

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 September 2022

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested a copy of a review of the operation of the Coroners and Justice Act. The Ministry of Justice (MoJ) confirmed it held information within the scope of the request but refused to provide it, citing section 35(1)(a) (formulation of government policy) of FOIA.
2. During the course of the Commissioner's investigation, it revised its position, citing instead section 36 (prejudice to effective conduct of public affairs) of FOIA.
3. The Commissioner's decision is that section 36(2)(c) is engaged but that the public interest balance favours disclosure of the information.
4. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
 - disclose the requested draft report, a copy of which was provided to the Commissioner during the course of his investigation.
5. The MoJ must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

6. On 28 May 2021, the complainant wrote to the Ministry of Justice (MoJ) and requested information in the following terms:

"In 2015, you completed a review of the operation of the Coroners and Justice Act. Please disclose an electronic copy of the review".

7. The request was made using 'whatdotheyknow'.
8. The MoJ provided its substantive response on 23 July 2021. It confirmed that the MoJ holds some information in relation to the post implementation review but refused to disclose it, citing section 35(1)(a) (formulation of government policy) of FOIA.
9. Following an internal review the MoJ wrote to the complainant on 17 August 2021 maintaining its application of section 35(1)(a).

Scope of the case

10. The complainant contacted the Commissioner on 20 August 2021 to complain about the way his request for information had been handled.
11. During the course of the Commissioner's investigation, the MoJ revisited its handling of the request. Having done so, it advised both the Commissioner and the complainant that it was relying on section 36(2)(c) (prejudice to effective conduct of public affairs) of FOIA, rather than section 35, to withhold the requested information. With respect to the level of prejudice, it considered that disclosure would prejudice the effective conduct of public affair.
12. The complainant remained dissatisfied. He considered that the MoJ had failed to explain why the exemption is engaged and was dissatisfied with its assessment of the public interest, describing it as "hopelessly misguided".
13. The Commissioner recognises that a public authority is able to raise a new exemption or exception either before the Commissioner or the First Tier Tribunal and both must consider any such new claims.
14. Accordingly the analysis below considers the MoJ's application of section 36(2)(c) of FOIA to the requested information.
15. The information is variously referred to in the correspondence as 'the review', 'the report' and 'the draft report'. For the purposes of this decision notice, the Commissioner will refer to 'the draft report'.
16. The Commissioner understands that the draft report arose from a post implementation review, launched in 2015, of Part 1 of the Coroners and Justice Act 2009, which replaced the legal framework for the investigation of deaths by coroners set out in the Coroners Act 1988.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

17. Section 36 of 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.
18. In this case the Commissioner is considering the MoJ's application of the exemption at section 36(2)(c).
19. Section 36(2)(c) states:

"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—

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs".
20. In his guidance on section 36¹, the Commissioner references the decision in *McIntyre v Information Commissioner and MoD* (EA/2007/0068) and states:

"The Information Tribunal here took the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption".

The qualified person's opinion

21. 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.
22. With regard to the process of seeking the opinion in this case, the MoJ explained that it consulted the qualified person, namely Minister Dines, Parliamentary Under Secretary of State for Justice, on 11 August 2022. The opinion, with regard to engaging the exemption contained at section 36(2)(c) of FOIA, was given on 15 August 2022.

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

23. The Commissioner is satisfied that it was appropriate for the MoJ to regard a Minister of the Crown, in this case Sarah Dines MP, as the qualified person for the purposes of section 36.
24. The MoJ provided the Commissioner with a copy of the submission to the qualified person and with evidence of the qualified person's opinion.
25. From the evidence he has seen, the Commissioner is satisfied that the MoJ obtained the opinion of the qualified person.

Was the opinion reasonable?

26. 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.
27. 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.
28. The Commissioner is mindful that the MoJ considers section 36(2)(c) applies in this case. His guidance on this limb of the exemption and the relevant case law state that, in order to engage this limb, a public authority must demonstrate some form of prejudice, not covered by another limb, that might result from disclosure
29. With regard to its revised position in this case, the MoJ simply told the complainant:

"The MoJ holds some information in relation to the post-implementation review that you have requested, however, it is exempt from disclosure under section 36(2)(c) of the FOIA - prejudice to the effective conduct of public affairs".
30. Similarly, it told the Commissioner:

"We have, however, reviewed the contents of the draft report again and concluded that the section 36(2)(c) exemption applies to this case, due to the risk that disclosure of the requested information would prejudice the effective conduct of public affairs".

31. With respect to the nature of the prejudice in regard to section 36(2)(c), the Commissioner states, in his guidance²:

"Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure".

32. The Commissioner would emphasise that section 36(2)(c) is concerned with the effects of making the information public. In this case, the issue is whether disclosure of the draft report would otherwise, or would be likely otherwise to, prejudice the effective conduct of public affairs.
33. The Commissioner has been provided with a copy of the submission provided to the qualified person. The Commissioner is satisfied that the submission clearly related to the request that was made by the complainant. He is also satisfied that it explained why an opinion was being sought, provided relevant background information and arguments as to why disclosure would otherwise, or would be likely otherwise, to prejudice the effective conduct of public affairs.
34. In respect of section 36(2)(c), the caselaw on this particular limb of the exemption states that, in order to "otherwise prejudice the effective conduct of public affairs", the Qualified Person must identify some form of prejudice that would not be covered by any other exemption.
35. In this case the Commissioner acknowledges that the prejudice envisaged in the submission to the qualified person is with respect to coroner services.

² <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

36. Having reviewed the withheld information the Commissioner is satisfied that it was reasonable to argue that disclosure in this case would otherwise prejudice the effective conduct of public affairs, namely the provision of coroner's services. He therefore accepts that it was reasonable for the qualified person to reach the view that disclosure would otherwise prejudice the effective conduct of public affairs by virtue of section 36(2)(c).

The public interest test

37. 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.
38. 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.
39. In this case, as the qualified person considered that disclosure 'would otherwise prejudice' the effective conduct of public affairs, he has carried the higher level of prejudice through to the public interest test.

Public interest arguments in favour of disclosing the requested information

40. In favour of disclosure, the complainant argued that a Select Committee of the House of Commons has urged the MoJ to publish the review. He told the MoJ:

"This is a very weighty factor in favour of disclosure".

41. The MoJ acknowledged that the draft report is a matter of interest to other stakeholders/individuals who have also asked for its release.
42. It also recognised that disclosing the work in support of the 2015 post implementation review of the Coroners and Justice Act 2009 would be in accordance with the government's general transparency agenda and that disclosure may promote public confidence in the MoJ's handling of such matters.

Public interest arguments in favour of maintaining the exemption

43. The MoJ put forward a number of arguments in favour of maintaining the exemption, including that:
- the information comprises an historical snapshot that has been superseded by events;

- there is reasonable risk that release of the draft report would prejudice the continued effectiveness of embedding and developing operational aspects the 2009 Act provisions, and indeed more recent reforms to coroner services contained in the Judicial Review and Courts Act;
 - the information and analysis within the draft report is unfinished and has not been subject to the usual quality assurance processes.
44. The Commissioner notes that the MoJ also put forward other arguments that appear to relate to engaging the exemption, rather than the public interest.
45. In its submission, in support of its arguments in favour of maintaining the exemption, the MoJ told the Commissioner that the early stage at which the drafting of the report was halted means that it does not contain any significant contextualisation or counterbalancing commentary or response:
- ".. as the report is not complete and is also very out of date, the content has not been contextualised, either contemporaneously within the context of the coronial system as it existed at the time, or within the context of the system as it operates seven years on, taking account of the changes and improvements that have developed in the intervening period".
46. Similarly, noting the information and analysis within the draft report has not been subject to the usual quality assurance processes, it argued that there is a risk that the material in the draft report could be misinterpreted and unhelpful to the public debate.

Balance of the public interest

47. When considering a complaint regarding the application of the exemption at section 36(2)(c), where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. In this case, this means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice would otherwise occur but will go on to consider the severity, extent and frequency of that prejudice in forming his own assessment of whether the public interest test favours disclosure.
48. With regard to the severity, extent and frequency of the envisaged prejudice to public affairs (specifically, to the coronial system) the Commissioner does not consider that the MoJ has demonstrated that it would be significant. For example, he has not seen any evidence in relation to the frequency of any such prejudice.

49. The Commissioner acknowledges the MoJ's arguments about the draft nature of the report and that the report has not been through its quality assurance processes. He also notes its concern about misinterpretation.
50. However, FOIA provides a right to information that public authorities hold; it does not require that information to be complete, accurate or up to date.
51. The Commissioner considers that, where a public authority considers disclosure can lead to misleading information entering the public domain, this should not, in itself be used to justify non-disclosure. Rather, he considers that a public authority should normally be able to explain to the requester the nature of the information, or provide extra information to help put the information into context.
52. The test under section 2(2) of FOIA is clear: the question is whether the public interest in maintaining the exemption is sufficiently strong to outweigh the public interest in disclosure. It is a simple balancing exercise.
53. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the MoJ.
54. Having had sight of the withheld information, the Commissioner considers that its disclosure would provide transparency and accountability.
55. The Commissioner has weighed the public interest in avoiding otherwise prejudicing the effective conduct of public affairs against the public interest in openness and transparency.
56. In this case, while the Commissioner finds the arguments are finely balanced, he considers that the public interest in maintaining the exemption is not sufficiently strong to outweigh the public interest in disclosing the withheld information. The Commissioner is therefore satisfied that the balance of the public interest lies in favour of disclosure.
57. It follows that the Commissioner finds that the MoJ was not entitled to refuse the complainant's request on the basis of section 36(2)(c).

Right of appeal

58. 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

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

59. 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.

60. 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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