

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2022

Public Authority: Ministry of Justice

Address: 102 Petty France
London
SW1H 9AJ

Complainant: Mr N Stilwell

Address: nathan@humanists.uk

Decision (including any steps ordered)

1. The complainant requested a 'call for evidence' paper on assisted dying. The Ministry of Justice (the 'MOJ') refused to provide the requested information, ultimately citing various subsections of the section 36 exemption (prejudice to effective conduct of public affairs) of FOIA, namely sections 36(2)(a)(i) (the maintenance of the convention of the collective responsibility of Ministers of the Crown), 36(2)(b)(i) (the free and frank provision of advice), 36(2)(b)(ii) (the free and frank exchange of views for the purposes of deliberation) and 36(2)(c) (would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs).
2. The Commissioner's decision is that the MOJ was not entitled to rely on any of the cited limbs of the exemption at section 36 for the reasons set out in this notice.
3. The Commissioner requires the MOJ to take the following step to ensure compliance with the legislation.
 - Disclose the requested paper in full electronically to the complainant.
4. The MOJ must take these steps within 35 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.

Background

5. The request was originally made to the MOJ by an individual who was representing his employer. This individual then made a subsequent complaint to the Commissioner. At the start of the Commissioner's investigation, it became apparent that the original complainant no longer worked at the organisation that had requested the information.
6. Following a conversation with the original complainant, and agreement from all parties, the complaint was passed to another employee from that organisation. He confirmed both that he was now representing the organisation and that the requested information was still required.

Request and response

7. On 6 November 2020, the complainant wrote to the MOJ and requested information in the following terms:

"I am writing to make a request under the Freedom of Information Act 2000.

Prior to 24 July 2019, the former Secretary of State for Justice, the Rt Hon. David Gauke, instructed the Ministry of Justice to draft a call for evidence on the impact of our existing laws on assisted dying. This paper was completed but never released. Therefore, please can I be provided with an electronic copy of this paper...".

8. The MOJ responded, late, on 6 January 2021. It refused to provide the requested paper citing section 36(2)(a)(i) of FOIA – the maintenance of the convention of the collective responsibility of Ministers of the Crown. It said that the associated public interest test favoured maintaining this exemption.
9. The complainant requested an internal review on 15 January 2021. He did not challenge the MOJ's reliance on section 36(2)(a)(i) itself, but disputed the balance of the public interest test.
10. Following its internal review the MOJ wrote to the complainant, late, on 20 April 2021. It maintained that the balance of the public interest associated with section 36(2)(a)(i) favoured maintaining the exemption, but now also cited the following additional exemptions:
 - Section 36(2)(b)(i) – the free and frank provision of advice.
 - Section 36(2)(b)(ii) – the free and frank exchange of views for the purposes of deliberation.

- Section 36(2)(c) – would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. Each of the above subsections have been applied to the requested paper as a whole such that all four cited subsections are being relied upon for the entire document, ie separate subsections are not being applied to separate parts of the withheld information.
 12. The MOJ again maintained that the public interest tests favoured withholding the requested information.

Scope of the case

13. The complainant contacted the Commissioner on 24 June 2021 to complain about the way his request for information had been handled. He submitted a detailed nine-page letter outlining his grounds of complaint and setting out the reasons why he refutes the MOJ's reliance on the exemptions listed above. In summary, he disputed both "the relevancy of these provisions and doubt their [ie the stated exemptions] applicability" and the MOJ's balancing of the respective public interest tests.
14. The Commissioner asked the MOJ to consider the complainant's grounds of complaint as part of its investigation response.
15. Despite the fact that the complainant did not complain about the delays with the response and internal review outcome in this case, the Commissioner has made a record of them.
16. Having received the MOJ's investigation response, which maintained that all four cited limbs of the section 36 exemption were engaged, the Commissioner wrote to the MOJ on 14 June 2022. He set out his preliminary view that section 36 could not be relied upon in this case and asked the MOJ whether it wished to reconsider its position, highlighting that the original recommendation to the qualified person had been to **disclose** the 'call for evidence' paper. In the event that the MOJ wished to maintain its position, the Commissioner also queried which subsection of 36 the MOJ wished to lead on and to identify any parts of the report it had most concerns about being disclosed.
17. The MOJ responded on 22 June 2022. It maintained its reliance on all four cited limbs of section 36 of FOIA and said that they all applied to the document as a whole. It did not address the point about areas of particular concern within the withheld paper.

18. The Commissioner has considered whether the MOJ was entitled to rely on any of the cited section 36 exemptions to withhold the requested information.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

19. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates differently to the other prejudice based exemptions in FOIA, in that it is engaged only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in subsections of 36(2).
20. In this case the Commissioner is considering the MOJ's application of the exemptions at sections 36(2)(a)(i), 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) which have all been applied to the requested paper.
21. For ease of reference, section 36(2)(a)(i) provides that information is exempt if its disclosure would, or would be likely to, prejudice the maintenance of the convention of the collective responsibility of Ministers of the Crown.
22. Sections 36(2)(b)(i) and (ii) provide that information is exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice, or the free and frank exchange of views for the purposes of deliberation.
23. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
24. In order to establish whether the exemptions have been applied correctly the Commissioner must:
 - Ascertain whom the qualified person is for the public authority in question;
 - Establish that an opinion was given;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion given was reasonable.

Who is the 'Qualified Person' and have they given an opinion?

25. The MOJ provided the Commissioner with a copy of the various submissions that had been provided to the qualified person outlining why it would be appropriate to initially disclose the requested information and, latterly, to rely on section 36 to withhold the requested information.
26. In this case, the initial submission was sent to both Minister Chalk and the then Lord Chancellor (the Right Honourable Robert Buckland QC) on 24 November 2020. It recommended disclosure of the requested report on the basis that the MOJ could neither reasonably argue that the report was exempt because it relates to the formulation or development of government policy (section 35(1)(a) of FOIA), nor because it would inhibit the free and frank exchange of views or otherwise prejudice the effective conduct of public affairs (section 36 of FOIA).
27. However, on 3 December 2020, prior to receiving a response from either party and having received further advice from a specialist adviser, the MOJ amended its stance. It sent a revised submission to Minister Alex Chalk recommending withholding the requested report, citing only section 36(2)(a)(i) at that point (the maintenance of the convention of the collective responsibility of Ministers of the Crown).
28. At the time of the request Alex Chalk QC was Parliamentary Under Secretary of State at the MOJ and Assistant Government Whip (between 14 February 2020 and September 2021). The Commissioner is satisfied that Minister Chalk was authorised as a qualified person under section 36(5) of FOIA.
29. The submission indicates that the withheld information was shown to the qualified person. The Commissioner notes that the qualified person gave his opinion on 3 December 2020 and signed his agreement to the submission which indicated that the level of prejudice claimed was the lower threshold of "would be likely".
30. At the internal review stage (in March 2021), the MOJ has explained that a further opinion was sought and that the qualified person was the former Lord Chancellor, Robert Buckland QC. From the case correspondence provided by the MOJ, the Commissioner notes that further submissions were made to Minister Chalk on 2 March 2021 and an update given to the Lord Chancellor on 26 March 2021. The MOJ has provided the Commissioner with a copy of an email dated 15 April 2021 recording the Lord Chancellor's agreement and has explained that:

"The former Lord Chancellor did not provide a written opinion on why section 36 was engaged but the letter of 20 April 2021, which he approved personally, reflected his views."

31. The Commissioner notes that the letter referred to above is that of the internal review outcome sent to the complainant which maintained that the various subsections of 36 applied, rather than the one subsection which was initially relied on. The Commissioner has also had sight of the email of 15 April 2021 and is satisfied that an 'opinion' was sought.
32. During the course of the Commissioner's investigation, on 22 April 2022, the MOJ sought a further opinion from the qualified person, this time Minister James Cartlidge.
33. The Commissioner notes that Minister Cartlidge was Parliamentary Under-Secretary of State for Justice between 2021 and 2022 and was authorised as the qualified person in terms of FOIA.
34. Minister Cartlidge provided his opinion on 17 May 2022 by way of a short email stating he "had decided not to publish [the requested paper] at this time".

What is the 'Qualified Person's' opinion and is it reasonable?

35. The Commissioner has gone on to consider whether any of the opinions of the various qualified persons involved in the handling of this request are reasonable. It is not the role of the Commissioner to substitute his own opinion for that of the qualified person. The qualified person is best placed to know the circumstances of their organisation and the significance of the information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.
36. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
37. As per the Commissioner's section 36 guidance¹:

"Where the ICO is considering a complaint regarding information withheld under section 36, it will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:

¹ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
- The qualified person's knowledge of or involvement in the issue.

The ICO is primarily concerned with the reasonableness of the substantive opinion and is not explicitly required to assess the quality of the reasoning process that lay behind it. However, the content of the opinion or the submission made to support it will often be relevant to the ICO's assessment of whether the opinion is reasonable. It is in the public authority's interests to provide the ICO with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that we may find that the opinion is not reasonable. If the qualified person makes an assertion that appears on the face of it to be an unreasonable opinion, then we are likely to find the exemption is not engaged, but if they had supported it by argument and evidence that relevant factors have been taken into account, it may be evident that it is at least a reasonable opinion. Section 36(2) is expressed in broad terms, and in order for the opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise."

38. In this case, unusually, three opinions have been sought as set out above. The Commissioner has decided that the most relevant opinion is that submitted during his own investigation on 15 April 2022, as it represents the MOJ's latest and final position in relation to the request under consideration. However, he has also reviewed and considered the previous opinions together with the accompanying submissions. Having done so, the Commissioner considers that the content of the various submissions reflects the MOJ's uncertainty from the outset as to whether or not the requested paper should be withheld.
39. Whilst some of the following may reiterate what has already been stated in this notice, the Commissioner considers it pertinent to do so given that they represent his deliberations in this case.
40. The Commissioner notes that the MOJ's initial stance in November 2020 was to recommend disclosure of the requested paper and that this was

reflected in its first submission to the qualified person of 24 November 2020. Here, the MOJ set out that neither section 35 nor section 36 could be relied upon and asked the qualified person's opinion of the then resulting disclosure. The submissions include the following:

"Releasing the call for evidence document has no legal, financial or devolution implications. It is simply a factual account of the divergence of views on the issue of assisted suicide; the current legal framework in England and Wales; previous Parliamentary debates; and legal challenges to the compatibility of the prohibition on assisting suicide with the European Convention on Human Rights (ECHR) all of which are well documented elsewhere."

41. In recommending disclosure, the MOJ recognised the likely parliamentary interest and potential calls for a review and that media coverage may be critical given that the paper was not published. The Commissioner notes that the fact that the paper was not published is already in the public domain.
42. However, the MOJ changed its stance and made revised submissions to the qualified person on 3 December 2020, this time recommending that section 36(2)(a)(i) be applied to the withheld paper.
43. In the opinion of the qualified person the exemption at section 36(2)(a)(i) was applicable to the withheld information. However, the Commissioner does not agree that section 36(2)(a)(i) is engaged. The internal review result letter acknowledges that:

"In order to avoid misleading the public, a letter would have to be released alongside, or a disclaimer added to, the call for evidence document setting out that the document is a draft and that releasing such a call for evidence on the matter of assisted dying has not gone through the cross - government clearance process and is, therefore, not government policy.

The Government maintains a neutral position on the matter of assisted dying. Releasing a draft call for evidence with a disclaimer that its release is not agreed public policy would undermine the convention of collective responsibility by reducing public confidence in the government's neutrality on assisted dying, undermining public debate and ongoing government unity and effectiveness."

44. From the submissions, the Commissioner considers that the MOJ's main reason for relying on section 36(2)(a)(i) is because it is concerned that disclosure of the requested information will set a precedent. In its response to the request, (as part of its public interest considerations,

although the Commissioner has included them here as they contain pertinent information) the MOJ said:

- “At no point did Her Majesty’s Government (HMG) agree to ask for views on assisted dying.
- Were any Government to seek views on such morally complex topics it is plausible to assume that some citizens would assume HMG was pursuing active policy work on these topics. In this case no active policy work was or is underway. It is worth stressing that at no point did HMG agree to even seek views on this topic.
- Good government does require there to be a protected space in which a broad range of ideas can be considered.
- Ministers should be able to consider a very broad range of ways to engage the public, including on morally complex topics. Were this safe space to be eroded the risk would be that more radical or ambitious options are simply not considered, leading to fewer options reaching Ministers, and a diminution in, and harm to, the quality of good government, in terms of the maintenance of the convention of the collective responsibility of Ministers of the Crown.
- This safe space inevitably means that some options are not pursued and there are a wide range of reasons for this. We judge that section 36(2)(a)(i) is designed to ensure that the very processes of government – including the process to gain or not gain Cabinet Agreement – can work effectively.
- We therefore judge that releasing this document risks creating an unhelpful and harmful expectation that information relating to Cabinet decision making is released under the FOIA. This would prejudice Ministers’ ability to debate complex issues away from external interference, commentary and distraction.”

45. Even if the Commissioner accepted the qualified person’s opinion as ‘reasonable’ in relation to the MOJ’s reliance on section 36(2)(a)(i), the Commissioner does not agree that the content of the paper contains any views from individual Ministers. It is (as the MOJ itself has stated) a factual document and its release would not undermine the convention of the collective responsibility of Ministers of the Crown. Furthermore, no precedent would be set by release of the withheld paper as each case has to be assessed on its merits.

46. The Commissioner does not accept that section 36(2)(a)(i) is engaged. He therefore does not need to consider the associated public interest test.
47. At internal review, the second round of submissions to the qualified person included three options for his consideration which were to:
- Overturn the reliance on section 36(2)(a)(i) and disclose the requested paper.
 - Overturn the reliance on section 36(2)(a)(i) and instead rely on section 35(1)(a)(i) – the formulation or development of government policy.
 - Uphold the decision to withhold the draft call for evidence under section 36(2)(a), and expand the argument to include exemption under section 36(2)(b)(i) (inhibition of the free and frank provision of advice), section 36(2)(a)(ii) (inhibition of free and frank exchange of views for the purposes of deliberation) and section 36(2)(c) (that disclosure would otherwise be likely to prejudice the effective conduct of public affairs), citing section 35 in the alternative.
48. The qualified person's opinion was to support the third option; however, he declined to cite section 35 "in the alternative" at this stage.
49. The submissions include consideration of the weaknesses of each of the three options. In relation to the third option regarding section 36, the submissions say:
- "...due to the factual, non-sensitive nature of the content of the document and as it does not reveal the views of any individual ministers, the likelihood of the ICO disagreeing with such an opinion is assessed as medium-high (50-70%). Therefore, it is considered that there is a medium to high likelihood that the ICO will find that the section 36 exemption does not apply. We do not think the ICO will be persuaded by arguments around harm arising from the setting of a precedent that this type of information will be disclosed in future given that the specific information in question lacks any sensitivity and is neutral".
50. In the opinion of the qualified person the exemptions at sections 36(2)(b)(i) and (ii) are also applicable to the withheld paper. Section 36(2)(b)'s two limbs protect the ability of officials to discuss issues and provide advice candidly. The Commissioner recognises that officials will sometimes need to discuss unpopular or controversial matters. If officials restrict their advice and discussions to only those matters

considered palatable it will result in lower quality advice and lower quality decision-making.

51. Information does not have to be notably “free and frank” for the exemption to be engaged – however, the more factual the information, the less likely it is that its’ disclosure will deter officials from speaking their minds in future.
52. However, as the MOJ itself has set out in the submissions to the qualified person, the content of the paper is factual and neutral and does not contain material of any significant sensitivity. The Commissioner considers that the factual nature of the withheld paper will not perturb officials if disclosed, as its release will not negatively impact the ability of such officials to discuss these issues or to provide candid advice. The Commissioner does not consider the opinion of the qualified person to be reasonable as it is clear that neither limb of section 36(2)(b) is engaged.
53. As the Commissioner has found that neither section 36(2)(b)(i) or (ii) is engaged in relation to the requested paper, it is not necessary for him to consider the associated public interest test.
54. In relation to section 36(2)(c), the submissions mainly argue that the arguments made in respect of section 36(2)(a)(i), (namely that disclosure would set a precedent for future disclosures) would be better made under the section 36(2)(c) limb. However, the submissions also acknowledge that:

“We do not think the ICO will be persuaded by arguments around harm arising from the setting of a precedent that this type of information will be disclosed in future given that the specific information in question lacks any sensitivity and is neutral.”
55. The Commissioner does not consider that the rationale put forward for section 36(2)(c) engages this limb for the very reasons the MOJ itself has identified. He again does not accept that the opinion of the qualified person is reasonable as the exemption is clearly not engaged. As a result, the Commissioner does not need to consider the associated public interest test.
56. As Minister Cartlidge’s opinion sought during the Commissioner’s investigation and given on 17 May 2022, only stated “Minister Cartlidge has decided not to publish this at this time”, there is nothing further for the Commissioner to consider in this case.

Conclusion

57. The Commissioner has reviewed the withheld paper, considered the opinions of the various qualified persons consulted in this case, together

with the accompanying submissions, and does not agree that any of the cited subsections of section 36 are engaged.

58. The fluctuation from recommending disclosure to applying four limbs of section 36 to withhold the requested information, whilst at the same time recognising the significant risk that the Commissioner would not uphold the MOJ's reliance on section 36, demonstrate that the MOJ was not confident in its ability to withhold the requested 'call for evidence'.
59. As the exemption is not engaged, the Commissioner does not need to consider the balance of the public interest but, had he done so, it is likely that he would have found that, because of the low probability of the prejudice occurring in respect of all four cited limbs, the public interest would favour disclosure. Furthermore, he notes that the internal review submissions to the qualified person include should the Commissioner find section 36 to be engaged, that there is a high likelihood of him concluding that the balance of the public interest test favours disclosure. The MOJ considered that the neutral and factual nature of the information, the fact that David Gauke requested the preparation of the 'call for evidence' is already in public domain and the length of time since the paper was drafted and the decision not to pursue this was taken would tip the balance in favour of disclosure.

Other matters

60. Although the complainant has not complained about the delays with the response and internal review outcome in this case, the Commissioner has made a record of them for monitoring purposes.
61. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by Design strategy² to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual³.

² <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

³ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

62. 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

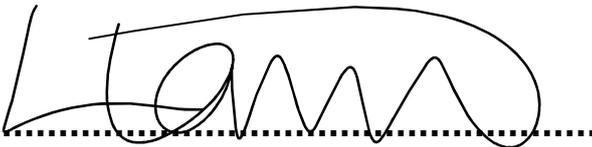
Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

63. 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.
64. 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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