

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2021

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested the full submissions and underlying evidence and statistics submitted by government departments in response to a 'Call for Evidence' relating to Judicial Review Reform. The Ministry of Justice (the 'MOJ') provided the complainant with the web link to the publicly available submissions. For the remaining withheld submissions, the MOJ said that some information contained in these departmental submissions had been incorporated into a summary document which the MOJ had published in April 2021. However, it withheld the exact detail of those unpublished submissions by virtue of section 36(2)(a)(i) (the exemption for the maintenance of the convention of the collective responsibility of Ministers of the Crown). During the latter stage of the Commissioner's investigation, the MOJ revised its position and cited section 36(2)(c) (prejudice to the effective conduct of public affairs) in relation to the submissions in their entirety. It highlighted those parts of the submissions which it now considered to additionally fall under section 36(2)(a)(i). In relation to the requested underlying evidence and statistics, the MOJ provided the information it held and said it did not hold the remainder.
2. The Commissioner's decision is that the MOJ correctly relied on section 36(2)(c) to withhold the remaining requested submissions. She finds that the balance of the public interest favours maintaining this exemption. As she has found section 36(2)(c) to be engaged, the Commissioner does not consider it necessary to determine whether section 36(2)(a)(i) also applies.

3. The MOJ explained that the complainant had made a separate request to the Home Office in relation to the second part of the request and had secured some information; a copy of that response was sent by the Home Office to the MOJ and is, therefore, now held. The Commissioner notes that the complainant is already in possession of that information through her request to the Home Office, so does not consider it necessary to order the MOJ to provide the same information to her again. In relation to the remaining underlying evidence and statistics which the MOJ said it did not hold, the Commissioner finds, on the balance of probabilities, that this information is not held by the MOJ.
4. The Commissioner does not require the MOJ to take any steps to ensure compliance with the legislation.

Background

5. According to the published Judicial Reform Review consultation document from March 2021¹, the Independent Review of Administrative Law Panel ('IRAL') was established on 31 July 2020 to examine trends in Judicial Review and to deliberate on any recommendations for reform. The consultation process ran from 18 March 2021 to 29 April 2021; a summary of the questions posed are contained at the end of the consultation document (pages 52 to 53).
6. The terms of reference for the review sought to direct IRAL's attention to certain key areas: codification, non-justiciability, the grounds of review and remedies, and procedure. The focus on these areas is reflected in the structure of the review's report ('the Report') published in March 2021². The published consultation document is intended to complement the analysis presented throughout the Report, although not all the issues covered in the Report have been taken forward to this consultation.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/975301/judicial-review-reform-consultation-document.pdf

² https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/IRALreport.pdf

7. Additional information is available publicly on this website³, including that relating to the external stakeholders consulted; however the complainant is only interested in the 28 submissions made by local and central government. A list of the participating government departments is contained within the published Report at Annex E (page 188).
8. A summary document of government responses was published on 7 April 2021⁴ which included unattributed summaries of 14 of the 28 submissions.

Request and response

9. On 1 April 2021, the complainant wrote to the MOJ and requested information in the following terms:

'On 16 March 2021 the Independent Review of Administrative Law Panel ('the Panel') published its Report. On 18 March 2021 the Government published its response ('the Response') and launched its consultation into Judicial Review Reform.

Annex E to the Panel's Report contains a List of Contributors, which includes 28 local and central Government departments. The Report also confirms that additional data was provided by the Ministry of Justice, the Upper Tribunal and the GLD [Government Legal Department]. Both the Report and the Response make some references to submissions made by Government Departments such as Home Office. However, neither these submissions nor the evidence underlying them have been published.

On 18 March 2021 the Lord Chancellor and Secretary of State for Justice Robert Buckland stated in the House of Commons that "The Government submissions to the consultation will be summarised and published within the next 10 days or so, which will give everybody a clear view of submissions to the call for evidence, but in a way that is consistent with collective Cabinet

³ <https://www.gov.uk/government/consultations/judicial-review-reform>

⁴ https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/supporting_documents/summaryofgovernmentstosubmissionstotheIRAL.pdf

responsibility...". The Lord Chancellor did not commit to publishing the submissions in full.

Information requested under the Freedom of Information Act

1. *Please provide all the submissions made by Government Departments to the Panel.*
 2. *Please provide any underlying evidence, data or statistics provided by Government Departments to the Panel (whether those Departments were listed as contributors or not). In particular, please provide the data provided by the Ministry of Justice, and the data underlying the Home Office's claim, quoted at paragraph 4.13 of the Report that "it spent over £75 million in 2019/20 on defending immigration and asylum judicial reviews and associated damages claims".*
10. Following publication of the summary document online on 7 April 2021, the complainant clarified her request further on 8 April 2021 as follows:

"I write further to our FOIA request made on 1 April 2021 for the Government's submissions to the IRAL Panel, along with any underlying evidence, data or statistics provided by Government Departments to the Panel. I have enclosed a copy of that request for your convenience.

I note that yesterday (7 April 2021) the Ministry of Justice published a 'Summary of Government Submissions to the Independent Review of Administrative Law' ('the Summary'). Pages 1 - 18 of the Summary outline, in general terms, the submissions made by 'fourteen Government departments'. It is not clear which Departments' submissions are included in the Summary. Pages 19 - 21 summarise statistical information provided to the Panel by eleven named Departments.

Annex E to the IRAL Report makes clear that fourteen central Government Departments and No. 10 Downing Street provided submissions to the Panel. It appears, but is unclear, that the No 10 Downing Street submission was not included in the Summary.

For the avoidance of doubt:

1. *The publication of the Summary on 7 April 2021 does not exempt the MoJ from complying with the FOIA request we*

made on 1 April 2021. That request was for the submissions and evidence provided by the Government to the Panel, not summaries thereof;

2. Our FOIA request of 1 April 2021 covers all the submissions made to the Panel by Government departments and bodies, which includes the submission made by No. 10 Downing Street. Please take into account the above information when you respond to our FOIA request of 1 April 2021."

11. The MOJ provided its substantive response to the request on 2 June 2021, having notified the complainant of the additional time it would need to consider the public interest test. It clarified which government department submissions had been published and provided the URL weblink⁵.

12. In relation to the remaining withheld submissions, the MOJ said:

"...these have all been incorporated into the summary of Government submissions, also located at the above link. This summary includes the submission from No10, however the exact content of those submissions is exempt from disclosure under section 36(2)(a) of the FOIA, because it would prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown".

13. The MOJ considered that the public interest favoured withholding this information.

14. The withheld submissions are those from:

- Attorney General's Office
- Department for Business, Energy and Industrial Strategy
- Department for Digital, Culture, Media and Sport
- Department for Education
- Department for Environment, Food and Rural Affairs
- Department of Health and Social Care

⁵ <https://consult.justice.gov.uk/judicial-review-reform/judicial-review-proposals-for-reform/>

- Department for International Trade
 - Department for Transport
 - Department for Work and Pensions
 - Foreign, Commonwealth and Development Office
 - HM Treasury
 - Home Office
 - Ministry of Defence
 - Ministry of Housing, Communities and Local Government
 - No. 10 Downing Street
15. In relation to the second part of the request for the underlying data and evidence, the MOJ provided some of the requested information for four government departments (specifically, the Office of the Advocate General for Scotland, Department for Business, Energy and Industrial Strategy, Department of Health and Social Care and the Foreign Commonwealth and Development Office). It said that it did not hold any further requested information and advised the complainant to contact the Home Office for the underlying data for the Home Office claim.
16. The MOJ also explained that:
- "The data that the Ministry of Justice provided was compiled from the published Civil Justice Statistics by the IRAL Secretariat and is already publicly accessible. The Ministry of Justice provided the panel with an online tool to access this data (<https://judicial-reviews-app.apps.alpha.mojanalytics.xyz/>) which is now publicly accessible through the Civil Justice Statistics publications (<https://www.gov.uk/government/collections/civil-justice-statistics-quarterly#2020>). There is a 'Sources' section on page 160 of the IRAL Report that details where the data in the Report came from."*
17. The complainant requested an internal review on 28 June 2021. The MOJ provided its internal review, late, on 23 August 2021 and maintained its original position.

Scope of the case

18. The complainant contacted the Commissioner on 25 August 2021 to complain about the way her request for information had been handled. The Commissioner has considered the complainant's detailed submissions, which mirror those she submitted at internal review:

"Our grounds for review are that, first, the convention of cabinet collective responsibility is not engaged by the information requested. Second, even if the convention is engaged, disclosure of the information would not be likely to prejudice the convention, and therefore the section 36(2)(a)(i) exemption does not apply. Third, even if section 36(2)(a)(i) does apply, the public interest balance favours disclosure of the information."

19. The complainant argued that in response to similar earlier requests made by other requesters, the MOJ had not previously relied on section 36(2)(a)(i) but instead section 35(1) (formulation or development of government policy). Whilst noting the complainant's view, the Commissioner must consider each case on its merits. Furthermore, the MOJ is entitled to cite any exemption it considers most applicable in relation to each request it receives.
20. During the latter stage of the Commissioner's investigation the MOJ revised its position. It now said that it wished to rely on section 36(2)(c) (prejudice to the effective conduct of public affairs) for the withheld submissions in their entirety. It maintained that section 36(2)(a)(i) additionally applied to small sections of the submissions.
21. On 2 November 2021 the Commissioner wrote to the complainant seeking her view on the MOJ's reliance on section 36(2)(c), which she provided on 8 November 2021. She disagreed that section 36(2)(c) could be relied upon for the following reasons which the Commissioner has summarised below:
- That the MOJ was incorrect to rely on section 36(2)(c) in addition to section 36(2)(a)(i) because the prejudice envisaged (ie the principle underlying collective responsibility) by the MOJ does not differ to that identified under section 36(2)(a)(i).
 - That it is *"absurd to suggest that Ministers or officials would have viewed the Call for Evidence by an independent panel external to government as a safe space in which to resolve sensitive policy matters"*.
 - That it is *"absurd"* for the MOJ to argue full disclosure of the departmental Call for Evidence submissions would set a precedent, affecting future reviews which may be necessary.

- That she disagrees with the MOJ's position on confidentiality with regard to those departments making the submissions.
22. The MOJ set out its rationale and arguments in relation to sections 36(2)(a)(i) and 36(2)(c) for the Commissioner's consideration. The MOJ highlighted aspects of its investigation response and the accompanying enclosures in their entirety which it said should not be shared in this notice. Although the Commissioner does not necessarily accept that all of the points highlighted should remain confidential, she has respected the MOJ's position in regard to certain specific aspects of its response and submissions.
23. Given that the MOJ's latest position is that section 36(2)(c) applies to the withheld government submissions in their entirety (with only small sections therein additionally withheld under section 36(2)(a)(i)), the Commissioner has first considered whether the MOJ has properly relied on section 36(2)(c) to withhold the remaining requested information. She has also considered whether, on the balance of probabilities, the MOJ held any further information beyond that already disclosed in relation to the requested underlying evidence and statistics.

Reasons for decision

24. 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"

25. In terms of section 36(2)(c), the issue for the Qualified Person to consider is whether disclosing the requested information under FOIA would or would be likely to otherwise prejudice the effective conduct of public affairs. Each case will need to be considered according to its own circumstances. Furthermore, although the effective conduct of public affairs is an important principle, the exemption is not absolute. Even if prejudice would or would be likely to occur, it is still necessary for the public authority to carry out the public interest test objectively in order to decide whether the information should be disclosed.

The Qualified Person's Opinion

26. 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 the legislation.
27. The Commissioner has had sight of the MOJ's section 36(2)(c) submissions to the Qualified Person of 27 October 2021 and of his Opinion which was given on 29 October 2021.
28. The MOJ has requested that the actual submissions to the Qualified Person are not replicated in this decision notice. However, the MOJ told the Commissioner:

"In the qualified person's reasonable opinion, disclosure would be likely to otherwise prejudice the effective conduct of public affairs due to the circumstances at the time of the request and the continued sensitivity regarding the withheld documents especially as the Judicial Review and Courts Bill was recently debated (26 October) at its second reading in Parliament. The qualified person further notes that the MOJ is working with other government departments and stakeholders on the Judicial Review and Courts Bill and it is a reasonable opinion to hold that a uniform approach to public disclosure was required between the different departments. MOJ is a public authority in its own right and it is correct to state that it needs to consider information requests made to it itself. However, it is a reasonable opinion to hold that it should take into account the views of other government departments it is working with and, if it were to take an approach that has not been agreed with those other departments in terms of disclosure, this would be likely to prejudice its ability to work effectively with those departments on the matter at hand, and more widely in the context of the Judicial Review and Courts Bill."

29. In relation to the section 36(2)(c) exemption, the Qualified Person's Opinion aligned with the submissions. His Opinion of 29 October 2021 confirmed that release of the information would cause the prejudice specified in section 36(2)(c).
30. 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 her 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.

31. 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.
32. As per the Commissioner's guidance on section 36(2)(c)⁶, the exemption "*is concerned with the effects of making the information public*" and the "*prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose*".
33. In order to engage a prejudice-based exemption such as section 36 there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice-based exemption:
- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would' result or 'would be likely' to result in prejudice.
34. In relation to the first test, the MOJ said it had been met because:

"The MOJ is of the view that there is a clear link between the withheld information and the applicable interests that section 36(2)(c) is designed to prevent. Subsection 36(2)(c) applies where there would be an adverse effect on a department's ability to offer an effective public service or to meet its wider objectives,

⁶ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

or where there could be an effect on other bodies or the wider public sector. In this case the withheld information relates to the interest this exemption is meant to protect, which is to provide an efficient public service relating to JR [Judicial Review]. Specifically keeping the departmental Call for Evidence submissions confidential ensures a 'safe space' that has allowed the UK Government to debate issues and develop ideas relating to JR and the possible impact of potential reforms to JR."

35. The Commissioner is satisfied that the applicable interests test has been met.

36. In relation to the second test, the MOJ submitted:

"The withheld information relates to important and sensitive issues concerning public administration, and we consider that there is a direct causal relationship between the disclosure of this material and the prejudice it would cause to the effective conduct of public affairs by removing the 'safe space,' which is required to cultivate efficient and informed discussions. Full disclosure of the departmental Call for Evidence submissions would set a precedent, affecting future reviews which are necessary not only to evaluate the current questions on JR reform, but to examine the wide range of issues dealt with by public authorities more generally in the regular conduct of public affairs. The disclosure would affect the MOJ's ability to offer an effective public service."

37. The Commissioner is satisfied that the MOJ has demonstrated a causal relationship between disclosure of the requested information and the resulting prejudice it would cause to the effective conduct of public affairs.

38. For the third part of the test, the MOJ said:

'In this case, MOJ believes that the likelihood is that the prejudice would occur as a result of the requested disclosure. The reason we believe this likelihood of the prejudice occurring is that the government departments provided their submissions with an expectation of confidentiality. Due to the reasonable expectation of confidentiality regarding the specific withheld information, it is a reasonable opinion to believe that disclosure would be likely to prejudice the conduct of public affairs relating to this matter. Disclosure would be breaching trust of the government departments and thus adversely affecting working relationships with them. This would affect MOJ's ability to deliver the service of providing as effective as possible, potential reforms, to administrative law. There are ongoing discussions on this issue,

as the Judicial Review and Courts Bill was recently debated in Parliament.

According to the ICO's Guidance, "if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption". I should take this opportunity to clarify that while 'safe space' prejudice arguments have been used in respect of both exemptions they have been used for separate and distinct purposes. The necessity for 'safe space' under the Section 36(2)(a)(i) exemption, mentioned earlier in this reply, is due to the need to maintain Cabinet collective responsibility and public unity regarding the final published decision. It is used in relation to Section 36(2)(c), due to the need for that private space to ensure there is no prejudice to the effective conduct of public affairs by there being an unwillingness to express certain views being expressed and considered due to concern of disclosure and thus leading to a less efficient service being provided. I hope this clarifies for the ICO how the safe space public interests and rationales are different for each of the subsections.'

39. In its submissions from its investigation response quoted in the preceding paragraph, the Commissioner notes that the MOJ has cited that the prejudice both 'would' and 'would be likely' to occur. However, in the MOJ's submissions to the Qualified Person, the MOJ said:

'You are required only to be satisfied that disclosure would, or would be likely to, cause such prejudice as described in this section of the FOIA. The Information Commissioner's Office defines "would" as that it is more likely than not that the prejudice would occur. "Would be likely to" is a lower standard, but the likelihood of prejudice must still be significant and weighty, and more than hypothetical or remote. In this case, we consider the stricter criteria of "would" applies.'

40. The Commissioner accepts that the MOJ's intention is that the higher threshold of 'would' applies and that this is the level of risk that the Qualified Person's Opinion is based upon.
41. The Commissioner accepts that the Qualified Person's Opinion is a reasonable one to hold in this case; she is satisfied that it is a reasonable opinion to hold that disclosure of the withheld information would otherwise prejudice the effective conduct of public affairs through the undermining of a private space to allow for the open expression of views. Having inspected the withheld information (ie the government submissions to IRAL), together with the Qualified Person's Opinion and the submission to the Qualified Person, the Commissioner's view is that

section 36(2)(c) is engaged in relation to the withheld information in its entirety. She must next consider the associated public interest test.

The public interest test

42. Section 36 of FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 36(2)(c) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the withheld information

43. The complainant raised the following arguments in favour of disclosure of the remaining submissions:

- *'We agree with the MOJ's points in favour of disclosing the information. We would add that there is a particularly strong public interest in submissions being disclosed when they have been used as a basis for recommendations which have in turn become highly controversial proposed legislation (the Judicial Review and Courts Bill). Former Conservative Minister David Davis MP recently described the legislation as "a worrying assault on the legal system" and "an obvious attempt to avoid accountability."*⁷

We would add that there is a strong public interest in greater information being shared about departmental views on judicial review, a subject on which very little is known. This was a point made by IRAL Panel chair Lord Faulks QC (a former Justice Minister) who told the Joint Committee on Human Rights: "[W]e were very keen that there should be as much publication of all the responses to the review as possible, so that everyone could see what different parties and organisations had said. I certainly thought that it would be useful if we got as much on the record as to what the different government departments thought. That was because, on the last occasion when there was a change in the law, in the 2015 Act where there were certain moderate changes to judicial review, a paper from the Ministry of Justice

⁷ <https://www.theguardian.com/commentisfree/2021/oct/25/judicial-review-peoples-right-fight-government-destroy-courts-undemocratic>

contained a number of assertions but did not actually give any evidence as to what government departments said.”⁸

44. The MOJ made the following arguments in favour of disclosure when citing the section 36(2)(c) exemption during the latter stages of the Commissioner’s investigation:

- *“The MOJ recognises the public interest in transparency and the commitment to being open and transparent. This is sacrosanct to having an effective public service.*
- *Disclosure of the entire submissions relating to the IRAL Call for Evidence for the IRAL (withheld information), enables wider public scrutiny of Government considerations and decision-making. Scrutiny of government decisions is a force of good in a democracy.*
- *These documents concern potential reform to administrative law. There is legitimate public interest in JR proceedings and this subject is of constitutional importance. Therefore, the disclosure could create increasing openness and clarity on this issue. The laws themselves are a means to hold government decision making to account and to ensure accountability.”*

45. As part of its submissions to the Commissioner, the MOJ said the factors in favour of disclosure it had identified in relation to section 36(2)(a)(i) also applied. Whilst there is some overlap, they are as follows:

- *“There is a public interest in the release of information where this leads to a better understanding of how Government conducts its business. This can help to inform public debate and to increase public confidence that decisions are properly made.*
- *The potential reform of administrative law is a subject of constitutional importance and there is legitimate public interest in the evidence submitted to the IRAL.*
- *Release of the information sought would increase transparency.”*

Public interest arguments against disclosing the withheld information

⁸ <https://committees.parliament.uk/oralevidence/2361/pdf/>

46. The MOJ provided the following arguments against disclosure of the withheld information:

- *"The MOJ considers that based on the section 36(2)(c) exemption, the public interest in withholding the requested information outweighs the public interest in disclosing the requested information. It is the responsibility of the MOJ to coordinate submissions from various government departments and stakeholders regarding the Call for Evidence for the IRAL. Because there is a reasonable expectation of confidentiality attached to this information, disclosure would be detrimental to the processes and trust required to co-ordinate and encourage Government departments (as well as stakeholders) in working efficiently together to find solutions, enable potential reform to administrative law and deliver an effective service.*
- *The MOJ considers that calling on various government departments to submit their respective views regarding the IRAL requires the government departments to have a "safe space" to express their views on the various issues regarding the IRAL. Expressing these issues and concerns particularly at very senior levels in Government require some "safe space" as such views may in some cases be considered controversial. It may be the case that suggested solutions contained in these documents 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, thus prejudicing the effective conduct of their public affairs and services provided.*
- *In particular, the MOJ notes that a number of government departments who made submissions to the IRAL Call for Evidence expressly stated that their submissions should not be disclosed to the public; whilst the MOJ is unable to apply the section 41 exemption (information received in confidence) to the withheld information, we believe this shows the mindset of the various government departments issuing their submissions as they all require a "safe space" to express their views regarding the submissions. The request was submitted at a crucial period when the MOJ was engaged in considerations around provisions for inclusion in the Judicial Review Bill, which is now before Parliament. Disclosing the withheld information would inevitably focus the attention on addressing media enquiries and similar, thereby distracting focus from the important task of passing the*

Judicial Review Bill through Parliament and thereby delivering on a manifesto pledge made by the Government to the electorate at the last election.

- *Furthermore, public discussion, and dialogue, on this issue, can be achieved without breaching the required "safe space" for Government departments. Any public interest in openness and transparency, on this issue, has already been achieved by the information that has already been disclosed and which is in the public domain. There is enough evidence in the public domain – including the summary of Government responses to the IRAL and the Government Response to the Judicial Review Reform consultation – to allow the public to comment on Government policy and understand the rationale behind why certain decisions on this specific issue have been made. Informing public debate and maintaining proper transparency are important aspects of our democratic society, and changes to administrative law potentially affect many people."*

47. As the Commissioner sought the complainant's view on the MOJ's reliance on section 36(2)(c) given that it was applied during her investigation, the complainant submitted the following counter-arguments:

- *"On confidentiality, we strongly reject the arguments that departments had a reasonable expectation of confidentiality for reasons set out above, therefore there can be no detriment to trust as the MOJ alleges."*

48. In relation to the issue of confidentiality the complainant argued that the IRAL Panel Questionnaire to Government Departments⁹ did not make any assurance that submissions would be kept confidential, rather it stated that an assurance of confidentiality could not be provided:

"Confidentiality

Information provided in response to this call for evidence, including personal information, may be published or disclosed in accordance with the access to information regimes (these are primarily the Freedom of Information Act 2000 (FOIA), the General Data Protection Regulations (GDPR), and the

⁹ (IRAL Call For Evidence, the Questionnaire can be found at page 6)
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf

Environmental Information Regulations 2004). If you want the information that you provide to be treated as confidential, please be aware that, under the FOIA, there is a statutory Code of Practice with which public authorities must comply and which deals, amongst other things, with obligations of confidence. In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances. An automatic confidentiality disclaimer generated by your IT system will not, of itself, be regarded as binding on the Ministry. The Ministry of Justice will process any personal data in accordance with the GDPR". (Emphasis added by the complainant).

49. The complainant also argued the following:

- *'The MOJ argues that "[i]f the requested information were to be disclosed, it 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". This is not a strong public interest argument. There is always a risk that people take parts of any information out of context. Unfavourable and potentially damaging inferences can also be drawn from the Government's reluctance to disclose information.*
- *The MOJ's third point references the need for a 'safe space'. Again, we strongly reject the contention that Departments saw their submissions as being provided in a safe / confidential space (as above, the Questionnaire to which the submissions were addressed informed them of the exact opposite).*
- *The MOJ goes on to allege that "Disclosing the withheld information would inevitably focus the attention on addressing media enquiries and similar, thereby distracting focus from the important task of passing the [Judicial Review and Courts] Bill through Parliament and thereby delivering on a manifesto pledge made by the Government to the electorate at the last election." This argument is, frankly, embarrassing. It demonstrates a fundamental disregard for the principles of transparency and accountability. Greater scrutiny and debate is likely to improve rather than detract from the quality of Parliamentary debate, and Parliamentarians themselves have expressed concerns over the Government's refusal to disclose the submissions (see above). In any event, if the MOJ had disclosed the submissions at the time*

they were provided to the Panel, or in response to [name redacted] first FOIA request in April 2021 this issue of timing would not have arisen. Indeed, given that the relevant date for assessing the public interest for and against disclosure is the date on which the request is finally refused (Maurizi v ICO & CPS [2019] UKUT 262 (AAC)), being 23 August 2021, when Parliament was in recess, and the fact that the Bill did not even receive its second reading until 18 October 2021, the weakness in this argument is even clearer.

- *Finally, the MOJ argues that the publication of its summary documents is sufficient to satisfy any public interest in openness and transparency. We strongly disagree – the summary is of little relevance to those who wish to understand the rationale on which the IRAL Panel made its recommendations. The summary was published in April 2021, after the IRAL Panel had reported. Further, there can be no reassurance that key information has not been omitted from the summary document or that there are not inaccuracies. It is likely that important meaning has been lost through vagueness and abridgment.'*

Balance of the public interest test arguments

50. In reaching a view on where the public interest lies in this case, the Commissioner has taken into account the nature of the withheld information as well as the views of both the complainant and the MOJ.
51. The Commissioner has weighed the public interest in avoiding otherwise prejudicing the effective conduct of public affairs against the public interest in openness and transparency. She notes that the Qualified Person considers that the prejudice envisaged 'would' occur if the requested submissions were disclosed in full.
52. The Commissioner considers the public interest test considerations under section 36 of FOIA require her to consider the extent, severity and frequency of the prejudice claimed by the public authority.
53. The Commissioner recognises the need for transparency and openness which is heightened due to the sensitivities surrounding the Judicial Review system issue in general. She acknowledges that the MOJ has considered what it is able to publish in the interests of both transparency and in aiding public understanding.
54. The MOJ said it considers that this need has been addressed through the publication of the comprehensive document summarising the government responses to IRAL. The government response to the Judicial Review Reform consultation (conducted by the MOJ in March and April

2021), which takes into account both the IRAL Report and stakeholder responses to the consultation, has also been published (in July 2021).

55. The MOJ has explained that the July 2021 document sets out the rationale for the measures the government is taking forward in the Judicial Review and Courts Bill and will help the public to understand the decision-making process in this area.
56. The Commissioner is mindful that her assessment of the public interest test must be made at the time of a public authority's internal review ie she must consider the prevailing circumstances at that point, as opposed to when she reaches her decision having investigated a complainant's complaint. The Commissioner notes the complainant's view on the summary document but is satisfied that the MOJ has examined what can be made publicly available. Given that the IRAL report and government response is also published, the Commissioner considers that sufficient detail is in the public domain to enable the public to understand the consultation position and the government response to it for the public interest to be satisfied.
57. With regard to the complainant's views on the confidentiality of the submissions, the commissioner notes that whilst the questionnaire did not give assurances of confidentiality, it did not give the impression that confidentiality was waived. In the Commissioner's view, the position on confidentiality on the questionnaire does not undermine or prevent the application of exemptions to the withheld information. In this case, based on the information in question, the MOJ has determined that it is necessary to withhold the information to prevent the prejudice to the effective conduct of public affairs with respect to the ongoing transition of judicial reform. The Commissioner agrees that the exemption is engaged and does not consider that the confidentiality point put forward by the complainant is relevant to the public interest.
58. The Commissioner accepts that the MOJ's safe space arguments were especially relevant at the time of the request and internal review, as highlighted by the MOJ. She is mindful of the need for the MOJ to be able to protect the complete views of those local and central government organisations partaking in the consultation process, particularly given the sensitivities surrounding judicial reform.

Conclusion

59. In the Commissioner's opinion disclosing the withheld information would be likely to cause inhibition to both the MOJ and to the participating government departments whose submissions have been withheld, and she considers that this is not in the public interest. The Commissioner is also mindful that the circumstances at the time of the public interest

test mean that the public interest was in withholding the requested information to protect the safe space for the duration of the reforms movement through parliament. She does not consider that there is a persuasive public interest argument in disclosing information which outweighs this. It follows that the Commissioner finds that the balance of the public interest favours maintaining the exemption.

60. Given that the Commissioner has found that the MOJ properly relied on section 36(2)(c) in relation to the withheld government submissions in their entirety, she has not found it necessary to consider its additional reliance on section 36(2)(a)(i) for small sections within those submissions.

Section 1 – general access to information

61. Section 1 of FOIA states that anyone making a request for information to a public authority is entitled to be informed whether the public authority holds the information, and, if so, to have that information communicated to them.
62. The Commissioner is mindful that when she receives a complaint alleging that a public authority has stated incorrectly that it does not hold the requested information, it is seldom possible to prove with absolute certainty whether the requested information is held. In such cases, the Commissioner will apply the normal civil standard of proof in determining the case and will decide on the 'balance of probabilities' whether information is held.
63. The Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the public authority to check whether the information is held and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.
64. The complainant's complaint to the Commissioner included the following:

"However, we remain unclear as to why MOJ does not hold data from other departments – such as Department of Education and

Department for Transport – whose data is quoted at paragraph 4.13 of the IRAL Report.”

65. The Commissioner has sought to determine whether, on the balance of probabilities, the MOJ holds any further recorded information within the scope of the second part of request. Accordingly, she asked the MOJ to explain what enquiries it had made in order to reach the view that it did not hold any further information.
66. The MOJ told the Commissioner that:

“There was no requirement for respondents to the IRAL’s Call for Evidence to structure their submissions in any particular way, or for them to include the underlying data on which assertions in their submissions were based. The only additional statistical data provided to the IRAL Panel is that which the MOJ disclosed in response to the original request. Otherwise, the information reproduced in the Report was received by the Panel without any further underlying data.

The supplementary query to IR [internal review] request specifically asked what underlying data had been provided to the IRAL Panel to support a remark in the Report that the HO [Home Office] had spent “over £75 million” in defending JR cases. We confirmed that the submission from the HO had not included a breakdown of how that figure had been calculated, nor had this information been provided to MOJ in any other form. The requestor has now obtained the underlying information relating to the £75 million figure from the HO, and the MOJ now also holds this information as we were sent a copy of HO’s response to [the complainant’s] related FOIA request.

The requestor also cites figures contained in paragraph 4.13 of the IRAL Report as part of their complaint to the ICO: costs sustained by the Department for Education in defending JR cases in the last three years, and costs reported by the Department for Transport as incurred in defending JRs relating to the expansion of Heathrow Airport. The figures quoted in this section of the Report are taken directly from those Departments’ submissions, and the MOJ can confirm that the submissions did not elaborate on any further relevant information or underlying data supporting those figures.”

67. The Commissioner notes the MOJ’s revised position in relation the Home Office claim relevant to the second part of the request, in that this information is now held as a result of the Home Office sending a copy of its response to the complainant’s separate request, to the MOJ.

68. The MOJ explained that it had reviewed the evidence provided to the IRAL Panel when carrying out its internal review, and that an officer not previously involved in responding to the original FOIA request had looked through all the information provided to the IRAL Panel afresh to determine whether any additional underlying data was held beyond that already disclosed. That officer concluded that no further such information existed.
69. The MOJ said that all the information provided to the IRAL Panel was received electronically. These documents were stored in a central location on the MOJ's SharePoint electronic filing system by the IRAL Secretariat. The MOJ advised that a thorough search was conducted by manually looking through the documents in the relevant folder on the electronic filing system. It added that those responding to the original FOIA request were the same individuals who provided the Secretariat function to the IRAL Panel, so they were already familiar with the records. The MOJ explained that the officer who conducted the internal review had discussions with those team members who had been part of the Secretariat to ensure that they had a full understanding of the way at which the information had been stored.
70. As stated above, the MOJ has explained that the searches to respond to request were conducted manually. It advised that this was achievable because the total amount of data (ie information received by the IRAL from government departments) was small enough to conduct manual searches. Automated searches, such as by using keywords, were not conducted because the MOJ said that there were no appropriate search terms which could produce meaningful search results - information within the scope of the request is not defined by any particular subject that could be used as a keyword to refine the stored records in a useful way.
71. The MOJ confirmed that no information relevant to the complainant's request had ever been held but deleted/destroyed. It qualified this by explaining that the MOJ provided the Secretariat function to the IRAL Panel and retained all of the information provided to the Panel after it was disbanded.
72. The MOJ told the Commissioner that it:

"does not hold underlying data and statistics for departments such as the Department of Education and the Department for Transport. I can confirm that MOJ has no policy, concerning the holding of that requested underlying data and statistics, on this issue, and that information was at no point held by the MOJ. This is because such information is not required to be held by MOJ. There is no business need or legal requirement for MOJ to hold that specific type of data."

MOJ has a general Record and Retention Destruction Schedule (RRDS) for records created for policy and legislative purposes. The policy says any such papers held should be kept for 20 years. The MOJ RRDS is available at the following link¹⁰ .

73. In addition, the MOJ said there is no business purpose for which the 'not held' data should be held by the MOJ. It advised that it only:

"holds data which was submitted by departments in response to the IRAL Call for Evidence. The information not held (the underlying data, and statistics) was not submitted. There is no business need or legal requirement for MOJ to hold this data.

The MOJ can confirm there is a business purpose for the information that is held. There is policy work still being conducted in light of the IRAL's Report. The recommendations made by the IRAL Panel were expanded upon in a Government consultation. This has led to a bill (which is currently before Parliament) and proposals for procedural reforms (which are still being assessed). The information provided in the Call for Evidence submissions may also be useful if and when any further JR reforms are considered in the future."

74. Finally, the MOJ said there is no statutory requirement for it to retain the requested information.

Conclusion

75. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed some or all of the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in the paragraphs above, the Commissioner is required to make a finding on the balance of probabilities.
76. Based on the explanation provided by the MOJ, the Commissioner is satisfied, on the balance of probabilities, that no further recorded information within the scope of the second part of request is held. She notes that information relating to the Home Office claim is now held by virtue of the Home Office's response to a separate request made by the

¹⁰ <https://www.gov.uk/government/publications/record-retention-and-disposition-schedules>

complainant (see quoted paragraph 66 above); however the Home Office information was not held by the MOJ at the time of the complainant's request or internal review. Given that the complainant is already in possession of that information, the Commissioner does not consider it proportionate to require the MOJ to provide an additional copy.

77. The Commissioner is therefore satisfied that, with the exception of the Home Office data referred to above, on the civil standard of the balance of probabilities, the MOJ does not hold any further requested information beyond that already provided in response to the second part of the request.

Other matters

78. In this case, the complainant requested an internal review on 28 June 2021. The MOJ did not provide its internal review until 23 August 2021.

79. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.

80. Part 5 of the section 45 Code of Practice¹¹ (the Code) states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.

81. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "*Openness by Design strategy*"¹² to improve standards of

¹¹

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

¹² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "*Regulatory Action Policy*"¹³.

¹³ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

82. 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

83. 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.
84. 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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Water Lane
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SK9 5AF