

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

### **Decision notice**

**Date:** 24 August 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 information about asylum casework from the Home Office. The Home Office refused to provide the requested information, citing sections 43(2) (Commercial interests), 31(1)(e) (the Operation of the Immigration Controls) and 40(2) (Personal information) of FOIA.
2. The Commissioner's decision is that one of the three documents caught within the scope of the request is properly withheld under sections 43 and 31 of FOIA. However, in respect of the remaining two documents, he finds that section 31 was not engaged and that section 43 only applies in respect of the name of a third party (he did not consider section 40 as this was not included in the grounds of complaint.)
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
  - With the exception of any personal information, and the name of a third party in the Annex, the Home Office must disclose the remaining information, ie the PID and Annex.
4. The Home Office 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 the Act and may be dealt with as a contempt of court.

## Background

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5. The Commissioner has recently considered a request for similar information under case reference IC-185253-Z2Q0<sup>1</sup>.
6. The published report referred to in the request includes the following:
  - 7.34 In order to work on 'recovery' following the pausing of substantive interviews during the first lockdown of the COVID-19 pandemic in March 2020, AO [Asylum Operations] identified and implemented a contingency workforce to conduct substantive interviews. When interviews recommenced in July 2020, there were circa 39,500 asylum cases that were awaiting an interview. There were two strands to the contingency workforce plan: the temporary redeployment of staff from other parts of the Home Office, and the outsourcing of some interviews to a third party supplier.
  - 7.35 For the first strand, the Home Office was able to identify a training team to train redeployed Home Office staff using bespoke foundation training, focusing on the interview section of the Foundation Training Programme (FTP). The senior manager responsible for contingency workforce stated that they had some 'good results' from these staff being deployed to do substantive interviews, likely because of their 'background in immigration' and having had 'immigration law around them'. A senior leader said 'They have shown that you can be effective in doing interviews without making the decisions'.
  - 7.36 For the second strand, AO submitted a proposal to the Home Secretary in August 2020 outlining a 'Third-Party Proof of Concept', in order to test whether the idea of using an external company to conduct substantive interviews was feasible. Internally, this was referred to as 'Operation Diamond'.
  - 7.37 The submission outlined that, due to the growing number of outstanding asylum claims, increased asylum support costs, and the risks of a 'second wave' of COVID-19, AO had been considering commercial options. It said that by engaging a commercial partner, AO would be able to increase the number of asylum interviews undertaken. The submission stated that one of its existing third-party suppliers had surplus resource, with a large

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025567/ic-185253-z2q0.pdf>

pool of “highly trained contact centre operatives with the right competency and recent experience of conducting sensitive interviews”. The profile of these operatives was considered reflective of the skills required of an asylum DM [Decision Maker] conducting substantive interviews with asylum claimants”.

## Request and response

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7. On 8 November 2022, the complainant wrote to the Home Office and requested the following information:

“Please could you release, under the provisions of the FOIA 2000:

(1) The proposal for a ‘Third Party Proof of Concept’ submitted by Asylum Operations to the Home Secretary in August 2020 referenced at 7.36, p.49 of ICIBI (2022) ‘An inspection of asylum casework: (August 2020 – May 2021)’ available here:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1034012/An\\_inspection\\_of\\_asylum\\_casework\\_August\\_2020\\_to\\_May\\_2021.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1034012/An_inspection_of_asylum_casework_August_2020_to_May_2021.pdf)

(2) Any risk assessments produced prior to the implementation of the ‘Third party proof of concept’

(3) Any concluding reports relating to the ‘Third Party Proof of Concept’, including data on the success of the concept (as referenced at 7.45, p. 50 of ICIBI (2022) ‘An inspection of asylum casework: (August 2020 – May 2021)’

I am available should you require any clarification on this request”.

8. On 17 November 2022, the Home Office responded. It refused to provide the requested information, citing section 43(2) of FOIA.
9. The complainant requested an internal review on 25 November 2022.
10. The Home Office provided an internal review on 2 February 2023 in which it maintained its position regarding section 43(2) of FOIA, adding reliance on section 31(1)(e) (the Operation of the Immigration Controls).
11. The Home Office also later relied on section 40(2) (Personal information) in respect of any named individuals, and their contact details, within the withheld documents.

## Scope of the case

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12. The complainant contacted the Commissioner on 9 March 2023 to complain about the way her request for information had been handled. She disagreed with the citing of section 43 on the following basis:

"1) the authority failed to disaggregate request and applied a blanket application of s.43

2) The authority did not identify a causal link between the disclosure of requested information and the prejudice claimed

3) The authority did not demonstrate that they had consulted with the relevant third party about the impact on their commercial interests. In my IR, I asked: "please could you demonstrate that the Home Office had consulted with a third party about the impact of the disclosure on commercial interests". This was not addressed.

4) A sufficient timeframe has elapsed such that the likelihood of disclosure affecting commercial competitiveness is reduced. Please note that the information requested related to a discontinued 'proof of concept' from August 2020".

13. In respect of section 31, the complainant argued:

"... the authority also considered the request to fall under s 31(1)(e) as "the documents you have requested contain specific information on the asylum casework system. Disclosure would provide would be criminals with information as to how to navigate the immigration/asylum system". However, as is noted at para 7.44 (p.50) of the same ICI report (2020), the Home Office concluded that the "proof of concept... has not been successful/proven", meaning that the disclosure would not impact upon the working of the current immigration system as it has no relevance. Further, the response to the IR does not demonstrate that the prejudice claimed by releasing the proposal, the risk assessment(s) or the report of the [sic] is real, actual or of substance. Indeed, it is considered that the claim the release of this information "would provide would be criminals with information as to how to navigate the immigration/asylum system" is speculative at best".

14. The complainant has made no reference to the citing of section 40 to withhold names, so the Commissioner has not further considered this element and any personal data can be properly withheld.

15. The Commissioner has viewed the withheld information. It consists of three documents:

- 1) Third party asylum interviewing proof of concept evaluation report
  - 2) Asylum operations third party interviewers proof of concept - Project Initiation Document (the "PID")
  - 3) Annex A – an annex to document 2) (the "Annex")
16. The disclosure of item 1) above has already been considered as part of the Commissioner's investigation referred to in paragraph 5. He has therefore not further considered this document, reaching his conclusion based on the same rationale.
17. The Commissioner can confirm that the Home Office did consult with the third party concerned regarding disclosure of its involvement; disclosure was declined.
18. The remaining information consists only of the PID and Annex, and it was unclear to the Commissioner which exemptions were being applied to these documents. The Commissioner considered that the Home Office's response to his enquiries where it stated "Any risk assessments produced prior to the implementation of the 'Third party proof of concept'" engaged section 31, led him to understand that the PID / Annex, which by their nature preceded the implementation, must fall into this category. He enquired regarding this and was advised that the Home Office also considered section 43 to apply to the PID / Annex.
19. The Commissioner will consider the citing of exemptions below.

## **Reasons for decision**

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### **Section 31 – Law enforcement**

20. This has been cited in respect of the PID and Annex in their entirety.
21. 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".
22. The exemption is subject to a public interest test. This means that the information must be disclosed if the public interest in disclosing the information is equal to, or greater than, the public interest in protecting the matters at subsection (e).
23. The complainant's views are in paragraph 13.

24. The Home Office advised the complainant:

"The documents you have requested contain specific information on the asylum casework system. Disclosure would provide would be criminals with information as to how to navigate the immigration/asylum system. All asylum seekers are assessed in the same way and it is important that sensitive operational information on the decision making process is protected".

25. It further explained to the Commissioner:

"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 and potential 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 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.

The Home Office has not published this review and its content should not be quoted in the public domain. It is an internal review intended for an internal audience only. Even the commercial provider has not seen it and it has not been provided to external stakeholders on the basis that the content is commercially sensitive".

26. Having read the withheld information, the Commissioner does not accept that it actually reveals any methodology relating to immigration control, rather it is a proof of concept document which has been authored to consider various options for dealing with the matters described in "Background" above.

27. The Commissioner is not convinced that there is any prejudice to law enforcement that would, or would be likely to be caused, by disclosure of either the PID or the Annex.

28. In cases where an authority has failed to provide adequate arguments in support of the application of an exemption, and where the reasons for its engagement are not otherwise apparent, the Commissioner does not consider it to be his responsibility to generate arguments on its behalf.
29. In this instance, the Commissioner considers that the Home Office has had ample opportunities to justify its position, including at the time of its initial response, at the internal review stage, in its response to an Information Notice and during his investigation. On the basis of the available evidence, and mindful of the public interest in transparency and accountability, the Commissioner has concluded that section 31 is not engaged.

### **Section 43 – Commercial interests**

30. 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.
31. The Commissioner's guidance on section 43<sup>2</sup> states that a commercial interest relates to a person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.
32. In case IC-185253-Z2Q0, referred to in footnote 1 above, the Commissioner concluded that the Home Office was entitled to withhold the name of a third party. Based on the same rationale, the Commissioner has again concluded that three references to a third party, which are contained in the "Option 1" section of the Annex, can be withheld in this case.
33. There is no reference to any third party elsewhere in the withheld information.
34. As removal of the name of the third party from the Annex has been deemed acceptable, no third party is identifiable from the remaining information. Therefore, the Commissioner only needs to consider the commercial interests of the Home Office itself.
35. Most of the arguments offered by the Home Office relate to the harm caused to commercial contracts with third parties. In the Commissioner's view, these fall away where no third party is identifiable. Furthermore, the documents have been produced internally

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<sup>2</sup> <https://ico.org.uk/for-organisations/section-43-commercial-interests/>



to consider various options for dealing with the matters described in "Background", above. Whilst they demonstrate some issues which the Home Office is seeking to address, and there would obviously have been some future cost connected to the work had the project gone ahead, the Commissioner does not consider that these documents are commercial in nature.

36. Although not clear, the Home Office appears to have applied this rationale to these documents:

"We believe section 43 is engaged as this was a proof of concept whereby, we were looking to develop new ways of working which may have informed future working. This proof of concept did not meet Home Office needs and after evaluating, was withdrawn. Therefore, disclosure of this proof of concept could 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.

If the Home Office were [sic] 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.

Other competitors could also 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".

37. The Commissioner does not agree that "reputational damage" is a commercial activity and that disclosure of these documents would realistically impact on the Home Office's ability to secure any future projects of this nature. These types of contracts are lucrative and the Commissioner does not consider it realistic for the Home Office to claim that disclosure would prevent future bidders showing an interest – no-one has been named and it is already known that the project did not go ahead.



38. Having considered all the above, the Commissioner has concluded that the Home office has not demonstrated that section 43 is engaged. This is because it has not convincingly shown how the disclosure of the withheld information would be likely to prejudice either any third party's commercial interests or its own.
39. It follows that the Home Office was not entitled to rely on section 43 of FOIA to withhold the remaining content of the PID /Annex.
40. The Home Office must therefore take the steps set out in paragraph 3.

### **Other matters**

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41. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

### **Information Notice**

42. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on his website.
43. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in the FOI and Transparency Regulatory Manual<sup>3</sup>.

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<sup>3</sup> [https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1\\_0.pdf](https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf)

## Right of appeal

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44. 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)

45. 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.
46. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**