

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2014

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

Decision (including any steps ordered)

1. The complainant requested information about proposed changes to the legislation concerning the rehabilitation of offenders. The Ministry of Justice (MoJ) confirmed that it held relevant information but refused to disclose it citing the section 35(1)(a) and (b) exemptions (formulation of government policy) of FOIA.
2. The Commissioner's decision is that the MoJ correctly applied sections 35(1)(a) and (b) to withhold the requested information. He requires no steps to be taken.

Background

3. The Rehabilitation of Offenders Act 1974 aims to aid the employment and resettlement of ex-offenders who have put their criminal past behind them by declaring certain convictions to be spent after a specified period of time following the conviction. For most purposes, a spent conviction is deemed as having never existed, and an ex-offender will not have to reveal it when applying for most jobs or for insurance,

for example. The rehabilitation periods are determined according to the sentence imposed to reflect the severity of the offence.¹

4. There are certain exceptions, however, where an employer can require disclosure of a caution or conviction (even if it is spent). These are listed in the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 and subsequent amendments.

Request and response

5. Following earlier correspondence, on 4 April 2013 the complainant requested information of the following description:

"Thank you very much for your reply to a freedom of information request dated 03 April 2013 [redacted]. Thank you for the clarification that the meeting did not take place, due to the cabinet reshuffle.

Could I please request under the freedom of information act 2000 any information held by the ministry of justice as to the intended nature of the proposed meeting?

I would be intrigued to find out any reasons why HM Forces should be exempt under the Rehabilitation of Offenders Act 2000. Any documents, correspondence, minutes of meetings etc would be very much appreciated".

6. The Commissioner understands that the request for information dated 3 April 2013, referred to above, was for the minutes of a proposed meeting between two Ministers - Crispin Blunt MP and Andrew Robathan MP – in the House of Commons on 6 September 2012.
7. The MoJ responded on 1 May 2013. It confirmed that it holds information within the scope of the request. However, it refused to provide it citing the section 35(1)(a) exemption of FOIA (formulation of government policy) as its basis for doing so.

¹

<http://www.publications.parliament.uk/pa/cm201314/cmgeneral/deleg2/130520/130520s01.htm>

8. Following an internal review, the MoJ wrote to the complainant on 24 May 2013. It revised its position, clarifying that it considers that both sections 35(1)(a) and (b) (Ministerial communications) apply.

Scope of the case

9. The complainant contacted the Commissioner on 11 October 2013 to complain about the way his request for information had been handled. He asked the Commissioner:

"Could you please review if the MoJ have correctly utilised the section 35 exemption".

10. The Commissioner considers the scope of his investigation to be the MoJ's application of sections 35(1)(a) and (b) to the withheld information.

Reasons for decision

11. Section 35 of FOIA sets out four exemptions designed to protect good government and provide a safe space for policymaking. The exemptions are class-based, meaning that the Commissioner does not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described.

12. The relevant parts of section 35(1) of FOIA which the MoJ considers apply in this case state that information held by a government department:

"is exempt information if it relates to-

(a) the formulation or development of government policy,

(b) Ministerial communications".

13. The approach of the Commissioner is that the term 'relates to' as it is used in this exemption can safely be interpreted broadly.

14. The FOIA does not define what is meant by the formulation or development of government policy. Although often used interchangeably, the Commissioner considers 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.

15. At the very least 'formulation or development' suggests something dynamic; 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.
16. 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.
17. The withheld information in this case comprises information in relation to the interaction between the MoJ and the Ministry of Defence (MoD) on the Rehabilitation of Offenders Act (ROA).
18. The MoJ told the complainant:

"In this case, the information relates to a possible amendment to the Rehabilitation of Offenders Act 1974 (Exceptions) Order 1975 for members of the Armed Forces, which is a policy still under deliberation".
19. In correspondence with the Commissioner, the MoJ told him:

"It is the Department's position... that the policy is still being developed and may thus be subject to further change and refinement".
20. The Commissioner notes that while the MoJ initially only cited section 35(1)(a) in its correspondence with the complainant, it subsequently confirmed that it also considers section 35(1)(b) applies to some of the withheld information.
21. The Commissioner accepts that there is likely to be some overlap with sections 35(1)(a) and (b). Many (although not all) ministerial communications will concern the formulation or development of government policy, and so will engage both sections 35(1)(a) and 35(1)(b).
22. Having viewed the withheld information and considered the MoJ's submissions, the Commissioner is satisfied that the information relates to the formulation and development of government policy on the rehabilitation of offenders and that section 35(1)(a) is therefore engaged.

23. With respect to the MoJ's citing of section 35(1)(b), the Commissioner is satisfied that the information also withheld by virtue of section 35(1)(b) relates to ministerial communications. It follows that he finds section 35(1)(b) is engaged in respect of that information.

The public interest

24. Having established that the section 35 exemption is engaged, the Commissioner must go on to consider the public interest test as set out in section 2(2)(b) of the FOIA.
25. The Commissioner considers that, generally speaking, there is no inherent or automatic public interest in withholding information just because it falls within section 35(1)(a). He takes the view that it is necessary to consider the content and sensitivity of the particular information and the effect its release would have in all the circumstances of the case, including the timing of the request, in order to determine the balance of the public interest.
26. While recognising that a complainant may have a personal interest in the requested information, a requester's private interests are not in themselves relevant to the public interest test. The Commissioner has to take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions. He must therefore consider the wider public interest issues when deciding whether or not the information requested is suitable for disclosure.
27. The Commissioner considers that public interest arguments under section 35(1)(a) should focus on protecting the policymaking process while public interest arguments under section 35(1)(b) should focus on protecting ministerial unity and effectiveness and protecting ministerial discussions and collective decision making processes. This reflects the underlying purposes of the exemption.
28. In this case the MoJ submitted a single set of public interest arguments in respect of its citing of section 35.

Public interest arguments in favour of disclosing the requested information

29. In correspondence with the complainant, the MoJ acknowledged:

"There has been a public interest in the working of the Rehabilitation of Offenders Act since it came into force and how policy has been shaped and developed by Government since. I appreciate, therefore, that in this context there are arguments in favour of the disclosure of the information you have sought".

30. Acknowledging the general public interest in transparency and accountability, it also recognised that disclosure of the information at issue:

"may lead to a greater understanding of the decision making process within Government and to how policy is created"

and potentially generate:

"meaningful participation between Government Departments and the public".

Public interest arguments in favour of maintaining the exemption

31. Arguing in favour of maintaining the exemption, the MoJ told the complainant that the withheld information relates to policy that is still being developed. Accordingly:

"Any changes brought forward would be subject to parliamentary scrutiny and debated in both Houses of Parliament. Releasing information at this stage may therefore damage this aspect of the policy formulation process".

32. It also said:

"There is a need to preserve the safe space for policy making that officials require when continuing to develop policy and for Ministers in deliberating ideas and reaching decisions. To release documents at this stage, before any final decision has been taken, could undermine the work that has been done so far and is still ongoing in developing policy emanating from the Rehabilitation of Offenders Act".

33. In that respect, the MoJ told the complainant it considers:

"The absence of a safe space can engender a risk averse approach in which individuals are less willing to engage, explore and challenge options, which is essential when developing policy".

34. The safe space argument concerns the importance of government having the freedom to debate policy and make decisions without being hindered by external comment.

35. The Commissioner understands that the ROA is a devolved matter. In that respect the MoJ told the Commissioner:

"The Department consider that it is important to ensure a protected space for discussions to take place both between

Government Departments as well as with Devolved Administrations”.

36. Regarding the subject matter and timing of the request, the MoJ said:

“It should be noted that although the public interest test in favour of withholding information relating to the formulation of Government policy grows weaker over time, and the ROA was first enacted in 1974 (and the exceptions order in 1975) the case for withholding details of discussions on possible future changes to workings of the Act is at its strongest while these discussions are live, as they are now”.

Balance of the public interest – section 35(1)(a)

37. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
38. In this case the Commissioner acknowledges that disclosure of the information in question would promote transparency and enable public debate. He considers that disclosure of the requested information would enhance the public’s understanding of issues which were discussed and considered by the Government departments involved.
39. Furthermore, he recognises that the Government’s policy and any legislative proposals with respect to the rehabilitation of offenders is clearly a matter of public interest.
40. However, focussing on the effect of disclosing the information in question, the Commissioner has taken into account that the relevant government policy is still under development and has not been announced or implemented. In the Commissioner’s view, the timing of the request adds significant weight to the public interest in favour of maintaining the exemption as the withheld information relates to a policy which was live and on-going at the time of the request.
41. The Commissioner considers that there is a strong public interest in protecting the safe space for Ministers and officials to be able to develop policy of a live issue away from external scrutiny.
42. While the Commissioner accepts that there is a public interest in informing public debate surrounding the issues to which the potential policy options relate, he gives greater weight to the public interest in

allowing Ministers and officials the space to further develop the policy in question and to be able to continue to effectively discuss issues in a frank and open manner.

43. The Commissioner's decision is that the public interest in disclosure is outweighed by the public interest in favour of maintaining the section 35(1)(a) limb of the exemption in this case.

Balance of the public interest – section 35(1)(b)

44. The Commissioner has also considered the relevant weight of the public interest arguments in respect of section 35(1)(b).
45. The MoJ has cited the same public interest arguments in respect of both limbs of section 35(1) in relation to the Ministerial Communications within the scope of the request.
46. Having considered the matter, the Commissioner finds that the public interest in this case favours protecting Ministerial communication and the exchange of views. He finds that the public interest in disclosure is outweighed by the public interest in favour of maintaining the section 35(1)(b) limb of the exemption.

Other matters

47. With respect to its citing of section 35(1)(b), in the Commissioner's view the MoJ failed to explain to the complainant why it considers that section applies. It appears that the MoJ relied to a large degree on the requested material being self-evidently exempt. This clearly did not assist the complainant in his understanding of why the information was withheld.
48. The Commissioner would take the opportunity to remind the MoJ that its explanation should have been detailed enough to give the requester a real understanding of why it considered the exemption applied.

Right of appeal

49. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Signed

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