

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 June 2012

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

Decision (including any steps ordered)

1. The complainant requested copies of emails between officials and representatives of insurance organisations relating to the government's proposed reforms to civil litigation funding and costs in England and Wales.
2. The Commissioner's decision is that:
 - The public authority was not entitled to withhold the name and role of an official in a public facing role from the email of 8 September 2011 on the basis of section 40(2) of the Freedom of Information Act 2000 (the Act).
 - The public authority was not entitled to withhold the names and roles of individuals acting on behalf of lobbying groups on the basis of section 40(2) of the Act.
 - The public authority was entitled to withhold the contact details of the official above in the email of 8 September 2011 and of the individuals acting on behalf of lobbying groups.
 - The public authority was entitled to withhold all the information in the 3 chains of email on the basis of the exemption at section 35(1)(a) of the Act.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the name and role of the official redacted from the email of 8 September 2011 on the basis of section 40(2).
 - Disclose the names and roles of the individuals acting on behalf on lobbying groups redacted on the basis of section 40(2).

4. The public authority 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. The complainant wrote to the public authority on 4 October 2011 and requested information in the following terms:

'Would you please provide all e-mails since 6th May 2010 between Robert Wright or Jo Taylor and (1) Jonathan Evans MP (2) Association of British Insurers (3) Keoghs Solicitors.'

6. The public authority responded in a letter dated 15 November 2011. It provided emails between Robert Wright and Jo Taylor (both senior officials at the Ministry of Justice), the Association of British Insurers (ABI) and Keoghs Solicitors. It however pointed out that no emails had been exchanged with Jonathan Evans MP.
7. The public authority however redacted information from the disclosed emails on the basis of the exemption at section 40(2). It also informed the complainant that an email was withheld on the basis of the exemption at section 35(1)(a). Two further emails were withheld on the basis of the exemption at section 41(1)(a).
8. Dissatisfied with the public authority's response, the complainant requested an internal review of the decision above on 17 November 2011.
9. Following an internal review, the public authority wrote to the complainant on 19 December 2011. It upheld the application of the exemption at section 40(2) and withdrew its reliance on section 41(1)(a) in relation to the two withheld emails. The public authority however withheld all three emails (i.e. including the email previously withheld under section 35) on the basis of section 35(1)(a).
10. On 7 March 2012 the public authority provided the Commissioner with a copy of an email chain it had located in the course of preparing its response to the Commissioner's queries. It explained that the relevant email chain also fell within the scope of the request and was exempt from disclosure on the basis of section 35(1)(a).

Scope of the case

11. On 28 December 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. He argued that officials representing public authorities or third parties should expect their names to be disclosed where they communicate with one another in their role as a spokesperson regardless of whether they are senior or junior staff.
13. He further argued that where names can be linked to their contributions, those comments relate to their professional capacity and do not reveal information of a personal nature and should be disclosed.
14. In terms of the application of section 35(1)(a), he submitted that too much weight had been given to the space needed for consultation and exploration of policy options in the circumstances because lobbyists will not be easily deterred from pushing for their agenda.
15. He also submitted that no consideration had been given to the promotion of accountability and transparency in the circumstances. He argued that placing an obligation on officials to provide reasoned explanations for decisions made will improve the quality of decisions and administration.
16. The Commissioner notes that the information withheld on the basis of section 35(1)(a) is actually contained in 3 separate email chains between officials and ABI. Two of the email chains comprise of 4 emails each and the remaining email chain is made up of 3 emails.
17. The scope of the investigation therefore was to determine whether the public authority was entitled to withhold all the information in the email chains described above as well as the redacted information from the previously disclosed emails on the basis of the exemptions at sections 35(1)(a) and 40(2) of the Act respectively.

Reasons for decision

Section 40(2)

18. The Commissioner first considered whether the redacted information from the emails already disclosed to the complainant was correctly exempt from disclosure on the basis of section 40(2) of the Act.
19. The public authority explained that the redacted information consists of personal information relating to its officials and to lobbyists.

20. The Commissioner notes their names, roles, email addresses and work telephone numbers were redacted on the basis of section 40(2).
21. Information is exempt from disclosure on the basis of the exemption at section 40(2) if the information constitutes personal data and either the first or second condition in section 40(3) is satisfied.
22. Personal data is defined in section 1(1) of the Data Protection Act 1998 (the DPA) as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'
23. The names, roles, email addresses and work telephone numbers clearly constitute the personal data of the relevant officials and the lobbyists. It is information which relates to them and from which they can be identified.

Would the disclosure of the names contravene any of the Data Protection Principles?

24. As mentioned, for section 40(2) to apply, either the first or second condition in sections 40(3) and 40(4) must be satisfied. The first condition in section 40(3) states that the disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.
25. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless-
 - (a) at least one of the conditions in Schedule 2 is met, and*
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'*
26. In terms of the officials' personal information, the public authority explained that it related to staff they regarded as junior officials who did not exercise any significant level of authority in relation to the emails. It however clarified that it redacted the name of an official in a public facing role from an email of 8 September 2011 because it did not consider the name would add meaningful value to the complainant's understanding of the disclosed information. It also

clarified that where Robert Wright and Jo Taylor were mentioned, no redactions were made as they were already named in the request.

27. In terms of personal information relating to lobbyists, the public authority took the view that disclosure would not add meaningful value to the complainant's understanding of the disclosed information. The information disclosed included the names of the associations and organisations it was engaging with. It took into account that the individuals mentioned would not have expected their names to be disclosed in response to a request under the Act. The public authority strongly submitted that disclosure could cause them unwarranted damage or distress, for example, in terms of their career and/or reputation. It judged that the benefits of disclosure would not be proportionate to any potential harm, distress or intrusion.
28. The Commissioner finds that it would have been unfair to disclose the personal information of junior officials who had not exercised any significant level of authority in relation to the disclosed information. He accepts that they would have had a reasonable expectation that their personal information would not be revealed under the Act in the context of the disclosed information. The Commissioner therefore finds that the public authority was entitled to withhold this information on the basis of the exemption at section 40(2) of the Act.
29. The Commissioner however disagrees with the public authority in relation to the official in a public facing role whose personal information was redacted. Firstly, the official appears to hold a senior position in terms of responsibility and influence and secondly, given the nature of the official's role, the Commissioner finds the official would have had a reasonable expectation that their name and role could be revealed under the Act in the context of the disclosed information or at least in relation to the government's proposed reforms to civil litigation funding and costs in England and Wales. The Commissioner does not consider that disclosure would be a significant intrusion or cause damage or distress. In cases on the disclosure of officials' names and roles an assessment of the effects should always be done in the context of the subject matter and information. However, he accepts that disclosure of the contact details would be unfair.
30. The Commissioner notes that central government departments will often remove officials' names on the basis of a blanket policy, that junior, in their view, means below Senior Civil Service (SCS). The Commissioner believes the correct approach is to focus on the specific nature of the role and the relationship to the information rather than a simple cut off at SCS. The Commissioner notes the recent comments of the Tribunal in *Home Office v Information Commissioner EA/2011/0203*:

'each individual's case must be determined on its own facts, taking into account the sorts of issues we have set out above. It would not be appropriate, in our view, to impose a blanket policy on the disclosure or withholding of individual's [sic] names based solely on an individual's grade'

The Commissioner finds that it would not have been unfair to disclose the name of this official in a public facing role, which also had significant responsibility.

31. Schedule 2 of the DPA provides conditions relevant for the purposes of processing of personal data. The Commissioner considers paragraph 6(1) of schedule 2 to be the relevant condition in the circumstances. It states:

'The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.'

32. The Commissioner has already determined that the disclosure would be fair in view of the nature of the senior official's role and reasonable expectations. There is therefore a legitimate interest in disclosure which would not constitute an unwarranted intrusion on the rights and legitimate interests of the senior official.
33. The Commissioner further finds that the disclosure is necessary to meet the public interest in the transparency of the policy formulation process in relation to the proposed reforms. He considers that disclosing the senior official's name and role in the context of the email from which the official's name was redacted and more generally against the background of the proposed reforms is necessary to the transparency of the process. The Commissioner has considered the approach of the Tribunal to the necessity test in the Home Office decision mentioned above. In the Home Office case the Tribunal found that there was not a 'pressing social need' for the disclosure of two officials' names. In the context of the current case, looking at the context of the request and the information, the Commissioner finds that there is a 'pressing social need' to disclose the name and role of the official involved but not the contact details.
34. The Commissioner considers that the term 'lawful' in the context of the first data protection principle refers to statute and to common law, whether criminal or civil. He has not found any reason to suggest that disclosing the senior official's name and role in the circumstances would be unlawful. The Commissioner therefore finds the public

authority was not entitled to withhold this information on the basis of the exemption at section 40(2) of the Act.

35. The Commissioner also considers spokespersons acting on behalf of lobbying organisations attempting to influence government policy should have a reasonable expectation that their names and roles could be revealed under the Act in the context of their participation in the policy formulation or development process. Their names and roles relate to the work of the organisations rather than personal details and they are accountable to the membership of the organisation. Their rank and status are of relevance in assessing the weight given to their opinion. Knowing who is lobbying, who has been consulted, their seniority and role can add to the understanding of the government's proposed reforms to legal aid particularly in relation to civil litigation funding and costs.
36. The Commissioner finds that disclosing the names and roles of the lobbyists would not have been unfair, but it would be unfair to disclose the contact details.
37. The Commissioner considers paragraph 6(1) of schedule 2 of the DPA to be the relevant condition in the circumstances. For the same reasons as above in relation to fairness in disclosing the names and roles of the lobbyists, the Commissioner finds that there is a legitimate interest in disclosing their names and roles. He further finds that the disclosure would not constitute an unwarranted intrusion on their rights and legitimate interests. The disclosure is also necessary in the interests of transparency for the same reasons.
38. The disclosure would not have been unlawful in the circumstances. The public authority was therefore not entitled to rely on the exemption at section 40(2) of the Act to withhold the names and roles of the lobbyists.

Section 35(1)(a)

39. Information held by a government department is exempt from disclosure on the basis of section 35(1)(a) if it relates to the formulation or development of government policy.
40. The public authority submitted that the withheld information in the 3 email chains '*relates to the formulation of government policy in the area of referral fees, insofar as it relates to provisions in Part 2 of the Legal Aid, Sentencing and Punishment of Offenders Bill which is currently before Parliament.*'
41. It argued that the withheld information forms part of the ongoing engagement process between the government and key stakeholders, from both the claimant and the defendant side.

Was the public authority entitled to rely on the exemption at section 35(1)(a) to withhold the 3 email chains?

42. The Legal Aid, Sentencing and Punishment of Offenders Bill (the Legal Aid Bill) is the conclusive part of the steps the government is taking to reform the provision of legal aid in England and Wales. A period of public consultation between 15 November 2010 and 14 February 2011 was launched by the government following the completion of Lord Justice Jackson's independent review of the rules and principles governing the costs of civil litigation in England and Wales. Lord Jackson published his report, '*Review of Civil Litigation Costs: Final Report*', in January 2010.
43. Part 2 of the Bill generally deals with litigation funding and costs. It contains specific provisions in relation to conditional fee agreements (the most common type of 'no win, no fee' agreements). One of the more contentious provisions in this regard (i.e. in relation to conditional fee agreements) is the proposed change in the current law so that in future, claimants, not defendants, are responsible for paying the 'success fee' to reimburse the claimant's lawyer. In addition to changing the law on who is responsible for the 'success fee', the government also intends, as part of its reforms, to ban 'referral fees' which it considers would act as a disincentive to claims management companies, insurance companies, lawyers and other middle men from encouraging people to make unnecessary claims.
44. The Commissioner finds that the withheld information was part of the engagement process between the government and key stakeholders in connection with proposed reforms to legal aid, particularly in relation to civil litigation funding and costs.
45. The steps taken by the government including placing the Legal Aid Bill before Parliament is clearly evidence of the formulation of government policy in relation to the provision of legal aid in England and Wales. The Commissioner therefore finds the withheld information relates to the formulation of government policy in connection with the cost of civil litigation in England and Wales.
46. The Commissioner finds that the 3 email chains fell within section 35(1)(a) of the Act.

Public Interest Test

47. Section 35 is a qualified exemption. The Commissioner must therefore consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information in the emails.

48. In favour of disclosure, the public authority recognised that the information in the emails relates to matters of public interest. Disclosure would therefore allow the public access to information on the formation of government policy in the area of referral fees, civil litigation funding and costs. It acknowledged that this might encourage more public participation in the development of such proposals.
49. The public authority further acknowledged that disclosure would enhance public knowledge about how government policy was being formed in regard to civil litigation funding and costs including the nature of the interaction between officials and stakeholders. It specifically recognised that there was a public interest in making the contribution of lobbyists public as the policy debate was ongoing. The public authority also noted that disclosure would promote its accountability to the general public in relation to the legal aid reform.
50. In favour of maintaining the exemption, the public authority explained that the withheld information forms part of a dialogue between the government and stakeholders in the insurance industry in relation to referral fees and civil litigation funding and costs reform. The dialogue was taking place to allow officials to develop policy proposals with informed stakeholders, including representatives of both claimants and defendants so that the government could understand the impact of possible policy changes under consideration. The public authority strongly submitted that these discussions needed to take place out of the public eye. It argued that there was a significant public interest in the value of government being able to test ideas with informed third parties out of the public eye, and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken.
51. The public authority was keen to stress that the final decisions on referral fees and civil litigation funding and costs had not been made. It strongly submitted that disclosure would leave officials in the position of having to defend everything that was raised during deliberations and this, it argued, would hinder the development of actual and effective policy proposals.
52. The public authority also stressed that alternative views were sought by officials to counterbalance those expressed by the insurance industry stakeholders consulted. It argued that this approach had safeguarded government policy from being unduly influenced by lobbyists and therefore lessened the public interest test at the time of the request to scrutinise the submissions made by the insurance industry.
53. The public authority further argued that disclosure would result in civil servants being less inclined to consult with stakeholders on the risks

and implications of policy options, for fear of being accused, or misrepresented, as subject to undue influence from the insurance industry. As a consequence, their ability to assess risks and implications would be diminished.

54. The public authority concluded that there was a strong public interest in officials having safe space, free from lurid headlines to develop and test policy options on civil justice effectively, engaging relevant stakeholders where necessary before they are publicly presented.

Balance of Public Interest

55. The Commissioner agrees it is unlikely that disclosure would have deterred lobbyists on both sides of the argument from pursuing their interests. He accepts that there was a strong public interest in disclosing the exchanges between officials and ABI given the latter's role in shaping how government policy was being formulated in relation to referral fees as well as civil litigation funding and costs. There was therefore a strong public interest in revealing the influence ABI was having on the proposed reforms. Given that ABI represents a significant number of stakeholders in the insurance industry and has considerable expertise in the field, the Commissioner considers there was a further public interest in disclosure to ensure that the lobbying system is seen to be fair and even-handed.
56. As mentioned, the request was made in October 2011. The Commissioner understands that the Legal Aid Bill was introduced to Parliament on 21 June 2011. He also understands that the request was made in between the 14th and 15th sittings of the Committee debate on the Bill in the House of Commons. The Commissioner considers it is a question of fact whether or not the process of formulating or developing a government policy is complete. The Commissioner accepts that whilst the policy is still in the process of being turned into legislation the policy development is still ongoing. This can extend up to the Bill gaining Royal Assent and becoming legislation. If the policy making process is still ongoing, this does not rule out the possibility that significant landmarks in that process have been passed and that the sensitivity of the information has started to wane. In this case the Commissioner finds that at the time of the request in October 2011, the government's policy in relation to litigation costs and funding had yet to be finalised.
57. The Commissioner considers there is a significant public interest in maintaining safe space for discussions, debates and deliberation while the process of formulating a policy is ongoing. He agrees with the public authority that premature disclosure in the face of strong media scrutiny could undermine the integrity of the policy formulation process. He accepts that disclosure of this information during the live

policy process would be likely to increase the risk that officials may be less robust in their assessments of all the possible options in relation to litigation costs and funding in the Legal Aid Bill. The Bill represents a major shift in the way legal aid is administered in England and Wales. It is also a significant departure in relation to the party responsible for paying 'success fees' in civil litigations. Given that at the time of the request, the Bill was in between Parliamentary debates, the Commissioner considers that there was a strong public interest in maintaining the safe space for officials to robustly consider all options without been constrained by the fear of having to constantly defend every action in public.

58. Conversely, it could be argued that given the importance of the Legal Aid Bill, there was a strong public interest in disclosure to ensure that the process was transparent and that the government could be held accountable for its policy. The Commissioner accepts that this is a significant public interest argument for disclosure and further information about the policy formulation could enable the public to engage with the debate, for example members of the public could contact their MP about the Bill. However, the Commissioner does accept that the Parliamentary oversight process itself, evidenced by the Committees debates, reduces the need for disclosure to enable accountability, to some extent. The Commissioner considers that premature disclosure in the circumstances at the time of the request was unlikely to significantly enhance the robustness of the policy formulation process given that the Bill is one which had (and still does) generated strong debates on both sides of the divide. It was more likely that officials could have become overly cautious in their deliberations for fear of been misrepresented or accused of been unduly influenced by lobbyists. Whilst disclosing the withheld information in the emails was likely to enhance the transparency of the process, it has to be balanced against the likely constraints on officials in conducting a robust assessment of all available options.
59. As mentioned, the Commissioner considers there is clearly a strong public interest in disclosing information relating to lobbyists. However, that has to be balanced against the equally strong public interest in ensuring that officials are able to conduct government business effectively, free from the constraint of constant media attention. Therefore, in the circumstances of this case, the Commissioner considers that on balance, the public interest in maintaining safe space for officials to formulate government policy in relation to civil litigation costs and funding was more significant.
60. The Commissioner finds that in all the circumstances of this case, the public interest in maintaining the exemption at section 35(1)(a) outweighed the public interest in disclosing the withheld information in the 3 email chains.

Right of appeal

61. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

62. 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.
63. 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

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF