

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 6 October 2022

**Public Authority:** Ministry of Justice  
**Address:** 102 Petty France  
London  
SW1H 9AJ

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the Government's consideration of the case for reform to bereavement damages.
2. The Ministry of Justice (MoJ) provided some information within the scope of the request but refused to disclose the remainder, citing section 35(1)(a) (formulation of government policy etc) of FOIA.
3. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a) and that, in all the circumstances of the case, the public interest favours maintaining the exemption.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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5. On 11 August 2021, the complainant wrote to the MoJ and requested information in the following terms:

"By way of background, in response to a parliamentary question, the Ministry has stated that the Government has considered the case for reform to bereavement damages. For your reference, see <https://questions-statements.parliament.uk/written-questions/detail/2021-07-13/32479>

Under the Freedom of Information Act, can you please provide any:

- Internal and/or external communications (including emails, meeting minutes, letters etc.) which relate to the Government's consideration of the case for reform to bereavement damages
- Internal and/or external papers/documentation which relate to the Government's consideration of the case for reform to bereavement damages.

Please provide any such papers/communications/documentation dated on or after 16 July 2019".

6. The MoJ responded on 7 September 2021. It denied holding the requested external information, but confirmed that it holds some of the requested internal information. However, it refused to disclose that information, citing sections 21 (information accessible by other means) and 35 (formulation of government policy etc) of FOIA.
7. The complainant requested an internal review of the MoJ's refusal to disclose ministerial submissions.
8. Following an internal review the MoJ wrote to the complainant on 7 October 2021, confirming its application of section 35.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 20 October 2021 to complain about the way his request for information had been handled.
10. He disputed the MoJ's application of section 35 and considered that the public interest favoured disclosure.
11. During the course of the Commissioner's investigation, the MoJ revisited its handling of the request, additionally citing section 40 (personal information) of FOIA in relation to withholding the names of staff whose names appear on documents who are below Senior Civil Service grades.
12. The complainant told the Commissioner that he was happy for the MoJ to redact those names.
13. Accordingly, the analysis below considers the MoJ's application of section 35 of FOIA to the information withheld by virtue of that exemption.
14. In correspondence with the complainant, the MoJ described that information as "a small number of ministerial submissions".

## Reasons for decision

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### Section 35 – formulation of government policy etc

15. Section 35(1)(a) of FOIA states that:

‘Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy’.

16. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

17. The purpose of section 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.

18. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

19. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

20. The exemption covers information which ‘relates to’ the formulation or development of government policy. The Commissioner considers the term ‘relates to’ can be interpreted broadly.

21. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.

22. The complainant told the MoJ that he considers that the value of maintaining a ‘safe space’ regarding this matter is questionable, “as, according to previous statements, the Government has considered the case for reform, and has no plans to consult on changes”. In that respect he referred the MoJ to the response to the Parliamentary Question cited in his request.

23. He also questioned the MoJ's view that the issue is subject to ongoing review.
24. The MoJ acknowledged the complainant's view that the Ministry has a settled policy in relation to reviewing the Fatal Accidents Act 1976 and the bereavement damages regime. In its correspondence with the complainant, the MoJ referred to the response to the Parliamentary Question cited by the complainant. It highlighted the phrase 'the Government does not currently have any plans', emphasising the word 'currently'.

25. It also told him:

"It is critical that officials feel able to provide Ministers with full and candid advice in the formulation of decisions.

If the material were to be disclosed there is a real risk that officials are likely to feel inhibited in the advice offered for future advice on this issue, which remains a live one in the sense that APIL [Association of Personal Injury Lawyers] actively campaigns for a review and for the reform of the current law in England and Wales. We continue to receive regular Ministerial correspondence following the publication of APIL's report in April 2021, 'Bereavement Damages: a disunited Kingdom'. As such Ministers are returning to this issue and the policy arguments that relate to it on a regular basis".

26. The MoJ concluded that there is a significant risk of a chilling effect on the advice officials would offer if there is a prospect of internal submissions on this topic being disclosable.
27. The MoJ explained to the Commissioner that the basis for the exemption being applied:

"... was the need for the Government to formulate policy and keep it under review within a safe space where Ministers can be offered frank and full advice".

28. Having considered the withheld information, and mindful of the purpose of the exemption, the Commissioner is satisfied that it is exempt from disclosure on the basis of section 35(1)(a) of FOIA.

### **Public interest test**

29. Section 35 is a qualified exemption and therefore 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 disclosure of the information**

30. The complainant argued that there is a significant public interest in disclosure in this case. He told the Commissioner:

“Criticism of the existing regime has been made since at least 2013. That these criticisms have not been addressed through changes in policy adds weight to the public interest in disclosure”.
31. He told the Commissioner that disclosure of the requested information may serve to increase public understanding of why no changes have been made.
32. He also argued that disclosure of the requested information may allow stakeholders to better perform their roles in holding the Government to account on the issue of reform to the bereavement damages regime.
33. The MoJ acknowledged that greater transparency generally makes government more accountable to the electorate and increases trust. It also recognised that awareness of the information might further public debate on issues relating to bereavement damages.

### **Public interest in maintaining the exemption**

34. In favour of maintaining the exemption, the MoJ told the complainant:

“The government needs a safe space to develop ideas, and to debate live issues reaching decisions away from external interferences and distractions”.
35. It also said that the issue that is the subject of his request “is subject to ongoing review and public debate...”. In the MoJ’s view, that increases the relevance of the argument that disclosure would inhibit free and frank discussions and circumscribe the duty of candour “leading to a chilling effect in policy discourse”.

### **Balance of the public interest arguments**

36. The Commissioner recognises the general public interest in transparency, openness and accountability.
37. He also acknowledges that the relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
38. In this case, the Commissioner considers that there is a clear public interest in the disclosure of information which can inform public debate on sensitive matters, namely those relating to bereavement damages.

39. However, he has also taken into account the MoJ's reference to the issue under consideration - the case for reform to bereavement damages - being subject to ongoing review.
40. He gives weight to the argument that disclosing the information at the time of the request would have been likely to have had a significant impact. The public interest in the MoJ being able to review and develop its policy in relation to bereavement damages, without significant disruption, is the overwhelming factor in the circumstances of this case.
41. Having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at the time of the request was of sufficient significance for him to conclude that maintaining the exemption outweighed the public interest in disclosure.

## Right of appeal

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42. 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)

43. 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.
44. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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