

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 June 2016

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

Decision (including any steps ordered)

1. The complainant requested information from the Ministry of Justice (MoJ) relating to contracts with G4S and Serco.
2. The MoJ confirmed it holds the requested information but refused to disclose it citing sections 31(1)(a), (c) and (g) of the FOIA (law enforcement - prejudice to the prevention or detection of crime, to the administration of justice and to the exercise by any public authority of its functions respectively).
3. The Commissioner has investigated and concluded that none of the exemptions are engaged.
4. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation:
 - disclose the withheld information.
5. The MoJ 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.

Background

6. In May 2013, irregularities were noticed in the billing practices of both G4S and Serco who were providing electronic monitoring services to the MoJ.

7. On 11 July 2013, the then Lord Chancellor and Secretary of State for Justice (Chris Grayling) made a statement to the House of Commons about the MoJ's electronic monitoring contracts with G4S Care and Justice Services and Serco Monitoring¹.
8. The Director of the Serious Fraud Office opened a criminal investigation into G4S and Serco electronic monitoring contracts in November 2013.

Request and response

9. On 26 July 2015, the complainant wrote to the MoJ and requested information in the following terms:

"I make the following request under the Freedom of Information Act: for copies of the contracts for electronic monitoring of offender that were in place with

A) G4S

B) Serco

at the time when the overpayments were made which were revealed by the SoS on 11 July 2013 (HC Deb 11 July 2013 col 573)".

10. The MoJ responded on 1 September 2015. It confirmed it holds the requested information but refused to disclose it citing the following exemption:
 - 31(1)(c) of the FOIA - law enforcement, prejudice to the administration of justice.
11. The MoJ provided an internal review on 1 February 2016 in which it maintained its original position with respect to the application of section 31. It told the complainant that it is not in the public interest if contracts for electronic monitoring that the Serious Fraud Office (SFO) are investigating are compromised by the premature disclosure of information.

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<http://www.publications.parliament.uk/pa/cm201314/cmhansrd/cm130711/debtext/130711-0002.htm>

Scope of the case

12. The complainant contacted the Commissioner on 8 February 2016 to complain about the way his request for information had been handled.

13. He told the Commissioner:

"The contracts have long since been terminated....

This is a massive public scandal. Contractors billed nearly £200m for work they did not do....

There is enormous public interest in knowing the terms of the contact...".

14. During the course of the Commissioner's investigation, the MoJ wrote to the complainant. It said that having revisited the request, it considered that additional subsections of section 31 apply:

"I can confirm that Section 31(1)(a), (c), (g) apply with equal force to all withheld information.

Subsection 31(1)(a) relates to the prevention or detection of crime and subsection 31(1)(g) relates to the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".

15. The analysis below considers the MoJ's application of sections 31(1)(a), (c) and (g) of the FOIA to the requested information.

Reasons for decision

Section 31 law enforcement

16. Section 31 provides a prejudice based exemption which protects a variety of law enforcement interests. That means that in order to engage the exemption there must be a likelihood that disclosure would cause prejudice to the interest that the exemption protects.

17. The MoJ considers sections 31(1)(a), (c) and (g) of the FOIA are the relevant sections in this case. Those sections state:

"31 – (1) 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

(c) the administration of justice

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)".

18. The MoJ is citing 31(1)(g) by virtue of 31(2)(a) - the purpose of ascertaining whether any person has failed to comply with the law.
19. Consideration of the section 31 exemption involves two stages. First, in order to be engaged, the following criteria must be met:
 - 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;
 - 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
 - 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. For section 31(1)(g) to apply the MoJ must be able to identify a public authority that has functions for one of the purposes specified in section 31(2) and explain how the disclosure would prejudice that function.
21. Secondly, the section 31 exemption is qualified by the public interest which means that, once the exemption has been engaged on the basis of the prejudice test, the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The prejudice test

22. The withheld information in this case comprises copies of the contracts for the electronic monitoring of offenders that were in place with G4S and Serco at the time when the overpayments were made. The MoJ told the Commissioner:

"Although, the contracts were awarded in 2004 and the investigation into the billing took place in 2013, there was an active SFO at the time of the request in July 2015 [sic]".

23. In its correspondence with the complainant, the Commissioner considers that the MoJ relied to a large degree on it being self-evident that the exemption was engaged on the basis that disclosure of the material would or would be likely to cause the prejudice the section 31 exemption is designed to protect. For example, it simply told the complainant:

"We...have reached the view that the release of the information in question would be likely to prejudice the administration of justice. We are therefore relying on the exemption under section 31(1)(c) of the Act".

24. It was with respect to its withholding of the requested information as a result of the public interest test that the MoJ told the complainant it:

"... had particular regard to the fact that the operation of the contracts is the subject of a formal investigation by the Serious Fraud Office, and that this investigation is still in train".

25. It was not until the Commissioner's investigation that the MoJ provided its substantive arguments in relation to the exemption being engaged.

Applicable interests

26. In correspondence with the Commissioner, the MoJ said:

"We believe that by disclosing this information that it may affect the ability to administer justice. The SFO may not be able to properly conduct and/or conclude their investigation, it may stop their ability to bring any criminal proceedings, should they wish to, or may hinder the ability of any defendant to a fair trial".

The nature of the prejudice

27. In order for the exemption to be engaged, the MoJ must show that the prejudice it is envisaging affects the particular interests that the exemption is designed to protect. Disclosure must at least be capable of harming those interests in some way, that is, have a damaging or detrimental effect on them.

28. With respect to section 31(1)(g), the Commissioner's guidance on section 31² states:

² <https://ico.org.uk/media/for-organisations/documents/1207/law-enforcement-foi-section-31.pdf>

"Where one public authority claims that a disclosure would prejudice the functions of another the Information Commissioner would expect that public authority to have obtained evidence from the public authority affected by the disclosure".

29. During the course of his investigation the MoJ confirmed that it had contacted the SFO regarding this request. It provided the Commissioner with details of the correspondence between it and the SFO.

30. In this case, the MoJ told the complainant:

"Disclosure would be likely to prejudice the ongoing criminal investigation into these issues and may prejudice the fair trial of any person against whom proceedings may be instituted".

31. It also told him:

"Disclosure could undermine the effectiveness and consequence of the investigation".

32. During the course of his investigation, the MoJ told the Commissioner:

"We were concerned that the disclosure of the requested information could hamper the on-going SFO investigation....In order to protect the administration of justice we consider that it is appropriate to withhold the information requested".

33. It explained that, if the contracts were disclosed:

"it could impact on the ability of the SFO to undertake their investigation and bring it to an appropriate conclusion. It could affect whether the SFO are able to fairly and accurately conduct their investigation....".

The likelihood of prejudice

34. From the correspondence the Commissioner has seen, the MoJ variously used the terms 'is likely to prejudice', 'would be likely to prejudice' and, 'could prejudice'.

35. In correspondence with the Commissioner it confirmed:

"We consider that the likelihood of prejudice is "would be likely to prejudice".

Is the exemption engaged? Would disclosure be likely to prejudice law enforcement?

36. The Commissioner considers that the prejudice test is not a weak test, and a public authority must be able to point to prejudice which is 'real, actual or of substance'. If the consequences of disclosure would be trivial or insignificant, there is no prejudice.
37. He also considers that the authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice. If the authority cannot show that the prejudice would or would be likely to occur, then the exemption is not engaged.
38. The MoJ maintains that both contracts should be exempted in their entirety in accordance with section 31(1)(a), (c) and (g) of the FOIA. As to whether the exemptions are engaged in this case, the MoJ has advanced very similar arguments for each of 31(1)(a), (c) and (g).
39. The Commissioner has first considered the MoJ's application of sections 31(1)(a) and (c).
40. The Commissioner recognises that those sections will cover all aspects of the prevention and detection of crime and also that the administration of justice is a broad term.
41. The Commissioner acknowledges that, at the time of the request, the operation of the contracts was the subject of a formal investigation by the SFO.
42. Having considered the MoJ's arguments in relation to the prejudice test, the Commissioner finds that the MoJ has failed to demonstrate that prejudice to the prevention or detection of crime or to the administration of justice is a real and significant likelihood as an outcome of disclosure. In particular he notes the limited nature of the evidence in relation to those arguments and the wide-ranging content of the contracts. It follows that the Commissioner finds that the MoJ has failed to establish engagement of the section 31(a) and (c) exemptions.
43. Turning next to its application of section 31(1)(g), the Commissioner considers it important that, in claiming the exemption on the basis of prejudice to the exercise by another public authority of its functions, the public authority claiming the exemption must have evidence that this does in fact represent or reflect the view of the other public authority.
44. The Commissioner is satisfied that the MoJ has consulted with the SFO as the relevant public authority in this case.
45. For the Commissioner to accept that prejudice would be likely to occur, however, there must be a real and significant likelihood of the outcome predicted by the public authority occurring as a result of disclosure. The issue for the Commissioner to determine, therefore, is whether the MoJ

has demonstrated that there is a real and significant likelihood of disclosure of the information in question resulting in prejudice to the SFO – in this case, in the exercise of its function to ascertain whether any person has failed to comply with the law.

46. The Commissioner accepts that the MoJ stated that, at the time of the request, the SFO's investigation was ongoing and could lead to future actions. He accepts that the MoJ's arguments concern the likelihood of the release of the material to prejudice that investigation.
47. However, having considered the arguments put forward by the MoJ, the Commissioner considers that the MoJ's arguments - arguments he considers to be generic arguments that the MoJ has applied in a blanket fashion to the contracts in their entirety - fail to establish how prejudice would be likely to result as a result of disclosure of the contracts.
48. The Commissioner is therefore not satisfied that the MoJ has demonstrated a causal link between the disclosure of the withheld information and prejudice to the SFO in the exercise of its functions.
49. Accordingly, the Commissioner finds that it has also failed to establish engagement of the section 31(g) exemption.

The public interest test

50. In light of the above finding, it has not been necessary to consider the public interest test.

Right of appeal

51. 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@hmcts.gsi.gov.uk

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

52. 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.
53. 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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