

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 6 October 2022

Public Authority: Crown Prosecution Service
Address: 102 Petty France
London
Sw1H 9EA

Decision (including any steps ordered)

1. The complainant has requested information relating to a concession granted regarding adult sex dolls.
2. The Commissioner's decision is that the Crown Prosecution Service (CPS) has correctly cited section 36(2)(b)(ii) - prejudice to effective conduct of public affairs and section 40(2) - third party data.
3. The Commissioner does not require the CPS to take any steps as a result of this decision notice.

Request and response

4. On 15 May 2021, the complainant made the following request for information under FOIA for:

"Re: <https://www.cps.gov.uk/legal-guidance/sex-dolls-childlike>

In that 2019 guidance, you state: "In *Conegate Ltd. v H.M. Customs and Excise* [1987] 2 W.L.R. 39 a concession was made that adult sex dolls were not obscene articles." Had this been the case, the ECJ would not have been involved in the Conegate debacle.

In *Conegate Ltd. v H.M. Customs and Excise* [1987] 2 W.L.R., decision paragraph 2, the UK contend "these goods to be 'indecent or obscene'

articles whose importation into the United Kingdom is prohibited under section 42 of the Customs Consolidation Act 1876."

This is clearly not a concession by the UK that adult sex dolls are "not obscene" as now creatively suggested by the CPS. Please supply evidence of the concession that adult sex dolls are no longer considered obscene by the UK Govt."

5. CPS responded on 15 June 2021 and denied holding the requested information.
6. CPS provided an internal review on 1 October 2021 in which it revised its position and confirmed information within the scope of the request was held. However, it refused to provide it citing section 36(2)(b)(ii), section 40(2) and section 42(1) as its basis for doing so.

Scope of the case

7. The complainant contacted the Commissioner on 4 October 2021 to complain about the way their request for information had been handled and stated:

"Many of their concerns regarding disclosure can be mitigated by providing the information with any personal information redacted, thereby permitting the CPS continued free and frank discussions without compromising or identifying any individual, whether staff or accused.

They indicate that section 42 applies to SOME material. This partial material may be excluded or redacted as necessary at their discretion, providing that the assertion of adult sex dolls being considered appropriate for import can be demonstrated with the remaining information held. I have asked them to supply the information they can possibly provide and not to attempt to blanket ban the request."

8. The Commissioner considers the scope of this case to be to determine if the CPS is entitled to rely on any of the exemptions it has cited.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

9. Section 36(2) states information is exempt from disclosure, if, in the reasonable opinion of the Qualified Person (QP), disclosure of the information:

- (b) would, or would be likely to, inhibit—
(ii) the free and frank exchange of views for the purposes of deliberation
10. Section 36 relies on a particular individual (the 'Qualified Person') giving an opinion on the likelihood of prejudice occurring. In determining whether the exemption is engaged, the Commissioner is required to consider the QP's opinion as well as the reasoning that informed that opinion.
 11. Therefore the Commissioner must ascertain who the QP is, establish that they gave an opinion, ascertain when the opinion was given and whether the opinion was reasonable.
 12. The CPS confirmed that a submission was sent to the Director of Public Prosecutions (DPP) on 23 August 2021 and a response was received on 31 August 2021. The CPS provided the Commissioner with a copy of the submission to the QP on which the opinion was based. The submission included the request for information, arguments as to why section 36(2)(b)(ii) was engaged and public interest arguments. The QP was also provided with the withheld information.
 13. The Commissioner is satisfied that the DPP is the QP for the purposes of section 36 and that their opinion on its application was properly sought at the internal review stage, and given.

Reasonableness

14. 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 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.
15. When determining whether the opinion is a reasonable one, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd (that is, if it is an opinion that a reasonable person could hold) then it is reasonable.
16. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion will not be

deemed unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It would only be deemed unreasonable if it is an opinion that no reasonable person in the QP's position could hold. Therefore, 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.

17. In this case, the Commissioner is satisfied that the submission to the QP clearly related to the request that was made by the complainant. He is also satisfied that it explained why an opinion was being sought and provided relevant background information together with a copy of the information it was proposed should be withheld under section 36(2)(b)(ii).

18. With regard to whether the inhibition envisaged related to the specific subsection of section 36(2) that is being claimed, the submission to the QP explained:

"Disclosure of the information contained is likely to inhibit the ability of CPS 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, colleagues should feel confident that there is a safe space to air advice, professional views, debate live issues and reach decisions. Inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.

Disclosure of discussions would be likely to inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and could ultimately lead to poor decision making in the future for the CPS. The section 36 exemption is about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the process of exchanging views; this process is likely to be inhibited if it became known that internal email discussions/views could be released into the public domain at a later date under a FOI request.

19. The QP can only apply the exemption on the basis that the inhibition to the free and frank exchange of views for the purpose of deliberation either 'would' occur or 'would be likely to' occur. The CPS has argued in this case that the inhibition 'would be likely to' occur.

20. The QP had access to the information itself and was of the view that section 36(2)(b)(ii) was engaged, as disclosure of the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

21. The Commissioner accepts that the inhibition envisaged in this case relates to that specified in section 36(2)(b)(ii), and, having viewed the information in question, that it is reasonable to believe that the inhibition would be likely to occur. The Commissioner is therefore satisfied that it was reasonable for the QP to reach the view that disclosure would be likely to inhibit the free and frank exchange of views for the purpose of deliberation.
22. It follows that the Commissioner is satisfied that section 36(2)(b)(ii) of FOIA is engaged.

Public interest test

23. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Arguments in favour of disclosure

24. As noted in the submission, the public interest factors in favour of disclosing the information included that the disclosure of this information could be considered as matter of public interest, particularly if it increases the public's understanding of how the CPS manages the development of legal guidance documents. Therefore, the disclosure of the information would increase accountability and transparency generally in connection with CPS decision-making.

Arguments in favour of maintaining the exemption

25. The public interest arguments in favour of maintaining the exemption is that the process of deliberation involving the free and frank exchange of views that is essential to the development of CPS legal guidance. The withheld material consists of internal CPS deliberations that led to the development of the CPS Childlike Sex Dolls legal guidance.
26. The requestor asked for "evidence of the concession that adult sex dolls are no longer considered obscene by the UK Govt". In the internal review, CPS interpreted this to relate to the view set out in its Childlike Sex Doll legal guidance, which states:

A childlike sex doll is capable of being an article embodying matter to be looked at, and thus an article within the meaning of the Act. In Conegate Ltd. v H.M. Customs and Excise [1987] 2 W.L.R. 39 a concession was made that adult sex dolls were not obscene articles. This concession does not prevent prosecutors from contending that childlike sex dolls are obscene articles.

27. It explained that, in developing the legal guidance, more junior CPS legal professionals exchanged views and opinions on the *Conegate* case. As part of the process of deliberation in arriving at a decision on this point in the legal guidance, staff expressed themselves openly and competing arguments were put forward and evaluated by senior CPS staff in order to finalise the legal guidance. These views were exchanged through emails and through comments on drafts of the legal guidance document.
28. In the emails, staff made the point that differing views on the existing legislation had been shared and that these needed to be discussed as a collective to set out the formal CPS position. This process of deliberation must be protected as the quality of CPS legal advice and decision making would be impaired if this exchange of views was made public as this would inhibit CPS staff from openly expressing their professional views and opinions. This is particularly the case in considering the impact of the case of *Conegate* as views were put forward on the judgment itself along with leading authorities, and non-senior CPS staff would not share their views openly if they thought these would later be made public.
29. The quality of CPS legal guidance is dependent on these open and frank deliberations on points of law taking place. The final version of the document is available to the public.
30. At the time of the request, this legal guidance was a live issue as it was under review. The guidance was updated on the CPS website in May 2022.
31. The following public interest arguments were raised in its submission to the QP in favour of maintaining the exemption:
 - Disclosure of the information would restrain the freedom with which opinions and options are expressed as part of the process of developing legal guidance documents. If the views of CPS staff (particularly more junior staff) were made public, this would inhibit the ability of CPS staff and others to express themselves openly, honestly, and completely when giving their views and opinions. This is particularly so in this case where more junior staff were questioning the decisions of established legal authorities.
 - As part of the process of deliberation, colleagues should feel confident that there is a safe space to air advice, professional views, debate live issues and reach decisions. Inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.

- Disclosure of discussions relating to the development of legal guidance would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and could ultimately lead to poor decision making in the future for the CPS.
- The section 36 exemption is about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the process of exchanging views; this process would be inhibited if it became known that internal email discussions / views could be released into the public domain at a later date under a FOI request.

Balance of the public interest

32. CPS argued that on balance and consistent with the reasonable view of the QP, it considered that while there is a public interest in increasing transparency and accountability in the development of legal guidance documents (the CPS makes the final version of these documents available to the public), the public interest favoured maintaining the exemption.
33. The guidance published sets out the position of the CPS that has been reviewed by senior CPS staff, whereas the emails and drafts that lead to the development of the legal guidance set out the views of more junior individual CPS staff members, which may or may not accord with the finalised CPS position.
34. This process of deliberation must be protected because if CPS staff thought their individual views and opinions may later be made public, they would not share those views, and this would affect the quality of CPS decision-making and CPS legal guidance documents overall.
35. This is particularly the case in relation to the development of the Childlike Sex Dolls legal guidance document where a number of differing opinions and views were put forward for senior decision makers to consider. There could be a chilling effect on CPS legal professionals, policy advisors and other staff, dissuading them from openly sharing their views in developing legal guidance if they thought their individual opinions would be made public. This legal guidance was a live issue at the time of the request as it was under review.
36. Given the Commissioner's investigation into this matter, the CPS provided the QP with a copy of the original submission seeking their opinion and the withheld information and asked them to consider their opinion again. The QP has confirmed their original opinion that disclosure of the information would inhibit the free and frank exchange

of views for the purpose of deliberation and therefore the information should be withheld under section 36(2)(b)(ii) FOIA.

Commissioner's decision

37. Even where the QP has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption. When considering a complaint regarding the application of the exemption at section 36(2)(b), where the Commissioner finds that the QP's opinion was reasonable he will consider the weight of that opinion in applying the public interest test.
38. 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.
39. The Commissioner recognises that, while the QP'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.
40. As a general rule, the Commissioner expects civil servants and local government officials to be robust. They should not easily be dissuaded from giving candid and frank opinions or from challenging prevailing orthodoxies. However, there are some circumstances in which they may be justified in being reticent if they believe that their views may become public knowledge.
41. There is a strong public interest in understanding how the CPS reaches its decisions on its legal guidance. After all, these decisions are likely to affect all members of the public to a greater or lesser degree. However, as the guidance is published once completed, the Commissioner considers this goes some way to satisfying the public interest. The published guidance is open to scrutiny and legal challenge if necessary.
42. 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, on a topic that was, at the time of the request, under review.
43. Furthermore, there is always an argument for presenting the full picture and allowing people to reach their own view.

44. 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.
45. 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. He considers that the chilling effect argument will always be strongest when an issue is still live.
46. 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 a sensitive topic within the broader issue of child sex exploitation. He considers this gives weight to the public interest in maintaining the exemption.
47. 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. He considers that disclosure of the information would add little to the overall debate of whether "childlike sex dolls are obscene articles".
48. The Commissioner has assessed the balance of the public interest according to the circumstances as they stood at the time of the internal review. He 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. His conclusion is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
49. 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.

Section 40 – third party personal data

50. The Commissioner notes that the information withheld under section 40(2) FOIA is email addresses, names and job titles. Clearly this is personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of FOIA cannot apply.
51. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

52. The complainant acknowledged that this information could be redacted from any disclosable information. As the Commissioner has found that none of the information should be disclosed he has not gone on to further consider the application of section 40(2).

Section 42 – legal professional privilege

53. As the information exempt by virtue of section 42 is also covered by section 36, it has not been necessary to consider this exemption further.

Right of appeal

54. 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

55. 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.
56. 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

Susan Duffy
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