

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 August 2012

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

#### Decision (including any steps ordered)

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1. The complainant has requested the responses to consultations made under section 5 of FOIA.
2. The Information Commissioner's (the Commissioner) decision is that the Ministry of Justice (the MoJ) has applied section 35(1)(a) appropriately.

#### Request and response

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3. On 22 December 2011, the complainant wrote to the MoJ and requested information in the following terms: *'Please send me copies of all responses received in reply to consultations made under section 5 of the Freedom of Information Act in 2011'*.
4. The MoJ responded on 3 January 2012. It provided the complainant with some website addresses and asked him to clarify his request.
5. On 4 January the complainant responded explaining that the time frame he wanted to be covered was from 1 January 2011.
6. In a letter dated January 2012 the MoJ disclosed the responses to the first consultation and explained that it was withholding the responses to the second consultation under section 35(1)(a).
7. Following an internal review the MoJ wrote to the complainant on 16 February 2012 stating that it was withholding the remaining information, being the responses to the second consultation, under section 35(1)(a).

## **Background**

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8. Section 5 of FOIA requires the Secretary of State to consult with any private organisation before designating it a public authority for the purposes of FOIA.
9. The MoJ carried out two separate consultation exercises. The first related to a proposal to extend coverage of FOIA to Academy Trusts, the Association of Chief Police Officers, the Financial Ombudsman Service and the University and College Admissions Services. At the time of the request, the consultation had been completed and had resulted in an order that had come into force in November 2011.
10. The second consultation exercise was undertaken in 2011 with a view to extending the coverage of FOIA to a further tranche of organisations that may be exercising public functions.

## **Scope of the case**

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11. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
12. The Commissioner has considered whether the MoJ has applied section 35(1)(a) appropriately.

## **Reasons for decision**

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### **Section 35(1)(a)**

13. Section 35(1)(a) of the FOIA states that information is exempt if it is held by a government department and relates to the formulation and development of government policy. It is a class-based exemption. Where a class based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
14. The Commissioner considers that the term 'relates to' can safely be given a broad interpretation. The exemption is qualified and a public authority would be obliged to disclose information where it was in the public interest to do so.
15. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are

generated and sorted, risks are identified, consultation occurs, and recommendations/ submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, ie something that is actually happening to policy. Once a decision has been taken on a policy line and it is not under review or analysis, then it is no longer in the formulation or development stage.

16. Although section 35(1)(a) can be applied to information relating to the formulation or development stage of a policy that has been decided and is currently being implemented, it cannot apply to information which purely relates to the implementation stage.
17. The MoJ explained that it wrote to 200 organisations on 4 March 2011 consulting them on their possible inclusion in a section 5 order; the organisations were asked to respond by 1 April 2011. The MoJ had received over 180 responses at the time of the request and confirmed that the answers were still being analysed; therefore no decision had been made on possible inclusion in a section 5 order.
18. The MoJ went on to explain that the consultation process was involved and lengthy. In addition to making policy decisions regarding the organisations to be included, the MoJ also needed to ensure that appropriate legal analysis was obtained in each case. The MoJ explained that when this was finished it would need to consult with the organisations in question over the scope of any order and give them time to prepare for changes that would result as a consequence of inclusion.
19. The Commissioner requested a sample of the replies received by the MoJ. Having considered the sample, he is satisfied that the withheld information relates to policy decisions with regard to which organisations should be designated as public authorities under FOIA. Therefore he is satisfied that section 35(1)(a) is engaged.

### **Public interest test**

20. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test i.e. whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

***Public interest arguments in favour of disclosing the requested information***

21. The MoJ accepts that disclosure would mean greater transparency which in turn makes government more accountable to the electorate and increases trust. It also acknowledged that increased knowledge of the way government works would lead to a more effective and broadly based public contribution to the policy making process.
22. The MoJ acknowledged that it is important there is transparency as to the bodies it is and is not consulting about possible inclusion under FOIA. It accepts that this would mean that the public could scrutinise the considerations and any decisions reached.
23. The complainant argued that disclosure of the information would not interfere with the MoJ's ability to make a decision regarding its policy.

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

24. The MoJ argued that the information should not be disclosed because it had not yet made a decision about its policy. It explained that the consultation process was an involved and lengthy process. Under section 5 of FOIA the Secretary of State was required to consult any private organisation before making an order to designate it as a public authority for the purposes of FOIA.
25. It also argued that it needed a free space in which to investigate, prepare and formulate its proposals, so that it could assess, respond and react to the views and opinions put to it; premature disclosure would place this in jeopardy.
26. The MoJ argued that Ministers and officials need to be able to conduct a full and frank assessment of the bodies they intend to consult and who they were considering for inclusion under section 5 of FOIA. It argued that good government depends on good decision making which needs to be based on the best advice available and a full consideration of all the options.
27. The MoJ explained that apart from making policy decisions regarding organisations to be included in the consultation, it also needed to ensure that appropriate legal analysis was carried out in each case. When the legal analysis was completed, it would need to consult the organisations again over the scope of any order and give them time to prepare for the changes that would result from inclusion.
28. The MoJ argued that disclosure of the requested information prematurely could raise public expectations and jeopardise any further consultations it may wish to have with bodies it considered suitable for

possible inclusion. Disclosure would also lead to speculation about which organisations were going to be included in the section 5 order, at a time when the Government had not reached a view on this. It also argued that good government depends on good decision making, which needs to be based on consideration of all the options and having free space to investigate, prepare and formulate its response.

29. In addition the MoJ argued that disclosure would make it difficult for Ministers and officials to conduct a full and frank assessment of the responses and formulate government policy effectively (i.e. a 'chilling effect' on the formulation of policy).

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

30. The Commissioner has considered the public interest arguments.
31. With regard to maintaining the exemption he notes the 'safe space' arguments. These arguments are only relevant if, at the time of the request, policy formulation and development was ongoing. This is because these arguments focus on the need for a private space to develop live policy.
32. The Commissioner notes that the MoJ explained to the complainant that at the time of his request, it had carried out two separate consultation exercises with regard to designating various organisations public authorities under a section 5 order. He further notes that one of the consultation exercises relating to a proposal to extend coverage of FOIA to Academy Trusts, the Association of Chief Police Officers, the Financial Ombudsman Service and the University and College Admissions Services had been completed at the time of the request. This consultation resulted in an order that came into force in November 2011; the MoJ disclosed those responses to the complainant.
33. With regard to the second consultation, the MoJ explained that this was undertaken last year to extend the coverage of FOIA to a further tranche of organisations that may exercise public functions. It explained to the Commissioner that it had received 185 responses in response to the consultation and that it was still analysing these responses with a view to deciding which organisations would be recommended for inclusion. On the basis of this explanation the Commissioner is satisfied that at the time of the complainant's request of 22 December 2011 the policy making process was live.
34. The Commissioner considers that significant weight should be given to the safe space arguments where the policy making process is live and the requested information relates to that policy making. He also considers that it is unlikely that in such cases the public interest will

favour disclosure unless, for example, disclosure would expose any wrongdoing.

35. Furthermore, in the Commissioner's opinion it is in the public interest for the MoJ to be able to candidly discuss its policy options regarding organisations to be designated as public authorities for the purposes of section 5 FOIA, away from public scrutiny.
36. With regard to the chilling effect argument the Commissioner notes that 'chilling effect' can include a number of scenarios:
  - disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which parties will make future contributions to that policy;
  - the idea that disclosing information about a given policy, whilst that policy is still in the process of being formulated and developed, will affect the frankness and candour with which relevant parties will contribute to other policy debates in the future; and
  - finally, an even broader scenario where disclosing information relating to the formulation and development of a given policy (even after the process of formulating and developing that policy is complete), will affect the frankness and candour with which relevant parties will contribute to other policy debates in the future.
37. In this case, policy formulation and development was still ongoing at the time of the request and therefore the third scenario is of less relevance. In considering the weight that should be attached to the first two scenarios in this case, the Commissioner has taken into account the comments made in a number of decisions of the First-tier Tribunal (Information Rights) (the Tribunal) and the High Court in which the chilling effect has been considered.
38. Taking these cases into account and bearing in mind the underlying principles set out above, the Commissioner considers that the weight attached to chilling effect arguments has to be considered on the particular circumstances of each case and specifically with regard to the content of the withheld information itself. Furthermore, a public authority would have to provide convincing arguments and evidence which demonstrates how disclosure of the withheld information would result in the effects suggested by it.

39. The Commissioner accepts that the withheld information contains genuinely free and frank comments and that the policy was still in the formulation and development stage when the request was made.
40. Although as a general rule the Commissioner is reluctant to attribute much, if any weight to the broader types of chilling effect, in the circumstances of this case he accepts that the first scenario, as described in paragraph 35, should be given some weight. The Commissioner accepts that disclosure of the consultation responses would make it more difficult for Ministers and officials to conduct a full and frank assessment and formulate government policy on the scope of FOIA effectively.
41. The Commissioner also accepts that some weight should be given to the argument that premature disclosure of the information could raise public expectations and would lead to speculation about which organisations were to be included at a time when the Government had not reached a view on this.
42. With regard to attaching weight to the public interest factors in favour of disclosure, the Commissioner recognises that their focus is on openness, transparency, accountability and improving decision making. The weight attached to each of these factors will depend on all the circumstances, including the content of the information and the timing of the request.
43. In the Commissioner's opinion disclosure of the withheld information would allow the public to see how the consultation process was carried out. It would also let the public see what questions were being asked and how the organisations responded. This in turn would lead to greater transparency and accountability. If the information had been disclosed at the time of the request, it could have helped inform public debate with regard to the organisations being considered for inclusion under section 5.
44. However, the Commissioner notes that the sample responses showed that the consultation exercise was still in the initial stages. The Commissioner considered the complainant's arguments that the MoJ should not take a 'blanket' approach to the replies and that it could supply some of them. However, although the Commissioner notes the complainant's comment that MoJ had written to specific organisations, the Commissioner is satisfied that, at the time of the request, it had still not been decided which of these organisations would be recommended for designation as public authorities for the purposes of FOIA.
45. The Commissioner has considered all the public interest arguments. He believes that the public interest in maintaining the exemption outweighs the public interest in disclosing it. This is for two main reasons: first, the

strong weight that should be attached to the safe space arguments; secondly, the weight (albeit less significant) that should be attached to the chilling effect arguments. Given the timing of the request (the policy process was live and in the initial stages), the Commissioner has concluded that this tips the balance in favour of maintaining the exemption in the circumstances of this case.

## Right of appeal

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46. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

47. 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.
48. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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