in some Category A prisoners feigning the desired behaviours during assessment with a view to getting their Category A status reduced to a lower classification. Such actions could subvert the effectiveness of the MOJ's prisoner management strategy, which would be likely to impact on the maintenance of good order and security in prisons.
29. The MOJ explained that although Category A prisoners are aware of the existence of the assessments, they do not know exactly what factors will be considered and what approach should be taken by those carrying out these assessments. Given that Category A prisoners are the most dangerous within the Prison Service, feigning reduced risk without having achieved the changes necessary would allow those individuals intent on doing so to artificially circumvent the assessment process. Therefore, the MOJ argued that disclosure would be likely to prevent the Prison Service fulfilling its duty to ensure that individuals in custody are held in safe and secure conditions, and that the public is protected from potential further criminality and wrongdoing within prisons and ultimately, prisoner escapes.
30. The Commissioner has no difficulty accepting that there is a clear causal link between the full disclosure of the requested Category A guidance, which contains detailed, specific information about the management and assessment of Category A prisoners, and prejudice to the security of prisons, their staff, prisoners and the public. Furthermore, having considered the nature of the prejudice that could occur, the Commissioner is satisfied that it is one that is real and of substance.

Likelihood of prejudice

31. It is not sufficient for the information to simply relate to an interest protected by section 31(1)(f); its disclosure must also at least be likely to prejudice the interests that it is designed to protect.
32. The MOJ has applied the lower test, that disclosure "would be likely to" cause prejudice. The Commissioner's guidance on the prejudice test states that "would be likely to prejudice": "...means that there must be more than a hypothetical or remote possibility of prejudice occurring;

there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%”.

33. Having viewed the withheld information, the Commissioner considers it realistic that it could be used by interested parties to resist and undermine the tactics and procedures for managing and assessing the re-categorisation of Category A prisoners in prisons. He accepts that this would be likely to prejudice the maintenance of security and good order in prisons.
34. As the Commissioner is satisfied that the likely prejudice alleged by the MOJ is real and of substance, and that there is a causal relationship between the disclosure of the remaining withheld information and the prejudice which the exemption is designed to protect against, he finds that the exemption provided by section 31(1)(f) is engaged.

Public interest test

35. Section 31 is a qualified exemption and is subject to the public interest test at section 2 of FOIA. 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 withheld information.

Public interest arguments in favour of disclosing the requested information

36. The complainant did not offer any specific reasons as to why it was in the public interest for the information to be disclosed, other than stating that “the redactions and reasons given are not in the public interest”. However, the Commissioner has considered his submissions about other related information such as the HCR-20 guidance being publicly available.
37. The MOJ submitted the following in favour of disclosure:

“It is important that HMPPS remains as transparent as possible to the public and it is recognised that disclosure of this document would help to enable this.

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

38. In favour of maintaining section 31(1)(f) of FOIA, the MOJ argued that:

“The disclosure of the information regarding Category A prisoner aspects pertaining to maintaining good order covered in documents is likely to prove invaluable to those engaged in criminality within prisons and assist their efforts to supply illicit items into the estate.

The release of such information is considered on balance to be detrimental to the good order and security in prisons. The ramifications of such a breach, particularly in a high security prison holding some of the most dangerous offenders, could be catastrophic and present a very real and significant risk to the safety of the public.”

39. At the point it disclosed some parts of the requested guidance, the MOJ also argued that:

“By disclosing this guidance, it would become accessible to Category A prisoners meaning that we would, effectively, be showing them how to behave to achieve a downgrade to a lower security category without having to genuinely reduce their risk. This could lead to the most dangerous prisoners progressing through their sentence to release with all of the factors that saw them offend so seriously still at play and in effect give prisoners the tools required to feign progress without undergoing the (often difficult) process of self-change required before they are able to be safely downgraded to a lower category.

This would have an effect on the good order of prisons as prisoners that should be held in Category A conditions are held in environments with lesser security and potentially released without having reduced their risks.

HMPPS would be at greater risk of not fulfilling its overarching purpose: protecting the public by preventing escapes.”

Public interest balancing test

40. When balancing the opposing public interests in a case, the Commissioner will decide whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by 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.

41. While the complainant may have personal reasons for wanting access to the information, the Commissioner must primarily consider wider public interest issues. It must also be borne in mind that disclosure under FOIA is, in effect, a disclosure to the world at large.
42. 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.
43. As well as this general public interest in transparency, the Commissioner acknowledges the legitimate public interest in the subject the information in this case relates to, namely safety, security and good order, in prisons.
44. Furthermore, the Commissioner also believes that disclosure could improve the public's confidence in the safety and security of prisons. Disclosure could improve the public's understanding of the factors taken into account in re-categorising Category A prisoners, which could in turn, increase public confidence in prisoner management.
45. The Commissioner notes that information, such as HCR-20 guidance, is publicly available which provides a general framework for assessing the risk of violence; however, he must consider the specific Category A risk assessment factors being withheld by the MOJ in this case.
46. 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. It is very clearly in the public interest that the security and good order of prisons is not undermined; maintaining effective control of prisons through informed and considered assessments of Category A prisoners is key to protecting the safety of all those who live and work within them, and also the safety of the wider public.
47. The Commissioner considers 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.
48. 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 remaining withheld information. The Commissioner is satisfied, therefore, that the MOJ was entitled to rely on section 31(1)(f) of FOIA for the information redacted under this exemption.
49. Given that the Commissioner has found that the MOJ has properly relied on section 31(1)(f) of FOIA, he has not considered it necessary to also examine the MOJ's reliance on section 38(1)(a) and (b) of FOIA.

Section 40(2) – personal information

50. The Commissioner will next consider the small amount of information withheld under section 40(2) – the FOIA exemption for personal information.
51. For ease of reference, the withheld names appear on page 1 (the author of the document) and page 13 (the name of the Extremism Strategy and Interventions Advisor).
52. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
53. Section 3(2) of the Data Protection Act 2018 ('DPA') defines personal data as:

"any information relating to an identified or identifiable living individual".
54. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
55. In this case, the names of two individuals named in the requested guidance document have been withheld. Both individuals are living and disclosure of their names would clearly identify them. Therefore, the Commissioner is satisfied that the requested information is personal data as the information relates to and identifies those individuals.
56. The next step is to consider whether disclosure of this personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject."
57. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
58. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.
59. The MOJ has said it considers there is "a wider legitimate interest in knowing who was involved in authoring and contributing to the

guidance, and that disclosure could demonstrate that the MOJ is acting in a transparent manner and would ensure accountability”.

60. The Commissioner accepts that there is a limited legitimate interest in the disclosure of the two names.
61. The MOJ has argued that disclosure is not ‘necessary’, stating:

“...the MOJ is not convinced that openness on this issue cannot be met by the redacted information already released, and/or in the public domain, or that knowing names of specific individual staff is necessary”.
62. The Commissioner considers that there is a limited legitimate interest in terms of openness and transparency if the names of the two members of staff were to be disclosed as it would show the seniority and suitability of the staff who have produced the document. However, knowledge of the name of one of the inward facing non-public individuals is not necessary particularly given that their role as the Extremism Strategy and Interventions Adviser has been disclosed. Therefore, the Commissioner does not consider that disclosure of that name is necessary to meet any legitimate interest as their role has been provided.
63. However, the Commissioner is aware that the role (in addition to the name) of the author has not been disclosed under FOIA so he finds that this does not meet the necessity test. Where disclosure is necessary to meet a legitimate interest, the legitimate interest must still be balanced against that individual’s rights and freedoms. In assessing the balance, the Commissioner will take into account the individual’s reasonable expectations and the consequences of disclosure, as well as the strength of the interest in disclosure.
64. The MOJ has explained that the author whose name has been redacted from the information, was internal and inward facing; and that their role did not involve interacting with or responding to the general public. This means that they reasonably expected less public scrutiny than that of MOJ staff whose role is to interact with the public. It is for this reason that they had, and still have, a reasonable expectation their name will not be disclosed under FOIA and why the MOJ is satisfied that their name can be withheld from disclosure.
65. The Commissioner has determined that there is insufficient legitimate interest to outweigh the fundamental rights and freedoms of the two named individuals. Therefore, he considers that there is no legal basis for the Council to disclose the requested information and to do so would be in breach of principle (a).

66. The Commissioner's decision is that the MOJ is entitled to rely on section 40(2) of FOIA to refuse to provide the requested information withheld under this exemption.

Other matters

67. The complainant also raised a number of non-FOIA matters that he wished the Commissioner to investigate. However, as they are not FOIA considerations, the Commissioner has not formally investigated them but has included his views here, where appropriate.
68. The complainant asked the Commissioner to consider the complexity and the rationale of the MOJ's reference numbering system for requests, given that more than one had been used in the handling of his own request. From the Commissioner's experience of dealing with FOIA complaints about the MOJ, he is aware that the MOJ gives each request a unique reference number, as also happens with any subsequent internal review request. In the case under consideration in this notice, three MOJ reference numbers were utilised, one for the original request, one for the clarified request and the other for the internal review request.
69. It is not for the Commissioner to proscribe how a public authority should reference its requests, but this approach seems reasonable to him, and is one that some other public authorities also adopt. He is satisfied that where a public authority deems it necessary to seek clarification of a request, it is entitled to 20 working days following the day it receives such clarification⁴ in which to respond to the request ie the 'clock' for responding under FOIA effectively restarts from receipt of the clarified request. This also means that no requesters are being disadvantaged by the use of more than one reference number.
70. The complainant queried the MOJ's "misquoting of sentences to read differently" whilst simultaneously recognising that the MOJ had misquoted a sentence he had written by inadvertently omitting a word. Whilst this is unfortunate, this is not a matter that the Commissioner can consider on this occasion. If it related to a request being misinterpreted then this is something he may be able to investigate.
71. The complainant argued that he should have been given a right to appeal against the MOJ's internal review outcome. However, under

⁴ <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

FOIA, public authorities are entitled to fully or partially amend their position in internal reviews - that is the purpose of the review, to take another look at how the request was handled and responded to. Public authorities are not required to provide any further right of appeal should they amend their position at internal review – requesters instead have the right to lodge a complaint with the Commissioner.

72. It is not an FOIA matter as to whether or not the MOJ has stated that the requested guidance overrules or contradicts PSI 08/2013. The Commissioner can only consider what recorded information, if any, is held that is relevant to a request and whether or not any, or all of it, is suitable for disclosure to the general public.

Right of appeal

73. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

74. 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.

75. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF