

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2023

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

Decision (including any steps ordered)

1. The complainant requested information on a third party supplier used to conduct asylum interviews. The Home Office refused to provide any of the information requested and applied a number of exemptions to various parts of the request, namely section 31(1)(e) – the operation of immigration controls, section 40(2) – personal information, section 43(2) – commercial interests and section 44 – prohibitions on disclosure.
2. The Commissioner's decision is that the Home Office was correct to rely on section 31(1)(e) of FOIA for all the information withheld under this exemption. He finds that section 43(2) of FOIA has been correctly applied to the respective parts of the withheld information with one exception, (namely, the dates for the 'proof of concept' phase as detailed in the step below). He does not agree that either section 40(2) or section 44(1)(a) of FOIA are engaged at all.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information held for part 2 of the request (ie the dates for the 'proof of concept' phase).
 - Disclose the withheld information for parts 3a and 3c of the request (ie the numbers of testing interviews broken down by nationality and outcome).

4. The public authority 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 5 May 2022, the complainant wrote to the Home Office and requested information in the following terms:

"On 4 November 2020, the Acting Head of Asylum Operations [name redacted] issued an update on the department's plans to scope and test "the concept of using a third-party supplier to conduct interviews and gather evidence."

LINK: <https://ilpa.org.uk/wp-content/uploads/2020/11/Asylum-Operations-Proof-of-Concept-Update-04.11.2020.pdf>

QUESTIONS Please provide:

1. The name(s) of the external supplier(s) involved in this proof of concept phase.
2. The dates of the roughly 8-week period in which the supplier(s) conducted testing interviews with live cases for the "proof of concept phase".
3. The total number of testing interview [sic] conducted with live cases during the roughly 8-week period for the proof of concept phase. Please break this down by:
 - a) The nationalities of the people interviewed
 - b) The name of the commercial supplier who conducted each interview
 - c) The outcome of the decision of their asylum claim (eg refused, granted, inadmissible awaiting decision)
4. Please provide a copy of any and all evaluation documents detailing information including:
 - a) Whether the external supplier(s) could deliver the support required
 - b) The viability of a longer-term service
 - c) Any improvements or efficiencies identified

5. A copy of the document outlining the framework used to measure interview quality
6. The number of interviews in which the interview fell below the expected levels of quality
7. A copy of the 'lessons learned' exercise conducted following the testing interviews.

If you need to redact or omit any information, please explain why and please note that time taken for redactions does not usually count towards the cost limit.”

6. The Home Office responded on 6 June 2022. It refused to provide the requested information citing section 43(2) of FOIA, (the exemption for commercial interests), and said that the public interest favoured maintaining the exemption.
7. The complainant requested an internal review on 7 June 2022. The Home Office provided the outcome of its internal review, late, on 4 August 2022. It maintained that section 43(2) applied, but also said that section 31(1)(e) of FOIA (the exemption for the operation of the immigration controls) applied to parts 5, 6 and 7 of the request and that the public interest test favoured maintaining this exemption.
8. Additionally, the Home Office said it wished to rely on section 40(2) (the exemption for personal information) for some of the withheld information but did not specify at that stage to which parts of the request it applied.

Scope of the case

9. The complainant contacted the Commissioner on 8 August 2022 to complain about the way his request for information had been handled. He provided his view as to why he considers the requested information should be provided which the Commissioner has taken account of.
10. When responding to the Commissioner's investigation, the Home Office confirmed its final position as follows:
 - Section 43(2) has been cited for parts 1, 2, 3b, 4, and 6 of the request.
 - Section 31(1)(e) has been applied to parts 5, 6 and 7 of the request (meaning part 6 of the request has both section 43(2) and section 31(1)(e) applied to it).

- Section 40(2) is cited for parts 3a and 3c of the complainant's request.
 - Section 44 is relied on for parts 3a, 3b and 3c of the request (meaning parts 3a and 3c also have section 40(2) applied to them and that 3b also has section 43(2) applied to it).
11. The Commissioner has considered whether the Home Office was entitled to rely on sections 31, 40, 43 and 44 of FOIA to withhold the requested information.

Reasons for decision

12. The Commissioner has first analysed the Home Office's application of section 43(2) given it has been applied to the first few parts of the request.

Section 43 – Commercial interests – applied to parts 1, 2, 3b, 4 and 6 of the request.

13. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
14. With regard to part 1 (which asks for the names of the external supplier(s)) and part 3b (the name of the commercial supplier who conducted the interviews, the Home Office argued:

"If the Home Office were to disclose this withheld information, it would discourage suppliers from helping with future proof of concepts or formally bidding for contracts and that would put the Home Office in a weaker position when tendering future asylum related contracts and seeking value for money for taxpayers. The information could also be used by competitors to build a picture of commercially sensitive information relating to the supplier, impacting existing relationships with suppliers and/or prejudicing their commercial interests. It is not in the Home Office's interest to disclose information that would damage the Department's relationship with its supplier, and the Home Office has a responsibility to protect sensitive information relating to such contracts. It would also be unfair to judge the performance of a supplier supporting the Home Office with a proof of concept compared to a supplier engaged for example through a contracted service with clear agreed service level agreements."

15. The Home Office said it had consulted with its suppliers and has been requested to continue to withhold the name(s). It advised that neither the names nor the documents in scope have been shared.

16. In relation to part 4 of the request (copies of any and all evaluation documents etc), the Home Office argued:

"If this information were to be released, it would discourage suppliers from bidding for contracts and that would put the Home Office in a weaker position when tendering future asylum contracts and seeking value for money for taxpayers.

Other competitors could also build a picture of commercially sensitive information relating to the supplier prejudicing their commercial interests. It is not in the Home Office's interest to disclose information that would damage the department's relationship with its suppliers, and the Home Office has a responsibility to protect sensitive information relating to contracts. This is clearly not in the public interest.

It would also be unfair to judge the performance of a supplier supporting the Home Office with a proof of concept compared to a supplier engaged for example through a contracted service with clear agreed service level agreements."

17. For part 6 of the request (namely, the number of interviews falling below expected levels of quality), the Home Office told the Commissioner that:

"This information engages section 43 as disclosure of this number, captured within the proof of concept work, is commercially sensitive information. Release would cause reputational damage to the supplier and may result in a loss of confidence of the Home Office's ability to offer this type of service in the future. It should be noted that where the interview fell below expected standards, corrective action was taken by the Home Office to ensure the interview did not negatively impact the outcome of the individuals asylum claim."

18. The Home Office also told the Commissioner the following in relation to its application of section 43(2) of FOIA:

"The information held is a "Third party asylum interviewing proof of concept evaluation report". The report is a detailed analysis of the effectiveness of a third parties [sic] interviewing capability and capacity to support UKVI's internal workforce by conducting substantive asylum interviews based on the work undertaken by the supplier in this proof of concept. It contains detailed

discussion on quality, delivery/performance and cost analysis and pricing structure.

This document is commercially sensitive relating to the supplier and release would put commercially sensitive information into the public domain that is not otherwise available and would allow competitors to build a picture of the supplier. This would prejudice their commercial interests. It would also be unfair, and could prejudice their reputation and therefore be commercially disadvantageous to them, to judge the performance of a supplier supporting the Home Office with a proof of concept compared to a supplier engaged for example through a contracted service with clear agreed service level agreements. The Home Office has a responsibility to protect sensitive information relating to contracts and proof of concept work in particular.

It is also not in the Home Office's interest to disclose information that would damage the department's relationship with its suppliers. If this information were to be released, it would discourage suppliers from bidding for contracts and that would put the Home Office in a weaker position when tendering future asylum contracts and seeking value for money for taxpayers.'

19. The Commissioner considers that the information withheld by the Home Office at parts 1, 3b, 4 and 6 of the request constitute commercially sensitive information. He considers that the prejudice envisaged by the Home Office would at least be likely to occur. He, therefore, finds the section 43(2) has been correctly applied to these parts of the request.
20. For part 2 of the request (the dates for the 'proof of concept phase'), the Home Office requested that its submissions to the Commissioner should not be reproduced in this notice. The Commissioner has respected the Home Office's position but has taken those points into consideration.
21. However, based on these submissions, the Home Office has not convinced the Commissioner that the dates for the 'proof of concept phase' could constitute commercially sensitive information. He therefore, concludes that section 43(2) is not engaged in respect of part 2 of the request. The step at paragraph 3 of this notice sets out what the Home Office now needs to do.
22. Having determined that the remaining information withheld under section 43(2) is caught by this exemption, the Commissioner must now consider the associated public interest test.

Public interest test

23. Section 43 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 43 is engaged, the requested information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest in favour of disclosure

24. The complainant did not submit any specific public interest arguments in relation to section 43(2) of FOIA.
25. The Home Office provided the following in favour of disclosure:

“Disclosure of this information would allow for greater openness and transparency and may assist in promoting public confidence of how public money is spent and what the money is being used for. Disclosure of this information may also increase accountability and enhance the public’s understanding about the risk and benefits of the proof of concept pilot including how the Home Office, Asylum Operations, increases decision output, reduces delays and increase quality. In addition, we would like to be fully open and transparent around newer ways of working and the reasoning behind this. Given this was a proof of concept [sic] are looking to develop new ways of working, to improve our services and would be in favour of releasing all information to support this.

All these factors are in the public interest and there is some weight to be given to the considerations in favour of disclosing the information.”

Public interest in favour of maintaining the exemption

26. Against disclosure, the Home Office argued that:

“There is a strong public interest test to not disclose information that is commercially sensitive to the pilot that may jeopardise the running of the project. This would have a negative effect of not only dampening the effectiveness of the pilot but also gain an insight into the project and how we maintain effective quality and outputs of asylum applications.

Disclosure might also cause reputational damage and may result in a loss of confidence of the Home Office’s ability to offer this type of service in the future by releasing commercially sensitive information precluding the business case. Given this was a proof of concept we were looking to develop new ways of working which may have shared [sic] future working.

We would not want to disclose some [sic] this information, we want the ability to test the processes and concepts without being prejudiced. Without releasing the information, we would like to maintain we are able to rest [sic] objectively without prejudice. This is clearly not in the public interest.”

27. In addition, the Home Office submitted the following arguments:

“...release of this information would release commercially sensitive information into the public domain about the supplier and would prejudice their commercial interests. The Home Office has a contractual obligation not to release such information and it would not be in the public interest to cause commercial prejudice to a third-party supplier.

There is a strong public interest to not disclose information that is commercially sensitive to the pilot that may have jeopardised the running of the project. This would have negatively affected the pilot by not only dampening its effectiveness, but also gaining insight into the project and how we maintain effective quality and outputs of asylum applications. Disclosure might also cause reputational damage and may result in a loss of confidence of the Home Office’s ability to offer this type of service in the future by releasing commercially sensitive information precluding the business case.

This was a proof of concept whereby the Home Office were looking to develop new ways of working which may feed into future working. We would not want to disclose this information at the time the request was received. It is in the public interest to ensure a safe space to test the processes and concepts without fear of early release”.

Balance of the public interest

28. The Commissioner acknowledges the public interest in openness, transparency and accountability.
29. Against this, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to the commercial interests of the parties involved in the testing concept.
30. The Commissioner acknowledges the very substantial public interest in avoiding that outcome and that this is a public interest factor of considerable weight in favour of maintenance of the exemption.
31. Having taken the above arguments into account, the Commissioner is satisfied that, in the particular circumstances of this case, the public

interest in maintaining the section 43(2) exemption outweighs that in disclosing the requested information.

Section 31- Law enforcement – applied to parts 5, 6 and 7 of the request

32. Since the Commissioner has found that section 43(2) is engaged for part 6, he has not deemed it necessary to consider the Home Office's application of section 31 to this part of the request. This analysis therefore considers the Home Office's application of section 31 to parts 5 and 7 of the request.

33. Section 31 of FOIA creates an exemption from the right to know if releasing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.

34. Section 31(1)(e) states:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to prejudice-

(e) the operation of the immigration controls".

35. The Home Office said that the disclosure of this requested information would prejudice the operation of immigration controls, and that the information being withheld contains the specific framework and the outcome of cases.

36. Additionally, the Home Office argued that it is not in the public interest to disclose the outcome of asylum cases, because if disclosed alongside additional data, including nationality data, there is a risk that individuals could be identified. It said:

"Some of the information requested for release would also provide an insight into the immigration system and how to navigate the asylum system for a decision, such as how quality is measured, which would put the system at risk of abuse if this information was released, undermining our ability to provide protection to the most vulnerable. All asylum seekers are assessed in the same way. It is therefore important that sensitive operational information is protected, as any disclosure that would prejudice the operation of immigration control would be contrary to the public interest.

Moreover, disclosure of any Home Office evaluation material and quality frameworks are likely to provide asylum seekers with

access to information relating to specific areas of concern and sensitive information that they would not otherwise be able to view. This could enable claimants (and legal representatives) to adapt the information they provide during interview and could result in potential claimants fraudulently changing the information they provide, just for the purposes of their asylum interview, thus jeopardising the credibility of the process.”

37. The Commissioner notes that the Home Office considers that the envisaged prejudice ‘would’ occur which is the higher threshold used. He has considered the available evidence and whilst he is not convinced that the higher threshold of ‘would’ prejudice is met, he is, however, satisfied that disclosure of the requested information would at least be likely to prejudice the operation of the immigration controls. He therefore finds that section 31(1)(e) has been correctly applied to parts 5 and 7 of the request.

Public interest test

38. The Commissioner will next consider the associated public interest test for section 31(1)(e) of FOIA.

Public interest in favour of disclosure

39. The complainant did not submit any specific public interest arguments in relation to section 31(1)(e) for parts 5 and 7 of the request.
40. In favour of disclosing the requested information, the Home Office acknowledged:

“There is a general public interest in openness and transparency in government, which will serve to increase public trust and promote public confidence in the operation of our immigration controls, the way we carry out our work, and in particular disclosure would provide an insight into the asylum system and may allow others to understand quality and how cases are assessed.”

Public interest in favour of maintaining the exemption

41. Against disclosure, the Home Office argued that:

“The information being withheld contains the specific framework and outcome of cases. It is not to disclose the outcome of asylum cases including their nationalities as individuals could be identified from this information.

Some of the information would also provide an insight into the immigration system and how to navigate the asylum system for a

decision, such as how quality is measured, which would put the system at risk if this information was released. All asylum seekers are assessed in the same way. It is therefore important that sensitive operational information is protected, as any disclosure that would prejudice the operation of immigration control would be contrary to the public interest.”

Balance of the public interest

42. The Commissioner accepts that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest.
43. As well as the general public interest in transparency, which is always an argument for disclosure, the Commissioner acknowledges the legitimate public interest in the subject the information in this case relates to, namely how asylum seekers are assessed.
44. The Commissioner accepts the argument that disclosure could inform and improve the public's confidence in the operation of the UK's immigration controls.
45. However, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding likely prejudice to the operation of the immigration controls.
46. The Commissioner considers it clear that there is a very substantial public interest in avoiding that outcome and that this is a public interest factor of considerable weight in favour of maintenance of the exemption.
47. Having taken the above into account, the Commissioner is satisfied that, in the particular circumstances of this case, the public interest in maintaining the exemption outweighs that in disclosing the requested information.
48. It follows that the Commissioner finds that section 31(1)(e) has been correctly applied to parts 5 and 7 of the request.

Section 40 – personal information – applied to parts 3a and 3c of the request

49. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
50. Section 3(2) of the Data Protection Act 2018 defines personal data as:

"any information relating to an identified or identifiable living individual".

51. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
52. In this case, the Home Office has applied section 40(2) to the numbers of testing interviews broken down by nationalities and separately broken down by outcomes. It has provided the Commissioner with this information in tabular form.

53. The Home Office has stated that it:

"cannot disclose the exact figure as there is a risk that this could lead to the identification of individuals".

54. However, the Home Office has not explained how disclosure of the numbers could lead to any individual being identified. Further, from the information provided by the Home Office, the Commissioner was not able to determine how reidentification could potentially occur through disclosing the requested numbers. He, therefore, is not satisfied that the requested information here constitutes personal data.
55. It follows that he finds that section 40(2) of FOIA is not engaged in relation to parts 3a and 3 c of the request.

Section 44 – prohibitions on disclosure – applied to parts 3a, 3b and 3c of the request

56. Since the Commissioner has concluded that section 40(2) is not engaged for parts 3a and 3c of the complainant's request, he has gone on to consider whether this information can instead be withheld under section 44(1)(1) of FOIA, given that this exemption has also been cited for this information. However, as the Commissioner has found that section 43(2) is engaged for part 3b of the request, he has not found it necessary to consider the Home Office's application of section 44 to this part of the request.
57. Section 44 of FOIA allows a public authority to withhold information whose disclosure, otherwise than under FOIA, would breach another piece of legislation.
58. The Home Office has confirmed that Rule 339IA of the Immigration Rules applies, which states:

"339IA. For the purposes of examining individual applications for asylum (i) information provided in support of an application and the fact that an application has been made shall not be disclosed to the alleged actor(s) of persecution of the applicant..."

59. The Home Office affirmed it has a duty of confidentiality to asylum claimants in accordance with legislation. It explained that if the requested information (at parts 3a and 3c) were to be released in relation to asylum interviews, it would risk breaching that duty and Rule 339IA.

60. Further the Home Office argued:

“If Home Office claimants were to be identifiable and this information was to fall into the wrong hands, this would put the claimant and their family at risk.

Engagement of 339IA would further rely on Section 44(1)(a), disclosure of information is prohibited under any enactment.

Section 44(1)(a) exempts information if its disclosure is prohibited by other legislation. Such provisions are referred to as statutory prohibitions or statutory bars and they prevent public authorities from disclosing specific types of information.

Information is exempt under this subsection if its disclosure would breach any of the following:

- primary legislation (an Act of Parliament); or
- secondary legislation (a Statutory Instrument).

Under FOIA, information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) (c. 36) (prohibitions on disclosure) if its disclosure— (a) would specify the identity of the person to whom the information relates, or (b) would enable the identity of such a person to be deduced.

In accordance with our obligations under the Refugee Convention and domestic law, we do not disclose information about an individual's asylum claim or seek information in a way that could expose them, or any family, to serious risk. We take any breach of this principle extremely seriously.

All asylum claimants are made aware that we do not disclose, to their own country, that they have claimed asylum in the UK, but we may share some information, for example, to help obtain travel documentation if their claim is refused.

Asylum claimants are also informed that we may share information with other UK government departments or agencies, including the National Health Service, local authorities, asylum authorities of other countries, international organisations or other

bodies. This is to enable us and other organisations to carry out their functions, including the provision of healthcare and prevention and detection of crime.

As stated above, disclosure of this requested contains information that could allow individuals to be identified. Releasing this information in relation to asylum interviews risks undermining the integrity of the asylum system and our ability to protect the most vulnerable, exacerbating the asylum backlog and paving the way for more disingenuous claims.

This could further open the Home Office to security risks, if individuals of concern for example war criminals or, those involved in serious criminality seek to abuse the immigration system on the bases of information released via this request.”

61. Having reviewed the information withheld by the Home Office under section 44(1)(a) of FOIA, the Commissioner does not agree that any individual can be identified should the requested numbers (nationalities and outcomes) be disclosed. The Home Office has failed to explain how disclosure of these numbers could lead to any individual potentially being identified and thereby breach Rule 3391A of the Immigration Rules.
62. The Commissioner, therefore, finds, that section 44(1)(a) of FOIA is not engaged in respect of parts 3a and 3c of the request.
63. The step at paragraph 3 of this notice sets out the action the Home Office is required to undertake as a result of the Commissioner's decision.

Other matters

64. Although the complainant has not complained about the delay in the Home Office issuing its internal review result, the Commissioner has 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

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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

**Laura Tomkinson
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