

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 November 2013

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

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Ministry of Justice (MoJ) regarding the basis upon which remaining papers concerning the case of the 'Shrewsbury 24' were retained by the Cabinet Office rather than transferred to The National Archives. The MoJ provided the complainant with the majority of information requested but withheld some material on the basis of section 23(1) (security bodies); section 35(1)(a) (government policy); section 35(1)(b) (Ministerial communications); section 38(1)(b) (health and safety); section 42(1) (legal professional privilege) and section 40(2) (personal data). The complainant disputed the application of all of the exemptions with the exception of sections 23(1) and 40(2).
2. The Commissioner has concluded that the section 42(1) has been correctly applied and the public interest favours maintaining that exemption. However, although he has found that section 35(1)(a) is engaged, he has concluded that the public interest favours disclosing the information withheld under this exemption. The Commissioner has also concluded that sections 35(1)(b) and 38(1)(b) are not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the complainant with the information previously withheld on the basis of sections 35(1)(a) and 35(1)(b).
  - Provide the complainant with the information previously withheld on the basis of section 38(1)(b).

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.

## Background

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5. At the time of the Instrument noted below the Public Records Act 1958 (PRA) required government departments to select and transfer records for permanent preservation to The National Archives when the records reached 30 years old.
6. The Constitutional Reform and Governance Act 2010 (CRAGA) has since changed the point at which records created by government departments must be transferred for permanent preservation to 20 years. The CRAGA also changed some of the FOIA exemptions in line with this reduced definition of when a record becomes a historical record. The change to 20 years is managed in a transitional process, from 2013 until 2022, releasing an extra year of records each year<sup>1</sup>.
7. However, the PRA allows departments to retain records beyond the normal period where necessary for administrative purposes or 'any other special reason'. To do so the relevant department must seek the approval of the Lord Chancellor. Successive Lord Chancellors have been satisfied that information relating to the security services falls within the category of 'other special reason' and that such information should be retained by the department. The Lord Chancellor's approval is referred to as the 'security blanket' and has been recorded in instruments signed by those Lord Chancellors.
8. The Lord Chancellor signed a new Security and Intelligence Instrument on 19 December 2011 and this runs until 31 December 2021.<sup>2</sup>

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<sup>1</sup> <http://www.nationalarchives.gov.uk/information-management/our-services/legal-obligations-for-transfer.htm>

<sup>2</sup>

[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/219904/security-intelligence-instrument.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/219904/security-intelligence-instrument.pdf)

## Request and response

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9. The complainant submitted the following requests to the MoJ on 30 January 2013:

*'Please provide copies of all correspondence and communications involving Chris Grayling relating to the case of the "Shrewsbury 24" If not captured by above please provide copies of any documentation relating to the Section 23 exemption of documents in the case. The linked article refers to the Lord Chancellor renewing the decision made by his predecessor in not releasing remaining papers.*

*Please provide copies of documents showing such and also provide a copies of documentation showing the decision made by his predecessor. These may have been made under the Public Records Act. I understand Section 23 of the FOIA contains a provision for a Minister of the Crown to issue a certificate stating the exemption is engaged and as part of this request I would like to request a copy.*

*Please disclose how many documents are being withheld.*

*Please provide copies of all correspondence and communications involving officials acting on Chris Grayling's behalf relating to the case of the "Shrewsbury 24".'*

10. The MoJ responded on 8 April 2013. It provided the complainant with information falling within the scope of his request but explained that further information had been withheld on the basis of the exemptions contained at the following sections of FOIA: 23(1); 35(1)(a); 38(1)(b); 40(2) and 42(1).
11. The complainant contacted the MoJ on 12 April 2013 in order to ask for an internal review of the decision to withhold information on the basis of sections 35(1)(a), 38(1)(b) and 42(1).
12. The MoJ informed him of the outcome of the internal review on 17 June 2013. The review upheld the application of the three exemptions with the exception of a small portion of information previously withheld under section 35(1)(a). In relation to this information the MoJ concluded that the public interest favoured disclosure of this information.
13. On 19 September 2013, during the course of the Commissioner's investigation, the MoJ informed the complainant that it also considered the information that remained withheld on the basis of section 35(1)(a) to also be exempt from disclosure on the basis of section 35(1)(b).

## Scope of the case

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14. The complainant contacted the Commissioner on 18 June 2013 in order to complain about the MoJ's decision to withhold information on the basis of the exemptions contained at sections 35(1)(a), 38(1)(b) and 42(1). He explained that he did not seek to challenge the application of sections 23(1) and 40(2). Following the MoJ's introduction of section 35(1)(b), the complainant informed the Commissioner that he also disputed the application of that exemption.
15. The MoJ has relied on section 42(1) to withhold one sentence contained in paragraph 6 of a submission to the Secretary of State for Justice dated 17 March 2011.
16. Sections 35(1)(a) and 35(1)(b) have been used to withhold paragraph 11 in the same submission.
17. Section 38(1)(b) has been used to withhold certain information contained in the following emails: one dated 13 November 2012 and sent at 13:44 and one dated 14 November 2012 and sent at 15:34.
18. The Commissioner has considered the application of these exemptions to the information identified in the preceding paragraphs.

## Reasons for decision

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### Section 42(1) – legal professional privilege

19. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege and this claim to privilege could be maintained in legal proceedings.
20. There are two categories of legal professional privilege: advice privilege and litigation privilege.
21. In this case the category of privilege the MoJ is relying on is advice privilege. This privilege is attached to confidential communications between a client and its legal advisers, and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation. The information must be communicated in a professional capacity; consequently not all communications from a professional legal adviser will attract advice privilege. For example, informal legal advice given to an official by a lawyer friend acting in a non-legal capacity or advice to a colleague on a line management issue will not attract privilege. Furthermore, the

communication in question also needs to have been made for the principal or dominant purpose of seeking or giving advice. The determination of the dominant purpose is a question of fact and the answer can usually be found by inspecting the documents themselves.

22. The Commissioner has considered the information redacted on the basis of section 42(1). Although this information was contained in a submission to the Secretary of State, the Commissioner is satisfied that the redacted information evidences the substance of an earlier communication between a MoJ lawyer and non-legal colleagues, and the purpose of that original communication was the provision of legal advice. The Commissioner is therefore satisfied that the information redacted from paragraph 6 of the submission dated 17 March 2011 is exempt from disclosure on the basis of section 42(1) of FOIA.

### **Public interest test**

23. However, section 42 is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in favour of disclosing the information**

24. The MoJ acknowledged that there was a public interest in release of information in order to let the public know that decisions have been made on the basis of good quality legal advice, and in seeing whether or not the legal advice was followed in the decision making-process. When considering the risks of certain actions, as in this case here, it may help public understanding to know what legal advice was sought by the MoJ and what the content of that advice was.
25. The complainant emphasised that the information sought by this FOI request concerned the decision to withhold material (under the 'security blanket' referred to above) concerning a case, ie 'Shrewsbury 24', in which it was alleged there was a miscarriage of justice. The complainant argued that it could not be in the public interest to withhold information in relation to a 40 year old case of such importance. Rather the public interest can only be served in knowing how the decisions to withhold the documents retained by the Cabinet Office was made or informed. By maintaining - as one campaigner put it - the 'veil of secrecy' the complainant argued that the MoJ can only add to suspicions and doubts as to what it did not want the public and campaigners to know.
26. The complainant noted that many of 'Shrewsbury 24' were now in their seventies and eighties and required disclosure of all of the information

falling within the scope of this FOI request now. The complainant also noted that the information disclosed in response to his request referred to the fact that the campaigners for the 'Shrewsbury 24' had not yet exhausted all legal means to access justice or the answers they seek; yet at the same time the MoJ refused to release relevant information which may assist the campaigners. With regard to the information withheld under section 42(1), the complainant argued that the legal advice offered in this case was crucial to understanding why documents concerning the case of the 'Shrewsbury 24' should be kept secret.

### **Public interest in maintaining the exemption**

27. The MoJ explained that the withheld information set out the legal view on certain actions and points out the risks of these. It argued that the release of such legal advice would have an adverse impact upon the provision of high quality legal advice in the future. Without such advice the government's decision making would be much reduced because legal advice would not be fully informed or frank if it were written with an eye to it being released shortly afterwards and this would be contrary to the public interest. The MoJ noted that the courts have historically recognised the principle of being allowed to consult one's lawyers in confidence and there is an element of strong public interest inbuilt into legal professional privilege itself. The MoJ explained that it could see nothing in the specific content of the withheld information to suggest such a strong public interest in disclosure that would override the inbuilt public interest in maintaining the lawyer-client privilege. The MoJ also explained that it considered this advice to be 'live' and was still being relied upon.

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

28. In considering the balance of the public interest under section 42, although the Commissioner accepts that there is a strong element of public interest inbuilt into legal professional privilege, he does not accept, as previously argued by some public authorities that the factors in favour of disclosure need to be exceptional for the public interest to favour disclosure. The Information Tribunal in *Pugh v Information Commissioner* (EA/2007/0055) were clear:

*'The fact there is already an inbuilt weight in the LPP exemption will make it more difficult to show the balance lies in favour of disclosure but that does not mean that the factors in favour of disclosure need to be exceptional, just as or more weighty than those in favour of maintaining the exemption'. (Para 41).*

29. Consequently, although there will always be an initial weighting in terms of maintaining the exemption, the Commissioner recognises that there

are circumstances where the public interest will favour disclosing the information. In order to determine whether this is indeed the case, the Commissioner has considered the likelihood and severity of the harm that would be suffered if the advice were disclosed by reference to the following criteria:

- how recent the advice is; and
- whether it is still live.

30. In order to determine the weight that should be attributed to the factors in favour of disclosure the Commissioner will consider the following criteria:

- the number of people affected by the decision to which the advice relates;
- the amount of money involved; and
- the transparency of the public authority's actions.

31. With regard to the age of the advice the Commissioner accepts the argument advanced on a number of occasions by the Tribunal that as time passes the principle of legal professional privilege diminishes. This is based on the concept that if advice is recently obtained it is likely to be used in a variety of decision making processes and that these processes are likely to be harmed by disclosure. However, the older the advice the more likely it is to have served its purpose and the less likely it is to be used as part of any future decision making process.

32. In many cases the age of the advice is closely linked to whether the advice is still live. Advice is said to be live if it is still being implemented or relied upon and therefore may continue to give rise to legal challenges by those unhappy with the course of action adopted on that basis.

33. In the circumstances of this case the legal advice which is summarised in the information redacted on the basis of section 42(1) dates from 16 February 2011. Therefore at the point the complainant's request was submitted in January 2013, the Commissioner accepts that the advice was still relatively recent. Furthermore, Commissioner accepts that the advice itself is still live and is still being relied upon by the MoJ given that it relates to the current 'security blanket' which remains in place until 2021. In the Commissioner's opinion the age of this particular advice, and the fact that it was still live at the time of the request, add considerable weight to the public interest in withholding this information.

34. With regard to the public interest arguments in the favour of disclosure, as a general principle the Commissioner recognises the value in the

disclosure of legal advice in order to confirm to the public whether decisions had been taken on the basis of sound legal advice, and moreover, whether that advice had been followed. Although the number of people who received convictions in the Shrewsbury Trials, and thus directly affected by decisions regarding the retention of information concerning the case are relatively low, the Commissioner believes that the controversial nature of the case - eg campaigners' argument that the convictions represented a miscarriage of justice and the alleged role of the Security Service - arguably increases the public interest in disclosure of the redacted information. Moreover, the renewal of the security blanket did not simply affect material concerning the case of the 'Shrewsbury 24', but all records held by all government departments which could be withheld on the basis of section 23 of FOIA. Thus there is a wider public interest in the disclosure which goes beyond the case of the 'Shrewsbury 24'.

35. However, having considered the content of the information withheld on the basis of section 42(1), in the Commissioner's opinion the degree to which this information would actually add to the public's understanding of the decision making process around the renewal of the 'security blanket' is actually quite limited.
36. Furthermore, the Commissioner does not accept that the government has maintained a 'veil of secrecy' around the decision making process which resulted in the Cabinet Office continuing to withhold some material about the Shrewsbury Trials under the security blanket renewed in December 2011. In the Commissioner's opinion based upon the information already in the public domain, and the information that has been provided in the response to this request, it is possible for the public to have a reasonably sound understanding of the decision making process surrounding the renewal of the blanket in 2011. For example, with the exception of one redaction on the basis of section 23(1), the nature of the information about the Shrewsbury Trials actually retained under the blanket is described in the documents released as part of this request as is the process by which the blanket was renewed. In considering the public interest in relation to this request, the Commissioner believes that it is important remember the distinction between disclosure of information associated with the decision making process surrounding the renewal of the security blanket and the disclosure of the information that is actually subject to the blanket itself.
37. In conclusion, the Commissioner does not dispute the public interest arguments advanced by the complainant and accepts that given the broad application of the blanket beyond the papers associated with the case of the 'Shrewsbury 24' the public interest in disclosure of the information arguably attracts further weight. However, in the Commissioner's opinion the extent to which disclosure of the withheld



information would genuinely aid the public's understanding of this matter is limited, especially taking into account the other disclosures made by the MoJ. In contrast, the Commissioner believes that significant weight should be attributed to maintaining the exemption given that the legal advice was recent and remained live at the time of the request. Therefore, the Commissioner has found that the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Section 35(1)(a) – formulation and development of government policy**

38. Section 35(1)(a) of FOIA states that:

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

*(a) the formulation or development of government policy'*

39. Section 35 is a class based exemption, therefore if information falls within the scope of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

40. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

41. At the very least 'formulation or development' suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.

42. Furthermore, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in *DfES v Information Commissioner & the*

*Evening Standard (EA/2006/0006, 19 February 2007) at paragraph 75(v), and DWP v Information Commissioner (EA/2006/0040, 5 March 2007) at paragraph 56.*

43. In describing these general principles the Commissioner fully recognises that policymaking can take place in a variety of ways: there is no uniform process. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
44. Nevertheless, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - the final decision will be made either by the Cabinet or the relevant minister;
  - the government intends to achieve a particular outcome or change in the real world; and
  - the consequences of the decision will be wide-ranging.
45. The MoJ argued that the redacted information relates to the formulation and development of government policy relating to the Lord Chancellor's Security and Intelligence Instrument.
46. The Commissioner accepts that the withheld information concerns considerations regarding renewal of the security blanket that was due to expire in 2012 and was ultimately renewed in December 2011. He therefore accepts that it relates to the formulation/development of government policy in respect of the renewal of that particular security blanket given that final decision on this matter was made at ministerial level. The withheld information is therefore exempt from disclosure on the basis of section 35(1)(a).

### **Public interest test**

47. Section 35 is a qualified exemption and therefore the Commissioner must also consider the public interest test at section 2 of FOIA and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest in favour of disclosing the information**

48. The MoJ acknowledged that there is public interest in the release of information as greater transparency makes government more

accountable to the electorate and thereby increases trust in government. In addition, increased knowledge in the way government works could mean that the public could contribute more to the policy making process leading to a more effective and broadly based process. The MoJ noted that its recognition of the public interest in transparency was demonstrated by the extent to which it released the majority of the information relevant to this request.

49. In addition to the overarching public interest arguments identified by the complainant referred to above, in relation to this specific information, the complainant argued that the purpose of section 35(1)(a) was to protect 'private thinking space'. However, the redacted information was contained in a policy document produced for the Secretary of State, in responding to letters from MPs, not a document showing any private thinking.

### **Public interest in maintaining the exemption**

50. The MoJ provided the Commissioner with submissions which collated the public interest arguments for sections 35(1)(a) and (b). In the Commissioner's opinion, although there is some overlap between the two exemptions and they can both be claimed for the same information, the public interest considerations may differ and public authorities should conduct a separate public interest test for each exemption. The part of the MoJ's submissions relating to section 35(1)(a) argued that good government depends on good decision making. In this case the withheld information relates to policy issues where full consideration of the options without fear of premature disclosure is necessary. Such premature disclosure could lead to ministers and officials feeling inhibited from being frank and candid in their correspondence and as a consequence the quality of debate and ultimately the quality of decision making would be diminished. The MoJ argued that although by the time of this request the security blanket had been signed and was in place, the blanket itself remained a live matter for as long as information was being withheld under that blanket. The MoJ therefore considered the policy in question to be a live matter.

### **Balance of the public interest test**

51. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of section 35(1)(a). In that case the Tribunal confirmed that there were two key

principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.<sup>3</sup>

52. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption. The Commissioner considers that the MoJ's line of argument appears to encompass two concepts, firstly that of safe space and secondly that a chilling effect.
53. With regard to 'safe space', the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. Nevertheless, the Commissioner does accept that the government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision. The timing of the request will therefore be an important factor in determining the weight that should be given to safe space arguments.
54. The Commissioner notes that in the MoJ's view at the time of the request, January 2013, the policy in question, i.e. the Lord Chancellor's security blanket, remained a live issue as the current blanket was in place until 2021 and information was continuing to be withheld under the blanket. In the Commissioner's opinion the fact that the blanket remains in place until 2021 does not mean that the formulation and development of policy making associated with the renewal of the blanket remains live until 2021. Rather in the Commissioner's opinion the formulation and development of the policy was completed at the point the Lord Chancellor signed the new blanket on 19 December 2011. The continued operation of the blanket until 2021 is simply evidence of the fact that the policy is being implemented until 2021. Therefore in the Commissioner's view at the point this request was submitted there was no need for the government to have a space safe in which to discuss the formulation/development of its policy towards the renewal of the

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<sup>3</sup> *DFES v Information Commissioner and Evening Standard (EA/2006/0006)*

security blanket which expired in 2012. Consequently, in the circumstances of this case the Commissioner is of the opinion that the safe space arguments do not attract any weight.

55. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
56. As discussed above, the Commissioner is of the opinion that the policy making in question was not live at the time of the request and thus he does not accept that disclosure of the withheld information could have had a chilling effect on the government's ongoing policy discussions regarding the Lord Chancellor's security blanket. Furthermore, having considered the content of the withheld information the Commissioner is not persuaded that disclosure of this particular information would have a significant effect on the candour of policy future discussions on other, unrelated policies. The Commissioner has expanded upon his reasons for reaching this conclusion in a confidential annex which is attached to this notice which will be provided to the MoJ only.
57. With regard to the public interest in disclosing the information withheld under section 35(1)(a), as with his comments in relation to the public interest test under section 42(1), the Commissioner recognises that the arguments identified by the complainant should not be dismissed lightly. However, in the Commissioner's opinion, once again the degree to which the disclosure of the information withheld on the basis of section 35(1)(a) would genuinely inform the public about the process of policy making in relation to this particular decision is somewhat limited.
58. Although the Commissioner believes that only limited weight should be attributed to the public interest arguments in favour of disclosure he believes that a similarly limited amount of weight should be attributed to maintaining the exemption. Under section 2(2)(b) of FOIA a public authority can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosing it. If the public interest is equal on both sides, then the information must be released. Therefore, the Commissioner has concluded that the public

interest favours disclosure of the information withheld under section 35(1)(a).

### **Section 35(1)(b) – Ministerial communications**

59. Section 35(1)(b) states that information is exempt from disclosure if it relates to 'Ministerial communications'.
60. The MoJ has provided the Commissioner with submissions to support its view that paragraph 11 of the submissions dated 17 March 2011 relates to a Ministerial communication and thus is exempt from disclosure on the basis of section 35(1)(b).
61. Having considered the MoJ's submissions, and the redacted information, the Commissioner is not persuaded that this information falls within the scope of the exemption contained at section 35(1)(b). The Commissioner cannot fully explain his reasoning without referring to the content of the redacted information itself. Therefore the Commissioner's basis for concluding that the redacted information is not exempt on the basis of section 35(1)(b) is set out in a confidential annex which will be provided to the MoJ only.

### **Section 38(1)(b) – health and safety**

62. Section 38(1)(b) is prejudiced based exemption which states that information is exempt from disclosure if its disclosure would, or would be likely to, endanger the safety of any individual.
63. In order for a prejudice based exemption, such as section 38(1)(b), to be engaged the Commissioner believes that three criteria must be met:
  - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld 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 information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold 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. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

64. The MoJ explained that the redacted information concerned the logistical handling of official documents and that disclosure of the information would put individuals at risk.
65. In its submissions to the Commissioner, the MoJ provided further details to support this position and also confirmed that it considered the exemption to be engaged at the higher threshold, ie that disclosure would endanger the safety of individuals. The Commissioner cannot reproduce the MoJ's submissions to him here without compromising the content of the information itself. However, the confidential annex discusses the MoJ's submissions in more detail.
66. With regard to the first criterion of the three limb test described above, the Commissioner is satisfied that the nature of the harm envisaged by the MoJ is one that falls within the scope of section 38(1)(b).
67. Similarly, the Commissioner is satisfied that disclosure of the withheld information has the potential to harm the safety of individuals. The Commissioner is therefore satisfied that there is a causal link between the potential disclosure of the withheld information and interests which section 38(1)(b) is designed to protect. Moreover, the Commissioner is satisfied that the resultant prejudice which the MoJ believes would be likely to occur is one that can be correctly categorised, in light of the Tribunal's comments above, as real and of substance.
68. However, in terms of the third criterion, the Commissioner is not persuaded that the likelihood of this prejudice occurring is one that is anything more than hypothetical and remote. Consequently, the Commissioner does not accept that section 38(1)(b) is engaged. He has elaborated on his reasons for reaching this conclusion in the confidential annex.

## Right of appeal

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69. 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)

70. 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.

71. 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**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
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