

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

### **Decision notice**

**Date:** 18 October 2023

**Public Authority:** Home Office  
**Address:** 2 Marsham Street  
London  
SW1P 4DF

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

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1. The complainant has requested from the Home Office a copy of the Home Secretary's review of the asylum seeker right to work policy. The Home Office refused to disclose the review, citing section 35(1)(a) (Formulation of government policy, etc) of FOIA.
2. The Commissioner's decision is that section 35(1)(a) is properly engaged and that the public interest favours maintaining the exemption. No steps are required.

#### **Request and response**

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3. On 20 April 2023, the complainant made the following information request:

"I would like to request a copy of the review into asylum seeker right to work policy that was concluded in 2021.

The review was commissioned in October 2018 and a statement summarising its conclusions was made in the House of Commons on 8 December 2021 (Statement UIN HCWS452).

Please see this link:

<https://questions-statements.parliament.uk/written-statements/detail/2021-12-08/HCWS452><sup>1</sup>

I would like a copy of the review in full including any evidence used”.

4. On 22 May 2023, the Home Office responded. It refused to provide the requested information, citing section 35(1)(a) of FOIA.
5. The complainant requested an internal review on 24 May 2023.
6. The Home Office provided an internal review on 17 July 2023 in which it maintained its position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 17 July 2023 to complain about the way his request for information had been handled. He said:

“The Home Office refused my request to disclose an internal review about whether to allow asylum seekers the right to work.

The department said it refused my request because it relates to the formulation or development of government policy and that the exemption at section 35(1)(a) is therefore engaged.

I asked it to review its decision on the grounds that it announced the findings of its review in December 2021...

The Home Office upheld its refusal following an internal review arguing that the policy remains live and therefore engages section 35(1)(a).

I do not believe this is the case. On the contrary, the minister of immigration was asked a parliamentary question about the policy on 21 March 2023. He replied on 29 March 2023 that "A review of the policy concluded in December 2021 and there will be no changes to the policy at this time." (See link: <https://questions-statements.parliament.uk/written-questions/detail/2023-03->

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<sup>1</sup> <https://questions-statements.parliament.uk/written-statements/detail/2021-12-08/HCWS452>

21/170642). Just three weeks later, I submitted my request for this review. If this was not an acceptable moment to release the information, then when would be?

The Home Office argue in their response to my interval [sic] review request "that the information concerned still relates to live policy development" because "policy issues relating to asylum seekers are a 'live' subject in process of formulation and development, particularly in the context of the forthcoming Illegal Migration Bill".

The Home Office, by its nature, will always be working on "policy issues relating to asylum seekers" and if it was to use this as grounds for refusal for every request, then it would never disclose any information to the public.

I note that the ICO itself writes in its guidance on section 35(1)(a) that "generic chilling effect arguments about unspecified future policy debates are unlikely to be convincing, especially if the information in question is not particularly recent".

8. The Commissioner will consider the application of section 35(1)(a) to the request.
9. The Home Office has explained to the complainant that the withheld information:

"... consists of analysis of asylum seekers right to work policy. It also contains financial and other policy-related information originating from a number of Government Departments and local government. It includes conclusions or recommendations to Ministers, as a result of the review".
10. The Commissioner has viewed the withheld information and agrees with this description.

## **Reasons for decision**

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### **Section 35(1)(a) – Formulation of government policy, etc**

11. Section 35(1)(a) of FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation or development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.

12. The purpose of subsection 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 policy options in private.
13. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
14. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
15. In its refusal notice, the Home Office explained to the complainant:

"Policy issues relating to asylum seekers are a 'live' subject in process of formulation and development.

It is known that the development of the policy will be ongoing for some time and will be subject to further development. The report in question is currently being used to inform on other strands of formulation or development of Government policy, in closely related areas, for which the Department is responsible.

It is also known that asylum policy attracts a high level of media interest and public concern. Therefore, it is important that Ministers and officials are able to consider policy analysis and recommendations without the distraction that would result from disclosure".

16. In response to the Commissioner, making reference to the grounds of complaint included above, the Home Office explained:

"It is correct that former Home Office Immigration Minister Chris Philp stated in December 2021 there would be no changes to the permission to work policy resulting from the review.

However, since then there has been renewed interest in whether asylum seekers should have permission to work in the UK. For instance, in April 2023, 'The Mirror' reported that an amendment was considered as the Illegal Migration Bill (now Act) (IMA) entered report stage on allowing asylum seekers to work after 6 months.

The rationale for the IMA is to prevent asylum seekers from making perilous journeys in order to seek asylum in the United Kingdom.

The scheme set out through the IMA, once implemented, would mean individuals who come to the UK illegally may be detained and removed to either their home country (if it is safe to do so), or relocated to a safe third country. This would mean that those entering illegally would have their asylum claim declared inadmissible to the UK asylum system. They would therefore be unable to work in the UK.

- The Home Office has also received recent ministerial correspondence from 'Lift The Ban Coalition' (LTB) also asking for a change in policy.
- In June 2023, the National Institute of Economic and Social Research (NIESR), published a report which claimed that allowing all asylum seekers in the UK to work could save the Government a total of £6.7bn each year, increase tax revenue by £1.3bn each year and add £1.6bn to the UK's annual GDP. The change in policy was also supported by the Adam Smith Institute. These findings were reported in national media.
- Most recently, on 3 October 2023, the Migration Advisory Commission (MAC) reviewed their Shortage Occupation List, which could impact the existing right to work policy. The Government is expected to respond to the recommendations in the report.

This confirms that policy issues relating to asylum seekers are very much a 'live' policy subject and although at that specific time in December 2021 Ministers did not want to make changes as a result of the LTB report, the review would be and is still being used for continued improvement and assessment of the policy in line with very sensitive emerging issues".

17. It has further evidenced to the Commissioner that the policy remains 'live' by providing the following information:

"The rationale remains that the asylum seekers permission to work policy has been subject to significant scrutiny throughout the years due to its restrictive nature, which allows asylum seekers to obtain permission to work if their claim has not been decided within twelve months through no fault of their own.

Despite the Government holding its existing position with regards to permission to work policy, there continues to be significant debate about the issue – not least since the recent NIESR report which contended that a change in policy could result in dramatic economic benefit.

As such, permission to work remains a point of constant attention...As the IMA prevents those who enter the UK unlawfully from being admitted to the UK asylum system, individuals caught by the IMA would not be eligible for permission to work as per the current policy. This was discussed by Home Office Minister Lord Murray during Committee Stage of the IMA following the laying of amendment 133 by Baroness Ludford, Lord Carlile of Berriew, The Lord Bishop of Chelmsford and Lord Kerr of Kinlochard; they requested an amendment to the policy to allow asylum seekers the permission to work after their claim has been outstanding for 3 months. These amendments have been taken into consideration along with the various other reports such as the NIESR, MAC and LTB that have prompted further consideration of the policy, which are being considered using the review of 2020".

**What Government policy does the requested information relate to?**

18. The Commissioner's guidance for the section 35 exemption<sup>2</sup> is as follows:

"The important point is that government policy is ultimately signed off by the Cabinet or Executive Committee or the relevant Minister. This is because only Ministers have the mandate to make policy. If the final decision is taken by someone other than a Minister, that decision does not itself constitute government policy".

19. The Home Office has explained that:

"This applies to the Asylum Seekers Permission to Work Policy for which the review is being used and available at: Permission to work and volunteering for asylum seekers (accessible)<sup>3</sup> - GOV.UK ([www.gov.uk](http://www.gov.uk)). ... this remains a live policy issue".

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

<sup>3</sup> <https://www.gov.uk/government/publications/handling-applications-for-permission-to-take-employment-instruction/permission-to-work-and-volunteering-for-asylum-seekers-accessible#about-this-guidance>

**Does the information relate to the development or formulation of Government policy and not the implementation?**

20. The Commissioner's guidance confirms that: "to be exempt, the information must relate to the formulation or development of government policy."
21. The Commissioner understands these terms to refer to the design of new policy and the process of reviewing or improving existing policy. It does not cover information relating purely to the application or implementation of established policy.
22. The purpose of the exemption in section 35(1)(a) is to provide a safe space to protect the integrity of the policy-making process.
23. Although it appears to contradict the published statement made in the House of Commons (see footnote 1), the Home Office has explained that this was superseded by proposals being considered under the IMA. Having regard to the explanations provided by the Home Office above, the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged as it relates to on-going development of the Asylum Seekers Permission to Work Policy.
24. As section 35 is a qualified exemption, the Commissioner must also consider the balance of public interest arguments.

**Public interest arguments in favour of disclosure**

25. The complainant's views are included above. When asking for an internal review he also said:

"...the overwhelming public interest in this information favours disclosure and that the department's arguments against doing so are weak.

The department gives the following as a factor against disclosure:

'The degree to which the public interest in openness has already been met by the disclosure of information on the same subject through parliamentary scrutiny. Avenues currently exist via the Parliamentary Questions and Urgent Questions to answer any questions, which are also published on Hansard for public view.'

I do not believe that the department's responses to Parliament have satisfied public interest. In its parliamentary statement [footnote 1] announcing the outcome of the review, the department does not give a full explanation of why it decided to ignore the recommendations of a report by the Lift the Ban coalition.

'The Home Office has carried out a comprehensive review of the Lift the Ban report; however, our evidence indicates the assumptions underpinning the recommendations are highly optimistic.'

However, the Home Office does not go on to detail the evidence or rationale it used to make this decision. As such, there is a clear public interest in understanding why the department has rejected a widely-supported set of recommendations from the charity sector.

I do not believe that the department can rely on "safe space" or "chilling effect" arguments as factors against disclosure because significant time has passed since the review was completed and a decision was taken to maintain the government's previous policy".

26. The Home Office recognised the following factors in favour of disclosure:

- Public interest in the disclosure of information to ensure transparency and visibility of public bodies being held to account regarding decisions made and use of funds.
- Providing the public with information to help their understanding of decisions which affect them.
- The general interest in transparency, which can support the public to understand of how government policy is formulated.
- Disclosure may serve to widen the base of stakeholder and public engagement which may in turn assist in the development and scrutiny of policy formulation.

27. It also advised the Commissioner that asylum remains very much a 'live' subject which is of significant interest to the general public.

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

28. At refusal stage, the Home Office provided the following arguments against disclosure:

- The degree to which the public interest in openness has already been met by the disclosure of information on the same subject through parliamentary scrutiny. Avenues currently exist via the Parliamentary Questions and Urgent Questions to answer any questions, which are also published on Hansard for public view.
- The public interest in maintaining a "safe space" in which to allow the development of government policy.
- Prejudicing the Department's ability to seek any consultation at an appropriate time by requiring ad-hoc disclosure of information under FOIA would be detrimental to the policy formulation process.
- The removal of this safe space could lead to a "chilling effect" where both the Department and third parties are less willing to engage in

exploration or pilots of new policy ideas where there is a risk of adverse public reaction should such proposals not be implemented.

29. The Home Office also explained to the complainant:

"... the information concerned still relates to live policy development. Policy issues relating to asylum seekers are a 'live' subject in process of formulation and development, particularly in the context of the forthcoming Illegal Migration Bill which necessitates changes to the Immigration Rules associated with the Right to Work policy. The development of the policy will be ongoing for some time and will be subject to further development. The report in question is currently being used to inform on other strands of formulation or development of Government policy, in closely related areas, for which the Department is responsible. It is very important that officials have the safe space to consider information without fear of distraction or of premature disclosure as this would inhibit discussions and the ability of ministers to take free and frank advice, which equally could result in less robust, well-considered or effective policies".

30. The Home Office also advised the Commissioner:

"...Publishing the 2021 review at this time is likely to inhibit the free and frank discussion of all policy options by removing the safe space between officials and ministers and is likely to cause a chilling effect whereby parties are less willing to engage in exploration or pilots of new policy ideas.

...the permission to work policy is one that receives regular and considerable public scrutiny, publication is of [sic] this information is likely to risk adverse public reaction should such proposals not be implemented.

Release of this information at this time would ... undermine the integrity of the policy making process and result in less robust, well-considered or effective policy development which would not be in the public interest".

### **The balance of the public interest arguments**

31. The Commissioner has considered the withheld information and the arguments put forward by both parties. He accords weight to the public interest in the accountability and transparency of public authorities and in this case, in the Government's approach to the regulation of Asylum Seekers Permission to Work, an area which remains of considerable public interest.

32. Disclosure of the information would provide the public with sight of the analysis that the government has received and is considering as part of its policy development and therefore disclosure would make the policy making process more transparent. In addition, disclosure of the withheld information would also provide interested stakeholders with an insight into the analysis of the issues in question which they could use to engage with the government.
33. As the policy making process remains live and ongoing, the likely engagement would result in particular attention and comment on its content. The Commissioner accepts that such attention would have a direct and detrimental impact on the policy development process itself. In his view, such 'safe space' arguments therefore need to be given notable weight – ie the concept that the Home Office needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction, where the policy making is live and the requested information relates to that policy making.
34. With regard to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases.
35. If, as in this case, the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight.
36. The Commissioner recognises that policy development needs some degree of freedom to enable the process to work effectively. He accords significant weight to the public interest in not prematurely disclosing information which was, at the time of the request, and still remains, under consideration regarding ongoing policy-making in this area. The Commissioner is also mindful of the fact that some information has been placed in the public domain to keep interested parties up-to-date, as far as possible.
37. The Commissioner agrees that 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. The Commissioner's decision is, therefore, that the Home Office was entitled to rely on section 35(1)(a) to refuse the request.

**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 .....**

**Carolyn Howes  
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