

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

### **Decision notice**

**Date:** 16 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 requested information relating to legal advice given to the former Home Secretary regarding the legality of the Rwanda policy.
2. The Home Office refused to provide the requested information, citing sections 27(1) (international relations) and 42(1) (legal professional privilege) of FOIA.
3. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of sections 27(1) and 42(1).
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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5. On 21 December 2022, the complainant wrote to the Home Office and requested information in the following terms:

"The former Secretary of State for the Home Department the Rt Hon Priti Patel announced her plans to send migrants to Rwanda to try to defer [sic] people from coming to the UK Illegally. This request only covers the tenure of Ms Patel.

1. All requests from the Former Home Secretary for Legal Advice.
2. The responses to such request for Legal Advice from the Former Home Secretary".

6. The Home Office responded on 16 January 2023. It confirmed it holds information within the scope of the request, but refused to provide it, citing section 42 (legal professional privilege) of FOIA.
7. Following an internal review, the Home Office wrote to the complainant on 13 March 2023 maintaining its position. However, it clarified that it is section 42(1) that applies.

## **Scope of the case**

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8. The complainant contacted the Commissioner on 19 March 2023 to complain about the way their request for information had been handled.
9. While they accepted that the section 42 exemption is engaged, they consider that the balance of the public interest favours disclosure.
10. During the course of the Commissioner's investigation, the Home Office additionally cited section 27(1)(a), (c), and (d) (international relations) of FOIA to some parts of the withheld information.
11. The complainant acknowledged receipt of correspondence from the Home Office in which it explained that it considered that an additional exemption applies.
12. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
13. The Commissioner considers that the scope of his investigation is to determine whether the Home Office is entitled to withhold the requested information under sections 42(1) and 27(1) of FOIA.

## **Reasons for decision**

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### **Section 42 legal professional privilege**

14. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. LPP protects the confidentiality of communications between a lawyer and client.
15. Section 42 is a class based exemption, that is, the requested information only has to fall within the class of information described by the exemption for it to be exempt. This means that the information

simply has to be capable of attracting LPP for it to be exempt. There is no need to consider the harm that would arise by disclosing the information.

16. LPP protects the confidentiality of communications between a lawyer and client. It has been described by the Tribunal in the case of 'Bellamy v The Information Commissioner and the DTI' (EA/2005/0023) (Bellamy) as:

“ ... a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communications or exchanges come into being for the purposes of preparing for litigation.”

17. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
18. The requested information in this case relates to legal advice sought by, or given to, the then Home Secretary for the purposes of the Migration and Economic Development Partnership (MEDP) between Rwanda and the UK.
19. The Home Office considers that both legal advice privilege and litigation privilege apply in this case. It also confirmed that the advice is live and recent.
20. From the evidence he has seen, the Commissioner is satisfied that the withheld information falls within the definition of LPP. The Commissioner is not aware of any evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of FOIA is, therefore, engaged.

### **Public interest test**

21. Section 42 is a qualified exemption and the Commissioner has therefore considered the balance of the public interest to determine whether it favours the disclosure of the information, or favours the exemption being maintained.

### **Public interest arguments in favour of disclosure**

22. Arguing in favour of disclosure, the complainant noted the amount of public money which will be spent on the agreement. They also considered that disclosure was in the public interest "to protect the lives of people trying to seek refuge in the UK".
23. The Home Office recognises the inherent public interest in transparency and accountability of public authorities, and in furthering public understanding of the issues they deal with.
24. The Home Office also acknowledged that disclosure of information relating to asylum claims in other countries or other arrangements relating to asylum seekers could improve public understanding of the asylum system and provide accountability in terms of the quality of decision making and the spending of public money.

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

25. In favour of maintaining the exemption, the Home Office told the complainant:

"There is a clear public interest in withholding this information to protect good government by preserving the concept of legal professional privilege and the rationale behind the concept. ...".
26. In support of its argument that the concept of LPP reflects the strong public interest in protecting the confidentiality of communications between lawyers and their clients, the Home Office told the complainant that this applies equally when the clients in question are ministers and officials.
27. In its submission to the Commissioner, the Home Office referred to the Commissioner's guidance on section 42 and to the Tribunal in the case of Bellamy.
28. The Home Office argued, in this case, that the Home Secretary should be free to request and receive legal advice from her legal advisers in relation to policy and litigation without fear of either being jeopardised by disclosure to the public.
29. It told the Commissioner:

"This is even more so the case while the policy is still sensitive and litigation still active".
30. The Home Office argued strongly against disclosure of privileged advice on an actively litigated policy.

31. In support of its view “that the arguments to withhold far outweigh the arguments to release”, the Home Office referred to a recent decision notice<sup>1</sup> which it believes addressed similar arguments to the ones in this case.

### **Balance of the public interest**

32. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege.
33. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
34. The Tribunal explained the balance of factors to consider when assessing the public interest test in Bellamy:
- “There is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest.”
35. The Commissioner acknowledges the complainant’s argument that the lawyer/client relationship in this case involves “a Secretary of State who is one of the most powerful people in the country”. He also recognises that, given the sensitive nature of the policy, the MEDP is a controversial matter.
36. However, he must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.
37. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has also had regard to the content of the withheld information.
38. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4023405/ic-164345-s8s8.pdf>

favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.

39. In all the circumstances of this case, however, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
40. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. It follows that the Home Office correctly applied section 42(1) in this case.
41. The Commissioner has next considered the Home Office's application of section 27 to the remaining withheld information.

### **Section 27 international relations**

42. Section 27(1) of FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—

- (a) relations between the United Kingdom and any other State,
- (b) [...]
- (c) the interests of the United Kingdom abroad, or
- (d) the promotion or protection by the United Kingdom of its interests abroad".

43. The Commissioner's guidance on section 27<sup>2</sup> acknowledges that there is some overlap between the different provisions set out in the exemption. It also recognises that the interests of the UK abroad, and the UK's international relations, cover a broad range of issues.
44. The Home Office told the complainant that it believes that release of the requested information would prejudice relations between the UK and Rwanda.

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<sup>2</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-27-international-relations/>

45. Similarly, in its submission to the Commissioner, the Home Office recognised the importance of continued co-operation with the Government of Rwanda and the need to maintain the trust of its international partners.
46. With regard to the risk of prejudice occurring as a result of disclosure, the Home Office confirmed the higher threshold, ie would prejudice. Describing the requested information as information that concerns the government policy on the MEDP with Rwanda, the Home Office told the complainant that release of this information would prejudice relations between the UK and Rwanda.
47. In order for a prejudice based exemption, such as section 27, to be engaged, the Commissioner considers that three criteria must be met:
  - First, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
48. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that, in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.
49. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the Home Office clearly relates to the interests which the exemptions contained at sections 27(1)(a), (c) and (d) are designed to protect.
50. With regard to the second criterion, having considered the content of the withheld information and taking into account the Home Office's submissions to him, the Commissioner is satisfied that there is a causal link between disclosure of this information and the prejudice which the three limbs of the exemption are designed to protect.

51. With regard to the third criterion, having duly considered the arguments put forward by the Home Office, the Commissioner's view is that the higher level of 'would occur' has been demonstrated.

52. Sections 27(1)(a), (c) and (d) are therefore engaged.

### **The public interest test**

53. Section 27(1) is a qualified exemption and therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption cited by the Home Office outweigh the public interest in disclosing the information.

### **Public interest arguments in favour of disclosure**

54. While acknowledging that the complainant considers that the public interest favours disclosure, the Commissioner recognises that while they put forward arguments in favour of disclosure in relation to section 42, the complainant did not put forward public interest arguments specifically relating to section 27.

55. The Home Office recognises that there is a general public interest in transparency and openness in Government, which will serve to increase public trust. It acknowledged that disclosure of any information that exists in relation to asylum seekers and the MEDP with Rwanda could improve public understanding of the UK's asylum system, aid public debate, provide accountability in terms of the quality of policy decision-making and the spending of public money

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

56. Arguing in favour of maintaining the exemption, the Home Office considers it important "that the UK conforms to the conventions of international behaviour, avoids giving offence to other nations and retains the trust of our international partners".

57. It argued that, in light of the MEDP, as well as other areas of collaboration (including security), continued co-operation with the Government of Rwanda is essential. In that respect, the Home Office told the complainant that if the UK does not maintain the trust and confidence of its international partners:

"... its ability to protect and promote UK interests through international relations would be hampered and potentially damage the bilateral relationships we hold, not just with Rwanda but with other governments, which will not be in the public interest".



58. It also considered that disclosure could prevent important policy issues and proposals from being thoroughly explored, which would not be in the public interest.
59. Emphasising the public interest in the UK being able to protect its national interests, the Home Office cited a decision notice (DN)<sup>3</sup> in another case where the Commissioner considered the application of section 27 of FOIA.
60. The Home Office told the complainant that it considers that the "same findings equally apply in this current case".

### **Balance of the public interest**

61. While the Commissioner accepts that the Home Office considers that his earlier DN sets a precedent, in his view, each case must be considered on its merits.
62. The Commissioner acknowledges that there will always be a general public interest in transparency.
63. In the Commissioner's view there is also a clear public interest in the disclosure of information which would provide an insight on the UK's relations with other states. In the specific circumstances of this request, he accepts that there is a general, and legitimate, interest in the public understanding of matters relating to asylum, including the MEDP with Rwanda. Disclosure of the withheld information would directly meet this interest.
64. However, in contrast, the Commissioner considers that there is very strong public interest in ensuring that the UK's relationships with other states is not harmed or made more difficult and less effective. This is to ensure that the UK can protect and promote its relations and interests abroad and it goes to the heart of the purpose of the exemption.
65. In the context of this request, the Commissioner accepts that disclosure of the withheld information would have a direct, and detrimental, impact on the UK's relations with Rwanda. In his view such an outcome would be firmly against the public interest, not only in the context of relations between the UK and Rwanda, but potentially more broadly.

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<sup>3</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2013/819674/fs\\_50467452.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2013/819674/fs_50467452.pdf)

66. In light of the above, the Commissioner has concluded that the balance of the public interest favours maintaining the exemptions contained at sections 27(1)(a), (c) and (d).

## Right of appeal

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67. 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)

68. 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.

69. 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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SK9 5AF**