

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2023

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

Decision (including any steps ordered)

1. The complainant requested a copy of a specified Windrush report which was ultimately withheld by the Home Office on the basis of section 36 of FOIA (effective conduct of public affairs).
2. The Commissioner's decision is that the Home Office was entitled to rely on subsections 36(2)(b)(i) and (ii) and 36(2)(c) in refusing to provide the requested report, and that in all the circumstances of the case the public interest favours maintaining these exemptions.
3. No steps are required as a result of this notice.

Request and response

4. On 1 June 2022, the complainant wrote to the Home Office and requested information in the following terms:

“Under the Freedom of Information Act 2000 I wish to see the following:

- A full copy of the 52-page report titled 'Historical Roots of the Windrush Scandal'."
5. The Home Office responded on 22 June 2022. It refused to provide the requested information, citing section 35(1)(a) of FOIA – the exemption for the formulation or development of government policy.
 6. The complainant requested an internal review on 29 June 2022. The Home Office provided its internal review outcome, late, on 24 November 2022. It revised its position and now cited the following exemptions in place of section 35:
 - Section 36(2)(b)(i) exempts information from release if disclosure of the information under FOIA would, or would be likely to, inhibit the free and frank provision of advice.
 - Section 36(2)(b)(ii) exempts information from release if disclosure of the information under FOIA would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
 - Section 36(2)(c) exempts information from release if disclosure of the information under FOIA would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Scope of the case

7. The complainant contacted the Commissioner on 24 November 2022 to complain about the way his request for information had been handled. He did not submit any particular grounds of complaint but asked the Commissioner to review the Home Office's position.
8. The Commissioner has considered whether the Home Office was entitled to rely on section 36 of FOIA to refuse to comply with the request.

Reasons for decision

9. The Home Office provided some useful context to the requested report as follows:

"The requested/withheld information – the 'Historical Roots of the Windrush Scandal' Report (hereafter known as the Report) – was commissioned by the Home Office in March 2020. The Report is intended for Home Office staff only. Its purpose is to build

knowledge and understanding of the historical development of immigration policy at the Home Office, and how this history was shaped by the history of race in the British Empire. The Report is intended to prompt discussion and debate on the development of immigration policy, and how this gave rise to circumstances which allowed the Windrush Scandal to happen. It was written by an independent academic and brought together a body of evidence and sources – already in the public domain – into one coherent document. The time frame covers Roman Britain up to 1981, with a particular focus on policies and legislation since 1945.

Under Recommendation 6 in the Comprehensive Improvement Plan (the Home Office’s response to the Windrush Lessons Learned Review), we also committed to developing a UK history training programme, working with academic experts to do so. While the Report is suggested reading for that course, it did not inform the development of that externally procured programme, nor does it form part of the package of materials created for it.”

Section 36 – prejudice to the effective conduct of public affairs

10. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a Qualified Person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
11. The Home Office has applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold the requested information in its entirety. Paragraph 6 of this notice sets out what these exemptions relate to.
12. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a Qualified Person. The Commissioner is satisfied that Minister Jenrick was authorised as a Qualified Person for the Home Office under section 36(5) of FOIA at the relevant time. He notes that the opinion was sought on 1 November 2022 and that the Qualified Person had access to the withheld report.
13. The Commissioner is satisfied that on 17 November 2022 the Qualified Person gave the opinion that all three subsections of the section 36 exemption were engaged.
14. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the Qualified Person’s opinion was a reasonable one.
15. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an

opinion that a reasonable person could hold – then it is reasonable. 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 is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the Qualified Person's position could hold. 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.

16. With regard to **section 36(2)(b)(i)**, the Qualified Person acknowledged that the requested report was not intended for external publication. He considered that a hypothetical future author commissioned to write a similar report may self-censor in fear of future disclosure, thereby affecting the quality of the advice provided by the Home Office.
17. The Commissioner understands from the Home Office that the report does not represent government policy and the views included in it are those of the author who is a historian, who was independent from the Home Office. He accepts it was reasonable for the Qualified Person to conclude that Ministers may also be reluctant to commission, or be asked to commission, similar reports that may include criticism of their predecessors or could become associated with current policies.
18. The Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the free and frank provision of advice for the reasons set out above.
19. In relation to **section 36(2)(b)(ii)**, the Qualified Person's opinion was that disclosure of the requested report would be likely to inhibit the ability of Home Office officials to partake in free and frank exchange of views needed to ensure effective future policy development. He considered that release of the report would be likely to result in negative media coverage and may mean staff participating in the training do not feel that there is a safe enough space to express themselves as openly and completely as they otherwise would have. He also explained that there would be likely to be a concern that the Home Office cannot provide a 'safe space' for controversial discussions, so staff would be less inclined to attend the training, and that even if they did attend, they would be less inclined to voice their opinions and fully participate in debate.
20. The Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the free and frank free and frank exchange of views for the purposes of deliberation based on the reasons set out above.

21. For **section 36(2)(c)**, the Qualified Person's opinion was that it was engaged because reaction to the requested report is likely to be unfavourable and reflect the Home Office in a poor light, as demonstrated by Guardian reporting in 2022 (Windrush scandal caused by '30 years of racist immigration laws' – report | Windrush scandal | The Guardian¹).
22. The Qualified Person believes that this negativity would be likely to influence Home Office staff and may deter them from engaging in training programmes on the history of migration. Further, any material staff disengagement from the Recommendation 6 learning package in line with Ministerial decisions, would not only have cost and resource implications (as the course might have to be redesigned and redelivered), but would also be likely to affect the development of staff and their ability to develop future government policies - particularly on immigration, thus having a counter-effect to the purpose for which the report was designed.
23. In accordance with the description of reasonableness at paragraph 15, the Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the effective conduct of public affairs on the basis set out above.
24. The Commissioner is also satisfied that the Qualified Person's opinion, namely that inhibition relevant to subsections 36(2)(b)(i) and (ii) and 36(2)(c) would be likely to occur through disclosure of the withheld information, is reasonable.
25. The Commissioner is therefore satisfied that all three limbs of section 36(2) were engaged correctly.

Public interest test

26. As sections 36(2)(b)(i) and (ii) and 36(2)(c) are qualified exemptions, and as the Commissioner is satisfied the exemptions were applied correctly in this case, he has next considered the balance of the public interest test.

¹ <https://www.theguardian.com/uk-news/2022/may/29/windrush-scandal-caused-by-30-years-of-racist-immigration-laws-report>

Public interest in disclosing the information

27. The complainant did not submit any specific public interest arguments to support his view that the information should be disclosed.
28. In favour of disclosure, the Home Office said:

“We recognise that there is a general public interest in openness and transparency in government, which will serve to increase public trust. There is an interest in members of the public being able to understand the development (and consequences) of immigration policies of the past, and how they helped create circumstances which allowed the Windrush scandal. The information is not new – its source material is in the public domain - it brings together in one document commissioned by the Home Office, the historical roots of the Windrush scandal including in terms of legislation that is still in use. Therefore, there is interest in this issue, and interest in this Report.

Moreover, the act of disclosing the Report would promote transparency and may help build trust and understanding on Windrush.

Furthermore, the release of information could have the effect of encouraging greater public involvement in immigration policy, thus increasing public participation in the political process and the level of public debate.”

Public interest in maintaining the exemption

29. In favour of maintaining the section 36 exemption, the Home Office submitted the following:

“Against the above, it is our view that disclosure of the Report would be likely to damage communities’ trust in government ways of working, principally its future development of immigration policy and/or legislation, if the Report were – as is likely to be the case if disclosed - seen through the lens of government actions taken in the past.

Moreover, it is also our view that disclosure would be likely to undermine the learning and development of staff, and therefore impede the effectiveness of this learning on the development and implementation of current and future policies. Adverse media coverage of the Report would be likely to have a negative effect on staff morale and in turn lead to a detrimental effect on their level of engagement in the important training. Staff may feel less secure in expressing candour, this would restrict the breadth and

depth of debate and reduce the value and effectiveness of the training. Impeding the effect of this learning on future policy development would be likely to lead to poorer decision-making: this would not be in the wider public interest.

Likewise, future authors of Reports may be deterred from providing their full advice in case they are subject to intrusion... It is not in the wider public interest for ministers and officials to base future decisions on reports which the authors have felt obliged to self-censor because of potential intrusion”.

Balance of the public interest

30. The Commissioner must assess whether, in all the circumstances of this case, the Home Office has properly applied section 36 and the associated public interest test.
31. In considering complaints regarding section 36, where the Commissioner finds that the Qualified Person’s opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or, as in this case, would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
32. The Commissioner accepts there is a general public interest in openness and transparency, and in increasing the public’s involvement in immigration policy, which in turn would increase public participation in the political process and the level of public debate.
33. The Commissioner acknowledges that there is an ongoing strong and significant public interest in the subject of Windrush and the incumbent sensitivities surrounding this matter.
34. However, the Commissioner also recognises that, having accepted the reasonableness of the Qualified Person’s opinions in respect of all three limbs relied on in this case, he must give weight to those opinions as an important piece of evidence in his assessment of the balance of the public interest.
35. In the circumstances of this case, the Commissioner accepts that there is a need for a safe space to provide advice and exchange views free from external comment and examination. He also finds that there is a need to protect Home Office staff from negative media coverage and its impact. He also finds that release of the information withheld under section 36(2)(c) of FOIA would be likely to impact on the participation of its staff in learning and development, particularly on the history of

migration training and on immigration, thus having a counter-effect to the purpose for which the report was designed. This in turn would impact on the development of current and future policies and thereby otherwise prejudice the effective conduct of public affairs.

36. Having considered the content of the withheld report, the Commissioner accepts that disclosure would be likely to impact on the effectiveness of these processes.
37. The Commissioner has assessed the balance of the public interest. He has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation against the public interest in openness and transparency. His conclusion is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.
38. The Commissioner has also assessed the public interest in avoiding the prejudice to the effective conduct of public affairs against that in openness and transparency. His decision is that the public interest in avoiding this prejudice is a relevant factor and he considers that the public interest in maintaining the section 36(2)(c) exemption outweighs the public interest in disclosure.
39. It follows that the Commissioner finds that the Home Office was entitled to rely on sections 36(2)(b)(i) and (ii) and 36(2)(c) to withhold the requested report.

Other matters

Internal review

40. Although the complainant has not complained about the delay in the Home Office issuing its internal review, the Commissioner has nevertheless therefore made a record of this delay. He notes that the Home Office exceeded both the recommended 20 working days' timeframe and that suggested for more complex cases of 40 working days.

Right of appeal

41. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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

Laura Tomkinson
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF