

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 June 2012

**Public Authority:** Youth Justice Board  
**Address:** 1 Drummond Gate  
London  
SW1V 2QZ

#### Decision (including any steps ordered)

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1. The complainant requested information relating to an investigation into allegations of an affair at a secure children's home. The Youth Justice Board (YJB) provided him with some information, withholding the remainder under the effective conduct of public affairs exemption (section 36) and the personal information exemption (section 40). The Information Commissioner's decision is that the YJB has correctly relied upon section 36(2)(b) to withhold the information. The Commissioner requires no steps to be taken.

#### Request and response

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2. The complainant wrote to the YJB on 14 September 2011 and requested information in the following terms:

*"1) I would like the names of all people who were part of an independent team set up by the Home Office and chaired by Arthur de Fische which investigated the children's home Red Bank in Merseyside following allegations in around 2000 that a member of staff was having an affair with a detainee.*

*Arthur's name has already been released in statement from St Helens Council – however it said he chaired a team. Who else was on this team?*

*2) A copy of their findings (if necessary redacted in part).*

*3) Minutes of any meetings they may have held on the subject of the allegation of an affair at Red Bank.*

*4) Any paperwork, correspondence, either email or letter, recordings or photographs relating to the investigation".*

3. The YJB responded on 9 November 2011. It said that it did not hold any information in relation to parts (1), (2) or (3) of the request. It confirmed that it held two documents within the scope of part (4) of the request, both dated 2001. It explained that the first of these is a letter from Arthur de Frisching asking for a statement from the YJB, the second being a copy of the statement that the YJB provided in response.
4. The YJB disclosed a redacted version of both documents to the complainant. It told the complainant that elements of both the letter and the statement had been redacted under section 40(2) of the FOIA (personal information). It also cited section 36 (prejudice to effective conduct of public affairs), clarifying that it was the information in pages 4-9 of the statement that was being withheld, in its entirety, under that section.
5. When requesting an internal review of its decision, the complainant was clear that he accepted, and agreed with, the YJB's reasons behind withholding names and identities from the documentation. However, he told the YJB:

*"I fully accept that certain parts of the five pages of the statement withheld should be redacted, but for the entire five pages to be FULLY withheld is working against the principles of open government and the principles of the Act itself".*
6. The YJB upheld its decision not to disclose that information in its internal review response of 9 December 2011.

### **Scope of the case**

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7. It is a matter of public record that an investigation was carried out by an independent team, chaired by Arthur de Frisching, a retired prison governor. The YJB was asked for a statement in connection with their review.
8. The Information Commissioner considers the scope of his investigation to be with respect to the YJB's citing of section 36 (prejudice to effective conduct of public affairs) in relation to pages 4-9 of that statement.

## Reasons for decision

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9. Section 36 is the only exemption in the FOIA that requires a determination by a 'qualified person'. The exemption will only apply if the reasonable opinion of a qualified person is that one of the forms of adverse effect specified in subsection 2 would follow from disclosing the information.

10. Section 36(2) states that:

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*

*(a) would, or would be likely to, prejudice-*

*(i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*

*(ii) the work of the Executive Committee of the Northern Ireland Assembly, or*

*(iii) the work of the Cabinet of the Welsh Assembly Government,*

*(b) would, or would be likely to, inhibit -*

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation, or*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".*

11. The term 'inhibit' is not defined in the FOIA. The Commissioner's view is that, in the context of section 36, it means to restrain, decrease or suppress the freedom with which opinions or options are expressed.

12. In this case, the YJB is relying on section 36(2)(b)(i) and (ii) and section 36(2)(c). The YJB described the withheld information as:

*"a chronological summary of the communications between the YJB and other parties once we were alerted to the allegations".*

13. It told the complainant that the qualified person agreed that releasing the material *"would, at minimum, be likely to cause a relevant prejudice"*.

14. In other words, the YJB is claiming that disclosure of the information would be likely to inhibit the free and frank provision of advice, the free

and frank exchange of views for the purposes of deliberation or would be otherwise likely to prejudice the effective conduct of public affairs.

15. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In the Commissioner's view, the YJB did not clearly explain to the complainant how or why it considered disclosure in this case would inhibit the processes of providing advice or exchanging views, or otherwise prejudice the effective conduct of public affairs.
16. However, in support of its reliance on section 36, the YJB provided the Information Commissioner with a copy of the submission that was provided to the qualified person, on 26 October 2011, in relation to this request for information. The Commissioner is satisfied that the qualified person in this case is the YJB's Chair.
17. In contrast to the lack of explanation provided to the complainant, the Commissioner notes that the submission to the qualified person detailed the ways in which the YJB considered disclosure would, or would be likely to, give rise to a relevant prejudice or inhibition.
18. Having considered the submission provided to the qualified person, and their response, the Information Commissioner is satisfied that the opinion given was reasonable.
19. He therefore finds the exemption engaged in relation to the information withheld by virtue of section 36(2) and he has carried the lower level of likelihood through to the public interest test.

*The public interest test*

20. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

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

21. The YJB acknowledged the presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest. More specifically it told the complainant:

*"it may be assumed that our material may have something to add in demonstrating whether the secure children's home in question was being operated in a fit and proper way, for which there is no doubt a genuine public interest".*

22. Arguing in favour of disclosure, the complainant told the YJB:

*"I do not believe the YJB staff, who may or may not still work within the organisation, ..... would feel like their advice or views would be inhibited by a few statements made of their opinion, given more than 10 years ago".*

23. Explaining further, he argued:

*"The original investigation was only revealed ten years after it happened – now it is the public's right to know how that investigation was conducted to the fullest extent to which that is possible".*

24. Challenging the YJB's withholding of the information at issue, especially given the timing of his request, the complainant told the YJB:

*"My most important point is this: that I do not see how an investigation which took place 10 years ago could have any impact on any future advice given by individuals because of the time difference and because they are not being named or identified. I believe there is a strong case for public interest because it provides insight into an important investigation which took place 'behind closed doors'".*

*Public interest arguments in favour of maintaining the exemption*

25. The YJB told the complainant:

*"The arguments in favour of withholding the material centre on the need for YJB staff and our youth justice partners to be able to exchange communications with each other in as open and frank a manner as possible including when we are invited by other Government departments to contribute to work such as the de Frisching Review."*

26. It argued that it was imperative that its staff were able to operate in as open a manner as possible when working on "*sensitive issues – such as investigations of the type conducted by Arthur de Frisching*".

27. It expressed concern that disclosure of information, such as the withheld information in this case, would inhibit its staff from providing candid advice, and in exchanging information and opinion with its partners, in any future work of a similar nature.

28. In this respect, the YJB argued strongly that it was in the public interest that the quality of its advice was maintained and that it continued to have effective relationships with its youth justice partners. It argued that this could only be achieved by ensuring that the environment in which its staff operate "*is as uninhibited as possible*".

29. Responding to the complainant's point that the investigation took place some ten years ago, the YJB clarified that it considered that its argument in favour of maintaining the exemption related not only to those staff involved at the time of the review, but more generally, to all YJB staff in relation to any such similar work. It told the complainant:

*"even ten years after the event, then there is a very real possibility that they [YJB staff] would be more cautious in the future in speaking as candidly as they are currently able to do and, in particular, in committing such material to paper".*

30. In this respect it explained that its freedom of information activity is reported internally and therefore if it released information relating to sensitive issues, staff would be aware of this.

31. During the course of his investigation, the YJB provided the Information Commissioner with further explanation about why it considered that disclosure would inhibit the YJB as an organisation to respond to sensitive enquiries as well as inhibit its staff from expressing themselves openly and honestly. It argued that this impact would apply both internally and when dealing with its youth justice partners. In the YJB's view, this would be detrimental to its work and clearly not in the public interest.

32. It also reiterated its view, which it had made clear to the complainant, that the withheld information in this case:

*"says nothing about the outcomes of the Review".*

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

33. As the YJB is citing multiple limbs of the exemption, the Information Commissioner has considered separately, in the case of each limb of the exemption, whether the public interest in disclosing the information under consideration equals or outweighs the public interest in maintaining the exemption.
34. The Commissioner has considered firstly the public interest arguments in respect of section 36(2)(b). In doing so, he notes that, in this case, the public interest arguments put forward by the YJB in relation to section 36(2)(b)(i) - the free and frank provision of advice - are broadly similar to those cited in relation to section 36(2)(b)(ii) - the free and frank exchange of views.
35. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, he must give weight to that

opinion as an important piece of evidence in his assessment of the balance of the public interest.

36. The Commissioner also appreciates that confidence in matters relating to young people in care is a matter of public interest. Specifically with respect to the complaint at issue in this case, he notes that it was the subject of media interest. He accepts that there is merit in general arguments in favour of promoting transparency and providing insight.
37. In balancing the opposing public interest factors in this case, the Commissioner has carefully considered the content of the withheld information as well as the arguments put forward by the YJB and the complainant. He has also taken into account the extent to which further disclosure would be proportionate and the extent to which release of the requested information would further public understanding.
38. In this case, the Commissioner considers that the balance of the public interest has been met to some extent by the very existence of the de Frisching Review. The Commissioner gives weight to the YJB's argument that there is an assurance that the allegations have been considered by an appropriate authority.
39. The Commissioner finds that, given the context of the request, disclosure of this particular information would be likely to cause prejudice of some impact on other similar circumstances in the future. There is a strong public interest in the YJB being able to share information in a free and frank way to enable its staff to express their candid opinions and offer frank advice or views in relation to sensitive issues.
40. Taking all the circumstances of the case into account, the Commissioner considers that the desirability for openness and transparency through disclosing the withheld information does not equal or outweigh the harm that disclosure would be likely to cause. The Commissioner therefore concludes that the public interest in maintaining the exemption at section 36(2)(b) outweighs the public interest in disclosing the information.
41. As he has come to the conclusion that all of the information falling within the scope of the request has been correctly withheld under section 36 (2)(b)(i) and (ii), the Commissioner has not gone on to consider the public interest arguments in relation to section 36(2)(c).



## Right of appeal

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42. 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: 0116 249 4253

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

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

43. 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.
44. 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 .....**

**Gerrard Tracey**  
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