

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 September 2018

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested information relating to the Ministry of Justice's (MoJ's) handling of a previous request for information.
2. The MoJ refused to provide the requested information, citing section 36 (prejudice to the effective conduct of public affairs) of the FOIA.
3. The Commissioner's decision is that the MoJ was not entitled to rely on section 36(2)(c). She found that sections 36(2)(b)(i) and (ii) are engaged but that the public interest favours releasing the requested information.
4. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
 - disclose the withheld information, a copy of which was provided to the Commissioner, with personal data, for example of the complainant and junior officials, redacted.
5. The MoJ must take this step 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. The complainant in this case is seeking disclosure of information about the MoJ's handling of a previous request for information he had made to the MoJ.

7. As such, the Commissioner considers the request in this case to be a meta request.
8. The Commissioner has issued guidance on meta requests¹. Her guidance advises:

"A meta request is a request for recorded information about the handling of a previous information request..."

Meta requests do not have any special status under FOIA or the EIR, nor are there any specific exemptions (or exceptions) for this type of request. This means that an authority should treat meta requests in the same way as any other information request".

Request and response

9. On 17 January 2018, the complainant wrote to the MoJ and requested information in the following terms:

"please could you provide all records you hold on how the Ministry (and its constituent agencies including HMCTS) dealt with my previous FOI request [reference redacted]? I.e. please provide the full "FOI case file" and all other emails, submissions etc. relating to the request if not within the case file".

10. The request was made through the 'whatdotheyknow' website.
11. Further to advising the complainant on 14 February 2018 that it required additional time to consider the public interest test, the MoJ provided its substantive response on 14 March 2018. It refused to provide the requested information citing the following exemptions:
 - sections 36(2)(b)(i) and 36(2)(c) of the FOIA (prejudice to effective conduct of public affairs).
12. Following an internal review, the MoJ wrote to the complainant on 23 May 2018 maintaining its position.

¹ <https://ico.org.uk/media/for-organisations/documents/1620/requests-about-previous-requests-for-information-meta-requests.pdf>

Scope of the case

13. The complainant contacted the Commissioner on 23 May 2018 to complain about the way his request for information had been handled. He told the Commissioner what he had told the MoJ, namely:

"I fail to see how the disclosure in question could (for all information concerned) attract the section 36(2)(b)(i) and 36(2)(c) exemptions. Even if they do, I believe the public interest clearly favours disclosure".

14. The analysis below considers the MoJ's application of section 36(2)(b)(i) and (ii) and (c) of the FOIA to the requested information.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

15. Sections 36(2)(b) and section 36(2)(c) of the FOIA state that:

"2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act – "

(b) would, or would be likely to inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".

16. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.

17. In correspondence with the complainant, the MoJ stated:

"For the MoJ, the legally qualified person is Rory Stewart OBE MP, who gave opinion that s36 was engaged".

18. The MoJ provided the Commissioner with a copy of the submission that was sent to Rory Stewart MP.

19. However, in its submission to the Commissioner, the MoJ confirmed that the opinion was provided on 14 February 2018 by Lucy Frazer MP.

20. The Commissioner has issued guidance on section 36 of the FOIA². With reference to identifying the qualified person, the Commissioner acknowledges that, in order to use section 36, the public authority must establish who their qualified person is.

21. In that respect, her guidance states:

"The qualified person is not chosen by the authority itself. Section 36(5) explains what is meant by the 'qualified person'. Subsections (a) to (n) define who the qualified person is for a number of specific authorities.

Subsections (a) to (n) of section 36(5) only specify the qualified person for a limited number of public authorities. Most public authorities will fall under section 36(5)(o). For these authorities the qualified person is either a Minister of the Crown or a person authorised by a Minister of the Crown. A Minister may authorise the public authority itself or any officer or employee of the authority to be the qualified person".

22. The Commissioner understands that Lucy Frazer was appointed as Parliamentary Under Secretary of State at the Ministry of Justice in January 2018³.

23. Having considered the legislation, and with reference to her guidance, the Commissioner is satisfied that it was appropriate for the MoJ to regard Lucy Frazer, a Minister of the Crown, as the qualified person for the purposes of section 36.

Is the exemption engaged?

24. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:

- whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;

² https://ico.org.uk/media/for-organisations/documents/2259713/prejudice-to-the-effective-conduct-of-public-affairs-section-36.docx#_Toc414524781

³ <https://www.lucyfrazer.org.uk/about-lucy-frazer>

- the nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice; and
 - the qualified person's knowledge of, or involvement in, the issue.
25. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The qualified person's opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.
26. With respect to the nature of the prejudice, the Commissioner's guidance on section 36 states:
- "Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority".*
27. Her guidance also recognises that:
- "... if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".*
28. The Commissioner has also been guided by the Tribunal's indication in the case of *Guardian Newspapers Ltd and Brooke v Information Commissioner & BBC* (EA/2006/0011 and EA/2006/0013, 8 January 2007), that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as

to the severity, extent and frequency of prejudice or inhibition of any disclosure.

29. In this case, the Commissioner is satisfied that the submission to the qualified person clearly related to the request that was made by the complainant. She is also satisfied that it explained why an opinion was being sought and provided relevant background information together with a copy of the withheld information in this case.
30. Having seen the submission provided to the qualified person, the Commissioner notes that the qualified person was asked to provide an opinion with respect to the following subsections of the exemption:
 - 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)
31. With respect to its reliance on section 36(2)(b), the Commissioner notes inconsistencies between the opinion given by the qualified person and the MoJ's correspondence. While the qualified person's opinion included both subsections (b)(i) (the free and frank provision of advice) and (b)(ii) (the free and frank exchange of views for the purposes of deliberation), these were not consistently referenced in either the MoJ's correspondence with the complainant or with the Commissioner.
32. For example, in correspondence with the complainant, the MoJ variously stated:

"All of the information is exempt from disclosure under section 36(2)(b)(i) and 36(2)(c) of the FOIA, because it would be likely to inhibit the free and frank provision of advice and would be likely otherwise to prejudice, the effective conduct of public affairs"

and

*"Disclosing this information would inhibit the free and frank provision of advice **or exchange of views**....[section 36(2)(b)(ii)]".*

33. With regard to the likelihood of prejudice or inhibition occurring as a result of disclosure, the submission to the qualified person reasoned:

"... that the higher level of prejudice is met..."

34. However, the arguments supporting that view referred both to "would" and "would be likely to".

35. Similarly, in its correspondence with the complainant, the MoJ stated that the information is exempt from disclosure:

*"... because it **would be likely** to inhibit ... and **would be likely** otherwise to prejudice..."*

and

*"...**would** inhibit the free and frank provision of advice or exchange of views,....**would** also prejudice the effective conduct of public affairs..."*

36. In its correspondence with the Commissioner, the MoJ also variously cited 'would' and 'would be likely to'.
37. In respect of the opinion given by the qualified person, and the exemptions contained at section 36(2)(b), the Commissioner would emphasise that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would, or would be likely to, inhibit the processes of providing advice or exchanging views.
38. In this case, as the MoJ is claiming more than one limb of section 36(2)(b) for the same information, the Commissioner has considered whether the content of the withheld information supports the argument that both these processes - the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation - would be inhibited.
39. The Commissioner is mindful of the nature of the request in this case.
40. Having considered the submission provided to the qualified person and having reviewed the withheld information, the Commissioner is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely to prejudice the effective conduct of public affairs by virtue of sections 36(2)(b)(i) and (ii). She accepts that it was reasonable to argue the need for a safe space on the basis that release of the information could potentially prevent or hinder the free and frank exchange of views or provision of advice. The Commissioner therefore finds sections 36(2)(b)(i) and (ii) engaged.
41. The MoJ is also claiming section 36(2)(c) for the same information.
42. For section 36(2)(c) to be engaged, some prejudice other than that to the free and frank expression of advice or views has to be shown.
43. In this case, the MoJ argued that officials need a neutral platform to discuss responses and processes, and that release of the requested information is likely to impact on how the MoJ and other government departments process and manage FOI requests in the future.
44. While she accepts that it is not an unreasonable position to take that disclosure of the requested information could have implications on the future conduct of officials, the Commissioner does not find that the MoJ

has demonstrated some prejudice other than that to the free and frank expression of advice or views.

45. It follows that she does not accept that section 36(2)(c) is also engaged.

The public interest test

46. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

47. The Commissioner has therefore considered 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

48. The complainant considered that the public interest favoured disclosure.

49. The MoJ recognised the general public interest in openness and transparency. It acknowledged:

"There is a public interest in disclosing information which helps further the public's understanding of the way in which Government operates, and contributes to the accountability of Ministers and public officials so as to increase public trust in the Government process".

Public interest arguments in favour of maintaining the exemption

50. In favour of maintaining the exemption, the MoJ told the complainant:

"If this information were to be released, it is likely to impact on how the MoJ and other government departments process and manage FOI requests in the future".

51. In further explained:

"The wider implications of this disclosure may also encourage an environment that avoids free and frank discussions in internal communication and the management of future FOI requests across government departments. This would damage the effectiveness of FOI processes and the government's commitment to improving transparency".

52. In its submission to the Commissioner, the MoJ did not expand on the public interest arguments it had provided to the complainant.

Balance of the public interest

53. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, the Commissioner must give weight to that opinion as a valid piece of evidence in her assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b) of the FOIA, the Commissioner is entitled, and will need, to form her own view as to the severity, extent and frequency of that detrimental effect.
54. In forming a view on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in the openness and transparency
55. She has also taken into account her guidance on requests about previous information requests which states:

*"Where an authority applies Section 36 to a meta request, the public interest arguments in favour of maintaining the exemption should focus on the consequences of disclosing the **specific information** caught by that request".*
56. In the Commissioner's view, while it explained generically about the chilling effect of disclosure, the MoJ failed to link this line of argument to the specific information under consideration.
57. As discussed in her guidance on meta data requests, the Commissioner considers that:

"... general arguments that aren't linked to the consequences of disclosing the specific information should be given little weight as public interest factors in favour of maintaining the exemption".
58. The Commissioner considers that much of the evidence the MoJ relied on in this case was on the basis of dealing with meta requests generally, rather than the specific request under consideration.
59. She is not satisfied that the MoJ provided reasons as to why a safe space was needed in relation to the specific withheld information.
60. Taking all the above into account, the Commissioner concluded that the public interest in favour of maintaining the exemption does not outweigh the public interest in favour of disclosure. It follows that the MoJ was not entitled to rely on section 36(2)(b)(i) and (ii) of the FOIA to withhold the requested information.

Other matters

61. In her guidance, the Commissioner recognises that information caught by a meta request is likely to contain a mixture of the requester's own personal data and third party personal data (principally the personal data of the employees who dealt with the original request).
62. The requester's own personal data is exempt from disclosure under Section 40(1) of FOIA and should be handled under the subject access provisions of the DPA.

Right of appeal

63. 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

64. 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.

65. 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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