

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 April 2024

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

Decision (including any steps ordered)

1. The complainant requested information relating to 'small boats', including a copy of a Lessons Learned Review which was mentioned in a 2019 ICIBI [Independent Chief Inspector of Borders and Immigration] report.
2. The Home Office denied holding some of the requested information. It refused to provide the Lessons Learned Review, citing sections 27 (international relations), 31 (law enforcement), 35 (formulation of government policy) and 40 (personal information) of FOIA.
3. The Commissioner's decision is that the Home Office was entitled to rely on sections 27(1)(a) and 31(1)(a)(b)(e) of FOIA to withhold information within the requested review. However, he finds that while section 35(1)(a) is engaged, the public interest favours disclosing some of the information caught by this exemption.
4. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation:
 - disclose the recommendations, withheld only by virtue of section 35, within the 'Summary of Recommendations' table in the review.
5. The Home Office must take this step 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

6. On 8 February 2023, the complainant wrote to the Home Office and requested information in the following terms:

"Please can you provide the following information under the FOI act.

BACKGROUND

Point 8.13 of the following 2019 ICIBI report says:

"The [Small Boats] Gold Command Group first met in January 2019. Initially, there were daily meetings, which later became weekly. Attendance varied from week-to-week, but always included a senior representative (typically a Director or Deputy Director) from the relevant parts of BICS, Home Office Legal Advisors, Press Office, plus the NCA. Minutes and actions were circulated to attendees."

Link to report:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933953/An inspection of the Home Office s response to in-country clandestine arrivals lorry drops and to irregular migrants arriving via small boats .pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/933953/An_inspection_of_the_Home_Office_s_response_to_in-country_clandestine_arrivals_lorry_drops_and_to_irregular_migrants_arriving_via_small_boats.pdf)

Point 8.14 of the same report says:

"In March 2019, the Gold Command Group commissioned a 'Cross-BICS Lessons Learned Review' of the response to small boats."

This review was published in June 2019¹.

QUESTIONS

1. Please provide a copy of the minutes of all Small Boats Gold Command Group meetings, as referred to in point 8.13 of the ICIBI report, which took place from 01 September 2021 to 31 November 2021

¹ The Commissioner notes that para 8.17 states that the report, dated June 2019, was not published.

2. Please provide a copy of the Lessons Learned Review, as referred to in point 8.14 of the ICIBI report, published in June 2019

I understand that some personal information may be redacted but please note that the time taken for redactions does not usually contribute towards the cost limit”.

7. On 5 May 2023, following the Commissioner’s intervention, the Home Office provided its substantive response. It denied holding information in scope of Q1. It confirmed it holds information in scope of Q2 but refused to provide it, citing sections 35(1)(a), 31(1)(a), (b) and (e) and 27(1)(a).
8. Following an internal review, the Home Office wrote to the complainant on 7 July 2023 maintaining its position.

Scope of the case

9. The complainant wishes to challenge the Home Office’s reasons for refusing to disclose the Lessons Learned review (the review) which they requested at Q2 of the request. They told the Commissioner:

“There is huge public interest in transparency regarding the UK’s handling of the increase in small boat crossings in the English Channel. This is underscored by the dozens of fatalities which have occurred after small boats carrying migrants have got into difficulties”.

10. During the course of the Commissioner’s investigation, the Home Office confirmed its application of sections 35, 31 and 27 of FOIA to the withheld information, clarifying which exemptions apply to which information. It additionally cited section 40(2) (personal information) in respect of the names and job titles of junior Home Office officials contained within the withheld information.
11. The Commissioner’s published guidance² to public authorities relating to requests for information about public authority employees is well

² https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

established. He also notes that the complainant accepts that personal information may be redacted.

12. Accordingly, the analysis below considers the Home Office's application of sections 35, 31 and 27 to the review in scope of Q2 of the request.

Reasons for decision

Section 27 international relations

13. Section 27(1) is a prejudice based exemption which states that information is exempt if its disclosure would, or would be likely to, prejudice:

“(a) relations between the United Kingdom and any other State”.

14. In his guidance on section 27³, the Commissioner states:

“You can only withhold information on the basis of section 27(1) if its disclosure would, or would be likely to, prejudice one of the activities listed in the subsections.

The test involves a number of steps:

Whether the harm is one which the exemptions in section 27(1) are designed to protect. [...]

Whether you can demonstrate a causal link between the disclosure and the harm.[...]

What the likelihood of the harm actually occurring is (ie “would” it occur, or is it only “likely to” occur?)”.

15. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal⁴ which suggested that, in the context of section 27(1), prejudice can be real and of substance “if it makes relations more

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-27-international-relations/>

⁴

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i205/Campaign%20Against%20the%20Arms%20Trade;%20EA.2007.0040%20.pdf>

difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary”.

The complainant's position

16. The complainant considers that the likelihood of harm to UK-French relations as a result of disclosure “is very low due to the lapse of time and changes in the administration of both countries”.

The Home Office position

17. In correspondence with the complainant, the Home Office acknowledged that Channel crossings by migrants in small boats continues to be an ongoing situation. With respect to the requested information, it explained:

“Ongoing talks continue to take place with the French authorities on the situation and the agreement between France and the UK continues to be under constant review. Release of this information would prejudice relations with the French authorities”.

18. In its submission to the Commissioner, the Home Office explained that the review includes “an internal UK Government description of operational, official and diplomatic interactions with the French Government” on the issue of tackling Channel crossings by migrants in small boats.
19. It also confirmed that the information requested “includes much discussion about the French response to Channel crossings”.

The Commissioner's position

20. The Commissioner acknowledges that the issue of small boat crossings is a sensitive topic. He also accepts that France is the focus of those parts of the review withheld under section 27.
21. He recognises that the Home Office considers that “releasing this information” would be likely to generate French concern that details of future discussions could enter the public domain, thereby damaging their confidence in the confidentiality of discussions.
22. 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 relates to the interests which the exemption contained at section 27(1)(a) is designed to protect. He also accepts that the prejudice that the Home Office has envisaged is real, actual or of substance.

23. With regard to the second and third criteria, having considered the nature and context of the information withheld on the basis of this exemption, and taken into account the Home Office's submissions to him, the Commissioner is satisfied that a causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the Commissioner is satisfied that the likelihood of such prejudice occurring is one that meets the lower threshold of 'would be likely'.
24. He has reached this decision in light of the nature of the information withheld by virtue of section 27 – its content and context - and the broader effect of any disclosure on the UK's relations with its international partners, and France in particular.
25. Section 27(1)(a) is therefore engaged.

Public interest test

26. Section 27 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 27(1)(a) outweighs the public interest in disclosing the withheld information.

Public interest in favour of disclosing the withheld information

27. The Home Office recognised the general public interest in transparency and accountability. It also recognised the specific public interest in enabling access to information it gathers to inform cross-Channel collaboration to tackle small boat crossings.

Public interest in favour of maintaining the exemption

28. In favour of maintaining the exemption, the Home Office argued that it would not be in the public interest to damage the relationship with the French government – a relationship it considers vital to live operational responses to small boat crossings.

Balance of the public interest arguments

29. The Commissioner accepts that there will always be a general public interest in transparency. He also recognises that there may also be a public interest in transparency about the issue the information relates to.
30. In his guidance on section 27, the Commissioner states:

“Section 27(1) is designed to protect the interests of the UK abroad and its relations with other international organisations, courts or states. There is a public interest in ensuring that the UK enjoys

effective international relations with other states, organisations and courts in order to further its foreign policy and domestic policy aims”.

31. The Commissioner recognises the importance of ensuring that such relations are effective ones, in order to support the UK’s ability to work closely with international authorities to enable joint operational responses to small boat crossings. In that respect, he recognises the public interest in safeguarding the Home Office’s current and future negotiations and agreements with the French Government.
32. He gives weight to the argument that it would not be in the public interest to damage working relations with the French government such as to result in a lack of cooperation and collaboration in the future. He accepts that disruption to these relationships would be against the public interest.
33. He also accepts that posing a risk to the joint operational response to small boat crossings is not in the public interest.
34. Taking all the above into consideration, the Commissioner has decided that, in this case, the public interest in maintaining the exemption outweighs the public interest in disclosure. He is therefore satisfied that the Home Office was entitled to refuse the request under section 27(1)(a) of FOIA.
35. The Commissioner has next considered the Home Office’s application of section 31 to the information withheld by virtue of that exemption.

Section 31 – law enforcement

36. Section 31 of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities. Section 31 can be claimed by any public authority, not just those with law enforcement functions.
37. With regard to the prejudice test, the Commissioner states in his guidance on section 31:

“When you are applying section 31, you should answer three questions:

Which law enforcement interest(s), protected by section 31, could be harmed by the disclosure?

Is the harm you have identified real, actual or of substance and is there a causal link between disclosure and that harm?

What is the likelihood of that harm actually occurring: would it occur, or is it only likely to occur?"

38. He also explains:

"The more likely the harm, the greater weight it will carry when you consider the public interest".

39. Consideration of the exemption at section 31 is a two-stage process: even if the exemption is engaged, the information should be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

Is the exemption engaged?

40. In this case, the Home Office is relying on sections 31(1)(a), (b) and (e). Those limbs of the exemption state that information is exempt if its disclosure would, or would be likely to, prejudice the prevention or detection of crime, the apprehension or prosecution of offenders and the operation of the immigration controls, respectively.

41. The Home Office told the complainant:

"The review contains intelligence information which if released, would undermine the Home Office's ability to detect and intercept boat crossings and to prevent the activity of illegal criminal gangs who facilitate them".

42. In its submission to the Commissioner, the Home Office put forward separate arguments in respect of each of the three limbs of the exemption it considers apply.

43. It argued, for example, that disclosure of the requested information would aid the criminals seeking to facilitate small boat crossings by informing organised criminal gangs about the likelihood of success, support their planning and inform new tactics. In relation to sections 31(1)(a) and (e), it considered that this information would be advantageous to Organised Crime Groups (OCGs) in supporting their planning of launch attempts and in enabling them to construct disruptive strategies.

44. In relation to section 31(1)(b), it argued that, as the review contains information about how various law enforcement agencies interact, disclosure would prejudice its capability to apprehend and prosecute offenders.

45. In this case, the Commissioner is satisfied that disclosure of the information withheld under section 31 is capable of having a detrimental impact on law enforcement with respect to the prevention or detection

of crime, the apprehension or prosecution of offenders and the operation of the immigration controls.

46. Having considered the arguments put forward by the Home Office, the Commissioner is satisfied that the higher level of 'would prejudice' is met in this case.
47. As the three criteria set out above are satisfied, the Commissioner considers that sections 31(1)(a), (b) and (e) of FOIA are engaged.

Public interest test

48. Section 31 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 31 is engaged, 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 referred to in subsections (a), (b) and (e).

Public interest in favour of disclosure

49. The complainant considers that the public interest favours disclosure. He told the Commissioner:

"... the operations of illegal criminal gangs are constantly evolving, as have the nature of the UK's operations to intercept and detect small boat crossings. The details in this document from more than four years ago will be of little practical benefit to organised criminal gangs ...".

50. The Home Office recognised the public interest in accountability and transparency as well as in information about methods used to detect migrant crossings in the Channel.

Public interest in favour of maintaining the exemption

51. The Home Office argued that it would not be in the public interest to release intelligence information that would aid criminals seeking to facilitate small boat crossings.
52. It argued strongly that it is not in the public interest to disclose information that would undermine activity and methods used to detect illegal crossings.

Balance of the public interest

53. The Commissioner recognises the complainant's belief that the age of the information lends weight to the public interest in disclosure.
54. The Commissioner also recognises the public interest in transparency. He accepts the strong public interest in knowing whether the Home

Office activity is efficient and productive, against a background of criminal gangs and dangerous, illegal, small boat crossings.

55. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption. In this case he has considered the public interest in avoiding prejudice to law enforcement matters, specifically in avoiding prejudice to the prevention or detection of crime, the apprehension or prosecution of offenders and the operation of the immigration controls.
56. Clearly, it is not in the public interest to disclose information that may compromise functions of law enforcement.
57. The Commissioner has had regard to the strong public interest in ensuring that the disclosure of information does not materially impede those functions. He has also taken into account that disclosure under FOIA is effectively disclosure to 'the world at large', with no onward restrictions on how the information may be used.
58. On balance, the Commissioner is satisfied that, in the circumstances of this case, the public interest in maintaining the exemption outweighs that in disclosing the requested information.
59. His decision, therefore, is that the Home Office was entitled to rely on sections 31(1)(a), (b) and (e) to withhold the information.
60. The Commissioner has next considered the Home Office's application of section 35 to the information withheld only by virtue of that exemption.

Section 35 formulation of government policy

61. Section 35(1)(a) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy".

62. Section 35 is class-based, meaning that there is no need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and catch a wide range of information.
63. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.

64. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
65. He considers that the term 'development' of policy includes the process of reviewing, improving or adjusting existing policy.
66. The exemption covers information which 'relates to' the formulation or development of government policy. The Commissioner considers the term 'relates to' can be interpreted broadly.
67. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
68. In relation to the requested lessons learned review, the Home Office initially simply told the complainant:

"... we have concluded that its release should be exempted under Section 35(1)(a) of the FOIA, as it relates to the formulation and development of Government policy".
69. Acknowledging that the review was written in 2019, it subsequently told the complainant:

"... Channel crossings by migrants in small boats continues to be an ongoing situation and is a topic of ongoing discussion. The review contains information which Ministers' and officials are still considering with all relevant authorities. As this is clearly an ongoing matter of developing government policy, I am satisfied that section 35(1)(a) is engaged".
70. By way of background to the withheld review, the Home Office told the Commissioner:

"The lessons learned review was commissioned to determine in relation to the small boats response what worked well, what could have been better and what should be done differently next time".
71. The Home Office further explained:

"Reviews of this nature are an essential part of policy development and depend upon participants being able to give their views freely and frankly".

72. In response to the Commissioner's question about which policy the Home Office considers the withheld information relates to, the Home Office said:

"This information relates to the policies around the operational response to Channel crossings by migrants in small boats, specifically the policies concerned with the development of command-and-control structures and policies covering the management of the small boats issue across the Home Office. These are not solely operational issues: the nature of the response to small boat crossings is a matter of Home Office and hence Government policy at the highest level".

73. It also told the Commissioner:

"The formulation of policy and operational responses towards Channel crossings by migrants in small boats was ongoing throughout the period of the lessons learned review and beyond, as the nature and complexity of the phenomenon continued to evolve in response to UK and French countervailing activity".

74. The Commissioner acknowledges that the complainant considers that the Lesson's Learned document, conducted under a different administration, four years ago, no longer pertains to the development or discussion of a specific policy which is still being formulated/developed.
75. However, having considered the withheld information, and mindful that the term 'relates to' can be interpreted broadly, the Commissioner accepts that the information relates to the policymaking process. It follows that he finds the exemption is engaged.

Public interest test

76. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

77. The complainant believes the public interest in transparency with regards to this Lessons Learned report outweighs the arguments the Home Office cited for withholding the information.
78. They consider that there is a 'huge public interest in transparency' regarding the UK's handling of the increase in small boat crossings in the English Channel.

79. The complainant argued that, according to the 2019 ICIBI report:

"...this Lesson's Learned document set out recommendations four years ago for how to address this issue".

80. They also noted:

"The number of crossings has since grown exponentially. The public interest in transparency as to what these recommendations were and which – if any – have been adopted, is significant".

81. The Home Office acknowledges the general public interest in transparency and accountability.

Public interest arguments in favour of maintaining the exemption

82. Arguing in favour of maintaining the exemption, the Home Office told the complainant that the policy and operational responses against Channel crossings by migrants in small boats continually evolve. It therefore argued that "it is vital that this policy making process is able to continue in as full and as collaborative a manner as possible".

83. It also said:

"Publishing such discussions, at a time when the issue continues to be unresolved and policy options remain necessarily agile, could have an adverse effect on the freedom and frankness of future discussions of this kind and the preservation of the convention of collective responsibility. Subject matter experts may feel unable or unwilling to share information germane to the debate out of fear that their views may be subsequently broadcast and critiqued, with the result that ensuing policy options become unnecessarily restricted".

84. It told the complainant that such limitations in the policymaking process would be against the public interest.

85. It also argued that it would not be in the public interest to jeopardise the government's position to continue to develop and formulate policies to prevent Channel crossings as a result of disclosing the report.

86. It made the same, or very similar, representations in its submission to the Commissioner.

Balance of the public interest

87. The Commissioner acknowledges that the relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.

88. The weight of these interests varies from case to case, depending on the profile and importance of the issue and the extent to which the content of the information actually adds to public debate.
89. The Commissioner has taken into account the Home Office's argument about the issue of small boat crossings being subject to ongoing review. The Commissioner recognises that policy development needs some degree of freedom to enable the process to work effectively.
90. He accepts that there is some weight to the public interest in favour of maintaining the exemption - centred on the importance of maintaining the safe space for officials and subject matter experts to feel confident that they can exchange views safely and frankly. He accepts that there is potentially some risk that disclosure may lead to those called upon to contribute to similar Lessons Learned reviews to be less candid in their contribution.
91. He recognises the public interest in the policymaking process being able to continue in as full and as collaborative a manner as possible.
92. However, in addition to the general public interest in transparency and accountability, he acknowledges that there is a clear public interest in the disclosure of information which can inform public debate relating to the government's response to small boats crossings. In this case he recognises that disclosure of the withheld information would enable the public to scrutinise government policy relating to what the Commissioner recognises continues to be an ongoing situation.
93. In particular, he considers there to be a strong public interest in the disclosure of the review recommendations, to provide transparency and insight into what the recommendations were and the extent to which they have been adopted.
94. Having assessed the weight of the arguments for disclosure and for maintaining the exemption, the Commissioner has concluded that, for the majority of the information withheld by section 35, the public interest favours maintaining the exemption. He has reached this conclusion based on the content of the information, the purpose of the exemption and the extent to which disclosure would aid public understanding.
95. However, he considers that the public interest arguments in favour of maintaining the exemption are not sufficient to outweigh the strong public interest in disclosure of the remaining information withheld under this exemption.
96. He has concluded that, in all the circumstances of the case, the public interest favours disclosure of the information caught by this exemption within the 'Summary of Recommendations', specifically the recommendations themselves.

Right of appeal

97. 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

98. 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.

99. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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