

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2020

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

Decision (including any steps ordered)

1. The complainant requested information relating to a Green Paper on a British Bill of Rights.
2. The Ministry of Justice (MoJ) disclosed some information within the scope of the request but refused to provide the remainder, citing sections 35(1)(a) (formulation of government policy) and 42(1) (legal professional privilege) of the FOIA.
3. The Commissioner's decision is that the MoJ was entitled to apply the exception at section 35(1)(a) of the FOIA and that the public interest favoured maintaining the exemption.
4. She requires no steps to be taken as a result of this decision.

Background

5. The request in this case refers to a Green Paper.

"Green Papers¹ are consultation documents produced by the Government. The aim of this document is to allow people both inside and outside Parliament to give the department feedback on its policy or legislative proposals".

¹ <https://www.parliament.uk/site-information/glossary/green-papers/>

Request and response

6. On 26 March 2019, the complainant wrote to the MoJ and requested information in the following terms:

"Please disclose the Green Paper on a British Bill of Rights drafted by Dominic Raab MP during his period as Under-Secretary of State at the Ministry of Justice from 12 May 2015 to 16 July 2016".

7. The MoJ responded on 24 April 2019, confirming that it held the requested information. It provided some of the information contained in the requested Green Paper but refused to provide the remainder. It cited the following exemptions as its basis for refusing to provide the remaining information within the requested document:

- section 35(1)(a) (formulation of government policy etc) of the FOIA;
- section 42(1) (legal professional privilege) of the FOIA.

8. Following an internal review, the MoJ wrote to the complainant on 1 August 2019, revising its position. It provided some further information within the scope of the request, but continued to withhold the remainder by virtue of sections 35 and 42 of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 23 October 2019 to complain about the way her request for information had been handled. She disputed the MoJ's application of both sections 35 and 42 of the FOIA.

10. While acknowledging that the MoJ had provided some information within the scope of the request, she told the Commissioner:

"From a 101-page document, almost three-quarters of it, 68 pages, were redacted".

11. In the complainant's view, the public interest favoured disclosing the document in its entirety.

12. In the course of her correspondence with the Commissioner, the complainant raised issues which are outside the scope of the Commissioner's remit. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part I of the FOIA.

13. In its submission to the Commissioner, the MoJ described the disputed information as being information within "*the latest draft of the consultation document on a Bill of Rights from June 2016*". The MoJ confirmed its application of the exemptions at sections 35(1)(a) and 42(1) of the FOIA to that information.
14. The analysis below considers the MoJ's application of sections 35 and 42 of the FOIA to the withheld information. That information comprises information within those parts of the document entitled "*Executive Summary*", "*The Case for Reforming UK human rights law*", "*The Government's Proposals*" and "*Appendix 2*".

Reasons for decision

15. The MoJ considered that all the withheld information was exempt by virtue of section 35(1)(a) and that some of the withheld information was also exempt by virtue of section 42(1).
16. The Commissioner has first considered its application of section 35(1)(a) to the withheld information.

Section 35 – formulation of government policy

17. 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.
18. In this case, the MoJ considered section 35(1)(a) applied. Section 35(1)(a) of the FOIA provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
19. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
20. In her guidance on section 35², the Commissioner accepts:

² <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

"Section 35 is class-based, meaning departments do not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and will catch a wide range of information".

21. In her guidance, the Commissioner also explains:

"The Modernising Government White Paper (March 1999) describes policymaking as: "the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world". In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives".

22. 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 of government policy, however, goes beyond this stage to improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.

23. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

The complainant's view

24. The complainant accepted that the document concerned was created for the purpose of the formulation or development of government policy. She told the Commissioner:

"However, this is not an open-ended category which, once engaged, may attach an exemption that applies indefinitely. This document is now several years old. It is no longer being formulated. At most, it is a record of the Government's proposals in 2016".

25. In support of her complaint, the complainant referred the MoJ and the Commissioner to posts on Twitter, including one by the Minister referred to in the request for information. She pointed out the 'apparent

inconsistency' in the positions of the former Secretary of State for Justice and his former department.

The MoJ view

26. The MoJ set out that the requested information relates to the development of government policy to reform the domestic human rights legal framework. It told the complainant:

"... [the withheld information] reflects government policy that was in the process of being formulated, and its disclosure would have a chilling effect on policy making related to this issue".

27. Similarly, it told the Commissioner:

"At the time of drafting, this policy work was being carried out to fulfil the 2015 Conservative Party Manifesto commitment to "scrap the Human Rights Act, and introduce a British Bill of Rights"".

28. With regard to the stage the work had reached, the MoJ explained:

"There was no publication or announcement of specific options, which would mark a clear end to the formulation of the policies announced, as was identified by the Information Tribunal in DfES v Information Commissioner and the Evening Standard (EA/2006/0006, 19 February 2007), para. 75(v): "We think that a parliamentary statement announcing the policy, of which there are examples in this case, will normally mark the end of the process of formulation."

29. With regard to the withheld information, the MoJ argued that, at the time of the request, the work done on the policy still had the potential to inform further policy development.

30. In support of its view, it told the Commissioner:

"This document was still an MoJ-internal draft in progress, forming part of the MoJ's ongoing policy development. Policy discussions were ongoing across Government, and this draft had not been approved across Government. Therefore, it was not a "developed Government plan", or settled Government policy, but a document to support the formulation of Government policy".

31. With regard to the status of the document, the MoJ told the Commissioner:

"The complainant also refers to Dominic Raab's statement in a tweet dated 24 March 2019 that "a Green Paper on a UK Bill of Rights ... was ready to go - but delayed because of the

referendum". This statement may reflect the fact that it was a complete document without gaps where sections were yet to be written; but, as stated above, it was not a finalised document, cleared across Government and ready to be published".

Is the exemption engaged?

32. The Commissioner recognises in her guidance that:

"To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

However, the exemption will not cover information relating purely to the application or implementation of established policy. It will therefore be important to identify where policy formulation or development ends and implementation begins".

33. Whether information relates to the formulation or development of government policy is a judgment that needs to be made on a case by case basis, focussing on the content of the information in question and its context.

34. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging.

35. Having considered the wording of the request, and viewed the withheld information, the Commissioner is satisfied that the withheld information clearly falls within the scope of the exemption contained at section 35(1)(a) of the FOIA. It relates to the Government's consideration of reform of the domestic human rights legal framework.

36. Any decision to support or oppose such reform, had it progressed, would have resulted in wide-ranging consequences with particular, real world outcomes.

37. The Commissioner is therefore satisfied that the exemption at section 35(1)(a) is engaged in this case.

The public interest test

38. Section 35 of the FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in favour of disclosing the withheld information

39. The complainant argued strongly that it was in the public interest to disclose the withheld information. She told the Commissioner:

"It is a matter of significant public interest that this document be disclosed in its entirety. The Human Rights Act has huge significance as part of the British Constitution. A developed Government plan to scrap it is of the greatest public interest, given the potential impact of such a step in reducing existing legal protections and endangering minorities and the vulnerable. This "ready to go" document was the first occasion on which the Government was to set out its detailed position on, and reasons for, the need to repeal and replace the Human Rights Act with a British Bill of Rights. This was an issue that had generated enormous public debate, interest and concern".

40. She considered that disclosure of the remainder of the requested information:

" ... will promote public understanding of the complexity of the underlying issues and better inform debate in the future".

41. In support of her view that the information should be disclosed, the complainant said:

"The decision maker should also specifically consider whether disclosure could encourage better quality advice and more robust, well considered and defensible decision making in the future".

42. With reference to the withheld information, she said:

"It is suggested that this part of the draft consultation document is particularly important and that there is a strong public interest in its disclosure – it is likely to contain purportedly factual information used as evidence to inform decision-taking as to what proposals to put in the Green Paper. There is a very particular public interest in that information being revealed so that it can be properly scrutinised".

43. In correspondence with the MoJ the complainant said:

"Timing is also particularly important in this case. The request is essentially for a historic document which relates to a policy which the Government currently has no plans to re-introduce. The Government may well wish to re-introduce the proposal at some unspecified date in the future and it is accepted that there are related matters pertaining to human rights presently of interest to this Government, but these are not justifiable reasons to continue withholding this particular document".

44. The MoJ recognised that disclosure would be consistent with the Government's wider commitment to transparency and would support public confidence that governments act on the basis of sound policy advice.

Public interest in favour of maintaining the exemption

45. In favour of withholding the information under consideration, the MoJ told the complainant:

"This draft proposal was not settled Government policy and at this point had not received collective Cabinet agreement. It was still under discussion with relevant departments and Number 10".

46. It put forward arguments typically referred to as 'safe space' and 'chilling effect' arguments, telling the complainant:

"Sound policy-making requires a safe space for officials to have full and frank conversations with Ministers. Routine disclosure of draft policy proposals would have a chilling effect on policy-making in general".

47. It also told her:

"Whilst we have no plans to introduce a Bill of Rights or to repeal the Human Rights Act 1998, a consideration of our human rights legal framework is still a part of the current government's Manifesto. Disclosure would have a chilling effect on any future advice that officials put to Ministers in this area".

48. Arguing that the public interest favoured withholding the information, the MoJ told the Commissioner that it considered that reform of the domestic human rights framework is a policy:

"... with significant constitutional implications which justify the ongoing 'considerable time' that is being taken to consider options, particularly in the context of other major constitutional changes".

49. It also told her:

"... the information that has been withheld reveals details of policy options that were under consideration at the time of drafting, and those options continue to inform the policy process which is still ongoing. These options have not been published or announced. Therefore there is a significant public interest in withholding the information".

50. It argued that, at the time the request was made, the work done on the policy still had the potential to inform further policy development and that disclosure would have a negative impact on the continuing formulation of policy.
51. It noted that, since the time of the request, in December 2019 the current Government was elected on a manifesto which includes a commitment to *"update the Human Rights Act"*. Accordingly it argued that reform of the domestic human rights framework is again a live policy process, to which the past policy work is of ongoing relevance.

Balance of the public interest arguments

52. With regard to the circumstances to consider with regard to the balance of the public interest, the Commissioner is mindful of her guidance on the public interest test³ that states:

"When carrying out the public interest test a public authority should consider the circumstances at the time at which it deals with the request.

If an authority is carrying out an internal review then it may consider the circumstances up to the time the review is completed".

53. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature and content of the withheld information. She has considered the comprehensive representations put forward by the complainant and the MoJ's submission in support of its position.
54. The Commissioner has also taken into account her guidance on section 35 which states⁴:

³ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

⁴ <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

"Public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption".

55. The Commissioner recognises that human rights is an area of importance, and that matters concerning the domestic human rights framework are clearly matters of genuine interest to the complainant.
56. The Commissioner accepts that there is a public interest in the UK being open and transparent with regard to any proposed reform of the domestic human rights legal framework and that, in the context of section 35, this extends to there being a public interest in understanding how government policy is made in relation to this topic. The Commissioner accepts that disclosure of this information would go some way to meeting this interest.
57. She also acknowledges that the relevance and weight of the public interest arguments will depend on the content and sensitivity of the particular information in question.
58. The Commissioner's guidance on section 35 recognises the importance of the timing of a request when considering the public interest. In that respect, the Commissioner considers:

"If the information reveals details of policy options and the policy process is still ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight".
59. While a White Paper may be seen as a statement of government policy, the withheld information in this case relates to a Green Paper, the content of which was still to be consulted on, prior to a decision being reached on an area of policy. Disclosure of the information would be likely to attract considerable public and media scrutiny of the Government's deliberations on the subject.
60. Taking all the above into account, the Commissioner is satisfied that there remains a need for an appropriate degree of safe space within which to develop ideas and consider policy issues away from external interference and distraction and to protect the policy and the formulation/development process.
61. In the Commissioner's view, disclosure of the withheld information presents a significant risk of undermining the confidential space needed by the MoJ to discuss policy making in this area, and moreover presents a genuine risk of encroaching on the candour of any future discussions in respect of such policy making.

62. She has therefore concluded that, in all the circumstances of this case, the public interest in maintaining the exemption is stronger than that in disclosing the information.
63. It follows that the Commissioner's decision is that the MoJ was entitled to apply section 35(1)(a) of the FOIA to withhold the requested information.
64. In light of that conclusion, the Commissioner has not found it necessary to consider its application of section 42 of the FOIA to the information also withheld by virtue of that exemption.

Right of appeal

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

66. 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.

67. 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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