

Mr Gabriel Kanter-Webber
[via email to: request-692523-5ead45a0@whatdotheyknow.com]

data.access@justice.gov.uk

28 October 2020

Dear Mr Kanter-Webber,

Freedom of Information Act (FOIA) Request – 200921017

Thank you for your request dated 21 September 2020 in which you asked for the following information from the Ministry of Justice (MoJ):

“Please provide an electronic copy of all recorded information you hold, dated 1 January 2019 or more recent, regarding the appointment of a reviewer of closed hearings under section 13(1) of the Justice and Security Act 2013.”

Your request has been handled under the FOIA. I am sorry for the delay in responding to your request.

I can confirm that the MoJ holds information on the subject matter you requested. However, the information is exempt from disclosure under certain sections of the FOIA, because it contains personal data or relates to the formulation or development of government policy or is reasonably assessable to you already.

Personal data

Section 40(2) and section 40(3A)(a) of the FOIA taken together mean that personal data can only be released if to do so would not contravene any of the principles set out in Article 5(1) of the General Data Protection Regulation (GDPR) and section 34(1) of the Data Protection Act 2018.

Individuals have a clear and strong expectation that their personal data will be held in confidence and not disclosed to the public under the FOIA. Also, although section 40 is an absolute exemption, we have considered whether there is a wider public interest in disclosing this personal information, that would override the fundamental rights of those concerned. We have concluded there is no such public interest in this instance.

We believe releasing the requested information into the public domain would be unlawful; the personal information is therefore exempt from disclosure under section 40(2). Some names have therefore been redacted.

Formulation or development of government policy

Sections 35(1)(a) exempts disclosure of information relating to the formulation or development of government policy. The purpose of section 35(1)(a) is to protect the integrity

of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.

To be exempt, the information must relate to the formulation or development of government policy.

In this case, having assessed the information that we hold, we reached the conclusion that, whilst the requirement to carry out a 5-year review of the “closed material procedure” provisions in the Justice and Security Act 2013 is set out in section 13 of the Act itself, there are different policy options that can be pursued to undertake the review, and that this is therefore a case of policy formulation. For example, we need to assess whether the Act requires an independent reviewer or whether the review can be carried out directly by officials in a government department, what should the terms of reference of the review be (in other words, what the words “*review of the operation of sections 6 to 11*” in section 13 mean in practice and whether the terms of reference of the review should explain that). We concluded that these, and similar questions on staffing and financing the review, are about policy formulation and not merely implementation of an established policy (especially as there is no precedent to look at for this specific review).

As with the other limbs of section 35, section 35(1)(a) is a qualified exemption, requiring a public interest test. The Ministry of Justice can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public Interest considerations favouring disclosure

- It would be consistent with the Government’s commitment to transparency.
- It would support public confidence that Governments act on the basis of sound policy advice.

Public interest considerations favouring withholding the information

- Sound policy-making requires a safe space for officials to have full and frank conversations with Ministers. Routine disclosure of draft policy proposals would have a chilling effect on policy-making in general and inhibit such discussions. This may mean that officials would, going forward, have fewer, or even no discussions, about policy options. Also, officials would be less likely to propose and record a full range of policy options around the 5-year review for fear of public release and of how they might be interpreted out of context. This would in turn result in poor policy making by limiting or distorting the options on the table in terms, for example, of resourcing requirements, and selection criteria for the reviewer.
- As set out in response to Parliamentary Questions, the Government has made it clear that consideration of the 5-year review of sections 6 to 11 of the Justice and Security Act 2013 is ongoing, and an announcement will be made. Policy work is progressing, but not yet completed, on preparing for the review. Therefore, disclosure now would have an adverse effect on the development of this work by pre-empting an announcement to Parliament, especially when the policy work is not yet completed.

On this occasion we consider that the public interest is better served by withholding this information under section 35(1)(a) of the FOIA.

Reasonable assessable or available via another route

As mentioned above, we can advise that we hold some information that can be accessed elsewhere or is available via another route. This information is exempt under section 21 of the FOIA. Section 21 is an absolute exemption, it is therefore not subject to the public interest test.

For ease of reference, the information that we hold which can be found via another route is as follows:

Parliamentary questions on the 5-year review of the Justice and Security Act 2013:

- <https://questions-statements.parliament.uk/written-questions/detail/2020-09-23/hl8401>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-09-22/93515>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-09-22/93513>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-09-22/93512>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-09-22/93511>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-07-08/70992>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-06-17/60691>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-06-17/60692>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-06-17/60693>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-01-29/9613>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4313>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4314>
- <https://questions-statements.parliament.uk/written-questions/detail/2020-01-16/4315>
- <https://questions-statements.parliament.uk/written-questions/detail/2019-04-04/240976>
- <https://questions-statements.parliament.uk/written-questions/detail/2019-04-04/240977>
- <https://questions-statements.parliament.uk/written-questions/detail/2019-04-04/240978>

Relevant section of the Justice and Security Act 2013 and its Explanatory Notes:

- <https://www.legislation.gov.uk/ukpga/2013/18/section/13/enacted>
- <https://www.legislation.gov.uk/ukpga/2013/18/notes/division/5/2/8>

Appeal Rights

If you are not satisfied with this response you have the right to request an internal review by responding in writing to one of the addresses below within two months of the date of this response.

data.access@justice.gov.uk

Disclosure Team, Ministry of Justice

You do have the right to ask the Information Commissioner's Office (ICO) to investigate any aspect of your complaint. However, please note that the ICO is likely to expect internal complaints procedures to have been exhausted before beginning their investigation.

Yours sincerely

Sergio Moreno

International, Rights and Constitutional Policy Directorate