

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

### **Decision notice**

**Date:** 5 October 2021

**Public Authority:** Crown Prosecution Service  
**Address:** 102 Petty France  
London  
SW1H 9EA

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

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1. The complainant requested a copy of the post case review report following the death of Caroline Flack. The Crown Prosecution Service (the 'CPS') refused to provide the requested information citing section 36(2)(b)(i) of FOIA – the exemption for the free and frank provision of advice.
2. The Commissioner's decision is that the CPS was entitled to rely on section 36(2)(b)(i) in this case. She also finds that the balance of the public interest favours maintaining section 36.
3. The Commissioner does not require any steps as a result of this notice.

#### **Background**

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4. The CPS has explained that the purpose of a post case review is to identify any good practice and learning points (from the investigation and any subsequent prosecution) that might benefit others in the future. This is an internal process which affords an important mechanism for evaluating good practice and lessons to be learned from the CPS' handling of cases.
5. The Commissioner understands that a post case review took place on 28 February 2020 in respect of Ms Flack to consider the handling of that case. A report (which is the subject of the request below) was produced following this review.

## Request and response

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6. On 23 October 2020, the complainant wrote to the CPS and requested information in the following terms:

*'Please provide a copy of the post case review report into the Caroline Flack case. Earlier this year the CPS claimed "disclosing the post case review report could undermine the coroner's hearing later this year".*

*Now the hearing has concluded, my request is for a copy of the post case review report.'*

7. On 18 November 2020, the CPS informed the complainant that it would not be able to meet the statutory 20 working days' deadline as further work was necessary to respond to the request properly. It apologised for this delay and issued its substantive response on 9 December 2020.
8. The CPS refused to provide the requested information citing section 36(2)(b)(i) (the free and frank provision of advice) and found that the public interest favoured maintaining the exemption.
9. The complainant requested an internal review on 9 December 2020. He said that withholding the report on the grounds that it would make prosecutors "*more circumspect*" in providing free and frank advice "*must be discounted*". He submitted the following points in support of his view:

*"Providing officials are acting in a fair, impartial and professional manner, they have nothing to fear from transparency.*

*Prosecutors are well aware that decisions in high profile cases, and others, will be subject to scrutiny and there is no evidence this has deterred them from providing free and frank advice. Indeed, they would be failing in their jobs if they were not to provide free and frank advice.*

*Transparency is capable of showing why the CPS decided the case was handled appropriately - despite claims to the contrary from Ms Flack's family and the CPS knowing Ms Flack had threatened to kill herself.*

*Transparency is capable of improving confidence in the CPS, by showing how thorough - or otherwise - the internal review was. The public must have confidence that such reviews do not simply rubber stamp past decisions, but fully scrutinise the evidence and circumstances to ensure public confidence in the CPS.*

*This case is so serious that it demands full transparency by the CPS. A young woman took her own life after being told she was being prosecuted for an assault the alleged victim did not support. This came after a senior prosecutor decided it was not in the public interest to prosecute her. It follows there is a compelling and significant public interest in the CPS being open and transparent about its review of this tragic case."*

10. Following its internal review the CPS wrote to the complainant on 30 December 2020. It maintained its original position, stating:

*"Disclosure of the material would prejudice CPS functions. CPS staff may become more concerned about what is put into such reviews if there were a risk that their views could be released into the public domain through an FOI request which would inhibit the process. It would constrain the provision of advice and would impair the quality of decision making by the CPS. CPS staff need the ability to express themselves openly, honestly and completely or to explore options when providing advice or giving their views as part of the process of deliberation."*

11. The CPS also re-stated that the balance of the public interest favoured maintaining the section 36 exemption.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 5 January 2021 to complain about the way his request for information had been handled. He did not submit any specific grounds of complaint, but asked the Commissioner to consider the CPS' refusal to provide the requested information.
13. Therefore, the Commissioner has considered whether the CPS was entitled to rely on section 36(2)(b)(i) of FOIA to withhold the requested report.

## **Reasons for decision**

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### **Section 36 – prejudice to effective conduct of public affairs**

14. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:

*(b) would, or would be likely to, inhibit—*

*(i) the free and frank provision of advice, or*

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

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs*

15. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the 'Qualified Person') within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role in determining whether or not the exemption has been correctly applied is to establish that an opinion has been provided by the Qualified Person, assure herself that that opinion is "reasonable" and to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

### ***The Qualified Person's Opinion***

16. The Director of Public Prosecutions ('DPP') is the Qualified Person for the CPS, a role defined in the legislation. The Commissioner is satisfied that Max Hill QC is the Qualified Person for the purposes of the legislation.
17. The Commissioner has had sight of the CPS' submissions of 1 December 2020 to the Qualified Person and of his Opinion which was given on 7 December 2020. In addition, the CPS also sought the DPP's opinion on 18 December 2020 in relation to the internal review and received his Opinion on 22 December 2020. The CPS provided the Commissioner with copies of all these documents.
18. The Qualified Person's Opinion of 7 December 2020 confirmed that release of the information 'would' cause the prejudice specified in section 36(2)(b)(i) of FOIA. This is the higher threshold (as opposed to 'would be likely') which means that the Qualified Person and the CPS consider that the prejudice would be 'more probable than not' ie there is more than a 50% chance of it occurring.
19. In explaining why disclosure would prejudice the free and frank provision of advice, and having regard to submissions, the Qualified Person noted that:

*"Disclosure of this information would inevitably lead to colleagues being more circumspect in providing free and frank advice in future and in putting their views forward regarding the handling of a case. As a result, future post case reviews would be less open and honest which would leave the CPS at a disadvantage to resolve serious issues effectively, especially when dealing with high profile cases. The review process needs to be free and frank to recognise possible fundamental weaknesses in order to implement change where necessary. The post case review*

*process is an established practice across the CPS, disclosure of the information would inhibit professionally qualified employees of the CPS from discussing their professional advice with senior management (i.e. in this case the [position redacted]) in a candid manner. Disclosure of the information could potentially damage the quality of advice and deliberation and lead to poor decision making in the future for the CPS."*

20. In addition to the foregoing, the Qualified Person's Opinion at internal review noted that:

*"...nothing has changed since the previous decision; the decision not to disclose pending the inquest should not have been seen as a reason to disclose after the inquest. As the latest Sub [submission] shows, the inquest heard evidence which was transparent and fully addressed all of the circumstances, to the satisfaction of HM Coroner. Albeit the requestor is right to say that we have nothing to fear from the content of this case review, that does not make a basis for disclosure, when the relevant facts have now been fully aired in public at the inquest".*

21. Section 36 places the Qualified Person's opinion at the centre of exemption. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is not for the Commissioner to substitute her own opinion for that of the Qualified Person. For an opinion to be reasonable, it need not be the most reasonable opinion available. If it is an opinion that a reasonable person could hold, then it is reasonable.
22. The Commissioner considers that an opinion is likely to be unreasonable if it fails to explain why the exemption applies to the particular withheld information or if the explanations do not relate to the limb of the exemption cited.
23. As per the Commissioner's guidance<sup>1</sup>, information may be exempt under section 36(2)(b)(i) if its disclosure would, (or would be likely to), inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice may impair the quality of decision making by the public authority.
24. If it is not evident how the provision of advice would be inhibited, it may be harder for the ICO to find that the opinion was a reasonable one. It is

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<sup>1</sup> Section 36 (ico.org.uk)

important to note that this exemption is about the process that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the process of providing advice. In order to engage the exemption, the information requested does not necessarily have to contain advice that is in itself notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice.

25. Having considered the withheld information, together with the Qualified Person's Opinion and the CPS' submissions, the Commissioner's view is that section 36(2)(b)(i) is engaged in relation to the withheld information in its entirety. She must next consider the associated public interest test.

### ***The public interest test***

26. Section 36 of FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at sections 36(2)(b)(i) outweighs the public interest in disclosing the information.
27. The CPS applied the higher bar that disclosure of the requested information 'would' cause prejudice, meaning that the likelihood of prejudice is greater than 50%. In this case, the Commissioner accepts that the higher threshold of 'would' has been demonstrated by the CPS. She will factor this into her public interest considerations.
28. In carrying out a public interest test, the Commissioner must weigh the public interest in preventing the prejudice, that she has already decided would occur, against the public interest in disclosure. The higher the likelihood, or the higher the severity, of the prejudice that may occur, the stronger the public interest will be in preventing it from occurring.
29. In line with her guidance on the public interest test<sup>2</sup>, the Commissioner must consider the situation at the time at which the public authority originally dealt with the request, or the time of the authority's internal review. Accordingly, in this case, the circumstances to be considered when carrying out the public interest test are those at the time, of the internal review, namely 30 December 2020.

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<sup>2</sup> the\_public\_interest\_test.pdf (ico.org.uk)

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

30. The complainant did not provide any specific public interest arguments in favour of disclosure of the withheld information.

31. The CPS submitted the following in favour of disclosure:

*"The arrest and prosecution of a high profile individual could be considered a matter of public interest particularly if it increases the public's understanding of how the CPS handles such cases. Therefore the disclosure of the information would inform the public about how the CPS handled this matter and increase accountability and transparency generally in connection with the criminal justice process.*

*There is also clear public interest in increasing the public's understanding of CPS processes and our ability to acknowledge, investigate and rectify any internal failures."*

**Public interest arguments against disclosing the withheld information**

32. The CPS provided the following arguments against disclosure of the withheld information:

*"Disclosure of this information would inevitably lead to CPS staff being more circumspect in providing free and frank advice and in putting their views forward regarding the handling of a case. As a result future post case reviews would be less open and honest which would leave the CPS at a disadvantage to resolve serious issues effectively, especially when dealing with high profile cases. The review process needs to be free and frank to recognise possible fundamental weaknesses in order to implement change where necessary.*

*The post case review process is an established practice across the CPS, disclosure of the information would inhibit professionally qualified employees of the CPS from discussing their professional advice with senior management in a candid manner. Disclosure of the information could potentially damage the quality of advice and deliberation and lead to poor decision making in the future for the CPS."*

**Balance of the public interest test arguments**

33. The Commissioner recognises the need for transparency and openness which is heightened due to the sensitivities around the high profile of the individual who was the subject of the post case review report. She

accepts that there is a clear public interest in increasing the public's understanding of CPS' processes and its ability to acknowledge, investigate and rectify any internal failures.

34. However, she is also mindful that the relevant facts have now been fully aired in public at the inquest.
35. The Commissioner accepts that the CPS' ongoing need to review its handling of certain cases involves maintaining a good working relationship with its officers and that exchanges with those officers would be inhibited and less free and frank if the requested information was to be disclosed. This in turn would have an impact of the efficacy of the post case review process itself which would be detrimental to the wider public interest in identifying good practice and lessons to be learned across post case reviews.

### *Conclusion*

36. In the Commissioner's opinion disclosing the withheld information would cause inhibition to the CPS' officers and ultimately would be detrimental to the workings of the CPS post case review process, neither of which is in the public interest. She does not consider that there is a persuasive public interest argument in disclosing the withheld information which would outweigh this. It follows that the Commissioner finds that the balance of the public interest favours maintaining the exemption at section 36(2)(b)(i) of FOIA.

### **Other matters**

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37. In this case, the CPS failed to respond to the request within the statutory 20 working days' timeframe. Although, the Commissioner acknowledges that the CPS informed the complainant that there would be a delay and apologised for this, she will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "Openness by Design strategy"<sup>3</sup> 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 her "Regulatory Action Policy"<sup>4</sup>.

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<sup>3</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>4</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>



## Right of appeal

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38. 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)

39. 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.

40. 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 .....**

**Gerrard Tracey  
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