

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2022

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

Decision (including any steps ordered)

1. The complainant requested information about Caribbean judges sitting on the Judicial Committee of the Privy Council. The Ministry of Justice (the 'MOJ') initially said it did not hold the requested information. During the course of the Commissioner's investigation, the MOJ revised its position. It now said that the requested information was held but refused to provide it citing sections 35 of FOIA (formulation of government policy) and 40 (personal information). The complainant confirmed he was only concerned with the information withheld under section 35 so the Commissioner has not considered the MOJ's reliance on section 40 any further.
2. The Commissioner's decision is that the MOJ has appropriately applied section 35(1)(a) of FOIA to the withheld information and that the balance of the public interest test favours maintaining the exemption.
3. The Commissioner does not require the MOJ to take any steps as a result of this notice.

Request and response

4. On 17 March 2021, the complainant wrote to the MOJ and requested information via the WhatDoTheyKnow.com website¹ in the following terms:

“The President of the Supreme Court today told a select committee that he's been working with you to find a way for Caribbean judges to sit on the Judicial Committee of the Privy Council (reported here²:)

Please disclose an electronic copy of all recorded information you hold related to these discussions/ this piece of work.

In considering whether or not any exemptions apply, you will of course bear in mind the fact that the existence of the project is now public knowledge.”

5. On 16 April 2021, the MOJ responded. It denied holding the requested information and said this is because it is “not the appropriate authority to contact on this subject”. The MOJ suggested the complainant should instead contact The Supreme Court which it advised may hold the requested information and provided the relevant email address.
6. The complainant requested an internal review on 16 April 2021, which the MOJ provided on 11 May 2021. It partly revised its position in that it said:

“In our original response, we also should have advised you that the judiciary of England and Wales is not a public body for the purposes of the FOIA as it is not listed under Schedule 1 of the Act. As a result of this, information held by or on behalf of the judiciary is not eligible for release under the FOIA. As part of the judiciary, the Supreme Court of England and Wales is not a public body and thus not subject to the FOIA. This also covers any discussions between judges on matters handled by the judiciary itself.

¹ https://www.whatdotheyknow.com/request/caribbean_judges#incoming-1952012

² <https://twitter.com/legalhackette/status/1372169231333261314>

Outside the scope of the FOIA, you may find it helpful to contact the Supreme Court directly who may be able to provide you with further information.”

7. The MOJ provided the complainant with address and email contact details for the Supreme Court.

Scope of the case

8. The complainant contacted the Commissioner on 13 May 2021 to complain about the way his request for information had been handled. He submitted grounds of complaint which set out his view that the MOJ may have misunderstood his request, which included:

“Overall, the Ministry’s handling of this request has been extremely odd and not especially competent. The simple fact remains that one of the most senior judges in the country has literally said that he has been working with the Ministry of Justice on a particular project, so if the Ministry is going to deny that that is the case, they will need to do so slightly more convincingly, and with clearer explanations, than they have done to date”.

9. On 14 December 2021, the Commissioner asked the MOJ to consider the complainant’s grounds of complaint, (which he replicated in full), as part of its investigation response.
10. On 14 January 2022, the MOJ advised that it had made an error in its original handling of the request, for which it apologised. Having reconsidered its position, the MOJ wrote to the complainant and now confirmed it held the requested information. The MOJ refused to provide it, citing section 35 (the exemption for the formulation of government policy, etc) and section 40(2) (the exemption for personal information). It said that the public interest test associated with section 35 favoured maintaining the exemption.
11. On 17 January 2022, the Commissioner wrote to the complainant seeking his view on the MOJ’s revised position, but to date no response has been received on this matter.
12. The Commissioner wrote to the MOJ again on 17 January 2022 to investigate its revised position (ie sections 35 and 40 of FOIA).
13. Having received the MOJ’s further investigation response, the Commissioner contacted the complainant on 15 February 2022 to ask

him to confirm whether he was concerned with the information withheld under section 40(2).

14. That same day, the complainant advised that he wished the Commissioner to consider only the information withheld under section 35 of FOIA.
15. Having reviewed the content of the withheld information, the Commissioner asked the MOJ to recheck whether any further recorded information was held in scope of the request. On 24 February 2022, the MOJ confirmed that no further recorded information was held.
16. Therefore, in this case, the Commissioner has considered the MOJ's reliance on section 35(1)(a) of FOIA.

Reasons for decision

Section 35(1)(a) - formulation or development of government policy

17. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
18. The purpose of subsection 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.
19. In his guidance on section 35³, 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".
20. In that guidance, the Commissioner also explains:

"The Modernising Government White Paper (March 1999) describes policymaking as: 'the process by which governments

³ section-35-government-policy.pdf (ico.org.uk)

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".

21. 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.
22. 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.
23. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged.
24. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007⁴) 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.
25. Ultimately 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 precise context and timing of the information in question.
26. In its revised response, the MOJ told the complainant it was relying on section 35 because:

"Section 35(1)(a) exempts disclosure of information relating to the formulation or development of government policy. This is intended to protect the integrity of the policy-making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In

⁴ Information Tribunal Appeal Number: EA/2006/0010 (tribunals.gov.uk)

particular, it ensures a safe space to consider policy options in private.”

27. In its submissions to the Commissioner, the MOJ said:

“This information relates to HM [Her Majesty’s] Government’s position on whether and how to take forward the proposal raised by Lord Reed, President of the UK Supreme Court.

At the time of the complainant’s submission, formulation and development of policy were ongoing, meaning that the policy question of whether and how to take forward Lord Reed’s proposal was not concluded (or, for example, referred elsewhere)...”

28. With reference to the Tribunal decision in *DfES v Information Commissioner & the Evening Standard*, the MOJ said it had taken particular heed of paragraph 75 of that decision, which states:

“Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has merely been broached as agreed policy.”

29. The MOJ stated:

“The ICO will appreciate from the documents previously shared [ie the withheld information] that at the date of the complainant’s request the policy matter was at only the very beginning of the policy process, on any measure. Discussion was at official level on how to deal with the proposal, and well in advance of putting advice to Government Ministers.”

30. The MOJ also averred:

“The judicial and executive branches of the constitution are independent of each other. The separation of these different powers has been established through convention, case law and statute: it is fundamental to the independence of the judiciary and to the rule of law. The judicial and executive branches must, of course, cooperate, and successful cooperation depends on the ability of each branch to deal with matters in confidence until such time, for example, as a policy is announced or a proposal brought before Parliament. MOJ believes that disclosure of discussions in this instance would inhibit free and frank discussion and that the loss of open exchange between the two

constitutional branches would damage the quality of advice and lead to poorer policy development and decision-making.”

31. Additionally, the MOJ said that a decision in relation to the relevant policy has not yet been taken.
32. The Commissioner accepts that the withheld information clearly comprises information relating to the formulation and development of government policy.
33. The Commissioner therefore accepts that the exemption at section 35(1)(a) is engaged.

Public interest test

34. Section 35 is a qualified exemption and therefore 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 arguments in favour of disclosing the information

35. The complainant has not submitted any specific public interest arguments in relation to section 35.
36. The MOJ recognised that there is a general public interest in transparency in relation to the courts.

Public interest arguments in favour of maintaining the exemption

37. The MOJ submitted the following arguments in favour of maintaining section 35(1)(a):
 - “The policy appraisal in question is at a very early stage. Withholding the requested information is necessary to protect the integrity of the live policy-making process, ensuring a safe space for the consideration of policy options.
 - Disclosure may cause unhelpful debate based on an incomplete picture of the policy. Release of information out of context from the proposals may also lead to a misunderstanding of the nature of these and any future changes. There is a danger disclosure of the data may lead to expectations based on isolated comments.”

Balance of the public interest arguments

38. The key public interest argument for this exemption will usually relate to preserving a ‘safe space’ to debate live policy issues away from external

interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future.

39. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight depending on the circumstances of the case. The need for a safe space will be strongest when the issue is still live. The timing of the request is therefore an important factor.
40. The Commissioner considers that there will always be a public interest in disclosing official information in the interests of openness and transparency. Specifically in this case, the Commissioner is of the view that there is a public interest in understanding the MOJ's preparedness for a potential legislative change to enable judges from overseas to sit on the Judicial Committee of the Privy Council ('JCPC').
41. In favour of maintaining the exemption, the Commissioner considers that the live and on-going circumstances of the policy making at the time of the request carries significant weight. He considers that disclosing the withheld information is likely to result in a chilling effect on future discussions on this matter, particularly on the work regarding the potential legislative change the Commissioner understands would be required to enable Caribbean judges to sit on the JCPC. In the circumstances of this case, there is a strong public interest in preventing such a chilling effect.
42. As the Commissioner has often noted, civil servants should not be easily deterred from giving impartial and robust advice by the possibility of future disclosure. However, the impact of a chilling effect on discussions, in relation to this policy, between civil servants and others should not be underestimated, particularly when free and frank advice is required in order to deal with legislative reform, such as those facing the MOJ at the time of the request. If the withheld information is disclosed, stakeholders may be less willing to share information with officials in future for fear that it could also be published prematurely, damaging the relevant entities' interests. This would have a detrimental effect on the formulation or development of policy in respect of enabling Caribbean judges to sit on the JCPC.
43. Furthermore, the Commissioner considers that there is a strong public interest in protecting the private thinking space for officials and Ministers to consider options in relation to the possibility of Caribbean judges sitting on the JCPC. Whilst disclosure would inform the public of the discussions and planning taking place in the event of the necessary legislative reform, the Commissioner considers that there is a stronger

public interest in allowing for uninhibited debate of the necessary policy development.

Conclusion

44. It follows that the Commissioner finds the information exempt from disclosure under section 35(1)(a) of FOIA.

Right of appeal

45. 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

46. 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.
47. 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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