

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2024

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

Decision (including any steps ordered)

1. The complainant requested information relating to checks on external speakers. The Ministry of Justice (MoJ) refused to provide the requested information, citing section 35(1) (formulation and development of government policy) of FOIA.
2. The Commissioner's decision is that section 35 is not engaged.
3. The Commissioner requires the MoJ to take the following step to ensure compliance with the legislation:
 - disclose the withheld information to the complainant.
4. The MoJ must take this step within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 July 2023, the complainant wrote to the MoJ and requested information in the following terms:

"All internal documents containing policies, guidance, procedures and other practices relating to 'due diligence' and/or other checks being

- conducted on external speakers in the course of organising departmental events, or other events affiliated with your department”.
6. The MoJ responded on 31 August 2023. It confirmed it holds information but refused to provide it, citing sections 35(1)(a) (formulation of government policy) and 42 (legal professional privilege) of FOIA.
 7. Following an internal review, the MoJ wrote to the complainant on 24 October 2023 maintaining its position.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way their request for information had been handled. They disputed that the exemptions are engaged, but, in the event that they are engaged, they consider that the public interest favours disclosure.
9. The complainant provided the Commissioner with evidence of a disclosure under FOIA by a different public authority, namely the Cabinet Office, in support of their complaint.
10. The Commissioner considers that the wording of the request that the Cabinet Office responded to, and the wording of the request in this case, are different. The request in this case is broader and has the potential to capture more information. He also takes the view that another public authority complying with, what appears to be, a similar request for information does not set an automatic precedent for disclosure under FOIA.
11. During the course of the Commissioner’s investigation, the MoJ wrote to the complainant advising that, having revisited its handling of the request, it no longer considered that the section 42 exemption applied. However, it confirmed, and clarified, its application of the exemption at section 35.
12. The complainant remained dissatisfied with the revised response, confirming that it wishes to challenge the MoJ’s application of section 35 to the information in scope of the request.
13. The MoJ provided the Commissioner with a copy of the withheld information during the course of his investigation.
14. The analysis below considers the MoJ’s application of section 35(1)(a) of FOIA to the withheld information.

Reasons for decision

15. 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 or 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.
16. 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.
17. Section 35 is class-based, meaning that a public authority 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. The classes are interpreted broadly and catch a wide range of information.
18. However, the exemption is subject to the public interest test.
19. In correspondence with the complainant, the MoJ confirmed that it has:

“... an established event planning and due diligence process, for assessing whether internal staff events hosted by our recognised MoJ Staff Networks, are fit for purpose, offer value for taxpayers' money and are in line with Civil Service rules including maintain impartiality”.
20. It also explained:

“The MOJ considers that the exemption in section 35(1)(a) is engaged because the information within the scope of the FOIA request relates to the formulation and development of Government policy on: Due Diligence and Impartiality Guidance for Cross-Government Diversity Network”.
21. In that respect, the MoJ told the complainant:

“The information that you have requested forms part of the review MoJ Due Diligence guidance (formulation/review of policy) and therefore we cannot release it at this time”.

and

"[Section] 35(1)(a) is appropriate because the information requested relates to ongoing government policy formulation or development on the topic of 'due diligence'".

22. In its submission to the Commissioner, the MoJ confirmed that, having reconsidered its position as a result of the Commissioner's investigation, it considers that the exemption applied at the time of the request.

23. It told the Commissioner:

"The withheld information relates to and is significantly linked to government policy, that being the Due Diligence and Impartiality Guidance for Cross-Government Diversity Networks.

[...]

... in the MOJ view there is a clear relationship between the content of the information withheld and the protection of the formulation and development of policy".

Is the exemption engaged?

24. In his guidance on section 35¹, the Commissioner states:

"To be exempt, the information must relate to the formulation or development of government policy. These terms broadly refer to the design of new policy, and the process of reviewing or improving existing policy".

25. 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.

26. The Commissioner's guidance also states:

"Departmental policies about the internal management and administration of individual departments are not government policy (eg HR, information security, management structure, or administrative

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

processes). All public and private sector organisations need these sorts of policies in place. They are about managing the organisation”.

27. It also addresses the relation between policy development and implementation:

“Even after a policy decision has been made, issues arising during implementation may then feedback into a policy improvement process, and some details may be adapted on an ad hoc basis during implementation. However, fine-tuning the details of a policy does not automatically amount to policy development, and sometimes may more accurately be seen as adjustments to its implementation”.
28. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case-by-case basis, focussing on the timing and precise context of the information in question.
29. The Commissioner accepts that the term ‘relates to’ can be interpreted broadly. He also accepts that there is no standard form of government policy; policy may be made in various ways and take various forms.
30. In this case, he considers that the MoJ relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis. He considers that the MoJ’s arguments relate more to the public interest test.
31. As noted above, the Commissioner asked the MoJ to provide him with a copy of the withheld information. As a result of his own research, the Commissioner considers that some of the information which the MoJ provided to him is in the public domain. In the circumstances, he finds that section 35 is not engaged in respect of this information.
32. With respect to the remaining withheld information, having regard to the explanations provided by the MoJ, and having considered the content of the withheld information, the Commissioner is not satisfied that the MoJ has demonstrated that the exemption at section 35(1)(a) is engaged.
33. In his view, the withheld information appears to relate to operational processes and procedures which ensure that the MoJ’s practices are in accordance with the then guidance, rather than the formulation or development of government policy.
34. As the Commissioner cannot be satisfied that the exemption is engaged, he has not found it necessary to consider the public interest test.

Conclusion

35. The Commissioner finds that section 35(1)(a) is not engaged.

Right of appeal

36. 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

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Michael Lea
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF