

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

### **Decision notice**

**Date:** 21 December 2016

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

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

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1. The complainant has requested from the Ministry of Justice information relating to the 2014-2015 pay remit of the Information Commissioner's Office and the salary increases awarded to its Executive Team in the middle of 2014.
2. The Ministry of Justice disclosed some of the requested information but withheld the rest under sections 35(1)(a), 35(1)(d) and 40(2) of the FOIA. As the complainant did not take issue with the Ministry of Justice's application of section 40(2), the scope Commissioner's investigation was limited to the application of section 35(1).
3. The Commissioner's decision is that the Ministry of Justice has correctly applied section 35(1)(a) of the FOIA to the information covered by Part 1 of the complainant's request and the public interest is in favour of maintaining the exemption. With regard to the information covered by Part 2 of the request the Commissioner's decision is that the Ministry of Justice has correctly engaged section 35(1)(d) but that the public interest is in favour of disclosing the information.
4. The Commissioner also finds that the Ministry of Justice has breached section 17(3) of the FOIA.
5. The Commissioner requires the Ministry of Justice to take the following steps to ensure compliance with the legislation;
  - Disclose the information in Part 2 of the complainant's request that the Ministry of Justice has redacted under section 35(1)(d) of the FOIA.

6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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7. On 19 February 2015 the complainant wrote to the Ministry of Justice (MoJ) and requested information in the following terms:
  - *"Please provide all information held relating to the 2014-15 pay remit of the Information Commissioner's Office, including records of any meetings or communications with the ICO or other parties, for example HM Treasury.*
  - *Please provide all information held relating to the awarding of substantial salary increases to the Executive Team members at the Information Commissioner's Office in the middle of 2014."*
8. The MoJ responded on 16 March, 10 April and 7 May stating that as it believed section 35(1)(a) of the FOIA might be applicable to the requested information it would need to undertake a public interest test. Although the MoJ acknowledged that under section 10(1) of the FOIA it was obliged to respond to the request within 20 working days, it pointed out that under section 10(3) it was entitled to apply for an extension of time to complete the public interest test.
9. On 13 April 2015 the complainant referred to the Commissioner's guidance which states that a public authority should not take longer than 40 days to consider the public interest test and then only in exceptional circumstances.
10. The MoJ wrote to the complainant again on 4 June 2015. It said it had completed the public interest test and confirmed it held the requested information. In relation to the first part of the request (part 1), it stated it was withholding the information in its entirety under Section 35(1)(a) of the FOIA. In relation to the second part of the request (part 2), the MoJ disclosed the majority of the information with some minor redactions under redactions under sections 35(1)(d) and 40(2) of the FOIA.
11. On 23 July 2015 the complainant requested an internal review.
12. Following an internal review the MoJ wrote to the complainant on 19 August 2015 and stated it was upholding its original decision.

## Scope of the case

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13. The complainant contacted the Commissioner in October 2015 to complain about the way his request for information had been handled. In particular he said he was unhappy about the MoJ's decision to apply section 35 of the FOIA. However, he said he was not complaining about the MoJ's application of section 40(2) of the FOIA.
14. The scope of the Commissioner's investigation will be limited to the MoJ's application of section 35(1)(a) in respect of the entirety of the information covered by Part 1 of the request and section 35(1)(d) in respect of the redacted segments of Part 2.

## Chronology

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15. The Commissioner contacted the MoJ on 30 October 2015 to request a copy of the withheld information together with any further arguments it wished to advance in support of its application of Section 35 of the FOIA. The Commissioner also invited the MoJ to give consideration to making a 'private and confidential' disclosure outside the FOIA.
16. The MoJ responded on 7 January 2016. To avoid any potential conflict of interest it said it was only prepared to send the withheld information to the Commissioner to view personally and not the officer dealing with the case. The MoJ also said it did not want to raise any further arguments in support of section 35 and was not prepared to make a private and confidential disclosure.
17. The Commissioner responded by saying he was not prepared to inspect the withheld information personally and invited the MoJ to reconsider its position.
18. Further discussions then took place between the MoJ and the Commissioner the result of which was that the MoJ said it would be prepared to allow the case officer to inspect the withheld information at its offices on the condition that no notes/photocopies would be taken out of the office and a suitably drafted non-disclosure agreement was signed.
19. The Commissioner arranged for the case officer to inspect the withheld information at the MoJ's offices on 18 April 2016.
20. In the meantime that Commissioner wrote to the complainant on 24 February 2016 advising him that the withheld information would be inspected at the MoJ's offices in April and asked him whether he still wished to pursue his complaint in the light of the independent review

report prepared by Professor Lynette Harris at the request of ACAS which was published on 26 January 2016.

21. The purpose of the report was to review the events, decisions and communication of matters relating to pay of Executive Team (ET) members in particular the decision to increase the pay of ET members on 1st July 2014 and reach a conclusion as to whether the decisions reached were made in an appropriate way; whether the appropriate permissions were gained; and make recommendations for future practice in this area of pay policy.
22. The complainant responded on 1 March 2016 and said he wanted to continue with the complaint
23. On 18 April 2016 the ICO's case officer inspected the withheld information at the offices of the MoJ in London.
24. Following an exchange of correspondence, the Commissioner wrote to the MoJ in May 2016 and requested a schedule listing all the information covered by Parts 1 and 2 of the complainant's request and an un-redacted copy of the information covered by Part 2.
25. The MoJ provided the schedules listing the requested information and an un-redacted version of the information covered by Part 2. In relation to Part 1 of the request this comprised of 112 pages all of which had been withheld under section 35(1)(a) of the FOIA. Of these 112 pages the MoJ conceded that it would not object to 14 being disclosed. Accordingly, in July 2016 these were disclosed to the complainant.

## **Reasons for decision**

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### **Section 35(1)(a) of the FOIA – formulation & development of government policy**

26. Section 35(1)(a) provides that:

"Information held by a government department ... is exempt information if it relates to –

(a) the formulation or development of government policy"

27. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or

altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

28. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information "relates to" the formulation and development of government policy.
29. In this case the MoJ has argued that the information falling within the scope of Part 1 of the complainant's request is exempt from disclosure under section 35(1)(a) of the FOIA as it relates to the formation and development of government policy.
30. The MoJ has argued that information regarding public sector pay policy is something which is being formulated and developed with relevant stakeholders (such as Trade Unions). Although it accepts that the 2014-15 pay remit has been implemented within the ICO, the MoJ has argued that the communications which took place in relation to this will be used as part of the consideration whilst developing the policies for upcoming pay remits. The MoJ has therefore argued that disclosure of the requested information could prejudice the outcome of any related future negotiations.
31. The complainant does not accept that the requested information relates to the formation of government policy. His view is that it relates to the implementation of such policy. He has argued that the requested information relates to a contract between the MoJ and the Information Commissioner's Office regarding the latter's pay remit. In his view, this implies implementation rather than formation of a pay policy which has already been determined by the government. Furthermore, he has argued that consideration between the MoJ and one of its non-departmental bodies on the way in which the government's policy is to be administered does not constitute government policy.
32. The Commissioner accepts that the withheld information in connection with the discussions concerning the 2014-15 pay remit for the ICO will relate to the development of policies for upcoming pay remits and the information could be used as part of that process.
33. The Commissioner is therefore satisfied that the information can be said to relate to the formulation and development of government policy and is therefore exempt from disclosure on the basis of section 35(1)(a) of FOIA.

### **Public interest arguments in favour of disclosure**

34. The MoJ recognises that there is a public interest in increasing the transparency of the workings of Government. The MoJ accepts that disclosing the requested information in relation to the ICO 2014-2015 pay remit would help improve public understanding of the decision making process and increase public confidence that changes to policies regarding public sector pay are well considered, debated and properly made.
35. The MoJ also recognises that giving access to information about how policy decisions are reached, what options are being considered and why some are excluded and others preferred may generate meaningful participation between Government Departments and the public during the policy formation process.

### **Public interest arguments in favour of maintaining the exemption**

36. The MoJ has argued that at the time of the request the pay policy was still live in respect of the 2014-15 pay remit and that final decisions had yet to be taken. Disclosure of the requested information before final decisions were made would harm the safe space required to assess all of the implications of the policy changes. The complainant has disputed this by pointing out that the 2014-15 pay remit was imposed on ICO staff in February 2015 before the request was made. As part of its internal review response the MoJ clarified that although the 2014-15 pay remit had been implemented within the ICO, the communications which took place would be used as part of consideration whilst developing the policies for the upcoming pay remits. It therefore felt that any disclosure of the requested information could prejudice the outcome of any related negotiations.
37. The MoJ has argued that information on any pay flexibilities, around public sector pay policy, agreed with HM Treasury or by MoJ senior management affects the overall level of pay offer that can be made by management during collective bargaining with trade unions. Often the financial value of pay reforms proposed will be given within pay remits.
38. The MoJ has pointed out that disclosure of the requested information while the policy is still live would affect the ability of officials who are formulating the policy and in discussion with stakeholders such as the Trade Unions on how the policy would work in practice. Access to policy information regarding the overall level of pay offer that is being considered (or the value of pay reforms) during collective bargaining would prejudice the outcome of pay negotiations with trade unions and could add unnecessary costs and/or reduce the likelihood of securing collective agreement to a pay offer to staff from management. This would significantly impact on the department's ability to deliver and formulate policy around pay and conditions both in this instance and in future policy formulation. The complainant has disputed this on the basis

that the negotiations for the 2014-15 pay remit had been terminated, there were no further discussions taking place and there was no risk to collective agreement as the pay offer had been imposed.

39. The MoJ has stated that information around the policy proposals is being shared with the relevant stakeholders (such as the Trade Unions) and their input is being sought and their views considered in the collective bargaining process. To place policy information in the public domain, beyond that which is already available, would damage the relationship between the department and its stakeholders which in turn may affect the usefulness of such engagement and hampering the department's ability to hold such free and frank discussions in the future.

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

40. The Commissioner is in possession of a schedule listing all of the withheld information and her case officer has had the benefit of viewing the withheld information at the offices of the MoJ.
41. The Commissioner recognises the public interest that disclosing the requested information in relation to the ICO 2014-2015 pay remit would help improve public understanding of the decision making process and increase public confidence that changes to policies regarding public sector pay are well considered, debated and properly made.
42. The Commissioner also accepts there is a public interest in giving access to information about how policy decisions are reached, what options are being considered and why some are excluded and others preferred as this may generate meaningful participation between Government Departments and the public during the policy formation process.
43. The Commissioner recognises there is a public interest preventing the disclosure of any information which could prejudice the outcome of any future civil service pay discussions and negotiations. Although the MoJ accepts that the 2014-15 pay remit at the ICO has been implemented it has argued that the communications which took place in relation to it will be used as part of the consideration for developing the policies for upcoming pay remits.
44. The Commissioner also accepts that there is a public interest in allowing official's safe space to assess the implications regarding the formulation and development of public pay sector policies.
45. The Commissioner recognises that there is a public interest in maintaining the MoJ's ability to deliver and formulate policy around public sector pay and conditions in relation to present and future policy formulation. The MoJ has argued that disclosure of information regarding the overall level of pay offer that was being considered (or the value of pay reforms) during collective bargaining would prejudice the

outcome of pay negotiations with trade unions and could add unnecessary costs and/or reduce the likelihood of securing collective agreement to a pay offer to staff from management.

46. The Commissioner believes there is a public interest in preserving the working relationship between the MoJ and its stakeholders such as Trade Unions and not doing anything which would hamper the ability of the department to hold free and frank discussions in the future. The MoJ believes that putting policy information in the public domain in addition to that which is already available would damage the relationship between the department and its stakeholders.
47. The Commissioner acknowledges the significant arguments on both sides of the equation but she has found that the arguments in favour of maintaining the section 35(1)(a) exemption are stronger and they outweigh the public interest in disclosure.

### **Section 35(1)(d) of the FOIA - operation of any Ministerial private office**

48. Section 35(1)(d) provides that:

"Information held by a government department ... is exempt information if it relates to –

(d) the operation of any Ministerial private office"

49. The MoJ has argued that the redacted information in this case engages section 35(1)(d) as it relates to administrative matters within Minister's private offices, namely the working patterns of and general advice given to Ministers.
50. The Commissioner accepts that section 35(1)(d) is applicable in this case as the indicated withheld information relates to the operation of a Ministerial private office. He has therefore gone on to consider the public interest test.

### ***Public interest arguments in favour of disclosure***

51. The MoJ recognises there is a general public interest in knowing how Ministerial Private Offices operate to build public confidence in how ministers are supported and how ministerial decisions and requests for advice are communicated to the Department.

### ***Public interest arguments in favour of maintaining the exemption***

52. The MoJ has argued that it is important ministers are able to communicate frankly with their private office staff and that requests for advice are able to be relayed to officials candidly in order to receive the



most appropriate and best quality advice to ensure informed decision making. The MoJ believes that disclosure of the redacted information would inhibit the ability of the private office to adequately communicate the minister's requests which could lead to a reduction in the quality of the advice available to ministers.

53. The complainant has suggested that the MoJ's arguments for withholding the redacted information are merely 'generic' and if accepted would mean that no Ministerial Private Office information would ever be disclosed. The complainant has speculated that the redacted information is probably of a fairly mundane and regular nature and cannot see why disclosure would have the general inhibitory effect on ministerial office communications claimed by the MoJ.

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

54. The Commissioner has seen the redacted information and is not persuaded by the MoJ's arguments that its disclosure would inhibit the private office's ability to adequately communicate with the minister in a candid manner to ensure the provision of best advice.
55. The redacted information comprises of one sentence to two separate emails and a reference to administration the 'Minister's Box' in 5 separate emails.
56. The two sentences are mundane and anodyne in nature and in the Commissioner's view disclosure would not have the effect described by the MoJ. The advice contained in one of the sentences was repeated in the Minister's letter which has been disclosed to the complainant. The other sentence simply contains a reference to making a routine check.
57. The MoJ has not provided any convincing arguments as to why disclosure of this administrative information would have any adverse effect of the day to day business of the private office.
58. Having considered the arguments for and against disclosure, the Commissioner has decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

### **Section 10 and section 17 of the FOIA**

59. Section 10(1) of FOIA requires public authorities to respond to a request promptly and in any event within 20 working days of receipt.
60. Section 17(1) of FOIA explains that if a public authority intends to refuse to comply with a request it must provide the requestor with a refusal notice stating that fact within the time for compliance required by section 10(1). Section 17(3) allows a public authority to extend its consideration of the public interest for a reasonable period of time if

necessary. The Commissioner believes that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request. Any extension beyond this time should be exceptional and the public authority must be able to justify it.

61. In this case the MoJ responded to the request within 20 working days on 16 March 2015 stating it considering the application of section 35 of the FOIA and required an extension of time in which to complete the public interest test. It eventually completed the public interest test on 4 June 2015 which was 71 working days after the date of the request on 19 February 2015. The only explanation given by the MoJ for the delay was that it needed to complete a public interest test. In the absence of further arguments, the Commissioner does not accept that such a lengthy period of time for considering the public interest was reasonable in all the circumstances.
62. Consequently the Commissioner has found that the MoJ has breached section 17(3) of FOIA by failing to inform the complainant of the outcome of its public interest deliberations within a reasonable timeframe.

## **Right of appeal**

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63. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

64. 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.
65. 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  
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