

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 February 2014

**Public Authority:** The Crown Prosecution Service  
**Address:** 5th Floor Rose Court  
2 Southwark Bridge  
London SE1 9HS

#### **Decision (including any steps ordered)**

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1. The complainant has requested information related to a previous FOIA request he had made to the Crown Prosecution Service ("CPS"). The CPS cited section 36 (prejudice to the effective conduct of public affairs) as a basis for refusing the requested information. It upheld this position after an internal review.
2. The Commissioner's decision is that the CPS is entitled to rely on the exemption it has cited as a basis for refusing the requested information. However, the CPS contravened its obligations under section 10 of the FOIA in failing to respond within 20 working days.
3. No steps are required.

#### **Background**

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4. The request in this case is for information created as a result of a previous FOIA request to which the CPS had given the reference number 3545. The previous FOIA request was made on 12 October 2012 in the following terms:

"Please disclose all documents relating to the charging decision taken by the CPS against the late Sir Jimmy Savile.

As way of background on October 1 this year [2012] Surrey Police released the following statement: 'In 2007 Surrey Police received an historic allegation of indecent assault which is alleged to have occurred at a children's home in Staines during the 1970s.

'The allegation was investigated and an individual was interviewed under caution.

'The matter was referred to the Crown Prosecution Service for a charging decision who advised there was insufficient evidence to take any further action.'

I am requesting documents detailing the Crown Prosecution Service's charging decision in this case.

I envisage that names of potential victim/s may need to be redacted to ensure compliance with both the Data Protection Act and the Sexual Offences Act and do not intend to apply for such redaction to be lifted.

Separately, please disclose the names of the CPS staff involved in the charging decision."

5. For the avoidance of doubt, this decision notice does not address the merits or otherwise of how the CPS handled the complainant's request of 12 October 2012. However, the chronology of events surrounding this earlier request is relevant to this case. To avoid further confusion, the Commissioner will now refer to this earlier request as "FOI request 3545". The complainant also refers to this earlier request by this phrase in his correspondence with the CPS.
6. The Commissioner notes that on 24 October 2012, the Director of Public Prosecutions ("DPP") at the time, Keir Starmer QC, issued a statement regarding reviews of the charging decisions referred to in FOI request 3545.<sup>1</sup> At the end of the DPP's statement of 24 October 2012 is a reference to a review which was to be conducted by his Principal Legal Advisor, Alison Levitt QC.
7. The complainant received the CPS' response to FOI request 3545 on 14 November 2012. It provided the name of a prosecuting lawyer in Surrey but refused to provide the remainder of the information described in that request. The complainant requested an internal review of the CPS' response to FOI request 3545 shortly after receiving this refusal. The Commissioner understands that there was delay on the CPS' part in providing him with the outcome of the internal review. The CPS sent an update to the complainant about the delay on 20 December 2012.

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<sup>1</sup> <http://blog.cps.gov.uk/2012/10/cps-statement-on-jimmy-savile-.html>

8. Alison Levitt QC's report (the "Levitt report") was eventually published on 11 January 2013.<sup>2</sup>
9. The CPS sent the complainant the outcome of its internal review of FOI request 3545 on 21 January 2013. It upheld its original refusal but included a link to the "Levitt report".

## **Request and response**

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10. On 21 December 2012 (that is, prior to the publication of the Levitt report), the complainant requested information of the following description:

"Please provide copies of all internal correspondence and communications in relation to FOI request 3545, made on October 12. This includes all correspondence and communications in providing a response which was received on November 14. And this also includes all correspondence and communication in relation to an update given by [named CPS employee] on December 20 in relation to a request for an internal review of FOI request 3545."

11. On 23 January 2013 (that is, after the publication of the Levitt report), the CPS wrote to advise of a delay. The complainant chased this up on 18 February 2013 and 28 February 2013. The CPS acknowledged this on 11 March 2013 and the complainant chased a response again on 20 March 2013. The complainant sought the Commissioner's intervention on 3 April 2013. The CPS wrote to the complainant on the same date to advise that it was treating the request as a priority. On 19 April 2013, the complainant chased this again. CPS wrote to the complainant on 23 April 2013 to advise that it would be sending a response by 29 April 2013.
12. In its response dated 29 April 2013, the CPS provided some information but withheld other information. It cited the following exemptions as its basis for doing so:
  - section 40(1) (the requester's personal data);
  - section 40(2) (unfair disclosure of personal data); and

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[http://www.cps.gov.uk/news/latest\\_news/dpp\\_statement\\_about\\_savile\\_cases/executive\\_summary\\_on\\_jimmy\\_savile\\_cases\\_report/](http://www.cps.gov.uk/news/latest_news/dpp_statement_about_savile_cases/executive_summary_on_jimmy_savile_cases_report/)

- section 36(2)(b)(ii) (prejudice to the effective conduct of public affairs).

13. The complainant requested an internal review of its use of section 36(2)(b)(ii) on 30 April 2013. The CPS sent the complainant the outcome of its internal review on 19 July 2013. It upheld its original position regarding section 36(2)(b)(ii).

### **Scope of the case**

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14. The complainant contacted the Commissioner on 10 August 2013 to complain about the way his request for information had been handled. He complained about the CPS' use of section 36(2)(b)(ii) in relation to that information within the scope of his request to which it had been applied. He did not dispute the CPS' use of section 40. It had applied provisions of this exemption to the complainant's own personal data and to small amounts of personal data relating to employees of the CPS.
15. The Commissioner has considered whether the CPS was entitled to rely on section 36(2)(b)(ii) in relation to that information within the scope of the complainant's request to which it has been applied.

### **Reasons for decision**

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16. Section 36(2)(b)(ii) of the FOIA states 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-

- (ii) the free and frank exchange of views for the purposes of deliberation'

17. In this case, the CPS sought the opinion of the DPP<sup>3</sup> on 17 April 2013. He provided an opinion on the application of section 36(2)(b)(ii) on 24
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<sup>3</sup> At the time of the request and in the early stages of the Commissioner's investigation, the DPP was Keir Starmer. On 1 November 2013, Alison Saunders was appointed DPP (<http://www.cps.gov.uk/about/dpp.html>).

April 2013. The Commissioner is satisfied that the DPP is the CPS' qualified person for the purposes of section 36.

18. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
  - Whether the prejudice 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.
  - 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.
  - The qualified person's knowledge of, or involvement in, the issue.
19. Further, 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. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. 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.
20. The CPS sought the qualified person's opinion on 17 April 2013. The DPP gave his opinion shortly after this on 24 April 2013. However, it should have sought the qualified person's opinion within 20 working days of receiving the request in order to comply with the timescales for response set out in section 10 of the Act. The CPS' failure to provide a timely response is not, however, a factor that can be considered when assessing the reasonableness of the qualified person's opinion.
21. When it eventually explained its use of section 36 to the complainant, the CPS said:

“disclosure of some of the material you have requested would inhibit the free and frank exchange of views for the purposes of deliberation. Disclosure of the information would inevitably lead to staff being more circumspect in their advice and in putting their views forward. As a result discussions in future would be less well informed which would in

turn leave the CPS less able to respond consistently and appropriately to requests under FOIA”.

22. In the Commissioner’s view, this is a reasonable opinion. It relates directly to the question of whether disclosure would inhibit any future exchange of views in this context. It is also a logical view that someone in the position of the qualified person could reach in the circumstances. As noted above, it is not for the Commissioner to determine whether this is the most reasonable opinion that could be held or indeed, the only opinion that could reasonably be held.
23. In light of the above, the Commissioner is therefore satisfied that section 36 (b)(ii) is engaged.
24. The CPS can only rely on section 36(b)(ii) where the public interest in doing so outweighs the public interest in disclosure. The Commissioner has therefore gone on to consider the balance of public interest in this case.

### **Public interest test**

25. The role of the Commissioner here is to consider whether the public interest in disclosure is outweighed by the public interest in maintaining the exemption. When assessing the balance of the public interest in relation to section 36, the Commissioner will give due weight to the reasonable opinion of the qualified person, but will also consider the severity, extent and frequency of the inhibition that he has accepted would result through disclosure.

### **Arguments in favour of disclosure**

26. The CPS said it had considered the following factor in favour of disclosure:
  - “The reasons behind the decision not to charge Jimmy Savile were of significant public interest at the time of the request and, consequently, there is a clear public interest in disclosure of CPS internal correspondence regarding a FOIA request for the charging decision”.
27. The complainant submitted the following arguments in favour of disclosure:
  - “The CPS has failed to provide any evidence to show future, unrelated discussions would be prejudiced by disclosure.
  - The ICO is clear that authorities must not exempt potentially embarrassing material and is also clear that ‘civil servants and other public officials are expected to be impartial and robust when giving

advice, and not easily deterred from expressing their views by the possibility of future disclosure'.

- In relation to any 'chilling effect' the ICO also makes this very valid point: 'It is also possible that the threat of future disclosure could actually lead to better quality advice'.
- The public interest can only be served by full disclosure.

### **Arguments against disclosure**

28. The CPS submitted the following arguments against disclosure:

- "The withheld material does not add much to the information already in the public domain in relation to the Jimmy Savile charging decision. The material contains draft responses and emails in which CPS staff exchange views for the purpose of issuing a considered response to a FOIA request. The information does not relate directly to the Jimmy Savile charging decision".

- "Alison Levitt's detailed report ... goes into significant detail regarding the CPS decision making and therefore reduces the public interest in disclosure of the withheld material further still".

29. For obvious reasons, the complainant did not submit any arguments against disclosure nor did the Commissioner require him to.

### **The Commissioner's decision**

30. The original charging decisions made in relation to allegations made against Jimmy Savile have caused considerable public anger. This has had an adverse effect on public trust in the CPS. There is particular concern about the way it has handled allegations of sexual abuse made by young and/or vulnerable people against individuals in positions of authority or individuals held in high regard.

31. The complainant's request was clearly prompted by the delays he had been experiencing in response to his FOI request 3545 which sought further information about the original charging decisions. When he made the request which is under consideration in this case, he was still waiting for the CPS to review its initial refusal of FOI request 3545.

32. As noted above, when considering the balance of public interest, the Commissioner considers the severity, extent and frequency of the inhibition that he has accepted would result through disclosure.

33. In the Commissioner's opinion, a crucial factor in the balance of public interest in this case is the timing of the request. When considering the

balance of public interest, the Commissioner must look at the circumstances prevailing at the time of the request, or at the time for compliance with the request (up to 20 working days after the request was received). Put another way, was the CPS correct, at the time of the request, to reach the view that the balance of public interest favoured maintaining the exemption it sought to rely on?

34. At the time of the request, the CPS was awaiting the outcome of Alison Levitt's review into the very subject covered in FOI request 3545. This means that the CPS were dealing with a series of complex and interconnected matters at the same time:
- The Levitt review itself
  - Ongoing and legitimate public concern about the matters covered in the Levitt review
  - Its response to questions about the Levitt review in advance of the publication of the review
  - Its compliance with its legal obligations under FOIA about requests, such as FOI request 3545, that were closely related to the subject matter of the Levitt review
35. The request under consideration in this decision notice is for a further layer of detail in this series of issues.
36. Where the CPS receives an FOIA request on a controversial topic that is under separate review at the same time, it must focus on providing its response to the initial FOIA request. There is little public interest in diverting it from that task by also requiring it to publish, at the same time, its deliberations into its handling of that request. The request in this case seeks access to such deliberations while they are still live. Such a request, in these circumstances, might well be considered a vexatious request under section 14 of FOIA.
37. The Commissioner recognises that there is a public interest in allowing the public to see, at an appropriate time, how a public authority has handled an FOIA request. In the circumstances of this case, he does not agree that this public interest factor carries substantial weight here. There will rarely be a public interest in providing a "running commentary" on the detail as to how a public authority is complying with its legal obligations in relation to other earlier requests that are being handled at the same time. Given the sensitivities surrounding the substantive issue covered by FOI request 3545, the short amount of time that had elapsed since that request had been made and the work which was going on at the time in relation to the Levitt review, the

Commissioner does not think that this would have been at all appropriate in this case.

38. The Commissioner also recognises that the CPS did not seek the qualified person's opinion until sometime considerably after the publication of the Levitt report, that is, until April 2013. As noted above, the Commissioner cannot take this into account when considering the reasonableness of the opinion. In the same way, it does not undermine the CPS' arguments as to the balance of public interest at the time of the request. Further comment about this delayed response is given later in this notice.
39. In light of the above, the Commissioner has concluded that the public interest in maintaining the exemption at section 36(2)(b)(ii) outweighs the public interest in disclosure in this case. In reaching this view, the Commissioner has given particular weight to the timing of the request. At the time the request was made, the CPS was still handling FOI request 3545 which was, in itself, about an important ongoing issue. To comply with its legal obligations in relation to FOI request 3545, the CPS was entitled to have a safe space for the free and frank exchange of views. Such exchanges would have been inhibited if the CPS had been required to publish information about them contemporaneously. This inhibition would be contrary to the public interest.

### **Section 10 – Delay**

40. Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

41. In this case, the request was made on 21 December 2012 and therefore the first working day following the date of receipt was 24 December 2012. The CPS did not provide a response until 29 April 2013 which is 86 working days following the date of receipt. In failing to provide a response within 20 working days, the CPS contravened the requirements of sections 1 and 10 of the FOIA.

### **Other matters**

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42. Whilst there is no explicit timescale laid down by the Act for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner believes that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it

may be reasonable to take longer but in no case should the time taken exceed 40 working days.

43. The Commissioner is concerned that in this case, it took 56 working days for an internal review to be completed. The Commissioner does not believe that any exceptional circumstances existed to justify that delay, particularly given that the Levitt report had been published four months before the request for internal review was made, and he therefore wishes to register his view that the CPS fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the CPS of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.
44. The Commissioner would also note that as at the date of this Notice, the CPS was subject to formal monitoring in relation to the timeliness of its responses to requests made under FOIA.<sup>4</sup>

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<sup>4</sup> [http://ico.org.uk/what\\_we\\_cover/monitoring\\_compliance](http://ico.org.uk/what_we_cover/monitoring_compliance)

## Right of appeal

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45. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

46. 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.
47. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**