

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 November 2014

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

Decision (including any steps ordered)

1. The complainant requested copies of correspondence sent and received by the Home Secretary relating to the "Go Home" vans campaign, which was part of what was officially named Operation Vaken. The Home Office refused to disclose this information and cited the exemptions provided by the following sections of the FOIA:

35(1)(a) (formulation or development of government policy)

36(2)(c) (other prejudice to the effective conduct of public affairs)

40(2) (personal information)
2. The Commissioner's decision is that the Home Office withheld information under section 35(1)(a) incorrectly and it is required to disclose this information, minus redactions in relation to which the Commissioner has found that section 40(2) is engaged. In relation to section 36(2)(c), the Commissioner has found that the Home Office cited this exemption correctly.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the information withheld under section 35(1)(a), with the information covered by section 40(2) redacted.
4. The Home Office 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 30 August 2013, the complainant wrote to the Home Office and requested information in the following terms:

"Please reveal all the correspondence sent/received by Theresa May in July and August 2013 re 'Go Home' campaign.

Please include both parts of campaign: Vans of Hate and Glasgow Posters"

6. Following a holding response sent on 26 September 2013, the Home Office responded substantively on 21 October 2013. It stated that the request was refused, with the exemption provided by section 35(1)(a) (formulation or development of government policy) cited.
7. The complainant responded on 21 October 2013 and requested an internal review. After a very lengthy delay and, as recorded below, only following the intervention of the Commissioner, the Home Office responded with the internal review outcome on 24 March 2014. The refusal under section 35(1)(a) was upheld, with the exemption provided by section 40(2) (personal information) of the FOIA now also cited.

Scope of the case

8. The complainant contacted the Commissioner initially on 2 October 2013 to complain at that stage about the delay in responding to his request. Following the receipt of a substantive response from the Home Office and requesting an internal review the complainant contacted the Commissioner several times to complain about the delay in the completion of the review.
9. A representative of the Commissioner contacted the complainant on 13 February 2014 and stated that, in view of the delay in the completion of the review, an investigation into the refusal of his request would be commenced at that stage without waiting for the completion of the review. The complainant confirmed that he did wish to proceed with his complaint at this stage.
10. The Commissioner subsequently contacted the Home Office on 14 February 2014 for further information and explanation about the refusal

of the request. The Home Office was advised that this case was being progressed due to the delay up until that point in the completion of the review and that, whilst it could choose to continue with the review, it should ensure that there was no delay in responding to the Commissioner's letter as a result. Despite this, there was a delay in responding to the Commissioner's letter whilst the review was completed.

11. When responding to the Commissioner's letter, the Home Office suggested that the scope of the request was not clear and that it had been interpreted as being only for internal correspondence. The Commissioner responded that the scope of the request was clear in that it covered *all* relevant correspondence, both internal and external, and that the Home Office should make its submissions on that basis.
12. In response to this the Home Office confirmed that it did hold external correspondence within the scope of the request, but that this was withheld under the exemptions provided by sections 36(2)(b)(ii) (inhibition to the free and frank exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs). It contacted the complainant to advise him of this.
13. The Commissioner is obliged to consider exemptions introduced during his investigation and so the following analysis covers sections 35(1)(a), 40(2), 36(2)(b)(ii) and 36(2)(c).

Reasons for decision

Section 35

14. The Home Office cited section 35(1)(a), which provides an exemption for information which relates to the formulation or development of government policy. Consideration of section 35(1)(a) is a two-stage process; first, the exemption must be engaged as a result of the information in question falling within the class specified in the exemption. Secondly, this exemption is qualified by the public interest, which means that, unless the public interest in the maintenance of the exemption outweighs the public interest in disclosure, the information must be disclosed.
15. Covering first whether the exemption is engaged, this exemption is cited in relation to the internal correspondence falling within the scope of the request. The information consists primarily of situation reports on "Operation Vaken"; the campaign referred to in the request, which were sent to the Home Secretary amongst others. The remaining items of

withheld information are emails concerning Operation Vaken that were either sent or copied to the Home Secretary.

16. The case of the Home Office is that Operation Vaken was part of a government policy formulation and development process and that, as the information in question all relates to Operation Vaken, it is covered by section 35(1)(a). The task here is to consider whether it is accurate to characterise Operation Vaken as part of a government policy formulation or development process, and if so, whether the information in question relates to that process.
17. The Home Office described Operation Vaken as *"a pilot of a novel approach to one aspect of immigration control, namely the removal from the UK of people who have no legal right to remain here"* and argued that *"assessment of the progress of such a pilot scheme is, almost by definition, part of the process of policy formulation and development in that it enables Ministers to consider options for implementing the pilot on a wider scale or abandoning that particular approach"*.
18. The Commissioner also notes the following about policy pilots from his published guidance on this exemption¹:

"In some cases, the government may decide to run a pilot scheme or trial to test a potential policy on a small scale before deciding whether to roll it out in full. Piloting a policy is one way of gathering evidence on its efficacy before making a final decision on whether or not to take it forward. Pilot schemes may therefore form part of the policy formulation process, particularly if the scheme's limits and end date are clearly defined, and no final decision has yet been taken on whether or in what form the policy should be adopted or rolled out more widely." (paragraph 51)
19. Whilst this guidance does go on to note that not all pilot processes will constitute policy formulation or development, particularly where they form part of the implementation of an existing policy, the Commissioner is of the view that Operation Vaken was part of the development of a government policy. That policy is whether and how to use publicity to encourage people with no legal right to remain to depart the UK voluntarily.

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http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx

20. The point in the Commissioner's guidance about a pilot scheme having a clearly defined end date is also satisfied.
21. Having accepted that Operation Vaken formed part of the development of a government policy, the next question is whether the information in question can be accurately described as relating to that policy. From the description given above, the Commissioner considers it clear without it being necessary to go into detailed analysis that this information does all relate to Operation Vaken and hence to the development of government policy. The exemption provided by section 35(1)(a) is, therefore, engaged in relation to this information.
22. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. In reaching a conclusion on the balance of the public interest, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office, as well as factors that apply in relation to the specific information in question here.
23. Covering first arguments in favour of maintenance of the exemption, in correspondence with the ICO about this case, the Home Office referred to the arguments that it had advanced in its refusal notice and internal review response. These arguments concerned harm to the policy making process through inhibition caused to the participants in that process.
24. These types of arguments are often referred to as "safe space" and "chilling effect" arguments. A safe space argument refers to the specific policy making process to which the information relates and the necessity of preserving a space away from the possibility of disclosure in which that process can be carried out. Chilling effect arguments refer to a wider impact, whereby disclosure in one case could have an inhibiting effect on participants in future policy making processes. These arguments are relevant when considering the balance of the public interest as it would be counter to the public interest to harm the government policy making process.
25. As to whether the Commissioner gives weight to this factor in this case, he notes that Operation Vaken was ongoing at the time of the request. As recorded in the evaluation report published by the Home Office in October 2013², whilst the "*proactive communications phase*" ended on 22 August 2013, the pilot continued until 22 October 2013. This means that in effect the Home Office was advancing a safe space argument

² <https://www.gov.uk/government/publications/operation-vaken-evaluation-report>

relating to the Operation Vaken pilot being ongoing at the time of the request.

26. In many cases where information has been requested about an ongoing policy making process, safe space arguments will be of very significant weight and will only be equalled where there are very clear and strong arguments in favour of disclosure. In this case, whilst the Commissioner recognises that the safe space argument is of significant weight, the nature of the content of the withheld information means that it carries less weight than it may do elsewhere.
27. The majority of this information is factual; it reports on the progress of Operation Vaken in terms such as how many voluntary departures had taken place, how much media coverage there had been and the public reaction to it. None of the information withheld under section 35 includes any opinion based commentary on the pilot.
28. This means that the argument about inhibition to officials involved in the pilot is much less convincing. Had it been the case that disclosure would reveal the opinions of officials on the value or success of the pilot, or upon the wisdom of launching it, a strong argument could have been made that disclosing these whilst the process was ongoing may harm that process. The Commissioner is far less convinced, however, that any official would be inhibited through disclosure to the point where they would no longer accurately report factual information. In summary, whilst the Commissioner accepts that the preservation of a safe space whilst Operation Vaken was ongoing is a valid argument in favour of maintenance of the exemption, the weight that this factor carries in this case is reduced due to most of the information being factual, rather than opinion-based.
29. In relation to a minority of the withheld information, the Commissioner does not accept that harm to the policy making process is a relevant factor. These materials are communications within the Home Office between officials and a Minister concerning a procedural matter around the decision making process leading up to the implementation of Operation Vaken. Whilst the Commissioner accepts that these materials are within the scope of section 35(1)(a) when "relates to" formulation or development of government policy is read widely, that relationship is tangential. Whilst disclosure of that information may cause some embarrassment to the Home Office, the Commissioner does not believe that disclosure of it could result in harm to the policy making process and so does not afford the safe space argument any weight in relation to that information.
30. Turning to factors that favour the maintenance of the exemption, the Commissioner has considered two main points here. First, the

considerable level of controversy that Operation Vaken generated and, secondly, section 35(4) of the FOIA, which states that regard shall be had to the public interest in factual information used in decision taking in the policy making process.

31. Operation Vaken, and in particular the billboards that formed part of it, resulted in a significant public reaction and public debate. Whilst there was a range of reaction, the Commissioner has noted that there appeared to have been a significant amount of public criticism and negative reaction. Many felt that this was an inappropriate action by the Government. It is also relevant that many of the criticisms did not disagree with the overall policy of government seeking the removal of foreign nationals in the UK illegally, but objected to the use of the billboards.
32. The Commissioner also takes into account that Operation Vaken relates to the area of immigration policy. This is an area of perpetual government policy making and public interest. Given the novel and unexpected nature of the policy approach taken by the government to pursue its wider policy objectives the Commissioner is of the view that there is a very significant public interest in the background documentation to this pilot and he considers this a valid public interest in favour of disclosure of the information of considerable weight. The Commissioner also finds that there was a strong public interest in understanding the operation of the programme and therefore the specific information in question.
33. As to section 35(4), the Commissioner has referred above to most of the content of the information in question here being factual, which indicates that this section is relevant. The information in question here was intended to be used to provide an informed background to a policy making process and, having considered section 35(4), the Commissioner finds that it is appropriate to give additional weight to the public interest in disclosure, on the circumstances of the case.
34. In conclusion, the Commissioner has recognised public interest in favour of maintenance of the exemption given that the policy making process in question was ongoing at the time of the request. However, he is of the view that the factual nature of the information means that disclosure would not be likely to result in severe harm to that process and his view is also that there is very significant public interest in the disclosure of this information given the reaction to Operation Vaken, the weight of which is increased when section 35(4) is taken into account. For these reasons, his conclusion is that the public interest in the maintenance of section 35(1)(a) does not outweigh the public interest in disclosure.

Section 40

35. In relation to the information covered in the section 35(1)(a) analysis above the Commissioner has gone on to consider section 40(2), which the Home Office cited in relation to names of individuals within that information. This section provides an exemption for information that is the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles. Consideration of this exemption is a two-stage process, covering first whether the information in question is personal data and, secondly, whether the disclosure of that personal data would be in breach of any of the data protection principles.

36. As to whether the information constitutes personal data, section 1(1) of the Data Protection Act 1998 (DPA) defines personal data as follows:

"personal data' means data which relate to a living individual who can be identified:

a. from those data, or

b. from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".

37. The information in relation to which section 40(2) has been cited falls into two categories. The first of these is information within an email and relates to an individual who voluntarily departed the UK. That individual is not named within the email, but the Home Office believes that other information combined with the content of the email would enable the identification of that individual.

38. The reasoning of the Home Office concerns the information that it holds itself; it argues that as *it* holds information that could be combined with the email to identify an individual, that information constitutes personal data. The question here, however, is whether an individual could be identified following the disclosure of this information into the public domain, so whether there is information available to any member of the public that could lead to identification.

39. On this point, the Commissioner notes that the content of the email gives the nationality and date of birth of the individual in question, as well as details of when they left the UK and the circumstances leading to their departure. The Commissioner accepts that there is sufficient detail in this email that could enable others with existing knowledge of the individual in question to link this information to that individual. That information does, therefore, constitute personal data in accordance with the definition given in section 1(1) of the DPA.

40. The second category of information is names of officials. Clearly this information both relates to and identifies those individuals and so is personal data.
41. The next step is to consider whether disclosure of that personal data would breach any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which provides that personal data shall be processed fairly and lawfully, and in particular whether disclosure would be fair to the data subjects. In forming a conclusion on this point, the Commissioner has taken into account the reasonable expectation of the data subjects and the consequences of disclosure upon them. He has also considered whether there is any legitimate public interest in the disclosure of this information.
42. On the first category of information, this personal data relates to the subject in their private capacity and there are no grounds on which to expect that this individual would anticipate this information being disclosed into the public domain by the Home Office. As a result, the Commissioner believes that the individual in question would hold a strong expectation that this personal data would not be disclosed by the Home Office. As to the consequences of disclosure upon that individual, the Commissioner recognises that disclosure contrary to that expectation would be likely to be distressing to that individual. For these reasons, the Commissioner finds that disclosure of the personal data relating to that individual would be unfair and in breach of the first data protection principle.
43. As to the second category of information, the Home Office has been specific that the staff members whose names it wishes to withhold are below Senior Civil Service level. The Commissioner's view is that in general it will be far less likely to be unfair to an individual to withhold personal data that relates to their professional capacity than it would be to disclose personal data relating to private life.
44. In this case, the Commissioner can see no convincing arguments as to why the data subjects would hold a reasonable expectation that this information would not be disclosed, or how disclosure would be damaging or distressing to them. This information relates to the data subjects in their professional capacities. Whilst the Commissioner recognises that the policy area to which the request relates did attract controversy, he does not believe that the disclosure of officials' names who worked on this policy would result in those individuals being associated with that controversy.
45. However, whilst section 40(2) is an absolute exemption, in order for disclosure to be in line with the first data protection principle, it is

necessary for there be a legitimate public interest in disclosure of the personal data. Although the Commissioner has found above in relation to section 35(1)(a) that there is a strong public interest in disclosure, this relates to the main content of the information and he does not believe that disclosure of junior officials' names is necessary in order to satisfy that public interest. As a result he concludes that disclosure of the names of junior officials would be in breach of the first data protection principle.

46. For the reasons given above, the Commissioner concludes that the exemption provided by section 40(2) is engaged in relation to both the information that relates to the individual who voluntarily left the UK and to the information relating to junior officials. At paragraph 3 above the Home Office is required to disclose the information covered in the section 35(1)(a) analysis, with the information also covered by section 40(2) redacted.

Section 36

47. In relation to correspondence external to the Home Office, it has cited the exemptions provided by sections 36(2)(b)(ii) and 36(2)(c) of the FOIA. Section 36(2)(b)(ii) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank exchange of views. Section 36(2)(c) provides the same in relation to prejudice to the effective conduct of public affairs in a manner other than specified elsewhere in section 36. The approach of the Commissioner to this subsection is that the public authority should identify prejudice that is also not covered by any of the other exemptions in part II of the FOIA.
48. These exemptions can only be cited on the basis of the reasonable opinion of a specified qualified person (QP), which for government departments is any Minister. The task for the Commissioner in reaching a conclusion as to whether these exemptions are engaged is to establish whether this exemption was cited on the basis of an opinion from a Minister and whether that opinion was reasonable. Section 36 is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
49. The Home Office has provided evidence that these exemptions were cited on the basis of an opinion from Lord Taylor, Parliamentary Under Secretary of State for Criminal Information, and that this opinion was given on 6 May 2014, prior to the date on which the complainant was advised that section 36 was cited. On the basis of this evidence the Commissioner accepts that this exemption was cited on the basis of an opinion from a valid QP.

50. The next step is to consider whether this opinion was reasonable. The Commissioner's approach on this point is that an opinion must be objectively reasonable. This means that the opinion does not have to be one that the Commissioner would agree with, nor the *most* reasonable opinion. As long as the opinion was in accordance with reason, section 36 will be engaged.
51. In explanation for the QP's opinion, the Home Office supplied to the ICO a copy of a submission that was provided to the QP to assist them in the formation of their opinion. The information in question here relates to concerns raised by individuals with their constituency MPs; it is either letters between individuals and their MPs, or else correspondence between MPs and the Home Office that stems from concerns raised by constituents. On section 36(2)(c), which the Commissioner has focussed on, the submission records that the exemption was cited in order to preserve the confidentiality of the process by which individuals can hold government to account through their MP. The submission suggested that disclosure of the information in question here could discourage individuals from contacting their MP and also could inhibit MPs from expressing their own views when passing the concerns of their constituent on to a Minister.
52. The wording of the submission indicated that the opinion of the QP was that inhibition and prejudice *would* result, rather than *would be likely* to result. The approach of the Commissioner when considering other prejudice based exemptions is that he will accept that prejudice *would* result where the likelihood of this is more probable than not. He has applied a similar test here and considered whether it was reasonable for the QP to hold the opinion that disclosure would be more likely than not to result in prejudice.
53. Having taken into account the content of the information in question and the basis for the QP's opinion as set out in the submission, the Commissioner accepts that disclosure could plausibly have the result that the QP envisaged. Specifically, he notes that the information in question is on a high profile issue. He is also of the view that individuals would generally hold a strong expectation of confidentiality when corresponding with their MP. As a result, the conclusion of the Commissioner here is that the opinion of the QP was objectively reasonable and so the exemption provided by section 36(2)(c) of the FOIA is engaged.
54. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. The finding that the QP's opinion was reasonable and so the exemption is engaged is not reconsidered here. Instead the task here is to consider the scope, extent and frequency of the outcome of disclosure that the QP believed would

result. In favour of disclosure, the Commissioner has taken into account what public interest there is in the information in question, as well as the general public interest in the transparency of the Home Office.

55. Covering first the arguments in favour of disclosure of this information, the Commissioner has taken into account here similar factors as set out at paragraphs 31 and 32 above. That this information relates to Operation Vaken and to immigration policy means that there is a strong public interest in the disclosure of this information. In particular in relation to this information there is a public interest in disclosure to understand more about how the Government reacted when opposition to Operation Vaken was raised with it. For these reasons the Commissioner believes the public interest in favour of disclosure of this information to be of very considerable weight
56. Turning to those factors that favour maintenance of the exemption, having found that the QP's opinion was reasonable - that prejudice to the process of MPs and constituents corresponding would result - then the public interest in avoiding that outcome must be recognised. That it would be counter to the public interest to prejudice that process is clear. As referred to above, how much weight that point should be afforded as a public interest factor depends on the severity, extent and frequency of that prejudice.
57. The outcome envisaged by the QP would not be limited only to further correspondence relating to Operation Vaken. Instead, it could extend to cover more generally any situation where an individual is corresponding with their MP. As such, the severity, extent and frequency of the prejudice would clearly be substantial.
58. The Commissioner considers that protecting the process through which individuals can raise issues with their MP, and MPs can raise those issues with government, to be a matter of considerable public interest. This is a fundamental part of the process through which individuals can hold the government to account; disclosure that would harm that process could only occur where there was an equally weighty public interest in favour of that.
59. In this case, the Commissioner has recognised strong factors in favour of disclosure of this information; similar arguments which he considered a sufficient basis upon which to order disclosure in relation to section 35(1)(a) above. However, in relation to section 36(2)(c) he considers that public interest to be outweighed by the public interest in preserving the system of correspondence between MPs and constituents. The conclusion of the Commissioner is, therefore, that the public interest in the maintenance of the exemption outweighs the public interest in

disclosure and the Home Office was not obliged to disclose the information in relation to which section 36(2)(c) was cited.

Other matters

60. The Commissioner's published guidance on internal reviews states that these should be completed within a maximum of 40 working days. In this case the internal review took over five months; an excessive delay. The Home Office must improve its performance in this regard. A record of this delay has been made separately to this notice and this issue may be revisited if evidence from other cases suggests that this is a recurrent issue with internal reviews carried out by the Home Office.

Right of appeal

61. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

62. 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.
63. 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

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