

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 July 2014

**Public Authority:** Crown Prosecution Service  
**Address:** 9<sup>th</sup> Floor Rose Court  
2 Southwark Bridge  
Southwark  
London SE1 9HS

#### Decision (including any steps ordered)

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1. The complainant requested information from the Crown Prosecution Service (CPS) - namely internal staff correspondence and emails – following a leaked email. The CPS refused to provide the requested information citing section 36(2)(c) of FOIA (prejudice to effective conduct of public affairs).
2. The Commissioner's decision is that the CPS has correctly applied section 36(2)(c) to the requested information.
3. The Commissioner does not require the CPS to take any steps as a result of this decision notice.

#### Background

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4. On 25 February 2013, The Times published an article, on the basis of a leaked email, saying that "*CPS lawyers are rejecting tricky cases to save cash*".

#### Request and response

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5. On 14 March 2013 the complainant wrote to the CPS and requested information in the following terms:

*"With regards to the content of the 'leaked' CPS e mail dated 18 January 2013, as reported in The Times on 25 February 2013, please supply copies of:*

*1. Any and all memos, letters and e mails created by CPS personnel which refer to the 'tick and star' brief marking system, as described in the leaked CPS e mail of 18 January 2013; and*

*2. Any and all letters and e mails from CPS Chief Crown Prosecutors or Area Directors addressed to CPS HQ, which were said by the DPP, on or after 25 February 2013, to provide 'reassurance/s' about the use, or former use, of a 'tick and star' brief marking system".*

6. The CPS responded on 23 July 2013. It provided the complainant with a link to some information – a letter - it considered relevant to points 1 and 2 of the request, telling him:

*"In response to points 1 and 2 above, a letter from the Director of Public Prosecutions (DPP) to the Chairman of the Bar Council providing a response to enquiries in relation to the so called 'tick and star' email can be found on the website of the Criminal Bar Association....".*

7. However, the CPS refused to provide the requested internal CPS emails. It cited the section 36(2)(c) exemption of FOIA (prejudice to effective conduct of public affairs) as its basis for doing so.
8. The complainant requested an internal review on 19 August 2013. The CPS sent him the outcome of its internal review on 19 February 2014, upholding its view.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 25 March 2014 to complain about the way his request for information in this case had been handled. In bringing his complaint to the Commissioner's attention, the complainant made reference to a previous request for information by way of context to his complaint in this case.

10. He told the Commissioner:

*"The present request also concerns staff correspondence, this time over the allocation of prosecution briefs to barristers..... In my submission, the CPS have no valid reason to prevent disclosure of the requested material, particularly given that they have previously disclosed such material in response to another Request for*

*documents on virtually the same subject – the briefing of self-employed barristers”.*

11. Although the Commissioner understands from this that the CPS would appear to have complied with a similar request, this does not set an automatic precedent for disclosure under the FOIA. Each case must be considered on its merits.
12. The Commissioner considers the scope of his investigation in this case to be the CPS's application of section 36(2)(c) to the withheld information.

## **Reasons for decision**

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### *Section 36 – prejudice to the effective conduct of public affairs*

13. To engage section 36, the qualified person must give an opinion that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. However, that in itself is not sufficient - the opinion must be reasonable.

14. Section 36(2) states:

*“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*

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

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

15. The CPS told the complainant:

*“Emails created by CPS personnel are exempt under section 36(2)(c) of the FOIA”.*

16. During the course of the Commissioner's investigation, the CPS confirmed that its position is that section 36(2)(c) applies to all the withheld information.
17. In determining whether section 36(2)(c) was correctly engaged, the Commissioner is required to consider the qualified person's opinion as

well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- establish that an opinion was given;
  - ascertain who was the qualified person or persons;
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
18. In this case, the Commissioner is satisfied that an opinion was sought from the then Director of Public Prosecutions (the DPP), on 19 July 2013.
  19. The opinion on the application of section 36(2)(c) was provided on 22 July 2013. The Commissioner is satisfied that the DPP is the CPS's qualified person for the purposes of section 36.
  20. In determining whether the exemption is 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;
    - the nature of the information and the timing of the request; and
    - the qualified person's knowledge of, or involvement in, the issue.
  21. 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.
  22. In the Commissioner's view, if the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.

23. In correspondence with the complainant, the CPS said:

*"In the opinion of the qualified person for the CPS (the Director of Public Prosecutions) disclosure of emails between senior managers and their staff would be likely to prejudice the effective conduct of public affairs. To disclose the emails would prejudice the whole process of establishing the CPS position with regard to its handling of the allocation of case files".*

24. The Commissioner takes the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by sections 36(2)(a) or (b).

25. Section 36(2)(b) of the FOIA provides exemptions where, in the opinion of the qualified person, the disclosure of the information would, or would be likely, to inhibit the free and frank provision of advice or exchange of views. Section 36(2)(c) then states that information is exempt if, in the opinion of the qualified person, its disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

26. The Commissioner acknowledges that the terminology used in these subsections is not explicitly defined in the FOIA. However, as documented in his guidance<sup>1</sup>, his understanding of the key terms is as follows.

- 'Inhibit' means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
- Examples of 'advice' include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.
- The 'exchange of views' must be as part of a process of deliberation.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

27. In the Commissioner's view, the content of the information at issue would not inhibit the exchange of views or advice. It follows that section 36(2)(b) cannot apply. Nor does he consider that any other exemption is relevant.
28. Accordingly, having considered both the withheld information and the submission provided to the qualified person, the Commissioner is satisfied that the qualified person's opinion – that disclosure would be likely otherwise to prejudice the effective conduct of public affairs - is reasonable. It follows that he finds that the exemption is engaged.

*The public interest test*

29. The fact that the exemption is engaged by the qualified person's opinion does not automatically mean that the information should be withheld. The public interest test is separate from the qualified person's opinion.
30. The Commissioner has gone on to consider, in accordance with section 2(2)(b) of FOIA, whether the public interest requires disclosure, despite the valid application of the exemption.

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

31. The complainant argued that there is a clear public interest in ensuring that work is allocated appropriately. He told the Commissioner:

*"This is a matter of public interest as it is vital that briefs are allocated in respect of an advocate's ability and not according to whether the work is more easily done by in-house CPS advocates, as was the case under a 'Tick and Star' policy operating at Isleworth Crown Court until the last DPP stepped in".*

*"Despite the reassurances offered to the Bar Council by the previous DPP, it remains a matter of public interest that any similar erroneous policies operated by different CPS areas are discovered and eradicated".*

32. The CPS recognises that there is a public interest in openness and transparency. It told the complainant:

*"There is a significant public interest in the way Government, and in particular the CPS, manages its administrative procedures in an effective and trustworthy manner. There is also a clear public interest in illustrating how transparent these processes are".*

33. Referring to the open letter written by the then DPP to the then Chair of the Bar Council to address the issue surrounding the leaked CPS email, the CPS told the complainant:

*"There is no doubt that there was a strong public interest in the Crown Prosecution Service addressing the issues raised by the e-mail of 18 January 2013. This is reflected by the DPP's personal involvement in the case and his own investigation into what had taken place".*

34. The CPS told the complainant that it considered that the public interest issues raised had been met by the actions taken:

*"and done so in an open and transparent letter, which is freely available".*

*Public interest arguments in favour of maintaining the exemption*

35. In favour of maintaining the exemption the CPS told the complainant:

*"However, it is vital that senior management and their staff are able to have a discussion in private to establish the background of disclosures made and to identify what local guidance exists within each of the CPS Areas.*

*There is a very strong public interest in the CPS being able to carry out these internal reviews and in having an open dialogue without the fear that that this information would be disclosed into the public domain".*

36. The CPS also told the complainant:

*"... there is no public interest in favour of additionally revealing the internal e-mails that surrounded this matter and which predicated the substance of the DPP's public response. Routine unfettered public disclosure of such e-mails would be counter-productive, by reducing the likelihood of frank and open internal exchanges. It is essential that the DPP or other senior managers in the CPS are able to make proper inquiries of staff and expect full and frank responses. Without such open uninhibited dialogue the business of the CPS would be undermined".*

*Balance of the public interest arguments*

37. 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.
38. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.
39. The Commissioner accepts that there will always be some public interest in there being transparency in the ways public authorities conduct their business. In this case, transparency would serve to inform the public, for example, about the way in which the CPS addressed the issues raised by the leaked email.
40. The Commissioner also notes that the CPS published an open letter in that respect, thus informing the public by way of an explanation of the guiding principles upon which allocation of work to advocates should be determined.
41. In forming a view on the balance of the public interest, the Commissioner has taken into account the general public interest in the openness and transparency of the CPS, as well as those factors that apply in relation to the specific information in question here.
42. Having accepted that the qualified person's opinion that prejudice would be likely to result was reasonable, the Commissioner has concluded that, in this instance, the public interest in avoiding that prejudice outweighs the public interest in disclosure. Therefore, the public interest in maintaining the exemption outweighs that in the disclosure of the withheld information and so the CPS was not obliged to disclose the requested information.



## Right of appeal

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43. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

44. 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.
45. 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** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**Cheshire**  
**SK9 5AF**