

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 20 March 2018

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

#### Decision (including any steps ordered)

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1. The complainant requested a report relating to unrepresented defendants in Crown Court cases. The Ministry of Justice (MoJ) refused to disclose the report under the exemption provided by section 35(1)(a) (formulation or development of government policy) of the FOIA.
2. The Commissioner's decision is that section 35(1)(a) was engaged, but that the public interest did not favour maintaining the exemption. The MoJ is now required to disclose the withheld report.
3. The Commissioner requires the MoJ to take the following steps to ensure compliance with the legislation.
  - Disclose the report titled "*Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspective*".
4. The MoJ 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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 31 March 2017 the complainant wrote to the MoJ and requested information in the following terms:  
  
*"Please disclose the report held by the Ministry of Justice into issues faced by courts and practitioners as a result of cases in which defendants are unrepresented."*
6. The MoJ responded substantively on 27 April 2017. It refused the request and cited the exemption provided by section 35(1)(a) (formulation or development of government policy) of the FOIA.
7. The complainant responded on 28 April 2017 and requested an internal review. The MoJ failed to carry out the internal review within a reasonable time period.

## Scope of the case

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8. The complainant contacted the Commissioner on 8 October 2017 to complain at that stage about the failure by the MoJ to carry out a timely internal review. After repeated contact from the ICO failed to rouse the MoJ to complete the internal review, the Commissioner moved to investigate the refusal of the request without waiting any longer for the review to be completed.
9. The Commissioner has considered the application of the exemption at section 35(1)(a) of the FOIA to the report titled *"Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspective"*.

## Reasons for decision

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### Section 35

10. Section 35(1)(a) of the FOIA provides an exemption for information that relates to the formulation or development of government policy. Consideration of this exemption involves two stages. First, the exemption must be engaged as the information in question falls within the class described in this section. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

11. As to whether this exemption is engaged, the question here is whether the information in question relates to the formulation or development of government policy. The reasoning from the MoJ was that the withheld information, which consists of a report titled "*Unrepresented Defendants: Perceived effects on the Crown Court in England and Wales – practitioners' perspective*", was part of a planned review of changes to legal aid following the Legal Aid, Sentencing and Punishment of Offenders Act 2012.
12. In her guidance on this exemption<sup>1</sup> the Commissioner notes that the review of an existing policy can form part of a policy making process. In this case the MoJ stated that it was intended that a Green Paper on legal aid was due to be published in 2018. That a Green Paper is to be published suggests that it is accurate to characterise the review of legal aid as a government policy formulation and development process. Given this, the Commissioner accepts the representations from the MoJ that the legal aid review amounted to a government policy making process and that the withheld information related to that process. She therefore finds that the exemption provided by section 35(1)(a) is engaged.
13. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. Section 35(1)(a) is a qualified exemption, so that, even though the exemption is engaged, the information must nevertheless be disclosed if the public interest in maintaining the exemption does not outweigh that in disclosure. In forming a conclusion on the public interest balance in this case, the Commissioner has taken into account the general public interest in the transparency and openness of the MoJ, as well as factors that apply in relation to the specific information in question.
14. Covering first arguments in favour of maintenance of the exemption, when considering the balance of the public interest in relation to section 35(1)(a) the Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential where appropriate.
15. In this case the MoJ argued that a safe space was necessary for the specific policy process to which the requested information relates.

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

Arguments concerning the preservation of a safe space within which to carry out the policy making process are, in general, valid on the grounds that this will assist in the open discussion of all policy options, including any that may be considered politically unpalatable. However, the weight that such arguments carry in each case will vary, depending on the circumstances.

16. The MoJ argued that the withheld information formed part of an ongoing policy making process. Whilst the Commissioner accepts that the wider review of legal aid was an ongoing process, when giving close consideration to the withheld information in question here the evidence available to her calls into question whether there was an ongoing policy making process to which that information closely related.
17. The withheld information concerns the impact of unrepresented defendants in criminal cases at Crown Court. The evidence available to the Commissioner suggests that the review of changes to legal aid stemming from the Legal Aid, Sentencing and Punishment of Offenders Act 2012 is focussed on civil court cases. The Commissioner's brief research on this matter suggests that the changes to legal aid primarily impacted on civil cases.
18. Furthermore and of particular note was a Ministerial submission that the MoJ supplied to the Commissioner as background with the intention that this would evidence that the review of legal aid did amount to government policy making. Whilst it does make that point in relation to the overall process, this submission also states specifically that there is no on-going policy development relating to self-representation in *criminal* courts. It also states that it was not the intention that the review of changes to legal aid would consider any impact from a rise in unrepresented defendants.
19. The Commissioner's section 35 guidance makes clear that she does not view the policy making process as indefinite; rather she views it as a process that begins and ends within a particular time frame. In this case, it does not appear that the post-implementation review of the changed legal aid system has resulted in a policy making process on the specific issue of self-representation in Crown Courts. Whilst the Commissioner accepted that the withheld information *relates* to a policy making process when she found the exemption was engaged, the evidence available to her suggests that the withheld information does not closely relate to any ongoing, live policy making process. This means that she does not regard there as being any weighty public interest in favour of maintenance of the exemption in order to protect a safe space for an ongoing policy process.

20. Where information does not relate to a specific and ongoing process, a wider argument can be made that disclosure in one case could have a chilling effect on other future processes. Key to how convincing such an argument will be is the content of the information to which it relates.
21. In this case the Commissioner does not regard the withheld information as being of any great sensitivity. It reports views from practitioners on the impact of unrepresented defendants on the Crown Courts. Having viewed the content of the withheld report, the Commissioner does not believe that the contributors would regard their comments as particularly contentious or sensitive. Whilst it appears unlikely that the contributors would have any significant anxiety about being linked to their contributions, they are in any event entirely anonymised and there does not seem to be any way that even a motivated party could link those contributions to individuals. As a result, the Commissioner does not consider it likely that any contributor to a future policy making process would experience a chilling effect through disclosure of the information in question and as a result be inhibited in their contributions, and so does not regard there as being any weighty public interest in favour of maintenance of the exemption in order to avoid a chilling effect.
22. In summary, the Commissioner's view is that there is public interest in favour of maintaining the exemption on the basis of the general public interest in preserving a degree of confidentiality for the policy making process. She does not, however, believe that there is significant further weight to this as a result of any convincing safe space or chilling effect arguments.
23. Turning to factors in favour of disclosure of the information in question, brief research of the issue reveals that the changes to legal aid stemming from the Legal Aid, Sentencing and Punishment of Offenders Act 2012 have been the subject of controversy and debate. Much of the comment on these changes has focussed on a perception that the system for granting legal aid is less fair than it previously was and that it has resulted in some defendants not being able to access representation. The withheld information would add to public knowledge and debate about legal aid provision and the Commissioner regards this as a valid factor in favour of disclosure of the withheld report.
24. It is clearly the case that the efficient running of the criminal justice system is a matter of public interest. The withheld information relates to this issue as it comments on the extent to which the Crown Courts are able to operate efficiently when defendants represent themselves. The Commissioner's view is that this illuminates further the public interest in disclosure relating to the subject matter of this information.

25. In conclusion, the Commissioner has recognised significant public interest in disclosure of this information on the basis of its subject matter, which means that it is relevant to an issue of public controversy and debate. The public interest in the maintenance of the exemption, however, is limited as a result of the evidence suggesting that the withheld information does not closely relate to an ongoing process. This means that the Commissioner's view is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure of the information. At paragraph 3 above the MoJ is now obliged to disclose the requested information.

### **Other matters**

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26. The Commissioner's view is that internal reviews should be completed within 20 working days, or 40 working days in exceptional cases. The Commissioner has made a separate record of the failure by the MoJ to complete the internal review promptly in this case. The MoJ must ensure that it has a system in place to carry out internal reviews promptly. This issue may be revisited should evidence from other cases suggest that this is necessary.

## Right of appeal

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27. 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: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

28. 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.
29. 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 .....**

**Ben Tomes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**