

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2024

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

Decision (including any steps ordered)

1. The complainant requested “any and all” Ministerial submissions relating to Manston Immigration Centre, including a second refined version of the request (with a specified date range), should the original exceed the cost limit in section 12 of FOIA. Ultimately, the Home Office responded to the second refined version of the request, a position which the complainant has not challenged, so the Commissioner has not considered this aspect any further.
2. The Home Office refused to provide the requested information citing the FOIA exemptions in section 31(1)(e) (the operation of immigration controls), section 35(1)(a) (the formulation or development of government policy), section 40(2) (personal information) and section 42(1) (legal professional privilege). The complainant was not concerned about the application of section 40(2) so the Commissioner has disregarded this from his investigation.
3. The Commissioner’s decision is that the Home Office was entitled to rely on section 35(1)(a) of FOIA applied to the majority of the withheld information. He also finds that section 42 of FOIA was engaged where applied. As he has found section 35(1)(a) to be engaged, the Commissioner has not deemed it necessary to consider the Home Office’s reliance on section 31(1)(e) of FOIA which was applied to the same information withheld under section 35(1)(a) of FOIA.
4. No steps are required as a result of this notice.

Background

5. Manston Immigration Centre near Ramsgate opened as a processing centre in February 2022, for the growing number of migrants arriving in the UK in small boats.
6. Migrants are intended to be held there for short periods while undergoing security and identity checks.
7. On 26 October 2022 the Home Office said¹:

"The aim was to run a site that had between 1,000 and 1,600 people passing through it every day, and that all of those checks would be completed in under 24 hours. For a large part of this year, that is exactly how it was operating".
8. Issues with the numbers of migrants held at Manston and the duration of their time there subsequently arose.²

Request and response

9. On 3 November 2023, the complainant wrote to the Home Office and requested information in the following terms:

'We hereby make a Freedom of Information Act 2000 request.

We would be grateful if you could please provide the following information:

- 1. Any and all ministerial submissions to Home Office Ministers and/or the Secretary of State for the Home Department in relation to Manston Immigration Centre in 2022.**

If you consider that the above request exceeds the appropriate limit, then we request the following information:

- 2. The five ministerial submissions to Home Office Ministers and/or the Secretary of State for the Home Department in relation to Manston Immigration Centre**

¹ <https://committees.parliament.uk/oralevidence/11390/pdf/>

² <https://www.bbc.co.uk/news/explainers-63456015>

between 15th September 2022 and 20th October 2022 as detailed in The Times article titled "Suella Braverman was 'warned again and again' over crisis at Manston", dated 6th November 2022.

We enclose the link to the article:

<https://www.thetimes.co.uk/article/suella-braverman-was-warned-again-and-again-over-migrant-crisis-at-manston-7k85qrmts>

Conclusion

Please note that we are not requesting personal data and we are not requesting identifying information.'

10. The Home Office responded, late, on 22 January 2024. It advised that it had interpreted the request as seeking submissions to Ministers relating to Manston Immigration Centre between 15th September 2022 and 20th October 2022 (ie the second refined variant). The Home Office refused to provide the requested information, citing the following FOIA exemptions as your basis for doing so:
 - Section 31(1)(e) – operation of immigration controls
 - Section 35(1)(a) – the formulation or development of government policy
 - Section 40(2) – personal information
 - Section 42(1) – legal professional privilege
11. The complainant requested an internal review on 22 February 2024 in relation to sections 31, 35 and 42 only of FOIA.
12. Following its internal review, the Home Office wrote to the complainant, late, on 22 May 2024. It maintained its original position.

Scope of the case

13. The complainant contacted the Commissioner on 21 May 2024 to complain about the way his request for information had been handled. He disagreed with the Home Office's reliance on sections 31, 35 and 42 of FOIA.
14. The Home Office told the Commissioner that it had responded to the second version of the complainant's request because the first would exceed the cost limit in section 12 of FOIA. The complainant has not

challenged the Home Office's decision to respond only to the second refined version of his request, so the Commissioner has not considered this aspect any further.

15. The Commissioner has considered whether the Home Office has properly relied on sections 31(1)(e), 35(1)(a) and 42(1) of FOIA to withhold the requested information in this case.

Reasons for decision

16. The Commissioner has viewed all the withheld information in this case. The Home Office has explained that it considers sections 31(1)(e) and 35(1)(a) to apply equally to the majority of the material, with the remaining legal advice information being withheld under section 42(1) of FOIA.
17. The Commissioner will first consider the information withheld under sections 35(1)(a). The Home Office has requested that a description of the withheld information is not reproduced in this notice, a position which the Commissioner has respected, albeit the request makes it clear that the complainant is seeking ministerial submissions.
18. The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
19. It applies only to information held by central government departments or the Welsh Government.
20. Section 35 is class-based, meaning it is not necessary 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. If the withheld information relates to the formulation or development of government policy, it is exempt information. The timing of a request is not relevant. The question is whether the information relates to the activity, irrespective of when the request was made.
21. However, section 35 is also a qualified exemption. This means that even if the exemption is engaged, the public authority must go on to apply the public interest test. It can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
22. The purpose of section 35(1)(a) of FOIA is to protect the integrity of the policymaking process, and to prevent disclosures that 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.

23. In response to the Commissioner's investigation, the Home Office explained:

'The submissions in question each provide candid advice on policy options and proposals for the changing situation and risks to operational capacity at Manston. Disclosure of the submissions would undermine the discussion that is required for effective policymaking in the future, because views would no longer be held in confidence. The information requested relates to an ongoing area of policy where Manston accommodation policy options can still be considered, or where other accommodation sites might still look to adopt these options in the future.

Your [investigation] letter states, the complainant believes "Reports indicate the submission concerned operational decisions at the time, not policy proposals."

For the reasons as noted above, we contend the submissions concerned advice on policy formulation and development options. As noted in the ICO guidance on section 35³

"There are no universal rules: policymaking models are always evolving, and may vary widely between departments and situations. It is likely that some policy areas will follow a more rigid, formal development process to maintain stability and certainty, while other policy areas are more fluid and need to evolve quickly. Depending on the context, policymaking may also be proactive or reactive, formalised or unstructured, or even made 'on the hoof' as a form of crisis management."

Examples of different processes that might involve policymaking include: ...

- responding to unexpected events;

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

...

- unusually sensitive or high-profile operational decisions’.

24. The Commissioner notes the complainant’s view that the requested information relates to “operational decisions”. However, based on his review of the withheld information, the Commissioner accepts that it represents ongoing policy formulation and development.
25. Furthermore, having reviewed the withheld information, and in line with the matters discussed at paragraph 20, the Commissioner is satisfied that the information to which the Home Office has applied section 35 relates to the formulation of a particular policy.
26. It follows that the Commissioner is satisfied that the Home Office was entitled to engage section 35(1)(a) of FOIA to withhold the redacted information within the disclosed readout.

Public interest test

27. The Commissioner will next consider the associated public interest test for section 35 of FOIA.

Public interest arguments in favour of disclosure

28. The complainant submitted the following arguments for disclosure:

“First, the submissions relate to a specific time and event. They also generated widespread public concern that ministers were breaching statutory prescribed detention limits. There is a strong public interest in favour of disclosure in order to restore confidence and trust in ministers’ actions at the time. Second, the public interest lies in good governance, not preserving a safe space for policymaking for the sake of it. There is a significant public interest in disclosure to enable scrutiny of the details of the policy at the time, especially when it relates to alleged unlawful conduct.”

29. The Home Office recognised the following in favour of disclosure:

Public interest arguments in favour of maintaining the exemption

30. The Home Office submitted the following arguments to the Commissioner:

“The Home Office is aware that disclosure of information may enhance the transparency and accountability of public authorities. It ensures that these entities are acting in the

public's best interest and allows for greater scrutiny of their actions and decisions. This transparency is crucial for maintaining public trust and confidence in government institutions.

Providing access to information could help the public better understand the formulation and development of government policy. This understanding is essential for fostering an informed citizenry that can engage meaningfully in democratic processes. It allows the public to see how decisions are made and the factors considered in policy development. This can lead to a more informed and engaged public, potentially resulting in improved public policies. Public engagement and debate are vital components of a democratic society, and access to information is a key enabler of this process.

Transparency in policy formulation process can promote good governance by ensuring that decisions are made based on sound evidence and thorough consideration of all relevant factors. It can also help to identify and address any potential issues or concerns at an early stage, leading to better policy outcomes.”

Public interest arguments in favour of maintaining the exemption

31. The Home Office submitted the following arguments to the Commissioner:

“Section 35(1)(a) is designed to protect the formulation and development of government policy. Disclosing information at this stage would undermine the safe space needed for officials to discuss and develop policy options freely and frankly. This safe space is essential for ensuring that all potential options are thoroughly considered without external pressure or influence.

If information related to the formulation of government policy were routinely disclosed, it would lead to a chilling effect where officials become less willing to provide candid advice and opinions. This could ultimately affect the quality of policy development, as officials might be more cautious and less thorough in their assessments.

Disclosure of information related to policy formulation would undermine the principle of collective responsibility. Ministers and officials need to be able to discuss and debate policy options in private to reach a consensus. Public disclosure of these discussions would lead to a fragmented and less cohesive approach to policymaking.

The ability of the government to develop effective policies would be prejudiced if sensitive information is disclosed prematurely. This would lead to public misunderstanding or misinterpretation of policy options that are still under consideration, potentially causing unnecessary concern or opposition.”

Balance of the public interest

32. The Home Office stated:

“There is a clear public interest in transparency and an understanding of the policy to which it relates. However, it is also in the public interest that officials and ministers have a safe space to develop and review policy options including reviewing any pre-existing information which relates to policy development.”

33. Public interest arguments associated with section 35(1)(a) must focus on the effect of disclosing the information in question at the time of the request, rather than the effect of routinely disclosing that type of information. Public interest matters also needs to be considered at the time the public authority should have responded to the request and take account of the circumstances as they were at that point.
34. The Commissioner further notes that there is some information relevant to Manston Immigration Centre in the public domain, which he considers goes some way to meeting the transparency and openness arguments identified. The Home Office updated information on the centre on 10 September 2024.⁴ There have also been various media articles relating to the signing of a new contract to develop and improve the site. One such example can be found here.⁵
35. Whilst the Commissioner accepts that the referenced publicly available information postdates the request, he is mindful that there would have been other relevant information online at the time of the request.
36. The Commissioner considers that the greater public interest lies in protecting the ‘safe space’ in which to debate that policy issue, away from external interference and distraction.

⁴ <https://www.gov.uk/government/publications/manston-arrivals-and-processing-centre/manston-factsheet>

⁵ <https://www.msn.com/en-gb/news/uknews/home-office-invites-bids-on-521-million-immigration-services-contract-at-manston-reception-centre-near-ramsgate-and-western-jet-foil-in-dover/ar-AA1sbnkp?ocid=BingNewsSerp>

37. It follows that the Commissioner finds the Home Office was entitled to rely on section 35(1)(a) of FOIA to withhold all the information withheld under this exemption.
38. As he has found section 35(1)(a) to be engaged, the Commissioner has not deemed it necessary to consider the Home Office's reliance on section 31(1)(e) of FOIA which was applied equally to this same information.
39. The Commissioner will next consider the Home Office's reliance on section 42(1) applied to the remaining withheld information.

Section 42 – Legal professional privilege

40. Section 42 of FOIA states that a public authority may refuse to disclose information which is subject to legal professional privilege ('LPP').
41. There are two types of LPP – litigation privilege and advice privilege. In its submissions to the Commissioner, the Home Office said:

“The information withheld is subject to legal advice privilege. Section 42 of the FOI Act exempts information from being released if a claim to legal professional privilege (LPP) could be maintained in legal proceedings. The information requested is subject to LPP. The advice is between the client and lawyer and made for the purpose of seeking or giving legal advice. The advice remains confidential and has not been shared outside of the Home Office.”

42. From what he has seen, the Commissioner is satisfied that the withheld information comprises confidential communications between client and legal adviser for the dominant purpose of seeking and giving legal advice. It falls within the definition of litigation privilege and is therefore subject to LPP. Accordingly, the Commissioner finds that the exemption is engaged in respect of the withheld information.
43. Section 42 is a class-based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.

Public interest arguments in favour of disclosure

44. The complainant submitted the following arguments for disclosure:

“... the passage of time, lack of transparency to date, and significant public controversy generated by the situation at the relevant time militates in favour of disclosure and the waiving of legal professional privilege”.

45. The Home Office recognised the following in favour of disclosure:

“While legal professional privilege is an important principle, it is not absolute. There are circumstances where the public interest in disclosure may outweigh the need to maintain confidentiality. Disclosing the requested information may enhance the transparency and accountability of public authorities. It ensures that these entities are acting in the public's best interest and allows for greater scrutiny of their actions and decisions. Providing access to information may help the public better understand the legal advice and decisions made by public authorities.”

Public interest arguments in favour of maintaining the exemption

46. The Home Office submitted the following arguments to the Commissioner:

“Section 42 of the FOIA protects information covered by legal professional privilege. This principle is fundamental to the administration of justice, as it ensures that clients can communicate freely with their legal advisers without fear that these communications will be disclosed. Disclosing privileged information could undermine this principle and deter individuals from seeking legal advice or being fully candid with their legal advisers.

The Information Commissioner's Office (ICO) guidance⁶ recognises that there is a strong inbuilt public interest in not releasing information that engages LPP. This is due to the importance of the principle behind LPP, which is safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice.

It is vital that legal advisers are able to give advice freely and frankly to officials and likewise for officials to be able to seek legal advice as required in confidence and on the understanding that it will not be routinely disclosed. If information of this nature were released it could have the effect of restricting the frankness and depth of such advice in future and create reticence on the part of officials in seeking legal advice. The public interest is served in allowing officials and their legal advisers the necessary

⁶ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-42-legal-professional-privilege/>

space to be able to seek and provide legal advice to ensure that the correct policy decisions are made.

We consider that there would also be an impact on the quality of legal advice. If legal advice were routinely disclosed, it could lead to a situation where legal advisers might feel constrained in providing comprehensive and frank advice. This could ultimately affect the quality of legal advice provided to public authorities, as advisers might be more cautious and less thorough in their assessments.

There may also be risk of prejudice to legal proceedings. Disclosing information covered by legal professional privilege could prejudice ongoing or future legal proceedings. This could occur if the disclosed information provides insights into the legal strategies or positions of public authorities, potentially giving an unfair advantage to opposing parties.”

Balance of the public interest

47. The Commissioner recognises the public interest in promoting accountability and transparency, particularly around the actions of public bodies. He also recognises the importance of maintaining openness in communications between client and lawyer to ensure full and frank legal advice.
48. The Commissioner notes that the circumstances surrounding the request and requirement for legal advice relates to a situation which gives rise to many strong feelings within the public arena.
49. The public interest inherent in section 42 will generally be extremely strong, owing to the importance of the principle behind LPP: safeguarding confidential communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately. This erodes the rule of law and the individual rights it guarantees.
50. The Commissioner accepts that there will always be a public interest in transparency, accountability and in the public having access to information to enable them to understand more clearly why particular immigration processing and ongoing provision decisions have been made and certain processes followed.
51. The Commissioner has attached appropriate weight to the public interest in disclosure as set out above. However, he does not consider that they

are strong enough to outweigh or override the substantial public interest in protecting the principle of LPP in this particular case..

52. Having considered the relevant factors, the Commissioner is satisfied that the public interest in maintaining the exemption in this case outweighs the public interest in disclosure. He considers that the limited public benefits in disclosure would not offset the resulting detriment to the Home Office's ability to obtain legal advice.
53. The Commissioner's decision, therefore, is that the Home Office was entitled to withhold the information exempted under section 42 of FOIA.

Other matters

54. Although not complained about by the complainant, the Commissioner has made a record of the delays with providing both the substantive response and internal review in this case.

Right of appeal

55. 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

56. 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.
57. 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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