

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 August 2017

Public Authority: Crown Prosecution Service

Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested information about the Crown Prosecution Service decision not to provide charging advice regarding deceased suspects. The Crown Prosecution Service withheld the information, citing sections 36(2)(b)(i) (free and frank provision of advice) and (ii) (free and frank exchange of views for deliberation) of FOIA.
2. The Commissioner's decision is that the Crown Prosecution Service has applied sections 36(2)(b)(i) and (ii) of FOIA appropriately.
3. The Commissioner does not require the Crown Prosecution Service to take any steps as a result of this decision.

Request and response

4. On 1 July 2016 the complainant wrote to the Crown Prosecution Service (CPS) and requested information in the following terms:

"Please provide copies of all information held by CPS headquarters relating to the decision by the CPS not to provide charging advice on deceased suspects. I understand the decision not to provide such advice was made this year and my request is for copies of all information relating to the decision, including information showing discussions about this."
5. The CPS responded on 28 July 2016. It provided the complainant with a copy of its policy on charging decisions relating to deceased suspects but refused to provide information relating to its decision not to provide

charging advice regarding deceased suspects, citing the following exemptions:

Section 36(2)(b)(i) – Disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice.

Section 36(2)(b)(ii) – Disclosure of the information would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.

6. Following an internal review the CPS wrote to the complainant on 24 August 2016, upholding its original decision.

Scope of the case

7. The complainant contacted the Commissioner on 30 August 2016 to complain about the way his request for information had been handled. He explained that it was clear that there was no evidence of any harm being caused by disclosure and that the CPS was guessing that harm may happen.
8. The Commissioner will consider the CPS's application of section 36(2)(b)(i) and (ii).

Reasons for decision

Section 36 – effective conduct of public affairs

9. 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."
10. 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.

11. 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.
12. CPS officials 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 the withheld information and information the CPS considered could be disclosed.
13. When considering whether section 36 is engaged, the Commissioner must determine whether the qualified person's opinion is a reasonable one. The Commissioner will consider 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.
14. 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.
15. 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.
16. 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 that the material in scope ensured internal senior colleagues and relevant stakeholders were updated on the policy regarding making charging decisions in respect of deceased suspects.

17. In addition, the CPS argued that disclosure of this information would inevitably lead to staff being more circumspect in their advice and in putting their views forward. As a result, deliberations and advice would be less well informed which would leave the CPS and key stakeholders at a significant disadvantage when considering future policy/decision making process.
18. 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.
19. The CPS claimed that disclosure 'would' inhibit the matters set out in sections 36(2)(b)(i) and (ii).
20. 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 information regarding the CPS' decision not to provide charging advice regarding deceased suspects would inhibit the processes of providing advice and/or exchanging views.
21. 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 it.

Public interest test

22. 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.
23. 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

24. The CPS explained that it considered that the public interest in maintaining sections 36(2)(i) and (ii) outweighed the public interest in disclosure.
25. It argued that meetings held to discuss the formation and remit of future policy/guidance require a 'safe space' for colleagues and key stakeholders to voice their concerns. It also argued that it was important that there was a safe space so that any potential problems and issues on the formulation of future policies could be fully understood.
26. The CPS went on to argue that it was vital that both its staff and staff from other agencies working with it, were able to freely and frankly exchange views for the purpose of deliberation without the fear that all their discussions would be released into the public domain. In addition, the CPS argued there was a strong public interest in staff being frank in their recommendations including being able to express concerns in confidence.
27. The CPS also argued that participants needed to understand that their views, given freely and frankly, would be kept confidential.
28. Furthermore, the CPS explained that the material in scope ensured that internal senior colleagues and relevant stakeholders were updated regarding the policy about charging decisions in relation to deceased suspects.
29. The CPS also explained that whilst disclosure of the information may provide some insight into the decision taken by it, it would not significantly add to the public debate regarding the CPS policy/decision making processes.
30. The CPS pointed out that the policy in question was already on its external website.

Public interest arguments in favour of disclosure

31. The CPS acknowledged that there was a clear public interest in increasing the public understanding of how it develops future policy/decision making processes.
32. The complainant argued that there was a compelling public interest in disclosure of the requested information as the public must have the ability to scrutinise the process by which public bodies decide to make a shift in policy.
33. The complainant pointed out that the CPS has previously provided charging advice on deceased suspects but has now made the decision not to do so. He argued that there is a compelling public interest in

discovering how the decision not to provide charging advice relating to deceased suspects, came about. In addition, the complainant argued that there was a compelling public interest in the public having access to information showing how the CPS decided that its policy must change and what processes it went through in arriving at the policy including who was involved in the decision-making, was the CPS lobbied and why had it decided to make this change in policy now.

34. The complainant also wanted to know whether it was because there were so many cases involving live suspects that the CPS was prioritising resources to deal with those rather than provide advice/decisions which would never result in an actual charge. He argued that the public has a right to know when there are such significant shifts in policy. In addition he argued that there was no evidence provided in this specific case that transparency would in any way inhibit officials in the future.
35. Furthermore, the complainant argued that transparency would ensure major decisions such as this were not made behind closed doors with no scrutiny or explanation. He also pointed out that the decision-making process in relation to this policy was not live and that his request for information occurred long after the change in policy had been communicated.
36. The complainant also pointed out that there are hundreds of ongoing police investigations into deceased suspects where huge amounts of public money was being spent investigating allegations which could never result in either a charge or clearing a suspect. He also pointed to investigations where, although the suspects were deceased, the CPS had provided an indication of whether they could have been charged with offences previously, including Jimmy Saville and Cyril Smith.
37. In addition, the complainant also pointed out that families of other deceased suspects who had been accused of offences including Edward Heath and Leonard Rossiter, would never know if they would have been cleared.

Balance of the public interest arguments

38. 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.
39. 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.

40. 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.
41. 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).
42. 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 the requested information would achieve these ends. However, she considers that the publication of the CPS's change of policy regarding the charging of deceased suspects, does achieve these ends.
43. The Commissioner notes that the CPS provided the complainant with a copy of its policy in its initial response. She notes that the policy explains, amongst other things, that in order to charge a suspect, they have to be alive. It also explains that its approach was consistent with the power of the DPP to decide whether there is sufficient evidence to charge a person with an offence, under section 37B of the Police and Criminal Evidence Act 1984. The CPS's policy also explained that this statutory provision clearly contemplates that any charging decision is in relation to a living person, as following the decision that person must be charged or cautioned or given notice of a decision not to charge. The Commissioner considers that publishing the policy goes some way to satisfying the public interest.
44. The Commissioner appreciates that the requester might have valid reasons for accessing the information which are founded on genuine concerns. 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. The Commissioner notes the complainant's arguments regarding the decision making process not being live and that disclosure would allow the public to see why this policy had changed. However, she notes that the CPS' published policy explains why its approach to charging advice relating to deceased suspects has changed.

45. 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 about 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

46. 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.

Right of appeal

47. 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

48. 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.
49. 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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