

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 April 2024

**Public Authority:** Criminal Cases Review Commission  
**Address:** 23 Stephenson Street  
Birmingham  
B2 4BH

#### **Decision (including any steps ordered)**

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1. The complainant has requested information about the Criminal Cases Review Commission's ('the CCRC') review of its handling of a particular case. The CCRC referred the complainant to its media statements about the review, but it refused to disclose the remaining information it held, citing sections 36 (Prejudice to effective conduct of public affairs), 42 (Legal professional privilege) and 43 (Commercial interests) of FOIA.
2. The Commissioner's decision is that the CCRC was entitled to apply sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to refuse to disclose the remaining information. However, he found breaches of sections 1(1), 10(1) and 17 in its handling of the request.
3. The Commissioner requires no steps.

#### **Background**

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4. Andy Malkinson spent over 17 years in prison for a crime he did not commit. During that time, Mr Malkinson made two unsuccessful applications to the CCRC, asking it to refer his case to the Court of Appeal. A third application was successful, and his conviction was eventually quashed in August 2023.
5. The CCRC then commissioned a review, carried out by an independent KC, into its handling of Mr Malkinson's applications.

## Request and response

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6. On 17 August 2023, the complainant wrote to the CCRC and requested information in the following terms:

"Today it was reported that you had instigated a review into your handling of the conviction of Andy Malkinson (for example, at <https://www.bbc.co.uk/news/uk-66537498>). You were reported to have stated that you had "long recognised" it was important to have a review.'

Please would you send to me any information you hold about a review into your handling of the conviction of Andy Malkinson. For context, but without prejudice to the generality of my request, I would like to know when and why you first recognised the importance of such a review."

7. The complainant sent a chaser on 18 September 2023 and the CCRC responded on 25 September 2023, as follows:

"Your request has been treated as a normal query, rather than a request under the Freedom of Information Act, due to its very general nature.

The Commission reflects on the outcome of all referred cases to either learn lessons from them, or to determine if any factors apply to previous or existing cases.

Further information about the independent KC-led review can be found on our website: [Specifics of upcoming independent review into CCRC investigations - Criminal Cases Review Commission.](#)"

8. The complainant requested an internal review on 25 September 2023. He said the request should have been formally responded to under FOIA.
9. Following the Commissioner's intervention, the CCRC provided the outcome of the internal review on 9 November 2023. It provided another link to the information it had previously referred to on its website, and said that the Terms of Reference for the review could be accessed from that link. It also provided a link to a recent media statement on its website, which it said had not been available at the time of its original response. It said it did not hold any other recorded information.

## Scope of the case

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10. The complainant contacted the Commissioner on 9 November 2023 to complain about the way his request for information had been handled. He disputed the CCRC's claim that it held no other information.
11. During the Commissioner's investigation, the CCRC conducted searches which located a small amount of information falling in scope of the request. It told the Commissioner, and the complainant, that this information was exempt from disclosure under sections 36, 42 and 43 of FOIA.
12. The complainant remained dissatisfied with the CCRC's response. He also told the Commissioner that the CCRC had failed to comply with the provisions of section 17 regarding why the exemptions applied, or how it had concluded that the public interest favoured maintaining them.
13. When considering this case, the Commissioner found that some of the information which the CCRC located was created after the date on which the request was received. Section 1(4) of FOIA states that the information falling in scope of a request will be the information that is held **at the time the request is received**. The Commissioner has therefore disregarded any information located by the CCRC which post-dates the date of the request.
14. The analysis below considers the CCRC's application of sections 36, 42 and 43 of FOIA to withhold information. The Commissioner has also considered the CCRC's general handling of the request under sections 1, 10 and 17 of FOIA.
15. The Commissioner has viewed the withheld information.

## Reasons for decision

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### Section 1 – amount of information held

16. Section 1(1) of FOIA states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

17. In cases where there is some dispute over whether a public authority holds more information than has been disclosed, 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 public authority holds further information. In doing so, he will take into account any specific reasons as to why it is likely – or unlikely – that more information is held.
18. The Commissioner will consider any evidence offered by the complainant. He will also consider the actions taken by the public authority to check whether more information is held and any other reasons offered by the public authority to explain why more information is not held. He will also consider any reason why it is inherently likely, or unlikely, that more information is held. For clarity, the Commissioner is not expected to prove categorically whether more information is held, he is only required to make a judgement on whether more information is held, on the balance of probabilities.
19. The complainant was sceptical of the CCRC's claim not to hold any recorded information on the matter, telling the Commissioner:

“Given the patent significance of the review to the CCRC, I believe that it is implausible that the CCRC does not hold more information of the description I requested, and therefore I do not believe its response can be correct.

For example, but without limitation to the scope of my request, I cannot believe that CCRC staff have never sent emails about a review, or that minutes have never been taken of a staff or board meeting at which a review was discussed.

I note that in one of the news articles to which I was directed, the Chair of the CCRC is quoted as saying ‘Having considered the judgment we began work on the Terms of Reference and identifying a senior and respected KC in the criminal justice system to lead on this.’ It is fantastic to suppose that the Terms of Reference came about without any written materials having been generated.”

20. In light of the complainant's comments, the Commissioner initially asked the CCRC to provide detailed evidence for its claim that it did not hold any other recorded information. In response, the CCRC provided the following information about its approach to reviewing referred cases, explaining why little recorded information was held:

“Reflecting on a referred case is standard practice and as such, it is not an unusual activity for the Commission to undertake. We will always reflect on cases that we have referred to the Court of Appeal

in order to determine if anything learnt can be applied to other current or future cases. As this case was high-profile and we had decided twice previously not to refer the case to the Court of Appeal, the Commission elected to appoint Kings Counsel (KC) to conduct the review to ensure that the review was fully independent in its conclusions.

...

As already mentioned, the need to undertake a review or to reflect on a referred case is not unusual. There is, however, no fixed process. Learning is generally gleaned from colleagues speaking with one another in conversations and oral discussions between relevant members of casework staff, including where appropriate, members of the Senior Leadership Team, as well as Commissioners. The outcome of those discussions may include updated or additional guidance, training or awareness sessions, and decisions to reach out to other potential applicants.

In this instance, there were oral conversations about the need for a review when the case was referred to the Court of Appeal, hence the use of the term 'long recognised'. There was no formal recorded decision but internally there was agreement that a review would be required and that it would take place after the Court had decided the appeal. It is often the Court's judgment that provides the most valuable source of material for our learning. Once the case had been referred to the Court of Appeal and the conviction quashed, the subsequent media and political interest in the case necessitated a rapid response, in a fast-moving situation.

The discussions that led to the creation of the Terms of Reference and the appointment of Chris Henley KC were primarily oral and between senior members of staff and the Chair. There were no formal meetings where minutes were required or taken."

21. However, the CCRC admitted that when responding to the request and the internal review, it had not conducted any searches of its computer systems, because it believed that doing so would engage the costs provisions of FOIA. It said search terms such as "Malkinson", "Review" or "Internal Review" on their own would throw up thousands of results which would then need to be manually reviewed to determine if they were relevant or not. The CCRC felt that having discussions about the request with people who were involved in organising the review was a more efficient way of responding. Those discussions suggested to it that recorded information was unlikely to be held.
22. For the purposes of responding to the Commissioner's enquiries, the CCRC said it had since undertaken "significant" keyword searches of its

systems, which returned around 1300 items of recorded information, all of which it manually reviewed. Of these items, it said that only a small number of emails, plus their attachments, actually fell within the scope of the request (albeit, as explained in paragraph 13, the Commissioner has scoped out those items which post date the request).

23. The CCRC described to the Commissioner the searches it carried out, which included all networked systems and emails (it explained that documents are not stored on local drives of personal computers). It provided the search terms used and said it was confident from its discussions with those involved in the review, that no further information had been produced. It said there is no business purpose that requires the CCRC to hold the requested information and no statutory requirements on it to retain it.
24. When, as in this case, the Commissioner receives a complaint that a public authority has not disclosed all the information that a complainant believes it holds, it is seldom possible to prove with absolute certainty that it holds no further relevant information. However, as set out in paragraphs 17 and 18, above, the Commissioner is required to make a finding on "the balance of probabilities".
25. From the information provided to him by the CCRC about the searches it conducted during the Commissioner's investigation, and the particular reasons why little recorded information would be held, the Commissioner is satisfied that, on the balance of probabilities, it has now located all the recorded information it holds which falls within the request's scope.

### **Section 36 – Prejudice to the effective conduct of public affairs**

26. The CCRC is relying on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to withhold a small amount of information. The CCRC explained that, for the reasons set out above, the information only covers the setting up of the review, and not the need for the review.
27. The withheld information consists of a small number of emails and email chains, with input from various internal and external stakeholders. The emails relate to the practicalities of setting up the independent review and the appointment of a suitable KC. They discuss timings and meetings, both internally and with external stakeholders, the pros and cons of particular arrangements, and the advice and opinions of senior members of staff. In addition to the emails, there is also one paragraph of an attached briefing document which contains information about the review.
28. The Commissioner has also included in his consideration of section 36, emails which the CCRC had exempted under section 42. This is because the emails are concerned with the task of appointing a suitable KC to

lead the review, a subject which is also covered in the information it exempted under section 36. In this case, the emails cover discussions about potential KCs, administrative arrangements and fees. The Commissioner is satisfied that they are not communications made for the main purpose of obtaining or giving legal advice<sup>1</sup>.

29. Under section 36, information will be exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice (section 36(2)(b)(i)) or exchange of views for the purposes of deliberation (section 36(2)(b)(ii)), or would otherwise prejudice, or be likely otherwise to prejudice, the effective conduct of public affairs (section 36(2)(c)).
30. The Commissioner's guidance on section 36<sup>2</sup> explains that information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure could inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision-making.
31. The exemption is concerned with the processes that may be inhibited, rather than with what is in the withheld information. The issue is whether disclosure would, in future, inhibit the processes of providing advice and exchanging views.
32. As regards section 36(2)(c), prejudice to the effective conduct of public affairs can refer to the impact on a public authority's ability to offer an effective public service or to the disruptive effects of disclosure (for example, the diversion of resources in managing the effect of disclosure).
33. The CCRC is concerned about the impact that disclosure of the information would have on its ability to discuss options and voice opinions about potentially sensitive and/or complex situations in future. It says it needs a 'safe space' to have such discussions, free from the influence of, and disruption or distraction caused by, external parties. It

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<sup>1</sup> The qualified person has also viewed the information in question, and confirmed her agreement to supporting arguments for the prejudicial consequences of disclosure that are very similar to those supplied for section 36

<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>



also argued that disclosure would have a chilling effect on future discussions.

34. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a 'qualified person'.
35. Having been provided with the submissions made to the qualified person, the Commissioner is satisfied that the CCRC's Chief Executive gave the opinion that the exemptions were engaged, and that she was authorised to do so as the 'qualified person' under section 36(5) of FOIA. The opinion was given on 21 March 2024, when the CCRC revised its position and applied section 36 to the request.
36. The Commissioner has gone on to consider whether the qualified person's opinion that the exemptions were engaged was 'reasonable'. He does not need to agree with the opinion in order for the exemption to be engaged. He need only satisfy himself that the qualified person's opinion is an opinion that a reasonable person could hold, in the circumstances.
37. The submission put to the qualified person summarised the reasons for applying sections 36(2)(b)(i) & (ii) and 36(2)(c). It was argued that the discussions in the emails between members of its senior leadership team and others were, and continue to be, full and frank. They dealt with sensitive issues regarding the practicalities of setting up the review. The CCRC said:

"Disclosure of these emails and attachments would, in my opinion, lead to the inhibition of similar free and frank discussions in the future. This is because those involved in the discussions would know that their thoughts, views and conversations are liable to be made public. They must be able to properly deliberate by exploring options and solutions. That loss of frankness and candour—and the consequent reluctance to consider uninhibited arguments to resolve difficult and/or complex issues—would damage the quality of deliberation, lead to poorer decision making and worse outcomes overall.

I also consider that there is a real need for a safe space to exist for these deliberations to take place without hindrance, pending final decisions being taken.

...

In my opinion, releasing information about internal discussions and debates on sensitive and complex subjects would prejudice the effective conduct of the Commission's function by inhibiting internal discussion, the full and frank consideration of cases and operational matters including potential issues, learning lessons from previous



reviews, fully understanding the implications of decisions made in cases. Releasing such information could also prejudice our ability to undertake reviews after a case has concluded because such draft comments could unfairly or wrongly be perceived and presented as being indicative of final and closed views.

It could also harm the ongoing relationship between the Commission and [external stakeholders] if frank discussions were released. It could also harm the public confidence and trust that applicants must feel if they are to access the Commission.”

38. Having reviewed the submissions put to the qualified person, the Commissioner is satisfied that they included a clear overview of the request, the information and relevant arguments for, and against, the application of each exemption.
39. The Commissioner finds that it was reasonable for the qualified person to reach the view from the submissions that, at the time of the request, disclosure of the information would inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. At the time of the request, the review had only just been announced. The CCRC still required space to consider all options, debate live issues, and reach decisions away from external interference and distraction. Disclosure of this information into the public domain would also be likely to have a chilling effect on future discussions (thereby inhibiting the processes of deliberation).
40. The Commissioner is also satisfied that, given the considerable media coverage that Mr Malkinson’s case has attracted, the opinion that disclosure would be likely otherwise to prejudice the effective conduct of public affairs, is a reasonable one. This is due to the level, and nature of, external engagement that disclosure of the information would be likely to prompt.
41. The Commissioner is therefore satisfied that sections 36(2)(b)(i) and (ii) and 36(2)(c) of FOIA are engaged in this case.

### **Public interest test**

42. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although sections 36(2)(b)(i) and (ii) and 36(2)(c) are engaged, the withheld information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

43. The complainant has not offered any arguments as to why the public interest favours disclosure, although the wording of his request and his comments in paragraph 19 would suggest he believes it does.
44. The CCRC's submissions acknowledged that the public has an interest in knowing how the CCRC set up the independent review of the Malkinson case, and in knowing that a suitable KC was appointed, in a fair manner.

### **Public interest arguments in favour of maintaining the exemption**

45. The CCRC argued that releasing information about internal discussions and debates on sensitive and complex subjects would undermine the Commission's ability to carry out its functions effectively, because it would inhibit future full and frank discussions of cases, operational matters, issues, and learning points. This would damage the quality of deliberation, lead to poorer decision making and worse outcomes overall.
46. The CCRC argued that is important for officials to have a safe space to discuss options and voice opinions about how to manage potentially sensitive situations and to provide briefings to senior staff members on complex matters. Releasing discussions about how it manages such situations, what the options are and what factors are being considered would have the effect of chilling the conversation if all possible options and factors that were discussed were to be made public. Releasing briefings would have the effect of chilling the briefing process and subsequent conversation with important external stakeholders. It could also harm the ongoing relationship between the Commission and external stakeholders, if frank discussions with or regarding them were released.
47. The CCRC also argued that disclosure would be likely to have severe consequences on public confidence in the criminal justice system:

"It could also harm the public confidence and trust that applicants must feel if they are to access the Commission. While we will aim to be as transparent as we can, we must also have regard to the legislative framework in which operate. We need to be willing to learn lessons from other cases and apply them effectively but without unnecessarily undermining the confidence of applicants, the public, stakeholders and staff."

### **Balance of the public interest**

48. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. He also recognises the need for transparency and openness on the part of public authorities involved in 'lessons learned' exercises. Disclosure in this case would inform the

public about how the CCRC managed the early stages of the setting up of an independent review into its handling of a case.

49. However, the Commissioner considers that the opinion of CCRC's Chief Executive, as the qualified person, carries considerable weight when balancing the public interest in this case. They have the requisite knowledge of the decision-making process, the information and the likely consequences of any disclosure.
50. He has also considered the timing of the request. Civil servants and other public officials are expected to be impartial and robust when giving advice, and not be easily deterred from expressing their views by the possibility of future disclosure. However, safe space and chilling effect arguments cannot be dismissed out of hand and are likely to be strongest if the issue in question is still live. In this case, the request was made on the day the review was announced. It was therefore very much a 'live' matter at the time the request was received, with ongoing deliberations and discussions about how best to proceed. Indeed, as set out in paragraph 13, the Commissioner was required to scope out particular information because it was created after the point the request was received.
51. Finally, the Commissioner has considered the severity and extent of the envisioned prejudice or inhibition. In carrying out this exercise, appropriate weight must be afforded to the public interest in avoiding harm to deliberation and decision making processes. There is a clear public interest in the CCRC's officials having the freedom to thoroughly explore all options for setting up a review, and in them being able to do so quickly. To support this, it is important that discussions can be had, and effective advice provided, without undue public scrutiny. Disclosing information would have a detrimental, chilling effect on the exchange of views, and subsequently on the quality of any advice that may be provided. Poor or deficient advice may result in the setting up of a review which is ineffective or deficient in some way. Clearly, this would not serve the public interest.
52. The Commissioner also accepts that, given the case's high profile, disclosure at the time of the request would have been likely to have a disruptive effect on the CCRC's work, because of the follow-up enquiries it would generate. Dealing with them would have diverted internal attention and resources away from its core business of examining potential miscarriages of justice, to respond to enquiries about matters which have not yet been finalised. It could also impact on stakeholder confidence, if it was unable to guarantee that sensitive discussions can take place in private.
53. The Commissioner considers the public interest in protecting good decision making by the CCRC to be a compelling argument in favour of

maintaining the exemptions. On balance, he finds the public interest would be served better by protecting the CCRC's access to an environment conducive to good decision making and maintaining stakeholder confidence. He has reached this view mindful that the withheld information would not inform the public about the CCRC's handling of Mr Malkinson's case. The request is for information about the review, and that was still in the process of being set up at the time of the request.

54. The Commissioner's decision is that the CCRC was entitled to rely on sections 36(2)(b)(i)(ii) and 36(2)(c) of FOIA to withhold the information in question.

### **Procedural matters**

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55. The Commissioner finds that the CCRC did not comply with section 1(1)(a) of FOIA, as it failed to properly establish whether or not it held information falling within scope of the request, prior to responding to it.
56. Furthermore, section 10(1) of FOIA states that a public authority must respond to a request promptly and "not later than the twentieth working day following the date of receipt".
57. In this case, the CCRC took 26 working days to respond to the request. It therefore breached sections 1(1)(a) and (b), and 10(1) of FOIA, by failing to respond to the request within 20 working days.
58. Finally, when notifying the complainant of its change of position, the CCRC did not explain why sections 36, 42 and 43 applied, and it did not explain how it had concluded that the public interest favoured maintaining the exemptions. These are breaches of section 17(1)(c) and 17(3)(b) of FOIA.
59. The Commissioner has made a record of these breaches, for monitoring purposes.

## **Right of appeal**

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60. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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