

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 July 2015

**Public Authority:** Ministry of Defence  
**Address:** Main Building  
Whitehall  
SW1A 2HB

#### Decision (including any steps ordered)

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1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a copy of its 'Service Justice Risk Assessment Matrix'. The MOD refused to disclose the information relying on sections 36(2)(b)(i) and (ii) of FOIA (the effective conduct of public affairs). The Commissioner has concluded that the exemptions are engaged and that the public interest favours maintaining the exemptions.

#### Request and response

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2. The complainant submitted the following request to the MOD on 2 October 2014:

*Please provide a copy of the Service Justice Risk Assessment Matrix containing:-*

*Risk Description  
Assessment (impact and likelihood)  
Risk Control  
Discussion Items  
Action  
Comment  
AFB2015'*

3. The complainant contacted the MOD again on 7 October 2014 and requested that:

*'Could you please arrange all draft versions to be provided in addition.'*

4. The MOD contacted the complainant on 30 October 2014 and explained that it considered the requested information to be exempt from disclosure on the basis of section 36 of FOIA but it needed additional time to consider the balance of the public interest test.
5. The complainant contacted the MOD again on 17 November 2014 and confirmed that he *'would appreciate various draft versions of this document and the dates the versions were produced please.'*
6. The MOD contacted him on 27 November 2014 in order to explain that it still needed further time to consider the balance of the public interest test.
7. The MOD informed him of the outcome of its deliberations on 15 December 2014. It explained that it considered the requested information to be exempt from disclosure on the basis of sections 36(2)(b)(i) and (ii) and that for both exemptions the public interest favoured withholding the information.
8. The complainant contacted the MOD on 16 December 2014 in order to ask for an internal review of this decision.
9. The MOD informed him of the outcome of the internal review on 16 January 2015. The review upheld the application of the exemptions cited albeit that it explained that the draft and final matrix were created in April 2013.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 19 January 2015 in order to dispute the MOD's decision to withhold the information he requested. He argued that there was a compelling public interest to support the disclosure of this information.

## **Reasons for decision**

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### **Section 36 – effective conduct of public affairs**

11. Sections 36(2)(b)(i) and (ii) state that:

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

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

*(i) the free and frank provision of advice, or  
(ii) the free and frank exchange of views for the purposes of  
deliberation'*

12. In this case the Minister for Defence Personnel, Welfare and Veterans provided the opinion in relation to the application of sections 36(2)(b)(i) and (ii). The Commissioner is satisfied that the Minister is a qualified person for the purposes of section 36.
13. The qualified person argued that both exemptions were engaged at the higher threshold, ie that disclosure 'would' result in the prejudicial consequences each exemption was designed to protect.
14. 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.
15. 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.
16. By way of background, the MOD explained that the Service Justice System serves the particular needs of the Armed Forces in that it applies the law of England and Wales to the Armed Forces wherever in the world they operate; it is separate from the criminal justice system. Governance and oversight of the Service Justice System are provided by

the Service Justice Board (SJB), chaired by the Minister for Defence Personnel, Welfare and Veterans, and with the Solicitor General, a Justice Minister, the Judge Advocate General, the Director of Service Prosecutions, the Chief of Defence Personnel, and the three Service principal personnel officers as its members. The Board is supported by the Service Justice Executive Group (SJEG).

17. The MOD explained that the Service Justice System Risk Assessment Matrix was introduced in 2010 as a means to inform those who preside over the governance of the Service Justice System. It helps to formulate the agenda for both the SJEG and the SJB. The matrix provides a summary of risks to the Service Justice System and their associated mitigation strategies. The matrix therefore captures initial thoughts and proposals related to the formulation of MOD and Government policy and legislation, including the Armed Forces Bill. The matrix is used when necessary to capture issues (real or perceived) for discussion and further direction.
18. The qualified person argued that sections 36(2)(b)(i) and (ii) were engaged because disclosure of the Service Justice Risk Assessment Matrix would encroach upon the safe space officials and Ministers need to discuss risks concerning the Service Justice System, and the mitigation of such risks. Disclosure would thus risk infringing the frankness of discussions because of concerns about their future release.
19. The Commissioner accepts that the qualified person's opinion is a reasonable one. The withheld information contains a frank, detailed and wide ranging assessment of the risks faced by the Service Justice System, along with details of the potential mitigation of the same. In the Commissioner's view it is reasonable to argue that disclosure of such information would have the two effects which the opinion envisages. Firstly, the potential for a chilling effect on the frankness with which future risks are recorded on the matrix and secondly leading to the erosion of the safe space officials and Ministers need to discuss such issues away from external scrutiny.

### **Public interest test**

20. 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.

### **Public interest arguments in favour of disclosing the information**

21. The complainant argued that there was a compelling public interest in disclosure of the withheld information. He acknowledged that whilst free

and frank provision of advice was necessary for the purposes of good decision making it was also important that good decisions are made with the advice given. The complainant suggested that if inconvenient advice is simply ignored in the decision making process, thus maintaining unfair policy – as he believed was the case in respect of the information which is the focus of this request - then the public interest should tip in favour of disclosing information. In order to support this line of argument the complainant made references to the content of the document (which the Commissioner presumes he has seen outside of FOIA) and suggested that it identified various risks to the Service Justice System, risks which he alleged had been denied by the MOD both in the media and in Parliament. (The Commissioner has not referred to the complainant's submissions on this point in any greater detail as to do so risks revealing the content of the withheld information itself).

22. The complainant argued that a transparent, accountable justice system should not hide behind 'a safe space for free and frank provision of advice' to hide vulnerable areas of the Service Justice system. Rather it should, he suggested, be more concerned with providing a safe working environment for Service Personnel. Moreover, if elements of the Service Justice System are open to abuse, it is absolutely in the public interest that they are identified and mitigated swiftly.

### **Public interest arguments in favour of maintaining the exemption**

23. The MOD argued that it was a fundamental requirement that officials have the freedom to develop and discuss frankly with the SJB policy issues and legislative developments and proposals that may affect both current and future Service personnel. The requested information reflects some of these developing issues in frank terms. Disclosure of the information would thus hinder the ability of the SJB and officials to evaluate issues in a space which is free from external pressures or considerations. The MOD argued that this would hinder the ability of the SJB considerably, thus prejudicing the effective conduct of public affairs.

### **Balance of the public interest test**

24. 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.

25. 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.
26. In the circumstances of this case, the Commissioner understands that at the point the complainant made his request the issues and considerations identified in the matrix were matters of ongoing concern. That is to say decision making around the risks identified remained live. Furthermore, as noted above, the information itself consists of a detailed and in places frank consideration of the risks associated with the Service Justice System. Consequently, the Commissioner accepts that if the withheld information was disclosed it would be very likely to result in future versions of the risk matrix being less detailed and or frank. Furthermore, not only does the Commissioner believe that the chilling effect argument needs to be given notable weight, he also accepts the logic of the MOD that the consequences of such an effect would undermine effective government decision making in relation to the SJB in the way suggested.
27. With regard to the safe space arguments, the Commissioner recognises that public authorities may need a safe space in which to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly side-tracked.
28. In the circumstances of this case the Commissioner accepts that disclosure of the withheld information would result in the MOD having to address issues raised by interested parties commenting on the risks and mitigation strategies set out in the matrix. In the Commissioner's opinion such an effect would clearly undermine the operation of the SJB and any decisions it took in relation to the mitigation of any risks to the Service Justice System. Consequently, the Commissioner believes that the safe space arguments need to be given considerable weight.

29. Turning to the arguments in favour of disclosure, the Commissioner agrees with the complainant that there is a significant public interest in ensuring that the Service Justice System is both transparent and accountable. Disclosure of the withheld information would certainly help to meet these aims as it would provide the public with a detailed and clear insight into the risks associated with Service Justice System that the SJB were considering, in addition to potential mitigation strategies to deal with such risks.
30. However, despite these arguments, the Commissioner's overriding view is that the public interest is best served by ensuring that risks within the system are identified and addressed as effectively as possible. Ultimately in the Commissioner's view, such an outcome is best achieved by protecting the safe space required by the SJB and thus also ensuring the frankness of its future discussions. The Commissioner has therefore concluded that the public interest favours maintaining the exemption.

## Right of appeal

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

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

32. 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.
33. 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**  
**Principle Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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