

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2022

Public Authority: Ministry of Justice

Address: 102 Petty France

London

SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested an electronic copy of Her Majesty's Government's submission to the Ousley review into the Justice and Security Act 2013. The MOJ cited initially section 22 of FOIA and refused to provide the requested information because it was intended for future publication. Following an internal review, the MOJ additionally cited section 36(2)(c) of FOIA (the exemption for prejudice to effective conduct of public affairs).
2. The Commissioner's decision is that the MOJ was correct to apply section 36(2)(c) of FOIA in this case at the time of the request. As he upheld the MOJ's reliance on section 36, the Commissioner has not found it necessary to consider its citing of section 22 of FOIA.
3. No steps are required as a result of this notice.

Request and response

4. On 30 December 2021, the complainant wrote to the MOJ via the WhatDoTheyKnow.com website and requested information in the following terms:

"Please provide an electronic copy of HM Government's submission to the Ousley review into the Justice and Security Act 2013."

5. The MOJ responded on 28 January 2022. It refused to provide the requested information, citing section 22 of FOIA (information intended for future publication).
6. The complainant requested an internal review on 28 January 2022 which was not provided until after the Commissioner's intervention.
7. The MOJ wrote to the complainant providing the outcome of its internal review on 29 March 2022. Whilst it maintained that section 22 of FOIA applied, it additionally cited section 36(2)(c).
8. The Commissioner has first considered the MOJ's reliance on section 36(2)(c) of FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

9. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a Qualified Person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
10. The MOJ has applied section 36(2)(c) to withhold the requested information in its entirety.
11. Section 36(2)(c) of FOIA states:

"(2) 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—

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs"
12. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a Qualified Person. The Commissioner is satisfied that Minister Cartlidge was authorised as a Qualified Person for the MOJ under section 36(5) of FOIA at the relevant time and that on 4 April 2022 he gave the opinion that the exemption was engaged.
13. The Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the effective conduct of public affairs. It was his opinion that disclosing the requested information would prematurely make evidence influencing a statutory report public before the report itself has been shared with Parliament. This in turn would be likely to jeopardise the relationship between the MOJ and Parliament.

14. The Commissioner is also satisfied that the Qualified Person's opinion, namely that inhibition relevant to subsection 36(2)(c) would be likely to occur through disclosure of the withheld information, is reasonable. He is therefore satisfied that the exemption was engaged correctly.

Public interest test

15. As section 36(2)(c) is a qualified exemption, and as the Commissioner is satisfied the exemption was applied correctly in this case, he has next considered the balance of the public interest test.

Public interest in disclosing the information

16. The complainant did not submit any specific public interest arguments to support his view that the information should be disclosed.
17. In favour of disclosure, the MOJ told the complainant:

"The extension of the use of closed material procedure under the Justice and Security Act 2013 attracted interest by the public at the time of the Bill in 2012-13. There is therefore public interest in the disclosure of the submissions, including the Government's submission, that have been received during the call for evidence on how this procedure has operated since 2013."

Public interest in maintaining the exemption

18. In favour of maintaining the section 36 exemption, the MOJ said:

"The disclosure of the Government response to the JSA [Justice and Security Act] review would be likely to prejudice the effective conduct of public affairs by negatively impacting the relationship between the Ministry of Justice and Parliament, by making evidence influencing a statutory report public before the report itself has been shared with Parliament."

Balance of the public interest

19. The Commissioner must assess whether, in all the circumstances of this case, the MOJ has properly applied section 36 and the associated public interest test.
20. Whilst the Commissioner accepts there is a general public interest in openness and transparency, and in having access to the actual submissions, he is mindful that a report will be published and that once that has happened, a summary of all responses to the 'call for evidence' will be also be published.

21. In reaching his decision in this case, the Commissioner has also considered his earlier decision in a similar complaint in which submissions were requested from the MOJ for the Independent Review of Administrative Law Panel into Judicial Review reform. In that case¹, the Commissioner upheld the MOJ's reliance on section 36(2)(c) of FOIA. His decision was further upheld on appeal by the First-tier tribunal ('FTT').
22. Whilst previous Commissioner decisions and FTT decisions are not legally binding, the Commissioner considers that the similarities between the case under consideration here and his earlier decision cannot be disregarded.
23. Without any strong countervailing arguments, the Commissioner considers that the balance of the public interest favours maintaining the exemption in this case.
24. As he has found section 36(2)(c) of FOIA to have been properly applied in this case, the Commissioner has not deemed it necessary to consider the MOJ's reliance on section 22 of FOIA.

Other matters

25. The complainant has complained about the delay in the MOJ issuing its internal review. The Commissioner notes that the MOJ exceeded both the recommended 20 working days' timeframe and that recommended for more complex cases of 40 working days. He has therefore made a record of this delay.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4019293/ic-126073-w0c6.pdf>

Right of appeal

26. 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

27. 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.
28. 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
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