

J E Garner
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28 October 2020

Dear J E Garner

Freedom of Information Act (FOIA) Outcome of Internal Review – 201001051

Thank you for your email of 1 October 2020, regarding FOI request **200915040**, in which you had asked for the following information from the Ministry of Justice (MoJ):

- 1. Please supply the findings of the above investigation referred to in Para. 47 if now completed;**
- 2. Please advise if anybody involved was disciplined and or dismissed as a result of the findings in 1;**
- 3. Were any HMPPS staff (at any level) involved in the forgery of documents provided as evidence to the ET case, if so please advise if they were they disciplined/dismissed as a result;**
- 4. Have any staff responsible for the forgery of documents, been referred to the Police/CPS for a consideration of a prosecution for the criminal offence of forgery?**

In your email you challenged the conclusion reached in the previous response- namely that the information requested was exempt from disclosure under Section 38(1)(a) of the FOIA. We therefore treated your email of 1 October as a request for an Internal Review of the response to FOI 200915040. I note that, in any case, you also subsequently wrote on 19 October and formally requested this review.

The purpose of an Internal Review is to assess how your FOI request was handled in the first instance and to determine whether the original decision given to you was correct. This is an independent review: I was not involved in the original decision.

As referenced above, the response to your original request confirmed the information requested is held but that it was exempt under Section 38(1)(a) because it would prejudice the health and safety of an individual. After careful consideration I have concluded that this response was **compliant** with the requirements of the FOIA.

Statutory deadline

The statutory deadline for your request was 13 October 2020, and the response was provided on 1 October 2020. The response was therefore compliant with the timeliness requirements of the FOIA.

Outcome

As section 38 is a qualified exemption, the public interest test was carried out in the original response to determine whether it was in the public interest to disclose the requested information. The relevant applicable interests cited in this exemption are endangerment to physical or mental health or safety of any individual. While it was acknowledged that there is a public interest in acting in an open and transparent manner (particularly with regard to questions about the conduct of staff working in public office), a real and significant endangerment to an individual's mental health had been identified and it was concluded that this endangerment outweighed any public interest in disclosure of the information.

I note that you have suggested that the unnamed individual is a member of HM Prison and Probation Service staff, however, I am not at liberty to reveal their identity here and therefore will make no further comment on this aspect of your email.

In any case, our view is that the identity of the individual is not a relevant consideration when determining whether the information should be disclosed or not. Guidance from the Information Commissioner¹ states that:

“Section 38 provides an exemption from disclosing information if it would endanger **any** individual (including the applicant, the supplier of the information or anyone else).”

The FOIA does not explain what it means by ‘endanger’. Our view is that ‘endanger’ equates to ‘prejudice’ and therefore section 38 is subject to the prejudice test.

In order for section 38 to be engaged, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the endangerment which the exemption is designed to protect. Furthermore, the resultant endangerment which is alleged must be real, actual or of substance.

It is also necessary to establish whether the level of likelihood of endangerment being relied upon by the public authority is met –i.e. disclosure ‘would be likely to’ or ‘would’ result in endangerment.

I have reconsidered and accept the arguments made in the original refusal regarding the prejudice at section 38(1)(a) in relation to the physical or mental health of any individual. This is because I am satisfied that the nature of the endangerment is “real, actual or of substance” and not trivial or insignificant. I am also satisfied that evidence exists of some causal relationship between the potential disclosure and the stated endangerment, but due to the sensitive and personal nature of the evidence of this, I cannot go into any further detail on this in this review.

I am satisfied that the level and nature of the endangerment identified would be likely to go beyond stress or worry and would constitute an endangerment to the mental health of a specific individual.

The Information Commissioner's guidance states: “Once section 38 is engaged and it has been established that there is a real and actual danger to someone's health and safety, it is difficult to find in favour of disclosure”. This view is supported by the First-tier Tribunal decision in **British Union for the Abolition of Vivisection vs Information Commissioner**

¹ <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

and Newcastle University EA/2010/0064 (10 November 2010), which states: “the public interest in maintaining the s38 (1) exemption, where it is engaged, is also strong. Self-evidently, there would need to be very weighty countervailing considerations to outweigh a risk to health and safety which was of sufficient severity to engage s38 (1)”.

Our view is that disclosure in spite of the identified risks will only be justified where a compelling reason can be provided to support such a decision. In this review I was not persuaded that there are any such reasons to justify disclosure.

In conclusion, I am satisfied that the response you received on 1 October was correct. That section 38(1)(a) has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Appeal Rights

If you are not satisfied with this response you have the right to apply to the Information Commissioner's Office (ICO). The Commissioner is an independent regulator who has the power to direct us to respond to your request differently, if she considers that we have handled it incorrectly.

You can contact the ICO at the following address:

Information Commissioner's Office

<https://ico.org.uk/Global/contact-us>

Yours sincerely

S Biswell
HMPPS Briefing and Correspondence Team