

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 July 2019

**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 the total number of incidents where an unmanned aerial vehicle ('UAV'), more commonly known as a "drone", had been used to convey prohibited articles into or out of prisons over three specified years. The Ministry of Justice (the 'MOJ') adopted various positions in relation to the year 2016, but advised the Commissioner that the information was not held. It refused to provide the information for the years 2017 and 2018, citing various subsections of section 31(1), the exemption for law enforcement.
2. The Commissioner's decision is that, on the balance of probabilities, the MOJ does hold information for the year 2016. She also finds that sections 31(1)(a), (b), (c) and (f) are not engaged in relation to the withheld information for the years 2017 and 2018. Her position is set out in a confidential annex which will be provided to the MOJ only.
3. The Commissioner therefore requires the MOJ to take the following steps to ensure compliance with the legislation:
  - Issue a fresh response in relation to the withheld information for 2016.
  - Disclose the withheld information in relation to the years 2017 and 2018.
4. 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.

## Request and response

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5. On 8 January 2019, the complainant wrote to the MOJ and requested information in the following terms:

*"Please provide the total number of incidents where a UAV has been involved for the following offence;*

- *Offender Management Act 2007 (Section 22) - Conveyance of prohibited articles into or out of prison.*

*Please provide results for the years 2016, 2017 and 2018."*

6. The MOJ responded on 21 January 2019. It refused to provide the requested information citing sections 31(1)(a) (the prevention or detection of crime), (b) (the apprehension or prosecution of offenders), (c) (the administration of justice), and (f) (the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained) of FOIA, all of which relate to law enforcement.
7. The complainant requested an internal review on 21 January 2019; he highlighted that he had not requested any detail surrounding the reported drone incursions, such as location or staff actions. Following consideration of the complainant's submissions, as part of its internal review, the MOJ wrote to him on 31 January 2019. It maintained that the previously cited subsections of section 31 applied to his request.

## Scope of the case

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8. The complainant initially contacted the Commissioner on 31 January 2019 to complain about the way his request for information had been handled. He provided all the correspondence relevant to his complaint on 20 February 2019.
9. The complainant submitted the following grounds of complaint to the Commissioner (bold text as submitted by the complainant):

*"I would like to highlight that I do not expect any detail beyond that which has been requested. I do not require detail of individual incidents, nor do I require a breakdown of incidents per prison. I do not require detail regarding counter-measures or active investigations.*

*This request is similar to a BBC article published in 2016, providing figures for UAV incursions into prisons for the years 2013, 2014 and 2015;*

<https://www.bbc.co.uk/news/uk-35641453>

*Both the refusal for the initial request and the appeal state that the information cannot be released due to the **'likely threat to good order and security of prisons'** and that the release of the information would **'likely subvert the effectiveness of our current counter measures'**. Additionally the information **'would likely prove invaluable to those engaged in criminality within prisons with a risk of undermining national efforts to maintain security'**.*

*In relation to the point regarding **'likely subvert the effectiveness of our current counter measures'**. Since I have not requested any detail other than the 'total' number of incursions involving a UAV, it is hard to understand how this might affect counter-measures. I have not requested a breakdown of prisons involved, nor details of counter-measures deployed, as such any measures adopted by prisons would not be affected.*

*In relation to the point regarding **'would likely prove invaluable to those engaged in criminality within prisons with a risk of undermining national efforts to maintain security'**. The request is specifically broad, as not to provide sufficient detail that would highlight weakness or potential exploits. There have been several news articles highlighting UAV incursions into prisons; as such the method is not new or unheard-of. Given this view, it is unlikely the information requested would be invaluable to offenders, nor would it undermine national efforts to maintain security.*

*In relation to the **'likely threat to good order and security of prisons'**. Understanding the total number of incursions involving a UAV should not affect prison security negatively and the refusal explanations provided to date have not provided an [sic] reason as to why they would. I understand that prison security is an evolving and demanding practice, where the aim is to stay ahead of potential exploits, but UAV incursions are not a new threat. Given the publicity already given to this offence type, having a better understanding of the total numbers should not affect security.*

*To date I do not believe I have been given sufficient cause for my application to be refused."*

10. As part of her investigation, the Commissioner asked the MOJ to consider the foregoing arguments raised by the complainant.

11. The Commissioner was provided with the withheld information in this case. As a result, she found it necessary to query the withheld figures with the MOJ due to the wording of its associated submissions, which caused a delay in her investigation.
12. As a result, the MOJ provided the Commissioner with revised figures partway through her investigation, advising:

*"There is no drone data for 2016. This is because the business unit only introduced the incident reporting system in October 2016 to improve recording of drone incidents. Prior to this, drone incidents were identified by free text search for the words "drone", "UAV" or "Unmanned Ariel vehicle" and reading text to determine if a drone/s was sighted and/or recovered. A combination of the old and new methods were used for a 6 month "bedding in period" from October 2016 to identify incidents of drone sightings and recoveries. Data from April 2017 is based on the new drone incident type only..."*

13. However, on 19 July 2019, the MOJ submitted the following in relation to the withheld information for 2016:

*"...I can advise you that before October 2016, drone activity, of whatever type, was not routinely recorded and that the recording of drone activity was incomplete, non-specific and left to the discretion of the user. This activity (sightings, recovery etc) would be recorded in a box called "other". This relied on the use of free text fields and so was in an unstructured format. As such it could not be "searched for" by running a report, for example, and to search the database systems manually, would engage costs. From October 2016 activity" (sightings, recovery etc) were recorded but this did not specify the type of activity.*

*Only when the new system was introduced in 2017, were they able to catcher [sic] reliable drone data."*

14. The withheld information ultimately provided by the MOJ consists of two annual totals for the years 2017 and 2018, broken down only by month. As stated above, the MOJ has advised there is no drone data for 2016. The Commissioner notes that the complainant has only requested the annual figures rather than monthly ones.
15. The Commissioner will consider whether or not any information is held in relation to the withheld information for 2016, and whether section 31 applies to the information withheld for the years 2017 and 2018.

## **Reasons for decision**

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## **Section 1 – general access to information**

16. The MOJ has not provided the complainant with any specific details in relation to the data of 2016, having refused to provide the information to the request as a whole. However, in light of the lack of clarity and the three different positions it has taken with the Commissioner during this investigation, the Commissioner finds it necessary to initially consider whether or not it has complied with its duty under section 1 of the FOIA in respect of the data for the year 2016.
17. Section 1 of FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and, if so, to have that information communicated to them.
18. In this case, the MOJ has stated that no information is held in relation to the year 2016. However, it had initially provided the Commissioner with the number of drone sightings for that year and, subsequently, alluded to a search being too difficult to undertake rather than information not being held.
19. In cases where there is some dispute about the amount of information located by a public authority the Commissioner, following the lead of a number of First-tier Tribunal decisions, applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to this part of the complainant's request.
20. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
21. From the MOJ's submissions, it is clear to the Commissioner that the latest position is that information must be held in respect of the year 2016 (see paragraph 13 above) albeit that information may be difficult to retrieve.
22. The Commissioner therefore requires the MOJ to issue a fresh response to the complainant in relation to the any information which may be held for the year 2016.

## **Section 31 – law enforcement**

23. The MOJ has cited sections 31(1)(a),(b), (c) and (f) in relation to the information withheld for the years 2017 and 2018. These 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) the apprehension or prosecution of offenders,  
(c) the administration of justice, and  
(f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained..."*

24. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed, but also that it can only be withheld if the public interest in the maintenance of the exemption outweighs the public interest in disclosure.
25. 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 (in this case, the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice and the maintenance of security and good order in prisons, etcetera);
  - 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.
26. The complainant has disputed that section 31 could be applied to withhold this information on the grounds set out under the 'Scope' section of this notice.
27. The MOJ provided the Commissioner with further arguments to support its citing of the various subsections of section 31, some of which she has set out in a confidential annex available to the MOJ only. This is because some of the arguments submitted by the MOJ would reveal details about the undisclosed figures.



28. The first point for the Commissioner to consider is whether the arguments provided by the MOJ relate to the relevant applicable interests, namely the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice and the maintenance of security and good order in prisons.
29. The withheld information in this case consists of two annual figures for 2017 and 2018, namely the number of drone incidents in prison establishments. The MOJ has argued that its provision would be likely to be used to disrupt the effectiveness of the MOJ's current counter measures by clearly revealing the precise number of drone incidents discovered nationally by HMPPS [Her Majesty's Prison and Probation Service] *"whilst also revealing those which may have been missed, thus highlighting gaps in operational response"*.
30. The MOJ also argued that disclosure of the requested information could prejudice any ongoing investigation of a drone incident by revealing the number of drone related occurrences which had been detected and that this could both risk alerting possible suspects and also weaken the possibilities of future arrests.
31. The Commissioner is satisfied that the arguments provided by the MOJ do relate to the applicable interests stated, so the first limb of the three part test outlined above is met.
32. As stated above, the MOJ must be able to demonstrate that a causal relationship exists between the disclosure of the figures in question and the prejudice envisioned. Furthermore, this alleged prejudice must be real, actual or of substance.
33. The Commissioner has considered all the MOJ's arguments in relation to its application of section 31(1) including those set out in the confidential annex attached to this notice.
34. She accepts that drones continue to be utilised by criminal groups, and others, to try to circumvent prison security measures and flood prisons with dangerous drugs and other contraband. This activity clearly contributes to the use of drugs in prisons, although it is well publicised that this is not the only method by which drugs are smuggled into prisons.
35. However, in the Commissioner's view, any possible weakness at any particular prison would not be revealed by the disclosure of the annual figures requested. The figures would be of little use to those with criminal intent as they are only an indication of the overall number of incidents without any further detail. No breakdown of location or any other patterns of behaviour can be ascertained from an annual figure. It is not under consideration here at which prison, or category of prison, the incidents occurred, what counter measures are being taken to try to

deter criminal activity of this type nor whether those measures are having an impact.

36. Further, many of the MOJ's arguments centre on the potential impact on its counter measures to counteract the usage of drones in this way, by revealing information to those intent on utilising drones illegally for prisoners. However, the complainant has not asked for any detail beyond the total annual figures for the specified years; there is no reference to counter measures, prison location, breakdown by month or actions taken during a drone incident. The Commissioner can find no link between provision of the figures requested and any plausible impact on the MOJ's ability to counteract drone use.
37. Having considered the arguments put forward by the MOJ, the Commissioner finds that the MOJ has failed to demonstrate a causal relationship between the potential disclosure of the withheld information and the prejudices which the exemption is designed to protect – the prevention or detection of crime, the apprehension or prosecution of offenders, the administration of justice and the maintenance of security and good order in prisons.
38. The Commissioner does not consider that the arguments provided in this case demonstrate that the harm in disclosure of the requested figures is real, actual or of substance. She therefore concludes that this exemption is not engaged in relation to the requested information for the years 2017 and 2018.
39. Since her finding is that the exemption was not engaged, it has not been necessary for her to go on to consider the balance of the public interest.



## Right of appeal

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40. 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](mailto:grc@justice.gov.uk)

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

41. 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.
42. 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**  
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