

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 June 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 review of sentencing policy. The Ministry of Justice (MoJ) refused to provide the requested information, citing section 35(1)(a) (formulation of government policy) of the FOIA.
2. The Commissioner's decision is that the MoJ was entitled to apply the exemption at section 35(1)(a) of the FOIA and that the public interest favoured maintaining the exemption.
3. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

4. On 2 October 2019, the complainant wrote to the MoJ and requested information in the following terms:

"I would like to see a copy of the Sentencing Review carried out by the MoJ, whose results were announced yesterday".
5. The MoJ responded on 29 October 2019. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
 - section 35(1)(a) (formulation of government policy etc).
6. Following an internal review the MoJ wrote to the complainant on 25 November 2019, maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 23 January 2020 to complain about the way his request for information had been handled. He disputed the reasons for withholding the requested information, telling the Commissioner:

"The sentencing review was announced publicly and stakeholders were interviewed. There is obviously a report. The reasons given to withhold it do not make sense".

8. During the course of her investigation, the MoJ confirmed its application of section 35(1)(a) to the requested information. It also provided the Commissioner with a copy of the information within the scope of the request.
9. The analysis below considers the MoJ's application of section 35(1)(a) of the FOIA to the requested information.

Reasons for decision

Section 35 formulation of government policy etc

10. The purpose of section 35 of the FOIA 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.
11. In this case, the MoJ considered section 35(1)(a) applied. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
12. The purpose of subsection 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.
13. In her guidance on section 35¹, the Commissioner accepts:

¹ <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".

14. 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".

15. 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 or decision makers.
16. 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.
17. 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.
18. The Commissioner considers that, in its initial correspondence with the complainant, the MoJ relied on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis.
19. It was not until it sent him the outcome of the internal review that it explained:
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"It is only necessary for the withheld information to 'relate to' the formulation, or development, of government policy for the exemption to be engaged, which it does. It relates to the formulation and development of government policy in relation to sentencing reform".

20. During the course of her investigation, the MoJ provided the Commissioner with background to the requested review of sentencing policy. It confirmed that it was announced on 12 August 2019 that the MoJ would conduct *"an urgent review ordered by the Prime Minister, to ensure the public are properly protected from the most dangerous criminals"*². It also advised that, on 1 October 2019, the Lord Chancellor and Secretary of State for Justice, made a written statement to Parliament³. In that statement, he said:

"Based on the findings of the review, we will be bringing forward proposals shortly for a comprehensive package of legislative reform....Our proposals to reform the sentencing and release framework complement the raft of initiatives we are taking as a Government to fight crime and protect the public from its devastating consequences. As we continue to develop policy and before legislating, we will consider fully the impact of the proposals and have due regard to the requirements of s149 of the Equality Act 2010".

21. The Commissioner accepts that that statement was made the day before the complainant made his request for information.
22. With regard to its application of section 35 to the requested information, the MoJ told the Commissioner:

"It was, at the time of the original request, the MoJ's submission that the information in the sentencing review forms part of ongoing policy discussions and releasing this information could affect the MoJ's approach to developing a policy position on sentencing".

² <https://www.gov.uk/government/news/sentencing-review-to-look-at-most-dangerous-and-prolific-offenders>

³ <https://hansard.parliament.uk/Commons/2019-10-01/debates/19100142000011/SentencingAndReleaseFramework>

23. The MoJ confirmed that it continues to be of the view that section 35(1)(a) applies to the sentencing review. In support of that view, it explained:

"In December 2019, the Government announced in the Queen's Speech that it would be introducing new sentencing legislation. This followed a number of commitments on sentencing contained in the Conservative Party Election Manifesto. Policy work is being undertaken in respect of these pledges and the commitment to bring forward sentencing legislation".

24. Regarding the ongoing development of the policy under consideration, the MoJ told the Commissioner that there had been no publication or announcement of specific options that would mark a clear end to the formulation of policies.

Is the exemption engaged?

25. The Commissioner understands that the current policy on the sentencing of violent and sexual offenders, as well as the sentencing of the most prolific offenders, is under review to consider whether changes in legislation would be required to ensure the public are properly protected from the most dangerous criminals.
26. The Commissioner accepts that the information that is being withheld relates to the review and therefore falls under the definition of development of government policy. Section 35(1) (a) is therefore engaged.

The public interest test

27. 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

28. The complainant argued that there was significant public interest in sentencing reform: he told the Commissioner that he considered full disclosure was required.
29. He explained that, while he understood from the MoJ that there are likely to be future opportunities for the public to consider and debate any proposals:

"This has not turned out to be the case....".

30. The MoJ recognised the high degree of public interest in sentencing reform:

"...in particular since the Prime Minister announced an urgent internal review of sentencing policy in August".

31. It also recognised the public interest in knowing what informs decisions. In that respect, it told the complainant that "some interested criminal justice stakeholders" had taken the opportunity to provide their views during the review. It recognised that those stakeholders would be interested in seeing the evidence that informs the recommendations in the review.

Public interest in favour of maintaining the exemption

32. In favour of withholding the information under consideration, the MoJ explained that the Sentencing Review is ongoing. It argued that disclosure at this time would not allow Ministers to effectively consider the policy options available. It told the complainant:

"We continue to explore options which could potentially result in significant reforms. It is therefore essential that we are able to have open discussions with Ministers in the future, without external scrutiny. If the information was disclosed, it could have a detrimental impact on policy development".

33. It also explained that it needed safe space to consider options without undue influence from the outside and to be able to have open discussions without the threat of those discussions being disclosed.

34. In that respect, it told him:

"Nothing should detract from Ministers' ability reasonably to take policy decisions that will help to deal with this issue of sentencing reform. Disclosure of the requested information could attract media coverage. This in turn raises the possibility that the public would engage in harmful speculation based on a potentially inaccurate, and misleading impression about the ultimate policy direction".

35. Similarly, the MoJ told the Commissioner:

"The ongoing policy work following on from the review, to the point of legislation being introduced, requires an appropriate degree of neutral space to allow officials to gather and assess information, and to provide advice to Ministers which will inform their eventual policy decisions. There is a strong public interest case in allowing this to happen".

Balance of the public interest arguments

36. 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 arguments put forward by the complainant as well as the MoJ's submission in support of its position.
37. While she notes that the complainant considered that the Prime Minister's announcement "... *made no reference to the review being internal*", the Commissioner accepts that the announcement⁴ did in fact state that the review team was instructed to report directly to the Prime Minister.
38. The Commissioner has also taken into account her guidance on section 35 which states:

"Public interest arguments under section 35(1) (a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption".
39. The Commissioner accepts that there is a general public interest in openness and transparency. She also accepts that there is a public interest in the issue of sentencing reform, particularly where it relates to ensuring that the public are adequately protected.
40. The Commissioner is mindful that there is no inherent or automatic public interest in withholding all information falling within the section 35 exemption. The relevance and weight of the public interest arguments will depend on the content and sensitivity of the information in question and the effect its release would have in all the circumstances of the case.
41. She gives weight to the MoJ's arguments that disclosure in this case would directly harm the effectiveness of the policy itself. The Commissioner accepts that the information reveals details of policy options, and that the policy making process is still ongoing. She therefore finds that the safe space arguments carry significant weight.

⁴ <https://www.gov.uk/government/news/pm-launches-sentencing-review-to-look-at-most-dangerous-and-prolific-offenders>

42. She considers the timing of the request is also relevant in this case. In that respect, the Commissioner recognises that the written statement on 1 October 2019 did not go into detail regarding policy that would lead to a conclusion that the policy had been fully developed. She gives weight to the argument that it is not in the public interest to disclose information, which contains a wide range of options and evidence, while the issues are still live and under review.
43. 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.
44. 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.
45. 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.
46. 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.

Right of appeal

47. 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

48. 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.

49. 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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