

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 22 July 2010

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

### Summary

---

The complainant requested background information relating to Lord Carter's report "*Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales*". The complainant was directed to some information available in the public domain. In relation to the remainder of the information it held that fell within the scope of the request, the public authority cited the exemption provided by section 35(1)(a) (information relating to the formulation or development of government policy). The Commissioner finds that this exemption was engaged, but that the public interest in the maintenance of this exemption did not outweigh the public interest in disclosure and that, in failing to disclose this information within 20 working days of receipt of the request, the public authority failed to comply with sections 1(1)(b) and 10(1) of the Act. The Commissioner also finds that the public authority failed to comply with the requirements of sections 10(1) and 17(1) in that it did not respond to the request within 20 working days of receipt. The public authority is required to disclose the information in question to the complainant.

### The Commissioner's Role

---

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

## The Request

---

2. The complainant made the following information request on 16 January 2008:

*"Please disclose copies of all unpublished (ie not already in the public domain) background information relating to overcrowding in prisons submitted to Lord Carter's report Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales.*

*This should include but is not limited to copies of any unpublished presentations dealing with the issue of prison overcrowding; any papers both previously prepared and specifically commissioned on overcrowding or that mention prison overcrowding; any previously unpublished factual background statistics and analysis (eg population forecasts) and other unpublished information that deals with the issue of overcrowding in prisons."*

3. After a very lengthy delay, the public authority responded substantively on 29 May 2009. The public authority confirmed that it held information falling within the scope of the request and some of this information was disclosed. In relation to other information, the public authority cited the exemption provided by section 21(1) (information accessible by other means) and directed the complainant to where this information was available online. The exemption provided by section 35(1)(a) (information relating to the formulation or development of government policy) was cited in relation to the remainder of the information. The public authority briefly addressed the balance of the public interest and concluded that this favoured the maintenance of the exemption.
4. The complainant responded on 23 June 2009 and requested an internal review. The public authority responded with the outcome of the review on 18 September 2009. The conclusion of this was that the exemption provided by section 35(1)(a) was upheld.

## The Investigation

---

### Scope of the case

5. The complainant contacted the Commissioner on 28 October 2009 in connection with the partial refusal of the request. The complainant specified that she did not believe that sufficient regard had been given to the “*overwhelming*” public interest in disclosure of the information in question. The complainant ascribed this public interest to the wish to be reassured that the prison population are appropriately managed in such a way that public safety is protected.
6. As noted above, section 21(1) was cited in the refusal notice. As the complainant specified unpublished information in the wording of the request, the information in connection with which section 21(1) was cited was not within the scope of the request. The citing of section 21(1) is not, therefore, covered in this Notice.

### Chronology

7. The Commissioner’s office contacted the public authority on 23 November 2009. The public authority was informed of the complaint and was asked to respond with a copy of the withheld information.
8. The public authority responded to this on 25 November 2009 and provided a copy of the withheld information. The public authority also stated that it believed that the exemption provided by section 35(1)(a) was engaged as the information related to the formulation and development of government policy on overcrowding in prisons. It also stated its reasons for concluding that the public interest favoured the maintenance of the exemptions, the primary reason for this being that it believed that disclosure would inhibit participants in the policy making process as these participants would be concerned that their contributions may later be subject to disclosure.

### Background

---

9. The complainant referred in the request to the report *Securing the Future: Proposals for the efficient and sustainable use of custody in England and Wales*. The opening to this report, which was published in December 2007, states the following:

*"In June this year [the Prime Minister, the Chancellor of the Exchequer and the Lord Chancellor and Secretary of State for Justice] asked [Lord Carter] to consider options for improving the balance between the supply of prison places and demand for them and to make recommendations on how this could be achieved."*

## Analysis

---

### Exemptions

#### Section 35(1)(a)

10. This section provides an exemption for information that relates to the formulation and development of government policy. This is a class based exemption, which means that if the information conforms to the class described in section 35(1)(a), it is exempt from disclosure. This exemption is qualified by the public interest, meaning that the information should be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

11. Turning to whether this exemption is engaged, as already noted the wording used in this exemption is 'relates to'. The Commissioner's approach to the term 'relates to' as it is used in the Act is that this can safely be interpreted broadly. The Commissioner takes the following comment made by the Information Tribunal in the case *DfES v the Information Commissioner & the Evening Standard* (EA/2006/0006) as confirmation that it considers this approach appropriate:

*"If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable"* (paragraph 58)

12. The public authority has provided little by way of explanation as to why it believes that this exemption is engaged, but the Commissioner assumes that the stance of the public authority is that the report referred to in the request (the "Carter review") formed part of the process of the formulation and development of government policy and that the information in question relates to that report. The Commissioner has, therefore, considered two issues when reaching a conclusion as to whether this exemption is engaged:

- Did the Carter review form part of the formulation and / or development of government policy?
  - Is it accurate to characterise the information in question as relating to the Carter review?
13. Turning first to whether the Carter review did form part of a policy making process, the Commissioner has noted three factors; the origin of the Carter review, the content of the report setting out its conclusions and the outcome of this report. As noted above at paragraph 9, Lord Carter was asked to carry out his review by senior members of the Government. The Commissioner notes this and takes this as an indication that the Government expected the outcome of the Carter review to impact upon government policy on prisons.
14. As to the content of the report, the Commissioner notes that this includes recommendations to the Government as to the steps that should be taken in relation to overcrowding in prisons. The Commissioner considers it safe to assume that these recommendations were made in the expectation that they would, if accepted, form part of the government policy making process in this area.
15. On the issue of the outcome of the Carter review, the Commissioner notes the following Hansard extract recording a written answer provided by the Secretary of State for Justice:

*"Following December 2007 Lord Carter's report, 'Securing the future: Proposals for the efficient and sustainable use of custody in England and Wales', Ministers agreed to the acquisition of the former RAF Coltishall site in Norfolk and conversion to a prison."*  
(1 Jun 2009: Column 80W)

16. The following from the Select Committee on Justice Fifth Report is also relevant:

*"In reaction to Lord Carter's report, Jack Straw announced on 5 December 2007 that the Criminal Justice Act 2003 would be amended so that Imprisonment for Public Protection (IPP) sentences could only be imposed by a court with a minimum tariff of two years, being the equivalent of a notional four year determinate sentence. This, and Lord Carter's further recommendations, were then taken forward through the Criminal Justice and Immigration Act 2008."*

The Commissioner takes this as evidence that the Government took steps to act upon at least some of the recommendations made in the Carter review.

17. On the basis that Lord Carter was asked to undertake this review by the Government, that the report setting out the conclusions of the review makes recommendations for action to the Government, and the evidence that the Government has taken action to follow at least some of the recommendations made by Lord Carter, the Commissioner accepts that the Carter review did form part of a government policy making process.
18. The next step is to consider whether the information in question here can be accurately characterised as relating to the Carter review, according to the wide interpretation of the term "*relates to*" set out above. The key factor that the Commissioner has taken into account here is the content of this information.
19. The information in question consists of a document prepared by HM Prison Service on prison overcrowding and a series of e mails covering similar ground that are headed "*Carter Review*". It appears that these e mails were submitted to those working on the Carter review with the intention of providing factual background about the current rate of overcrowding within prisons and projected future availability of space within prisons.
20. On the basis that this information is relevant to the subject matter that the Carter review covered and to the content of the report setting out the conclusions of this review, the Commissioner accepts that this information can be accurately characterised as relating to the Carter review. The Commissioner takes the fact that this information was identified by the public authority as falling within the scope of the request as an assurance that it was submitted to those working on the Carter review.
21. The conclusion of the Commissioner is that the exemption provided by section 35(1)(a) is engaged. The basis for this conclusion is that the Carter review did form part of the formulation and development of government policy and that it is accurate to characterise the information in question here as relating to the Carter review.
22. Section 35(2)(a) provides that any statistical information that is used to provide an informed background to policy making is not exempt by virtue of section 35(1)(a) if the policy making process was complete by the time of the request. The information in question here includes content that could be described as statistical. As covered below at

paragraph 29, the Commissioner accepts that it is possible that the policy making process related to the Carter review was ongoing at the time of the refusal notice (which in this case the Commissioner has taken as the relevant date due to the extreme delay in providing a substantive response to the request) and, therefore, this conclusion that section 35(1)(a) was engaged applies to the statistical information.

### **The public interest**

23. Having concluded that the exemption provided by section 35(1)(a) is engaged, it is necessary to go on to consider the balance of the public interest. In forming a conclusion on the balance of the public interest, the Commissioner has taken into account the arguments advanced by the public authority and the complainant, as well as what the subject matter and content of the information suggest about the balance of the public interest. These factors are in addition to the general public interest in improving the openness and transparency of the government policy making process.
24. That the information is within the class specified in the exemption is not, however, of relevance to the balance of the public interest. This is in line with the approach taken by the Information Tribunal in *DfES v the Commissioner & the Evening Standard* (EA/2006/0006), where it stated in connection with section 35(1)(a):

*“The weighing [of the public interest] exercise begins with both pans empty and therefore level.”* (paragraph 65)
25. The arguments of the public authority concern the harm that it believes would result through disclosure by disrupting the confidentiality of the policy making process. The public authority has suggested that this would have an impact on the behaviour of those participating in this process. In the case *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), the Information Tribunal set out a number of guiding principles for the consideration of the balance of the public interest in relation to this exemption. The arguments of the public authority are relevant to the ‘chilling effect’ factor identified by the Tribunal in that case. The Commissioner also believes that the factor relating to the maintenance of a ‘safe space’ for the policy making process that has been covered on other occasions by the Tribunal and by the Commissioner is relevant to the arguments of the public authority.
26. The term ‘chilling effect’ refers to an adverse effect on the frankness and candour of participants in the policy making process. The term

- 'safe space' refers to the need for a protected space in which to formulate policy, debate live issues, and reach decisions without being hindered by external comment and/or media involvement. Arguments about 'safe space' are related to 'chilling effect' arguments, but are distinct, as the need for a safe space within which to debate policy away from external involvement exists regardless of any chilling effect that may or may not result through disclosure. The basis of safe space arguments is that an erosion of the safe space for policy making would have a detrimental impact on the quality of the policy making process.
27. The weight that the Commissioner affords to chilling effect and safe space arguments will depend on how closely they relate to the information and policy making process in question. For example, an argument that disclosure would result in a chilling effect to policy making in general would usually carry less weight than an argument that a chilling effect would affect the specific policy area to which the information relates. Also key is the stage reached in the policy making process at the time of the request. Where a public authority argues that harm would result to a specific and ongoing policy making process, this will generally carry more weight than an argument suggesting that harm would result to future policy making in general through disclosure of information relating to policy that was complete at the time of the request.
  28. In this case, the argument advanced by the public authority is general; it has advanced no suggestion that disclosure of the information in question would lead to disruption to the policy making process in relation to prisons. Instead, its suggestion appears to be that disclosure in this case would have a broad negative impact upon policy making in general.
  29. In terms of the stage reached in the policy making process to which the information relates, as noted above the Select Committee on Justice referred to the Criminal Justice and Immigration Act 2008. This received Royal Assent on 8 May 2008. Whilst this post-dated the request, owing to the extremely lengthy delay in replying to the request, it pre-dated the refusal notice and the Commissioner has, therefore, taken this into account here. According to the evidence available to the Commissioner, the process of enacting at least some of the recommendations of the Carter review was complete by the time of the refusal notice. However, the Commissioner accepts that it is possible that the process of implementing other recommendations may have been ongoing at the time of the refusal notice.
  30. The Commissioner anticipates that the public authority may argue that the wide issue of policy on prisons and custodial sentences is ongoing



and that this is likely to be the subject of some form of policy making at any given time. However, in the case *DfES v IC & Evening Standard* (EA/2006/0006), the Tribunal rejected a similar argument, which suggested that policy making was an ongoing process rather than having a definable beginning and end, when stating:

*“When the formulation or development of a particular policy was complete ... is a question of fact. However, s 35(2) and to a lesser extent 35(4), clearly assume that a policy is formulated, announced and, in many cases, superseded in due course. We think that a parliamentary statement announcing the policy, ...will normally mark the end of the process of formulation. There may be some interval before development”* (paragraph 75(v))

31. Establishing the point at which the policy formulation and development process that the Carter review was a part of was complete has proved difficult. As noted above, it appears that the Government did accept at least some of the recommendations of the Carter review. In turn, it appears that at least some of the recommendations that were accepted were enacted in the Criminal Justice and Immigration Act 2008. As noted above, the Commissioner accepts that it is possible that policy formulation and development in relation to accepted recommendations from the Carter review that were not enacted in the Criminal Justice and Immigration Act 2008 was ongoing at the time of the refusal notice. In relation to any relevant policy formulation and development process that was ongoing at the time of the refusal notice, the Commissioner accepts that there was a public interest in the maintenance of a safe space in which to carry out this policy making process and affords this factor some weight in favour of maintenance of the exemption. However, this factor carries less weight than would have been the case had the public authority provided evidence that relevant policy making was ongoing at the time of the refusal notice.
32. As to what the content of the information suggests about the likelihood of a chilling effect, the Commissioner notes that this does include descriptions of different options concerning prison accommodation and provides advice, apparently to those working on the Carter review, about which of these options to follow. As this information records the provision of advice about different options, the Commissioner accepts that the chilling effect argument is relevant to this information. However, this advice primarily sets out facts, stating that a particular prison has no scope for further overcrowding for example, rather than recording opinion. The Commissioner believes it significantly less likely that a chilling effect would result through the disclosure of information recording advice that relies on fact than would be the case were information recording advice that relies upon opinion disclosed. As the

information in this case records advice that is based upon fact, the Commissioner considers the factor related to chilling effect to carry less weight than would be the case if the information recorded advice based upon opinion. The Commissioner also affords this factor reduced weight as the chilling effect argument is general, rather than having been made in relation to the specific policy making process to which the information in question relates.

33. The Commissioner has also considered what information was in the public domain at the time of the refusal notice and what this indicates as to the likelihood of harm to the policy making process through a chilling effect. Given that, as previously noted, the information in question here primarily records fact, if these facts were in the public domain at the time of the refusal of the request, the Commissioner believes that this would significantly decrease the likelihood of a chilling effect. On this point, the Commissioner notes that both the Carter review itself and the information in relation to which section 21(1) was cited (as it was in the public domain) include information similar to that in question here. Both include detailed statistical information about the prison population and commentary as to the impact of this. In the absence of specific argument on this point from the public authority, the Commissioner is not clear as to why it believed that a chilling effect would result through disclosure of the information in question here that had not previously resulted through other, similar, information having been disclosed into the public domain. The impact of this information that was available in the public domain at the time of the refusal notice upon the balance of the public interest is that the Commissioner affords the chilling effect only minimal weight as a factor in favour of maintenance of the exemption.
34. Turning to the arguments advanced by the complainant, as well as any other factors that favour disclosure of the information in question, the complainant argued that there is a public interest in ensuring that the prison population is being appropriately managed and that disclosure of the information in question here would serve that public interest. The Commissioner agrees with the complainant that there is a public interest in the prison population being appropriately managed and in the disclosure of information that sheds light on this issue. The Commissioner also believes that there is a broad public interest in information that increases public knowledge as to how successfully, or otherwise, the prison system is working. This public interest is heightened given that it has been widely acknowledged in recent years that the prison system has had difficulties coping with an increase in the numbers of prisoners and that the numbers of prisoners, and the attendant issues that this will raise for the prison system, are likely to continue to increase in the future.

35. As to whether this public interest extends to the information in question here, the Commissioner notes that this information relates directly to the subject of prison accommodation and whether this can meet the demand caused by an increase in the numbers of prisoners. Aside from this, the approach of the Commissioner is that, where there is a public interest in a subject, this public interest will extend to all information that relates to that issue. In this case, the Commissioner believes that there is a valid public interest in the information in question given that the subject matter of this information is the management of the prison population and that it relates to the specific issue of prison overcrowding. The Commissioner considers the subject matter and content of this information to be a public interest factor in favour of disclosure of significant weight.
36. Section 35(4) provides that specific regard shall be had to the particular public interest in the disclosure of factual information used as the background to policy making. As previously noted, the information in question is primarily factual. The Commissioner considers that the factual nature of this information, combined with the public interest in information relating to the management of the prison population covered above, means that the particular public interest in factual background information recognised in the Act is a factor of significant weight in favour of disclosure.
37. The conclusion of the Commissioner is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure. As noted above, the basis for the conclusion on the part of the public authority that the public interest favoured the maintenance of the exemption was the harm that it believed would occur to the policy making process through disclosure of the information in question. The public authority believed that this harm would occur through an erosion of the safe space in which to develop policy and through a chilling effect upon the participants in the policy making process. The outcome of the Commissioner's analysis of the chilling effect and safe space arguments is, in short, that the safe space argument is of some weight, but, as noted above at paragraph 31, less than would have been the case had the public authority provided evidence that the policy making process was ongoing at the time of the refusal notice, and that the chilling effect argument is of minimal weight. Given the lack of weight that the Commissioner has afforded to the argument that disclosure would be likely to result in harm to the policy making process, he considers it clear that the public interest in disclosure on the basis of the subject matter and content of the information, and on the basis of the particular public interest in the

factual content in respect of which section 35(4) is relevant, is not outweighed by the public interest in the maintenance of the exemption.

## **Procedural Requirements**

### **Section 1 / Section 10**

38. In failing to respond within twenty working days of receipt of the request confirming that it held the information requested, the public authority did not comply with the requirement of section 10(1).
39. In refusing to disclose the information requested within 20 working days of receipt of the request on the basis that the public interest favoured the maintenance of the exemption provided by section 35(1)(a), an analysis of the public interest with which the Commissioner does not agree, the public authority failed to comply with the requirements of sections 1(1)(b) and 10(1).

### **Section 17**

40. In failing to respond with a valid refusal notice within 20 working days of receipt of the request, the public authority did not comply with the requirement of section 17(1).

## **The Decision**

---

41. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it concluded incorrectly that the public interest in the maintenance of the exemption provided by section 35(1)(a) outweighed the public interest in disclosure and, in so doing, failed to comply with the requirements of sections 1(1)(b) and 10(1). The Commissioner also finds that the public authority failed to comply with the requirements of sections 10(1) and 17(1) in that it did not respond to the request within 20 working days of receipt.

## **Steps Required**

---

42. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

- disclose to the complainant the information previously withheld under section 35(1)(a).
43. The public authority must take the steps required by this Notice within 35 calendar days of the date of this notice.

### **Failure to comply**

---

44. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Other matters**

---

45. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern.
46. The Commissioner's published guidance on internal reviews states that a review should be conducted within 20 working days, unless there are exceptional circumstances, in which case the review period may be extended to 40 working days. In this case the Commissioner notes that there appeared to be no exceptional circumstances, but that the public authority failed to provide the outcome to the review within 20 working days. Neither did the public authority respond with the outcome to the review within 40 working days. The public authority should ensure that internal reviews are carried out promptly in future.

## 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 22<sup>nd</sup> day of July 2010**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**

## **Legal Annex**

### **Section 1**

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

### **Section 10**

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

### **Section 17**

Section 17(1) provides that -

“A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

(a) states that fact,

(b) specifies the exemption in question, and

(c) states (if that would not otherwise be apparent) why the exemption applies.”

### **Section 35**

Section 35(1) provides that –

"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office."