

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 May 2023

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

Decision (including any steps ordered)

1. The complainant has requested a copy of a withdrawn prison service instruction ('the PSI') on security incident reporting, and a copy of the policy that replaced it. The Ministry of Justice ('the MoJ') said that the information was exempt from disclosure under sections 31(1)(f) (Law enforcement) and 38(1)(a)(b) (Health and safety) of FOIA.
2. The Commissioner's decision is that the MoJ was entitled to rely on section 31(1)(f) to withhold some of the information. However, some of the information in the PSI is not exempt under section 31 or section 38 of FOIA.
3. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation.
 - Disclose the PSI **except** paragraphs 8, 15, 16 (second paragraph only, at the top of page 10), 22, 23, 44, 45 and Annex B, which the Commissioner has determined are exempt under section 31(1)(f). Redactions should be made to withhold the names and contact details of any third parties.
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

5. On 10 February 2023, the complainant wrote to the MoJ and requested information in the following terms:

“I’ve requested the policy PSI 11/2012 para 5.0, 5.1, 5.2, 5.4, 5.5, 5.6 as I’m aware para 5.3 describes the prison service definition of what a barricade situation is. So I was wondering either side of para 5.3 what the para’s are and if they go more into a barricade situation. However I thought psi 11/2012 was still in affect [sic]. I acquired para 5.3 with a previous FOI request where I wasn’t told that the policy is no longer in effect. So I would like to add a request for the current policy for definition of a barricade situation where would [sic] like the entire copy of the policy not just an extract please.”
6. The MoJ responded on 17 February 2023. It stated that PSI 11/2012 had been removed from circulation and had been replaced by the Incident Management Manual (‘the IMM’). It provided a two line definition of “a barricade incident”.
7. The complainant requested an internal review on 17 February 2023, reiterating that he wanted copies of the specified paragraphs and a copy of the new IMM, or, at the very least, “...everything on barricade situations in that policy”. Additionally, he requested a full copy of the withdrawn PSI and asked questions about the definition of “barricade”.
8. The MoJ wrote to the complainant on 7 March 2023. It said that its previous response should have explained that the requested information was exempt from disclosure under section 31(1)(f) of FOIA, which is concerned with prejudice to the maintenance of security and good order in prisons. It said that both the withdrawn PSI and the IMM were exempt from disclosure under that exemption and it referred the complainant to the information on barricades provided in its initial response.

Scope of the case

9. The complainant contacted the Commissioner on 10 March 2023 to complain about the way his request for information had been handled.
10. At the time of complaining, he only asked that the Commissioner “...look to see if I can have the paragraphs either side of what I’ve already been informed of” (ie paragraphs 5.0, 5.1, 5.2, 5.4, 5.5 and 5.6 of the PSI).

11. During his investigation, the MoJ provided the Commissioner with unredacted versions of the PSI and the IMM. It also added the exemption at section 38 of FOIA, notifying the complainant accordingly.
12. Having viewed the particular paragraphs referred to by the complainant, the Commissioner noted that they did not contain any information on barricades, and he advised the complainant accordingly, inviting him to consider withdrawing his complaint.
13. The complainant declined to withdraw, stating that he wished to receive a full copy of both the withdrawn PSI, and its replacement, the IMM.
14. Although the Commissioner has the discretion to refuse to investigate matters which aren't raised with him at the time a complaint is submitted, in this case the MoJ had treated the request as being for copies of the PSI and the IMM, and it had provided the Commissioner with submissions in support of its decision to refuse to disclose both documents. The analysis below therefore considers whether the MoJ was entitled to rely on the cited exemptions to withhold the PSI and the IMM.

Reasons for decision

The withheld information

15. PSI 11/2012 is an instruction document on the Management and Security of the Incident Reporting System, which was withdrawn from circulation in 2022. It contains guidance and instructions aimed at ensuring the consistent and accurate reporting of security incidents.
16. The PSI was replaced with the IMM, which is His Majesty's Prison and Probation Service's ('HMPPS') current policy on the management and resolution of serious incidents. In addition to the reporting protocols previously set out in the PSI, the IMM contains more detailed, operational information on the management of security incidents. The MoJ told the Commissioner:

"It is a restricted document within HMPPS that is limited to individuals that require access to manage serious incidents and disorder in prisons. Incidents of disorder in prisons, and other secure settings managed by HMPPS, occur with relative frequency, however most are low level and are resolved locally...HMPPS invests heavily in incident management preparedness to ensure that the potential confusion and lack of information associated with incidents can be overcome quickly...The Incident Management Framework outlines how we manage incidents, what tactics we use to do so, and how we set a strategy to get there. It includes information on how we negotiate in

these situations, as well and the tactical intervention options available by teams of specialist officers where necessary.”

17. As far as the Commissioner has been able to ascertain, neither document in this case is in the public domain.

Section 31 - Law enforcement

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

19. The Commissioner's guidance on section 31¹ 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.”

20. 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.
21. 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

22. 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.

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

23. The MoJ argues that the disclosure of the PSI and the IMM would reveal information about prison security management tactics, which could be used by individuals seeking to undermine or resist prison security.
24. 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.

The nature of the prejudice

25. 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.
26. The MoJ told the Commissioner:

“...disclosure of the framework would likely be used by some individuals to subvert the effectiveness of our current strategic and tactical response to incidents, which would be likely [sic] cause serious damage to prisons, potential escapes, and loss of life.”
27. It explained that the withheld information ensured that:

“...incidents can be safely defused for both prisoners and staff and that prisoners are unable to use incidents to escape from custody. The Incident Management Policy Framework overarches HMPPS management of critical incidents and would provide those wishing to counteract our contingencies with information about our strategic, tactical and operational responses. Although prisoners are aware that we have response capability they do not know how we will utilise those resources or what tactics we will employ. Therefore, disclosure would 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 escapes.”
28. The Commissioner has no difficulty accepting that there is a clear causal link between disclosure of the IMM, which contains detailed, specific operational information about the management of security incidents, 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.
29. However, the Commissioner is not persuaded that the same can be said of most of the information in the PSI. He notes that the arguments the MoJ has submitted overwhelmingly refer to the contents of the IMM alone. As set out in paragraph 15, the PSI is principally concerned with

providing instructions on the consistent and accurate reporting of security incidents. For the most part, it does not contain operational information about the management of those incidents. Rather, it simply gives definitions of incident categories and instructions on how they should be recorded.

30. The Commissioner is not persuaded from the MoJ's arguments that most of the information in the PSI, if disclosed, would be likely to result in the effects that the MoJ has described. He also notes that it was willing to provide the definition of "a barricade situation" and sees no distinction between that, and disclosing definitions of other categories of incident.
31. As the MoJ has provided no arguments which show how purely administrative information would be likely to prejudice matters covered by section 31(1)(f), the Commissioner has concluded that, for the majority of the PSI, there is no causal link between disclosure and prejudice to safety and good order in prisons. That being the case, section 31(1)(f) is not engaged in respect of that information. (The Commissioner has gone on to consider whether section 38 provides grounds for withholding it, in paragraphs 52-57, below.)
32. However, there is some information in the PSI which, in giving instructions on how to record particular incidents, reveals operational information about their actual management. The Commissioner accepts that this goes beyond simply being administrative information and that it could be used by interested parties to build up a picture of how certain incidents are managed, with a view to undermining or manipulating situations. He therefore accepts that there is a causal relationship between disclosure of the following paragraphs of the PSI, and the prejudice that section 31(1)(f) is designed to protect against:
 - paragraphs 8, 15, 16 (second paragraph only, at the top of page 10), 22, 23, 44, 45 and Annex B.

Likelihood of prejudice

33. 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.
34. 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%".

35. The MoJ said:

“The MoJ is conscious of the fact that disclosure of any information under the FOI is to the whole world and not just a requester. Therefore, the MoJ is satisfied that disclosure of the specific requested information would indeed be likely to prejudice the maintenance of security and good order in prisons. By releasing the information requested it is the MoJ’s judgement that this would be likely to publicly disclose to everyone, including those who may misuse the information, our tactics, used to safely de-escalate and resolve serious incidents, and therefore that would be likely to undermine this effective control.”

36. 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 security incidents in prisons. He accepts that this would be likely to prejudice the maintenance of security and good order in prisons.

37. 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

38. 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

39. The complainant did not offer any reasons as to why it was in the public interest for the information to be disclosed.

40. The MoJ acknowledged that there is a public interest in disclosure of the information, for the following reasons:

“We recognise that disclosure in full would provide greater transparency and enable the public to be made aware of the full extent of the management of incidents. This could increase the public’s operational understanding of how establishments maintain good order and security in prisons.

It is important that the public have confidence in the operation of the prison system and there is a public interest in ensuring that there are safe and robust procedures for ensuring the safety of prisoners and staff.

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 Ministry of Justice. 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

41. The MoJ said that the complainant’s request was clearly focussed on knowing about ‘barricades’ and that it had provided him with the relevant definition. It said the public interest in transparency on that point had therefore been served.
42. More generally, the MoJ argued that it was not in the public interest for it to disclose information which might affect or threaten the security and good order of prisons:

“The likely threat to the good order and security of prisons and the implications of this for prisoners and staff, favours non-disclosure of detailed information on incident management. It is my judgement that the information requested would be likely to be used by some individuals to subvert the effectiveness of our current counter measures

Prisons have a duty of care to ensure the safety of all prisoners, staff, and visitors to prisons. They are required to manage threats to security and order which impact directly on the safety and well-being of individuals and to the establishment as a whole. Maintaining effective control of the prison is key to protecting the safety of persons within the establishment and in turn the safety of the public. By releasing the information requested it is my judgement that this would indicate our tactics used, and therefore undermine this effective control.”

Public interest balancing test

43. 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.

44. The Commissioner is not aware of the complainant's personal reasons for wanting the withheld information. While he may have personal reasons for wanting access to the information, the Commissioner must primarily consider wider public interest issues.
45. 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.
46. 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.
47. The Commissioner acknowledges that there is a public interest in the general public understanding how prison unrest is responded to and managed, so that they can be reassured that the welfare of all who live and work in prisons, prison visitors and those who live close to prisons, is given due regard by the Prison Service. Disclosure of the withheld information could therefore increase the public's operational understanding of how prisons maintain good order and security.
48. Furthermore, the Commissioner also believes that disclosure could improve the public's confidence in the safety and security of prisons. Disclosure could inform debate and improve the public's confidence in prisoner management during conflict situations.
49. 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 is key to protecting the safety of all those who live and work within them, and also the safety of the wider public.
50. 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.
51. 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 MoJ was therefore entitled to rely on section 31(1)(f) of FOIA to refuse to disclose the IMM and paragraphs 8, 15, 16 (second paragraph only, at the top of page 10), 22, 23, 44, 45 and Annex B of the PSI.

Section 38 – Health and safety

52. The MoJ has cited sections 38(1)(a)(b). The Commissioner has considered whether it applies to the parts of the PSI which are not exempt under section 31.
53. Section 38(1) of FOIA says that information is exempt information if its disclosure would, or would be likely to, (a) endanger the physical or mental health of any individual, or (b) endanger the safety of any individual. The exemption must therefore be engaged as a result of endangerment to physical or mental health being at least likely to result.
55. The MoJ did not provide the Commissioner with specific submissions on its application of section 38, referring him instead to a further refusal notice it recently sent the complainant. This letter did not explain why it considered that section 38 was engaged, although it did contain public interest arguments, both for, and against, its application. The public interest arguments were virtually identical to those the MoJ had advanced in respect of section 31. They set out arguments of potential harm which the Commissioner has already rejected in respect of this information.
56. As stated above, the Commissioner regards this information to be administrative in nature. For the same reasons as set out in the section 31 analysis, he is not persuaded that the disclosure of administrative information would, or would be likely to, endanger the health or safety of any individual.
57. Accordingly, the Commissioner has determined that section 38 is not engaged. The MoJ should therefore take the action specified in paragraph 3, above.

Right of appeal

58. 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

59. 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.

60. 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

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