

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2017

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant requested both the draft and final minutes of the last two CPS meetings. The CPS provided a link to one set of final minutes and explained that the second set was in the process of being published. It also withheld two sets of draft minutes, citing sections 36(2)(b)(i) (free and frank provision of advice) and (ii) (free and frank exchange of views for deliberation) of the FOIA.
2. The Commissioner's decision is that the Crown Prosecution Service has applied section 36(2)(b)(i) and (ii) of the FOIA appropriately to the draft minutes. However, the Commissioner considers that the Crown Prosecution Service has breached section 22 (intention to publish) of FOIA with regard to the second set of final minutes. The Commissioner also considers that the Crown Prosecution Service has breached section 21 (information accessible by other means) and sections 17(1) (request for information) and 10(1) (time for compliance) of the FOIA.
3. The Commissioner does not require the Crown Prosecution Service to take any further steps as a result of this decision notice.

Request and response

4. On 11 February 2016, the complainant wrote to the Crown Prosecution Service (CPS) and requested information in the following terms:

" Please provide copies of the draft minutes of the last two CPS board meetings;*

** Please provide copies of the final minutes of the last two CPS board meetings."*

5. The CPS responded on 9 March 2016. It confirmed that there were two sets of minutes – September 2015 and November 2015. It provided a link to the September 2015 final minutes and explained that it was in the process of publishing the November 2015 final minutes. It refused to disclose any draft minutes, relying on sections 36(2)(b) (i) and (ii).
6. Following an internal review the CPS wrote to the complainant on 18 March 2016, upholding its application of section 36.

Scope of the case

7. The complainant contacted the Commissioner on 22 March 2016 to complain about the way his request for information had been handled. He explained that he considered that the internal review had failed to detail any public interest test or confirm whether the opinion of the qualified person was sought in relation to the application of section 36.
8. The complainant went on to explain that the exemption could only be engaged if such an opinion had been sought. Furthermore, the complainant explained that the requester should be informed that this opinion had been sought. He argued that the lack of any mention of this opinion suggested that it had not been sought.
9. The Commissioner will consider whether the CPS has applied the exemptions appropriately and the way in which it handled the request.

Reasons for decision

Section 21 – information accessible by other means

10. In its refusal notice of 9 March 2016 the CPS provided a link to the September 2015 minutes it had already published.

11. Section 21(1) states that

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.

(2) For the purposes of subsection (1)-

(a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

12. As section 21 is an absolute exemption it is not subject to public interest considerations.

13. The purpose of the exemption is to ensure that there is no right of access to information via FOIA if it is available to the applicant by another route. The Commissioner's guidance on section 21¹ explains that, unlike consideration of most other exemptions in FOIA, a public authority can take the individual circumstances of the applicant into account. In order for section 21 to apply there should be another existing, clear mechanism by which the particular applicant can reasonably access the information outside of FOIA.

14. The Commissioner considers that it is reasonable for a public authority to assume that information is reasonably accessible to the applicant as a member of the general public, until it becomes aware of any particular circumstances or evidence to the contrary.

¹ <https://ico.org.uk/media/for-organisations/documents/1203/information-reasonably-accessible-to-the-applicant-by-other-means-sec21.pdf>

15. Even if the requested information is fully in the public domain, this does not mean that it is automatically exempt under section 21. Public authorities should consider an applicant's particular circumstances (if and when they become aware of them) when deciding whether publicly available information is in fact reasonably accessible to that individual. For example, the applicant may not have reasonable access to the internet.
16. Furthermore, the Commissioner considers that information, although generally available elsewhere, is only reasonably accessible to the applicant if the public authority:
 - knows that the applicant has already found the information; or
 - is able to provide the applicant with precise directions to the information so that it can be found without difficulty. When applying section 21 in this context, the key point is that the authority must be able to provide directions to the information.
17. In this case, the Commissioner has not been made aware of any reason why the complainant could not access the information. She therefore considers that section 21 exemption does apply to the September 2015 minutes published by the CPS.
18. However, she considers that the CPS has breached section 21 as it did not cite this exemption in its refusal notice.

Section 36 – effective conduct of public affairs

19. Sections 36(2)(b)(i) and (ii) of FOIA states that

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

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

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation."

20. Sections 36(2)(b)(i) and (ii) can only be engaged if, in the reasonable opinion of the qualified person, disclosure would result in any of the effects set out above.
21. In the present case, the Director of Public Prosecutions (DPP), Alison Saunders, provided the opinion. The Commissioner is satisfied that the DPP is the qualified person for the purposes of section 36.
22. The CPS provided the Commissioner with copies of the submissions which were provided to the DPP, Alison Saunders, in her capacity as the qualified person. The submissions included the request for information, arguments as to why the section 36 exemption was engaged and public interest arguments. The DPP was also provided with copies of the final minutes and the withheld draft minutes.
23. When considering whether section 36 is engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. The Commissioner considered the relevant factors including:
 - Whether the prejudice relates to the specific subsections of section 36(2) that are being claimed. If the prejudice or inhibition is not related to the specific subsections, 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.
24. When determining whether the opinion is a reasonable one, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd – that is if it is an opinion that a reasonable person could hold – then it is reasonable.
25. However, 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 will not be deemed unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It would only be deemed unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Therefore, 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 qualified person accepted the recommendation provided by the CPS that the exemptions at sections 36(2)(b)(i) and (ii) should be relied upon. She also agreed with the reasoning provided to her by the CPS which explained that its board meetings are a chance for the executive team to provide comprehensive updates to the non-executive directors. Furthermore, the CPS explained that this will often include discussions on sensitive matters which they need to be made aware of.
27. In addition, the CPS argued that disclosure of this information would inevitably lead to its board and other senior staff being more circumspect in their provision of advice and in putting their views forward. In turn, this would leave the CPS at a significant disadvantage when making high level decisions which would have a direct impact on it.
28. The qualified person can only apply the exemption on the basis that the inhibition to the free and frank provision of advice and the exchange either 'would' occur or would only be 'likely' to occur. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition to the free and frank exchange of views should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition would occur.
29. In its submissions to the qualified person, the CPS claimed that disclosure 'would' inhibit the matters set out in sections 36(2)(b)(i) and (ii).
30. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the draft minutes would inhibit the processes of providing advice or exchanging views.
31. Having reviewed the withheld information the Commissioner is satisfied that it was reasonable for the qualified person to conclude that sections 36(2)(b)(i) and (ii) applied to the withheld information.

Public interest test

32. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition

would result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of the case, the public interest in maintaining either of the exemptions outweighs the public interest in disclosing the information.

33. When considering complaints about the application of section 36, where the Commissioner finds that the qualified person's opinion is reasonable, she will consider the weight of that opinion in applying the public interest test.

Public interest arguments in favour of maintaining the exemption

34. The CPS argued that it was vital that its board was able to freely and frankly provide advice and exchange views, for the purposes of deliberation, without the fear that their consideration of options relating to strategy and any recommendations would be disclosed into the public domain.
35. The CPS also argued that there was a strong public interest in its board being able to have free and frank discussions, to ensure that informed decisions could be made based on all the relevant information. It explained that there would inevitably be a less rigorous process if the board were to discuss matters in the knowledge that such discussions may one day be put into the public domain.
36. Furthermore, the CPS explained that discussions within its board meetings were often to do with sensitive topics. It argued that the safe space to freely and frankly discuss options in order to identify the most efficient approach for the organisation was vital to identify a robust proposal for future working.
37. The CPS also pointed out that since September 2014 it was committed to publishing the minutes of board meetings. It explained that it had already published the minutes of the CPS Board Meeting on the 23 September 2015 and that the minutes for November 2015 would be published in due course. The CPS argued that the public interest in disclosing the unedited minutes was reduced as the public would already be aware what the board had been considering when discussing the potential future changes to it.
38. In addition, the CPS argued that on balance, the public interest favoured withholding the information as disclosure would not add significantly to the public debate but would prejudice the effective conduct of it. It

explained that the confidential discussions within board meetings and the space for free and frank discussions were necessary to enable effective strategic decisions to be made.

Public interest arguments in favour of disclosure

39. The CPS acknowledged that there was a clear public interest in seeing the various elements of its strategic leadership and in understanding how this could affect its work and priorities.
40. The complainant explained that it was clear that the CPS believed that it was being transparent by publishing edited minutes of board meetings months after they take place. However, evidence obtained through other FOI requests to other bodies, showed that minutes go through a process of editing, so the final version which may or may not be proactively disclosed, contains few details of what was actually discussed.
41. The complainant also argued that there was a significant and compelling public interest in scrutinising the work of the CPS and the discussions had by its board. He also explained that this significant and compelling public interest included having copies of the draft minutes.
42. In addition, the complainant argued that the withheld minutes would be capable of demonstrating whether the final version bore any resemblance to the discussions - on topics which affect justice - which had actually taken place. He explained that this was only possible through transparency, rather than the disclosure of edited minutes

Balance of the public interest arguments

43. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
44. When attributing weight to the 'chilling effect' arguments ie that disclosure of information would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making, the Commissioner recognises that civil servants are expected to be robust and impartial when providing advice.

45. The Commissioner considers that they should not be easily deterred from expressing their views by the possibility of any future disclosure. However, she also considers that chilling effect arguments cannot be dismissed out of hand. In this case, she accepts that the CPS should be able to hold free and frank discussions which include the provision of advice and the exchange of views for the purpose of deliberation, in order to enable strategic decisions to be made. The Commissioner also considers that, given the CPS' role as a prosecuting authority, it is very important that it can hold meetings to discuss issues affecting it, in a free and frank manner.
46. With regard to the CPS' 'safe space' argument, the Commissioner considers that this argument is more commonly applied to the development of government policy and as such relates to the application of section 35. However, there may be a similar need for any public authority to have a safe space in which to develop ideas or make decisions. If the disclosure of information would or would be likely to prejudice this, there may be an argument for engaging section 36(2)(c) (effective conduct of public affairs) .
47. The Commissioner accepts the general principle that the disclosure of information can aid transparency and accountability. In the present case, she has not been provided with and is not aware of, any specific reason why disclosure of draft minutes would achieve these ends. However, she considers that the publication of the official meeting minutes does achieve these ends.
48. The Commissioner appreciates that the requester might have valid reasons for accessing the information which are founded on genuine concerns, but in her view these are more in the nature of a personal or private interest. In considering where the balance of the public interest lies the Commissioner does not take into account the motivation of requesters except where this reflects a broader public interest. In this instance, the Commissioner is not aware of any broader public interest which would be served by the disclosure of the information, certainly not an interest which would counteract the public interest in the CPS' ability to conduct its affairs effectively.
49. The Commissioner has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and exchange of views for the purposes of deliberation against the public interest in openness and transparency of the CPS and the complainant's arguments regarding disclosure. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and considers that the public

interest in maintaining the exemption outweighs the public interest in disclosure.

Conclusion

50. Taking all of the above into account, the Commissioner is satisfied that sections 36(2)(i) and (ii) have been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 22 – future publication

51. The Commissioner notes that the CPS had not published the final November 2015 minutes at the time of the request.

52. Section 22 provides state that

‘(1) Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not).

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all of the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).’

53. The Commissioner notes that in its initial response of 9 March 2016 the CPS explained to the complainant that the November 2015 minutes would be published in due course.
54. Given that the CPS confirmed to the complainant that the November 2015 minutes would be published in due course but did not cite the section 22 exemption, the Commissioner consider that the CPS has breached the section 22 exemption.
55. The Commissioner notes that the minutes of 25 November 2015 have now been published by the CPS on its website

Procedural matters

Section 17 – refusal of a request

56. Section 17(1) provides that if a public authority is not going to disclose requested information, it must inform an applicant of this and specify the exemption in question.
57. Given that the CPS did not cite the sections 21 and 22 exemptions, the Commissioner also considers that the CPS has breached section 17.

Section 10 – time for compliance

58. Section 10(1) provides that a public authority should reply to a request for information promptly and no later than the twentieth working day after receipt.
59. As the CPS did not explain cite sections 21 and 22 exemptions in its refusal notice, the Commissioner considers that it had breached section 10(1).

Other matters

60. The Commissioner notes that the complainant has stated that the CPS should have confirmed that it had obtained the opinion of the qualified person and in not doing so, implied that it had not done so; therefore the section 36 exemption could not be applied.
61. The Commissioner has considered the CPS' refusal notice of 9 March 2016. She notes that it explained why it was applying section 36 and also provided public interest arguments. Although the CPS did not specify that it had obtained the qualified person's opinion, the Commissioner does not consider that this implies that the qualified person's opinion was not sought.
62. Furthermore, as part of her investigation into complaints regarding the application of section 36 by public authorities, the Commissioner always establishes who the qualified person is and whether the qualified person's opinion has been sought. Clearly, if it transpired that the opinion had not been sought, the Commissioner would find that the section 36 exemption was not engaged.

Right of appeal

63. 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

64. 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.
65. 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

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