

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

### **Decision notice**

**Date:** 19 September 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 information about the Secretary of State for Justice's decision not to issue, or be a party to, the judicial review proceedings against the Parole Board's ruling to release John Worboys (a convicted sex offender also known as the 'Black Cab Rapist') from prison. The Ministry of Justice (the 'MOJ') provided the cost information but refused to provide the legal advice, citing section 42(1) of FOIA – legal professional privilege.
2. The Commissioner's decision is that the MOJ has correctly withheld the information under section 42 of FOIA.
3. She does not require the MOJ to take any steps as a result of this notice.

#### **Background**

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4. Since 1997 the Parole Board has been responsible for directing the release of those sentenced to indeterminate, and certain determinate, terms of imprisonment if it is satisfied that it is no longer necessary for the protection of the public that they be detained.
5. There is no right of appeal against a decision of the Parole Board although any can be the subject of challenge by way of judicial review on public law grounds. Never before has a decision to direct the release of a prisoner been challenged.
6. On 13 March 2009, John Radford, then known as John Worboys, was convicted after trial in the Crown Court at Croydon of 19 serious sexual offences committed between October 2006 and February 2008 involving

twelve victims. On 21 April 2009 Mr Radford was sentenced to an indeterminate sentence for public protection specifying a minimum term of imprisonment of eight years (being the equivalent of a determinate sentence of 16 years), less time spent on remand. That period expired on 14 February 2016 after which Mr Radford was eligible to be released, but only in the event that the Parole Board was satisfied that it was no longer necessary for the protection of the public for him to be held in prison.

7. On 26 December 2017, the Parole Board determined that incarceration was no longer necessary in Mr Radford's case and directed his release into the community, on licence, subject only to the jurisdiction of the High Court by way of judicial review.
8. The Secretary of State for Justice, David Gauke, sought legal advice as to whether to issue judicial review proceedings against the Parole Board's decision to release Mr Radford. He was advised that such proceedings stood little chance of success and did not proceed on that basis.<sup>1</sup>
9. However, three sets of judicial review proceedings were instituted by the Mayor of London, two of Mr Radford's victims and News Group Newspapers. Further details about the case and the varying outcomes can be found here.<sup>2</sup> The High Court quashed the Parole Board's decision to release Mr Radford.
10. Subsequently Dame Glenys Stacey, Chief Inspector of Probation, was tasked by David Gauke with reviewing the contact that took place between the National Probation Service and the victims involved in the case of John Radford and within scope of the Victim Contact Scheme. Her findings are publicly available in the following report.<sup>3</sup>

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<sup>1</sup> <https://www.gov.uk/government/speeches/secretary-of-states-oral-statement-on-transparency-of-the-parole-board-and-victim-support>

<sup>2</sup> <https://www.judiciary.uk/wp-content/uploads/2018/03/dsd-nbv-v-parole-board-and-ors-summary.pdf> and <https://high-court-justice.vlex.co.uk/vid/co-368-2018-co-707380573>

<sup>3</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/679684/Investigation-into-the-policy-and-process-followed-by-the-victim-contact-scheme-in-the-case-of-John-Worboys.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/679684/Investigation-into-the-policy-and-process-followed-by-the-victim-contact-scheme-in-the-case-of-John-Worboys.pdf)

## Request and response

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11. On 31 March 2018, the complainant wrote to the MOJ via the *WhatDoTheyKnow.com* website<sup>4</sup> and requested information in the following terms:

*"I would like to see the legal advice, and all other information, relating to the the [sic] Sec. of State for Justice not issuing, or being a party to, judicial review proceedings with regard to the decision of the Parole Board with regard to JOHN RADFORD (formerly known as JOHN WORBOYS) - see judicial review case reference, DSD And NBV & Ors R (On the Application Of) v [2018] EWHC 694 (Admin) (28 March 2018). I also want to see how much the advice cost the state. Please supply copies of all invoices etc. and a breakdown of costs."*

12. The MOJ responded on 30 April 2018. It provided some information within the scope of the request (costs of legal advice), but refused to provide the remainder citing section 42 of FOIA, legal professional privilege. It considered that the public interest lay in withholding the requested information.
13. The complainant requested an internal review on 30 April 2018 in which he reiterated that he wanted copies of "all invoices". The MOJ provided the outcome of its internal review, late, on 26 July 2018 where it upheld its original position in relation to section 42 but provided copies of invoices with redactions for section 40(2), personal information of third parties.
14. There followed an email exchange as to whether the MOJ had provided all the invoices in scope. The MOJ confirmed it had provided the invoices relating to the decision of the Secretary of State for Justice not to seek judicial review proceedings (as a claimant) with regard to the decision of the Parole Board in the case of John Radford, formerly known as John Worboys (referred to as "Issue A").
15. The MOJ queried whether the complainant required the invoices for the judicial review proceedings themselves, issued by DSD and NBV and Others, in which the Secretary of State was named as a defendant and interested party [Neutral Citation Number: [2018] EWHC 694 (Admin)] (referenced as "Issue B"). The complainant subsequently confirmed he also required the invoices relating to this matter ("Issue B").

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<sup>4</sup> [https://www.whatdotheyknow.com/request/legal\\_advice\\_given\\_to\\_the\\_sec\\_of](https://www.whatdotheyknow.com/request/legal_advice_given_to_the_sec_of)

## Scope of the case

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16. The complainant contacted the Commissioner on 26 July 2018 to complain about the way his request for information had been handled. He confirmed that the Issue B invoices had not been provided.
17. The MOJ advised the Commissioner that it considered the invoices described as Issue B to fall outside the scope of the current request and was therefore handling this as a new request. The Commissioner accepts this stance and is therefore not considering this matter as part of this complaint.
18. Furthermore, the complainant has confirmed that this complaint only concerns the withholding of the legal advice.
19. The Commissioner has therefore considered whether the MOJ is entitled to rely on section 42 to withhold some of the information requested (legal advice).

## Reasons for decision

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### Section 42 - legal professional privilege

20. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege ('LPP') and this claim to privilege could be maintained in legal proceedings.
21. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information. However, as the exemption is subject to the public interest test, this issue will be considered later.
22. The purpose of LPP is to ensure the confidentiality of communications between a legal adviser and their client. This allows the client to set out in full all the issues relevant to the legal problem that they need advice about and allows the lawyer to provide as full advice as possible.
23. There are two categories of LPP – litigation privilege and legal advice privilege. In this case the MOJ has confirmed that it considers the withheld information to be subject to litigation privilege.
24. Litigation privilege applies to confidential communications between a lawyer and their client made for the purpose of providing or obtaining

legal advice about proposed or contemplated litigation. The information must have been created for the dominant purpose of giving or obtaining legal advice for use in preparing for that litigation.

*Litigation privilege*

25. The MOJ has argued that, in this case, litigation was anticipated – the Secretary of State was examining whether or not to issue judicial review proceedings against the Parole Board which had determined that John Radford (formerly known as Worboys) was a suitable candidate for release from prison. The MOJ said:

*"From the Secretary of State's statement to the House of Commons on 9 January 2018<sup>5</sup> it can be inferred that, had he been in a position where he believed such a judicial review had a prospect of success, he would likely have followed this course. Indeed, although the Secretary of State chose not to pursue judicial review proceedings against the Parole Board, litigation did soon afterwards ensue, brought by two of Worboys' victims - DSD and NBV, the Mayor of London, and News Group Newspapers Ltd."*

26. The MOJ has explained that this advice was taken to assist in the anticipated litigation as it was taken to determine whether such litigation might be successful.
27. It also explained that the communications were made between professional legal advisers and a client (the Secretary of State for Justice).
28. Having viewed the withheld information the Commissioner considers that it is clearly a communication made between two professional legal advisers and a client for the purposes of providing legal advice. The report contains confidential legal advice to the Secretary of State for Justice from a QC and a lawyer relating to a potential judicial review of the Parole Board's decision that John Radford should be released.
29. Therefore, the Commissioner accepts that the information attracts LPP on the grounds of litigation privilege and that, on this basis, section 42(1) of FOIA is engaged.

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<sup>5</sup> <https://www.gov.uk/government/speeches/transparency-of-the-parole-board-and-victim-support>

30. Once the public authority has established that the requested information falls within the definition of LPP, the next question that often arises is whether privilege has been lost or waived because of earlier disclosures.
31. 'Waiver' is a term that describes disclosures made to a legal opponent within the context of specific court proceedings. Privilege over information can be waived in a particular court case but still retained for the same information in other contexts and indeed in other court proceedings. In this context 'cherry picking', or only revealing part of the advice given, is not permitted.
32. However, arguments about waiver and cherry picking have no relevance in the context of considering disclosure of information under FOIA. This is because FOIA is concerned with disclosures to the world at large rather than disclosures to a limited audience. In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential.
33. In line with her guidance<sup>6</sup> the Commissioner therefore recommends that public authorities avoid referring to or thinking about whether privilege has previously been waived, and instead focus on the key question of whether privilege has been lost because previous disclosures to the world at large mean the information can no longer be considered to be confidential.
34. In order to assess this question, the authority must investigate whether or not any disclosure has been made in either a restricted or an unrestricted way.
35. In this case, the MOJ has argued that it is:

*"... satisfied that privilege attached to the withheld information has not been waived or lost. While the disclosure by the Secretary of State in the House of Commons would be construed as unrestricted disclosure of information to the world at large, we consider that it is only the information disclosed that loses its legal professional privilege for FOI purposes and therefore any residual information will still be protected. In this instance, the Secretary of State has only revealed a conclusion of the legal*

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

*advice and not the substance and has therefore not waived or lost privilege on the substance of the advice.*

*In this, we rely on paragraph 27 of the Information Tribunal Decision of 15 February 2008 Mersey Tunnel Users' Association (MTUA) v Information Commissioner and Merseytravel (EA/2007/0052)<sup>7</sup> – "that the rule that by relying upon part of a privileged document before a court the party doing so waives privilege in the whole document does not apply to partial disclosure of privileged information outside the context of litigation." In any event, on the facts, we are not persuaded that the limited references to the conclusions of the advice, set out in paragraph 18 above, could amount to a partial waiver in any event.'*

*On the facts of the case in question the Secretary of State gave only the conclusion of the advice. His statements to the House of Commons did not reveal the full advice, or anything approaching that, or quote directly from the substance, nor did the disclosed information reveal the reasoning behind the legal advice."*

36. The Commissioner's section 42 guidance states:

*"If the disclosure did not reveal the content or substance of the remaining information, then the remaining part will keep its quality of confidentiality. Therefore a brief reference to or summary of the legal advice that does not reveal its substance will not lead to a loss of privilege."*

37. The Commissioner is satisfied that only the conclusion of the advice has been released into the public domain and that the content and substance of the legal advice has not. She has therefore concluded that the MOJ has correctly relied on section 42(1) in this case.

### **The public interest test**

38. Section 42 is a qualified exemption, subject to the public interest test as set out in section 2(2)(b) of FOIA. It requires the public interest in maintaining the exemption to be balanced against the public interest in disclosing the information. Only if the public interest in preventing the harm that would be caused by disclosure outweighs the value in disclosing the information, can the information be withheld.

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<sup>7</sup>[http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i46/MerseyTunnelDecision\\_website.pdf](http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i46/MerseyTunnelDecision_website.pdf)

39. It has been established by the Tribunal that there is a general public interest in maintaining this exemption and the principle that client/lawyer communications should remain confidential. This public interest will always be strong and it reflects the importance placed on individuals feeling free to discuss any legal problems they have with their legal adviser in a full and frank manner.

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

40. The MOJ has submitted the following arguments in favour of disclosure:

*"There is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. There is always a public interest in these principles and here too they must be given weight.*

*Sometimes there is a public interest in the specific subject matter the information relates to. Normally, this would be if a particular policy decision has a widespread or significant impact on the public, to a whole system for instance. In this instance, what is at stake is, on the one hand, an individual's liberty and, on the other, a question of whether that individual represents a risk to the public. Even though the Parole Board's assessment is based on the risk an individual presents to the public, what is at stake in the information requested is whether to review a unique case rather than changes to the parole or criminal justice system as a whole. Although some weight might perhaps be attached to the principle that Parole Board decisions are based on 'risk to the public', it seems difficult to entertain that the information requested relates to a decision that would have a widespread or significant impact on the public, given that it relates to a unique case and does not relate to systemic change. Nevertheless, it seems almost a fact universally accepted that the Worboys case carries with it a high level of public interest, and that cannot be ignored.*

*There is public interest in presenting a 'full picture', to remove any suspicion of manipulating the facts, or 'spin'. This is particularly the case where there is information already in the public domain that is misleading or does not reveal the full picture. I judge there to be very little weight to this element of the public interest because the 'full picture' has already been independently and openly revealed through the judicial review process brought by the victims of Worboys, the Mayor of London, and News Group Newspapers Ltd. as well as Dame Glenys Stacey's report on the ways in which victims were contacted as part of the Parole Board's initial decision to release Worboys. (For*

*the former, see footnote 2 above and, for the latter, see footnote 3 above).*

*As to the 'full picture' of the legal advice itself, the Secretary of State has accurately shared the conclusion of the advice with the House of Commons while withholding the substance of the advice itself. There is therefore no information in the public domain as to the contents of the substantive advice while the 'full picture' of the advice's conclusion has been shared."*

41. The complainant has contended that as the judicial review is now complete, the requested legal advice should be disclosed. He argued that:

*"The public has a right to know the quality of the legal advice it received, if it followed that advice and how much the advice cost.*

*This is basic transparency."*

42. He also highlighted the public interest in terms of the publicity surrounding the Radford case. However, it is important to note that the public interest in relation to FOIA requests means the public good, not what is of interest to the public, and not the private interests of the requester.

*Public interest arguments in favour of maintaining the exemption*

43. The MOJ has argued the following:

*"The judicial review case that took place, the subsequent judgement, and Dame Glenys Stacey's report all serve to satisfy (at least in part) any public interest in the disclosure of the information that has been requested. The judgement in the judicial review details, independently, the Parole Board's decision to release Worboys, disclosing facts about the case to the public, in addition to making a considered judicial assessment of the Secretary of State's standing and likelihood of success in bringing a judicial review himself against the Parole Board. The public interest in disclosure of the 'full picture' can never be completely discounted, but the three items listed at the start of this paragraph [ie in paragraph 40 of this notice] do, in our view, go a considerable way toward its satisfaction.*

*In a related fashion, arguments in favour of disclosure should be balanced against how far disclosing the requested information would further the public interests identified. In this case, it is not clear that disclosing this information would increase public understanding or inform debate. This is because, once more,*

*much information is already in the public domain, either through the judicial review proceedings that did go ahead and subsequent judgement, through Dame Glenys Stacey's report, or through the conclusion of the advice provided to parliament by the Secretary of State. Indeed, we would argue that the principal public interest is contained in the conclusion of the advice rather than the reasoning.*

*Lastly, the decision itself has now been the subject of legal scrutiny and has been quashed. This is not a case where the Secretary of State's refusal to intervene has led to an allegedly unsatisfactory decision to remain in place.*

*Generally speaking, the public interest in maintaining an exemption will diminish over time, as the issue the information relates to becomes less topical or sensitive. How long a period of time must elapse before the public interest in disclosure increases varies and should be measured on a case-by-case basis. In this case, not a great deal of time has passed (about 7 months between the legal advice being given and the outcome of the internal review) and although the judicial review case is over, Worboys' new parole hearing is yet to take place. Furthermore, government policy is still being developed in light of this case. Here, I refer to the Review of the Parole Board Rules and the consultation for a mechanism for reconsidering parole decisions, which the government is still in the process of formulating its response to and yet to legislate on. (For the former, see<sup>8</sup> and for the latter, see<sup>9</sup>).*

*'The Worboys case' is still very much in the public eye, and, on that basis, may be said to be both topical and sensitive. On balance, we consider the information to still be recent and, if not 'live', then at the very least 'dormant', such that the public interest in maintaining an exemption still carries weight."*

44. The MOJ has also argued the following:

*"There is a significant inbuilt weight of public interest in maintaining legal privilege. Given the very substantial public interest in maintaining the confidentiality of material subject to*

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<sup>8</sup> <https://www.gov.uk/government/publications/review-of-the-parole-boardrules>

<sup>9</sup> <https://consult.justice.gov.uk/digital-communications/reconsideration-of-parole-board-decisions/>

*legal privilege between lawyers and their clients, it is likely to be only in exceptional circumstances that this interest in maintaining legal privilege will give way to public interest in disclosure.*

*Disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests – both directly, by unfairly expositing its legal position to challenge, and indirectly, by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour.*

*The government's willingness to seek frank legal advice is therefore essential in upholding the rule of law. What is more, disclosure may lead to a reluctance to seek the advice at all in future. Without such comprehensive advice, the quality of the government's decision making would be much reduced because it would not be fully informed.*

*Lastly, there are not considerable amounts of money involved or a vast number of people affected by the information in the case. In the Mersey Tunnel User's Association ruling ... amounts upwards of tens of millions of pounds or 'all tunnel users'<sup>10</sup> were highlighted as significant factors in favour of the public interest in disclosure. These are both lacking in this case."*

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

45. The factors that favour disclosure in the public interest must be equally weighty as (or indeed heavier than) those that favour the public interest in maintaining the exemption.
46. The Commissioner has considered the arguments put forward by the complainant and the stated position of the MOJ, in addition to both her own prior findings and those of the Information Tribunal relating to legal professional privilege. She has also had regard to the content of the withheld information.
47. Some weight must always be attached to the general principles of achieving accountability and transparency. This in turn can help to increase public understanding, trust and participation in the decisions taken by public authorities.

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<sup>10</sup> About 25 million vehicles a year according to Merseytravel's website, see <https://www.merseytravel.gov.uk/about-us/guide-to-Merseytravel/Pages/Mersey-Tunnels.aspx>

48. However, there is also a strong opposing public interest in maintaining the MOJ's right to communicate with its legal advisors in confidence. To outweigh that public interest, it would be necessary for there to be an even stronger public interest in disclosure, which might involve factors such as circumstances where substantial amounts of money are involved, where a decision will affect a substantial amount of people, or where there is evidence of misrepresentation, unlawful activity or a significant lack of appropriate transparency.
49. There is no evidence available to the Commissioner that indicates that the MOJ has demonstrated any inappropriate or unlawful activity. The Commissioner also accepts that there is a strong public interest in ensuring that the MOJ is able to seek appropriate legal advice.
50. In the Commissioner's view, a number of events have taken place to limit the public interest in disclosure, namely the judicial review hearing and judgement, the Secretary of State's statement to the House of Commons and Dame Glenys Stacey's report. This is because the public has already been well informed about the matters relating to this case.

### *Conclusion*

51. In this case, the Commissioner finds that the factors in favour of disclosure do not carry the necessary weight. She has therefore concluded that the public interest in maintaining the exemption outweighs the public interest in disclosing the information, and that the exemption provided by section 42(1) of FOIA for legal professional privilege has been correctly applied.

### **Other matters**

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52. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As she has made clear in her '*Good Practice Guidance No 5*', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
53. The Commissioner has noted the MOJ's explanation that the review took longer than the recommended period because:

*"The response was delayed initially while copies of the final invoices were being obtained and then further by the internal clearance processes it was necessary to undertake to issue the response to [the complainant]."*

54. The Commissioner remains concerned that in this case, it took 61 working days for an internal review to be completed, despite the publication of her guidance on the matter.

## Right of appeal

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55. 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)

56. 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.

57. 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 .....**

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