

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 September 2023

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
SW1H 9EA

Decision (including any steps ordered)

1. The complainant made a request for information relating to the public consultation process of the Deception as to Gender Section in the Rape and Serious Sexual Offences (RASSO) legal guide.
2. The Commissioner's decision is that the CPS correctly applied section 36(2) but considers that the balance of the public interest favours disclosure of the information.
3. The Commissioner also finds that the CPS breached section 10 (time for compliance) of FOIA in its handling of the request.
4. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation:
 - Disclose the requested information subject to appropriate redactions for information exempt under section 40(2) (third part personal data).

Request and response

5. On 26 September 2022, the complainant wrote to the CPS and requested information in the following terms:

"You have today (26th Sept 2022) announced a Public Consultation of the Deception as to Gender Section in the Rape and Serious Sexual Offences (RASSO) legal guide:

[Consultation on the Deception as to Gender section in the Rape and Serious Sexual Offences \(RASSO\) legal guidance | The Crown Prosecution Service \(cps.gov.uk\)](#)

In your introduction (on the page linked above) you state:

"As part of the drafting process the CPS has conducted a pre-consultation with interest groups. A first draft of the guidance was provided to these groups and feedback was provided in writing and during workshops. The feedback was considered, and revisions were made."

Will you please provide:

1. The name of each of the interested groups you consulted with.
 - 1a. Were any individuals consulted? If so, please provide sufficient information to indicate their standing.
 2. How the initial 'pre-consultations' were conducted e.g were they by means of inviting feedback by letter/email, or attendance at meetings or workshops etc.
 3. The name of each group that participated in any of the workshops held after the first draft was provided, and how often they did so."
6. The CPS responded on 14 February 2023 answering questions 1a and 2 of the request and withheld information relating to question 1 and 3 under section 36(2)(b)(ii) of the FOIA.
 7. At internal review the CPS maintained its original decision and in addition applied 36(2)(c) of the FOIA to the withheld information.

Background

8. The CPS conducted a public consultation from 26 September 2022 to December 2022 on a proposed revision to its legal guidance on RASSO, specifically regarding Chapter 6: Consent, the section on Deception as to Gender in rape and serious sexual assault cases. The public consultation was with interested groups who were given the opportunity to comment and provide feedback on the revised guidance with an aim for the final

version of the guidance to be informed by as wide a range of views as possible.¹

Scope of the case

9. The complainant contacted the Commissioner on 9 May 2023 to complain about the way her request for information had been handled.
10. The Commissioner has therefore considered whether the CPS was correct to refuse part 1 and 3 under section 36(2)(b) and (c) of the FOIA.

Reasons for decision

Section 36 – effective conduct of public affairs

11. The sections of 36 which the CPS are seeking to rely on are as follows:

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

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

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

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

12. In determining whether these sections are engaged the Commissioner must determine whether the Qualified Person's (QP) opinion was a
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¹ [Consultation on the Deception as to Gender section in the Rape and Serious Sexual Offences \(RASSO\) legal guidance | The Crown Prosecution Service \(cps.gov.uk\)](#)

reasonable one. The CPS sought the opinion of the Director of Public Prosecutions on 7 February 2023 as to whether sections 36(2)(c) of FOIA was engaged and on 14 March 2023 at internal review in which he approved the opinion that both section 36(2)(b)(ii) and section 36(2)(c) were engaged. The Commissioner notes that the QP had access to a copy of the withheld information.

13. In determining whether the exemption is engaged, the Commissioner must consider whether the QP's opinion was a reasonable one. The Commissioner does not necessarily need to agree with the opinion of the qualified person for the exemption to be engaged. He needs only satisfy himself that the qualified person's opinion is an opinion that a reasonable person could hold.
14. The Commissioner accepts it was reasonable for the QP to consider that free and frank discussion is essential to enable balanced and informed decisions by those responsible for creating consultation documents.
15. The QP acknowledged that disclosing the withheld information would be likely to prejudice the substance and implementation of the work of the CPS and that it would discourage CPS officials and individuals/organisations to engage candidly in CPS consultations through fear of their participation being disclosed.
16. In accordance with the description of reasonableness at paragraph 13, the Commissioner accepts that it was reasonable for the QP to consider that there was a need to protect the effective conduct of public affairs on the basis set out above.
17. The Commissioner is satisfied that the QP's opinion, namely that inhibition relevant to subsections 36(2)(b)(ii) and 36(2)(c) would be likely to occur through disclosure of the withheld information, is reasonable.
18. The Commissioner therefore considers section 36(2)(b)(ii) and section 36(2)(c) is engaged. As section 36 is a qualified exemption, the Commissioner will now go on to consider whether the public interest lies in disclosure or in maintaining the exemption.

The CPS's public interest arguments

19. The CPS stated that as a taxpayer funded service there is a public interest in the disclosure of information held by the CPS concerning the current consultation into the Deception as to Gender legal guidance.

20. The CPS acknowledged that disclosure of the withheld information would inform the public about how the CPS dealt with the matter of Deception as to Gender and increase accountability and transparency in general.
21. However, the CPS also acknowledged that to disclose the names of the organisations that the CPS consulted with would inevitably prejudice the CPS's ability to effectively conduct consultations in the future as it would be likely to discourage organisations from participating in CPS consultations, particularly on issues where they may be drawn into controversy.
22. The CPS also argued that to release information would inevitably lead to all parties being more circumspect in providing free and frank views and all parties should feel confident that there is a safe space to air advice, provide professional views, debate live issues and reach decisions. It claimed that the process is likely to be inhibited if it became known that their participation was to be released into the public domain at a later date as a result of a request made under FOIA.
23. The CPS explained that if it released the details of the participating organisations at this point, there is a strong possibility that they would not participate in any further consultation. It argued that this would have a material impact on the CPS' ability to draw upon their expertise stating the following:

“The loss of frankness and candour that could follow would be likely to damage the quality of deliberations which would likely lead to poorer decision making in the CPS. This would be likely to prejudice the effective conduct of public affairs.”
24. The CPS argued that there is a reasonable expectation of confidentiality attached to this information, disclosure would be detrimental to the processes and trust required when organisations participate in consultations with the CPS. It stated that organisations that participated in the workshops are likely to have expected some level of confidentiality regarding any advice that they provided and making their participation public would almost certainly cause an issue for them, as they may be obliged to set out their position on the issues in public.

Complainant's public interest arguments

25. In the complainant's submission to the Commissioner she argued that it is very much in the public interest for the public to be reassured, or not, that the CPS sought advice and input from a range of organisations representing a variety of views and that they were not potentially

persuaded to any specific view as a result of all the participating groups sharing the same opinion.

26. The complainant explained that she believed it to be unlikely that the views of any of the participating organisations are not already known, or could not be reliably inferred from other public statements or known lobbying.
27. In response to the CPS's statement that disclosing the information requested would be likely to discourage organisations from participating in the future, particularly on issues where they may be drawn into controversy, the complainant argued that it is the more controversial topics where lies the greatest public interest in knowing which organisations have been consulted. The complainant provided an example of the topic of Abortion Laws or reinstating the Death Penalty and that the public interest would be greatly served by knowing that the CPS had consulted with Pro-Life groups, or only with lobbies for the return of the death penalty respectively.
28. The complainant argued to the Commissioner that it is in the public interest to know that the CPS consulted with a range of organisations espousing a variety of views if these groups are going to be having any input that could influence the deliberations and the CPS' subsequent decisions. She explained that consulting only with organisations who take one particular view on controversial issues has the potential to lead to poorer decision making and therefore there is public interest in being given reassurance, or not, that this is not the case.

The Commissioner's view

29. The Commissioner accepts that there is a need for a safe space for organisations to provide advice and exchange views free from external comment and examination. However, the Commissioner also accepts there is a public interest in understanding consultation processes and that this is stronger when the public authority has outlined its aim to be "informed by as wide a range of views as possible".
30. The Commissioner understands the complainant's argument that in this case it is very much in the public interest for the public to be reassured that the CPS sought advice and input from a range of organisations representing a variety of views and not potentially persuaded to any specific view as a result of all the participating groups sharing the same opinion.

31. The Commissioner also understands the complainant's argument that consulting only with organisations who take one particular view on controversial issues has the potential to lead to poorer decision making and that it is in the public interest to know that the CPS consulted with a range of organisations with a variety of views, especially as these groups are potentially going to be influencing legal guidance.
32. The Commissioner accepts that it is important for the CPS to be able to allow organisations to contribute on a confidential basis and, when it does provide such an opportunity, to respect that confidence. However, in this case, the Commissioner is aware that many of the organisations have proactively disclosed that they were part of the consultation process and have included their responses on their websites. The Commissioner notes that the complainant is not asking for the organisations responses but simply which organisations participated.
33. In response to the CPS's argument that there is a need to protect organisations from negative media coverage and its impact, the Commissioner would argue that as it is the CPS who created the guidance it is hard to envisage what negative media coverage would occur unless it was that the CPS only consulted with organisations with shared views.
34. In this case, it is the Commissioner's opinion that there is a stronger public interest in openness, transparency and reassuring the public that the CPS carried out its consultation process fairly and as described. Therefore, it's the Commissioner's decision that the organisations names previously withheld under section 36(2) should be disclosed.
35. The Commissioner is aware from the withheld information individuals were also asked to participate in the consultation process and that the individual's names should not be disclosed as they will be exempt from disclosure under section 40(2) (third party personal data).

Section 10 – time for compliance

36. Under section 1(1) of FOIA, anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to them if it is held and is not exempt information.
37. Section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".

38. From the evidence provided to the Commissioner in this case, the CPS did not deal with the request for information in accordance with FOIA as it failed to provide a full response to the requestor within 20 working days. The Commissioner finds that the CPS breached section 10(1) by failing to respond to the request within 20 working days.

Right of appeal

39. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

40. 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.

41. 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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