

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 August 2018

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

Decision (including any steps ordered)

1. The complainant requested a copy of an audit report dated 2009 relating to forensic medical records.
2. The Crown Prosecution Service (CPS) withheld the report in its entirety citing section 36(2)(c) (prejudice to effective conduct of public affairs) of the FOIA.
3. The Commissioner's decision is that section 36(2)(c) was engaged but that the public interest favours releasing the requested information. She also found a procedural breach.
4. The Commissioner requires the CPS to take the following step to ensure compliance with the legislation:
 - disclose the withheld report to the complainant.
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.

Request and response

6. On 6 December 2017, the complainant wrote to the CPS and requested information in the following terms:

"Under the FOI act, please provide me with a copy of the report which was an audit by [name redacted] for the CPS in the West

Midlands in 2009. The report was an audit of medical SARC [Sexual Assault Referral Centre] notes by healthcare professionals working for the provider [name redacted]. Please provide the full report”.

7. The CPS provided its substantive response on 14 February 2018. It refused to provide the requested information citing the following exemption:
 - section 36(2)(c) prejudice to effective conduct of public affairs.
8. Following an internal review, the CPS wrote to the complainant on 19 March 2018. It stated that it maintained its original position.

Scope of the case

9. The complainant contacted the Commissioner on 21 March 2018 to complain about the way her request for information had been handled.
10. She disputed the CPS’s consideration of the public interest. In that respect, she put forward arguments in favour of disclosing the requested information which she considered the CPS had failed to take into account and criticised its arguments for withholding the requested information.
11. As is her practice, the Commissioner wrote to the CPS at the start of her investigation inviting it to revisit its handling of the request and to submit a final submission in support of its position.
12. The analysis below considers the CPS’s application of section 36(2)(c) of the FOIA to the requested information. That information comprises a report dated 2009 which documented the findings of an audit of medical SARC notes.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

13. Section 36 can only be cited on the basis of the reasonable opinion of a specified qualified person that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur.
14. In this case, the CPS cited section 36(2)(c).
15. Section 36(2)(c) of the FOIA states:

"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 –

...

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

16. In other words, section 36(2)(c) provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a manner other than that specified elsewhere in section 36.
17. This exemption is also qualified by the public interest, meaning that if the exemption is engaged, the information should nonetheless be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
18. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.
19. 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. 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.
20. In its submission to the Commissioner, the CPS confirmed that an opinion was sought from the Director of Public Prosecutions (DPP) on 17 January 2018 and that the opinion on the application of section 36(2)(c) was provided on 12 February 2018. The CPS provided the Commissioner with a copy of the submission upon which the opinion of the qualified person was based.
21. The Commissioner is satisfied that the DPP is the qualified person for the purposes of section 36.

Reasonableness

22. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all of the relevant factors. These may include, but are not limited to:
 - whether the prejudice or inhibition 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; and
 - the qualified person's knowledge of, or involvement in, the issue.
23. In this case, the Commissioner is satisfied that the submission to the qualified person clearly related to the request that was made by the complainant. She is also satisfied that it explained why an opinion was being sought and provided relevant background information together with a copy of the withheld information.
24. With regard to whether the prejudice related to the specific subsection of section 36(2) that is being claimed, the submission to the qualified person reasoned that disclosure would be likely to prejudice "*the effective conduct of public affairs for the purposes of policy formulation between the CPS staff and external agencies*".
25. The Commissioner accepts that the prejudice envisaged is other than to the prejudice or inhibition specified in sections 36(2)(a) and (b).
26. The Commissioner's guidance on section 36 of the FOIA¹ states:
- "It is important to remember that the qualified person's opinion is about whether the prejudice or inhibition would or would be likely to occur"*.
27. In that respect, the Commissioner notes an inconsistency between the qualified person's opinion and the CPS's correspondence with the complainant. That correspondence variously stated:

*"The disclosure of the information **would be likely** to prejudice the effective [conduct] of public affairs for the purposes of policy formulation between the CPS staff and external agencies"*.

and

*"Disclosure of the material would not add significantly to the public debate and release **would** prejudice CPS functions"*.

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

28. However, the Commissioner accepts that the submission to the qualified person referred to the lower level of likelihood of prejudice occurring as a result of disclosure – would be likely to prejudice.
29. She considers that some of the arguments in the submission refer to the public interest test, an issue which properly falls to be considered when, or after, the decision has been taken that the exemption is engaged.
30. However, notwithstanding her concerns about the quality of the submission to the qualified person, the Commissioner is satisfied that the overall conclusion of the process was correct.
31. Having considered the submission provided to the qualified person and having reviewed the withheld information, the Commissioner is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely otherwise to prejudice the effective conduct of public affairs.
32. Accordingly, the Commissioner is satisfied that section 36(2)(c) of the FOIA was engaged.

The public interest test

33. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.

Public interest arguments in favour of disclosing the requested information

34. The CPS acknowledged that disclosure would support its commitment to openness and transparency.
35. In favour of disclosure, the complainant put forward a number of arguments, including telling the CPS:

"... This is in the wider public interest, especially given the concerns around the CPS and disclosure of all evidence to alleged offenders in the recent months, this now relates to victims. Are they getting the correct forensic and medical care?. This document would suggest they weren't in 2009 and would also imply the CPS does not want to release this information..."

36. In her correspondence with the Commissioner, the complainant reiterated the arguments she had put to the CPS. Additionally, she said:

"If the information in the report reflects badly on the public authority then surely it is for them to explain how they will improve their performance instead of refusing to release the information? I would also like to point out that the information requested was

created in 2009 and so the Police and CPS have had almost 9 years to improve the situation since then”.

37. With regard to the CPS’s reasoning for withholding the information the complainant told the Commissioner:

“These points make quite big assumptions about the potential negative impact of releasing the information and the reporting of it without offering any substantive evidence to back it up”.

Public interest arguments in favour of maintaining the exemption

38. With respect to its withholding of information for the purpose of safeguarding the effective conduct of public affairs, the CPS told the complainant that disclosure of the report:

“... might have the potential to damage our current relationships with organisations supporting victims of sexual offences”.

39. It also considered that, in the wider context of disclosure and media reporting, there may be an impact on the confidence potential victims have in the Criminal Justice system. In that respect it told her:

“Jurors may lose confidence in the quality of scientific evidence presented to them during the course of a trial and it may not be possible for judges to adequately address any misconceptions by appropriate directions to the jury”.

40. It also argued that disclosure of the information:

“... would be likely to prejudice the effective of public affairs [sic] for the purposes of policy formulation between the CPS staff and external agencies”.

41. In summary, the CPS told the complainant:

“Disclosure of the material would not add significantly to the public debate and release would prejudice CPS functions”.

42. In its submission to the Commissioner, the CPS did not expand on the public interest arguments it had provided to the complainant.

Balance of the public interest arguments

43. In this case, both in the submission provided to the qualified person and in correspondence with the complainant, the prejudice claimed is in relation to the effective conduct of public affairs for the purposes of policy formulation between CPS staff and external agencies.

44. The Commissioner has gone on to consider the severity, extent and frequency of that prejudice in forming her own assessment of whether the public interest test dictates disclosure.
45. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, she must give weight to that opinion as a valid piece of evidence in her assessment of the balance of the public interest.
46. With respect to the timing of the request, the Commissioner is mindful of the date of the withheld report. She is also mindful that section 36(2)(c) is concerned with the effects of making the information public.
47. The Commissioner accepts that there will always be a general public interest in transparency. In this case, she acknowledges the public interest in knowing that Referral Centres provided appropriate forensic and medical support to victims.
48. In her guidance on section 36 of the FOIA, specifically section 36(2)(c), the Commissioner recognises that prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
49. The CPS's public interest arguments against disclosing the requested information in this case centre on disclosure prejudicing the effective conduct of public affairs for the purposes of policy formulation.
50. While she recognises the generic nature of that argument, the Commissioner is not satisfied that the CPS explained what policy formulation the withheld information relates to. Nor does she consider that the CPS explained satisfactorily why releasing the 2009 audit report of SARC notes would diminish the ability of CPS staff to engage with external agencies.
51. Although it was reasonable to think that prejudice would be likely to occur, the Commissioner does not accept that the CPS evidenced that it would be severe or widespread given the age of the requested information.
52. Taking all the above into account, the Commissioner concluded that that the public interest in favour of maintaining the exemption does not outweigh the public interest in favour of disclosure. It follows that the CPS was not entitled to rely on section 36(2)(c) of the FOIA to withhold the requested information.

Section 17 refusing a request

53. Following receipt of her request for information, the CPS wrote to the complainant on 3 January 2018 extending the time for responding. It told her:

"The CPS are required to conduct a public interest test in relation to your request. This public interest test is required because some of the information you have requested may engage section 36 (prejudice to the effective conduct of public affairs) of the FOI Act".

54. The Commissioner's guidance on section 36 states:

"As section 36 is a qualified exemption, the public authority may, if necessary, under section 10(3), extend the 20 day time limit in order to consider the balance of public interest, but they must still, under section 17(1), inform the requestor within 20 days that section 36 is engaged and why. Section 36 can only be engaged when the qualified person has given their opinion. This means that the public authority should obtain that opinion within 20 days before they can extend the time limit to consider the public interest test.

If the qualified person's opinion was not given within 20 days, section 36 can still be engaged if the opinion is given before the completion of the internal review, even though there will have been a procedural breach of section 17(1)".

55. From the evidence she has seen, the CPS extended the time for considering section 10(3) without first obtaining the qualified person's opinion. There is a procedural breach of section 17(1): section 36 cannot be engaged until the qualified person's opinion has been given.

Right of appeal

56. 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

57. 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.
58. 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

**Gerrard Tracey
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