

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 18 November 2013

**Public Authority:** Ministry of Justice

**Address:** 102 Petty France  
London  
SW1H 9AJ

#### Decision (including any steps ordered)

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1. The complainant requested information recording a review of the credibility of the legal aid system carried out at the behest of the Justice Secretary. The Ministry of Justice (MoJ) refused to disclose this information and cited the exemption provided by section 35(1)(a) (formulation and development of government policy) of the FOIA.
2. The Commissioner's decision is that section 35(1)(a) was cited correctly and so it was not required to disclose this information.

#### Request and response

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3. On 12 June 2013, the complainant wrote to the MoJ and requested information in the following terms:

*"It [was reported on 8 November 2012] that the Secretary of State has ordered an investigation of the aspects of the legal aid system that 'affect its credibility with the public': for instance, here: <http://www.bbc.co.uk/news/uk-20234180>.*

*My request is for a copy of the terms of reference (or equivalent) of this investigation, and any internal correspondence relating to it".*

4. The MoJ responded on 10 July 2013. The request was refused, with the exemptions provided by the following sections of the FOIA cited:

35(1)(a) (formulation or development of government policy)

40(2) (personal information)

42(1) (legal professional privilege)

5. The complainant responded on 11 July 2013 and requested an internal review. The MoJ responded with the outcome of the review on 30 July 2013. The refusal of the request under the exemptions cited previously was upheld.

## **Scope of the case**

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6. The complainant contacted the Commissioner on 30 July 2013 to complain about the refusal of his information request. The complainant indicated that he did not agree that the exemptions cited by the MoJ had been applied correctly.
7. The MoJ supplied to the ICO a copy of the information withheld from the complainant. Included within this was an exchange of emails relating to an earlier information request made by the complainant. The view of the Commissioner is that those emails are not within the scope of the request and so they are not covered by the following analysis. The exemption provided by section 35(1)(a) of the FOIA has been considered in relation to the remainder of the withheld information.

## **Reasons for decision**

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### **Section 35**

8. Section 35(1)(a) of the FOIA provides an exemption for information that relates to the formulation or development of government policy. Consideration of this exemption is a two-stage process. First, the information in question must fall within the class described in this section; that is, it must relate to the formulation or development of government policy. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
9. Covering first the issue of whether the exemption is engaged, the argument of the MoJ is that this information relates to the formulation and development of policy surrounding the legal aid system. The specific information requested by the complainant concerns an investigation into aspects of the legal aid system that may affect its credibility. The MoJ states that this is a part of the government policy titled "Transforming

Legal Aid". This followed the commitment given in the Coalition Agreement that *"We will carry out a fundamental review of Legal Aid to make it work more effectively"*<sup>1</sup>.

10. The gov.uk website refers to this policy as "Making legal aid more effective"<sup>2</sup>. This also notes that a consultation titled "Transforming Legal Aid: Delivering a more credible and efficient system" was open between 9 April and 5 September 2013. A further consultation *"on refined proposals"* was ongoing at the time of writing.
11. The Commissioner notes that a government policy formulation and development process about legal aid was ongoing at the time of the request. He also accepts that the investigation into the credibility of legal aid that was referred to in the wording of the request was part of that process. As the information in question relates to that process, it clearly engages the exemption provided by section 35(1)(a).
12. When requesting an internal review, the complainant raised the point of whether the withheld information included any statistical content. Section 35(2)(a) provides that section 35(1)(a) cannot apply in relation to statistical information used to provide an informed background to the taking of a decision on government policy once the decision about government policy has been taken.
13. In this case the withheld information does include some numerical content. Whether or not this is considered statistical information, section 35(2)(a) is not relevant as it is clear that the policy making process to which the withheld information relates was ongoing at the time of the request.
14. The next step is to consider the balance of the public interest. In forming a conclusion on the public interest balance in this case, the Commissioner has taken into account the general public interest in improving the transparency and openness of the MoJ, as well as factors that apply in relation to the specific information in question here. This includes arguments advanced by the MoJ and by the complainant.

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/78977/coalition\\_programme\\_for\\_government.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/78977/coalition_programme_for_government.pdf)

<sup>2</sup> <https://www.gov.uk/government/policies/making-legal-aid-more-effective>

15. Covering first those factors in favour of disclosure of the information, legal aid accounts for a very significant sum of public money, with some sources suggesting that the budget for it is in excess of two billion pounds annually<sup>3</sup>. A system that accounts for such a large sum of public money is a matter of considerable public interest and this public interest is particularly marked where there are questions about the "credibility" of this system.
16. The issue of cutting the legal aid bill has been the subject of considerable public interest and debate, with a focus on whether a reduction in the legal aid budget would reduce the possibility of fair representation in legal proceedings for all, regardless of their financial circumstances. However, the policy making process aimed specifically at achieving a reduction in the cost of legal aid was, at least to some extent, complete at the time of the request following the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012, which came into force in April 2013.
17. The information in question here does touch on this issue, however, with the credibility review to which the request in this case relates being at least partly aimed at a further reduction of the legal aid bill. In any event, work by the Government on the credibility of the legal aid system is itself a matter of valid public interest even separately from the issue of cuts to the overall legal aid budget.
18. The view of the Commissioner is that disclosure of the information in question would improve public knowledge and understanding of the background to the Government's policy making process in the area of changes to the legal aid system. The subject matter of this information is a valid public interest factor in favour of disclosure of considerable weight.
19. Turning to the factors that favour maintenance of the exemption, when considering the balance of the public interest in relation to section 35(1)(a) the Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process. There are two main issues to consider here, the first of which is the possibility of harm to the quality of the policy making process if those involved were not confident

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<https://spreadsheets.google.com/pub?key=0AtE8tc3zkyCLdHo2QktFdkhwc05HV3k4VjNNTXI5MVE&hl=en&output=html>

that their contributions would remain confidential. The second issue concerns the convention of collective Cabinet responsibility and the possibility of harm to this if the information in question was disclosed.

20. The Commissioner recognises that the argument concerning the preservation of a space within which to carry out the policy making process is, in general, valid on the grounds that this will assist in the open discussion of all policy options, including those that may be considered politically unpalatable. However, the weight that this argument carries in each case will vary, depending on the circumstances.
21. In this case the policy making process to which this information relates is current; as stated above at paragraph 10, a consultation process was underway at the time of writing. The complainant argued that the policy making process concerning the credibility of the legal aid system was complete by the time of the request. Whilst, as covered above, the passage of the Legal Aid, Sentencing and Punishment of Offenders Act 2012 marked the point at which one tranche of work on the reform of legal aid was complete, for the reasons covered above the Commissioner has found that policy making in relation specifically to the credibility of the legal aid system was ongoing at the time of the request.
22. The argument from the MoJ therefore relates directly to the policy making process recorded in the information in question; that disclosure would harm policy making on the issue of the credibility of the legal aid system. On this point the Commissioner notes that the content of the information primarily consists of email exchanges, with each email attributable to an individual official. He also notes that the content of some of these emails could be described as free and frank, with officials expressing their views openly.
23. Whilst civil service officials are required to contribute to the policy making process in a free and frank manner, as noted above the Commissioner does accept that the argument concerning a safe space within which to carry out policy making is valid. In this case the view of the Commissioner is that this argument carries particular weight due to the information relating to a current, ongoing policy making process. Therefore, the need to preserve a safe space within which to carry out the policy making process is a valid factor in favour of maintenance of the exemption in this case.
24. Turning to the issue of the convention of collective Cabinet responsibility, the information in question includes content that is attributable to named Ministers. In relation to this information the Commissioner considers it appropriate to consider whether disclosure of

this information could impact upon the convention of collective Cabinet responsibility, whereby all members of the Cabinet share responsibility for all government policies, regardless of any misgivings they may have voiced privately. This argument concerns whether disclosure of the individual views of a Minister could erode this convention, with a resultant negative impact upon the operation of Cabinet government.

25. The Commissioner notes that the withheld information records Ministerial views on an issue of ongoing policy consideration at the time of the request, and also that the issue of changes to the legal aid system is high profile and of some controversy. The Commissioner recognises that a disclosure that reveals Ministers' individual views in these circumstances could result in an erosion of collective Cabinet responsibility. He finds that this is a valid public interest factor in favour of maintenance of the exemption.
26. The Commissioner has recognised a strong public interest in favour of disclosure of this information on the grounds of its subject matter. However, he has also recognised that disclosure may result in harm to the policy making process and could result in an erosion of collective Cabinet responsibility.
27. It is particularly significant here that the policy making process to which the information relates was ongoing at the time of the request. As covered above, the legal aid system requires the expenditure of very large sums of public money and this means that there is a valid public interest in disclosure of information relating to this system. However, this also means that there is a public interest in ensuring that policy making in relation to this system is effective, and in avoiding disclosure that may result in harm to this.
28. Particularly in view of the policy making process in question having been ongoing at the time of the request, the conclusion of the Commissioner is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure. The MoJ is not, therefore, required to disclose this information and it has not been necessary to go on to consider the other exemptions cited.

## Right of appeal

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29. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

30. 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.
31. 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 .....**

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
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