

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 February 2022

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested costings information received by the Ministry of Justice (the 'MOJ') from OCS Cleaning Group UK Ltd in relation to improving cleaners pay between specified dates. The MOJ initially refused the request on the basis of the section 43 FOIA exemption (commercial interests). During the course of the Commissioner's investigation, whilst the MOJ maintained that section 43(2) applied, it additionally cited section 36 (prejudice to effective conduct of public affairs), section 41 (information provided in confidence) and section 43(1) (trade secret).
2. The Commissioner's decision is that sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged. Having considered the associated public interest tests the Commissioner finds that the public interest favoured maintaining all three limbs of the section 36 exemption. As he has found that the MOJ was entitled to rely on sections 36(2)(b)(i) and (ii) and section 36(2)(c), he has not deemed it necessary to consider the MOJ's reliance on the other cited exemptions.
3. The Commissioner does not require the MOJ to take any steps to ensure compliance with the legislation.

Background

4. The request was originally made to the MOJ by an individual who was representing his employer. This individual then made a subsequent complaint to the Commissioner. At the start of the Commissioner's investigation, it became apparent that the original complainant no longer worked at the organisation that had requested the information.
5. Following a conversation with the original complainant, and agreement from all parties, the complaint was passed to another employee from that organisation. He confirmed both that he was now representing the organisation and that the requested information was still required.
6. In terms of providing some context to the request, the MOJ has explained that in January 2018, the MOJ and OCS [OCS Group UK] commenced a new soft services contract that covered the cleaning service to 102 Petty France. The Commissioner understands "soft services" to be those which make the workplace more pleasant or secure to work in, such as cleaning, security and waste management.
7. This contract was awarded to OCS following a competitive bidding process entered into by a number of external service providers.
8. Following commencement of the contract in 2018, any existing staff transferred under TUPE (Transfer of Undertakings (Protection of Employment)) regulations to OCS with their existing terms and conditions. As part of the transfer and mobilisation process, the application of the Living Wage Foundation's Real Living Wage and London Living Wage arose and the MOJ asked OCS to provide a cost impact assessment. After due consideration this was not taken any further.

Request and response

9. On 11 November 2020, the complainant wrote to the MOJ and requested information in the following terms:

"Please provide me with any costings received by the Ministry of Justice / the Secretary of State for Justice from OCS Group UK Ltd for improving the pay of cleaners employed by OCS Group UK Ltd and deployed to 102 Petty France, London, SW1H 9AJ, between February 2018 and April 2018 inclusive."
10. The MOJ responded on 4 December 2020. It refused to provide the requested information citing the section 43 FOIA exemption for

commercial interests and stating that the associated public interest test favoured maintaining the exemption.

11. The complainant requested an internal review on 4 February 2021, which the MOJ provided on 3 March 2021. It maintained that section 43(2) applied.

Scope of the case

12. The original complainant contacted the Commissioner on 20 April 2021 to complain about the way his request for information had been handled. He submitted the following grounds of complaint which the Commissioner asked the MOJ to consider as part of its investigation response:

“Our principle complaint about this determination is that crucial public interest considerations were not taken into account when assessing whether the commercially sensitive material ought to be disclosed. The MOJ summarises the public interests in favour of disclosure as (i) general transparency and (ii) facilitate confidence in public decision-making. These are generic points that would not have much weight in the balance. But there is a major additional factor: disclosure would allow assessment of the equality implications of decisions regarding the terms and conditions of (predominantly BAME [black, Asian and minority ethnic]) outsourced workers.”

13. During the course of the investigation, the MOJ informed both the Commissioner and the complainant that, in addition to section 43(2), it wished to rely on the following exemptions:
 - Section 36 – prejudice to effective conduct of commercial affairs.
 - Section 41 – information provided in confidence.
 - Section 43(1) – trade secret.
14. The Commissioner has first considered the MOJ’s reliance on section 36. Specifically, the MOJ has cited subsections 36(2)(b)(i) and (ii) and 36(2)(c), the definitions of which are set out below.

Reasons for decision

Section 36 – prejudice to effective conduct of commercial affairs

15. Section 36(2)(b) and (c) of FOIA provide that:

“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-

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

16. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the ‘Qualified Person’) within the public authority giving an opinion on the likelihood of prejudice occurring.

The Qualified Person’s Opinion

17. The MOJ sought the view of Mr Cartlidge MP as the Qualified Person for the MOJ, a role defined in the legislation. The Commissioner is satisfied that Mr Cartlidge is a Qualified Person for the purposes of FOIA.

18. The Commissioner has had sight of the MOJ’s section 36(2)(b)(i), (ii) and (c) submissions to the Qualified Person of 17 December 2021 and of his Opinion given on 20 December 2021.

19. The MOJ advised that the submissions, which included a copy of the withheld information, and the Opinion, were written down. The MOJ explained that the Qualified Person was provided with submissions that include contrary arguments as to why section 36 was not engaged, together with an assessment of the arguments in favour of disclosing the information and ‘for’ and ‘against’ public interest arguments. Ultimately, the submissions recommended applying the section 36 exemption.

20. On the evidence available, the Commissioner is satisfied that an Opinion was given by the Qualified Person on 20 December 2021.

Is the Qualified Person's Opinion reasonable?

21. The MOJ has requested that the actual submissions to the Qualified Person are not replicated in this decision notice due to the potential harm this may cause. The Commissioner has respected this request.

22. The Qualified Person identified three limbs of the exemption that he believed were applicable to the withheld information; he said that disclosure would prejudice the free and frank provision of advice and the free and frank exchange of views (sections 36(2)(b)(i) and (ii)). He also said that disclosure would prejudice the MOJ's ability to offer an effective public service or to meet its wider objectives, or where there could be an effect on other bodies or the wider public sector (section 36(2)(c)).

23. In relation to section 36(the MOJ told the Commissioner:

“In this case, MOJ believes that the likelihood is that the prejudice would occur as a result of the requested disclosure.”

24. The MOJ also said:

“In this case the withheld information relates to the interest this exemption is meant to protect, which is to enable free and frank advice, and deliberations on the topic, and the providing [sic] an efficient public service. Specifically keeping the requested information confidential ensures candid, uninhibited debate and discussions.”

25. In relation to the prejudice, the MOJ said that, in the Qualified Person's Opinion, the withheld information relates to important and sensitive issues. It explained:

“Due to the reasonable expectation of confidentiality regarding the specific withheld information, it is a reasonable opinion to believe that any disclosure would be likely to inhibit the openness, and sharing of information”.

And,

“Were the specific requested information to be disclosed, it would have a detrimental effect on views offered because the debate on this topic would adversely impact the commercial position of an individual service provider.”

26. Section 36 places the Qualified Person's Opinion at the centre of exemption. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is not for the Commissioner to substitute

his own opinion for that of the Qualified Person's. For an opinion to be reasonable, it need not be the most reasonable opinion available. If it is an opinion that a reasonable person could hold, then it is reasonable.

27. The Commissioner considers that an opinion is likely to be unreasonable if it fails to explain why the exemption applies to the particular withheld information or if the explanations do not relate to the limb(s) of the exemption that have been cited.
28. The Commissioner does not consider that it is a wholly unreasonable opinion to consider that disclosure of the requested information in this case would result in some form of inhibition to discussions on the topic of the request and would prejudice the operation of an effective public service. The likelihood and severity of any inhibition will be considered further in the public interest test. The Commissioner notes that some of the arguments noted by the Qualified Person relate to commercial interests (see paragraph 25), overall the Commissioner accepts that the Qualified Person has provided an opinion on the application of section 36. Further, the explanations relate to both the withheld information and to the aspects that section 36 is designed to protect.
29. The Commissioner must consider whether the Qualified Person's opinion was reasonable as to the level of likelihood of that inhibition and prejudice occurring. The Commissioner notes that there is some inconsistency in the Qualified Person's opinion and the MOJ's submissions as to the level of likelihood, as 'would be likely' has been referred to in discussion of some aspects of the application of the exemption. However he is satisfied that overall, the Qualified Person's opinion was that disclosure of the information 'would' inhibit both the free and frank provision of advice and exchange of views, and would prejudice the effective conduct of public affairs in the ways specified. This is the higher threshold of probability.
30. The Commissioner has considered the opinion of the Qualified Person. In the circumstances of the case, and having reviewed the withheld information, the Commissioner is satisfied that it was reasonable for the Qualified Person to hold the opinion that inhibition and prejudice relevant to sections 36(2)(b)(i) and (ii) and 36(2)(c) would occur if the information were disclosed.
31. The Commissioner therefore accepts that sections 36(2)(b)(i) and (ii) and 36(2)(c) are engaged.

Public interest test

32. Section 36 is a qualified exemption and therefore, even where prejudice is identified as resulting from disclosure, the information can only be withheld if the balance of the public interest favours maintaining the exemption.
33. In the Qualified Person's Opinion, the higher bar that disclosure 'would' cause prejudice applies, meaning that the likelihood of prejudice is more than 50% to occur should the withheld information be disclosed.
34. In carrying out a public interest test, the Commissioner must weigh the public interest in preventing the prejudice that would occur against the public interest in disclosure. The Qualified Person's Opinion will affect the weight of the argument for withholding the information. If, as is the case here, the Qualified Person has decided that disclosure 'would' prejudice or inhibit, this carries a greater weight than if he had said disclosure 'would be likely' to prejudice or inhibit.
35. In line with his guidance on the public interest test¹, the Commissioner must consider the situation at the time at which the public authority originally dealt with the request, or the time of the authority's internal review. Accordingly, in this case, the circumstances to be considered when carrying out the public interest test are those at the time of the internal review, namely 3 March 2021.
36. The Commissioner has considered the public interest submissions in relation to all three subsections of section 36.

Public interest arguments in favour of disclosure of the information

37. In this case, the complainant was given the opportunity to comment on the MOJ's reliance on section 36, which occurred during the Commissioner's investigation. The complainant did not submit any public interest arguments as such, but asked the Commissioner to refer to the initial case.
38. The Commissioner has therefore, taken into consideration, the complainant's point set out in paragraph 12 of this notice, namely that disclosure would allow assessment of the equality implications of

¹ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

decisions regarding the terms and conditions of predominantly BAME outsourced workers.

39. In this case the withheld information relates to the interest this exemption is meant to protect, which is to enable free and frank advice, and deliberations on the topic, and the provision of an efficient public service. The MOJ argued that specifically keeping the requested information confidential ensures candid, uninhibited debate and discussions.
40. In relation to all three subsections of section 36, the MOJ made the following submissions in favour of disclosure of the withheld information:
- The MOJ recognises the public interest in transparency and the commitment to being open and transparent.
 - Disclosure of the information could enable wider public scrutiny of Government considerations and decision-making. Scrutiny of government decisions is a force of good in a democracy.
 - The release of this information may lead to greater transparency as it may help the public understand the reasons for outsourcing or how contracts with labour costs are costed.

Public interest arguments in favour of maintaining the exemptions

41. In relation to the subsections of section 36(2)(b), the MOJ stated that:

“There is a specific public interest in preserving the confidentiality of service providers’ discussions and views on this topic, and not inhibiting the free and frank exchange of views between MOJ and providers on this issue.”

And,

“Under Section 36(2)(b)(i) and (ii) in order to ensure the highest quality discussions and decisions are made, MOJ and OCS (the contract provider) needs [sic] to be able to express their views freely and fully, in confidence.”

42. With regard to its section 36(2)(c) submissions, the MOJ said it:

“...considers that delivering an effective service requires the government departments to have a “safe space” to express their views on this topic. It may be the case that suggested recommendations are not always actioned due to certain reasons, and the public disclosure of such information may cause

the public to lose confidence in such government departments. Further, if the requested information were to be disclosed, they could be taken out of context and it could damage the validity of the views of the respective government department and lead to loss of confidence in such government department, and the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure would prejudice the effective conduct of their public affairs and services provided. The disruption caused would be the effort and time defending and debating options that have already been considered or a position which is now out of date as National Minimum and Real Living and London Living Wages have all changed annually since this data was produced so is also out of date and not representative of the current financial position”.

43. The MOJ submitted other arguments it deemed to be confidential so they have not been replicated here. However, the Commissioner has taken them into account when balancing the public interest.

Balance of the public interest arguments

44. The Commissioner accepts that there is a public interest in disclosing the withheld information, particularly in view of the potential for wider public scrutiny and understanding, together with aiding public confidence in the MOJ's decision-making around outsourced services. He also accepts that disclosure of the requested information would promote the general principles of openness and transparency.
45. The Commissioner is mindful that the public interest in accountability has already been addressed by the MOJ's engagement with the trade unions on this issue and by the fact that this topic has been fully considered and rejected by the Civil Service Board in 2019.
46. The Commissioner has considered the complainant's view that disclosure would allow an assessment of the equality implications of pay decisions, particularly given that the complainant has advised that the majority of the outsourced cleaners are BAME. The Commissioner recognises the importance of the MOJ (and all UK organisations) abiding by the Equality Act 2010, and accepts that disclosure of the withheld information could provide further transparency in this area. However, he is also aware that there are other routes to pursue potential discrimination claims which therefore reduces the public interest in disclosure of this information through FOIA.
47. The Commissioner notes that the Qualified Person's Opinion is that disclosure of the requested information 'would' prejudice the free and frank provision of advice and exchange of views for the purpose of

deliberation, and the effective conduct of public affairs. As set out above, this higher threshold carries more weight in the public interest balancing exercise.

48. The Commissioner accepts the MOJ's stance that disclosure would also prejudice the effective conduct of public services by suppliers, civil servants from commercial, human resources and financial functions, relating to public spending. The Commissioner agrees that in order to ensure an effective service can be provided to the public, it is important that there is a "safe space" for government officers of the MOJ to have a robust confidential, deliberation process, on the pay issue. A loss of confidentiality, caused by disclosure, would prejudice the public service MOJ provides, by affecting the range of options considered on how to provide an effective public service. The information requested relates to a decision-making process, which is applicable to several government departments, therefore the Commissioner recognises the need to protect the process both for MOJ and other government services to ensure they are not prejudiced.
49. The Commissioner accepts that the MOJ's safe space arguments were especially relevant at the time of the request and internal review. He is mindful of the need for the MOJ to be able to protect the complete views of those organisations partaking in the pay review process, particularly given the sensitivities surrounding pay.
50. On balance the greater public interest is, in the view of the Commissioner, held in preserving the ability of the MOJ to effectively conduct its public affairs.

Conclusion

51. It follows that the Commissioner upholds the MOJ's reliance on sections 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA for the requested information withheld under section 36.
52. As he has found the above three subsections of section 36 to be engaged, the Commissioner does not deem it necessary to consider the MOJ's reliance on the other cited exemptions.

Right of appeal

53. 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

54. 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.
55. 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

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