

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2015

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

Decision (including any steps ordered)

1. The complainant requested information about the Ministry of Justice's (MoJ) position on recommendations from the Senior Salaries Review Body (SSRB) relating to pay for Employment Judges.
2. The MoJ confirmed it held the requested information but refused to disclose it, citing sections 35(1)(a) (formulation of government policy) and 40(2) (personal information) of FOIA.
3. The Commissioner has investigated MoJ's application of section 35. His decision is that the requested information engages the exemption in section 35(1)(a) of the FOIA but that the public interest favours disclosing some of that information.
4. The Commissioner requires MoJ to disclose the information which he finds cannot be withheld in the public interest.
5. 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

6. The SSRB provides independent advice to the Government on the remuneration of the judiciary and certain other groups.
7. Prior to making the request in this case, the complainant had made a previous, similar, request for information to MoJ. Specifically he

requested information relating to the 33rd and 34th Annual SSRB reports, published in March 2011 and March 2012 respectively.

8. The Commissioner considered the complaint about MoJ's handling of that request in case reference FS50477229. His decision in that case can be found on the ICO website¹.
9. That decision in that case was appealed to the First-tier Tribunal (Information Rights) and the outcome promulgated on 15 September 2014: the Tribunal found that the public interest test favoured disclosure. The Commissioner is aware that MoJ has lodged an appeal to the Upper Tribunal in that case.

Request and response

10. On 2 April 2013 the complainant made a two-part request for information to the MoJ, comprising parts 'A' and 'B'.
11. In the first part of the request, part 'A', the complainant requested information in the following terms:

"A. Please let me know if you hold the following information in relation to the MoJ's consideration of the 35th Annual SSRB Report published in March 2013:

(1) Any decision not to implement the recommendations of the SSRB in their 35th Report that the role of salaried Employment Judge be re-graded to judicial salary band 6.2 and by whom the decision was made.

(2) If no decision has yet been taken as to whether to implement the recommendations of that Report, information evidencing or relating to consideration of the Report to date and the outcome of those considerations (including any decision to postpone consideration of it), the process by which such decisions will be taken upon it, by whom such decisions will be made and when.

¹

http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50477229.aspx

(3) Any representations or submissions which you have received from or on behalf of any judicial office holder and/or any judicial association referring to the salaries of Employment Judges between 2007 and the date of this letter”.

12. Part 'B' of the request was for information about the number of serving salaried judges in various years, including what proportion of the total were women.
13. MoJ responded on 30 April 2013. It confirmed that it holds the requested information. However, it refused to provide the information requested at part 'A', citing section 35(1)(a) (formulation of government policy) as its basis for doing so. It also cited section 40(2) (personal information) in relation to a small amount of information – mainly names and signatures - within the scope of that part of the request. With respect to part 'B' of the request, MoJ directed the complainant to a website that holds published Judicial Diversity statistics from 2001 to 2012.
14. The complainant requested an internal review on 15 May 2013. With respect to part 'A' of his request, he disputed the MoJ's application of section 35(1)(a) of the FOIA. However, when requesting an internal review, the complainant told the MoJ that he has *“no interest in ascertaining the identities of any civil servants involved in this matter”*.
15. With respect to part 'B' of the request, he told the MoJ he considered it unacceptable to be referred to a website.
16. The MoJ sent him the outcome of its internal review on 28 August 2013. It upheld its original position in respect of part 'A' of the request. It revised its position with respect to the information requested in part 'B' of the request citing section 21 (information accessible by other means) in respect of some of the information and section 12 (cost of compliance exceeds the appropriate limit) of the FOIA in respect of the remainder.

Scope of the case

17. The complainant contacted the Commissioner on 13 September 2013 to complain about the way his request for information had been handled. He confirmed that he did not wish to complain about MoJ's handling of part 'B' of the request. Rather, his complaint is with respect to the MoJ's application of section 35 to the information requested at part 'A'.
18. In bringing his complaint to the Commissioner's attention, the complainant advised the Commissioner:

"the subject of this complaint... raises a very similar issue to that currently before the Tribunal."

19. In the course of his investigation, the Commissioner sought clarification of the MoJ's response in this case. In particular, he exercised his powers under section 51 of FOIA to issue an Information Notice seeking clarification of the information MoJ considers to be within the scope of the request. MoJ responded, explaining the nature of the searches it had conducted and advising that additional information relevant to the request had been found. It confirmed that it considers that section 35(1)(a) applies to that information.
20. At the instigation of the Commissioner, MoJ also reconsidered the status of some information in the scope of the request. It acknowledged that some of the information it had originally considered to be exempt from disclosure was in the public domain. It provided a copy of that information to the complainant.
21. With the agreement of the complainant, the Commissioner considers the scope of his investigation to be the MoJ's application of section 35(1)(a) to the information withheld by virtue of that exemption.
22. While he has carefully considered the First-tier Tribunal's (FTT) judgment in the earlier case involving similar issues to the ones raised in this case, the Commissioner is not bound by FTT decisions.

Reasons for decision

Section 35 formulation of government policy

23. Section 35 sets out four exemptions designed to protect good government and provide a safe space for policymaking. The exemptions are class-based, which means there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. The classes are broad and will catch a wide range of information.
24. In this case, MoJ considers that section 35(1)(a) applies.
25. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy. In the Commissioner's view, the term 'relates to' can be interpreted broadly. For example, information may 'relate to' the activity due to its original purpose when created, or its later use, or its subject matter.

26. The request in this case relates to the MoJ's consideration of the 35th Annual SSRB Report.

27. With respect to the subject matter of the request the MoJ told the complainant:

"A decision is yet to be made about the Senior Salaries Review Body's (SSRB) recommendations".

28. In requesting an internal review the complainant told the MoJ:

"My requests sought information relating to a specific decision, or a decision to postpone making a decision, following the existing government policy quoted above on SSRB recommendations and not to formulation of policy".

29. In response, MoJ said:

"You state that you have sought information about 'a decision to postpone making a decision'. What your Freedom of Information request asked for was information about any decision to postpone consideration of the relevant SSRB recommendations. There has been no such decision".

30. In correspondence with the Commissioner in respect of any decision about the SSRB recommendations, MoJ confirmed:

"That question remains live and is a question of government policy".

31. The MoJ further told the Commissioner:

"The level of judicial pay is plainly a question of government policy as is whether the government will give effect to the SSRB recommendations in respect of Employment Judges".

32. Having viewed the withheld information - and considered the MoJ's submissions - the Commissioner is satisfied that it falls within the category of 'formulation or development of government policy'. He accepts that the information relates to government policy on public sector pay, in particular judicial salaries. Accordingly he finds that section 35(1)(a) is engaged in respect of the withheld information.

Public interest

33. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the FOIA (whether, in all the circumstances of the case, the public interest

in maintaining the exemption outweighs the public interest in disclosing the information).

34. With respect to the public interest test the Commissioner's guidance on section 35(1)(a) states:

"Section 35(1)(a) covers any information relating to the formulation and development of government policy. There is no automatic public interest in withholding all such information. Public interest arguments should focus on potential damage to policymaking from the content of the specific information and the timing of the request. Arguments will be strongest when there is a live policy process to protect".

Public interest arguments in favour of disclosing the requested information

35. The Commissioner has considered the comprehensive arguments in favour of disclosure put forward by the complainant. For example, in the complainant's view:

"In this case, the public interest is overwhelmingly in favour of release. The independence of the judiciary from executive interference is clearly in the public interest and is close to being of paramount importance. There is a significant public interest in ensuring that there is no politically motivated executive interference with judicial remuneration which obviously would be inimical to judicial independence".

36. The complainant also told MoJ:

"Further there is a strong public interest in ensuring that the involvement of the executive, or of any judicial office-holder or association, in delaying decisions recommended by an independent review body, is open to scrutiny under the Freedom of Information Act".

37. In that respect, he said that disclosure in this case would allow:

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

38. In correspondence with the complainant, MoJ acknowledged the public interest in transparency and accountability. For example it told the complainant in respect of disclosure in this case that:

"Access to relevant recorded information about how policy decisions are reached, what options are being considered and why some are

excluded and others preferred potentially generates meaningful participation between Government Departments and the public”.

39. The Commissioner acknowledges that the MoJ recognises that it may be appropriate to place the withheld information in the public domain:

“... at some future date once the current process of policy formation is concluded”.

Public interest arguments in favour of maintaining the exemption

40. In favour of withholding the information at issue, MoJ told the complainant:

“... the Government is considering the policy options. Hence final decisions around the policy in the area outlined in your request (Judicial Salaries) are still in the process of being taken, and this is the very time at which the public interest in preserving the safe space for policy making is at its highest”.

41. MoJ also told him:

“It is paramount that the civil servants at the Ministry of Justice have space to test policy options on Judicial Salaries effectively engaging relevant stakeholders where necessary and out of the public eye before they are publicly presented”.

42. It also submitted generic arguments, for example that:

“in order to best develop policy and provide advice to Ministers, officials need a space in which open and honest discussion can take place”.

43. During the course of his investigation, MoJ provided the Commissioner with further submissions in support of its view that disclosure of its internal deliberations would impact on the Government’s ability to explore options and make effective decisions about judicial pay.

44. For example, MoJ told the Commissioner:

“The principal public interest in withholding the information is in maintaining a private thinking space to allow full and frank discussion of the formulation and development of policy [on public sector pay]”.

45. In correspondence with the Commissioner MoJ confirmed that it has not concluded the process of policy formulation to which the withheld information relates.

46. MoJ told the Commissioner not only that disclosure would inhibit government retaining a safe space to consider its policy options in respect of public sector pay - and judicial pay in particular - but that it considered it to be '*fundamentally inappropriate*' for disclosure to occur while the policy formulation process is ongoing.

Balance of the public interest

47. 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.
48. In forming a conclusion about the balance of the public interest in this case, the Commissioner is mindful that the purpose of section 35 is to protect good government: it reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private. He has also taken into account that public interest arguments under section 35(1)(a) should focus on protecting the policymaking process - this reflects the underlying purpose of the exemption.
49. Focussing on the effect of disclosing the information in question, the Commissioner has considered the arguments advanced both by the MoJ and by the complainant and weighed the public interest factors for and against disclosure. In this case, having regard to the subject matter of the information at issue, the Commissioner acknowledges that there is clearly a public interest in transparency, openness and accountability in relation to public sector pay policy. The Commissioner recognises the public interest in the public being informed on this issue to enable them to engage in debate and discussion. He also accepts that there is a public interest in those aspects of public sector pay policy that affect the judiciary. Whilst there is a significant public interest in disclosing the information the Commissioner does accept that it is raised to the level contended by the complainant.
50. The Commissioner has also taken into account that the relevant government policy is still under development: in this case he is satisfied that the withheld information relates to a policy which was live and on-going at the time of the request. As the requested information relates to that policy making, he considers that the need for a safe space to debate policy and reach decisions without external comment is a valid argument.

51. In the Commissioner's view, the timing of the request adds significant weight to the public interest in favour of maintaining the exemption.
52. In respect of some of the withheld information - information comprising two annexes to a submission to Ministers about the judicial pay settlement - the Commissioner considers it reasonable to conclude that that information is likely to have been disseminated more widely. In his view, the content of Annexes A and B is likely to be known beyond government.
53. In support of that view, the Commissioner notes that MoJ told the complainant in its correspondence of 28 August 2013 about "*a Written Ministerial Statement this March*" which set out the Government's response to that year's judicial remuneration made by SSRB.
54. In his view, the public interest in maintaining the exemption in respect of the information comprising Annex A and Annex B does not outweigh the public interest in disclosure. He therefore orders disclosure of that information.
55. With respect to the remaining withheld information, while the Commissioner accepts that there is a public interest in informing public debate surrounding the issues under consideration, he gives greater weight to the public interest in allowing Ministers and officials the space to consider its policy options and to be able to continue to effectively discuss issues in a frank and open manner.
56. With regard to the small amount of withheld information comprising internal emails covering the substantive information he is also mindful of what purpose disclosure would serve and what this information would add.
57. Having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in maintaining the exemption outweighs the public interest in disclosure. Accordingly he finds that the MoJ was entitled to withhold the remaining requested information in this case by virtue of section 35(1)(a).

Right of appeal

58. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

59. 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.
60. 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

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