

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 December 2023

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

Decision (including any steps ordered)

1. The complainant requested copies of communications relating to a visit by the Home Secretary to Rwanda, from the Home Office. The Home Office disclosed some information but refused to disclose the remainder citing section 36(2)(b)(i) (Prejudice to effective conduct of public affairs) of FOIA.
2. Where cited, the Commissioner's decision is that the Home Office was entitled to rely on section 36(2)(b)(i) of FOIA to withhold the requested information. However, in failing to respond to the complainant's further request for a copy of the qualified person's opinion, the Home Office has breached sections 1 and 10 of the FOIA.
3. The Commissioner requires the Home Office to:
 - comply with the request for a copy of the qualified person's opinion or issue a valid refusal notice as set out in section 17 of FOIA.
4. The Home Office must take this 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 19 March 2023, the complainant wrote to the Home Office and requested the following information:

"I request copies of all communications relating to media invitations and coverage for Suella Braverman's visit to Rwanda that include references to any of the following:

 - The Guardian
 - The Mirror
 - BBC
 - iNews."
6. On 24 May 2023, the Home Office responded. It disclosed some of the requested information but refused to disclose the remainder citing section 36(2)(b)(i) of FOIA.
7. The complainant requested an internal review on 1 June 2023. When doing so he requested a copy of the qualified person's opinion.
8. The Home Office provided an internal review on 2 August 2023 in which it maintained its original position. It did not refer to the additional request.
9. During the Commissioner's investigation the Home Office also cited reliance on section 40 (2) (Personal information) of FOIA in respect of: "names and contact details of junior officials in both the Home Office and No.10 Downing Street. There are also names of employees who work for external media organisations".

Scope of the case

10. The complainant contacted the Commissioner on 9 August 2023 to complain about the way his request for information had been handled. His grounds of complaint were as follows:

"My request for a copy of the record of the qualified person's opinion has not been addressed in the internal review response and a copy has not been provided. I have further concerns when the response states that "The Home Secretary agreed section 36(2)(b)(i) was engaged in this case." In line with ICO good practice, I would have expected the Home Secretary, as qualified person, to have carried out an unbiassed assessment of the arguments as to why inhibition would or would be likely to occur,

the counter arguments and any other factors taken into account to form a reasonable opinion. In reality it appears that the qualified person has been asked to agree an already formed opinion and casts doubt on whether the exemption has been properly engaged as a result.

The internal review provided the Home Office with an opportunity to strengthen the arguments as to why inhibition would or would be likely to occur and the counter arguments. The response does little more than uphold the decision made in the original response without strengthening the arguments or providing additional information. While the Department's ability to provide free and frank advice may or may not be a convincing argument for the information in its entirety, I am not convinced this applied to the small subset of information that I have requested. I perceive that the information relating to the exclusion of certain media outlets from the Home Secretary's trip to Rwanda may be being withheld to avoid embarrassment and the internal review response does nothing to convince me otherwise".

11. The Commissioner will consider this below. He has viewed both the withheld information and the qualified person's opinion.

Reasons for decision

Section 1 – General right of access

Section 10 – time for compliance

12. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
13. Section 10(1) of the FOIA provides that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt. From the information provided, it is evident that the Home Office did not respond to the complainant's request for a copy of the qualified person's opinion, which was sought when he requested an internal review.
14. Ordinarily, the Commissioner would ask the complainant to follow up this lack of response himself, however, on this occasion he raised the matter with the Home Office directly as part of his investigation enquiries. Unfortunately, when responding to these enquiries, the Home Office made no further comment about this element other than to say that the opinion had been provided to the Commissioner to assist with

his own deliberations and that it had been: “properly sought and received and was reasonable, in line with both the FOIA itself and the ICO guidance on this issue”.

15. Therefore, in order to prevent any further delay, the Commissioner has considered the non-response as part of this current decision.
16. The Commissioner’s decision is that the Home Office did not deal with this element of the request for information in accordance with FOIA. In this case the Home Office has breached sections 1(1) and 10(1) by failing to respond to this part of the request within 20 working days. The Home Office is now required to comply with the step at paragraph (3).

Section 36 – prejudice to the effective conduct of public affairs

17. 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. The Home Office is relying on the lower level of likelihood in this case, ie would be likely to prejudice.
18. The Home Office has applied section 36(2)(b)(i) to withhold the remaining information. Arguments under this section are usually based on the concept of a ‘chilling effect’. The chilling effect argument is that disclosure of discussions would be likely to inhibit free and frank discussions in the future, and that the loss of frankness and candour would be likely to damage the quality of advice and deliberation and lead to poorer decision making.
19. The Commissioner’s guidance on section 36¹ states that information may be exempt under sections 36(2)(b)(i) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice as part of the process of deliberation.
20. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that the Home Secretary is authorised as the qualified person under

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/>

section 36(5) of FOIA and that they gave the opinion that the exemption was engaged.

21. The Home Office explained that:

“Section 36(2)(b)(i) of the FOIA is engaged because the information relating to the media invitations and coverage of the Home Secretary’s visit to Rwanda include discussions involving officials around media handling and media statements. It is necessary that such discussions take place in a safe space to ensure proper consideration can be given to the management of such events. To release this information would be likely to inhibit the free and frank provision of advice on future such occasions”.

22. The Home Office has explained to the Commissioner:

“The information to which this exemption applies consists of email discussions between Home Office officials seeking advice on providing a statement to respond to an article ... which criticised the Home Secretary for excluding certain media outlets from her trip to Rwanda in March 2023. Collectively, these open and honest discussions directly feed into the advice that was provided to officials in how best to respond...

Similarly, there are emails between Home Official officials and their counterparts at No.10 Downing Street seeking advice on media handling.

It is our view that disclosure of these emails would be likely to inhibit the free and frank provision of advice thereby impacting the quality and ability of officials and Special Advisors to engage in the provision of advice during what might be considered a safe space during conversations around media handling. Officials would be less inclined to provide advice if there was a risk that the advice provided (or discussions around the issues which helped inform the advice) be disclosed as a result of an information request.

To be effective, communications advice and handling strategies need to contain frank discussion and comment on the subject in question. Releasing such information would be likely to inhibit officials’ willingness for such frankness. Equally, officials are required to prepare draft press lines and background notes, often at short notice, which may not accurately reflect the final outcome reached. Releasing such drafts therefore could give a misleading impression and would likely inhibit future such advice”.

23. Having viewed the opinion given, which is clearly expressed in respect of the limb of section 36 that is being relied on, the Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of discussions and deliberations. He is also satisfied that the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that the exemption was engaged correctly.
24. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information (only just preceding the date of the request) and that the subject matter itself continues to represent a significant public interest. The Home Office needs to be able consider advice on a range of measures regarding cooperation with the media and this needs to be effectively managed.
25. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has taken account of the age of the requested information and that the matters under consideration were very recent at the time of the request. If contributors were concerned that their deliberations might be made public, the resultant loss of frankness and candour in the course of discussions and deliberations would be likely to damage the quality of advice to decision makers, and thus inhibit the Home Office's ability to make informed decisions. It is also noted that some information was disclosed to the complainant where no harm was envisaged.
26. The Commissioner considers the public interest in good decision-making by the Home Office to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served to some extent if the information was disclosed, on balance, he finds the public interest in protecting the Home Office's access to unfiltered and frank advice to be the considerably stronger argument.
27. Consequently, he is satisfied that, in this case the public interest favours maintaining the exemption. It follows that his decision is that the Home Office was entitled to rely on section 36(2)(b)(i) of FOIA to refuse the request.
28. As this exemption covers all of the undisclosed information, the Commissioner has not found it necessary to go on to consider the late application of section 40(2) in respect of any personal information.

Right of appeal

29. 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

30. 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.
31. 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
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