

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 September 2011

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

Summary

The complainant submitted a request to the Ministry of Justice (MoJ) for the statistics considered by the Secretary of State for Justice, Ken Clarke, prior to his announcement that the government would not enforce a policy of 'absolute tariffs' for anyone caught carrying a knife. The MoJ refused to provide the information relying on the exemption contained at section 21 for some of the information and on the exemption contained at 35(1)(a) for the remainder of the information. The Commissioner has decided that the MoJ was incorrect to rely on section 21 as the information was not reasonable accessible to the complainant. The Commissioner has also concluded that although the remaining information is exempt from disclosure on the basis of section 35(1)(a), the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant submitted the following request to the Ministry of Justice (MoJ) on 5 January 2011:

'Please release all statistical data used, viewed or taken into consideration by Justice Secretary Ken Clarke prior to his announcement that the government would not enforce a policy of "absolute tariffs" for anyone caught carrying a knife.

It is my understanding that the Act permits the release of statistical data used in forming government policy.

This link may be useful for reference -

[http://www.bbc.co.uk/news/uk-politics-11929401.](http://www.bbc.co.uk/news/uk-politics-11929401)'

3. The MoJ responded on 26 January 2011 and explained that 'as most of the information you are seeking is already in the public domain' it believed that the information was exempt from disclosure on the basis of section 21 of the Act. The MoJ directed the complainant to the following four website links:

<http://www.hesonline.nhs.uk/Ease/servlet/ContentServer?siteID=1937&categoryID=211>

<http://www.justice.gov.uk/publications/reoffendingofadults.htm>

<http://rds.homeoffice.gov.uk/rds/crimeew0910.html>

<http://www.justice.gov.uk/publications/knife-possession-sentencing.htm>

4. The complainant contacted the MoJ on the same day and explained that its response did not answer his request. He noted that the Act specifies that data taken into consideration before policy is formed should be made available. The complainant also noted that Ken Clarke is the Minister responsible for forming policy in this area and it is he who takes the final decision within the department. However, the response suggested that relevant information exists within the department and NHS that is publically available, but his query was not what is available should a Minister or civil servant choose to look at it, but what information was actively considered by Ken Clarke prior to forming the policy as referenced in his email.
5. The MoJ subsequently issued an undated letter in which it informed the complainant of the outcome of the internal review. The review upheld the application of section 21 as cited in the refusal notice. However the review also explained that further information relevant to the request had been located but this was being withheld on the basis of 'section 35(2)' of the Act.

The Investigation

Scope of the case

6. The complainant contacted the Commissioner on 11 March 2011 in order to complain about the way in which the MoJ had responded to his request. Firstly, he noted that providing him with a list of websites did not identify which specific information was considered explicitly by the Secretary of State for Justice. Secondly, he disputed the application of 'section 35(2)' given the explicit provisions within the Act to allow the public to see what statistics had been considered in the formulation of government policy. The complainant also argued that the public must be given the chance to disagree with Ministers' interpretation of statistics and their importance.

Chronology

7. The Commissioner contacted the MoJ on 27 May 2011 and asked for a copy of the information that had been withheld. The Commissioner asked the MoJ to confirm that this information had been specifically considered by the Secretary of State himself. The Commissioner also noted that 'section 35(2)' was not in fact a valid exemption, albeit that this section did make reference as to how the exemption contained at section 35(1)(a) could be applied to statistical data. The Commissioner therefore asked the MoJ to clarify the basis upon which it believed the exemptions contained within section 35 applied to this request.
8. The Commissioner received a response from the MoJ on 18 July 2011 in which it provided the withheld information and clarification on its reliance on section 35. The MoJ confirmed that the withheld information that it provided to the Commissioner was information personally considered by Secretary of State when making a decision in relation to this policy.

Analysis

Substantive Procedural Matters

9. The complainant in this case only sought the 'statistical' information considered by the Secretary of State. The term statistics is not defined within the Act but the Commissioner considers statistical information to be the product of some form of mathematical or scientific analysis and will include the facts and data which are fed into the analytical models.

10. The withheld information provided to the Commissioner by the MoJ consists of fourteen numbered paragraphs along with associated footnotes. Having reviewed the information the Commissioner is of the opinion that some of it does not fall within the scope of the complainant's request because it cannot accurately be described as statistical information. Rather such information consists of descriptions of policy options in respect of sentencing for knife crime expressed without reference to any sort of numerical analysis. The Commissioner therefore believes that such information falls outside the scope of the request. This is the information contained at the paragraphs numbered 10, 13 and 14 in the MoJ's submissions to him. The Commissioner has not therefore considered whether such information is in fact exempt from disclosure.
11. With regards to the information that the Commissioner does accept is within the scope of the request, the paragraphs numbered 1 to 9 have been withheld on the basis of section 21 and those numbered 11 and 12 have been withheld on the basis of section 35(1)(a).

Exemptions

Section 21 – Information reasonably accessible by other means

12. Section 21 provides that information is exempt from disclosure if it is reasonably accessible to the applicant.
13. In the Commissioner's opinion in order for a public authority to be able to correctly rely on this exemption it needs to be able to precisely direct an applicant to the requested information. This is to say it needs to give an applicant sufficiently clear directions so that the requested information can be found without difficulty and not hidden within a mass of other data.
14. The Commissioner has considered the parts of the withheld information that the MoJ has argued is exempt from disclosure on the basis of section 21 of the Act. In the Commissioner's opinion this information is clearly not reasonably accessible to the complainant by virtue of four URLs provided to him by the MoJ. This is because the statistical information that has been withheld by the MoJ under this exemption consists of approximately two pages of data. In comparison the volume of information contained on the websites the complainant was directed to is vast with hundreds, if not thousands, of pieces of data. In the Commissioner's opinion it would be very difficult, if not impossible, for the complainant to locate the withheld information within the data contained on the websites the MoJ directed him to. The Commissioner has therefore concluded that the MoJ is not entitled to rely on section 21 of the Act to withhold the information contained at the paragraphs

numbered 1 to 9, including the footnotes associated with these paragraphs.

Section 35(1)(a) – formulation and development of government policy

15. Section 35(1)(a) provides that:

‘Information held by a government department or by the National Assembly for Wales 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 scope 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 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. ‘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. At the very least ‘formulation or development’ suggests something dynamic, i.e. something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.

18. The MoJ has explained to the Commissioner that the policy in question is sentencing policy for individuals carrying knives. The MoJ also explained that it was clear that the information in question related to the formulation of the policy in question because the requested information was part of the submission given to the Secretary of State for Justice.

19. The Commissioner accepts that the withheld information falls within the scope of section 35(1)(a) because it obviously constitutes information relating to the formulation and development of an identifiable government policy. However, before concluding that the

exemption has been applied correctly he must take into account the affect of section 35(2) of the Act. This states that:

'Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy'

20. In the Commissioner's opinion for section 35(2) to have affect three criteria have to be met:
1. The information constitutes statistical information;
 2. The policy decision to which it relates has been taken; and
 3. The statistical information provided an informed background to that decision.
21. The MoJ accepts that the first and third criteria are met. However it believes that the second criterion is not met because at the time of the request the policy decision to which the statistical information relates to had not been taken. In support of this position the MoJ explained that on 7 December 2010 the government's consultation on sentencing policy, *Breaking the Cycle*, was launched with a closing date for replies of 4 March 2011 with the government response being published on 21 June 2011. At the time the consultation was launched the proposals put forward were to maintain the existing sentencing regime in respect of knife crime. Although there was no specific question relating to knife crime in the consultation document, the maintenance of the existing regime represented a change from the Conservative manifesto commitment and this issue remained, at the time of the complainant's request, an area of ongoing debate within the wider context of the *Breaking the Cycle* consultation.
22. On the basis of this explanation the Commissioner agrees with the MoJ that at the time of the complainant's request the policy decision in respect sentencing on knife crime was still in the process of formulation and development and therefore section 35(2) cannot have affect in the circumstances of this case. The information contained at the paragraphs numbered 11 and 12 is therefore exempt from disclosure on the basis of section 35(1)(a).

Public interest test

23. However section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the Act and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of maintaining the exemption

24. The MoJ argued that with regard to the consultation on sentencing policy, it was important for officials and Ministers to have a protected space within this area of ongoing debate. It is vital that the department can consider the different policy options without fear of speculation which may influence final policy decisions, especially in regard to a policy such as this which has attracted a great deal of public interest.
25. It is extremely important that government policy has the strongest possible evidence base. Disclosure of this information could therefore be detrimental to the extent that stakeholders, both internal and external, would be less prepared to make representations and provide advice on matters on which they are often experts, to the overall detriment of the policy development process. This can ultimately lead to less effective decision making on policy matters being made in the future.
26. Additionally the policy development process is often iterative with early proposals being amended, or rejected altogether, as the development of the policy continues. It is important that Ministers and officials are able to proceed with continuing process of policy development freely and on confidence.

Public interest arguments in favour of disclosing the requested information

27. The MoJ acknowledged that decisions taken by Ministers in the MoJ have a significant impact on the lives of the public and therefore there is a public interest in this process being transparent. This greater transparency makes government more accountable to the electorate and increases trust. There is also an argument that disclosure of this information can satisfy the public that the process and advice relating to the development of the policy is of a high quality.
28. The complainant argued that the public must be given the chance to disagree with Ministers' interpretation of statistics and their importance.

Balance of the public interest arguments

29. In considering the balance of the public interest arguments outlined above, the Commissioner has taken into account the comments of a key Information Tribunal decision involving the application of the section 35(1)(a).¹ In that case the Tribunal confirmed that there were two key principles that had to be taken into account when considering the balance of the public interest test: firstly the timing of the request and secondly the content of the requested information itself.
30. The Commissioner has initially considered the weight that should be attributed to the public interest arguments in favour of maintaining the exemption:
31. With regard to the safe space arguments, these are only relevant if at the time of the request, the policy formulation and development was ongoing. This is because such arguments are focused on the need for a private space in which to develop live policy. For the reasons discussed above in relation to section 35(2) the Commissioner accepts that at the time of the complainant's request the policy formulation and development remained ongoing.
32. In line with the comments of the Tribunal decision referenced above at paragraph 29, the Commissioner believes that significant and notable weight should be given to the safe space arguments in cases such as this where the policy making process is live and the requested information relates directly to that policy making. The Commissioner agrees that it is clearly in the public interest that the MoJ is able to candidly discuss the different aspects sentencing policy away from external scrutiny including the content of statistical information, particular in this case because of the high levels of public and media interest in this topic area.
33. However, the Commissioner believes that the weight that should be attributed to the safe space arguments are lessened to some degree given the content of the information. That is say the withheld information is simply statistical information, it is not information which contains detailed discussions, analysis or suggestions for alternative approaches to sentencing policy. (Indeed by definition such information would fall outside of the complainant's request for information). In the Commissioner's opinion the policy makers' ability to discuss a range of policy options would be less hindered by disclosure of statistical information than the policy options themselves. Furthermore, the Commissioner is mindful of the Tribunal's comments that whilst the

¹ [DFES v Information Commissioner and Evening Standard](#) (EA/2006/0006)

concept of safe space is an important one, information falling within the scope of section 35(1)(a) cannot be regarded as exempt from disclosure per se; it remains a qualified and they will be scenarios where the public interest favoured disclosure despite the need to protect this safe space.²

34. With regard to the chilling effect arguments, the Commissioner notes that these arguments can encompass a number of related scenarios:

- Disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will make future contributions to that policy;
- The idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates; and
- Finally an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other future, different, policy debates.

35. Clearly, in this case as the policy formulation and development was ongoing at the time of the request, the third scenario is not relevant to this case, rather it is simply the first two scenarios upon which the MoJ's argument focus. In considering the weight that should be given to these two scenarios the Commissioner has taken into account the comments of a number of Tribunal and High Court decisions which discussed the concept of the chilling effect.³ As a consequence of these pieces of case law, and bearing in mind the underlying principles set out above, the Commissioner believes that the actual weight attributed to chilling effect arguments have to be considered on the particular circumstances of each case and specifically on the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the information in question would result in the effects suggested by the public authority.

² [Scotland Office v the Information Commissioner](#) (EA/2007/0128) – see para 62.

³ [Foreign and Commonwealth Office v Information Commissioner](#) (EA/2007/0047) – see paragraph 26 and [Credits Guarantee Department v Friends of the Earth \[2008\] EWHC 638 \(Admin\)](#) (17 March 2008) see paragraph 38.

36. Whilst not dismissing the impact of the chilling effect in this case entirely, the Commissioner is reluctant to attribute great weight to it. This is because the Tribunal has argued that it is reasonable to expect civil servants to continue to provide independent and robust advice: 'we are entitled to expect of [civil servants] the courage and independence that ... [is]...the hallmark of our civil service' as they are 'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions.'⁴ Therefore although the Commissioner is prepared to accept that contributors to policy making may for example be less candid in the manner in which they put forward various policy options, he does not accept that contributors would significantly amend the submissions they provide to Ministers to the point of leaving out vital aspects of statistical analysis. In some cases the Commissioner accepts that revealing certain statistical information may reveal policy intention or direction, but he does not find this to be the case here.
37. In the Commissioner's opinion disclosure of the withheld information in this case would provide the public with a more informed insight into the MoJ's proposals in respect of knife crime sentencing. Disclosure would certainly contribute directly to the complainant's aim of understanding exactly what statistical information the Secretary of State for Justice was presented with when reaching a decision whether to enforce a policy of absolute tariffs for anyone caught carrying a knife. With regards to the timing of the request disclosure at time the request was submitted – i.e. January 2011 – could have also allowed interested parties to make a more informed response to the Breaking the Cycle consultation. Disclosure may also inform the public as to why the proposals in December 2010 in respect of knife crime sentencing differed from the proposals set out in the Conservative manifesto.
38. The Commissioner has also taken section 35(4) of the Act into account when considering the public interest balance. Section 35(4) provides:
- 'In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.'

⁴ See EA/2006/0006 paragraph 75(vii).

The Commissioner highlights the fact that this provision focuses on factual information which has been used, or is intended to be used in the decision making process. It therefore highlights the benefits of also disclosing factual information whilst a policy process is ongoing. The information in question is factual information as well as statistical information; in the Commissioner's view there will often be an overlap between the two concepts. This therefore supports the case that significant weight should be given to the public interest in disclosure.

39. Having taken the above into account the Commissioner has decided that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information. He has reached this decision on the basis of the following factors: the limited weight that he has attributed to the chilling effect arguments; the fact that the weight attributable to the safe space arguments is reduced because the information relates simply to statistical information; the relevance of section 35(4); and the fact that the withheld information could, in his opinion genuinely inform the public about the government's proposals regarding sentencing of knife crime which could have led to more informed contributions to the Breaking the Cycle consultation.

Procedural Requirements

40. Section 1(1) of the Act provides a general right of access to information and states that, subject to the application of an exemption:

'Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.'

41. Section 10(1) of the Act requires that a public authority complies with the requirements of section 1(1) promptly and in any event within 20 working days.
42. In the circumstances of this case, as the Commissioner has concluded that the information falling within the scope of the request should be disclosed the MoJ should have provided this to the complainant within 20 working days of his request. The MoJ's failure to do this constitutes a breach of section 1(1)(b) and 10(1) of the Act.

The Decision

43. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act.

Steps Required

44. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Provide the complainant with the information contained at the paragraphs numbered 1 to 9 and 11 and 12 including the footnotes associated with these paragraphs. (These paragraph numbers relate to the numbering adopted by the MoJ when it provided the Commissioner with requested information).
45. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

46. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

47. Although the Commissioner has concluded that the information contained at paragraph 10 of the withheld information falls outside the scope of the request, in complying with the steps set out above the Commissioner suggests that the MoJ gives consideration to also disclosing this paragraph. This is because it places the statistical information that the Commissioner has ordered to be disclosed into context. The Commissioner notes that the information contained at paragraph 10 is already in the public domain.

Right of Appeal

48. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 20th day of September 2011

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
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Cheshire
SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Information Accessible by other Means

Section 21(1) provides that –

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information.”

Section 21(2) provides that –

“For the purposes of subsection (1)-

- (a) information may be reasonably accessible to the applicant even though it is accessible only on payment, and
- (b) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment.”

Section 21(3) provides that –

“For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme.”

Formulation of Government Policy

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,

- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office."

Section 35(2) provides that –

"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications."