

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 June 2023

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

Decision (including any steps ordered)

1. The complainant requested information relating to assessing the impact of the Nationality and Borders Act on the asylum decision-making process.
2. The Home Office refused to provide the requested information, citing sections 22(1) (information intended for future publication) and 35(1)(a) (formulation of government policy) of FOIA.
3. The Commissioner's decision is that the Home Office correctly engaged section 35 and the public interest favours maintaining the exemption. However, he finds that section 22 is not engaged. He also finds that the Home Office breached section 10 (time for compliance) of FOIA.
4. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation:
 - disclose the information withheld by virtue of section 22(1) to the complainant.
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 3 November 2022, the complainant wrote to the Home Office and requested information in the following terms:

"I am making an FOI request to ask for any assessment of the impact of the Nationality and Borders Act on asylum decision-making, including:

- The time it takes to process applications
- Expected impact on processing backlogs
- Associated costs on staffing and / or accommodation

In January 2022 the responsible Minister said an economic impact assessment would be published in due course, but I am unable to find it. Such an assessment may well contain this information, and if so providing this is likely to be an adequate response. Otherwise I would like to request any unpublished material that addresses these aspects above.

If only some of the above exist then please do provide that. If summaries of the above exist, then providing such a summary that addresses these issues would be sufficient."

7. The request was made using 'whatdotheyknow'.
8. The Home Office sought clarification about the nature of the requested information on 11 November 2022.
9. The complainant provided the following clarification on the same day:

"I am looking to get copies of documentation that provide impact assessment on the Nationality and Borders Act covering any of the following areas:

- The time it takes to process applications
- Expected impact on processing backlogs
- Impacts on costs to process asylum applications
- Impacts on the cost to house asylum-seekers during the process
- Financial forecasting where the above is a component even if that is not broken out specifically".

10. Following the Commissioner's intervention, the Home Office provided its substantive response on 6 February 2023. It refused to comply with the request, citing section 12(1) (cost of compliance) of FOIA.
11. On 1 March 2023, following an internal review, the Home Office revised its position. It confirmed it holds the Impact Assessment (IA) on the Nationality and Borders Act 2022 (NABA) which contains information relevant to the request. However, it refused to provide that information, citing sections 22(1) (information intended for future publication). It also refused to provide the information it holds relating to the financial forecasting on costs and volumes of asylum claims, citing section 35(1)(a) (formulation of government policy).

Scope of the case

12. Following earlier correspondence about the Home Office's failure to provide a substantive response, the complainant contacted the Commissioner on 1 March 2023. The complainant disputes the application of exemptions to refuse the request.
13. The Commissioner considers that the scope of this complaint is to determine if the Home Office was entitled to apply section 22(1) of FOIA to withhold the IA and if it was entitled to apply section 35(1)(a) of FOIA to withhold the requested information withheld by virtue of that exemption, information described by the Home Office as 'the analysis on costs and volumes'.
14. The Commissioner will also consider the Home Office's compliance with the timeliness requirements of FOIA.

Reasons for decision

Section 22 information intended for future publication

15. Section 22(1) states:

"Information is exempt information if—

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)".

16. In order to engage the exemption, the public authority does not need to have set a specific publication date, but it must have already had a settled intent to publish the information before the request was made and it must be intending to publish all the withheld information – not just parts of it.

The complainant's view

17. In support of his request for information, the complainant referred to a Written Answer, dated 14 January 2022, which said:

"As previously stated, an economic impact assessment of the Nationality and Borders Bill will be published in due course, to complement the Equality Impact Assessment, which was published on 16 September [2021]".

18. When requesting an internal review of its handling of the request, the complainant told the Home Office that he understood "... that the responsible Minister said more than a year ago that such an assessment would be published".
19. The complainant argued that there are multiple requests in parliament for this assessment and that it is in the clear public interest that government departments publish this kind of information in a timely manner.
20. He also considered that the requested information is information "that would normally be released through the process of taking a bill through parliament".

The Home Office's view

21. By way of background to the requested information, the Home Office explained to the Commissioner:

"Regulatory Impact Assessments (IAs) are part of the government decision-making process. They set out the objectives of policy proposals and the costs, benefits and risks of different ways (non-regulatory as well as regulatory) of achieving those objectives. They help ministers and Parliament decide on the appropriate (regulatory or non-regulatory) approach when faced with a policy question".

22. With regard to the status of the information in scope of this part of the request, the Home Office told the Commissioner:

“We confirm that the Economic Impact Assessment is the final document, and no information has been or will be altered or discarded to prepare the IA for publication”.

23. The Home Office told the complainant that, although the exact publication date is not yet known, there is an intention to publish this information.

24. While acknowledging that, in the circumstances of this case, the exact publication date is not yet known, it considered that publication before the planned date, in response to individual FOI requests, would undermine the Home Office pre-planned publication procedures.

25. In its submission to the Commissioner, the Home Office re-iterated its view that the Home Office has been clear that it intends to publish the IA at a future date, and that this has been reaffirmed by several Home Office ministers to Parliament and expressed in response to parliamentary questions and freedom of information requests.

26. The Home Office told the Commissioner that the document will be published in full “once ministers made a decision on a final publication date”.

The Commissioner’s view

27. The Commissioner recognises that, where section 22 is being relied on, although the public authority must hold the information at the time of the request with a view to its publication, the exemption does not require a set publication date to be in place.

28. His guidance on section 22¹ puts forward a number of scenarios whereby a public authority may still be able to apply the exemption if there is no fixed publication date. For example, where publication will take place once other actions have been completed, publication will take place by reference to other related events or there is a draft publication schedule that has not been finalised.

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

29. The Commissioner accepts the Home Office evidence that it had, and still has, the intention to publish the requested IA, even if the actual publication date had not been determined. He notes that public assurances have been given to that effect.
30. The Commissioner has next considered whether, in all the circumstances, it is reasonable to withhold the information from disclosure until its publication at some time in the future.
31. In the Commissioner's view, the closer to the date of publication, the more reasonable it is likely to be for the public authority to withhold the information until publication has taken place.
32. The Commissioner has again referred to his guidance, where he accepts that there is some overlap between the factors to consider when deciding what is reasonable, and those which are relevant to the application of the public interest test.
33. In that respect, he accepts that the Home Office considers its decision to withhold the information is in line with its accepted publication practices. It told the Commissioner, albeit in relation to the public interest test, that it is in the public interest to ensure that the publication of official information is a properly planned and managed process.
34. The Commissioner recognises that the Home Office is mindful of the need to protect its ability to use staff resources in a way that avoids undermining reasonable publication timetables, as well as responding to any scrutiny including media interest, in a properly contextualised, orderly, and co-ordinated manner.
35. In considering whether it is reasonable to withhold the requested information from disclosure until publication at some future date, the Commissioner has taken into account the public assurances that this will happen, including that given on 14 January 2022. The Commissioner considers that this has set an expectation for publication, and also notes that information of this type is routinely published.
36. In reaching his decision in this matter, the Commissioner has taken into account that the Home Office described the withheld information as 'the final document'. He is also mindful that, while the Home Office told him that Ministers have made a commitment to publish the IA, and will "make a decision on a final publication date", it has not provided any indication of when, or in what circumstances, this decision to publish will be made.
37. In the circumstances of this case, the Commissioner does not consider it reasonable to ask the public to wait.

38. It follows that he does not find the exemption engaged.

Public interest test

39. Section 22 of FOIA is a qualified exemption. However, as the exemption is not engaged, the Commissioner has not gone on to consider the public interest test.

Section 35 formulation of government policy

40. 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”.

41. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

42. 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.

43. 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.

44. He considers that the term ‘development’ of policy includes the process of reviewing, improving or adjusting existing policy.

45. 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.

46. 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.

47. In relation to the requested forecasting information, the Home Office told the complainant that this information relates to an ongoing area of live policy development.

48. In its submission to the Commissioner, the Home Office explained that, while measures within the NABA came into force on 28 June 2022, there are still elements of policy development ongoing. It confirmed that information that it considers to be relevant to the request was obtained to support design work and policy options to ministers.
49. Having considered the withheld information, and mindful of the purpose of the exemption, the Commissioner is satisfied that the exemption is engaged.

Public interest test

50. 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

51. The complainant argued that there is a significant public interest in disclosure in this case. He made reference to the public interests in transparency, good decision-making by public bodies and securing the best use of public resources.
52. The Home Office acknowledged that there is a clear public interest in transparency and an understanding of the policy to which it relates. In its submission to the Commissioner it argued that disclosure may serve to widen the base of stakeholder and public engagement which may, in turn, assist in the development and scrutiny of policy formulation.

Public interest arguments in favour of maintaining the exemption

53. Arguing in favour of maintaining the exemption, the Home Office told the Commissioner that, by disclosing the information, the Home Office would not be provided with a 'safe space' in which to allow the development of government policy.
54. It argued that it is not in the public interest to disclose information which may be subject to change and is superficial until finalised.
55. Furthermore, it argued that prejudicing its ability to provide free and frank advice by requiring ad-hoc disclosure of information under FOIA would be detrimental to the policy formulation process.
56. It told the Commissioner that release of this information "at this stage" would undermine the integrity of the policy-making process and result in

less robust, well-considered or effective policies. It argued that this would not be in the public interest.

Balance of the public interest

57. The Commissioner recognises the general public interest in transparency, openness and accountability.
58. He also 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.
59. In this case, the Commissioner considers that there is a clear public interest in the disclosure of information which can inform public debate relating to asylum claims.
60. However, he has also taken into account the Home Office's reference to the policy options under consideration being subject to ongoing review.
61. He gives weight to the argument that disclosing the information at the time of the request would have been likely to have had a significant impact. The public interest in the Home Office being able to review and develop its policy in relation to asylum related matters, without significant disruption, is the overwhelming factor in the circumstances of this case.
62. Having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at the time of the request was of sufficient significance for him to conclude that maintaining the exemption outweighed the public interest in disclosure.

Procedural matters

Section 10 time for compliance

63. Section 10 of FOIA sets out the timeframe within which a public authority must respond to an FOIA request. Authorities must respond to requests promptly, and by the twentieth working day following the date of receipt of the request.
64. From the evidence provided to the Commissioner in this case, it is clear that the Home Office did not deal with the request for information in accordance with FOIA. The Commissioner finds that the Home Office has breached section 10(1) by failing to respond to the request within 20 working days.

Right of appeal

65. 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

66. 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.

67. 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

**Laura Tomkinson
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