

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 June 2015

Public Authority: Ministry of Defence

Address: Main Building
Whitehall
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted four requests to the Ministry of Defence seeking information about how it had handled an earlier request, submitted by another individual, which had sought a copy of a presentation made to the Army Justice Board (AJB). In response the MOD provided the complainant with copies of the information falling within the scope of his four requests, albeit with exemptions applied on the basis of section 21 (information reasonably accessible by other means); section 30 (investigations); section 31 (investigations); section 35 (government policy); section 36 (effective conduct of public affairs); section 40 (personal data) and section 42 (legal professional privilege).
2. The complainant disputed the application of the various exemptions and was also dissatisfied with the MOD's failure to explain which parts of the redacted information had been withheld on the basis of section 36 of FOIA.
3. The Commissioner's decision is as follows:
 - The MOD is entitled to rely on the various exemptions it has cited. The only exceptions to this are as follows:
 - The information redacted from agenda item 2a (indicated as serial 11 on the schedule of information provided to the Commissioner) is not exempt from disclosure on the basis of section 35(1)(a).
 - The information redacted from agenda item 4 (indicated as serial 20 on the schedule of information provided to the

Commissioner) is not exempt from disclosure on the basis of section 21.

- The information redacted from slide 40 from the AJB presentation (serial 27 in the MOD's schedule as provided to the Commissioner); the information redacted from briefing notes on agenda item 1b (serial 7); the information redacted from agenda item 4 (serial 23); and the information redacted from agenda item 6a (serial 26), sub para 3b is not exempt from disclosure on the basis of section 40(2).
 - The MOD breached section 17(1)(b) by failing to specify which exemption had been applied to each particular redaction.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
- Provide the complainant with the relevant parts of the briefing notes without the redactions identified at serials 7, 11, 20¹ and 23 in place.²
 - Provide the complainant with a copy of the information disclosed to him on 16 and 29 September 2014 but this time annotating the redactions which have been made on the basis of section 36.]
5. 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

6. The complainant submitted the following requests to the MOD on 29 April 2014:
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¹ The MOD can however continue to withhold paragraphs 2c, 2g, 4b and 4c as the Commissioner is satisfied that section 36(2)(b)(i) applies to this information.

² Similarly, although the Commissioner has concluded that section 40(2) does not apply to the information redacted from slide 40 (serial 27) and the information contained at sub para 3b in agenda item 6a (serial 26), he is satisfied that this information is exempt from disclosure on the basis of section 36(2)(b)(i). He has not therefore ordered this information to be disclosed.

[1] A copy of the request made under freedom of information to the MOD with the reference: 18-09-2013-151538-006

[2] All responses provided to freedom of information request: 18-09-2013 151538-006

[3] All internal MOD communication generated from the freedom of information request 18-09-2013-151538-006.

[4] Screen prints showing all data held on the Access to Information Toolkit (AIT) regarding the freedom of information request 18-09-2013-151538-006.³

7. The MOD contacted the complainant on 20 June 2014 and confirmed that it held information falling within the scope of his requests but it considered this information to be exempt from disclosure on the basis of the exemptions contained at the following sections of FOIA: 30, 31, 35, 36 and 42. It explained to the complainant that it needed further time to consider the balance of the public interest in relation to each exemption.
8. Having become dissatisfied with the amount of time it was taking the MOD to complete its public interest considerations, the complainant contacted the Commissioner. The Commissioner issued a decision notice on 11 August 2014 in which he ordered the MOD to issue a substantive response to the requests.⁴
9. The MOD contacted the complainant on 16 September 2014 and provided him with a response in relation to requests 1, 2 and 4. The

³ Request 18-09-2013-151538-006 sought the following information:

- '1. The Army Justice Board (un-redacted) powerpoint slide presentation (with notes) from the AJB meeting which I believe was held Wednesday 11 September 2013.*
- 2. All the Army Board briefing notes marked "restricted management" (un-redacted), which explain what is laid out in the powerpoint presentation, in relation to the AJB meeting held Wednesday 11 September 2013.'*

The requester was provided with a copies of the information he sought albeit with redactions applied on the basis of the following sections of FOIA: 21(1), 30(1)(a), 30(1)(a), 35(1)(a), 36(2)(b) and (c), 40(2) and 42(1). As explained later in this notice, the information originally sought by request 18-09-2013-151538-006 also falls within the scope of the request 3 as submitted by this complainant on 29 April 2014.

⁴ FS50543110

MOD provided him with the information it held falling within the scope of these requests albeit noting that some information had been redacted on the basis of section 40(2) of FOIA. Furthermore, with regard to request 2, the MOD noted that the final response to the FOI request in question (18-09-2013-151538-006) actually post-dated his requests. Nevertheless, the MOD explained that it was providing a redacted version of its response to that request.

10. The MOD contacted the complainant again on 29 September 2014 and provided him with a response to request 3. The MOD provided the information falling within the scope of this request but explained that redactions had been made on the basis of the following sections of FOIA: 21, 30(1)(a), 31(1)(a), 35(1)(a), 36(2)(b), 36(2)(c), 40(2) and 42(1).
11. The complainant contacted the MOD on 2 October 2014 and asked it to conduct an internal review into its handling of his requests. He explained that he disputed the application of all of the exemptions cited in the MOD's responses of 16 and 29 September 2014. He also asked the MOD to indicate which specific redactions had been made under section 36 of FOIA.
12. The MOD acknowledged receipt of the internal review request on 2 October 2014 and explained that the majority of internal reviews were taking between 20 and 40 working days to complete.
13. The MOD contacted the complainant again on 14 January 2015 and explained it had not yet completed its internal review considerations. It aimed to have done so by 4 February 2015.
14. The MOD informed the complainant of the outcome of the internal review on 18 March 2015. The internal review upheld the application of the various exemptions, the only exceptions being a small amount of information which had previously been withheld under sections 21 and 40(2) respectively which was disclosed to the complainant. The MOD also informed him that it was not prepared to highlight which parts of the withheld information section 36 had been applied to because public authorities are not obliged to provide a paragraph by paragraph analysis of which exemptions apply to particular redactions.

Scope of the case

15. The complainant contacted the Commissioner on 18 December 2014 to complain about the MOD's failure to complete the internal review. Following the completion of the internal review the complainant confirmed to the Commissioner that he remained dissatisfied with the

MOD's reliance on the various exemptions cited by it to withhold parts of the withheld information.

16. In essence, the requests submitted by the complainant on 29 April 2014 are 'meta-requests' in that they seek information held by the MOD in relation to how it handled a previous FOI request submitted by another individual.
17. The information originally disclosed by the MOD in response to this previous request, ie the AJB presentation and briefing notes, falls within the scope of request 2 of the complainant's request. However, in order to comply with request 2 the MOD simply had to provide the complainant with a copy of the material in the format it was disclosed, ie with the various redactions listed in footnote 1 in place. Nevertheless, an unredacted copy of the AJB presentation and briefing notes were attached to an email which fell within the scope of request 3. In effect then, the complainant's requests of 29 April 2014 seek the *same* information as sought by the previous request received by the MOD *and* details of how the MOD handled this previous request.

Reasons for decision

Section 36 – effective conduct of public affairs

18. The MOD has relied on section 36(2)(b)(i) to rely on two classes of information, firstly information contained in the AJB briefing material and secondly information redacted from the internal communications falling within the scope of request 3. The MOD also sought to rely on section 36(2)(c) to withhold some information contained within the briefing notes for the AJB presentation.
19. Sections 36(2)(b)(i) and (c) 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...

...(c) would otherwise prejudice, or would be likely otherwise prejudice, the effective conduct of public affairs.'*
20. In the circumstances of this case the MOD sought two separate opinions from the qualified person, both of which were sought from the Minister for Defence Personnel, Welfare and Veterans.

21. The first opinion, provided in November 2013, was sought as part of the MOD's response to the original FOI request and covered information contained in the AJB briefing material. Although this opinion was sought in relation to the previous request, as the exact same information fell within the scope of request 3 the MOD continued to rely on this opinion to engage both exemptions in relation to information contained in the AJB presentation and briefing notes which it was still seeking to withhold on the basis of sections 36(2)(b)(i) and (c).
22. In this opinion the qualified person argued that the section 36(2)(b)(i) was engaged in respect of the advice provided by junior staff officers to the AJB board and the Adjutant General to facilitate their discussions. She argued that disclosure of this advice 'would' inhibit the provision of similar advice in the future. In relation to section 36(2)(c) she argued that disclosure of information pertaining to ongoing cases would undermine the MOD's ability to manage these cases effectively and the failure to do so would result in a variety of risks to the department which ultimately presented a threat to the effective conduct of public affairs.
23. The second opinion was sought specifically in response to the complainant's requests. In it the qualified person argued that disclosure of parts of the internal MOD communications falling within the scope of request 3 'would' inhibit the free and frank provision of advice and thus was exempt from disclosure on the basis of section 36(2)(b)(i). This was on the basis that disclosure of advice about how to handle FOI requests would inhibit similar discussions in the future.
24. 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.
25. 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.

26. The Commissioner is satisfied that the two opinions provided by the qualified person are reasonable ones. In relation to the first opinion, the Commissioner accepts that information redacted from the AJB presentation and briefing notes consists of detailed and frank advice regarding issues associated with Army discipline. In the Commissioner's view it is reasonable to suggest that disclosure of such information risks having an inhibiting effect on the provision of such advice in the future. Furthermore, having reviewed the information withheld on the basis of section 36(2)(c) the Commissioner accepts that its disclosure would risk prejudicing the MOD's ability to manage the ongoing legal cases which are identified in the information itself and this in turn would indeed risk prejudicing the effective conduct of public affairs. In relation to the second opinion the Commissioner recognises that the internal communications regarding the handling of the original FOI request are also detailed and clearly contain frank advice about the handling of that request. Given the nature of this advice the Commissioner therefore considers it reasonable to suggest that disclosure would inhibit the provision of advice in similar circumstances in the future.
27. The Commissioner has therefore concluded that sections 36(2)(b)(i) and (c) are engaged.

Public interest test

28. Section 36 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining either of the exemptions cited outweighs the public interest in disclosing the information.
29. As noted, the exemptions contained at section 36 have been relied upon to withhold two broadly different types of information; firstly information contained within the AJB presentation and secondly information concerning the management of the original FOI request which sought a copy of this presentation. Therefore, in considering the balance of the

public interest test the Commissioner has taken into consideration the differences between the information that has been withheld under these exemptions.⁵

Public interest arguments in favour of disclosing the information

30. The complainant argued that Service Complaints and Service Justice are matters of significant public interest, especially because the MOD has the sole duty of care to Service Personnel. He argued that for the Service Justice System (SJS) to operate effectively without the oversight of independent bodies it is particularly important that bodies such as the AJB are open and transparent. More specifically, the complainant argued that the suspicion of wrongdoing will increase the balance of the public interest. He suggested that in previous AJB meetings the subject how the Army had, as he phrased it, 'incorrectly punished soldiers who had received police cautions' had been discussed. The complainant argued that if any of the withheld information concerned changes to Rehabilitation of Offenders Act or Armed Forces Act, due to the incorrect disciplining of soldiers with police cautions, then there was a clear public interest in the disclosure of such information. The complainant also questioned the significant amount of information that appeared to have been redacted on the basis of section 36. He specifically queried whether disclosure simply of the titles of some of the slides would be prejudicial to public affairs and inhibit the free and frank provision of advice.
31. In relation to the information contained in the AJB presentation and briefing notes, the MOD acknowledged FOIA's general presumption of openness and that disclosure of the withheld information would allow the public access to information available on the issues discussed by the AJB. In particular it accepted that disclosure would improve transparency in relation to the SJS and in particular the actions the Army is taking on a number of issues concerning the SJS.
32. Similarly, in relation to the information concerning how the original request was handled, the MOD acknowledged that its disclosure would

⁵ It should be noted that the MOD has provided the Commissioner with a detailed analysis of the balance of public interest test for each specific redaction it has made on the basis of section 36. Given the number of redactions, and moreover the references the MOD's submissions make to the withheld information, the Commissioner has not set these submissions out in full in this notice. Rather they are set out in a summarised form. Indeed the MOD made similarly detailed and specific submissions in relation to its reliance on the other exemptions it cited. Again, and for similar reasons, this notice refers to a summarised version of the MOD's submissions when discussing the other exemptions.

also contribute to the legislations' general presumption of openness and would also reveal some of the issues the AJB was considering about the SJS given that the request handling information refers directly to the AJB presentation itself. The MOD also noted that if staff were aware that their advice concerning the handling FOI requests was to be disclosed this could improve the quality of the advice.

Public interest arguments in favour of maintaining the exemption

33. The MOD argued that the public interest favoured maintaining section 36(2)(b)(i) in relation to the AJB presentation and briefing notes for the following reasons:
34. The redacted information focuses primarily on steps being taken by the Army to resolve ongoing issues concerning personnel issues. In this context the points being discussed are sensitive ones which have the potential to have a wide impact across the Army. Consequently, the MOD argue that it was likely that disclosure would have the following consequences, all of which were firmly against the public interest:
 - Disclosure of such advice would be likely, the MOD argued, to prevent open and honest advice being submitted to senior officers in the future if subordinates are concerned it might be disclosed publicly.
 - Would be likely to inhibit senior officers from seeking formal advice because of concerns that advice may be less than free and frank.
 - Likely to inhibit senior officers from seeking formal advice because of concerns that the advice might be disclosed and embarrass subordinates and/or the requester.
 - Disclosure may prevent documenting of advice and thus a possible shift to oral briefings with a written record being kept.
35. In relation to the application of section 36(2)(b)(i) to the request handling information, the MOD argued that a similar a chilling effect on discussions about the handling of FOI requests would occur; junior officials would be inhibited from seeking and offering frank advice on the handling of requests if they knew such information was to be disclosed. The MOD argued that such an outcome would be firmly against the public interest as it would impact directly on the quality of future output and decision making.
36. In relation to application of section 36(2)(c) to information contained in the AJB presentation and briefing notes, the MOD argued that disclosure of this information would be seriously prejudicial to the department's position in the courts and given the precedent setting nature of some of the cases, could therefore significantly impact on the department's

longer term ability to conduct its operations and have a negative reputational and financial impact if followed by a significant number of claims. The public interest therefore fell firmly in favour of allowing the MOD to determine its legal strategies in confidence.

Balance of the public interest test in relation to section 36(2)(b)(i)

37. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
38. With regard to attributing weight to chilling effect arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when giving advice. They should not easily be deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand. If the decision making which is the subject of the requested information is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing discussions are likely to carry significant weight. Arguments about the effect on closely related decisions or policies may also carry weight. However, once the decision making in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
39. In relation to the application of section 36(2)(b)(i) to the AJB briefing material, the Commissioner understands that at the point that the complainant submitted his request, many of the issues discussed in the material remained ones that were subject to ongoing decision making. Furthermore, having examined the information that has been redacted from the briefing material the Commissioner accepts that it discusses a number of sensitive topics in a candid and frank manner. The Commissioner therefore accepts that disclosure of this information would present a real and significant risk in having a chilling effect on the contribution of advice to future AJB briefing documents. The Commissioner accepts that this would undermine decision making and be contrary to effective government in the manner the MOD argued.
40. In relation to the application of this exemption to the internal communications concerning the original request, the Commissioner recognises that the MOD's decision making in respect of that particular case was complete at the point at which the complainant submitted that

request. Nevertheless, given the detailed and frank nature of the discussions the Commissioner is persuaded that disclosure of this information would still infringe discussions necessary as part of the handling of future FOI requests received by the MOD. In the Commissioner's view there is significant public interest in allowing public authorities to discuss internally how to handle such requests before responding.

41. In relation to the arguments in favour of disclosure, the Commissioner agrees with the complainant that there is a clear public interest in ensuring that the SJS is both accountable and transparent. Such an interest is arguably increased, as the complainant suggests, because of the criticisms that the SJS has faced from various quarters. Disclosure of the information redacted from the AJB briefing material would provide the public with a clear and indeed detailed insight into the issues discussed by the board at the briefing in September 2013. This would demonstrate how the Army is dealing and managing the various matters that are discussed including those directly affecting the SJS. This could reassure the public about the actions that the Army is taking. Consequently, the Commissioner is of the view that the public interest in disclosing the information redacted from the AJB briefing material should not be underestimated.
42. In contrast, the Commissioner believes that the public interest in disclosing the information redacted from the internal communications regarding how the request was dealt with is somewhat more limited. Whilst disclosure would be useful in explaining how the MOD dealt with a complex FOI request, the overarching value in such an outcome is arguably quite limited in comparison.
43. However, the Commissioner has concluded that the public interest favours maintaining the application of section 36(2)(b)(i). In relation to the application of the former exemption to the AJB briefing documentation, the Commissioner recognises there is a significant public interest in disclosing information about matters affecting the SJS. However, in the Commissioner's view this interest is met, to some extent, by the information contained in the AJB briefing material that has already been disclosed. Furthermore, the Commissioner believes that any such public interest in disclosure is outweighed by the MOD having the ability to freely and frankly discuss issues concerning such matters in order to protect the future policy and decision making process. In reaching this conclusion the Commissioner is satisfied that disclosure even of some of the titles of particular slides would present a real risk to nature of future discussions on this subject.
44. With regard to the disclosure of the internal communications, the Commissioner is of the view that the public interest significantly firmly

favours allowing the MOD to discuss and process future FOI requests it receives with the benefit of free and frank internal advice.

45. With regard to the application of section 36(2)(c), the Commissioner accepts that there is a compelling public interest in ensuring the MOD is able to effectively manage its approach to ongoing legal cases. Therefore although disclosure of the information withheld under this exemption would provide the public with an insight into these cases, the Commissioner believes that the public interest firmly favours maintaining this exemption.

Section 35(1)(a) – formulation and development of government policy

46. Section 35(1)(a) of FOIA states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

47. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
48. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
49. At the very least 'formulation or development' suggests something dynamic, ie something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
50. In describing these general principles the Commissioner fully recognises that policymaking can take place in a variety of ways: there is no uniform process. Whether information relates to the formulation or

development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.

51. Nevertheless, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
52. The MOD argued that the information that it withheld on the basis of section 35(1)(a) related to the government's policy for dealing with service complaints which will inform the drafting of the Armed Forces Bill (AFB).
53. Having reviewed the withheld information the Commissioner accepts that the majority of this clearly relates to the formulation of the Armed Forces Bill. That is because such information comprises details of various measures, including the approach to service level complaints, which could be included in the AFB. However, the Commissioner does not accept that the information redacted from agenda item 2a (indicated as serial 11 on the schedule of information provided to the Commissioner) can be said to fall within the scope of this exemption. This is because in the Commissioner's view the information redacted from this document relates to the operational army policy rather than government policy options in relation to the AFB. Such information is not therefore exempt from disclosure on the basis of section 35(1)(a).

Public interest test

54. Section 35 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

55. The MOD emphasised that the withheld information comprised proposals for the next Armed Forces Bill, the development of which was clearly a significant policy issue for the Army and MOD. It argued that release of such unrefined information or details of such immature information was

not in the public interest. This is because disclosure of information in this state would be likely to damage public confidence in the MOD's conduct of processes such as the AFB and be prejudicial to a meaningful public debate. The MOD argued that public debate on Service Complaints issues should be well informed and based on a mature analysis of the issues that government has considered as strategic questions that need to be answered. Premature release of the information would be prejudicial to effective policy making as it would override the government's right to freely discuss and consider all aspects of potential policy in private to ensure that it is of maximum value.

Public interest in disclosing the withheld information

56. As indicated above, the complainant argued that if the withheld information related to changes to the Rehabilitation of Offenders Act or Armed Forces Act, due to the incorrect disciplining of soldiers with police cautions, thus hiding wrongdoing, then the public interest would clearly favour disclosure of this information.

Balance of the public interest arguments

57. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of the section 35(1)(a). In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.⁶
58. With regard to the safe space arguments, the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public

⁶ *DFES v Information Commissioner and Evening Standard (EA/2006/0006)*

interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.

59. In the circumstances of this case, the complainant submitted his request on 29 April 2014. It is the Commissioner's understanding that at this point the policy making surrounding the forthcoming Armed Forces Bill remained live. In light of this the Commissioner accepts that considerable weight should be attributed the chilling effect arguments given that the policy making process remained live and the information redacted on this basis is candid and detailed in nature. For similar reasons, the Commissioner believes that considerably weight needs to be given to the safe space arguments. Given the interests in matters associated with the SJS, and indeed the criticisms of it as referred to by the complainant, the Commissioner believes that disclosure of the redacted information at the point the complainant submitted his request would result in the MOD having to deal with considerable external interest and involvement in this matter. Both effects, would in the Commissioner's opinion, be firmly against the public interest.
60. That said, the Commissioner accepts that disclosure of the withheld information would provide the public with a clear insight into the policy areas being considered for inclusion in the forthcoming Armed Forces Bill. Disclosure of this information would not only increase accountability and transparency around this issue as the complainant suggests but also allow those members of the public with an interest in such matters to provide more informative contributions the government on this subject.
61. Nevertheless the Commissioner has decided that the public interest favours maintaining the exemption. He has reached this finding in light of the fact that the policy making remained live at the time of the request. As a consequence of this in the Commissioner's opinion the cumulative weight that should be attributed to the chilling effect and safe space arguments outweighs the public interest in disclosure.

Section 30 – investigations

62. The MOD sought to rely on section 30(1)(a)(i) to withhold information contained within the AJB briefing material and information comprising internal communications which fell within the scope of request 3. The relevant information contained in the internal communication (reference 3-10, serial 31) is actually contained within an email which has been withheld, in full, by the MOD on the basis of section 36(2)(b). As the Commissioner has already concluded that this email is exempt from disclosure on the basis of that exemption he has not gone on to consider whether parts of it are also exempt on the basis of section 30(1)(a)(i).

63. Therefore the Commissioner has simply considered the MOD's decision to redact information from the AJB briefing material on the basis of section 30(1)(a)(i). This consists of one sentence of information.

64. Section 30(1)(a)(i) states that:

'Information held by a public authority is exempt information if it has at any time been held by the authority for the purpose of –

(a) any investigation which the public authority has a duty to conduct with a view to it being ascertained –

(i) whether a person should be charged with an offence'

65. The Commissioner is satisfied that the redacted information relates to a specific Royal Military Police investigation into the theft of firearms. The Commissioner is therefore satisfied that the exemption is engaged.

Balance of the public interest arguments

66. Section 30 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 30(1)(a)(i) outweighs the public interest in disclosing the information.

67. The MOD acknowledged that disclosure of the redacted information would demonstrate that the RMP is investigating this particular case. However, it argued that as the investigation remained live and disclosure of information associated with it could have the effect of potentially helping suspects evade detection and/or prejudice the case.

68. In the Commissioner's view there is clearly a significant public interest in ensuring that the RMP's investigation of cases is not impeded. In the particular circumstances of this case the Commissioner accepts that disclosure of the withheld information could well prejudice the conduct of the investigation in question. In contrast the Commissioner believes that there is a very limited public interest in the disclosure of the particular information in question. The Commissioner has therefore concluded that the public interest favours maintaining the exemption.

Section 31 – law enforcement

69. The MOD sought to withhold information on the basis of section 31(1)(a) which related to RMP operational activity, including police intelligence, contained in both the AJB briefing material and in the internal communications.

70. This section states that information which is not exempt from disclosure on the basis of section 30 is exempt if its disclosure would, or would be likely to, prejudice the prevention or detection of crime.
71. The MOD argued that the redacted information related to ongoing civilian police cases and included information exchanged with these forces and other organisations such as the National Ballistics Intelligence Service. They argued that as the information related to incidents that are, or will be, investigated in the future, release of this information would be likely to be detrimental to any such ongoing investigations.
72. The Commissioner has reviewed the information withheld on the basis of this exemption and is satisfied that its disclosure is likely to prejudice the prevention of detection of crime. This on the basis that the information refers to and provides some details of active police investigations and refers to particular types of crimes which the RMP may focus their resources in the future.

Balance of the public interest

73. Section 31 is a qualified exemption and therefore the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption contained at section 31(1)(a) outweighs the public interest in disclosing the information.
74. The MOD acknowledged that disclosure of the redacted information would provide an insight into the RMP's collaboration with other forces in gathering information. However, it considered any such interest to be outweighed by the public interest in ensuring that ongoing and future police investigations are not harmed.
75. The Commissioner concurs with the MOD's findings; disclosure of the redacted material would provide some, albeit limited insight, into the RMP's activities with other forces. However, in the Commissioner's view any such benefit of disclosure is significantly outweighed by the impact on the efficiency and effectiveness of future investigations. In particular, the Commissioner believes that the public interest in withholding the information is particularly strong given that disclosure of the information risks undermining the effectiveness of a number of investigations.

Section 21 – information reasonably accessible by other means

76. Section 21 states that information is exempt from disclosure if it is accessible to the requester via other means.
77. The MOD initially relied cited this exemption to withhold three categories of information:

- A previous decision notice issued by the Commissioner. This was on the basis that the notice in question could be viewed on the Commissioner's website. The MOD provided the complainant with a link to the notice in question.
 - Slides contained in the AJB briefing concerning data about services complaints; and
 - Accompanying notes about this data from the briefing notes which accompanied the presentation.
78. In relation to the latter two pieces of information the MOD originally argued that similar information was accessible in the Service Complaints Commissioner's reports and provided the complainant with a link to these. However, the internal review concluded that whilst there is information contained in the Service Complaints Commissioner's 2013 Annual Report which relates to the backlog of cases and nature of complaints, such information was not in fact sufficiently similar so as to represent an alternative source for the relevant slides of the AJB briefing. The internal review therefore concluded that section 21 should not have been cited and the complainant was therefore provided with copies of the relevant slides from the presentation.
79. However, the Commissioner notes that the complainant was not provided with the accompanying notes about these slides contained in the briefing notes.⁷ In the Commissioner's view such information is also not exempt from disclosure on the basis of section 21 for the same reasons set out by the MOD in respect of the presentation slides themselves. Furthermore the MOD has also argued parts of these four paragraphs are also exempt from disclosure on the basis of section 36(2)(b) and section 40(2). Thus it seems somewhat illogical for the MOD to argue that paragraphs 2 to 6 are reasonably accessible to the complainant when in fact it considers parts of the very same information to be exempt because its disclosure would prejudice the effective conduct of public affairs or breach the Data Protection Act.
80. In contrast the Commissioner is satisfied that the decision notice falling within the scope of the request is clearly reasonably accessible to the complainant for the reasons indicated by the MOD.

⁷ Serial 20, paras 2 to 6.

Section 40(2) – personal data

81. Section 40(2) of FOIA states that personal data is exempt from disclosure if its disclosure would breach any of the data protection principles contained within the Data Protection Act 1998 (DPA).

Is the withheld information personal data?

82. Clearly then for section 40(2) to be engaged the information being withheld has to constitute 'personal data' which is defined by the DPA as:

'...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual.'

83. The MOD sought to withhold the names and posts of a number of MOD officials on the basis of this exemption. The Commissioner is satisfied that information of this nature clearly constitutes personal data.

84. The MOD also sought to withhold a small amount of further information contained both in the AJB presentation itself and the accompanying briefing material.⁸ The MOD argued that although such information did not name or specifically identify particular individuals it would be possible to identify the individuals in question because the statistics or incidents referred to concerned low numbers of individuals. The Commissioner has considered the variety of data that has been redacted and is not persuaded, based upon the submissions provided by the MOD, that it could be used to identify any particular individual. Therefore the Commissioner is not persuaded that this information is personal data and thus it is not exempt from disclosure on the basis of section 40(2) of FOIA.

⁸ Slide 40 from the presentation itself (serial 27 in the MOD's schedule as provided to the Commissioner); and information from briefing notes on agenda item 1b (serial 7); agenda item 4 (serial 23); and agenda item 6a serial 26, sub para 3b.

85. With regard to the personal data of MOD staff, it argued that disclosure of this information would breach the first data protection principle which states that:

'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.'*

86. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - what the public authority may have told them about what would happen to their personal data;
 - their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights (ECHR);
 - the nature or content of the information itself;
 - the circumstances in which the personal data was obtained;
 - particular circumstances of the case, eg established custom or practice within the public authority; and
 - whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed? In consideration of this factor the Commissioner may take into account:
 - whether information of the nature requested is already in the public domain;
 - if so the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

87. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.
88. In considering 'legitimate interests' in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests with the rights of the data subject, it is also important to consider a proportionate approach, ie it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.
89. The MOD argued that there was no expectation on the part of the individuals in question that their personal involvement in any of these matters would be released to the public. The MOD explained that its policy is that names and posts of members of staff below the Senior Civil Service and their military equivalents will not normally be available in the public domain and would therefore be redacted from any information which is released.
90. The Commissioner accepts that the junior officials would have had a reasonable expectation that their names and contact details will not be disclosed in the context of the request. He accepts that the individuals concerned were carrying out public functions and must therefore have the expectation that their actions in that regard will be subject to a greater scrutiny than would be the case in respect of their private lives. However, he is particularly mindful of the fact that the officials were not in public facing roles and did not exercise any significant level of authority in relation to the documents from which their names were redacted. Therefore, disclosing their names in that context could place them in a similar position with the senior officials whose names were disclosed by the public authority in that they could be seen as having exercised a significant level of authority, as with those senior officials, even though that was clearly not the case.
91. In view of the above, the Commissioner finds that it would have been unfair to disclose the names of the junior officials in question. Disclosure would have contravened the first data protection principle. The MOD was therefore entitled to withhold the names of the officials on the basis of section 40(2).

Section 42 – legal professional privilege

92. The Commissioner has not considered the MOD's reliance on section 42(1) as the small amount of information withheld under this exemption

was also withheld on the basis of section 36(2)(c). For the reasons set out above the Commissioner is satisfied that the latter exemption has been correctly applied by the MOD.

Section 17 – refusal notices

93. Section 17 of FOIA requires that:

'(1)A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which—

- (a)states that fact,*
- (b)specifies the exemption in question, and*
- (c)states (if that would not otherwise be apparent) why the exemption applies.'*

94. In the circumstances of this case, as explained above, the MOD provided the complainant with redacted versions of the documents falling within the scope of his four requests. In doing so it stated in its refusal notice that these redactions had been made on the basis of a variety of exemptions.

95. At the internal review stage the complainant asked the MOD to indicate which specific redactions had been made under section 36 of FOIA. The MOD refused to do so. The MOD explained that it was not prepared to highlight which parts of the withheld information section 36 had been applied to because in its view public authorities are not obliged to provide a paragraph by paragraph analysis of which exemptions apply to particular redactions.

96. In the circumstances of this case, given the number of redactions made to the documents that have been partially disclosed (and indeed the number of exemptions applied to each document), the Commissioner does not consider that for these documents the MOD has met the requirements of section 17(1)(b). That is to say, the complainant has not been provided with a sufficiently clear indication as to which pieces of information have been withheld on the basis of which exemption.

97. Therefore, in order to comply with the requirements of section 17(1)(b) and to address the complainant's need to understand how section 36 has been applied, the MOD needs to provide the complainant with a copy of the information it disclosed to him on 16 and 29 September 2014 with a sufficiently clear indication as to why a particular piece of information has been redacted from a particular document.

Right of appeal

98. 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

99. 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.

100. 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

Gerrard Tracey
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