

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2023

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Decision (including any steps ordered)

1. The complainant requested a named minister's email correspondence relating to compensation payments for victims of infected blood, during a specified time period. The Ministry of Justice (the 'MOJ') refused to provide the requested information, citing sections 35(1)(a) and (b) of FOIA (formulation of Government policy, etc) and section 40(2) (personal information). The complainant confirmed he was only concerned with the MOJ's reliance on section 35 of FOIA.
2. The Commissioner's decision is that sections 35(1)(a) of FOIA is engaged and the balance of the public interest favours maintaining this exemption. As he has found section 35(1)(a) to apply, the Commissioner has not deemed it necessary to consider the MOJ's additional reliance on section 35(1)(b) of FOIA. However, by failing to provide its initial response within 20 working days, the Commissioner also finds that the MOJ breached section 10 of FOIA.
3. No steps are required as a result of this notice.

Background

4. The Commissioner notes that complainant in this case had previously made a similar request to the Department of Health and Social Care (on the same subject matter but for a different individual's emails). This request was refused by the public authority under a number of

exemptions including section 35 of FOIA. The subsequent complaint to the Commissioner resulted in a decision notice¹ which upheld the public authority's reliance on section 35 (please refer to the notice for the full decision).

5. Although this decision is not legally binding, and the Commissioner must consider each case on its merits, he has taken account of it when assessing the current case.

Request and response

6. On 8 March 2023, the complainant wrote to the MOJ, via the WhatDoTheyKnow.com website, and requested information in the following terms:

“Please provide copies of all e-mail correspondence (including attachments) sent to OR from Antonia Romeo during the period 1st December 2022 - 31st January 2023 that relate to Infected Blood Compensation.”

7. On 5 April 2023, the MOJ wrote to advise the complainant that it was extending the response deadline by a further 20 working days in order to consider the public interest test associated with the exemptions.
8. The MOJ responded, late, on 8 June 2023. It refused to provide the requested information citing the following FOIA exemptions:
 - Section 35(1)(a) – the formulation or development of government policy
 - Section 35(1)(b) – Ministerial communications
 - Section 40(2) – personal information
9. The complainant requested an internal review on 9 June 2023 in relation to the MOJ's reliance on sections 35(1)(a) and (b) only.

Scope of the case

10. The complainant contacted the Commissioner on 7 August 2023 to complain about the way his request for information had been handled.
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¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4026395/ic-238814-g7t9.pdf>

His initial complaint centred on the then outstanding internal review outcome.

11. On 18 August 2023, the MOJ wrote to the complainant to say it was extending the time for providing the internal review outcome to the recommended maximum 40 working days (meaning its reply should have been issued by 4 September 2023). The MOJ explained that this was due to the complexity of the case and the necessary input required from third parties.
12. The MOJ subsequently provided its internal review to the complainant, late, on 18 September 2023 and maintained its original position.
13. On 21 September 2023, the complainant confirmed to the Commissioner that he remained dissatisfied. He objected to the “broad-brush application” of section 35 and to the late internal review (please refer to the ‘Other matters’ section of this notice). In particular, the complainant considers that the policy is no longer at the ‘formulation’ stage but is at the ‘implementation’ stage as he stated some interim payments have been made.
14. For clarity, as no complaint was raised at any stage by the complainant about the Home Office’s reliance on section 40(2) of FOIA, the Commissioner has not considered this aspect when investigating this case.
15. The Commissioner has considered whether the MOJ was entitled to rely on section 35 of FOIA to refuse this request. He has viewed the withheld information in this case.

Reasons for decision

Section 35(1)(a) – formulation of government policy

16. Section 35(1)(a) of FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands ‘formulation’ to broadly refer to the design of new policy, and ‘development’ to the process of reviewing or improving existing policy.
17. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered policy options in private.

18. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
19. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
20. The Commissioner is of the opinion that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
21. The MOJ considers that the exemption in section 35(1)(a) is engaged because there is information within the scope of the request which relates to the formulation and development of government policies. It has explained that whilst the overarching policy is the Infected Blood Enquiry and associated Infected Blood Compensation, "the primary sensitivity is that it relates to write rounds, and thus collective cabinet responsibility". The Commissioner notes, from the internal review public interest arguments, that the 'collective responsibility aspect' mainly applies to section 35(1)(b) of FOIA.
22. The MOJ has advised this matter still a live area of government policy development and has provided further details 'in confidence', which the Commissioner has taken into account.
23. The Commissioner is satisfied that all of the withheld information relates to ongoing policy development and thus that section 35(1)(a) of FOIA is engaged.

Public interest test

24. He must next consider the associated public interest test.

Public interest arguments in favour of disclosing the requested information

25. The complainant submitted the following arguments in favour of disclosure:

"As part of the public interest test, I do not believe enough weight, if any, has been given to the fact that many of those infected and affected by infected blood products do not think that the government is progressing with the established policy of paying compensation in relation to infected blood. Releasing this information would increase public confidence that the government is doing what it says it is doing. Furthermore, if the information shows the opposite, then the public interest favours the public knowing that is the case."

26. MOJ recognised that there is an inherent public interest in transparency and accountability of public authorities. In this specific case, it also recognises that there is a public interest in the increased Government transparency and accountability in relation to the compensation scheme.

Public interest arguments in favour of maintaining the exemption

27. In its substantive response to the complainant, the MOJ argued that:

- Releasing the information could significantly undermine ministerial unity and effectiveness by disclosing information shared in confidence between ministers.
- Releasing the information could result in less robust, less well-considered or less effective ministerial debates and decisions around securing collective agreement if a safe space is not preserved.

28. At internal review, the MOJ maintained that the above section 35(1)(a) public interest arguments, both in favour of and against disclosure, still applied. However, it expanded on the 'safe space' argument as follows:

"...we also accept that significant weight should be given to 'safe space' sometimes known as neutral space arguments, ie the concept that the MOJ needs a safe space to develop ideas and promote frank and free debate regarding live issues. There is a stronger public interest in favouring [sic] of protecting this safe space and the ability of Ministers and officials to debate the issues candidly, consider options freely and frankly so as to ensure that the most appropriate decisions are made in the way that is best for the policy to develop.

It is a sensitive live policy issue, which will require ongoing submissions, exchanges of emails and reports on this subject matter. It considers the public interest rests in maintaining and protecting the ability of Ministers to discuss and debate the policy issues and options in a free and frank manner, away from public scrutiny.

Furthermore, disclosure of the withheld information, at the time of the request, when policy was (and still is) being formulated is likely to have led to external interference and distraction and thereby undermine the effectiveness in formulating and developing policy to safeguard the public in relation to this important issue”.

29. The MOJ submitted the following arguments to the Commissioner:

“There is a strong public interest that the formulating and developing policy are of the highest quality and informed by a full consideration of all the options. Ministers must be able to discuss policy freely and frankly, exchange views on available options and understand their possible implications.

There is a need to protect the safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.

The ICO guidance² states that if the information reveals the views of an individual Minister on a government position, arguments about maintaining collective responsibility are likely to carry significant weight. If collective responsibility arguments are relevant, they always carry significant weight in the public interest test because of the importance of the general constitutional principle.”

30. Section 35(1)(a) is intended to ensure that the possibility of public exposure does not deter from full, timely and effective deliberation of policy formulation and development, including the exploration of all options. Releasing the information at the time the request was made, and any subsequent debate in the media, may have prevented or prejudiced the development of policy by causing undue distraction or hindered the consideration of all options. This would have not been in the public interest.

The balance of the public interest arguments

31. There will always be some inherent public interest in withholding information that falls within a class that Parliament decided deserved special protection. However, the weight to be attributed to that public interest will vary depending on the sensitivity of the policy in question

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

and the stage the policymaking process was at when the request was refused.

32. The Commissioner recognises that policy development needs some degree of freedom to enable the process to work effectively. The MOJ considers that there is a strong public interest in protecting information where release would be likely to have a detrimental impact on the ongoing development of policy.
33. The requested information contains open and frank views from Ministers and officials which were shared on a confidential basis. Should this information be made public, it could deter stakeholders from similar future engagement with the MOJ, which could negatively impact policy development by limiting the range of views that officials can consider. This could undermine the subsequent development of policies by weakening the ability of government to be fully informed.
34. The Commissioner has considered the withheld information and the arguments put forward by both parties. He accords some weight to the public interest in the accountability and transparency of public authorities and in this case, in the government's approach to the compensation scheme associated with the infected blood enquiry.
35. However, the Commissioner accords more significant weight to the public interest in not disclosing confidential information regarding this matter and thereby potentially negatively impacting policy development around it.
36. The Commissioner therefore finds that the public interest in maintaining the exemption at section 35(1)(a) of FOIA outweighs the public interest in disclosure at the time of the request.
37. It follows that he finds that the Home Office was entitled to rely on section 35(1)(a) of FOIA to refuse this request. Given this conclusion, the Commissioner has not deemed it necessary to consider the MOJ's additional reliance on section 35(1)(b) of FOIA.

Section 10 – time for compliance

38. Although not complained about by the complainant, the Commissioner has noted that the MOJ failed to provide its substantive response to the request within the statutory 20 working days' time limit and has nevertheless logged this delay.

Other matters

Internal review

39. The MOJ took a considerable time to conduct an internal review. The Commissioner cannot consider the amount of time taken 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.
40. Part 5 of the section 45 Code of Practice³ (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.
41. The Commissioner is concerned that it took over three months for an internal review to be completed.
42. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his FOI and Transparency Regulatory Manual⁴.

³https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁴ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

43. 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

44. 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.
45. 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

Carolyn Howes
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