

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2024

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

Decision

1. The complainant has requested information relating to the 2017 and 2019 revised Personal Injury Discount Rate (PIDR).
2. The Commissioner decided that the Ministry of Justice (MoJ) was entitled to rely on section 36(2) (effective conduct of public affairs) of FOIA to withhold the relevant information.
3. The Commissioner does not require any steps.

Request and response

4. On 17 January 2023 the complainant requested information of the following description:

"I would like to request copies of

(a) the earlier GA/GAD drafts and

(b) the comments by the Government Economic Service and/or the Analytical Service Division of the Ministry of Justice on those earlier drafts of

(i) the GAD Personal Injury Discount Rate analysis of 17 July 2017 and

- (ii) the GA's advice to the Lord Chancellor dated 25 June 2019."
5. The MoJ provided a response on 10 March 2023 confirming that the information was held but it was being withheld under section 35(1)(a) of FOIA.
 6. At internal review the MoJ upheld its original decision.

Background

7. The MoJ provided the Commissioner with a background to PIDR (Personal Injury Discount Rate) stating the following:

"...PIDR is set to assist courts to calculate the awards of damages in serious personal injury cases. The lump sum awarded reflects the interest they can expect to receive after investing it. The overall principle is based on the claimant achieving fair and full compensation over the lifetime of their injury."
8. The MoJ also explained that the rate was reset in both 2017 and 2019 and that the second of these resets occurred under the provisions of the Civil Liability Act 2018. It stated that it should also be noted that the 2019 reset was accompanied by a 'Statement of Reason' for why the rate was set as it was which drew upon the 2019 Government Actuary Department's (GAD) advice .

Scope of the case

9. The complainant contacted the Commissioner on May 2023 to complain about the way his request for information had been handled.
10. During the Commissioner's investigation the MoJ revised its decision confirming that it was now withholding the requested information under section 36(2)(b)(i) and (ii) of FOIA.
11. The MoJ wrote to the complainant on 15 August 2023 informing him of the revised decision.
12. The complainant confirmed to the Commissioner on the 11 September 2023 that he remained dissatisfied with the MoJ's decision.
13. The Commissioner considers that the scope of his investigation is to determine whether the MoJ correctly withheld the requested information under section 36(2)(b)(i) and (ii) of the FOIA.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

14. Section 36(2) of FOIA states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information ... – (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation,
15. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that Minister Argar is authorised to act as the qualified person in this case under section 36(5) of FOIA.
16. The MoJ provided the Commissioner with a copy of a submission to the qualified person and of the qualified person's opinion. It confirmed that the opinion was sought on and received on 26 July 2023.
17. In determining whether the exemption is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one.
18. 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 unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold.
19. In its submission to the Commissioner, the MoJ argued that disclosure of the requested information relating to the setting of the PIDR would inhibit free and frank provision of advice and the free and frank exchange of views in the future. It explained that the Lord Chancellor takes into account a wide range of factors before deciding what principles to follow in setting the rate and such factors will need to be considered (for example, assumptions on rates of return on investments) in future reviews and thus the material remains live and relevant.

20. The MoJ argued that the loss of frankness and candour would inhibit the quality of advice and deliberation and that it is critical officials feel able to provide Ministers with full and frank advice. It stated that if the 2017 material is disclosed officials are likely to feel inhibited in the advice offered for future discount rate reviews as a precedent will have been set that will encourage requests made under FOIA and may lead to legal challenges based on weighting given to different factors in the advice.
21. The MoJ also argued that the PIDR rate setting process is highly complex and susceptible to legal challenge from different interests. Disclosure of the 2017 analysis and advice relating to PIDR could lead to assumptions being made about advice for future reviews on principles to be followed and weighting to be applied by the Lord Chancellor, notwithstanding the new legislative methodology. It stated that there is a risk of a chilling effect on the advice officials would proffer if there is a prospect of PIDR advice and submissions being disclosable.
22. The MoJ stated that under the Civil Liability Act 2018, the MoJ will need to review the rate again by the end of 2024 (five years after 2019). The MoJ explained that when the rate is reviewed in 2024 it will be done based on advice from an Expert Panel rather than GAD. It explained that the Expert Panel may choose to do things differently than GAD and there have been criticisms of the approach adopted in 2019 and some of the comments made by the MOJ analysts in 2019 may remain germane this time round. It stated that there were disagreements between the MoJ and GAD which may be replicated during the 2024 PIDR Review.
23. Having viewed the withheld information, the Commissioner considers that it is not unreasonable to engage section 36(2)(b) in this case, given the nature of the withheld information and the MoJ's claim that the material remains relevant to the next review in 2024.
24. Section 36 is subject to the public interest test. The Commissioner notes that the MoJ considers that disclosure 'would be likely' to prejudice or inhibit the effective conduct of public affairs.
25. The Commissioner has therefore carried the lower level of likelihood through to the public interest test.

Public interest arguments in favour of disclosure

26. The MoJ acknowledged that there is a clear public interest in information relating to key decisions. Greater transparency generally makes government more accountable to the electorate and increases trust.
27. The MoJ also acknowledged that it is helpful for stakeholders and the wider public to be able to understand the Lord Chancellor's reasons for

any decision made, including the considerations taken into account. There is also a public interest in being able to assess the quality of the advice given and the decision-making process in the light of that advice.

28. The MoJ recognised that awareness of the information might further public debate on issues relating to the discount rate and might assist insurers and legal professionals in considering issues relating to the setting of the rate under different methodologies.
29. In his complaint to the Commissioner, the complainant stated that GAD adopted a new and little-known methodology, Economic Scenario Generators (ESG) in its internal modelling – which was known to the actuarial profession, but with which the general public (including economists and public servants) were unfamiliar.
30. The complainant stated that it was the objective of his request to see if the economist profession has different views to those of the actuaries however accepted that this turned out to not be the case.
31. The complainant therefore argued that given that there was little or no disagreement, it is unlikely that the possibility of future disclosure could have had an inhibitory effect at the time.

Public interest arguments in favour of maintaining the exemption

32. The MoJ argued that there is a wider public interest in maintaining a neutral space which allows officials to discuss the methodological and technical issues relating to policy development frankly. It explained that while there was little disagreement in this case, the possibility of future disclosure of any MoJ comments on drafts of the 2017 GAD analysis would have inhibited such discussions.
33. The MoJ stated that the drafts of the 2019 GAD advice and any MoJ comments upon them were integral to the Lord Chancellor's decision to reset the PIDR. Disclosure of draft versions of GAD advice and the MoJ comments would be detrimental as it would prevent officials from freely discussing matters prior to a ministerial decision.
34. The MoJ argued it needs to ensure that all such decisions are robust, and disclosure of prior discussions would undermine the MoJ's work.
35. The MoJ acknowledged the case for openness and transparency around the conduct of government. However it stated that, in this instance, it is outweighed by the public interest in government officials and their advisors having a neutral space to consider all options available.

36. The MoJ explained that public interest in transparency around the setting of the PIDR has been addressed by publishing its response to the 2018 Call for Evidence¹, the final 2019 GAD advice² and the Lord Chancellor's Statement of Reasons³ which have all been made available to the public.

Balance of the public interest

37. The Commissioner recognises the public interest in facilitating public debate of important decisions which would impact the finances and lives of many individuals, often in vulnerable situations, as well as relevant organisations. He also acknowledges that there is a strong public interest in the public having access to information which would enable them to understand clearly how PIDR decisions were arrived at.
38. However, the Commissioner agrees with the MoJ that it has addressed the public interest in transparency by placing information in the public domain that explains the government's decision making and in this case the setting of the PIDR.
39. The information in the public domain provides evidence of the matters the Lord Chancellor took into account. There will be those who disagree with the Lord Chancellor's decision, but there is sufficient evidence in the public domain to allow such people to challenge the basis for that decision.
40. The Commissioner understands the complainant's argument that, where there is little or no disagreement, it is less likely that the possibility of future disclosure could have an inhibitory effect. However, the Commissioner accepts that there is a public interest in maintaining a neutral space which allows officials to discuss the methodological and technical issues relating to policy development frankly.
41. The Commissioner recognises that ministers need to decide matters with the benefit of full knowledge and receive frank advice from officials. He expects officials to give robust advice but also accepts that a significant chilling effect could sometimes prevent that from happening.

¹ [Setting the Personal Injury Discount Rate \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

² [Setting the Personal Injury Discount Rate \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

³ [statement-of-reasons.pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

42. The Commissioner considers the public interest in good decision-making by the MoJ to be a compelling argument in favour of maintaining the exemption. While he acknowledges the public interest in openness and transparency, the MoJ has provided evidence that it has addressed this. Therefore, the Commissioner finds the public interest in protecting the MoJ's access to unfiltered and frank advice to be the considerably stronger argument.
43. Consequently, he is satisfied that, in this case the public interest favours maintaining the exemption. It follows that his decision is that the MoJ was entitled to rely on section 36(2)(b)(i) and (ii) of FOIA to refuse the request.

Right of appeal

44. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

45. 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.
46. 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

Robyn Seery
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