

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 November 2022

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 about the decision by the then Lord Chancellor to set a revised Personal Injury Discount Rate which she had announced on 27 February 2017.
2. The Commissioner decided that the Ministry of Justice were entitled to rely on the section 36(2) (effective conduct of public affairs) and section 42(1) (legal professional privilege) FOIA exemptions to withhold the relevant information.
3. The Commissioner did not require any steps.

Request and response

4. On 18 January 2021 the complainant wrote to the Ministry of Justice (MOJ) and made the following request for information:

"The [27] February 2017 PIDR [Personal Injury Discount Rate] decision by the then Lord Chancellor, Liz Truss, differed from that of her predecessor Lord Irvine in 2001, in at least three important respects, viz. (i) she felt bound by Wells v Wells whereas he did not - he took account of a range of other factors outlined in his statements laid before the Houses in July 2001, and which led him to round the PIDR up from 2.09% to 2.5%, whereas she said she was bound by Wells to focus solely on the ILGS [Index Linked Government Securities] average rate and ignore how awards were actually invested, (ii) he took

account of the interests of defendants as well as claimants – see *Simon v Helmut* [2012] UKPC 5, par 35, whereas she believed she could not, and (iii) he adopted a different calculation methodology to Wells, taking a three-year average of all ILGS outstanding (with a minor adjustment for near maturity yield distortions) whereas she disregarded ILGS issues with remaining lifespans of less than five years. I therefore request copies of the advices/ submissions/ memos she received, internal and external, on these three issues in the six months prior to the decision being taken. [August 2016 – 27 February 2017]”.

5. MOJ refused to provide the requested information citing the section 35(1) (formulation of government policy, etc) and section 42(1) FOIA exemptions.
6. On 6 July 2021, following an internal review, MOJ revised their position to rely on the section 36(2)(b) and section 42(1) FOIA exemptions.

Scope of the case

7. The complainant contacted the Information Commissioner on 4 October 2021 to complain about the way his request for information had been handled.
8. In his investigation, the Commissioner considered the MOJ reliance on the section 36(2) and 42(1) FOIA exemptions.
9. During the course of his investigation the Commissioner considered representations from the parties. He had regard for his own guidance to public authorities and to relevant precedent decisions by the Courts.
10. The Commissioner reviewed the withheld information and considered the application by MOJ of the exemptions cited. His review included a further four documents which MOJ located during his investigation, all of which MOJ withheld relying on the section 36(2) FOIA exemption.
11. MOJ withheld the personal information of junior officials relying on the section 40(2) FOIA (personal information) exemption. The complainant did not dispute these redactions and the Commissioner accepted them but did not consider their application in detail.

Reasons for decision

Section 36(2) – prejudice to effective conduct of public affairs

12. Section 36(2) FOIA states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information ... – (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation,
13. The complainant said that there was little correlation between his request and the MOJ response to it. He added that, shortly after the February 2017 announcement, fresh legislation had been introduced which had changed the system for setting PIDR. He said that many of the relevant calculations were now being made by the UK Government Actuary's Department. He considered that a review of the rationale for the change to a new system for reviews might reveal other issues.
14. MOJ confirmed, and the Commissioner verified, that the opinion of the qualified person (QP) had been obtained on 25 June 2021; the QP had decided that the section 36(2)(b)(ii) FOIA exemption was engaged and that disclosure would inhibit the free and frank provision of advice or exchange of views in the future. MOJ added that the wide range of factors taken into account in 2017 would need to be considered in future rate-setting reviews so the information remained live and relevant. The QP had confirmed that any loss of frankness and candour would inhibit the quality of advice to Ministers and their deliberation.
15. MOJ said that the higher level of sensitivity for prejudice 'would' occur, rather than 'would be likely to' occur applied.
16. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is not necessary for the Commissioner to agree with the opinion of the QP in a particular case. Moreover the opinion does not have to be the only reasonable opinion that could be held or even the 'most reasonable' opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable. In other words, it is an opinion that a reasonable QP could hold.
17. The Commissioner considered it was a reasonable opinion to hold that disclosure would, or would be likely to, prejudice MOJ's ability to consider and deliberate freely and frankly the issues identified. It is a reasonable opinion for the QP to hold that MOJ needed to be able to deliberate internally without having to manage the distraction and later disclosure of full and frank internal discussions.
18. The Commissioner saw that the financial consequences of PIDR decisions were very significant for many organisations, both public and private, and for individuals. He had regard for the views of the parties

and found especially weighty the MOJ QP's view and MOJ's wider evidence that the higher level of prejudice 'would' occur. He therefore decided that the section 36(2) FOIA exemption had been correctly engaged by MOJ.

Public interest test

19. The complainant said he was concerned that the system should be fair to both claimants and defendants as well as to the public purse. He said that in his view, the fresh legislation enacted after February 2017, took a completely different approach and no longer related to ILGS. He added that two of the three issues he had specified in his request were no longer relevant to future PIDR decisions. He opined that the factors that had guided the 2017 decision were now merely of historical interest.
20. MOJ said that arguments for disclosure included the need for transparency; the government had to be accountable to the electorate and trusted by it. MOJ added that disclosure would enable the wider public to form a view on the quality of the advice given and the quality of the decision making process itself. Disclosure would facilitate debate on issues relating to the PIDR. However MOJ said that the need for transparency had been met by the publication in February 2017 of the then Lord Chancellor's statement of reasons which had set out in detail the rationale for the 2017 PIDR decision.
21. MOJ said that the case for maintaining the exemption included the importance of safeguarding openness and candour and ensuring that Ministers had access to full and frank advice from officials. Advice given needed to be the best available and not tainted by any 'chilling effect' that might otherwise inhibit officials who needed to discuss the issues without fear of subsequent disclosure.
22. MOJ added that the withheld information remained live and was undiminished in importance despite the passage of time; the information therefore remained relevant to future PIDR decisions.
23. The public interest balancing test for the section 36(2) FOIA exemption requires the Commissioner to consider the extent, severity and frequency of the inhibitions claimed by MOJ. For the avoidance of doubt, the Commissioner makes clear that he has no mandate to consider the substantive issues the request raised and he did not do so in this matter.
24. The Commissioner considered whether or not the withheld information was of historical interest only. In making his determination, he viewed the withheld information. He took careful note of evidence from the

complainant and MOJ. In the light of the evidence before him, he decided that the withheld information could still be of continuing relevance to future PIDR decision making.

25. The Commissioner recognised the public interest in transparency, accountability and facilitating public debate of what he accepted were important issues the decisions on which would impact the finances and lives of many, often vulnerable, individuals as well as relevant organisations. He also saw that there was a strong public interest in the public having access to information which enabled them to understand clearly how identified PIDR decisions were arrived at and to scrutinise how MOJ managed the challenges they faced.
26. The Commissioner attributed considerable weight to the opinion of the QP who had been briefed on relevant issues by expert officials when he had made his reasonable decision. Ministers needed to decide matters with the benefit of full knowledge and receive full and frank advice from officials. He expected officials to give robust advice but accepted that a significant chilling effect could sometimes prevent that from happening. The Commissioner had regard for the QP's opinion that prejudice to MOJ 'would' result from disclosure.
27. While accepting that there were arguable grounds for disclosure, the Commissioner considered that the case withholding the information was stronger. He therefore decided that MOJ had acted correctly in maintaining the section 36(2) FOIA exemption.

Section 42 – legal professional privilege

28. The complainant acknowledged that the legal professional privilege FOIA exemption was pertinent but argued that it was now only of historical interest.
29. MOJ said that relevant information being withheld was subject to legal advice privilege. The relevant information comprised communications between lawyers and clients and it was important for those to be protected.
30. The Commissioner, having considered the representations of the parties and seen the withheld information, decided that the section 42(1) FOIA exemption had been correctly engaged to withhold the relevant information.
31. Section 42(1) FOIA is a qualified exemption. It is therefore subject to the public interest test. The Commissioner considered whether, in all the circumstances of the case, the public interest in disclosing the information outweighed the public interest in maintaining the exemption.

Public interest test

32. The complainant said that legal advice given some years earlier was now of historical interest only.
33. MOJ accepted the need for transparency, accountability and facilitating public debate of complex and weighty issues. MOJ added that the then Lord Chancellor's publication of a statement of reasons in February 2017 did much to address this need.
34. MOJ said that they needed to safeguard openness and candour and ensure that Ministers had access to full and frank legal advice in order to uphold the proper administration of justice.
35. The Commissioner acknowledged that the reasons advanced for disclosure were valid. He recognised the public interest in proper transparency, accountability and in members of the public gaining access to information enabling them to understand clearly why, in 2017, particular decisions had been made and processes followed. He saw that MOJ had already published much explanatory information.
36. However he did not consider these concerns alone were so compelling or of such high public interest as to override the long standing principle of upholding legal professional privilege between lawyer and client.
37. The Commissioner considered that by far the stronger public interest lay in protecting the ability of MOJ and other public bodies to seek and receive high quality legal advice when they needed it without fear that it could later become public knowledge.
38. The Commissioner was therefore satisfied that the balance of the public interest favoured maintaining the exemption to protect the strong public interest in Ministers having access to full and frank legal advice when it was needed. He considered that inappropriate disclosures would damage the client/ lawyer relationship and would leave MOJ unable properly to defend their interests as they saw fit.
39. The Commissioner was therefore satisfied that the balance of the public interest favoured maintaining the section 42(1) FOIA exemption and decided that MOJ had applied the exemption correctly.

Right of appeal

40. 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

41. 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.
42. 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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