

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 October 2018

Public Authority: Crown Prosecution Service
Address: Rose Court
2 Southwark Bridge
London
SE1 9HS

Decision (including any steps ordered)

1. The complainant has requested information about the Crown Prosecution Service's (CPS) decision to prosecute in a specific case of suspected female genital mutilation (FGM). The CPS said it did not hold some of the information described in the request. With regard to the information it did hold, it said it was exempt from disclosure under sections 30 (investigations and proceedings), 36 (effective conduct of public affairs), 40 (personal information) and 42 (legal professional privilege) of the FOIA.
2. The Commissioner's decision is that the CPS was entitled to rely on sections 30(1)(c) and 36(2)(b)(ii) of the FOIA to withhold the majority of the information. However, she found that it breached sections 1 and 10 of the FOIA with regard to information it subsequently found that it did hold in respect of the second part of the request.
3. The Commissioner requires the CPS to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to question 2. The information described in paragraph 59, below, should either be disclosed (with appropriate redactions for personal data) or a refusal notice issued which is compliant with section 17 of the FOIA.
4. The CPS 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. In 2014, the CPS made the decision to prosecute an NHS doctor for the offence of FGM. It was alleged that a medical procedure that the doctor had performed in the course of giving aftercare to a woman who had given birth in a UK hospital, constituted FGM.
6. The doctor was subsequently found not guilty of the charge. The judge in the case commented that the doctor *"...had been badly let down by a number of systematic failures which were no fault of his own"*, and members of the public and the medical profession expressed concern that the CPS's decision to prosecute him had been misguided.

Request and response

7. On 6 March 2018, the complainant wrote to the CPS and requested information in the following terms:

"I am sending this request under the Freedom of Information Act.

 1. *Please provide a copy of all documents held by the CPS concerning the decision to prosecute [name redacted] for the offence of conducting FGM.*
 2. *Please provide a copy of all correspondence sent and received by Alison Saunders concerning the decision to prosecute [name redacted] for the offence of conducting FGM."*
8. The CPS responded on 27 March 2018. With regard to the first question, it confirmed that it held information but said it was exempt from disclosure under sections 30(1)(c) (investigations and proceedings), 40(2) (personal information) and 42(1) (legal professional privilege) of the FOIA. It said that it did not hold any information in respect of the second question.
9. Following an internal review, the CPS wrote to the complainant on 13 April 2018. It upheld its decision with regard to the request.

Scope of the case

10. The complainant contacted the Commissioner on 16 April 2018 to complain about the way his request for information had been handled. In respect of question 1, he argued that the exemptions cited had been applied incorrectly, in a 'blanket fashion', to withhold all information; he believed that it should be possible to disclose at least some of the requested information. He also said that there were pressing public interest arguments supporting disclosure in respect of question 1. He did not challenge the CPS's assertion that it held no information in respect of question 2.
11. During the course of the Commissioner's investigation, the CPS advised that it had located further information in respect of question 1, which it considered exempt from disclosure under section 36(2)(b)(ii). It also established that it did in fact hold information in respect of question 2. It said that some of it was exempt from disclosure under section 30(1)(c), and some of it was exempt under section 36. The remainder, it said, could be disclosed, with redactions for section 40(2), although it did not do so.
12. The Commissioner has considered whether the CPS was entitled to rely on the exemptions cited to withhold the requested information. In doing so she has viewed the withheld information, which for question 1 consists of information surrounding, and leading to, the charging decision, and for question 2, correspondence to and from the Director of Public Prosecutions (DPP) on the matter. The Commissioner has also considered how the CPS dealt with the information in respect of question 2 which it had said could be disclosed.

Reasons for decision

Section 30 – investigations and proceedings

13. The CPS applied section 30(1)(c) to withhold most of the information requested in question 1, consisting of the original prosecution file, internal advice and analysis of the available evidence and other material held within the CPS Communications Directorate. It also withheld some of the information requested in question 2, consisting of communications about the prosecution case to and from the DPP.
14. Section 30(1)(c) of FOIA states:

"Information held by a public authority is exempt information if it has at any time been held by the authority for the purposes of –

(c) any criminal proceedings which the authority has power to conduct."

15. The phrase "at any time" means that information can be exempt under section 30(1)(c) if it relates to an ongoing, closed or abandoned investigation.
16. Section 30(1) is a class-based exemption, which means that there is no need to demonstrate harm or prejudice in order for the exemption to be engaged. However, information must be held for a specific or particular investigation and not for investigations in general.
17. The Prosecution of Offences Act 1985 created the CPS, which is responsible for prosecuting criminal cases investigated by the police in England and Wales. As such, the Commissioner is satisfied that the CPS has the power to conduct criminal proceedings.
18. Turning to whether the information in this case is held by the CPS for the purpose of specific criminal proceedings which it has the power to conduct, the Commissioner notes that the very wording of the request predetermines that any relevant information will fall within the scope of section 30(1)(c). She is therefore satisfied that the information is held for a specific investigation and consequently that the exemption is engaged as regards the information requested.

The public interest test

19. Section 30(1)(c) is a qualified exemption and is subject to the public interest test. The Commissioner must consider whether, in all of 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 disclosure

20. The complainant cited transparency and accountability arguments, saying that there was public concern over the decision to prosecute the case. He believed that since the case was now concluded, full disclosure of the information would allay any public concerns about the process, and allow the CPS to be properly held to account if any errors were made.
21. The CPS recognised that disclosure would increase public understanding of its decision making and prosecuting processes. It also acknowledged that transparency could increase public confidence in the CPS.

Public interest arguments in favour of disclosure

22. The CPS explained to the Commissioner:

"There is a strong public interest in safeguarding the prosecution process. Maintaining the confidentiality of communications between the Police and the CPS, as well as other public bodies is an essential part of this process. It is important for officials to be able to freely justify and maintain their thought process when making decisions on criminal cases, without fear of the routes leading to those decisions later being disclosed into the public domain. Additionally, it is important to remember that to release case information may dissuade witnesses from assisting in future investigations. Witnesses are a vital part of the prosecution process and it is crucial that they are able to approach the investigative body and provide statements without fear that they may one day be placed into the public domain, save through the court process. Releasing this sort of information would be likely to prejudice future prosecutions.

There is a strong public interest in the courts being the sole forum for determining guilt."

23. The CPS also stated:

"...the arguments for withholding in this case are particularly strong because of the area of criminal law this offence relates to. At pages 38 – 43 of the withheld material you will find a paper drafted by the Director's Legal Team that considers the offence broadly, and has an impact on this specific case. Such deliberations are not publically available and could prejudice the application of this offence in future cases if released in to the public domain."

Balance of the public interest

24. When considering the application of the exemption at section 30(1), the Commissioner believes that consideration should only be given to protecting what is inherent in that exemption (the effective investigation and prosecution of crime), which requires the following:

- the protection of witnesses and informers to ensure people are not deterred from making statements or reports by fear it might be publicised;
- the maintenance of independence of the judicial and prosecution processes;
- preservation of the criminal court as the sole forum for determining guilt;

- allowing the investigating body space to determine the course of an investigation; and
 - information that deals with specialist techniques.
25. The Commissioner considers that there are public interest arguments which touch on each of the bullet points in this case.
26. The Commissioner recognises the wider detriment that could be caused to the CPS by the loss of the ability to consider case options and reach decisions away from external interference and scrutiny. The expectation amongst staff, that deliberations could routinely be disclosed, could have an inhibiting, 'chilling' effect on their participation in future investigations. The consequent loss of frankness and candour could damage the quality of information being recorded and the quality of deliberation, and lead to poorer decision-making. It could also undermine any future prosecutions for FGM, which is an emerging area of criminal law, requiring particular, specialist knowledge. The Commissioner accepts this prejudice as a real and possible outcome.
27. The Commissioner understands that there is a very strong public interest in supporting the protection of the CPS's prosecution processes, which includes its dealings with witnesses and with victims. Such discussions must remain full and frank and without fear of being made routinely available to the public. Were these parties concerned that any content of their detailed statements could find their way into the public domain, it seems likely that it may serve as a deterrent to the provision of honest and frank evidence. The Commissioner believes this argument to be particularly weighty in favour of maintaining the exemption, as it could ultimately undermine the course of investigations if such evidence is not sought and given in a full expectation of confidence.
28. While the Commissioner notes the complainant's view that there is public concern about why the prosecution was brought, it is a very weighty argument for maintaining this exemption that the criminal court is maintained as the sole forum for determining guilt rather than the general public at large, and that the CPS not be deterred from bringing to court 'difficult' cases. Although the doctor was found not guilty of the offence of FGM, the unfettered disclosure of this information (and particularly the evidence considered) under the terms of the FOIA could mean that it is misinterpreted by the public and could result in him being sought out and put under unnecessary and unfair personal risk.
29. Accordingly, the Commissioner finds the public interest arguments in favour of maintaining the exemption to be compelling in respect of the information described in paragraph 13, above. She therefore concludes that the public interest in maintaining the exemption outweighs that in

disclosure and that the CPS was entitled to rely on section 30(1)(c) to withhold the requested information.

30. As this exemption has been applied to the information described in paragraph 13 in its entirety, the Commissioner has not found it necessary to consider the other exemptions cited in respect of that information.

Section 36 –prejudice to the conduct of public affairs

31. The CPS applied section 36(2)(b)(ii) to withhold information comprising material relating to case management panel meetings, discussions on its handling of the FGM prosecution case, draft statements and correspondence between the DPP and her legal adviser (the latter being information it discovered during the investigation, referred to in paragraph 11 above).

32. Section 36(2) provides that information is exempt if, in the reasonable opinion of a qualified person, its disclosure:

"(b) would, or would be likely to, inhibit:

...

(ii) the free and frank exchange of views for the purposes of deliberation."

33. The application of section 36 relies on a qualified person being of the opinion that the inhibition envisaged would, or would be likely to, occur. In determining whether the exemption is engaged the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion.
34. Therefore, the Commissioner must ascertain who the qualified person is, establish that they gave an opinion, ascertain when the opinion was given and consider whether the opinion was reasonable.
35. The CPS confirmed that an opinion on the application of section 36(2)(b)(ii) was sought from the DPP on 5 September 2018 and it communicated her response on 14 September 2018, which was that it was her opinion that the exemption had been appropriately applied. The CPS provided the Commissioner with a copy of the submission to the qualified person on which the opinion was based. The submission included the request for information, arguments as to why section 36(2)(b)(ii) was engaged and public interest arguments. The qualified person was also provided with the withheld information.

36. The Commissioner is satisfied that the DPP is the qualified person for the purposes of section 36, and that her opinion on its application was properly sought and given.

Reasonableness

37. In determining whether the exemption is correctly engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner will consider all relevant factors. These may include, but are not limited to:
- whether the prejudice or inhibition 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; and
 - the qualified person's knowledge of, or involvement in, the issue.
38. When determining whether the opinion is a reasonable one, the Commissioner considers that if the opinion is in accordance with reason and not irrational or absurd (that is, if it is an opinion that a reasonable person could hold) then it is reasonable.
39. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion will not be deemed unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It would only be deemed unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. Therefore, the qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
40. In this case, the Commissioner is satisfied that the submission to the qualified person clearly related to the request that was made by the complainant. She is also satisfied that it explained why an opinion was being sought and provided relevant background information together with a copy of the information it was proposed should be withheld under section 36(2)(b)(ii).
41. With regard to whether the inhibition envisaged related to the specific subsection of section 36(2) that is being claimed, the submission to the qualified person explained:

"Disclosure of this information would inevitably lead to staff being more circumspect in their advice and in putting their views forward in future. As a result discussions in future would be less well informed"

which would in turn leave the CPS less able to respond consistently and appropriately to requests under the FOIA. It would also make responses harder to explain in future if the CPS decisions are appealed.

Disclosure of discussions would inhibit free and frank discussions in the future and the loss of frankness and candour would damage the quality of advice and deliberation which could lead to poorer decision making.

Disclosure of this information used as part of a deliberative case focused process could inhibit those who engage in such discussions in the future. The CPS engages in deliberations with their staff to understand how case decisions may impact the case outcome and enable it to make conclusions based on this."

42. The qualified person can only apply the exemption on the basis that the inhibition to the free and frank exchange of views for the purpose of deliberation either 'would' occur or 'would be likely to' occur. The CPS has argued in this case that the inhibition 'would' occur (meaning that the qualified person considers it is more likely than not that the inhibition would occur).
43. The Commissioner accepts that the inhibition envisaged in this case relates to that specified in section 36(2)(b)(ii), and, having viewed the information in question, that it is reasonable to believe that the inhibition would occur. The Commissioner is therefore satisfied that it was reasonable for the qualified person to reach the view that disclosure would inhibit the free and frank exchange of views for the purpose of deliberation.
44. It follows that the Commissioner is satisfied that section 36(2)(b)(ii) of the FOIA is engaged.

The public interest test

45. Section 36 is a qualified exemption, meaning that although the exemption is engaged, it is nevertheless necessary to consider whether, taking account of all the circumstances of the case, the public interest favours disclosing the information over maintaining the exemption.

Public interest arguments in favour of disclosing the requested information

46. The CPS recognised that disclosure would increase public understanding of its decision-making and prosecuting processes. It also acknowledged that transparency could increase public confidence in the CPS.

47. The CPS acknowledged that there was public interest in the subject of FGM and its treatment in the criminal justice system, and that disclosure of the withheld information would give an insight into how the CPS is approaching the issue.
48. The Commissioner considers the complainant's public interest arguments in respect of section 30 to also have relevance to the application of section 36(2)(b)(ii).

Public interest arguments in favour of maintaining the exemption

49. The CPS presented chilling effect arguments. It said that the free and frank exchange of views is essential for effective operations within the Criminal Justice System as it provides the basis for sound decisions, capable of being robustly defended, to be made. There is a clear public interest in there being a private space for public authorities to undertake such deliberations and it is vital that CPS staff are able to freely and frankly exchange views for the purpose of deliberation without the fear that their discussions will be released into the public domain, as this could undermine the quality of decision making.

Balance of the public interest arguments

50. The Commissioner has first considered the arguments in favour of disclosure and accepts that they carry some weight, in that disclosure would provide transparency and accountability and give the public an insight into the CPS's approach to prosecuting suspected FGM cases.
51. The Commissioner has also borne in mind that the prosecution of FGM is a matter of significant public interest. The Commissioner understands that, to date, there have only been two prosecutions and no convictions for the offence of FGM, and that there has been some public perception that the decision to prosecute in this case was misguided. The withheld information reflects the thinking behind the CPS's decision to prosecute and so would inform the public's understanding of its actions. However, the extent to which it would do this has to be balanced against the harm to the deliberative process which underpins prosecution decisions.
52. The Commissioner notes that, having accepted the qualified person's opinion that disclosure of the information would have the stated detrimental effect, she must give weight to that opinion as a valid piece of evidence in her assessment of the balance of the public interest.
53. The arguments for maintaining the exemption essentially focus on the 'chilling affect' argument, that officials would be less candid in the free and frank exchange of views for the purposes of deliberation in relation to decisions as to whether to prosecute. 'Deliberation' refers to the public authority's evaluation of competing arguments or considerations

in order to make a decision. It is envisaged that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making with regard to whether or not cases should go forward for prosecution.

54. When attributing weight to 'chilling effect' arguments, the Commissioner recognises that civil servants are expected to be robust and impartial when providing advice. The Commissioner considers that they should not be easily deterred from expressing their views by the possibility of any future disclosure.
55. However, she also considers that it is very important that the CPS should be able to hold free and frank discussions for the purpose of deliberation, so as to facilitate appropriate and well evidenced prosecution decisions, capable of being justified and robustly defended, to be made. The Commissioner considers that, given the CPS's role as a prosecuting authority, it is very important that staff can deliberate on how to proceed in individual cases in a completely free and frank manner, without fear that their input will be released into the public domain. In addition, witnesses and victims must not be deterred from fully cooperating with criminal investigations, for fear that the information they give, or which is about them, may not be held in confidence.
56. It is vital that the right person is prosecuted for the right offence, that prosecutions are not brought unnecessarily, and only where there is a realistic prospect of conviction. Any undermining of this process would be damaging to the interests of justice. The Commissioner considers this to be an argument in favour of maintaining the exemption of considerable weight.
57. The Commissioner has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and exchange of views for the purposes of deliberation against the public interest in openness and transparency and the complainant's arguments about disclosure. Her conclusion is that the public interest in avoiding this inhibition is a strong factor and she considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
58. Taking all the above into account, the Commissioner is satisfied that the CPS was entitled to rely on section 36(2)(b)(ii) to withhold the requested information.

Section 1 – information held

59. During the course of the Commissioner's investigation, the CPS located other information which fell within the scope of question 2, comprising a

covering letter from an MP to the DPP, with a constituent's letter expressing concern about the decision to prosecute in this case, and the DPP's response. The CPS had previously told the complainant it held no information in respect of that part of the request. The CPS told the Commissioner:

"The CPS is of the view that this material could be disclosed with the attached redactions applied under Section 40 'Personal Information' to protect the identity of the constituent. It should be noted that before we consider taking any action in this regard we would require an opportunity to notify the MP's Office and give them an opportunity to raise any concerns."

60. In correspondence with the CPS, the Commissioner made it clear that this was the CPS's opportunity to finalise its position with regard to the request, and that if it decided to reverse or amend its position in any way, it must notify the complainant and fully justify its position to the ICO. The CPS has not done this, nor has it specified to the Commissioner any grounds under which the information might be withheld (aside from concealing the constituent's identity, under section 40(2)).

61. Section 1(1) of the FOIA states:

"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."

62. Where an exemption or other non-disclosure provision is being relied on to withhold information, the requester should be informed of this in line with the provisions of section 17 (refusal of request) of the FOIA. Section 10 (time for compliance) provides that this action must be taken within twenty working days of receipt of the request.

63. The CPS has identified to the Commissioner that it holds information in respect of question 2 which it had incorrectly told the complainant it did not hold. It has not informed the complainant of this, nor has it communicated the information to the complainant or issued a refusal that is compliant with section 17, in respect of it.

64. The Commissioner therefore considers that the CPS breached section 1 and section 10 of the FOIA with regard to question 2. She now requires the CPS to take the action set out at paragraph 3 to rectify this.

Right of appeal

65. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

66. 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.
67. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF