

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 May 2020

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

Decision (including any steps ordered)

1. The complainant requested information relating to a decision to house sex offenders at Hollesley Bay open prison in Suffolk.
2. The Commissioner's decision is that the Ministry of Justice (MoJ) has appropriately applied the exemption at section 35(1)(a) (formulation of government policy) of the FOIA. However, the public interest favours disclosure of some of the withheld information.
3. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
 - provide the complainant with a copy of the information specified in the confidential annex to this decision notice, with personal information redacted in accordance with the Commissioner's guidance on third party personal data.
4. The MoJ must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. Following earlier correspondence between the complainant and the MoJ about Hollesley Bay open prison, on 15 April 2019 the complainant wrote to the MoJ and requested information in the following terms:

"Copies of any document you hold....that relate to the decision to house sex offenders at HMP and YOI Hollesley Bay in Suffolk".

6. The MoJ responded on 2 May 2019. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
 - section 35(1)(a) (formulation of government policy).
7. Following an internal review, the MoJ wrote to the complainant in correspondence simply dated 'May 2019'. It maintained its original position.

Scope of the case

8. The complainant contacted the Commissioner on 4 September 2019 to complain about the way her request for information had been handled.
9. She disputed both the MoJ's application of section 35 and its consideration of the public interest test. She also questioned the date of the MoJ's internal review correspondence.
10. The complainant told the Commissioner:

"So that there can be no misunderstanding, I should clarify [that the request] relates specifically to the original decision to house sex offenders at Hollesley Bay and not to any subsequent further plans regarding implementation that the MoJ may be working on".
11. It is accepted that, prior to the request under consideration in this case, there had been meetings between the two parties regarding Hollesley Bay prison. It is also accepted that the complainant had made a previous FOI request on the subject of Hollesley Bay prison. That previous request had also been refused by the MoJ by virtue of section 35(1) of the FOIA.
12. During the course of the Commissioner's investigation, the MoJ confirmed that the internal review response was sent to the complainant on 21 June 2019:

"... although the letter was mistakenly dated 'May 2019'."
13. The MoJ also revisited its handling of the request, as a result of which it confirmed its application of section 35(1)(a). However, it also advised that parts of the documents in scope of the request are also exempt from disclosure under section 40(2) (personal information) of the FOIA. The MoJ wrote to the complainant accordingly.

14. With regard to the timing and context of the request in this case, the MoJ told the Commissioner:

"The MoJ agrees that at the time of the request, a decision had been taken to house sex offenders at Hollesley Bay. The decision was taken by the Secretary of State on 20th June 2018, and announced on 24th July 2018".

15. During the course of her investigation, the MoJ provided the Commissioner with a copy of the withheld information.
16. The Commissioner had cause to question the amount of information provided to her, as a result of which the MoJ acknowledged that, regretfully, some information within the scope of the request had not been included. It provided the information concerned and apologised for the omission. The MoJ also explained the reason for the apparent 'gaps' in the information, identified by the Commissioner, saying these were due to changes to the governance route that was initially envisaged.
17. The analysis below considers the MoJ's application of sections 35 and 40 of the FOIA to the withheld information. That information comprised relevant emails from the team responsible for recommending the decision, together with:

"... copies of all formal governance processes, namely minuted meetings, forums, boards and submissions, ...".

Reasons for decision

Section 35 formulation of government policy etc

18. The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
19. In this case, the MoJ considered section 35(1)(a) applied. Section 35(1)(a) of the FOIA provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
20. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or

effective policies. In particular, it ensures a safe space to consider policy options in private.

21. In her guidance on section 35¹, the Commissioner accepts:

"Section 35 is class-based, meaning departments do not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and will catch a wide range of information".

22. In her guidance, the Commissioner also explains:

"The Modernising Government White Paper (March 1999) describes policymaking as: 'the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world'. In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives".

23. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister or decision makers.

24. Development of government policy, however, goes beyond this stage to improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.

25. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

¹ <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

The complainant's view

26. The complainant confirmed their support for the principles that underpin the section 35 exemption. She accepted *"that those making government decisions should be allowed the time and space to make an informed decision"*. However, the complainant told the MoJ that the request related specifically to a policy decision (to house sex offenders at Hollesley Bay) that, at the time of the request, had been made and publicly announced. While not required to do so, the complainant explained that the request was made in order to help to understand that decision.

The MoJ's view

27. In correspondence with the complainant, the MoJ acknowledged:

"As you have stated, the decision ... has actually been made and further plans are being developed to implement that decision. You are requesting the information relating to that decision-making process".

28. The Commissioner considers that, in its correspondence with the complainant, the MoJ initially relied on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis. For example, it told the complainant:

"All of the information is exempt from disclosure under section 35(1)(a) of the FOIA, because it relates to the development of government policy".

29. It subsequently provided further arguments in support of its position, stating:

"As the policy decision has yet to be implemented, the disclosure of the decision-making process could impact the successful implementation of that decision".

30. The MoJ told the complainant that disclosure of the requested information could damage the integrity of the government's policy making processes.

31. In its submission to the Commissioner, the MoJ said:

"Drawing on the Modernising Government White Paper (March 1999), ICO guidance is that 'government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world'."

The decision to accommodate Men Convicted of Sexual Offences at HMP Hollesley Bay fits squarely within this definition, as a tangible 'real world' decision taken in order to improve resettlement outcomes for this group of prisoners. It supports both an overarching policy ambition in the government's manifesto that 'prisons should be places of reform and rehabilitation', and is part of wider policy development relating to the size and function of the open prison estate (more information provided below). Both this decision and the wider policy development were approved by the Secretary of State on behalf of the government".

32. It further explained that the decision should be regarded:

"... as a review and improvement of existing policy, with the aim of resolving issues arising from the current policy, by improving the movement of offenders through the prison system".

Is the exemption engaged?

33. The Commissioner recognises in her guidance that:

"To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

However, the exemption will not cover information relating purely to the application or implementation of established policy. It will therefore be important to identify where policy formulation or development ends and implementation begins".

34. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.

35. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant Minister;
- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

36. The Commissioner is also mindful of her guidance that the section 35 exemptions are class-based, which means there is no need to show any

harm in order to engage the exemption. The information simply has to fall within the class described. The classes are broad and will catch a wide range of information.

37. Her guidance also notes that the timing of the request is not relevant when determining whether the information engages the exemption. The question is whether the information relates to the activity, irrespective of when the request was made.
38. In her guidance, the Commissioner recognises that policy design and implementation:

"... are becoming increasingly integrated, and that many implementation issues will also relate to policy formulation. Considering the risks and realities of implementation may be an important factor when assessing policy options. If implementation issues are actively considered as part of the policy design (ie before a policy decision is finalised) and feed into that process, they will also relate to the formulation of the policy".

39. Having considered the wording of the request, and viewed the withheld information, the Commissioner considers that the information that falls within the scope of the request clearly falls within the scope of the exemption contained at section 35(1)(a) of the FOIA.
40. The Commissioner is therefore satisfied that the MoJ was entitled to engage the exemption at section 35(1)(a) in this case.

The public interest test

41. Section 35 of the FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the withheld information

42. In favour of disclosing the information, the complainant asked, in her correspondence with the MoJ:

"How can the public ever be confident that government officials have made 'well-informed decisions' if there is no means of obtaining the documentation upon which that decision has been based?"

43. The MoJ recognised that disclosure would be consistent with the Government's wider commitment to transparency, making government more accountable to the public and increasing trust. It also considered

that the modernisation of the prison estate in England and Wales is of current interest to parliamentarians, trade unions and the wider public.

Public interest in favour of maintaining the exemption

44. In favour of withholding the information under consideration, the MoJ told the complainant:

"Although this position has been publicly stated, it nonetheless does not alter the exemption in terms of releasing any documents or correspondence relating to the formulation of this policy. Such documentation will relate to prison service operations, as well as future plans, that can still not be disclosed at this stage".

45. In its submission, the MoJ told the Commissioner:

"It should be noted that [the complainant] does not dispute that the information requested relates to the formulation or development of the policy".

46. The MoJ recognised, however, that the complainant considered that the public interest favoured disclosure:

"... now that the formulation/development period is over and the implementation period is underway."

47. However, the MoJ told the Commissioner that less weight should be attached to the public interest arguments in favour of disclosure:

"... due to the particular circumstances of the case, namely the level of engagement [with the complainant] that had taken place outside of the FOIA process".

48. In that respect the MoJ told the Commissioner that there had been a series of meetings, as well as correspondence, between the parties.

49. The MoJ considered that the actions it had taken were relevant:

"... as they represent willingness on the MoJ's behalf to be as transparent as possible and to address the concerns [of the complainant] over a prolonged period".

50. The MoJ told the Commissioner that, in the circumstances of this particular case, while disclosure of the withheld information would not substantively increase the public's understanding of the decision it would:

"... encroach upon the 'safe space' necessary for civil servants to discuss and formulate/develop policy, exercise a 'chilling effect' on

future policy discussions, and put at risk implementation of this decision and related policy development which remains underway”.

51. In its submission to the Commissioner, the MoJ recognised that the weight attached to ‘safe space’ arguments may be time limited, and that once an initial announcement has been made, there is likely to be increasing public interest in scrutinising and debating the details of the decision. However, in this case, the MoJ told the Commissioner:

“The MoJ considers that more weight should be attached to these considerations due to the particular circumstances of the case”.

52. It provided the Commissioner with further arguments in support of that view, including that:

“Premature disclosure of the subject matter could hinder the policy under development and adversely affect the way future policy is developed”.

53. It also argued that disclosure of factors considered during policy development could jeopardise implementation planning.

Balance of the public interest arguments

54. The Commissioner is satisfied that the exemption at section 35(1)(a) is engaged, however she does not consider that there is an inherent or automatic public interest in maintaining the exemption. The exemption is not absolute but is subject to the public interest test. This means that Parliament was of the opinion that, in some cases, the public interest would lie in the disclosure of information into the public domain, despite the exemption being engaged.
55. When balancing the public interest arguments in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
56. While the FOIA does not list factors that favour disclosure, the Commissioner considers that factors favouring disclosure include furthering public understanding and debate of issues of the day, greater accountability and transparency of public authorities for decisions taken by them and, fostering strong accountability and transparency in public expenditure.
57. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature and content of the

withheld information. She has considered the comprehensive representations put forward by the complainant and the MoJ's submissions in support of its position. She has also reviewed the information available in the public domain on this subject matter.

58. In her deliberations, the Commissioner has taken into account her guidance on section 35 which states:

"Public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption".

59. The Commissioner recognises that the decision where to accommodate individuals within a particular offender group is an area of importance, and that matters concerning the Hollesley Bay prison are clearly matters of genuine interest to the complainant.

60. She also acknowledges that the relevance and weight of the public interest arguments will depend on the content and sensitivity of the particular information in question.

61. The Commissioner's guidance on section 35 recognises the importance of the timing of a request when considering the public interest. In that respect the Commissioner considers:

"If the information reveals details of policy options and the policy process is still ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight".

62. The Commissioner considers that the arguments are finely balanced in this case. Having taken all the above into account, the Commissioner was not satisfied that the MoJ had demonstrated sufficient public interest in maintaining the exemption to warrant withholding all of the relevant information and disclosing none of it.

63. In the Commissioner's view, disclosure of most, but not all, of the withheld information presents a significant risk of undermining the confidential space needed by the MoJ to discuss policy making in this area, and moreover presents a genuine risk of encroaching on the candour of any future discussions in respect of such policy making.

64. The Commissioner is satisfied that there remains a need for an appropriate degree of safe space within which to develop ideas and consider policy issues away from external interference and distraction and to protect the policy and the formulation/development process.

65. In respect of that information, she therefore concluded that, in all the circumstances of this case, the public interest in maintaining the exemption is stronger than that in disclosing the information.

66. However, with respect to the remaining small amount of withheld information, the Commissioner concluded that the balance of the public interest lay in disclosure. It follows that the Commissioner's decision is that the MoJ was not entitled to apply section 35(1)(a) of the FOIA to withhold that information. That information is described in a confidential annex to this decision notice, a copy of which will be provided to the MoJ only.

Section 40 personal information

67. With respect to its application of section 40 of the FOIA to the withheld information, the MoJ told the complainant:

"The documents include names and contact details of Ministry of Justice employees directly or indirectly involved in the decision-making process. Where these individuals are relatively junior within the organisation and not employed in public facing roles, they will have a reasonable expectation that their personal information is not disclosed.

... We believe releasing the requested information into the public domain would be unlawful. Individuals have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOIA".

68. The Commissioner accepts that, where information is to be disclosed, it should be disclosed in accordance with her guidance "*Requests for personal data about public authority employees*"².
69. It follows that, in making the above disclosure of information, the MoJ should redact the personal information of its junior officials, ie those ranking below senior civil service grades, along with the personal contact details of senior officials.

Other matters

70. The Commissioner notes that the wording of the request specifies '*any document*' relating to the decision and is therefore mindful of the wide range of the request in this case.
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² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

71. As is her practice, the Commissioner asked the MoJ to provide her with a copy of the withheld information, clearly marked with which exemptions applied.
72. The Commissioner accepts that where information is in the form of email chains, the information may contain duplicates as emails chains often overlap. Similarly, she accepts that where draft versions of documents are involved, the drafts may contain very similar information.
73. However, she considers that the MoJ could, and should, have done more to assist with respect to annotating the withheld information. For example, where the withheld information comprised a set of minutes covering a range of topics, the Commissioner considers it both appropriate and necessary for the MoJ to have highlighted which aspects of the information it considered to be in scope.
74. The Commissioner expects that, in future, the MoJ will give greater thought as to how it presents her with a copy of the withheld information in order to assist her consideration of that information.

Right of appeal

75. 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

76. 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.
77. 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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