

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 February 2014

Public Authority: The Crown Prosecution Service
Address: 5th Floor Rose Court
2 Southwark Bridge
London SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested information relating to the review carried out by Alison Levitt QC about the Crown Prosecution Service's involvement in allegations against Jimmy Savile. The Crown Prosecution Service ("CPS") cited provisions of section 36 as its basis for withholding this information.
2. The Commissioner's decision is that the CPS is entitled to rely on the provisions of section 36 that it has cited as a basis for refusing to provide the requested information.
3. No steps are required.

Request and response

4. On 13 February 2013, the complainant requested information of the following description. The Commissioner has numbered the requests for ease of future reference:

"My request relates to the recent review carried out by Alison Levitt QC surrounding CPS involvement in allegations against Jimmy Savile (http://www.cps.gov.uk/news/assets/uploads/files/savile_report.pdf) and is as follows:

[1.] Please provide copies of transcripts/notes/copies or interview/s carried out with the reviewing lawyer.

Some examples are given in the report, such as Footnote 27 [actually Footnote 55] which reads: 'I asked him why he had written this; he replied that it must have been his understanding of what the police had told him.'

On page 109 it is written: 'I am not aware of such advice being sought or given and the reviewing lawyer is adamant that he knew nothing of this.'

My request is for all documentation surrounding these interviews, which includes any notes or tape recordings taken by the person carrying out the interview.

In responding, please provide a list of all documentation and when it was produced.

[2.] Please provide copies of any documents showing how the comments used in the published review were agreed with the reviewing lawyer and/or any protocol for agreement.

The press office recently informed me that enquiries had been made 'about the interview with the reviewing lawyer and there are no notes or similar from this interview that have been agreed with all relevant parties'.

Asked about the use of some information from these interviews in the published review, I was told these were likely to have been agreed with the reviewing lawyer. Please provide any documentation showing such and/or how the quotes or information from the interview/s was allowed to be used in the published review."

5. The complainant chased a response from the CPS on 20 March 2013 and sought the Commissioner's intervention on 3 April 2013.
6. On 26 April 2013, the CPS responded. It refused to provide the requested information caught by the scope of Request 1. It argued that it was exempt under section 36(2)(c) (prejudice to the effective conduct of public affairs). It denied holding information caught by the scope of Request 2.
7. The complainant requested an internal review regarding its response to Request 1 on 30 April 2013. The CPS sent him the outcome of its internal review on 17 July 2013. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 10 August 2013 to complain about the way his request for information had been handled.
9. On 2 October 2013, the Commissioner wrote to the complainant to explain that his investigation would focus on whether the CPS was entitled to rely on section 36(2)(c) in relation to Request 1. The complainant did not raise any objection to this.
10. At this stage, the CPS had construed a particular set of information as falling within the scope of the request. The Commissioner will now refer to this as the "first set of information".
11. In correspondence with the Commissioner, the CPS also introduced reliance on section 36(2)(b)(i) in that disclosure would be likely to inhibit the free and frank provision of advice. It had identified additional information as falling within the scope of the request. The Commissioner will now refer to this as the "additional information".
12. The CPS obtained the opinion of its qualified person with regard to the application of both section 36(2)(i) and 36(2)(c) to this additional information. The Commissioner has therefore considered whether the CPS is entitled to rely on section 36(2)(c) as its basis for refusing to provide the first set of information and the additional information. He has also considered whether the CPS is entitled to rely on section 36(2)(b)(i) as its basis for refusing to provide the additional information.

Reasons for decision

13. Section 36(2)(b)(i) and section 36(2)(c) state:

'(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act...

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

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

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

14. In this case, the Director of Public Prosecutions ("DPP")¹ provided an opinion on the application of sections 36(2)(c) on 24 April 2013 in relation to the first set of information. The DPP provided an opinion on the application of section 36(2)(c) and section 36(2)(b)(i) on 26 October 2013 in relation to the additional information. The Commissioner is satisfied that the DPP is the CPS' qualified person for the purposes of section 36.
15. In determining whether these exemptions are engaged the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
16. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
17. The Commissioner notes that the CPS introduced section 36(2)(b)(i) during the course of his investigation rather than during its handling of the request. This was in relation to the additional information – information which it had not initially considered as falling within the

¹ At the time of the request and in the early stages of the Commissioner's investigation, the DPP was Keir Starmer. On 1 November 2013, Alison Saunders was appointed DPP (<http://www.cps.gov.uk/about/dpp.html>).

scope of the request. The process by which the opinion was obtained was therefore not in accordance with the time requirements of the Act – this requires that relevant exemptions are cited and their application explained to the requester within 20 working days of the request. However, the CPS' failure to do this does not, in itself, mean that the opinion is unreasonable.

18. The CPS explained to the complainant that section 36(2)(c) applied because:

“In the opinion of the qualified person for the CPS – the Director of Public Prosecutions – disclosure of transcripts/notes/copies or interview/s carried out with the reviewing lawyer (hereafter referred to as ‘the notes’) would prejudice the effective conduct of public affairs. To disclose the notes, which constitute an incomplete record of the interview, would prejudice the whole process of analysing all the facts of the CPS decision not to prosecute and producing a balanced analysis with conclusions”.

19. It also said:

“[It] is vital that CPS staff are able to make notes during interviews of this kind that form part of important internal reviews of CPS handling of cases. These notes form a vital record that is referred to when assessing all the material relevant to the review. They are also required as reference material in order to set out the methodology and analysis and explain and justify the conclusions of the review”.

20. As noted above, the CPS did not consider the application of section 36(2)(b)(i) until it had identified further relevant information during the course of the Commissioner's investigation. It sought the opinion of the qualified person about this additional information. The qualified person also gave the opinion that the additional information was exempt under section 36(2)(c).

21. The CPS explained to the Commissioner:

“[The information reflects] a draft version of the report. The draft was prepared before all relevant material and information had been considered. It was, for example, prepared before Ms Levitt had spoken to a number of those involved in person. Plainly, it was only after Ms Levitt had drawn together all relevant material and information that she was able to reach the final conclusions outlined in the published report.”

22. It also argued:

“If those dealing with high profile, difficult and sensitive matters such as this are not entitled to have draft documents withheld they may feel

constrained from altering any views they have expressed in draft documents prior to full and thorough consideration of the matter they are dealing with."

23. Having examined the withheld information, the Commissioner is satisfied that the qualified person's opinion in relation to each set of information is reasonable. Therefore both sets of withheld information are exempt under section 36(2) as claimed by the CPS. As the exemptions are qualified, the Commissioner has gone on to consider, in accordance with section 2(2) of FOIA whether the public interest requires disclosure, despite the valid application of the exemptions.

Balance of public interest – arguments in favour of disclosure

24. The complainant asserted the following points in favour of the public interest in disclosure:

- The CPS's arguments go against the reason the DPP gave for publishing the review. He said: "In the interests of transparency and accountability, I have decided to publish her report in full." The report is only complete with the background material used to inform it.
- Disclosure would not give rise to prejudice of an operational nature.
- The public interest in knowing what was asked and the responses is crucial to assessing conclusions regarding this element of the full report, which identified a string of questionable decisions and has led to a further review by the CPS.
- The CPS' arguments about the incomplete nature of the notes give rise to further valid questions: Why? What sort of record was taken? How were answers recorded? Were questions recorded? How robust was the process?
- The CPS itself concedes that "disclosure would increase public confidence in the CPS as it would demonstrate that the review was thorough. It would also allow the public to determine whether the reviewing lawyer had been interviewed appropriately."
- The public must be able to scrutinise the review that was carried out and examine the failings identified by the CPS in its own report in more detail.
- In releasing the information the CPS is well able to provide context to accompany the notes etc rather than hide behind the argument

that releasing them might lead to a misleading picture. This again, strengthens the need for transparency.

- As has been recognised by the ICO in a recent FOIA disclosure (BBC severance payments) matters concerning the Jimmy Savile scandal present a public interest which could – and [in the complainant's opinion]- should sway the argument in favour of disclosure. The complainant gave no further detail as to what he was referring to here.

25. The CPS acknowledged the following points in favour of disclosure:

- “[As highlighted by the complainant] disclosure would increase public confidence in the CPS as it would demonstrate that the review was thorough. It would also allow the public to determine whether the reviewing lawyer had been interviewed appropriately”.
- “We accept that there is a public interest in furthering the understanding of the way in which the CPS dealt with allegations against Jimmy Savile and any failures that may have allowed him to avoid prosecution. Further, the disclosure of material on which Ms Levitt’s report was based is capable of promoting accountability and transparency as to the conduct of Ms Levitt’s review.”

Balance of public interest – arguments against disclosure

26. Against disclosure, the CPS set out the following arguments:

- “However, the disclosure of [the additional information] does very little to further these objectives [as set out in the previous paragraph] and would, in fact, prejudice the effective conduct of public affairs”.
- Prejudice would arise because the additional information reflected a draft version that did not take into account all the relevant material that was eventually considered. There was a public interest in ensuring that a person drafting such a report could freely alter their drafts as they collate additional information. “In short, it would unfairly and unnecessarily undermine confidence in Ms Levitt’s report if the extracts document, which reflected her views at a point when the report was at a draft and incomplete stage, were disclosed”.
- It also asserted that it would be unfair to the person interviewed to release an incomplete draft which did not yet take into account all relevant material.

- “If those dealing with high profile, difficult and sensitive matters such as this are not entitled to have draft documents withheld they may feel constrained from altering any views they have expressed in draft documents prior to full and thorough consideration of the matter they are dealing with”. It argued that this point was also pertinent to the application of section 36(2)(b)(i)) the likely inhibition to the free and frank provision of advice arising from disclosure would run contrary to the public interest.

Balance of public interest – the Commissioner’s decision

27. The complainant has set out a number of arguments in favour of disclosure which the Commissioner has considered very carefully. The CPS has admitted that the criminal justice system fell short of the trust placed in it by the public to take decisions that best serve the public. It has already asserted that the decisions that were taken historically in the Jimmy Savile case, would not be taken today. Arguably, publishing the information requested in this case could serve to further the weighty public interest in increasing public understanding about the review to which this request refers.
28. However, having read the information that has been withheld in this case, the Commissioner considers that there is a compelling public interest in avoiding the likely prejudice that would arise to any similar reviews if the requested information were disclosed. Those involved in any review of past decisions inevitably take notes or create drafts that, in themselves, are not prepared with a view to future publication. The prospect of future publication of such material would be likely to distract the reviewer and others involved and interrupt the natural flow of work towards the creation of a final version of the review. The inhibition to the free and frank provision of advice that is likely to arise is, in the Commissioner’s view, significant and would be contrary to the public interest. It would be likely to render the conduct of such reviews much less effective.
29. In relation to this review, the publication of incomplete notes made in the course of considering the complex issues involved would not be in the public interest. The Commissioner recognises that the incomplete notes are, in effect, superseded by the final, published version of the review. It might, in theory, be possible to cross reference the incomplete version with the final version. He also recognises that the CPS is not prevented from providing contextual information to explain further any incomplete information that it might be required to publish under FOIA. However, he does not think that it would aid the public’s understanding of the complex issues covered in the review to have both incomplete and complete information about the topic in the public domain. Nothing

significant would be added to the understanding of the key issues. Furthermore, it would inevitably become difficult to work out which version any extract under consideration came from - the published review or the incomplete information. This additional complication is not, in the Commissioner's view, in the public interest. Indeed, it might reasonably be regarded as contrary to the public interest.

30. The complainant has implied concerns about the adequacy of the review. However, having considered the content of both the first set of information and the additional information, the Commissioner has concluded that disclosure would not serve any public interest there might be in addressing any such concerns.

Section 36 - conclusion

31. The Commissioner has concluded that the public interest in maintaining the exemptions at section 36(2)(b)(i) and section 36(2)(c) significantly outweighs the public interest in disclosing the requested information. In reaching this view he has given particular weight to the likely prejudice that would arise to similar reviews in the future. He has also given weight to the confusion that would inevitably arise where there is both incomplete and complete information available in relation to the review in question.

Other matters

32. Whilst there is no explicit timescale laid down by the FOIA for completion of internal reviews, the Commissioner considers that they should be completed as promptly as possible. The Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
33. The Commissioner is concerned that in this case, it took 47 working days for an internal review to be completed. The Commissioner has not been made aware that any exceptional circumstances existed to justify that delay, and he therefore wishes to register his view that the CPS fell short of the standards of good practice by failing to complete its internal review within a reasonable timescale. He would like to take this opportunity to remind the CPS of the expected standards in this regard and recommends that it aims to complete its future reviews within the Commissioner's standard timescale of 20 working days.

Right of appeal

34. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Graham Smith
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