

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 22 June 2011**

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

### **Summary**

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The complainant requested information from the Ministry of Justice (MoJ) relating to applications made to the Homicide Fund 2010. The MoJ provided some information but withheld the remainder by virtue of the exemptions in sections 40 (personal information) and 43 of the Act (commercial interests). During the course of the Commissioner's investigation, it disclosed more of the information but refused to disclose the remainder. The Commissioner's decision is that the public authority was entitled to withhold the information by reference to sections 40(2) and 43(2). However, the public authority's handling of the request also resulted in breaches of certain procedural requirements of the Act as identified in this Notice.

### **The Commissioner's Role**

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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.

### **Background**

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2. This complaint arose from a bidding process involving third sector organisations that provide support to families and friends of victims of homicide. Applicants were invited to bid for the 2010/11 Homicide Fund, with applicants competing against each other for the available funds.

## The Request

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3. The requester wrote to the Ministry of Justice (MoJ) on 28 May 2010 with the following request for information:

### *"SAMM NATIONAL*

- 1. Which person(s) made the decision to award £140,000 per annum to SAMM National and what application process was undertaken?*
- 2. What was the justification for the decision to award SAMM National a further years funding in addition to the previous ten years of funding?*
- 3. Which Government Department funded these payments and from which budget did they come?*
- 4. How have the activities enabled by this funding been monitored and evaluated?*
- 5. Can you please provide details of this monitoring and evaluation, year by year, over the past eleven years?*

### *VICTIMS CHAMPION*

- 1. What was the process by which the post of Victims Champion was advertised?*
- 2. Who shortlisted and interviewed the candidates for the post of Victims Champion?*
- 3. What government funding has been given to organisations run by Sara Payne and/or Shy Keenan?*
- 4. What monitoring and evaluation has been undertaken with regard to Ms Payne and/or Ms Keenan's publically funded work?*

### *HOMICIDE VICTIMS FUND AND NATIONAL VICTIMS SERVICE*

- 1. Who appointed Ms Caroline Cooper to have overall control over the Homicide Victims Fund application process?*
- 2. Who decided on the composition of the assessment panel and why was there no representative of the Third Sector?*

3. *Why is there no formal right to complain about legitimate grievances relating to the assessment process?*
4. *Who appointed Ms Caroline Cooper to respond to complaints relating to an assessment process of which she was the lead person, and why is this person effectively both judge and jury?*
5. *Why was due diligence not applied at the point of application despite assurances that ineligible applications would not be allowed to proceed?*
6. *Why was MAMAA singled out for preferential treatment in terms of being given weeks of additional time to rectify serious problems in its Charity Commission financial reporting obligations?*
7. *Was any other applicant provided with additional time to improve their application?*
8. *Did any OCJR employees make a written declaration of interest with respect to this funding process and membership of groups bidding for funds?*
9. *In the letter to us dated 20 May 2010, it was stated that legal and procurement advice was sought as well as advice from the Charity Commission on conducting checks and we wish to be informed of the names of all those providing this advice.*
10. *In the letter to us dated 20 May 2010, it was stated that our concerns relating to MAMMA had been fully investigated and we wish to be informed of the names of all those who undertook this investigation and the nature of the investigative process.*
11. *In the letter to us dated 20 May 2010, it was stated that any claim of bias or partiality had not been substantiated and we wish to be informed of the investigative process and the names of all those involved who arrived at this conclusion.*
12. *In the letter to us dated 20 May 2010, it was stated that [name redacted]'s reference was 'strong' and we wish to be informed why it was previously regarded as weak enough to contribute to our application being unsuccessful.*
13. *As these are public funds, we are fully prepared to share our application with other groups in the interests of openness*

*and transparency and wish to request copies of all other funding applications that were received in this funding round.*

14. *On what basis are publically funded projects regarded as 'commercially sensitive'.*

4. The MoJ responded on 9 July 2010. In this correspondence, the MoJ provided responses to the complainant's questions but withheld some of the requested information citing the exemptions in sections 43(2) (commercial interests) and 40(2) (personal information) of the Act.
5. In its internal review correspondence, which was sent to the complainant on 20 September 2010, the MoJ disclosed some of the remaining information previously withheld under section 40(2) but upheld its decision to withhold information under section 43(2).

## The Investigation

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### Scope of the case

6. The complainant contacted the Commissioner on 6 October 2010 to complain about the way his request for information had been handled. At the Commissioner's request, he provided further information in support of his complaint on 14 December 2010. The complainant specifically asked the Commissioner to consider the following points:

*"Public funding is supposedly transparent and especially where there are potentially contentious issues surrounding such funding, we feel that it is unreasonable to refuse the information we have requested".*

*"We feel that 'commercial sensitivity' is being used in a way which merely disguises the truth in instances where the truth may be inconvenient. We seek clarification on the use of such secrecy in the area of public funding".*

7. During the course of the Commissioner's investigation the complainant confirmed that some of the responses provided by the MoJ were acceptable to him. He also agreed to pursue some of the outstanding matters independently and therefore these are not addressed in this Notice.
8. As a result of the further release of information by the MoJ, as outlined in the *Chronology* section below, the Commissioner wrote to the complainant inviting him to withdraw his complaint. In light of his response, the Commissioner has focussed his Decision Notice on the

remaining withheld funding application information in relation to which the MoJ is citing the exemptions in sections 40 (personal information) and 43 (commercial interests).

## **Chronology**

9. The Commissioner wrote to the MoJ on 26 January 2011 asking for further explanation of its reasons for citing sections 40 and 43 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemptions outweighs the public interest in disclosure of the information requested.
10. Having kept the Commissioner informed of progress in the preparation of its response, the MoJ finally provided its substantive response on 11 April 2011. In its response, the MoJ confirmed that, following further investigation, it was able to disclose some of the remaining withheld information. The Commissioner notes that during this period the MoJ wrote out to the third parties whose information is involved in this case. It advised the Commissioner that it was relying on the exemptions in sections 40(2) and 43(2) to withhold the remainder of the information.
11. The MoJ wrote to the complainant on 5 May 2011, providing him with a substantial amount of the remaining withheld information. This comprised:
  - those parts of the application forms submitted by organisations applying for funds under the Homicide Fund 2010 which those organisations were content to disclose;
  - those parts of the application forms submitted by organisations applying for funds under the Homicide Fund 2010 which the MoJ considered were not exempt under the Act; and
  - details of the monitoring and evaluation of SAMM National held by the MoJ, namely details for the past two financial years.
12. The Commissioner contacted the complainant on 11 May 2011 asking him whether the recent disclosure satisfied his request and inviting him to withdraw his complaint.
13. The complainant responded by asking further questions "*to clarify issues of remaining uncertainty*".

## Analysis

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### Exemptions

#### Section 43 Commercial interests

14. Section 43(2) of the Act provides:

*"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)".*

15. In order to apply the exemption it is necessary to consider whether the release of such information would prejudice someone's commercial interests. Then, if appropriate, it will be necessary to apply the public interest test.

#### *Applicable interests*

16. The withheld information in dispute in this case is information relating to applications made to the Homicide Fund 2010.

17. In this case, the MoJ has argued that the applicable interests are those of the MoJ itself and those of the voluntary sector organisations which submitted bids.

#### *Is the information commercially sensitive?*

18. In the Commissioner's view, organisations compete by offering something different from their rivals. That difference will often be the price at which the goods or services can be delivered, but that difference may also relate to quality or specification and may include working practices and know-how, for example, that allow a quality of service to be more efficiently delivered.

19. In this case, the Commissioner understands that, amongst other things, the organisations bidding for funds were required to demonstrate provision both of a high quality service to those bereaved by murder or manslaughter and of a high level of need for the service for which funding was sought.

20. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his *Awareness Guidance* on the application of section 43. This comments that:

*"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services".*

21. The *Guidance* recognises that “commercial interests” is a wide concept and that while the essential feature of commerce is trading, the information which falls within the exemption may relate only indirectly to the activity of buying and selling. It further comments that, while the underlying motive of commerce is likely to be profit, this is not necessarily the case.
22. In the context of this case, the Commissioner considers that the commercial interests relate to the organisations’ ability to participate competitively for funding in return for the specialist support they provide to people bereaved by murder and manslaughter. Accordingly, he is satisfied that the withheld information is commercial in nature and therefore falls within the scope of the exemption contained in section 43(2).

#### *Nature of the prejudice*

23. The Information Tribunal in *Hogan and Oxford City Council v The Information Commissioner Hogan* (EA/2005/0026 and EA/2005/0030) commented:

*“An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated ‘real, actual or of substance’ (Hansard HL (VOL. 162, April 20, 2000, col. 827))”.*

24. The Commissioner’s view is that the use of the term “prejudice” is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
25. The MoJ told the complainant:

*“bids were submitted with the expectation that the contents would not be disclosed and to do so would reveal information about costs and operating models which might provide competing organisations with an unfair advantage in future bidding rounds”.*

#### *Likelihood of prejudice*

26. The MoJ told the complainant that disclosure **would** prejudice commercial interests. However, it subsequently told the Commissioner:

*“we believe prejudice **is likely** to occur”.*

#### *Evidence of prejudice*



27. The Commissioner has first considered the arguments put forward by the MoJ as to why it considers its own commercial interests would be prejudiced.
28. The MoJ argued that release of the requested information would make it less likely that some organisations would participate in the bidding process.
29. The Commissioner has considered the withheld information in relation to the representations provided by the MoJ. In the Commissioner's view, arguments related to deterring prospective bidders from submitting tenders have not been explained convincingly in terms of establishing a plausible link between disclosure and commercial prejudice to the MoJ.
30. The Commissioner has next considered the arguments put forward with respect to the commercial interests of the voluntary sector providers of victim support services.
31. Importantly, when considering prejudice to a third party's commercial interests the Commissioner's view is that the public authority must have evidence that this does in fact represent or reflect the view of the third party. The public authority cannot speculate in this respect – the prejudice must be based on evidence provided by the third party, whether during the time for compliance with a specific request or as a result of prior consultation, and the relevant arguments are those made by the third party itself. This approach has been confirmed by the Information Tribunal in the case of *Derry City Council v ICO* (EA/2006/0014).
32. While he accepts that, due to time constraints for responding to requests, it may be that arguments are formulated by a public authority based on its prior knowledge of the third party's concerns, the Commissioner's view is that prejudice and the public interest are normally to be assessed at the time of the request, or, at the latest, at the time when the refusal notice should have been issued.
33. The Commissioner notes that the scope of the original request clearly included "*copies of all other funding applications that were received in this funding round*". He notes that it appears that the MoJ may only have fully consulted the third parties involved after having been advised that the Commissioner had received a complaint about this request.
34. The Commissioner would remind public authorities that, as a matter of good practice, they should establish their arguments and obtain their supporting evidence by the time of the internal review.



35. The Commissioner has considered the reasons put forward by the third parties who objected to the disclosure together with any arguments they provided in support of their objection.

*Is the exemption engaged?*

36. In considering how likely it is that the commercial interests of a third party organisation might be prejudiced if information were disclosed in this case the Commissioner has considered both the nature of the information and the likelihood of similar information being relevant in a future bidding exercise.
37. In this case, the Commissioner is satisfied that the MoJ has provided evidence in support of its arguments in relation to the likelihood of prejudice as a result of disclosure. Having duly considered the arguments, the Commissioner's view is that the lower level of 'would be likely to occur' has been demonstrated. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 43(2) and he has carried this lower level of likelihood through to the public interest test.

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

38. The MoJ acknowledged that to disclose the information would increase transparency and give clear explanations for the decisions that are made. It also recognised the strong public interest in the transparency of the process: to show that business is conducted in an open and honest way.
39. The Commissioner notes that the MoJ also accepted that disclosure could inform the debate about how the MoJ operates and increase trust in its decision-making processes involving the expenditure of public funds.
40. In this respect, the Commissioner notes that the MoJ told the complainant at the internal review stage:

*"Ministers have, however, commissioned officials to undertake a review of victim and witness policy, support provision and funding and we will shortly be contacting partner organisations including [name redacted] to involve them in the review process. As part of this, we can consider whether there are arrangements which can be adopted in future whereby more information relating to service providers can be made public in a way which is equitable and does not prejudice their or other's commercial interests".*

***Public interest arguments in favour of maintaining the exemption***

41. In favour of maintaining the exemption, the MoJ argued that it would not be in the public interest as disclosure:

*"may prevent organisations from submitting competitive bids for future tenders".*

42. It expanded this argument by explaining that the aim of the bidding round was *"to identify the organisations that would provide the best service ... for reasonable costs"*. In its view, the public interest would not be served if good quality organisations did not participate in the bidding process as this would undermine the ability of the MoJ to obtain the best quality and value from organisations for the delivery of vital services.

43. The MoJ also argued that:

*"Disclosure of this information could allow a poor quality organisation with access to all the bids to copy other organisations strategies and put in a superficially good application leading to a poorer quality service being commissioned with the result being poorer outcomes for victims supported and poor use of the public's money".*

***Balance of the public interest arguments***

44. The Commissioner considers that there is clearly a public interest in financial transparency and accountability of public authorities. He also recognises the public interest in disclosing information where to do so would help determine whether public authorities are acting appropriately. In this case, disclosure of the withheld information would enable the public to see the basis for decisions which were taken about funding and so ensure that the public authority was discharging its functions adequately.
45. Disclosure would also promote accountability and transparency by allowing the public to ascertain whether the relevant decisions (related to funding the support of those bereaved by homicide) were being taken on a sound, rational basis and that public money was being appropriately spent.
46. When considering the public interest test, the Commissioner considers that the age of the information requested is a relevant factor to the extent that, in general, the public interest in maintaining the exemption will diminish over time.
47. In this case, the Commissioner has considered the argument that information that was commercially sensitive during the bidding process

may no longer be sensitive once funding decisions have been made. However, in his view, it is not necessarily the case that information provided during a similar, future bidding exercise would differ materially to the withheld information in this case.

48. In this respect, the Commissioner has taken account of the context in which the withheld information was provided. In doing so, he notes the specific and specialist nature of the organisations involved, the competitive environment in which such organisations seek funding and the amount of funding available on this occasion.
49. In his view, this scenario lends weight to the argument that the sensitivity of the information does not decrease over time to such an extent as to diminish the public interest in maintaining the exemption.
50. The Commissioner has also considered the public interest with respect to the argument that access to all the bids could lead to a poorer quality service being commissioned. Given the ultimate beneficiaries of the funding, the Commissioner considers that it is in the public interest that the best quality service and value is obtained.
51. The exemption under section 43(2) is designed to recognise that there are certain circumstances in which it is appropriate to withhold information that would harm the commercial interests of a third party. Whilst there are public interest factors in favour of disclosure in this case, particularly as public funds are involved, there is also a public interest in ensuring that the commercial interests of a third party are not prejudiced in circumstances where it would not be warranted and proportionate.
52. Having balanced the opposing public interest factors in this case, the Commissioner is satisfied that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

#### **Section 40 Personal information**

53. In order to reach a view on the MoJ's arguments in relation to this exemption, the Commissioner has first considered whether the withheld information is the personal data of one or more parties.

*Is the information personal data?*

54. Personal data is defined in section 1(1) of the Data Protection Act (DPA) as:

*"data which relate to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*

*and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of that individual”.*

55. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
56. Having considered the small amount of withheld information in this case, and the context in which it was obtained, the Commissioner is satisfied that the withheld information constitutes information that falls within the definition of 'personal data' as set out in section 1(1) of the DPA. He is also satisfied that the information relates to living individual(s) other than the applicant.
57. However, for the section 40(2) exemption to apply, the public authority would need to show that disclosure would contravene the data protection act principles as set out in the DPA.

*Would the disclosure breach one of the data protection principles?*

58. The first data protection principle states that:

*“Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –*

*(a) at least one of the conditions in Schedule 2 is met”.*

59. Both requirements must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data protection principle.

*Would it be fair to disclose the requested information?*

60. In determining whether a disclosure is fair under the first principle of the DPA, for the purposes of section 40 of the Act, the Commissioner considers it appropriate to balance the consequences of any disclosure and the reasonable expectations of the data subject(s) with general principles of accountability and transparency.

61. The MoJ put forward concise arguments in support of its citing of the exemption in section 40(2), stating that:

*“disclosure would breach the fair processing principle, as it would be unfair on the person who the personal data relates to, and they have a reasonable expectation that the Department would hold that information in confidence”.*

62. The Commissioner recognises that disclosure will always involve some intrusion into privacy but that intrusion will not always be unwarranted. In considering this matter, the Commissioner has considered the expectations of the data subject(s) and the degree to which the release of the information would infringe on their privacy. In this case, having taken into account the context of the withheld information, the Commissioner considers disclosure of the withheld information in this case would be unfair. He has reached this decision on the basis that the specific details involved could be linked to an individual(s) to provide particular information about that individual(s).
63. As the Commissioner has concluded that it is unfair to release the personal information in this case and that disclosure would breach the first data protection principle, he has not gone on to consider whether any schedule 2 conditions apply.

## **Procedural Requirements**

### **Section 1 General right of access**

#### **Section 10 Time for compliance**

64. Section 1(1) of the Act creates a general right of access to information held by public authorities. It provides for any person making a request for information to be informed in writing by the public authority whether it holds the information of the description specified in the request, and, if that is the case, to have that information communicated to him. The time limit for complying with section 1(1), set out in section 10(1), is twenty working days.
65. In this case, the complainant made his request on 28 May 2010. The Commissioner understands that it was received by the MoJ on 2 June 2010, after the bank holiday. The MoJ did not issue its refusal letter until 9 July 2010 – taking more than 20 working days to respond to the request. Accordingly, the Commissioner finds that, in failing to confirm or deny within 20 working days whether it held the requested information, the MoJ breached the requirements of section 10(1), and that it also breached section 17(1) by failing to provide the details required by that section within 20 working days.

66. The Commissioner notes that in this case, during the course of his investigation, the MoJ accepted that some of the requested information was not exempt and accordingly released that information to the complainant. The Commissioner finds that the MoJ breached section 1(1)(b) of the Act in failing to provide the information until after the complainant had approached the Commissioner. In addition, since the MoJ failed to provide the information within the statutory time limit it also breached section 10(1) of the Act.

## **The Decision**

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67. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:

- it was entitled to apply sections 40(2) and 43(2) to the withheld information.

68. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- it breached section 1(1)(b) by not providing the complainant with the requested information by the time of the completion of the internal review;
- it breached section 10(1) by failing to inform the complainant whether it held the requested information within 20 working days of the request;
- it breached section 10(1) by not providing the complainant with the requested information within 20 working days of the request; and
- it breached section 17(1) by failing to issue the refusal notice within the statutory time limit.

## **Steps Required**

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69. The Commissioner requires no steps to be taken.

## Right of Appeal

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70. 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)

71. 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.

72. 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 June 2011**

**Signed .....**

**Jon Manners  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

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### General Right of Access

#### **Section 1(1) provides that -**

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

- (b) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (c) if that is the case, to have that information communicated to him."

#### **Section 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **Personal information.**

### **Section 40(1) provides that –**

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

### **Section 40(2) provides that –**

“Any information to which a request for information relates is also exempt information if-

(a) it constitutes personal data which do not fall within subsection (1), and

(a) either the first or the second condition below is satisfied.”

### **Section 40(3) provides that –**

“The first condition is-

(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of “data” in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-

i. any of the data protection principles, or

ii. section 10 of that Act (right to prevent processing likely to cause damage or distress), and

(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

## **Commercial interests.**

### **Section 43(1) provides that –**

“Information is exempt information if it constitutes a trade secret.”

**Section 43(2) provides that –**

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).”