

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 September 2017

Public Authority: Ministry of Justice

Address: 102 Petty France

London

SW1H 9AJ

Decision (including any steps ordered)

1. The complainant has requested information relating to a phone call he believes took place in 2009 between the then Lord Chief Justice, Lord Judge, and the then Lord Chancellor/Secretary of State for Justice, Jack Straw regarding youth sentencing. He also asked for information about certain decisions subsequently made in respect of youth sentencing policy. The Ministry of Justice ("the MoJ") said that it did not hold most of the information described in the request. It withheld information about youth sentencing policy, citing the exemption at section 36(2)(b)(ii) (inhibition to the free and frank exchange of views for the purposes of deliberation) of the FOIA.
2. The Commissioner's decision is that, on the balance of probabilities, the MoJ did not hold most of the requested information. The Commissioner also found that the MoJ was entitled to rely on section 36(2)(b)(ii) to withhold the information that it did hold.
3. The Commissioner requires no steps to be taken.

Background

4. Since 2007, the Lord Chancellor has held the post of Secretary of State for Justice, ministerial head of the Ministry of Justice. References in this decision notice to "the Lord Chancellor" should therefore also be taken as referring to the Secretary of State for Justice.

Request and response

5. On 29 December 2015, the complainant wrote to the MoJ and requested information in the following terms:

"On October 27, 2015 (reference [reference number redacted] I was informed by [name redacted], the head of the Policy, Disclosure and Business Management Teams at the Ministry of Justice's Data Access and Compliance Unit that, inter alia, on Thursday, November 5, 2009, a 12-minute phone call was scheduled to take place between the then-Lord Chief Justice, Lord Judge, and the then-Lord Chancellor/ Minister of Justice, Jack Straw, concerning "Youth Sentencing".

(2) In view of this please provide the following information, covering the period from November 5, 2009 to November 19, 2009. ("Written communication" here refers to any note, email, memorandum, diary entry, letter, note of the contents of a phone call, or any other form of written communication or documentation whatsoever).

i) Confirmation that the phone call in (1) above occurred. Please note that, in addition to the two independent sources referred to in my earlier FOI requests who informed me that the Lord Chief Justice had spoken to Jack Straw on the subject in the time frame indicated, I have reliable information from a further source, independent of the first two, that a conversation did take place between Lord Judge and Jack Straw on November 5, 2009.

ii) The names and titles of anyone else who listened in (in particular, Jack Straw's private secretary or assistant private secretary).

iii) Copies of any written communication by any person participating in or listening to the call, as to the contents of the call, in particular as regards youth sentencing.

iv) Any written communication subsequently sent by anyone within the Ministry of Justice concerning the contents of the call, including, though not limited to, any communication made to or from Jack Straw's private office, or to or from a policy unit within the ministry, any communication made to Jack Straw or any civil servant on his behalf (in particular that presented him with options in relation to youth sentencing and the commencement or non-commencement of section 9 of the Criminal Justice and Immigration Act 2008), and any communication to a Ministry of Justice legal team, either directly or via a policy team, in relation to youth sentencing, and in particular relating to the contents of Criminal Justice and Immigration Act 2008 (Commencement No. 13 and Transitory Provision) Order 2009 (S.I. 2009 No. 3074), and, in particular, the commencement or non-commencement of section 9 of the 2008 Act.

v) Details of any internal meetings or discussions held in relation to the communications in (2) iii) and iv), including when and where they were held, who attended, what was said and what conclusions were reached. This should include any emails, memoranda or minutes written before, during or after any such meeting.

vi) The name and title of the person who drafted S.I. 2009 No. 3074.

vii) A full explanation of why and how it was decided that that order would not bring section 9 of the Criminal Justice and Immigration Act 2008 into force..."

6. The MoJ failed to respond to the request and the Commissioner issued a decision notice on 15 June 2016, requiring it to respond¹. The MoJ responded on 14 July 2016. It confirmed that it held information which fell within the scope of the request, but advised that it was exempt from disclosure under section 36(2)(b)(ii) of the FOIA.
7. The complainant requested an internal review on 26 July 2016. The MoJ provided the outcome of the internal review on 18 August 2016. It upheld its application of section 36(2)(b)(ii) to withhold the requested information.

Scope of the case

8. The complainant contacted the Commissioner on 18 October 2016 to complain about the way his request for information had been handled.
9. By way of background, he explained that an expected provision regarding the sentencing of offenders under the age of 18 had failed to be brought into force, and he suspected that this was as a result of discussions between the Lord Chancellor and the Lord Chief Justice. He challenged the application of section 36, stating that the public interest favoured disclosure of the requested information and that any representations made by the Lord Chief Justice on matters of importance relating to the administration of justice, should be made openly and to Parliament.
10. During the Commissioner's investigation she established that the only part of the request in respect of which the MoJ considered that it held recorded information, was in relation to section 9 of the Criminal Justice

¹ https://ico.org.uk/media/action-weve-taken/decision-notice/2016/1624508/fs_50629003.pdf

and Immigration Act 2008 (parts (iv) and (vii) of the request). The MoJ was unable to locate any information as to the existence or otherwise of the telephone call described in the request, from which all the other questions flowed.

11. The Commissioner has therefore considered whether, on the balance of probabilities, the MoJ held information about the alleged telephone call, and whether it was entitled to rely upon the provisions of section 36(2)(b)(ii) to refuse to disclose such information as it did hold in respect of the other parts of the request.
12. During her investigation, the Commissioner considered representations from the complainant and the MoJ. Her staff reviewed the withheld information, which comprises an exchange of written correspondence between the then Lord Chancellor and Lord Chief Justice. She also had sight of the submission put to the qualified person and the qualified person's response.

Reasons for decision

Section 1 – information held

13. Section 1 of the FOIA states that any person making a request for information is entitled to be informed by the public authority whether it holds the information, and if so, to have that information communicated to him.
14. In cases where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes might be held, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities. In essence, the Commissioner will determine whether it is likely or unlikely that the MoJ holds information relevant to the complainant's request.
15. 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 take into account 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 or not the information is held on the civil standard of the balance of probabilities.

16. The information in this case is information about the contents of a phone call which allegedly took place in 5 November 2009, together with any action subsequently taken as a result.
17. The MoJ explained to the Commissioner that it had conducted thorough searches and was satisfied that it did not hold any information about the alleged telephone call or any notes made in relation to it. It explained that, assuming the call had taken place, if a minute had been taken, it would have been recorded in the Private Office notebook. It explained that the retention period for Private Office notebooks is six months. No other copies of notebooks are held elsewhere and the information would not be held electronically.
18. The phone call was alleged to have taken place in 2009. Had a note been made of the call at that time, it would have been destroyed midway through 2010, in compliance with the formal retention policy – five years before the complainant made his request. The MoJ was therefore satisfied from the searches that it had conducted, and from its knowledge of its procedures for recording and destroying information, that a note of the phone call, if one had at some time been held, had been destroyed some time ago and was not held by the MoJ or accessible under FOIA.
19. In view of the time that has elapsed since the phone call was alleged to have taken place, and the explanation the MoJ has provided as to its recording and retention policy, and in light of the searches it nevertheless conducted, the Commissioner is satisfied that the MoJ has demonstrated that it has reasonable grounds for considering that the information, if it ever was held, was destroyed some time ago. Accordingly, she is satisfied that, on the balance of probabilities, it does not hold the information described at paragraph 16, above.

Section 36 – prejudice to effective conduct of public affairs

20. As set out in paragraph 10, above, the MoJ has applied section 36(2)(b)(ii) to withhold information falling within parts (iv) and (vii) of the request.
21. Section 36(2)(b)(ii) states that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the purpose of deliberation.
22. Section 36 of the FOIA is a prejudice-based exemption, meaning that it is necessary to consider the impact that disclosure would or would be likely to have. The MoJ has in this case specified the level of prejudice as “would be likely”.

23. The Commissioner's guidance explains that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the withheld information would be likely to inhibit the processes of exchanging views for the purposes of deliberation.

"Note that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether the disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank." (paragraph 45)

24. Consideration of the exemption provided at section 36(2)(b)(ii) is a two-stage process. First, the exemption must be engaged on the basis of a qualified person having provided a reasonable opinion. Secondly, the 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.
25. In determining whether the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed that opinion. Therefore the Commissioner must:
- ascertain who the qualified person is,
 - establish that they gave an opinion,
 - ascertain when the opinion was given, and
 - consider whether the opinion was reasonable.
26. Section 36(5)(a) of the FOIA provides that the qualified person for a government department will be any Minister of the Crown. The MoJ has advised the Commissioner that the qualified person in this case is the Solicitor General. The Attorney General's Office website² states that the Solicitor General is a Minister of the Crown. The Commissioner is therefore satisfied that the Solicitor General meets the definition of "qualified person" for the purposes of section 36.
27. The MoJ submitted a written request for the qualified person's opinion on 16 June 2016. The opinion was provided, in writing, on 7 July 2016.

² <https://www.gov.uk/government/organisations/attorney-generals-office>

Is the opinion reasonable?

28. In determining whether the exemption is engaged, the Commissioner must decide whether the qualified person's opinion was a reasonable one. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable.
29. The Commissioner is not required to determine whether it is the *only* reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. It only has to be a reasonable opinion.
30. The Commissioner will consider all relevant factors when assessing whether the opinion was reasonable, including:
 - the nature of the information and the timing of the request,
 - whether the prejudice relates to the specific subsection of section 36(2) that is being cited (if the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable), and
 - the qualified person's knowledge of, or involvement in, the issue.
31. The MoJ provided the Commissioner with a copy of the submission that was put to the qualified person. It said that the qualified person viewed the information which was subject to the exemption, which comprised an exchange of correspondence between the then Lord Chief Justice and the Lord Chancellor, between June 2009 and November 2009 regarding proposals for youth sentencing.
32. The qualified person accepted the recommendation provided in the submission that the exemption at section 36(2)(b)(ii) should be relied upon. He agreed that the withheld information constituted an exchange of views for the purposes of deliberation. "Deliberation", in the Commissioner's view, refers to a public authority's evaluation of competing arguments or considerations in order to make a decision.
33. The qualified person further agreed that disclosure would be likely to prejudice the relationship between the current Lord Chief Justice and the Lord Chancellor. This was because disclosure would be likely to have a "chilling effect", inhibiting the ability of the incumbent Lord Chief Justice and the Lord Chancellor and their advisers from expressing themselves openly, honestly and completely when giving advice as part of the process of deliberation. He accepted that inhibiting the provision of candid advice or the exchange of views may impair the quality of decision making by the MoJ.

34. The MoJ considered that the complainant was motivated by a belief that the Judiciary had been “interfering” in MoJ policy. The MoJ strongly denied that this had been the case. Nevertheless, the inhibition of the free and frank exchange of views would be a real consequence if disclosure were to negatively influence public perception of the Judiciary as “interfering”, rather than the MoJ’s view of the relationship being important engagement with a main stakeholder.
35. The Commissioner’s own guidance on section 36³ confirms that section 36(2)(b) arguments will usually be based on the disclosure of the information having a ‘chilling effect’ in terms of inhibiting free and frank discussions in the future and that going forward, the loss of frankness and candour would damage the quality of advice and deliberation leading to poorer decision and policy making.
36. Having viewed the withheld information, and considering the arguments above, the Commissioner finds that the qualified person’s opinion, that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation, was a reasonable one. Therefore the exemption at section 36(2)(b)(ii) of the FOIA was engaged.

Public interest test

37. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition would be likely to result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. The Commissioner does not have to agree with the qualified person’s opinion to accept the exemption is engaged. However, by accepting that the opinion is reasonable in this case, the Commissioner recognises there is potential for those participating in exchanges similar to ones under consideration here, as well as the incumbent post holders, to be more circumspect when sharing their views with others in the future.

Public interest considerations favouring disclosure

39. The complainant considered that the public interest overwhelmingly favoured disclosure of the information. He believed that the then Lord

³ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

Chief Justice had influenced the drafting of the MoJ's youth sentencing policy, and that it was in the public interest that the extent of his influence be revealed. He commented:

"I would draw to your attention [to] section 5 of the Constitutional Reform Act 2005, which makes quite clear that whilst the Lord Chief Justice may make representations on matters of importance relating to the administration of justice, this should be done openly and to Parliament. Secret, behind the scenes representations are the antithesis of the expectation behind this provision."

40. The MoJ acknowledged the general public interest in transparency surrounding the decision making of government departments. It accepted that the disclosure of the information in question may assist wider public understanding in respect of the relationship between the Lord Chancellor and the Lord Chief Justice, and also how the MoJ interacts with its key stakeholders, such as the Judiciary.

Public interest considerations favouring withholding the information

41. The MoJ explained that the relationship between the Lord Chancellor, as the ministerial head of the MoJ, and the Lord Chief Justice, as the head of the Judiciary, is a stakeholder relationship that requires open and candid discussions, particularly as the Judiciary has a key role in supporting the functions of MoJ agencies, such as HM Courts and Tribunals Service. It was vital that they be able to freely and frankly exchange views for the purpose of deliberation without the fear that their discussions would be released into the public domain. In addition, the MoJ argued there was a strong public interest in them being frank in their recommendations, including being able to express any concerns in confidence.
42. Prejudice to these relations through the inhibition of the ability to exchange views freely and frankly would have a significant and lasting impact on the functions and processes of the MoJ beyond the remit of the information which is the subject to this request. In its submission, the MoJ said:

"... while the content of the letters between the former LCJ and Justice Secretary are relatively factual and there has been a significant passage of time since they were written, the prejudicial effect on the ongoing relationships between the incumbent LCJ and SoS by disclosure of these letters is the process the MoJ considers to be inhibited by disclosure, to the extent in which there could be an effect on the wider public sector."

43. It was the MoJ's view that disclosure would be likely to have a future impact on how views are communicated. It foresaw, for example, a

potential increase in discussions undertaken verbally and them not being minuted, which would damage the processes associated with preserving the corporate memory. The MoJ also argued that disclosure would lead to individuals being more circumspect in their advice and in putting their views forward. As a result, deliberations and advice would be less well informed which would leave the MoJ and key stakeholders at a significant disadvantage when considering future policy/decision making process.

44. The MoJ explained that it had contacted the current Lord Chief Justice to seek his views on disclosure in this case. He in turn had consulted with the former Lord Chief Justice, and as a result, he had significant reservations about the prejudicial effect of disclosure on the ongoing relationship between the head of the Judiciary and the MoJ, particularly in view of the need for the Head of the Judiciary to be able to engage in appropriate discussions with the Lord Chancellor on matters which affect the justice system. The present Lord Chief Justice expressed concern that disclosure would prejudice the ongoing stakeholder relationship of the incumbents and would affect their ability to express themselves openly when giving advice and views.
45. The MoJ considered that the fact that one of the parties to the exchange covered by the request has expressed serious concerns over disclosing the information supports its position that disclosure would alter the nature of the relationship between the head of the Judiciary and the Lord Chancellor, and the MoJ and its judicial stakeholders, and that the likely inhibition to the candour of their discussions would be detrimental to the public interest.

Balance of the public interest

46. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
47. The Commissioner has considered the arguments in favour of disclosure and acknowledges there is a strong public interest in disclosure of information which would demonstrate that a sensitive piece of judicial policy has been properly discussed and deliberated at a sufficiently senior level. She is also mindful of the complainant's call for scrutiny of the drawing up of the MoJ's youth sentencing policy. The Commissioner recognises that disclosing any information which sheds light on these processes would serve the public interest in this regard.

48. Balanced against this, the Commissioner acknowledges there is some significant weight attached to the "chilling effect" arguments. If information about the exchange of views in this case is put into the public domain then senior officials and others are likely to be inhibited from providing open and honest advice and exchanging free and frank views for the purposes of deliberation in the future. This in turn would affect the ability of the MoJ to make effective and fully informed decisions in the future.
49. Whilst the Commissioner is of the view that senior officials should be sufficiently robust to make decisions without being deterred by concerns about advice and deliberations being publicly available, this view does not outweigh the need to deliberate and provide advice in confidence in relation to important and large scale issues, as was involved in the particular circumstances of this case. The MoJ should be able to engage in free and frank discussions which include the provision of advice and the exchange of views for the purpose of deliberation, in order to enable strategic decisions to be made. The Commissioner considers that, given the MoJ's role in overseeing the judicial system, it is very important that it can do so in a genuinely free and frank manner.
50. Disclosure of the withheld information would be likely to be prejudicial to any future frank and candid discussions that may take place around concerns raised by and with the Judiciary, as stakeholders, around the implementation of policy, particularly in instances which may affect the functional separations between the MoJ and the Judiciary. In particular, disclosure of the information would be likely to directly prejudice the relationship between the Lord Chancellor and the Lord Chief Justice, and the wider department and its judicial stakeholders. It would be likely to impact the frequency and effectiveness of future collaboration in respect of the MoJ seeking input from its judicial stakeholders on controversial and sensitive policy issues if confidence in the perceived confidentiality of such conversations was damaged by the belief that they may be disclosed to the public under FOIA.
51. It is in the public interest that the Lord Chief Justice and the Lord Chancellor are able to debate issues in respect of MoJ departmental policy openly, honestly and completely, free from the pressures of disclosure, to ensure that both the MoJ and the Judiciary benefit from open and candid debate. It is in the wider public interest to preserve the integrity of confidential communications, to ensure both the MoJ and the Judiciary benefit from the high quality decision making which flows from open and candid debate. The Commissioner recognises the specific importance of protecting this process. Disclosure of the withheld information would likely have a direct impact in the loss of confidence in the ability of the Lord Chief Justice and the Lord Chancellor to communicate and seek views on departmental policy, practices and

issues candidly and confidentially which would be likely to adversely affect the quality of decision making.

52. The Commissioner has weighed the public interest in avoiding the inhibition of the free and frank exchange of views for the purposes of deliberation against the public interest in the openness and transparency of the MoJ, and the complainant's arguments about disclosure. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and she considers that the public interest in maintaining the exemption outweighs the public interest in disclosure. Accordingly, the Commissioner finds that the MoJ was entitled to apply section 36(2)(b)(ii) to withhold the information.

Right of appeal

53. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

54. 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.
55. 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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