

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 26 August 2021

**Public Authority:** Crown Prosecution Service  
**Address:** 102 Petty France  
London  
SW1H 9EA

#### Decision (including any steps ordered)

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1. The complainant requested information relating to the Crown Prosecution Service (CPS) LGBT hate crime schools resource pack, launched in January 2020 and subsequently withdrawn following a threat of legal action.
2. The CPS refused to provide the requested information by virtue of section 36(2)(b)(ii) (prejudice to effective conduct of public affairs) of the FOIA.
3. The Commissioner's decision is that section 36(2)(b)(ii) is engaged and that the balance of the public interest lies in maintaining the exemption.
4. However, the Commissioner found procedural breaches of sections 10(1) (time for compliance), 17(1) and 17(3) (refusal notices) of the FOIA.
5. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

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6. On 1 July 2020, the complainant wrote to the CPS and requested information in the following terms:

*"This is a request under the Freedom of Information Act for information relating to the CPS LGBT hate crime schools resource pack launched in January 2020 which was withdrawn following a threat of legal action."*

*Please could you provide:*

*a) Copies of all communications between the CPS, Gendered Intelligence and Stonewall in 2019 relating to this pack. If this is too broad I suggest the CPS limit its search to the individual(s) in the CPS charged with overseeing its development.*

*b) Copies of any internal complaints or comments received after the report's launch and subsequent negative publicity. Again, if necessary please restrict your search to the individual(s) who would be expected to receive and respond to these complaints who I anticipate would be the same individual(s) as in a).*

*c) Copies of any internal discussions amongst senior CPS management relating to the legal threat and subsequent publicity, subject to legal privilege ie I do not expect to be passed details of legal advice received".*

7. The CPS responded on 1 October 2020. It denied holding the information requested at part (b) of the request. It refused to provide the information requested at parts (a) and (c) of the request, citing the following exemption as its basis for doing so:
  - section 36(2)(b)(ii) (prejudice to effective conduct of public affairs)
8. Following an internal review the CPS wrote to the complainant on 30 November 2020 maintaining its original position.

## **Scope of the case**

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9. Following earlier correspondence the complainant contacted the Commissioner on 30 November 2020 to complain about the way her request for information had been handled.
10. She was dissatisfied with the way in which the CPS had conducted the public interest test, and considered that the CPS had failed to address the points she had raised in her request for a review.
11. The analysis below considers the CPS's application of section 36(2)(b)(ii) to the information within the scope of parts (a) and (c) of the request.
12. The Commissioner has also considered the timeliness with which the CPS handled the request.

## **Reasons for decision**

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13. During the course of the Commissioner's investigation, by way of context, the CPS explained:

*"On 21 January 2020, the CPS published revised guidance for schools on homophobic and transphobic bullying and hate crime.... On 30 April 2020, the CPS agreed to withdraw the Pack pending a detailed review of the content... On 1 September 2020, ...the Schools' Pack was withdrawn permanently".*

### **Section 36 prejudice to effective conduct of public affairs**

14. Section 36 of the FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs.
15. In this case the Commissioner is considering the application of the exemption at section 36(2)(b)(ii). That section provides that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
16. The terminology used in this subsection is not explicitly defined in the FOIA. However, the Commissioner's guidance on section 36<sup>1</sup> explains her understanding of the key terms as follows:

*"• 'Inhibit' means to restrain, decrease or suppress the freedom with which opinions or options are expressed.*

*• 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) 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.

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

18. The Commissioner's guidance on section 36 of the FOIA contains a section called 'Qualified person'. That section covers, amongst other things, identifying the qualified person, and that the qualified person's opinion is crucial in order to engage the exemption.
19. Her guidance also states that, in a case involving the application of section 36, 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.
20. With regard to the process of seeking the opinion in this case, the CPS explained that it consulted the qualified person, namely the Director of Public Prosecutions (DPP), on 15 September 2020. The opinion, with regard to engaging the exemption contained at section 36(2)(b)(ii) of the FOIA, was given on 25 September 2020.
21. The CPS also explained that, when conducting the internal review, it had made a further submission to the DPP, as the qualified person, on 20 November 2020 and that on 26 November 2020, the DPP confirmed their opinion that section 36(2)(b)(ii) applied.
22. During the course of her investigation, the CPS provided the Commissioner with a copy of both submissions to the qualified person. The CPS also provided the Commissioner with evidence of the qualified person's opinion and how it was reached.
23. From the evidence she has seen, the Commissioner is satisfied that the CPS obtained the opinion of the qualified person and took the opportunity to reconsider the qualified person's opinion in accordance with her guidance.
24. She is also satisfied that when, reconsidering the matter, the qualified person was aware of the points raised by the complainant when she requested an internal review.

*Was the opinion reasonable?*

25. 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.
26. 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.
27. With respect to the limb of the exemption claimed in this case, the Commissioner's guidance explains:
- "Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to inhibit the ability of 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 by the public authority..."*
28. With respect to its application of section 36(2)(b)(ii), the CPS cited the lower level of likelihood (would be likely to prejudice).
29. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the requested information regarding the schools resource pack would be likely to inhibit the process of exchanging views as part of the process of deliberation.
30. The Commissioner recognises that the CPS's arguments for maintaining the exemption comprise both 'chilling effect' and 'safe space' arguments. For example, the CPS considered that disclosure in this case would inhibit free and frank exchange of views in future and that a safe space was needed to air views and debate live issues in what they refer to as a polarised debate.
31. The Commissioner recognises that, whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
32. She also accepts that while, traditionally, safe space arguments relate to internal discussions, they can still apply where external contributors have been involved.

33. The Commissioner has reviewed the withheld information. She has also taken into account the timing of the request in relation to the age of the information and the status of the threatened legal action.
34. In light of the above, the Commissioner is satisfied that the content of the withheld information supports the argument that disclosure in this case would be likely to inhibit the free and frank exchange of views for the purposes of deliberation. She therefore accepts that it was reasonable for the qualified person to reach the view that disclosure would be likely to prejudice the effective conduct of public affairs by virtue of section 36(2)(b)(ii).

*The public interest test*

35. 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.
36. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
37. The Commissioner acknowledges that, during the course of her investigation, the complainant raised matters, relating to the passage of time since the request, which she considered of relevance to the public interest test.
38. However, when dealing with a complaint that information has been wrongly withheld the Commissioner will consider the situation at the time at which the authority originally dealt with the request, or the time of the authority's internal review. That position was confirmed by the Upper Tribunal in *Maurizi v The Information Commissioner & The Crown Prosecution Service (Interested Party: Foreign & Commonwealth Office)* [2019] UKUT 262 (AAC)<sup>2</sup>.

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

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39. In correspondence with the CPS, the complainant highlighted the public interest in transparency over the influence of lobbyists.
40. Acknowledging the ongoing legal action relating to the resource pack, she told the CPS there was likely to be public discussion about it in any case.
41. The CPS acknowledged, in its correspondence with the complainant:

*"There is a clear public interest in the launch of these packs and disclosure of internal handling of legal challenge correspondence would inform the public about how the Crown Prosecution Service (CPS) dealt with the matter and increase accountability and transparency".*

*Public interest arguments in favour of maintaining the exemption*

42. In favour of maintaining the exemption, the CPS told the complainant:

*"Disclosure of this material would be likely to inhibit CPS staff to express themselves openly, honestly and completely in putting their views forward. As part of the process of deliberation CPS Staff should feel confident that there is a safe space to air their views, debate live issues and reach decisions. It is vital that CPS staff are able to provide free and frank exchange of views regarding their deliberations without fear that those outcomes or conversations will be released into the public domain under a FOI request.*

*Furthermore, to inhibit free and frank exchange of views for the purposes of deliberation and the loss of frankness and candour that could follow, would be likely to damage the quality of staff views and deliberation which would likely lead to poorer decision making in the CPS".*

43. It re-iterated those arguments in its internal review correspondence.
44. As is her practice, during the course of her investigation, the Commissioner asked the CPS about the public interest arguments in favour of maintaining the exemption that were taken into account.
45. In its submission, the CPS responded along similar lines to those provided to the complainant.
46. The Commissioner notes that, having accepted 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.

*Balance of the public interest*

47. When considering a complaint regarding the application of the exemption at section 36(2)(b), where the Commissioner finds that the qualified person's opinion was reasonable she will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test favours disclosure.
48. The Commissioner recognises that, while the qualified person's opinion will affect the weight of the argument for withholding the information, some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of information held by public authorities. This assists the public in understanding the basis on which, and how, public authorities make their decisions and carry out their functions, and in turn fosters trust in public authorities.
49. The Commissioner has also taken into account that there is a legitimate public interest in the subject the information relates to. Disclosure in this case would allow the public to scrutinise exchanges within the CPS, and between the CPS and other parties, on a topic that was, at the time of the request, a matter of public interest and subject to review.
50. Furthermore, there is always an argument for presenting the full picture and allowing people to reach their own view.
51. However, the Commissioner acknowledges that there is a public interest inherent in prejudice-based exemptions, in avoiding the harm specified in that exemption, such as, in this case, prejudicing the effective conduct of public affairs. The fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test.
52. The Commissioner has considered how much weight to attach to the alleged chilling effect and the extent to which disclosure of this particular information would be likely to cause detriment to similar processes in the future. She considers that the chilling effect argument will always be strongest when an issue is still live.
53. With respect to the nature of the information and timing of the request in this case, the Commissioner notes that the requested information relates to the schools pack which, at the time of the request, remained both topical and sensitive. She considers this gives weight to the public interest in maintaining the exemption.



54. The Commissioner has also considered the extent to which the content of the withheld information would add to the public debate and inform the public's understanding.
55. The Commissioner has assessed the balance of the public interest according to the circumstances as they stood at the time of the internal review. She has weighed the public interest in avoiding the inhibition of the free and frank exchange of views for the purposes of deliberation against the public interest in openness and transparency. Her conclusion is that the public interest in avoiding this inhibition is a relevant factor and she considers that, although finely balanced, the public interest in maintaining the exemption outweighs the public interest in disclosure.
56. It follows that the Commissioner is satisfied that the CPS was entitled to rely on section 36(2)(b)(ii) to withhold the requested information.

*Procedural matters*

*Section 10 time for compliance*

57. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
58. Section 10(1) of the FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.
59. The request in this case was submitted on 1 July 2020 and acknowledged by CPS on the same day. However, it was not until 1 October 2020 that the CPS provided its substantive response.
60. In its submission to the Commissioner, the CPS explained that the reason for the delay in responding to the request was due both to the nature of the request and the CPS's remote working arrangements caused by the pandemic and associated work pressures.
61. The Commissioner finds that the CPS breached section 10(1) of the FOIA by failing to comply with section 1(1) of the FOIA within the statutory time period.

*Section 17 refusal notices*

62. If a public authority intends to refuse a request on the grounds that it is subject to an exemption in Part II of the FOIA, then it must issue the requester with a refusal notice informing them of its decision. The public

authority should issue its refusal notice no later than 20 working days after the date of receipt of the request.

63. If the public authority needs further time to consider the public interest test then it can issue an initial refusal notice explaining why the exemption applies and giving an estimated date by which the public interest test will be completed. Once the public interest test has been completed then, if the public authority still intends to withhold information, it will need to issue a further refusal notice explaining its application of the public interest test.
64. 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".*
65. By failing to notify the complainant within 20 working days, that a Part II exemption applies, the Commissioner finds a breach of section 17(1).
66. As the CPS took more than a further 20 working days to communicate the outcome of the public interest test, the Commissioner finds a breach of section 17(3).

## **Other matters**

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### *Timeliness of the internal review*

67. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.
68. In this case, the internal review that the complainant requested on 1 October 2020 was not completed in accordance with that guidance.
69. The Commissioner expects the CPS to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

## Right of appeal

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70. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

71. 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.

72. 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 .....**

**Laura Tomkinson**  
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