

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2013

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

Decision (including any steps ordered)

1. The complainant has requested the complaints handling manual and standard phrases recommended for use by complaints handlers at Her Majesty's Court Service. After a protracted delay, the Ministry of Justice ("MoJ") provided some information but refused to provide the remainder citing section 31(1)(c) (prejudice to the administration of justice), section 42(1) (legal professional privilege) and section 40(2) (unfair disclosure of personal data) as its basis for doing so. It upheld this position at internal review. It also initially relied on section 41 (information provided in confidence) but withdrew this argument during the Commissioner's investigation.
2. The Commissioner's decision is that the MoJ is entitled to rely on the exemptions it has cited as a basis for withholding most of the requested information. However, it is not entitled to rely on any of the exemptions it has cited in relation to some of the withheld information listed in a Confidential Annex to this Notice. Also, in failing to provide an adequate response within 20 working days, the MoJ contravened the requirements of sections 1(1)(a) and 10(1) of the Act.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information identified as not exempt in the Confidential Annex.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 3 February 2010 the complainant requested information of the following description:

"54. For this reason [regarding concerns about a named employee of Her Majesty's Court Service ("HMCS")¹] I would like you to provide a copy of Hmcs' internal complaints handling manuals and guides along with a copy of all the preset phrases your staff are equipped with, together with the instructions and guidance for the deployment of these phrases, so that I can decide whether [named HMCS employee] is deliberately breaching your own rules and guidelines or whether your staff are instructed to misdirect and shift the focus of complaints whilst evading or rewriting what the complaint is actually about."

6. The complainant had asked for similar information on previous occasions. For example, on 12 July 2009, he requested information of the following description. "Please can you provide any internal documentation or guidance you and/or Hmcs have on dealing with complaints and template or preset phrases to be used when dealing with complaints and correspondence". On 10 January 2010, he also requested information of the following description amongst other comments and requests: "It occurs to me that you will have internal complaints handling procedures and guides, an office manual that instructs you how to handle complaints and a Customer Services manual that offers you guidance on how to deal with queries and the like. Please provide these for my perusal."
7. The MoJ's initial responses (please see Note 1) of 25 March 2010 and 15 April 2010 were wholly inadequate. They referred to the requested information as being in an "internal document" that "fall outside Freedom of Information criteria". This is not correct. Information that is held by a public authority for its own purposes (such as the requested

¹ HMCS was combined with Her Majesty's Tribunal Service on 1 April 2011 to create Her Majesty's Courts and Tribunal Service ("HMCTS"). This is an agency of the MoJ. For the purposes of this decision notice, the Commissioner will refer to the MoJ as being the relevant public authority. HMCS no longer exists and MoJ has overall responsibility for HMCTS, the successor to HMCS. Given the timing, some of the correspondence referred to in this notice was sent to the complainant from HMCS. However, from this point in the notice, the Commissioner will refer to the correspondence as having been sent from the MoJ. More information about HMCS and its successor organisation can be found via this link <http://www.justice.gov.uk/about/hmcts>

information) should be disclosed upon request under the Act unless it is exempt information.

8. The complainant chased a response from the MoJ (see Note 1) on several occasions. This included a reiterated request dated 19 April 2010.
9. The MoJ wrote to the complainant on 28 June 2010 (see Note 1). It cited the exemption at section 31 as being under consideration but explained that, by virtue of section 10(3), it required further time to consider the balance of public interest. It provided the complainant with contact details for making a complaint about this response and with information about making a complaint to the Commissioner.
10. The MoJ wrote to the complainant on 20 July 2010. It referred to an email from the complainant of 22 June 2010 which requested an internal review of the MoJ's delay. It also referred to the date of the original FOIA request as being 19 April 2010 and acknowledged that its response of 28 June 2010 was outside the 20 working day time for compliance. It explained that, although it should have explained this to the complainant within 20 working days, it was entitled to take further time to consider the balance of public interest.
11. In a further letter to the complainant dated 29 July 2010 (following a further chasing letter from the complainant of 28 June 2010), the MoJ gave the complainant a target date for response of 20 August 2010.
12. There were further delays during which, on 28 October 2011, the parties exchanged correspondence about the use of a postal address. MoJ asked the complainant for his address so that it could send information to him. The complainant said that he would prefer to receive the information by email.
13. Despite repeated attempts by the complainant to obtain a response over a lengthy period, no substantive response was sent to the complainant in relation to this request until 11 May 2012. The MoJ's explanation for this delay is addressed later in this Notice. In its letter of 11 May 2012, MoJ said that it was providing some information within the scope of the request at point 54 but refused to provide the remainder. It cited the following exemptions as its basis for doing so:

Section 31(1)(c) – Prejudice to law enforcement (administration of justice)

Section 40 – Unfair disclosure of personal data

Section 41 – Information provided in confidence

Section 42 – Information which is subject to legal professional privilege

14. The complainant requested an internal review on 14 July 2012. MoJ sent him the outcome of its internal review on 13 August 2012. It upheld the position it set out in its letter of 11 May 2012.

Scope of the case

15. The complainant contacted the Commissioner on 1 March 2013 to complain about the way his request for information had been handled. He provided relevant copy correspondence so that the Commissioner could consider taking the case forward on 4 May 2013.
16. The Commissioner normally requires complainants to submit a complaint under section 50 of the Act within 6 months of receiving the outcome of a public authority's internal review. However, given the protracted delays that the complainant experienced, he accepted this complaint.
17. After a further exchange of correspondence with the complainant, the Commissioner established the scope of the complaint to be as follows:
- Is the MoJ entitled to rely on the exemptions it has cited as a basis for refusing to withhold the information described in the complainant's request?
 - Why were there protracted delays in the handling of this request?
 - Did the MoJ contravene the Act by making a disclosure to him in hard copy form rather than in electronic form?
18. The Commissioner notes that the MoJ withdrew reliance on section 41 during the course of the Commissioner's investigation. The Commissioner has therefore considered whether the MoJ is entitled to rely on sections 31, 40 and 42.
19. Given the protracted delays that arose (as described above) the Commissioner has looked at any version of the requested information that existed at the time of the request (February 2010) and at the time of the refusal (May 2012). The information includes preset phrases and guidance on how to use them as described in the request.

Reasons for decision

20. This notice will deal first with the procedural elements of the complaint, namely: alleged delay and alleged failure to provide electronic copies.
21. Section 1(1) of the Act 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."

22. 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."

23. The Commissioner disagrees with the MoJ that the initial request was dated 19 April 2010. He is satisfied that the request was dated 3 February 2010.

24. In light of the above, the Commissioner is satisfied that the MoJ contravened the requirements of section 1(1) and section 10(1) by failing to provide a proper response to the complainant's request within 20 working days.

25. When the complainant sought the MoJ's explanation for the 'administrative delay' it wrote to him on 5 December 2012 and explained the following:

"I accept that the extensive time it took to provide you with a response to your first request meant that we fell short of any reasonable standard of customer service, for which I apologise. Thought [sic] the MoJ had no substantive progress update to many of your emails, because of their frequency, we also should have provided you with contact details for the Information Commissioner sooner."

26. It went on to say:

"The explanation for the delay – that there had been an 'administrative oversight' was not intended to trivialise the inconvenience caused by the delay. The delay was caused by human error – a member of the team responsible for your request left the team and your [request] was consequently overlooked; there were delays in locating the information you requested and ineffective communication between teams. I can only apologise for this grave failure on our part to deliver you with acceptable standard [sic] of customer service".

27. In its response to the Commissioner, the MoJ offered the same explanation and accepted that, from the complainant's perspective, it had seemed like a deliberate attempt to withhold information from him.

28. The Commissioner makes further comment about this in the Other Matters section of this Notice.

Preferred means for communication

29. Section 11 of the Act states that:

“(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely

(a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant...

the public authority shall so far as reasonably practicable give effect to that preference.”

30. Section 11(4) provides that –

“Subject to subsection (1), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.”

31. The MoJ provided some information to the complainant in hard copy format – photocopied text with information either not included or blanked out. He had stated on 28 October 2011 that he preferred to receive the information by email.
32. In correspondence with the complainant, the MoJ claimed that the complainant did not provide it with a postal address in a timely manner and this contributed, in part to its delay. When the Commissioner asked the MoJ about this, it said that it could not determine why it had, at the time, taken the decision to provide the information in hard copy.
33. Although the complainant expressed a preference for an electronic version of the requested information, he did not do so at the time of the request. In the Commissioner’s view, the requirements of section 11 can only be considered where the requester expresses their preference for a particular means of communication at the time the request is made. Requesters cannot therefore claim retrospectively that they required information to be provided by different means to the means by which it was, in fact, provided. The ICO considers that where an applicant expresses a preference after the original request but before the public authority has begun dealing with it, that expression of preference should be regarded as having been made at the time of the request and should therefore be given effect to. In this case, the complainant did not express a specific preference for an electronic version until after the MoJ had started to deal with the request. The MoJ was not therefore required to give effect to that preference.

34. Where the complainant now wishes access to the same information in electronic format, he should make a fresh request. This would not constitute a repeated request because it is a request for access to the information in a specified format.
35. The complainant also alleges that the information was deliberately sent by post at the same time as other material related to court matters was sent to him in order to overload him with information and undermine his ability to deal with a court matter in a timely manner. The Commissioner has no remit to consider whether this is the reason why the MoJ acted as it did. However, noting the overall inadequacy of the MoJ's handling of this request, he would observe that it is also reasonable to conclude that the timing of the disclosure was an unfortunate coincidence.

Section 11 - Conclusion

36. The Commissioner is satisfied that the complainant did not express a preference for receiving the information in electronic form at the time of the request. He expressed his preference after the MoJ had started to deal with the request. The MoJ was therefore not obliged to provide the information in electronic form in response to a retrospective expression of preference. The MoJ therefore did not contravene section 11 in the handling of this request.

Exemptions from disclosure

37. This notice will now address the use of exemptions. Given the protracted delays that arose (as described above) the Commissioner has looked at any version of the requested information that existed at the time of the request (February 2010) and at the time of the refusal (May 2012). The information includes preset phrases and guidance on how to use them as described in the request.
38. During the Commissioner's investigation, the MoJ withdrew reliance on section 41 (information provided in confidence). The Commissioner has, therefore, not considered this exemption further.
39. The MoJ sought to argue that section 31(1)(c) and section 42(1) applied to all the withheld information. For reasons set out later in this notice, the Commissioner does not agree that these exemptions apply in full to all the withheld information. The Commissioner has concluded that the information can broadly be considered to fall into three tranches:
 - a) high level general information about the complaints handling process;
 - b) more detailed information about the complaints handling process including details of interactions with other agencies; and

c) information about how claims for compensation are handled.

Section 31(1)(c) – Prejudice to law enforcement (administration of justice)

40. Section 31 of FOIA creates an exemption from the right to know if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
41. In order to engage a prejudice based exemption such as section 31 there must be likelihood that disclosure would cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption. First, the actual harm which the public authority alleges would, or would be likely to, occur if the disputed information was disclosed, has to relate to the applicable interests within the relevant exemption. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the disputed information and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold (would be likely), the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. The Commissioner considers that the higher threshold places a stronger evidential burden on a public authority to discharge. The chances of the prejudice occurring should be more probable than not.
42. Consideration of the exemption at section 31 is a two-stage process. Even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
43. In this case, the MoJ is relying on section 31(1)(c) of FOIA. This states that information is exempt if its disclosure would, or would be likely to, prejudice the administration of justice.
44. The first step in considering whether this exemption is engaged is to address whether the prejudice predicted by the public authority is relevant to the law enforcement activity mentioned in section 31(1)(c) - the administration of justice.

45. The MoJ told the complainant:

"Some interests that are protected by section 31 are drawn quite widely, for example: the administration of justice, the prevention or detection of crime and the operation of immigration controls. But section 31 also applies where the exercise by any public authority of certain specified functions would be prejudiced by disclosure. Those functions include: ascertaining whether a person is responsible for improper conduct, determining the cause of an accident and ascertaining a person's fitness to carry on a profession.

This section is not restricted to information of any particular description; it turns on consideration of the likely effects of any disclosure".

46. In correspondence with the Commissioner, the MoJ explained: "If we were to disclose some of the information, it is likely to be seen as prejudicial to the effectiveness of relationships between the different agencies involved in the administration of justice". It provided specific examples from the withheld information. It also explained "It could lead to a negative impact on the effectiveness of the operational elements of the judicial system and legal profession" and "Disclosure of the information could facilitate the commission of an offence; for instance, fraud against the Department. Because the document contains information about how the Department assesses and arranges compensation payments and method and levels of authorisation".
47. The Commissioner does not agree that information about "how the Department assesses and arranges compensation payments and method and levels of authorisation" relates to an interest that is applicable to section 31. This is information in the third tranche referred to above. The Commissioner considers this information relates more closely to the MoJ's position as a respondent in a compensation claim. It is therefore more relevant to section 42(1).
48. It is for each individual (preferably having obtained independent legal advice) to consider whether they wish to make a claim for compensation arising from an action of the MoJ. In the Commissioner's view, there is no prejudice to the administration of justice where an individual makes a claim for compensation. The claim either succeeds or it fails, in whole or in part. Each case would be determined on its own merits. If an individual decides to make a fraudulent claim, that is a matter for them. The Commissioner acknowledges that where the detail of the MoJ's approach regarding compensation claims is disclosed, this may prompt some individuals to "test the system" using that detail for their own pecuniary advantage. However, primarily, the harm caused by disclosure of the detail of the MoJ's approach regarding compensation

claims is to the MoJ's right to defend its position in law not to the administration of justice.

49. The Commissioner has therefore excluded from further consideration under section 31, any information in the third tranche referred to above. He has considered this information under section 42(1) which the MoJ sought to rely on in addition to section 31 in respect of this information.
50. However, the Commissioner is satisfied that the other prejudicial outcomes described by the MoJ in this case are relevant to the particular interest that the exemption is designed to protect. These are:
 - prejudice to the effectiveness of relationships between the different agencies involved in the administration of justice; and
 - prejudice to the effectiveness of the operational elements of the judicial system and legal profession.
51. The Commissioner has next considered whether the MoJ has demonstrated a causal relationship between the disclosure of the information at issue and the prejudice that section 31(1)(c) is designed to protect. In his view, disclosure must at least be capable of harming the interest in some way, ie, have a damaging or detrimental effect on it. Having considered what the content of the information suggests about the likelihood of prejudice, the Commissioner is satisfied that there is a causal link between disclosure of some of the disputed information and the prejudicial outcomes described above. He also agrees that this prejudicial outcome, where it might arise, would be of substance.
52. However, the Commissioner notes that the first tranche of information is detail at a very high level and is very generalised. As such, the Commissioner considers that any harm that might arise to MoJ's own operational effectiveness or to its relations with other agencies would not be of substance.
53. The MoJ, appears to suggest disclosure of its complaints handling guide in operation at the time of the request might have led to a spike in frivolous complaints because disclosure would show how its complaints system operated. This would, in turn, undermine its operational effectiveness. Disclosure of its current complaints guide would have a similar effect, it appears to argue. The Commissioner is not convinced as to the strength of this argument. Any number of factors might give rise to a spike in complaints (frivolous or otherwise) which the MoJ, in common with any other complaints handling organisation faced with a similar challenge, would have to address. Applying to a complaints process can be daunting and time consuming for any service user. The

Commissioner considers that while some individuals might be more inclined to make a frivolous application to a complaints process where they can readily see the detail of that process, others might be deterred from doing so because the details shows the effort that might be required for their part.

54. The Commissioner has therefore excluded the first tranche of information from further consideration under section 31 because, in his view, disclosure would not give rise to significant prejudice to the administration of justice. Later in this notice, he will consider whether any of the other exemptions cited by MoJ apply to this information.
55. This notice will now consider whether the second tranche of information is exempt under section 31(1)(c). This is information which the Commissioner would broadly describe as more detailed information about the complaints handling process including details of interactions with other agencies.
56. The test that the Commissioner applies when considering whether prejudice would be likely to result is that the likelihood of this must be real and significant, and certainly more than hypothetical or remote. With respect to the level of likelihood of prejudice, the MoJ confirmed that it considers that prejudice would be likely to result - rather than would result - if the information was released.
57. In the Commissioner's view, while it is impossible to state with certainty that prejudice would be likely to occur, the nature of the second tranche of information and the context in which it was created makes it more likely than not that the prejudicial outcomes described could arise. As noted above, the requested information addresses in detail the various stages of the complaint process and, in part, how other agencies might be connected with that process.
58. In conclusion, the Commissioner is satisfied that the MoJ has demonstrated how prejudice to the administration of justice could arise where the second tranche is disclosed and that there is a real possibility of this occurring, to substantially negative effect. He therefore finds the exemption at section 31 engaged in relation to the second tranche of the withheld. For reasons outlined above, he does not agree that section 31 is engaged in relation to the first and third tranche of information.
59. The information to which these conclusions relate is set out in a Confidential Annex to this Notice. Regrettably, the Commissioner cannot describe further the information to which these conclusions relate

without revealing the content of that information. To do so would negate the purpose of this decision notice.

Section 31(1)(c) – Public interest test

60. As a qualified exemption, section 31 is subject to the public interest test which is set out in section 2(2)(b) of the FOIA. Section 2(2)(b) provides that such an exemption can only be maintained where: "... in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure of the information". In other words, where a public authority is satisfied that the release of the information requested would be likely to prejudice law enforcement activities, it can only refuse to provide the information if the public interest in withholding it outweighs the public interest in its disclosure.

Public interest arguments in favour of disclosure

61. The complainant described the MoJ's responses as "fraudulent" and "dishonest". He did not make specific or detailed arguments as to the application of exemptions. Suffice to say that he disagrees with the MoJ's position that it is entitled to withhold the information in question.
62. The MoJ set out the following arguments in favour of disclosure: "there [are] public interest arguments in favour of disclosing information on the basis of good customer service and better awareness of the complaints procedure which was current at the time of the request.

Public interest arguments in favour of maintaining the exemption

63. For obvious reasons, the complainant cited no arguments in favour of maintaining the exemption.
64. The MoJ emphasised the public interest in avoiding prejudice to effective relationships with partner agencies in the administration of justice. It provided examples from the withheld information in support of this view. It also explained that disclosure could have a negative and restrictive impact on the effective working of administration although it did not clearly explain how this would arise – the Commissioner has concluded that these arguments relate more closely to the first tranche of information. It also made public interest arguments regarding information about compensation payments. However, it also relied on broadly similar arguments in relation to section 42(1). The Commissioner has therefore considered the merits of those arguments in that context later in this notice in relation to the third tranche of information.

Balance of public interest test

65. 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.
66. The weight given to arguments in favour of disclosure will depend both on the need for greater transparency, and any other arguments in favour of disclosure, and also the extent to which the information in question will meet those needs. The Commissioner accepts that there is a presumption running through the FOIA that openness is, in itself, to be regarded as something which is in the public interest. He recognises that there will always be a general interest in transparency.
67. In this case the Commissioner recognises that there is a general public interest in disclosing the full guide that was in operation at the time of the request and the guide that was in operation at the time of the refusal. This would aid public understanding of the MoJ's complaints handling guide and would increase the public's ability to scrutinise how the MoJ handles complaints.
68. The complainant feels that certain of the MoJ's employees have fallen short of what should be expected of them. He appears to want access to the guide in order to see for himself whether they have, in fact, fallen short. Alternatively, disclosure might show that the guide itself has given rise to shortcomings in the way MoJ employees deal with service users. Arguably, disclosure would allow him and any other person in the same position to reach a clearer view on this.
69. The Commissioner recognises that the complainant has been ill-served by the MoJ in the way it handled his request under the Act. The Commissioner has set out his conclusions on this point elsewhere in this Notice. However, he has no remit to consider whether the complainant has been ill-served by the MoJ in his other dealings with them. While the complainant may wish to use the guide to take the MoJ to task about its dealings with him, this is not, in the Commissioner's view, indicative of a wider public interest in disclosing the information which is exempt under section 31. While there is a general public interest in allowing greater scrutiny of an organisation's complaint handling process, the example of the complainant's experience does not add greater weight to that interest.

70. While the Commissioner understands the complainant's reasons for wanting access to the information held by the MoJ, in reaching a decision in this case the Commissioner has to take into account issues of public interest not of private interest to the complainant. He must consider whether or not it is appropriate for the withheld information to be released to the general public.

Section 31(1)(c) – Conclusion

71. The Commissioner has carefully considered the arguments in favour of disclosing the second tranche of information and those in favour of maintaining the exemption. He accepts that the public may be interested to know some of the finer details of the MoJ's complaints handling processes. However, he finds that the need to avoid prejudice to the effectiveness of relationships between the different agencies involved in the administration of justice to be particularly compelling. He therefore concludes that the balance of the public interest in all the circumstances of this case lies in favour of maintaining the exemption at section 31(1)(c) in relation to the second tranche of information.

Section 42 – Information which is subject to legal professional privilege

72. As noted above, the Commissioner identified two tranches of information which were not exempt under section 31(1)(c). These are the first and third tranches described above; the first tranche being general complaints handling information which is at a very high level and the third tranche being information which relates to the MoJ's compensation claim handling processes. He has therefore considered whether either tranche is, in whole or in part, exempt under section 42(1).
73. Section 42(1) of the FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege. MoJ has applied the exemption to all of the information it identified as being within the scope of the request. For reasons outlined above, the Commissioner has considered whether it applies to the first and third tranches of the withheld information.
74. There are two types of legal professional privilege: litigation privilege and advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. For information to be covered by litigation privilege, it must have been created for the dominant (main) purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. It can cover communications between lawyers and third parties so long as they are

made for the purposes of the litigation. Litigation privilege can apply to a wide variety of information, including advice, correspondence, notes, evidence or reports.

75. Advice privilege applies where no litigation is in progress or contemplated. In these cases, communications must be confidential, made between a client and legal adviser acting in a professional capacity, and for the sole or dominant purpose of obtaining legal advice. The legal adviser must have given advice in a legal context; for instance, it could be about legal rights, liabilities, obligations or remedies. Advice from a lawyer about financial matters or on an operational or strategic issue is unlikely to be privileged, unless it also covers legal concerns, such as advice on legal remedies to a problem.
76. The MoJ has argued that both litigation and advice privilege applies to the information in question. It argued that the guide was produced with advice from departmental lawyers and that it sets out how the MoJ acts in response to claims for compensation.
77. With regard to the first tranche of information, the Commissioner considers that this is almost exclusively operational information. It does not cover legal concerns such as advice on legal remedies. He also notes that much of the information in the later version of the guide that has been withheld was disclosed to the complainant in its earlier form. As such, he does not agree that the first tranche of information attracts either litigation or advice privilege. He has therefore excluded the first tranche from further consideration under section 42(1).
78. However, as regards the third tranche, the Commissioner is satisfied that it was created as a result of a real prospect or likelihood of litigation, rather than just a fear or possibility. It is a detailed guide as to how the MoJ approaches claims for compensation.
79. Information will only be privileged so long as it is held confidentially and not disclosed. As far as the Commissioner can see, the third tranche, unlike the first tranche, remained confidential at the time of the request and there is therefore no suggestion that privilege had been lost. The Commissioner therefore accepts that the third tranche of information is legally privileged and the exemption is engaged. He has therefore gone on to consider the public interest test.

Public interest in favour of disclosure

80. The MoJ acknowledged that there are arguments in favour of release. It explained to the Commissioner:
"The public interest arguments in favour of disclosure that were considered concerned accountability of public authority and

transparency of decision making. It was argued that a disclosure would ensure public interest in authorities being accountable for the quality of their decision-making and ensuring that decisions have been made on the basis of good quality legal advice are part of that accountability. Transparency in the decision-making process and access to the information upon which decisions have been made can enhance this accountability. It could also be seen that there is a public interest in some cases in knowing whether or not legal advice has been followed.”

81. As above, the complainant did not submit any specific public interest arguments in relation to section 42 but raised general concerns about the MoJ’s approach to his request.

Public interest in favour of maintaining the exemption

82. Arguing in favour of maintaining the exemption, the MoJ said: “It was considered that any potential disclosure of information concerning legal advice could increase “off the record” communication between lawyers and complaint handlers thus affecting the Department’s ability to keep complete written records of advice given and received ... this legal advice is given in confidence and if the lawyer/client relationship is not maintained, the Department’s position could be undermined and this important relationship compromised.
83. It added: “[as a consequence of disclosing information which attracts legal professional privilege] the Department is not fully briefed and its decisions are ill-informed. There is also the possibility of inconsistency of the application of advice if it is not clearly documented. The response [it gave the complainant] maintained that such a situation could have a negative impact on the effectiveness of the judicial system and on the fairness of legal proceedings. If the Government’s ability to defend its legal interests was compromised, this is not in the public interest”.

Balance of public interest arguments

84. In balancing the opposing public interest arguments in cases such as this, involving the section 42 exemption, the Commissioner is mindful of the Information Tribunal’s decision in *Bellamy v Information Commissioner (EA/2005/0023)* which gave considerable weight to the public interest in withholding information which attracts legal professional privilege.
85. The Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind legal professional privilege, namely: safeguarding openness in all communications between client and lawyer to ensure

access to full and frank legal advice, which in turn is fundamental to the administration of justice.

86. In line with the relevant case law, the Commissioner accords significant weight to the maintenance of legal professional privilege. While mindful that this should not mean that this exemption becomes effectively absolute, in the Commissioner's view it is the case that there will need to be very clear and specific public interest grounds for the public interest in the maintenance of legal professional privilege be overridden.
87. In addition, the Commissioner accepts that, given that a compensation claim here would be a claim against the public purse, there is a strong public interest in allowing the MoJ to prepare its response to a compensation claim in a manner which it sees as fit without exposing its approach to public scrutiny. This may undermine its ability to defend itself which would have a negative impact on the public purse.
88. The MoJ has argued that there is a public interest in avoiding frivolous or fraudulent claims that might arise where its processes for handling compensation claims are made public. The Commissioner is sceptical as to the merits of this argument. An individual is entitled to pursue a claim for compensation if they consider it to be warranted. As outlined above, where a person attempts a fraudulent claim for compensation, this is a matter for that person. The claim will succeed or fail, in whole or in part on its own merits.
89. In reaching his decision in this case the Commissioner has taken into account the inbuilt public interest in the concept of legal professional privilege, as well as what the particular factors in this case suggest about the balance of the public interest. This includes what specific harm may result – the Commissioner also accepts that further weight can be given to maintaining the exemption, as the legal advice related to a live and on-going matter. The Commissioner accepts that, given the extremely large number of cases heard in HMCTS on a daily basis, the MoJ may regularly find itself the subject of claims for compensation.
90. The Commissioner does not agree that the public interest would be properly served by exposing the MoJ's approach to compensation claims. The MoJ is entitled to determine in private how it approaches such claims, particularly given that any compensation would be paid from the public purse. He can see little, if any, public interest in disclosing this information.

Section 42 (1) – Conclusion

91. In light of the above, the Commissioner has concluded that the first tranche of information is not exempt under section 42. This is because it does not attract legal professional privilege. However, he is satisfied that the third tranche of information is exempt under section 42 and the public interest favours maintaining the exemption. In reaching this view, he has given particular weight to the public interest in protecting lawyer-client confidentiality where legal proceedings are envisaged.

Section 40 – Unfair disclosure of personal data

92. The requested information includes the names of officials at the MoJ. Their names have been redacted under Section 40(2). Section 40(2) of the Act states that personal data (which is not the personal data of the requester) is exempt if its disclosure would breach any of the data protection principles contained within the Data Protection Act ("DPA"). The term "personal data" is defined specifically in the DPA.²

Is this information personal data?

93. In determining whether information is personal data, the Commissioner has referred to his own guidance and considered the information in question.³ He has looked at whether the information relates to living individuals who can be identified from that information and whether that information is biographically significant about them.

94. He is satisfied that the names of individuals in the requested information are those individuals' personal data. It is information relating to each of them from which each can be identified. It shows not only their place of employment but also that they were involved in particular projects at that place of employment. The Commissioner is satisfied that information which shows where a person is employed is biographically significant about that person.

95. The next question for the Commissioner to consider is whether disclosure of that information under the Act would contravene any of the data protection principles of the DPA.

² <http://www.legislation.gov.uk/ukpga/1998/29/contents>

³

http://www.ico.org.uk/for_organisations/data_protection/the_guide/~media/documents/library/Data_Protection/Detailed_specialist_guides/PERSONAL_DATA_FLOWCHART_V1_WITH_PREFACE001.ashx

96. The data protection principle that is normally considered in relation to section 40 is the first data protection principle which states that:

'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –
at least one of the conditions in Schedule 2 is met, and in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

97. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - o what the public authority may have told them about what would happen to their personal data;
 - o their general expectations of privacy, including the effect of Article 8 of the European Convention on Human Rights;
 - o the nature or content of the information itself;
 - o the circumstances in which the personal data was obtained;
 - o particular circumstances of the case, eg established custom or practice within the public authority; and
 - o whether the individual consented to their personal data being disclosed or conversely whether they explicitly refused.
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed?

98. In consideration of this factor, the Commissioner may take into account:

- whether information of the nature requested is already in the public domain;
- if so, the source of such a disclosure; and even if the information has previously been in the public domain does the passage of time mean that disclosure now could still cause damage or distress?

99. Furthermore, notwithstanding the individual in question's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

100. In considering 'legitimate interests', in order to establish if there is such a compelling reason for disclosure, such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests. In balancing these legitimate interests

with the rights of the individual in question, it is also important to consider a proportionate approach, ie it may still be possible to meet the legitimate interest by only disclosing some of the requested information rather than viewing the disclosure as an all or nothing matter.

101. The MoJ has argued that the names and contact details that had been redacted were those of junior civil servants. This contrasts with an individual at "SCS" (or Senior Civil Servant) who, it accepts has a reasonable expectation that their name would be disclosed given their seniority.
102. The Commissioner has considered the question of fairness in this case by looking at whether it would be fair to the individuals concerned to put their personal data into the public domain in this context.
103. The Commissioner notes that while some of the individuals named in the withheld information may, on occasion, deal with members of the public, their roles are relatively junior. He agrees that it is outside their expectations that their names would be published and that such expectations are reasonable in this context.
104. Further, he considers that disclosure of this personal data outside the reasonable expectations of the individuals concerned is not necessary in order to satisfy the legitimate interests of the public. There is a legitimate interest in improving transparency by public authorities. However, the Commissioner does not consider that transparency would be further enhanced by the disclosure of junior officials' names in this case.

Section 40(2) – Conclusion

105. The Commissioner has therefore concluded that disclosure of the names of individuals found in the withheld information would be unfair and in contravention of the first data protection principle of the DPA. Consequently, he considers that the names that have been redacted from disclosure are exempt under section 40(2) of the Act.

First tranche of information - Conclusion

106. In light of the above, the Commissioner does not agree that any of the first tranche of information is exempt from disclosure, except for the names of any junior officials where they are found in the first tranche of information. The Commissioner therefore requires the MoJ to disclose the first tranche of information (except for junior officials' names). The information to which this refers is listed in a Confidential Annex to this Notice.

Other matters

107. The complainant has raised concerns that the MoJ deliberately mishandled his request. The MoJ has conceded that its failures could give an impression of deliberate blocking. However, it is satisfied that, while its handling of the request has been deeply flawed at several stages, this was not deliberate.
108. The Commissioner has concluded in the main body of this notice that the MoJ contravened section 10 of the Act in its delayed initial response. He also notes that the MoJ far exceeded his recommended timescale for conducting an internal review – 40 working days in exceptional cases.
109. In light of the excessive delays and given the complainant's fixed views, the Commissioner has considered whether there was, in fact, deliberate blocking as the complainant alleges. If there was, this would be a criminal breach of the Act under section 77.
110. As with all allegations of criminality, the Commissioner needs to consider the burden of proof to the criminal standard. This means that he would need to prove beyond all reasonable doubt that the offence took place. In the specifics of this case, he would need to prove that:
- a) the requested information existed at the time of the request;
 - b) the exemptions cited by the MoJ did not apply to them; and
 - c) the information was deliberately held back to avoid disclosure.
111. Although the Commissioner is satisfied that the information was held at the time of the request, for reasons set out in the main body of this Notice, he considers that the exemptions cited did apply in this case. Even if he is wrong on that point, he can see no evidence that the information was deliberately hidden to avoid disclosure.
112. Even if all three factors could be satisfied, there is a time bar of 6 months on prosecutions under section 77. The request and the internal review took place beyond the time bar. The Commissioner has spoken publically on a number of occasions about the difficulties this can cause in bringing prosecutions under section 77.⁴

4

http://www.ico.org.uk/about_us/consultations/~media/documents/consultation_responses/ico_submission_to_report_on_post_legislative_scrutiny_of_foia.ashx (see paragraph 15)

113. The Commissioner recognises that it is entirely understandable that the complainant considers the MoJ's delays to be suspicious and indicative of deliberate blocking. However, the Commissioner considers it is also reasonable to conclude that the MoJ, by its own admission, gravely mishandled the request from the outset but not with criminal intent.

Right of appeal

114. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

115. 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.

116. 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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Wycliffe House
Water Lane
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SK9 5AF**