

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 24 October 2024

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

#### **Decision (including any steps ordered)**

---

1. The complainant requested information relating to correspondence between the then Home Secretary and Prime Minister about the plan to send asylum seekers to Rwanda.
2. The Home Office refused to provide the requested information, citing sections 35(1)(a) and (b) (formulation of government policy) of FOIA.
3. The Commissioner has investigated the Home Office's application of section 35(1)(b) to the requested information.
4. The Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(b) of FOIA to withhold the requested correspondence.
5. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

---

6. On 26 March 2024, the complainant wrote to the Home Office and requested information in the following terms:

"All written correspondence between the current Secretary of State for the Home Department and the Prime Minister regarding the plan to

send asylum seekers to Rwanda. To narrow down the request the dates should be from the 13th November 2023 to the 26th March 2024.”

7. The Home Office responded on 24 April 2024. It confirmed it holds information within the scope of the request, but refused to provide it, citing section 35(1)(b) (formulation of government policy) of FOIA.
8. The complainant requested an internal review on 26 April 2024. While they accepted that section 35(1)(b) was engaged, they considered that the public interest in releasing the information outweighs the public interest in withholding it.

### **Scope of the case**

---

9. In the absence of an internal review response, the complainant contacted the Commissioner to complain about the way their request for information had been handled.
10. Having been advised that the Commissioner had accepted the complaint without an internal review, the complainant provided further arguments in support of their complaint.
11. With respect to the application of section 35(1)(b), they told the Commissioner that the exemption is no longer arguable as the requested information concerns the Rwanda deportation policy, a policy “which has been scrapped by the new Government”.
12. They also noted that the Ministers specified in the request are no longer in post.
13. In its substantive response, only provided after the Commissioner had issued an Information Notice, the Home Office confirmed its application of section 35(1)(b) and additionally cited section 35(1)(a).
14. The Home Office told the Commissioner that, having reconsidered its position as a result of his investigation, it considers that both limbs of the exemption applied at the time of the request.
15. The analysis below considers the Home Office’s application of section 35(1) to the information in scope of the request.

### **Reasons for decision**

---

#### **Section 35 formulation of government policy**

16. 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.
17. The purpose of subsection 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 policy options in private.
18. Section 35(1)(b) covers any information relating to Ministerial communications. The purpose of that limb of the exemption is to protect the operation of government at Ministerial level. It prevents disclosures that would significantly undermine Ministerial unity and effectiveness or result in less robust, well-considered or effective Ministerial debates and decisions.
19. Section 35 is class-based, meaning that a public authority does not 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.
20. The Commissioner has first considered the Home Office's application of section 35(1)(b) to the information in scope of the request.
21. Having seen a copy of the withheld information, the Commissioner is satisfied that it comprises communications between Ministers and, therefore, that section 35(1)(b) is engaged.

### **Public interest test**

22. Section 35 is subject to the public interest test, as set out in section 2 of FOIA. 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 disclosure.
23. The Commissioner acknowledges that many, but not all, Ministerial communications concern the formulation or development of government policy, and so engage both sections 35(1)(a) and 35(1)(b).
24. He accepts that while a public authority may claim both exemptions for the same information, as in this case, the public interest considerations may differ.
25. In that respect, he acknowledges that, in its submission to the Commissioner, the Home Office provided separate public interest arguments for sections 35(1)(a) and (b).

26. In appeal reference [\[2022\] UKUT 104 \(AAC\)](#), known as Montague, the Upper Tribunal ruled that “the competing public interests have to be judged at the date of the public authority’s decision on the request... and prior to any internal review of that initial decision” (para 63).
27. The Commissioner takes a similar approach when investigating complaints under section 50 of FOIA. That is, he will assess how the public authority carried out the public interest test by reference to the time of its decision, which will not include the time of the internal review, if it conducted one.
28. The Home Office response in this case was 24 April 2024. The Commissioner considers this to be the relevant date for consideration of the public interest.

### **Public interest arguments in favour of disclosure**

29. Arguing in favour of disclosure, the complainant told the Home Office:

“The Rwanda Scheme was passed by both Houses of Parliament and is expected to cost the British Taxpayers at the very least £370 million. This is an extortionate amount of money and the British public deserve to get the “free and frank” discussions. In the PIT, the Home Office did not consider the strong point of the importance to the Public that the full truth is revealed about this flagship policy”.
30. The complainant told the Home Office that disclosure of the requested information “is vital to the Public's understanding of ministerial discussions regarding the Rwanda Scheme”.
31. Similarly, they told the Commissioner:

“The principles of transparency and public scrutiny are fundamental to democratic governance. Given the significant public interest in the Rwanda deportation policy, its implications, and the decision-making process, it is crucial that the information is released to the public”.
32. The Home Office acknowledge that there is a general consideration in favour of openness and transparency in Government to increase public trust and confidence.
33. Of relevance in this case, it recognised that the UK-Rwanda Migration and Economic Development Partnership “is clearly a matter of strong public interest given its significant media coverage”. In that respect, it accepts that disclosure would increase public awareness of this policy area and discussion around the scope and effects of the scheme.

### **Public interest arguments in favour of maintaining the exemption**

34. By way of context, the Home Office told the Commissioner that the UK-Rwanda Migration and Economic Development Partnership was a live policy issue under consideration by Ministers across Cabinet and in various Government Departments.

35. Arguing in favour of maintaining the exemption, the Home Office told the Commissioner that disclosure would compromise the 'safe space' which Ministers need to formulate and develop policy.

36. In that respect, it told the Commissioner:

"It is important to safeguard the deliberative process of government by ensuring that Ministers can engage in free and frank discussions without the risk of premature disclosure".

37. It also argued:

"In the context of the UK-Rwanda Migration and Economic Development Partnership, disclosing the requested information at this stage would likely result in less robust and less well-considered policies. Sharing the views of the Home Secretary and the information that he provided the Prime Minister on specific occasions would not serve the public interest".

38. Similarly, it argued that protection 'of these communications' is paramount to ensure that the development of government policy is conducted in an environment conducive to comprehensive and effective deliberation. Furthermore, the Home Office told the Commissioner that maintaining the confidentiality of the requested information is in the public interest:

"because the quality of any decision-making process depends on the frankness and candour with which views are presented and policies scrutinised".

### **Balance of the public interest**

39. As noted above, the purpose of section 35(1)(b) is to protect the operation of government at Ministerial level.

40. Public interest arguments under section 35(1)(b), therefore, should focus on protecting Ministerial unity and effectiveness, and protecting Ministerial discussions and collective decision-making processes. This reflects the purpose of the exemption.

41. The Commissioner has had regard to his published guidance on section 35<sup>1</sup> which states that there is no inherent or automatic public interest in withholding information just because it falls within a class-based exemption. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the information in question and the effect its release would have in all the circumstances of the case.
42. The Commissioner recognises the argument that there has been a change to the political environment since the request was responded to. However, in carrying out his assessment of the public interest test, the Commissioner will consider the circumstances that existed at the date of the public authority's decision on the request, as required by the statutory time for compliance.
43. Having considered the arguments put forward by the complainant and the Home Office, the Commissioner recognises that there is a clear public interest in the disclosure of information which can inform public debate relating to the Rwanda deportation policy.
44. However, he has also taken into account that the focus of the request, namely the plan to send asylum seekers to Rwanda, was very much a live issue at the relevant time.
45. The Commissioner accepts that Ministers needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
46. He also acknowledges that the need for a safe space is strongest when the issue is still live.
47. Having weighed the public interest factors for and against disclosure, and having regard to the purpose of section 35(1)(b), the Commissioner has determined that the public interest in protecting the safe space at the time of the response to the request was of sufficient significance for him to conclude that maintaining the exemption outweighed the public interest in disclosure.
48. The Home Office was therefore entitled to withhold the information by virtue of section 35(1)(b).

---

<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

49. In light of his finding, the Commissioner has not found it necessary to consider the application of section 35(1)(a) to the same information.

### **Other matters**

---

50. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.
51. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to these timescales.
52. This concern will be logged for monitoring purposes.

## Right of appeal

---

53. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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