

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to the monitoring of legal practitioners as referenced by the Minister of State for Immigration. The Home Office refused to provide any of the requested information, citing three limbs of section 36(2) of FOIA (the exemption for prejudice to the effective conduct of public affairs). During the course of the Commissioner's investigation, the Home Office additionally cited section 31(1)(a) of FOIA (the exemption for the prevention or detection of crime), for all the requested information.
2. The Commissioner's decision is that the Home Office was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to refuse the request, and he finds that the balance of the public interest favours maintaining the exemptions. As he has found section 36 to be engaged, the Commissioner has not deemed it necessary to consider the Home Office's additional reliance on section 31(1)(a) of FOIA.
3. No steps are required as a result of this notice.

Background

4. The Commissioner understands that the request is concerned with Immigration Representatives, also known as Immigration Advisors and Legal Representatives who have permissions to provide people with asylum advice. Collectively, they are often referred to as Representatives and/or Reps.

Request and response

5. On 2 March 2023, the complainant wrote to the Home Office and requested information in the following terms:

'Minister of Immigration Robert Jenrick said:

"We are monitoring the activities, as it so happens, of a small number of legal practitioners, but it is not appropriate for me to discuss that here. The wider point I was making stands, which is that the British public are looking on askance at the fact that individuals, mostly young males, are setting off from a demonstrably safe country, France, and soliciting human traffickers to ferry them across the channel, and they are invariably throwing their documents into the sea, so that they can exploit our human rights laws. That needs to change. The British public are angry and frustrated at that situation. We understand that and that is why we are taking action." (See: <https://www.theyworkforyou.com/debates/?id=2023-02-20a.33.1>)

In light of this, I would like to request the following information:

- (1) How many legal practitioners are currently being monitored by the government?
- (2) When, exactly, did the monitoring of legal practitioners begin?
- (3) Out of the legal practitioners the government is currently monitoring, how many are (a) solicitors (b) barristers?
- (4) Without providing the legal practitioners' names, please disclose the names of law firms or chambers that those who are being monitored work at.
- (5) Please describe the nature of this "monitoring".
- (6) Which unit or department within the Home Office is carrying out this monitoring? Or has this monitoring been outsourced? If this work has been outsourced, please provide the name of the company/companies involved.

I would like to receive this information in an electronic format. If you feel that a substantive response to this request is not possible within a reasonable time frame, I would be grateful if you could contact me and provide assistance as to how I can

refine the request. If you need any clarification, please contact me. I look forward to receiving a response in 20 working days. Many thanks.'

6. After notifying the complainant on 31 March 2023 that it was extending the deadline for its response to consider the public interest test associated with sections 22 (information intended for future publication) and 36 (prejudice to effective conduct of public affairs), the Home Office responded on 21 April 2023. It refused to provide any of the requested information, citing the following FOIA exemptions:
 - Section 36(2)(b)(i) – prejudice to the free and frank provision of advice;
 - Section 36(2)(b)(ii) – prejudice to the free and frank exchange of views for the purposes of deliberation;
 - Section 36(2)(c) – would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
7. The complainant requested an internal review on 24 April 2023.
8. Following its internal review the Home Office wrote to the complainant on 30 May 2023. It maintained that section 36(2)(b)(i), (ii) and (2)(c) applied to the request.

Scope of the case

9. The complainant contacted the Commissioner on 4 July 2023 to complain about the way her request for information had been handled.
10. In relation to the Home Office's reliance on sections 36(2)(b)(i) and (ii), the complainant said:

'This application concerns the provision of advice and/or the exchange of views for the purposes of deliberation. However, my request concerns a series of questions which asks for statistical information, as well as details about this "monitoring".

As the ICO states [in its section 36 guidance¹] “an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views”. Nor do the questions I pose have a connection to internal decision-making. I am not, for example, asking for copies of internal communications between officials.’

11. The complainant submitted the following in relation to the Home Office’s citing of section 36(2)(c):

“The Home Office does not particularly demonstrate why a response to my series of questions would prejudice the effective conduct of public affairs. I find the Home Office’s response very vague.”

12. During the course of the Commissioner’s investigation, on 23 October 2023, the Home Office wrote to both the complainant and the Commissioner. It advised it now also wished to rely on section 31(1)(a) of FOIA – the exemption for the prevention or detection of crime, for all of the requested information.
13. Whilst the Commissioner sought the complainant’s view on the Home Office’s application of section 31(1)(a) he has not found it necessary to consider its reliance on section 31 for the reasons set out in this notice.
14. The Commissioner has considered whether the Home Office was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold the information in scope of the request.

Reasons for decision

Section 36 - prejudice to effective conduct of public affairs

15. The Home Office has confirmed that it was relying on sections 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA to withhold all the requested information.

¹ <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

16. 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.
17. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. However, the qualified person’s opinion is not required under section 36(4) of FOIA for statistical information.
18. The Commissioner’s section 36 guidance states:

“The term ‘statistical information’ includes statistics, ie factual information presented as figures. However, it has a wider meaning than just statistics and includes not just the raw data that may be used for statistical analysis but the mathematical model or methodology used to analyse the data and the product or outcome of that analysis.”
19. In the Commissioner’s view, statistical information is more than just numbers – it is founded at least to some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being:
 - (i) derived from some recorded or repeatable methodology, and
 - (ii) qualified by some explicit or implied measures of quality, integrity and relevance.
20. The Commissioner has does not consider the withheld information in this case to be ‘statistical’.
21. The Home Office provided the Commissioner with a copy of its section 36(2)(b)(i) and (ii) and 36(2)(c) submission to the qualified person, namely the Immigration Minister, Robert Jenrick.
22. The Commissioner notes that Mr Jenrick was also the Minister quoted in the request; however, he considers that the two matters can be legitimately separated – the qualified person is being asked to give an opinion as to whether the requested information can be disclosed which does not affect anything that he said in the quoted statement that was made publicly.
23. The Commissioner is satisfied that in seeking the opinion of a Minister of the Crown, the Home Office has met the requirements of section 36(5) of FOIA.
24. The Home Office acknowledged that it sought the qualified person’s opinion twice, initially on 24 March 2023 in response to the

complainant's FOIA request, with the opinion being given on 5 April 2023.

25. The Commissioner noted that the original submission mainly focussed on sections 36(2)(b)(i) and (ii) of FOIA and queried this with the Home Office, who advised that it wished to make additional submissions in relation to section 36 of FOIA.
26. Consequently, a further opinion was sought from the same qualified person on 9 October 2023. The Home Office clarified that it had sought the qualified person's opinion on both its additional section 36 submissions, and whether he was still in agreement with the original arguments put to him in the original submission. The qualified person gave his opinion on 17 October 2023, finding all three cited limbs of section 36 to be engaged.
27. In the specific circumstances of this case, the Commissioner is satisfied that section 36 is engaged on the basis of these opinions. From the evidence he has seen, he accepts that the information that the qualified person considered when he gave both opinions included the information that falls to be considered under section 36 in this case.
28. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the qualified person's opinions were reasonable.
29. 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.
30. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focussing only on the content of the information.
31. With regard to the limbs of section 36(2)(b), the issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of

relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.

32. With regard to section 36(2)(c), the Commissioner's guidance on section 36² states:

"..., the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".

33. In the Commissioner's view, it is not unreasonable to engage sections 36(2)(b)(i) and (ii) in this case given the nature of the withheld information. He notes the Home Office's stance that disclosure would inhibit free and frank analysis in the future, and that the loss of frankness and candour would damage the quality of risk assessments and deliberation and lead to poorer decision making.
34. The Commissioner also accepts that it is not unreasonable to engage section 36(2)(c). The Home Office has argued that disclosure would be prejudicial to the effective conduct of public affairs and the Home Office operation in question. It argued that its release would enable legal practitioners to know they are being monitored, which would impact the Home Office's ability to continue to investigate these subjects. In addition, the Home Office stated that it would give information to legal practitioners not currently known to it, but that may require future investigation, as to how to potentially evade future detection.
35. The Commissioner is therefore satisfied that the exemptions are properly engaged.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

Public interest test

36. The Commissioner must next consider the public interest test associated with section 36 of FOIA.
37. With regard to sections 36(2)(b)(i) and (ii), the Commissioner notes that the Home Office considers that disclosure would prejudice or inhibit the free and frank provision of advice and the free and frank exchange of views, which is the higher level. The Home Office also advised that the higher threshold of would prejudice is relevant to its reliance on section 36(2)(c) ie that disclosure would prejudice or inhibit the effective conduct of public affairs.
38. The Commissioner has carried this higher level of likelihood through to the public interest test.

Public interest arguments in favour of disclosing the information

39. The complainant submitted the following arguments in support of disclosure:

‘Firstly, one must scrutinise and hold the government to account over the Home Office’s “monitoring” of lawyers. A passing comment about the “monitoring” of lawyers in Parliament - and very limited, further information from the government following Jenrick’s comments - is simply not enough. The public needs more information to understand what was meant, as well as the nature of this “monitoring”.

Secondly, it is essential to find out the extent of this “monitoring” and how many legal practitioners are being surveilled. “Monitoring” lawyers is very serious, and raises questions about the legality of such activities.

Thirdly, a disclosure of the information I seek would inform the public and bring about much needed transparency.’

40. For all three limbs of section 36 cited, the Home Office said it:

“recognises that there is a general public interest in transparency and openness in Government. It is acknowledged that disclosure of any information that may exist relating to the monitoring of legal representatives could improve public understanding of the policies and provide accountability in terms of the quality of policy decision-making and the spending of public money”.

Public interest arguments in favour of maintaining the exemption

41. Against disclosure, relative to sections 36(2)(b)(i) and (ii), the Home Office argued that there is a clear public interest in protecting the 'safe space' around officials where they can provide candid advice to ministers, and other senior officials, free from the fear of the release of their advice. The Home Office said that officials need to provide detailed, candid advice to ministers on the subject of the request to ensure that the decision makers have all the relevant information to enable them to make a fully informed decision.
42. The Home Office has argued that if officials are concerned that their advice to ministers and senior officials will be released, they may be less willing to provide thorough detailed information. The Home Office has argued that this in turn would lead to poorer decision making, which is not in the public interest.
43. In other words, it is vital that ministers/officials can obtain advice and consider policy and operational issues freely and frankly without risk of disclosure. The Home Office has argued that it is firmly in the public interest to avoid prejudice to the effective conduct of public affairs.
44. With regard to its reliance on section 36(2)(c), the Home Office has argued that it is not in the public interest to name any law firm which may be involved in being monitored (as requested by the complainant) as even release of this information would highlight to the legal practitioners in those firms that they are potentially under investigation.
45. In addition, the Home Office argued that it is not in the public interest to reveal the nature of any monitoring, nor any associated details as requested by the complainant, as it would enable legal practitioners to know how they are being monitored, and provide information on the extent of any such monitoring. This would affect the Home Office's ability to conduct the operation to continue to investigate such legal practitioners but would also give information to assist those wishing to evade future detection.
46. In relation to its application of all three limbs of section 36, the Home Office told the complainant that:

"I am satisfied release of the requested information would prejudice the Home Office's ability to provide an effective public service and thereby otherwise prejudice the effective conduct of public affairs. It is important that the Home Office is able to consider information related to this issue in confidence. Release would prejudice this and therefore impact on the ability of officials and ministers to consider matters in detail with a full

understanding of the issues. Disclosure would subsequently impact on the quality of future advice and deliberation. There is a clear public interest in ensuring ministers and officials have the space to consider and understand issues without fear of premature disclosure. There is also a clear public interest in avoiding inhibition of the effective conduct of public affairs. I am satisfied that the public interest remains in favour of withholding this information and section 36(2)(b) and section 36(2)(c) is [sic] engaged.”

Balance of the public interest test arguments

47. 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 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.
48. In this case, it is worth reiterating here that the most recent qualified person’s opinion (17 October 2023) encompassed that of his original opinion (5 April 2023). The Commissioner has considered both opinions.
49. As noted above, the arguments for maintaining the exemptions essentially focus on the ‘safe space’ argument.
50. With regard to the public interest in favour of disclosing the information, the Commissioner recognises that there is a legitimate public interest in the subject the information relates to.
51. 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.
52. 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. Having considered the content of the withheld information, the Commissioner accepts that disclosure would impact on the effectiveness of this process. He also finds that release of the information withheld under section 36(2)(c) of FOIA would impact any monitoring of legal practitioners involved with immigration, with a view to eradicating abuses, and thereby otherwise prejudice the effective conduct of public affairs.

53. The Commissioner has been mindful of the public interest in the Home Office having effective processes which allows it to openly debate issues of significant public interest without undue inhibition. In this case, he considers that the severity of the prejudice that may happen as a result of disclosing the withheld information affects the weighting of the public interest in disclosure.
54. The Commissioner has also considered the extent to which the content of the withheld information at the time of the request would add to the public debate and inform the public's understanding.
55. 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.
56. 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 inhibition 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.
57. It follows that the Commissioner's decision is that the Home Office was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to withhold the requested information.
58. As he has found section 36 of FOIA to be engaged, the Commissioner has not deemed it necessary to consider the Home Office's additional reliance on section 31(1)(a) of FOIA.

Right of appeal

59. 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

60. 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.
61. 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

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