

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 2 September 2019

**Public Authority:** Crown Prosecution Service  
**Address:** 8<sup>th</sup> Floor, 102 Petty France  
London  
SW1H 9EA

### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the Crown Prosecution Service (CPS) submission to the Lammy Review. The CPS refused to provide the requested information, citing sections 36(2)(b)(i) and (ii) and 36(2)(c) (prejudice to effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that section 36(2)(b)(i) and (ii) are engaged and that the balance of the public interest lies in maintaining the exemption. However, as the CPS failed to complete its deliberations on the balance of the public interest within a reasonable time, it breached section 10(1) of the FOIA.
3. The Commissioner requires no steps to be taken as a result of this decision.

### **Background**

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4. On 8 September 2017, The Right Honourable David Lammy MP published his final report<sup>1</sup> into the treatment of, and outcomes for, Black, Asian and Minority Ethnic (BAME) individuals in the criminal justice system [CJS].

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<sup>1</sup> <https://www.gov.uk/government/publications/lammy-review-final-report>

5. The purpose<sup>2</sup> of the review was:

*"I. To develop an accurate understanding, based on analysis of quantitative and qualitative data, of the factors affecting the treatment of and outcomes for BAME individuals within the CJS in England and Wales.*

*II. To identify areas for reform and examples of good practice, in the UK and beyond*

*III. To make recommendations for improvement with the ultimate aim of reducing the proportion of BAME offenders in the CJS and making sure that all suspects and offenders are treated equally, whatever their ethnicity".*

## **Request and response**

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6. On 14 September 2017, the complainant wrote to the CPS and requested information in the following terms:

*"I would like to make a request under the Freedom of Information Act for the Crown Prosecution Service evidence or submission to the David Lammy [sic] into the treatment of and outcomes for Black, Asian and Minority Ethnic individuals in the Criminal Justice System".*

7. The CPS responded on 27 November 2017. It refused to provide the requested information citing the following exemption:

- section 36(2)(b)(i) and (ii) (prejudice to effective conduct of public affairs).

8. The complainant requested an internal review on 22 January 2018.

9. The CPS ultimately provided an internal review on 6 December 2018, revising its position. It confirmed the application of section 36(2)(b)(i) and (ii) and, additionally, it cited section 36(2)(c) of the FOIA.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/643001/lammy-review-final-report.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/643001/lammy-review-final-report.pdf)

## Scope of the case

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10. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation, on 18 April 2019, to support his complaint about the way his request for information had been handled.
11. The complainant explained:

*"I am seeking a review of the CPS decision to refuse to release the submission to The Lammy Review on the grounds that I believe it is in the public interest for it to be released.*

*I also find it difficult to agree with their decision when part of submission appears in the review under CPS charging on pages 20 and 21".*
12. He also expressed dissatisfaction with *"the dilatory way"* with which the CPS handled his request.
13. During the course of the Commissioner's investigation the CPS confirmed its application of sections 36(2)(b)(i) and (ii) and 36(2)(c) to the withheld information.
14. The analysis below considers the CPS's application of section 36 of the FOIA to the withheld information. That information comprises the CPS's submission to the Lammy review, other than the part of the submission quoted in the published report. As that information is already in the public domain, section 36 cannot apply to it.
15. The analysis below also considers the timeliness with which the CPS handled the request.
16. The Commissioner has addressed the time taken by the CPS to conduct the internal review in 'Other matters' below.

## Reasons for decision

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### *Section 36 prejudice to effective conduct of public affairs*

17. In its correspondence with the complainant the CPS referred to sections 36(2)(b) and (c) of the FOIA. These provide the following exemptions:

*"(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”.*

18. The terminology used in these subsections is not explicitly defined in the FOIA. However, the Commissioner's guidance on section 36<sup>3</sup> explains her understanding of the key terms as follows:

*“• ‘Inhibit’ means to restrain, decrease or suppress the freedom with which opinions or options are expressed.*

*• Examples of ‘advice’ include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.*

*• The ‘exchange of views’ must be as part of a process of deliberation.*

*• ‘Deliberation’ refers to the public authority’s evaluation of competing arguments or considerations in order to make a decision”.*

#### *The qualified person’s opinion*

19. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.
20. The Commissioner's guidance on section 36 of the FOIA contains a section called ‘*Qualified person*’. That section covers, amongst other things, identifying the qualified person, and that the qualified person's opinion is crucial in order to engage the exemption.

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

21. Her guidance also states that, in a case involving the application of section 36, the Commissioner expects that the qualified person would take the opportunity presented by an internal review to consider their reasonable opinion again, taking account of any comments from the complainant.
22. With regard to the process of seeking the opinion in this case, the CPS explained that it consulted the qualified person, namely the Director of Public Prosecutions (DPP), on 3 November 2017. The opinion, with regard to engaging the exemptions contained at section 36(2)(b)(i) and (ii) of the FOIA, was given on 21 November 2017.
23. The CPS also explained that, when conducting the internal review, it had made a further submission to the qualified person. In the absence of the DPP, that submission was made to the Director of Legal Services (DLS) who confirmed, on 29 November 2018, that section 36(2)(c) additionally applied.
24. During the course of her investigation, the CPS provided the Commissioner with a copy of the first submission to the qualified person (the DPP). The CPS also provided the Commissioner with evidence of the qualified person's opinion (the DLS), and how it was reached, in respect of the internal review.
25. From the evidence she has seen, the Commissioner is satisfied that the CPS obtained the opinion of the qualified person and took the opportunity to reconsider the qualified person's opinion in accordance with her guidance.

*Was the opinion reasonable?*

26. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
  - whether the prejudice or inhibition 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; and
  - the qualified person's knowledge of, or involvement in, the issue.
27. 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. 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.

28. With respect to the limbs of the exemption claimed in this case, the Commissioner's guidance explains:

*"Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority..."*

29. With respect to section 36(2)(c), the Commissioner's guidance states:

*"... section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)"*

30. In its correspondence with the complainant, albeit in relation to the public interest test, the CPS variously used the terms 'would', 'will' and 'would or would be likely to'.

31. The Commissioner did not consider that this gave a clear indication of whether the risk of any prejudice occurring was considered to be one that 'would be likely to' occur, or whether the risk met the higher test of 'would occur'.

32. However, in its correspondence with the Commissioner, with regard to the likelihood of prejudice occurring in this case, the CPS told her with respect to section 36(2)(b)(i) and (ii) respectively:

*"The CPS's view is that disclosure would inhibit the free and frank provision of advice.*

*The CPS's view is that disclosure would inhibit the free and frank exchange of views for the purposes of deliberation".*

33. With respect to its application of section 36(2)(c), the CPS cited the lower level of likelihood (would be likely to prejudice).

34. 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's submission to the Lammy Review would, or would be likely to, inhibit the processes of providing advice and/or exchanging views and/or would, or would be likely to, otherwise prejudice the effective conduct of public affairs.
35. In this case, the Commissioner is satisfied that the first submission to the qualified person clearly related to the request that was made by the complainant. She is also satisfied that it explained why an opinion was being sought and provided relevant background information.
36. Having reviewed the withheld information the Commissioner is satisfied that it was reasonable to argue that disclosure in this case would inhibit the free and frank provision of advice and would inhibit the free and frank exchange of views for the purposes of deliberation. She therefore accepts that it was reasonable for the qualified person to reach the view that disclosure would prejudice the effective conduct of public affairs by virtue of section 36(2)(b) (i) and (ii).
37. However, the Commissioner finds that there is no clear argument in the record of the second opinion as to what the 'other prejudice' could be that would be relevant to section 36(2)(c). In light of this the Commissioner has concluded that section 36(2)(c) is not engaged.

*The public interest test*

38. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.
39. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

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

40. From the evidence she has seen, although the complainant told the Commissioner that he considered that the public interest favoured disclosure, he did not put forward any arguments in support of that view.
41. The CPS acknowledged a clear public interest in transparency.



*Public interest arguments in favour of maintaining the exemption*

42. In favour of maintaining the exemption, the CPS told the complainant that disclosure:

*"...would lead to staff being more circumspect in their advice and in putting their views forward".*

43. It argued that, as a result:

*"... deliberations and advice will be less well informed which would leave the CPS at a significant disadvantage when considering future policy/decision making processes".*

44. It also considered that disclosing information relating to the formulation and development of a given policy or decision making process (even after the process is complete) has the potential to affect the frankness and candour with which relevant parties will contribute to other, future, policy debates and decision making processes.

45. It considered that it would not be in the public interest if inhibiting the provision of advice, or the exchange of views, impaired the quality of such contributions.

46. Summarising its public interest arguments in favour of maintaining the exemption, the CPS told the complainant:

*"The CPS contribution contains open, honest and frank analysis of the data held and in the public domain to the David Lammy Review team, in the interests of allowing the Review team to come to a well-informed and reasoned decision in making recommendations for improvement with the ultimate aim of reducing the proportion of BAME offenders in the CJS. Disclosing that contribution could be likely to inhibit the frank exchange of views for the purposes of deliberation in the future, which may unintentionally impair the quality of decision making by the CPS in the future".*

47. Describing its preparation of the information under consideration in this case, the CPS told the Commissioner:

*"In the course of preparing material for the Lammy Review submission, staff in the CPS looked honestly, frankly and in close detail at what the available data was telling them".*

48. It told the Commissioner that if the requested information was disclosed, *"it would inevitably affect the frankness and candour of advice provided".*



*Balance of the public interest*

49. The Commissioner has first considered the arguments in favour of disclosure and accepts that they carry some weight.
50. Although she does not consider that the complainant set out a case for why disclosure of the information sought by his request would be in the public interest, the Commissioner recognises that disclosure would provide transparency and accountability and give the public an insight into the CPS.
51. The Commissioner has also taken into account that the question of racial bias is a matter of significant public interest. The withheld information reflects the CPS's analysis of its data with a view to identifying whether there is any evidence of racial bias in its decision-making. The Commissioner has considered the extent to which that analysis would add to the public debate and inform the public's understanding of the CPS's actions. She recognises that the extent to which it would do this has to be balanced against the harm to the quality of its input to policy making in the future.
52. The Commissioner notes that, having accepted the qualified person's opinion that disclosure of the information would have the stated detrimental effect, she must give weight to that opinion as a valid piece of evidence in her assessment of the balance of the public interest.
53. The arguments for maintaining the exemption essentially focus on the 'chilling affect' argument, that officials would be less candid in the free and frank provision of advice and exchange of views for the purposes of deliberation in the future.
54. The Commissioner recognises that, whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
55. With regard to attributing weight to the public interest in maintaining the exemptions in this case, the Commissioner accepts that disclosure of the withheld information does pose some risk of having a chilling effect on future responses to a public review by a third party. It is envisaged that the loss of frankness and candour would damage the quality of advice and deliberation and lead to staff being more circumspect in their advice and in putting their views forward.
56. In reaching this view the Commissioner accepts that, for the process of providing responses or submissions to a third party to work effectively, officials need to be able to undertake candid and free assessments and discussions.

57. Furthermore, with respect to the nature of the information and timing of the request, the Commissioner notes that the requested information relates to the Lammy Review which, at the time of the request, was only very recently published.
58. 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. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and she considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
59. Taking all the above into account, the Commissioner is satisfied that the CPS was entitled to rely on section 36(2)(b)(i) and (ii) to withhold the requested information.

*Section 10 time for compliance*

60. Section 1(1) of the FOIA states that upon receipt of a request a public authority must confirm or deny whether information is held, and if that information is held it must be communicated to the requester.
61. Section 10(1) of the FOIA states that public authorities must comply with section 1(1) within 20 working days of receipt of the request.
62. Section 10(3) enables an authority to extend the 20 working day limit up to a 'reasonable' time in any case where:
  - it requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption; **or**
  - it needs further time to consider whether it would be in the public interest to confirm or deny whether the information is held.
63. The FOIA does not define what might constitute a 'reasonable' extension of time. However, the Commissioner considers that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.
64. While the CPS advised the complainant that further time was required to consider the public interest in this case, it is evident that the CPS did not respond to the complainant within the statutory time frame and so it is in breach of section 10(1) of the FOIA.

## **Other matters**

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65. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has issued guidance in which she has stated that, in her view, internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.
66. In this case, despite the complainant asking the CPS, on a regular basis, about progress, the internal review that he requested on 22 January 2018 was not completed in accordance with that guidance.
67. The Commissioner expects the CPS to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

## **Right of appeal**

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68. 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](mailto:grc@justice.gov.uk)

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

69. 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.
70. 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 .....**

**Jon Manners**  
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