

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 July 2020

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

Email: data.access@justice.gov.uk

Decision (including any steps ordered)

1. The complainant requested information contained in emails to and from the Chief Executive of Ministry of Justice's HM Prison and Probation Service regarding the then impending release on parole of a named high profile offender.
2. The Commissioner's decision is that the Ministry of Justice has partly complied with the request in its application of the section 36(2) FOIA exemption (prejudice to effective conduct of public affairs). She decided that, to comply with FOIA fully, the Ministry of Justice must disclose the information defined in the confidential annex to this Notice. This annex has been sent in confidence to the Ministry of Justice only.
3. The Commissioner requires the Ministry of Justice to take the following steps to ensure compliance with the legislation:
 - Disclose the information specified in the confidential annex to this Notice.
4. 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

5. In September 2019 the Chief Probation Officer for the National Probation Service of the Ministry of Justice (MOJ) wrote an open letter intended for publication in a relevant local newspaper ("the MOJ letter") to say that a named high profile convicted offender was soon to be released from prison on a parole licence ("the licensee"). The decision to release the licensee had not been a MOJ administrative decision but had been taken by an independent Parole Board.
6. The MOJ letter said that the impending release on licence, potentially for the remainder of what had been a lengthy prison sentence, would be subject to strict licence conditions including an unusually large exclusion zone. The MOJ letter acknowledged that nothing could take away the pain that had been caused to the victims of the licensee's offending but expressed the hope that the extremely strict safeguards MOJ was putting in place would provide some reassurance to members of the public. The MOJ letter added that the MOJ offer to provide victim support services to any victim who wanted to use them remained available.
7. On 26 September 2019, the complainant made the following request for information under FOIA for:

I write with a request for information under the FOIA as follows:

Please provide copies of all emails sent and received by Jo Farrar between (and including) September 13, 2019, and September 20, 2019, which relate to [name redacted – the licensee].

8. MOJ did not respond substantively until 19 November 2019. It did then respond and refused to provide the requested information that it held, citing the section 35(1)(a) (Formulation of government policy) and 36(2)(b) and 36(2)(c) (Prejudice to effective conduct of public affairs) FOIA exemptions.
9. MOJ maintained this position following an internal review.

Scope of the case

10. The complainant contacted the Commissioner on 7 January 2020 to complain about the way his request for information had been handled. He said that his request had been for emails relating to the release on parole of the licensee, a former high profile offender who had already served a lengthy prison sentence for offences of a sexual nature.

11. The complainant added that the MOJ debates and decisions made when deciding the way forward in this case “*were of significant public interest, considering the danger posed by [the licensee] to the public*”. He said that there was a compelling and legitimate interest in transparency in this specific case. Providing MOJ officials had been acting in a fair, impartial and professional manner, they had nothing to fear from disclosures about their advice and actions. He said that disclosure would show how robustly, or otherwise, measures surrounding the licensee’s release were considered and would undoubtedly improve public confidence in MOJ’s reputation when it was dealing with serious cases such as this one.
12. The withheld information comprises emails received within the specified timeframe by Dr Jo Farrar, the chief executive of HM Prison and Probation Service which is an executive agency of MOJ. There were emails within the scope of this request. One further email to Dr Farrar related to a separate matter but contained some references to this matter. The rest of that email is not otherwise within the scope of this request and not relevant to this matter. MOJ withheld this information relying on the section 35(1) and section 36(2) FOIA exemptions.
13. In reaching her decision, the Commissioner considered representations made by both parties and reviewed the withheld information. She has had regard for other related disclosures of information made by MOJ which were made close to the specified timeframe, notably the MOJ letter and a MOJ press office daily brief.
14. During her investigation, the Commissioner invited MOJ to accept informal resolution of the matter making some limited disclosures of withheld information. Having considered its position carefully, MOJ decided to maintain the section 36 FOIA exemptions in respect of all of the withheld information. Accordingly the Commissioner proceeded to a determination on the basis set out below.

Reasons for decision

Section 36 FOIA - prejudice to effective conduct of public affairs

15. Sections 36(2)(b) and (c) FOIA state that

“(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—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

16. The terminology used in these subsections is not explicitly defined in FOIA. However, the Commissioner’s guidance on section 36 FOIA¹ explains her understanding of the key terms to be:

- ‘Inhibit’ means to restrain, decrease or suppress the freedom with which opinions or options are expressed.
- Examples of ‘advice’ include recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources. However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views.
- The ‘exchange of views’ must be as part of a process of deliberation.
- ‘Deliberation’ refers to the public authority’s evaluation of competing arguments or considerations in order to make a decision”.

The qualified person’s opinion

17. To find that any part of section 36(2) FOIA 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.

18. The Commissioner’s guidance on section 36 of the FOIA contains a section called ‘*Qualified person*’. That section covers, among other things, identifying the qualified person, and saying that the qualified person’s opinion is crucial in order to engage the exemption.

19. The Commissioner’s guidance also states that, in a case involving the application of section 36 FOIA, the Commissioner expects that the qualified person would take the opportunity presented by an internal review to consider their reasonable opinion again, taking account of any comments from the complainant.

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudiceto-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

20. With regard to the process of seeking the opinion in this case, MOJ explained that certain emails had been withheld under section 36 (2)(b) and (c). In the reasonable opinion of its qualified person (QP), who was the MOJ Minister responsible for making such decisions, disclosure of the information would, or would be likely to, inhibit the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
21. MOJ told the Commissioner that a submission had been sent to the relevant QP, Chris Philp, on 22 October 2019 setting out the reasons for seeking his agreement to apply the exemption. The submission had explained that disclosure by MOJ would inhibit the free and frank provision of advice, and the free and frank exchange of views in the future, by restricting the flow of advice or the depth or relevance of advice concerning high-profile offenders.
22. MOJ said its concern was that disclosing the arrangements for supervising high profile offenders released on licence into the community would inhibit its ability to put effective measures in place to prevent further offending. Disclosure of the withheld information could lead to a loss of frankness and candour in the advice given, which would inhibit future decision-making. MOJ therefore considered that section 36(2)(b) was engaged and no longer relied on section 36(2)(c) FOIA.
23. MOJ added that their officials' submission to the QP had gone on to explain that the effective conduct of public affairs would be prejudiced by the provision of incomplete advice, or oral advice only. There was too a risk of incorrect or incomplete recording of decisions which would ultimately endanger its public protection system arrangements.
24. MOJ said that the QP's office had confirmed that the QP had agreed the approach set out in the submission. Also that Section 36 FOIA could be engaged.
25. The complainant did not challenge MOJ's reliance on the section 36(2) FOIA exemption being engaged.
26. During the course of her investigation, MOJ provided the Commissioner with evidence of officials' submissions to the QP and his agreement that the information should be withheld. From the evidence she has seen, the Commissioner is satisfied that the MOJ obtained the opinion of the QP in accordance with her guidance.

Was the opinion reasonable?

27. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the QP's opinion is reasonable.

In doing so the Commissioner considers 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.

28. In determining whether or not the opinion is reasonable, 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 QP's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
29. With respect to the limbs of the exemption claimed in this case, the Commissioner's guidance explains that information may be exempt under section 36(2)(b)(i) or (ii) FOIA if its disclosure would, or would be likely to, inhibit the ability of the public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making.

Likelihood

30. The section 36(2) FOIA exemption applies where disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views. In evidence to the Commissioner MOJ maintained that the higher level of risk of prejudice applied and that prejudice 'would' follow from disclosure of the withheld information rather than the lower level of risk 'would be likely to'.
31. The Commissioner saw that relevant submissions had been made to the QP and the application of the section 36 FOIA exemption approved by him within the relevant time frame. She therefore decided that the exemption was engaged.
32. The section 36(2) FOIA exemption is qualified and so is subject to the public interest balancing test which the Commissioner then considered.

Public interest test

33. Even where the QP has concluded that the exemption applies, because it is a qualified exemption, the public interest test must be applied to the decision whether or not to disclose the withheld information. The Commissioner therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the information

34. The complainant told the Commissioner that MOJ's response failed to consider the compelling public interest in disclosure of the requested information. He said that the information related to the release of a very serious offender. He said that the families of the victims had argued that this individual should never be released from prison, but now the individual was free and vast amounts of public money were being spent on monitoring.
35. The complainant added that there was a compelling public interest in disclosing information showing how Dr Farrar had dealt with the case and what options had been discussed. He said that disclosure could show how thoroughly, or otherwise, senior officials had dealt with the licensee's release and the options considered to ensure public safety. He opined that disclosure of that information was capable of improving public confidence in how MOJ and its agencies dealt with the release of such serious criminals. Failure to disclose the information would lead to distrust and fears of a cover-up.
36. The complainant added that, providing officials were acting in a fair, impartial and professional manner, they had nothing to fear from disclosure. He asserted that the public rightly understood that a range of options were considered when making such decisions.
37. For its part, MOJ told the Commissioner that there was a general public interest in openness and transparency in dealing with the management of offenders of this kind. Such openness could increase public trust in, and engagement with, Government and could have a beneficial effect on the overall quality of decision-making in Government.

Public interest considerations favouring withholding the information

38. MOJ said that disclosure of this information would restrict the flow of advice or the depth or relevance of advice concerning high-profile offenders, for fear that the arrangements for their supervision in the community would be released by the press. This in turn would undermine MOJ's ability to put effective measures in place to avoid the likely commission of further offences. Disclosure could lead to a loss of

frankness and candour in the advice given. This would inhibit senior managers' – and possibly Ministers' – decision-making abilities in the future.

39. MOJ added that, when releasing high profile offenders in the past, it had sometimes experienced journalists laying siege to premises which had caused dangers. Release of high profile offenders could make for interesting newspaper stories but could not outweigh the overwhelming public interest in the effective management of offenders newly released from custody. MOJ Ministers and officials needed to discuss these matters, confident that discussions would not be compromised by media disclosure.
40. MOJ opined that it could have relied additionally on other exemptions but it had not sought to rely on any because it believed that the section 35 and 36 FOIA exemptions sufficed and the key principle at stake, was the arrangements made to protect the public.

Balance of the public interest

41. In determining the balance of the public interest, the Commissioner considered carefully the representations she received from the complainant and MOJ. She viewed the withheld information and considered its content. She also had regard for the content of the MOJ letter and MOJ's opinion that the higher threshold of the likelihood that some prejudice to the conduct of public affairs 'would' occur.
42. The Commissioner considered the arguments for disclosure and for maintaining the exemption. She accepted that both sets of issues had merit and needed to be accorded some weight. Accordingly she decided that, while much of the information had been correctly withheld, the balance of the public interest favoured disclosure now of information that MOJ had already put into the public domain in the past but was not necessarily all readily available now to an interested member of the public. She found that doing so would not prejudice the effective conduct of public affairs.
43. The Commissioner recognised, and MOJ had accepted, that disclosure would provide transparency and accountability and give the public an insight into MOJ decision making, all of which are necessary to maintain public confidence in MOJ's decision making and the independent Parole Board process.
44. MOJ recognised that certain issues of public safety favoured disclosure and acknowledged the deep distress that some of the victim families had experienced already and that some would be likely to find the licensee's release upsetting. The Commissioner noted too that establishing the

licensee in the community, and maintaining that individual there safely, would make demands on the public purse.

45. MOJ said, but the Commissioner did not accept, that there was no benefit in disclosing information that had already been placed within the public domain, notably within the MOJ letter.
46. MOJ added that it considered that the complainant's request for information had been a 'fishing trip', alleging that it lacked focus and had been made in the hope of revealing an 'interesting story' but one that ignored the real world concerns of MOJ. The Commissioner found the information request to have been focused and had been targeted within a very specific and significant timeframe relating directly to the planned release of the licensee. She therefore did not accept MOJ's 'fishing trip' hypothesis.
47. During the Commissioner's investigation, MOJ told her that Dr Jo Farrar had not '*dealt with the case*' in the way that the complainant may have assumed. MOJ added that she had played no active role in the arrangements for the licensee's release.

The Commissioner's decision

48. Having taken all of these factors into account, the Commissioner decided that, apart from two emails, the balance of the public interest favoured maintaining the section 36(2) FOIA exemption and withholding the information in full.
49. For one of the relevant emails she decided that, for some of the content, the public interest balance favoured making some limited disclosures which she set out in a confidential annex to this Notice. This annex has been sent to MOJ (only). For the remaining content of that email, she decided that the balance of the public interest favoured maintaining the section 36(2) FOIA exemption.
50. For the second of those two emails, the Commissioner saw that this was a lengthy document a small part of which contained fragments of text falling within the scope of this information request. MOJ had withheld that information relying on the section 35 FOIA exemption and saying that, at the time of the request, there was a clear need for MOJ Ministers and officials to have a safe space in which to consider its contents, most of which is not relevant to this matter. The complainant did not dispute the application of the section 35 FOIA exemption and the Commissioner, having reviewed its contents, was satisfied that the exemption was engaged and that the balance of the public interest favoured maintaining the section 35 exemption.

Right of appeal

51. 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

52. 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.
53. 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

Dr R Wernham
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