

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2024

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

Decision (including any steps ordered)

1. The complainant has requested from the Home Office copies of written communications between the then Home Secretary, Suella Braverman, and her office and civil servants where the ethnicity of grooming gangs was referenced. The complainant also asked for any research and evidence to support the Home Secretary's claims regarding British Pakistani predominance in these gangs and related claims and any press briefings provided to her on this subject. At first, the Home Office refused to provide the information it held citing sections 27, 31, 40(2) and 42(1) of FOIA. It later decided that it did not, in fact, hold any information falling within scope. Having conducted further searches, the Home Office did locate some information that fell within scope but withheld it under section 36 of FOIA – prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that section 36 of FOIA is engaged but that the public interest favours disclosure.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the information the Home Office has withheld under section 36(2)(b)(i) of FOIA.

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 the Act and may be dealt with as a contempt of court.

Request and response

5. On 2 April 2023, the complainant wrote to the Home Office to ask for information – the evidence from which to back up claims made by the Home Secretary in a television interview with Laura Kuenssberg of the BBC:

“Please furnish me with the evidence to back your claims as I'd like to understand why you and your predecessors have perpetuated this racist and unevidenced claim that has been disproved by UCL.”

6. The complainant chased this request on 13 April 2023 and requested information in the following terms:

“I'd like to escalate this please and under the freedom of information act I'd like all correspondence and evidence between Suella's office and civil servants on this issue highlighting what evidence there is on the profile of groomers being from one particular ethnicity predominantly across England and Wales and the other racist claims she made.”

7. The Home Office asked for clarification.

8. On 20 April 2023 the complainant made the following request for information under the FOIA:

“My request was quite clear Suella Braverman made the claim that grooming gangs have been disproportionately British Pakistani men.

I want copies of all correspondence and meeting notes/minutes between Suella and her office and civil servants in relation to grooming gangs where they reference ethnicity of perpetrators. I also want any research and evidence the home office holds that has been shared with Suella, to support her claims that grooming gangs are predominantly British Pakistani men and her claims that the British Pakistani community are somehow also complicit in those crimes.

I'd also like copies of any briefings on this subject that civil servants have provided to Suella including those drafted for her press

appearances. This request has been made under the freedom of information legislation..."

9. After the complainant had chased a response, the Home Office responded on 19 June 2023. The requested information was withheld under sections 27(1)(a) and 31(1)(e) of FOIA.
10. The complainant asked for a internal review on 25 August 2023. The review was chased more than once but the first chaser had gone to an email inbox that didn't accept incoming messages.
11. On 4 October 2023 the Home Office provided an internal review in which it maintained its original position regarding sections 27 and 31. The review added further exemptions for other parts of the information – sections 42(1) and 40(2) of FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 4 October 2023 to complain about the way their request for information had been handled. They did not accept that there was "any lawful reason for the Home Office to withhold" the information.
13. On 30 October 2023 the Commissioner sent his first investigation letter to the Home Office.
14. On 18 December 2023 the Home Office responded to the Commissioner's investigation letter. It stated that it had changed its position and that it no longer considered that it held the requested information, having consulted with the policy teams involved. In the revised response to the complainant the Home Office explained the following:

"We assess that our initial interpretation of the question was too broad; the inclusion of operational information which references an individual's nationality but makes no reference to ethnicity and is limited only to the details of the specific case would not be within the scope of the request. In addition, given that the nature of the information is limited to a specific case with no broader commentary or assessments provided, we do not consider that this information would have been used to support the view that grooming gangs are predominantly Pakistani."

15. After the Home Office had confirmed its new position to the complainant, the latter did not accept that no information was held falling within the scope of their request. They argued that the Home Office was playing with semantics as regards "ethnicity" and "nationality". The complainant's view is that,

"Suella Braverman would have received a media briefing and a briefing pack (clearly seen she was referring to during the interview on the BBC with Laura Kuensberg). I do not believe that this information does not exist either in deleted folders, existing folders or in IT systems in a manner that cannot be retrieved. By law they should retrieve it and provide it."

The complainant was not persuaded that no written communications were shared before the interview as it was high-profile and the minister would have been "properly briefed".

16. On 26 January 2024 the Commissioner wrote again to the Home Office and asked questions about what searches it had conducted to establish that it did not hold any information relevant to the request.
17. The Home Office responded on 14 February 2024 and altered its position again as it had located some information provided to the then Home Secretary prior to her interview on BBC and Sky television. It explained to the Commissioner that it had interpreted -

"the request to be in three parts, as follows:

(a) Copies of all correspondence and meeting notes/minutes between the then Home Secretary Suella Braverman and her office and civil servants in relation to grooming gangs where they refer to the ethnicity of perpetrators.

(b) Any research or evidence that the Home Office holds, that has been shared with the then Home Secretary Suella Braverman, to support her claims that grooming gangs are predominantly British Pakistani men and her claims that the British Pakistani community are somehow also complicit in those crimes.

(c) Copies of any briefings on 'this subject' that civil servants have provided to the then Home Secretary Suella Braverman including those drafted for her press appearances.

For part (c), given the context we consider that 'this subject' must be interpreted as meaning the claim that grooming gangs are or were predominantly Pakistani. Given that any briefing provided to the then Home Secretary would have been provided by officials to her Private Office, any information within scope of part (c) would

already be encompassed by part (a). The only difference is that part (c) refers specifically to briefings drafted for 'press appearances', but this is not a separate category from the wide range of information requested at (a)."

The Home Office confirmed that there was no information held falling within (b).

18. The Home Office explained that the dates it had searched for the requested information were between 6 September 2022 and 19 October 2022 when Suella Braverman was first Home Secretary and 25 October 2022 (when she became Home Secretary again) and 13 April 2023 when the request was received.
19. The information falling "within scope would by definition have been provided to the then Home Secretary or her Private Office". The Home Office carried out searches "across Private Office and Communications Directorate". The key word searches were "'grooming gangs'", "'ethnicity'" and "'Pakistani'" and these were carried out across the diary inbox of the Home Secretary and the inbox of her Private Secretary. There were results from the search term "'grooming gangs'" but "the vast majority were not within scope because they did not match the specific characteristics of the requested information". At that time some information was identified as potentially in scope but was later ruled as out-of-scope.
20. The Home Office contended that "the key word searches would have picked up anything within scope of (b) (see paragraph 17). It also considers that staff in the Private Office would have been aware of any research/evidence because it would be "recent and high-profile". However, a check was made with the Child Sexual Exploitation Unit and it confirmed that there was no information falling within (b).
21. However, as regards (c) which would also have fallen under the scope of (a), senior communications staff were contacted. They provided a briefing which "was sent direct to a Special Adviser and was not copied to Private Office, hence the reason why it was not identified at an earlier stage".
22. The Home Office considers its searches to have been "proportionate and sufficient" and that there is "no evidence to suggest that any recorded information within scope was ever deleted or destroyed".
23. It did not consider that the information it had located all fell within the scope of the request but highlighted what did. The information it identified was withheld under section 36 of FOIA – prejudice to the effective conduct of public affairs.

24. Having written to the Commissioner on 14 February 2024, the Home Office sent a further response to the complainant on 28 February 2024 stating that it had located information that fell within part c) (see paragraph 17) and consequently part a) as well. However, it did not hold any information regarding part b). The information it held that fell within part c) was withheld under section 36(2)(b)(i) of FOIA.
25. The complainant noted in an email to the Home Office and the Commissioner that the public authority had "admitted that there was no evidence for the claims Braverman made and that other information is held".
26. The Commissioner considers that the scope of his investigation is the highlighted information provided by the Home Office that it confirmed to the complainant it holds and considers should be withheld under section 36(2)(b)(i) of FOIA.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

27. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

(2)(b) would, or would be likely to, inhibit -

(i) the free and frank provision of advice..."

28. It is important to note that the exemptions under section 36 are about processes and the inhibition of those processes. It is not about the information itself. The Commissioner needs to consider if disclosure would or would be likely to inhibit the process of providing advice. The requested information itself does not have to be free and frank.
29. In its response to the Commissioner, the Home Office cited section 36(2)(b)(i) in relation to the withheld information that is being considered here. The Commissioner has been provided with the withheld information. He is unable to describe the withheld information in any more detail for reasons of confidentiality.
30. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the QP) within the public authority giving an opinion on the likelihood of prejudice occurring. The Commissioner is

required to consider the QP's opinion as well as the reasoning which informed that opinion. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

31. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a QP. The QP at the Home Office is the Home Secretary, the Rt Hon James Cleverly. The Commissioner is satisfied that he was the appropriate qualified person to give an opinion. The opinion of the QP was sought on 8 February 2024. The QP was provided with arguments for maintaining the exemption and contrary arguments regarding disclosure. On 12 February 2024 the Home Secretary agreed that he was content with the arguments provided in favour of withholding the information.

Is the qualified person's opinion reasonable?

32. The QP accepted that he was content with the arguments provided to withhold the information.

33. The Commissioner's guidance¹ regarding the definition of "reasonable" is as follows:

"In this context an opinion either is or is not reasonable. In deciding whether an opinion is reasonable, the plain meaning of that word should be used, rather than defining it in terms derived from other areas of law. The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". Therefore, if it is an opinion that a reasonable person could hold – then it is reasonable."

It does not have to be the only reasonable opinion that could be held. It is only unreasonable if no reasonable person in the QP's position could hold it.

¹ [Section 36 - Prejudice to the effective conduct of public affairs | ICO](#)

34. In order to determine whether section 36(2)(b)(i) is engaged, the Commissioner must determine whether the QP's opinion was a reasonable one. In doing so the Commissioner has considered the following factors -
- Whether the inhibition relates to the specific subsection that has been cited, in this case section 36(2)(b)(i). If the inhibition is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request.
 - The qualified person's knowledge of, or involvement in, the issue.

Section 36(2)(b)(i)

35. The information that was withheld is a briefing provided to Suella Braverman, the then Home Secretary, prior to a broadcast media round on 2 April 2023. The Home Office explains that -

"the topics covered in the briefing range quite widely and only some of it both relates directly to grooming gangs and refers to the ethnicity (or, in this context, nationality) of perpetrators".

It regards "'ethnicity' as including references to Pakistani nationality" in the requested information. The disclosure of this information "would inhibit the free and frank provision of advice". In other words, suggesting that the inhibition is at the higher level. The Commissioner notes that the written submission to the Home Secretary suggests that the inhibition is at the lower level.

36. The Home Office further contends that -

"the briefing, including the 'lines to take' constitutes advice to the Home Secretary. The lines to take were in effect recommendations from communications and policy officials that the responses might be used in answer to questions raised."

37. Its view is that, "The then Home Secretary could accept the advice and use the lines, where appropriate, or not. That was a matter for her judgment." The Home Office states that some of this advice and lines to take "were not accepted or not repeated in public...Lines to take provided to a Minister will always, in our view, constitute advice including for the purposes of the FOIA".
38. The Home Office submitted to the Commissioner that the opinion of the QP is reasonable and that the exemption is engaged.

39. The Commissioner's guidance states that arguments under section 36(2)(b)(i) are usually based on the concept of a 'chilling effect'. The 'chilling effect' argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.

40. The Commissioner's guidance also explains that the 'chilling effect' operates at various levels:

"Arguments under s36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.."²

41. The Commissioner is satisfied that the QP's opinion is reasonable in respect of this limb of section 36 and is therefore engaged at the lower level of inhibition.

Public interest test

42. Even though the Commissioner accepts that section 36 is engaged, he needs to consider the public interest in this matter and whether it favours disclosure, nonetheless. The Commissioner's guidance explains that,

"The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. If it does not, the information must be released."

Public interest factors in favour of maintaining the exemption

43. The Home Office maintains the following:

"In favour of maintaining the exemption, the media briefing lines in question constitute written advice to Suella Braverman from officials. Disclosure would be likely to inhibit the future free and

² Ibid.

frank provision of advice because it would mean that lines representing particular positions or views could not be held in confidence. This would have a limiting and negative effect on the quality of internal and external discussion and decision-making in future and on the quality, honesty and comprehensiveness of advice to Ministers, which would not be in the public interest."

Public interest factors in favour of disclosing the requested information

44. The Home Office "recognise[s] that there is an inherent public interest in transparency and accountability regarding governmental meetings with external stakeholders".
45. It also recognises "a clear public interest in the work of government departments being transparent and open to scrutiny". However, the Home Office qualifies this by contending that "these specific media lines, which were unused, is...limited".
46. The complainant believes that "there is a clear and compelling public interest in the Home Office providing the information I have asked for in order to set the record straight". They provide links to the press regulator's findings:

[Suella Braverman UK-Pakistani grooming claim misleading, says press regulator - BBC News](#)

Research findings from University College London:

[Analysis: A new Home Office report admits grooming gangs are not a 'Muslim problem' | UCL News - UCL - University College London](#)

A media item which the complainant describes as "The NSPCC...highlight[ing] the issues with the Home Offices questionable claims..."

[NSPCC warns against framing grooming gangs problem as ethnicity-based | Child protection | The Guardian](#)

47. The complainant argues that, "There is no legitimate reason to withhold this information if she [the Home Secretary] was ready to share that info in the interview anyway". After the Home Office cited section 36 of FOIA the complainant put forward further robust arguments arguing for release. The Commissioner notes that the requested information is clearly of significant interest to the complainant and their argument is that it is also in the public interest to disclose it.

The balance of public interest

48. The Commissioner has found that the QP's opinion was reasonable and the weight of that opinion is considered as part of the public interest test. Greater weight is given if the QP decides that inhibition "would", rather than "would be likely to" occur. In this case the lower level was cited.
49. Although he considers that a reasonable opinion has been expressed by the QP, the "severity, extent and frequency of that prejudice or inhibition in forming" that opinion is important to an assessment of whether the public interest favours disclosure. The Home Office has only provided one central argument - the 'chilling effect' that it considers would be likely to ensue from disclosure that would not be in the public interest. The Commissioner's guidance states that -

'Tribunals are generally sceptical of such arguments. In [Davies v Information Commissioner and the Cabinet Office \(GIA\) \[2019\] UKUT185 \(AAC\)](#), 11 June 2019 the Upper Tribunal stated at paragraph 25 that, There is a substantial body of case law which establishes that assertions of a "chilling effect" on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution.'

50. The reasons for this caution are that the FOIA has been in place for nearly twenty years and civil servants and public officials cannot guarantee that their advice will remain confidential. More importantly is that these individuals "are expected to be impartial and robust when giving advice, and not be easily deterred from expressing their views by the possibility of future disclosure". The awareness that advice could be disclosed in the future might conversely "lead to better quality advice".
51. The argument for non-disclosure is strongest when the issue is still 'live'. The Commissioner recognises that the information was only just over two weeks old at the time of the request. The issue of grooming gangs and ethnicity/nationality is ongoing, though it could be argued that the briefing only related to specific time-limited broadcasts and is therefore no longer 'live'. However the Home Office did not present any argument about the 'live' nature of the information.
52. As discussed earlier, the sole argument put forward by the Home Office is the 'chilling effect'. The Commissioner is not persuaded that this one argument supports its contention that disclosure is against the public interest. He can only consider the arguments presented and weigh one against the other. The fact that this was a briefing, presumably means that the information could have been utilised by the Home Secretary, whether she did so or not. This is also one of the complainant's arguments. Additionally, the Commissioner does not accept that officials

whose role is to provide advice will be deterred from doing so because that advice might be disclosed. Though clearly there is weight in the QP's opinion, the public interest in non-disclosure has not been presented with sufficient strength to outweigh the complainant's opinion that it is in the public interest to see this information.

Procedural matters

53. The Home Office asked for clarification of the original request. A clarification was received on 20 April 2023. The Home Office did not send a refusal notice until 19 June 2023. The Commissioner has not been provided with any evidence to suggest the Home Office applied a public interest test extension. The Commissioner therefore finds that the public authority has breached section 17(1) by failing to issue a refusal notice within 20 working days and by citing a new exemption months later.

Other matters

54. The Commissioner has not made a determination based on the information the Home Office previously considered to be in scope and has progressed his case on the basis of the revised interpretation. He notes that the Home Office, amongst other exemptions, had cited section 40(2) of FOIA – personal information - to some of that earlier information.

55. The Home Office clearly had difficulty in determining the scope of this request. Given the breadth of the request and clear difficulty the Home Office has had in interpreting it and what information, if any, fell within scope when it looked at the request again, it determined that, "the nature of the information is limited to a specific case with no broader commentary or assessments provided". The Commissioner considers that the searches conducted by the Home Office were not sufficient enough to locate the information it subsequently withheld under section 36 until ten months after the request was received. Therefore they were inadequate and he would expect the Home Office to conduct a more thorough search in future.

Right of appeal

56. 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

57. 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.

58. 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

Janine Gregory
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF