

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 3 June 2013

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

#### Decision (including any steps ordered)

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1. The complainant requested information about the Ministry of Justice's (MoJ's) consideration of aspects of some Senior Salaries Review Body Reports. The MoJ said that it did not hold some of the requested information and refused to provide the remainder citing section 35(1)(a) (formulation of government policy).
2. The Commissioner's decision is that the MoJ correctly applied section 35(1)(a) in this case. He requires no steps to be taken.

#### Request and response

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3. On 20 September 2012 the complainant requested information in relation to the MoJ's consideration of the 33<sup>rd</sup> and 34<sup>th</sup> Annual Senior Salaries Review Body's (SSRB) Reports published in March 2011 and March 2012:

*"Please confirm whether you hold any information regarding:*

1. *Any decision not to implement the recommendations of the SSRB in their 33<sup>rd</sup> Report that the role of salaried Employment Judge be re-graded to judicial salary band 6.2.*
2. *Any decision not to implement the recommendations of the SSRB in their 34<sup>th</sup> Report that the role of salaried Employment Judge be re-graded to judicial salary band 6.2.*

3. *If no decision has yet been taken as to whether to implement the recommendations of either Report, considerations of the Reports to date and the outcome of those considerations, the process by which such decisions will be taken upon them, by whom such decisions will be made and when.*
4. *The government's policy and/or position on the difference (if any) between re-grading of a post to a higher salary band and a salary increase and the rationale for such policy and/or position".*
4. As the Commissioner understands it, the SSRB provides independent advice to the Government on the remuneration of the judiciary, senior civil servants, senior officers of the armed forces and some Very Senior Managers (VSMs) in the National Health Service<sup>1</sup>.
5. The MoJ responded on 18 October 2012. It denied holding information in relation to parts (1), (2) and (4) of the request. It confirmed that it holds some information in scope of part (3) but refused to provide that information citing the section 35 exemption (formulation of government policy) as its basis for doing so.
6. The complainant requested an internal review on 9 November 2012. The MoJ sent him the outcome of its internal review on 4 December 2012. It upheld its original position with respect to the first three points of the request. With respect to (4) it said that it was not clear whether the question referred to the re-grading of the judiciary or was a more general question about re-grading generally in the civil service. With respect to the former it confirmed that, in the context of the SSRB recommendation:

*"there has been no decision about re-grading the post, therefore there is no policy".*

### **Scope of the case**

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7. The complainant contacted the Commissioner on 12 December 2012 to complain about the way his request for information had been handled.
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<sup>1</sup> <http://www.civilservice.gov.uk/recruitment/working/pay-and-reward/scs-pay>

He confirmed that he was dissatisfied with the way the MoJ had responded to each of the four parts of the request.

8. Accordingly, the Commissioner considers the scope of his investigation to be the MoJ's application of section 35 to the withheld information. He has also considered whether the MoJ is correct when it says that it does not hold the information requested at parts (1), (2) and (4) of the request.
9. During the course of his investigation, the MoJ told the Commissioner that it considered that section 40(2) (personal information) applied to a small amount of personal information contained within the withheld information. Specifically, it considered this to cover the names and signatures of third parties. It apologised for not having cited that exemption in its correspondence with the complainant.
10. If appropriate, the Commissioner will also consider the MoJ's application of that exemption.

## **Reasons for decision**

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

11. The complainant told the MoJ:

*"My request was couched in wide terms and obviously extends to decisions to postpone or delay implementation. It is simply not credible that you hold no information regarding the issue (unless of course ... there has been no discussion whatsoever about the recommendations)".*

12. The Commissioner notes that the MoJ told the complainant:

*"There has been no decision not to implement the recommendations of the SSRB in their 34<sup>th</sup> Report that the role of salaried Employment Judge be re-graded to judiciary salary band 6.2".*

13. Similarly, it told him:

*"there has been no decision about re-grading the post".*

14. Accordingly, it told the complainant that it does not hold information in scope of parts (1), (2) and (4) of his request.
15. Having considered the wording of the request and the MoJ's reasons for asserting that it does not hold relevant information the Commissioner is

satisfied with its view that it does not hold information within the scope of those parts of the request.

*Section 35 formulation of government policy*

16. The Commissioner has next considered the MoJ's handling of part (3) of the request. The MoJ refused to provide the information it holds that falls within scope of that part of the request, citing section 35(1)(a) of FOIA.
17. Section 35 is a class-based exemption. This means that if, as a matter of fact, information falls within any of the categories listed in that section, it is exempt. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy.
18. In the Commissioner's view, although 'policy' is not a precise term, it can be about the development of options and priorities for ministers, who determine which options should be translated into political action and when. He also considers that the term 'relates to' can be interpreted broadly. The Commissioner's approach to defining government policy is set out in recently updated guidance<sup>2</sup>. It clearly indicates that policy can be developed in many ways and in a wide range of circumstances.
19. The complainant asked the MoJ:  
  
*"What 'policy' is being referred to?"*
20. He explained:  
  
*"All four of my requests sought information relating to a specific decision, or a decision to postpone making a decision, about the recommendations and not to formulation of policy".*
21. Although it failed to respond to the complainant's question in correspondence with him, during the Commissioner's investigation the MoJ told the Commissioner:

*"It is our strong view that disclosure of the information would prejudice the formulation of public sector pay policy".*

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/government-policy-foi-section-35-guidance.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx)

22. During the course of his investigation, the MoJ provided the Commissioner with a copy of the withheld information - information within the scope of part (3) of the request regarding consideration of the SSRB reports.
23. Having viewed that information the Commissioner is satisfied that it falls within the category of 'formulation or development of government policy'. He accepts that the information relates to government policy on public sector pay, more specifically in the area outlined in the request, namely judicial salaries. Accordingly he finds that section 35(1)(a) is engaged in respect of all of the withheld information and has gone on to consider the public interest arguments associated with that exemption.

*Public interest*

24. Having found that the exemption is engaged, the next step is to consider the balance of the public interest.

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

25. The complainant told the MoJ:

*"The Senior Salaries Review Body was established as an independent body to review and make recommendations about judicial salaries, in order to preclude government interference for political reasons with them..... In this case, the public interest is overwhelmingly in favour of release. The independence of the judiciary from executive interference is undoubtedly manifestly in the public interest".*

26. He also told the MOJ:

*"Given the vital role of an independent judiciary in the maintenance of the rule of law it is, frankly, difficult to think of a more compelling set of circumstances favouring disclosure in the public interest than those prevailing in this case".*

27. Other factors cited by the complainant in favour of disclosure are that:

*"it is in the public interest that officials be held to account and provide reasons for taking or (as in this case) apparently not taking decisions";*

and

*"It also allows affected individuals to understand why decisions affecting them have been taken (or not) and to challenge the process (if any) being followed".*

28. The MoJ acknowledged that disclosure would promote accountability, and perform an educative function:

*"by allowing the public to find out more about how government policy is being formed in regard to SSRB recommendations".*

29. The MoJ also recognised, in correspondence with the Commissioner, that disclosure would aid public understanding of the decision-making process.

*Public interest arguments in favour of maintaining the exemption*

30. The MoJ provided the complainant with generic arguments in favour of withholding the requested information. For example it told the complainant:

*"Disclosure would also result in civil servants being less inclined to consult with stakeholders on the risks and implications of policy options, for fear of this information being disclosed, or misrepresented. As a consequence, their ability to assess risk and implications would be diminished".*

31. However, in correspondence with the Commissioner, the MoJ expanded on these generic arguments, providing further evidence in support of its view that disclosure of its internal deliberations would impact on the Government's ability to explore options and make effective decisions. For example, it told the Commissioner that disclosure would leave civil servants having to defend *"everything that has been raised during deliberation, whether proceeded with or not"*.

32. It also told him that, in order to develop policy and provide advice to Ministers, officials need a space in which open and honest discussion can take place. It provided him with background information about pay policy for those in the public sector in order to provide context to such internal deliberations.

*Balance of the public interest*

33. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
34. In considering the public interest the Commissioner has followed the approach set out in his published guidance on section 35<sup>3</sup>.
35. In forming a conclusion about the balance of the public interest in this case, the Commissioner has taken into account the general public interest in favour of transparency and openness as well as those factors that apply in relation to the specific information in question, including arguments advanced by the MoJ and by the complainant.
36. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.
37. In this case, the Commissioner, having regard to the subject matter of the information at issue, acknowledges that there is clearly a public interest in transparency, openness and accountability in relation to policy decisions taken by government about public sector pay policy affecting the judiciary. The Commissioner recognises the public interest in the public being informed on this issue to enable them to engage in debate and discussion.
38. The timing of the request is a crucial factor. From the evidence he has seen, the Commissioner is satisfied that the policy process was live at the time of the request. As the requested information relates to that policy making, he considers that the need for a safe space to debate policy and reach decisions without external comment is a valid argument. It has been generally accepted by both the Commissioner and Tribunal (see guidance referenced above) that significant weight

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[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/government-policy-foi-section-35-guidance.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx) in particular pages 46-53.

should be given to maintaining the exemption, where a valid need for safe space is identified. A compelling public interest in favour of disclosure is required when a significant need for safe space is demonstrated.

39. The Commissioner accepts that the particular issues related to government pay policy towards the judiciary are of significant public interest. This is in light of the generally recognised high importance of the judiciary's independence from the executive. However, the Commissioner finds that the public interest factors in favour of disclosure are not compelling enough in light of the significant impact disclosing the information at the time of request – the public interest in enabling the government to develop its pay policy, without significant disruption is the overwhelming factor in the circumstances of this case. The Commissioner has also carefully considered the content of the information – whilst disclosure would clearly inform the public and those wishing to influence the debate the content does not create a compelling case.
40. In light of this, having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at that time was of sufficient significance for him to conclude that maintaining the exemption outweighs the public interest in disclosure.
41. As the Commissioner has concluded that the MoJ was entitled to withhold the requested information under section 35(1)(a), he has not gone on to consider the application of section 40(2).



## 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 .....**

**Steve Wood**  
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