

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 June 2024

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

Decision (including any steps ordered)

1. The complainant made a request for information relating to the document titled "Sovereign Borders: International Asylum Comparisons Report". The Home Office refused to provide the information citing sections 21(1) of FOIA for Section 1 of the report and section 35(1)(a) and 36(2)(b)(i) and (ii) of FOIA for the remaining sections of the report.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(a) of FOIA in respect of the withheld information. The Commissioner has also considered the Home Office's delay in providing a response and has found that the Home Office failed to complete its deliberations on the balance of the public interest within a reasonable time and has therefore breached section 17(3) of FOIA.
3. The Commissioner does not require further steps.

Request and response

4. On 13 February 2023, the complainant wrote to the Home Office and requested information in the following terms:

"...a complete copy of the Home Office document entitled: "Sovereign Borders: International Asylum Comparisons Report."

For clarification, this document was produced by Home Office Insight and Analysis and dates from 2020. Section 1, entitled "Drivers and impact on asylum migration journeys" has already been released under FOI. What I am requesting is a copy of the complete report, or 'evidence pack,' which I understand to consist of an executive summary and 4 embedded sections.

I would also be grateful if you could confirm whether or not this report has been updated since 2020 with additional information; in which case I would like to request copies of both the original report and the updated version."

5. The Home Office responded on 9 August 2023 after multiple public interest test extensions stating that it did hold information within scope of the request. It stated that section 1 of the Sovereign Borders: International Asylum Comparisons report is exempt under section 21 of the FOIA as it is already reasonably accessible. It stated that the remaining sections of the report are being withheld under section 35(1)(a) and 36(2)(b)(i) and (ii) of the FOIA.
6. Following an internal review the Home Office wrote to the complainant on 2 October 2023 maintaining its original position.

Scope of the case

7. The complainant contacted the Commissioner on 7 November 2023 to complain about the Home Office's refusal of the remaining parts of the report under section 35(1)(a) and section 36(2)(b)(i) and (ii). The complainant did not dispute the application of section 21 to the publicly accessible report and so this is outside the scope of this complaint.
8. The Commissioner considers that the scope of his investigation is to decide whether the Home Office correctly engaged section 35(1)(a) and 36(2)(b)(ii) and (ii) of the FOIA to the remaining parts.

Reasons for decision

Section 35 – formulation or development of government policy

9. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to:

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

10. 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.
11. 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.
12. 'Development' may go beyond this stage to the process involved in improving or altering existing policy, such as piloting, monitoring, reviewing, analysing or recording the effect of existing policy.
13. Whether information is related 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 content of the information in question and its context.
14. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy;
 - the final decision will be made by Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome of change in the real world;
 - the consequences of the decision will be wide-ranging.
15. The Commissioner's guidance on section 35(1)(a)¹ explains that in some cases the government announces a high-level policy, or passes a 'framework' bill into law, but leaves the finer details of a policy still to be worked out. The high-level policy objective has been finalised, but detailed policy options are still being assessed and debated. Later information about the formulation of the detailed policy will still engage the exemption. The exemption is not limited to information that contains policy options, advice or decisions.
16. Pre-existing information about the history or factual background of a policy issue may also be covered.

¹ [Section 35 - Government policy | ICO](#)

Home Office's arguments

17. The Home Office explained that the withheld information relates to live policy development for both the Nationality and Borders Act (NABA) and the Illegal Migration Act. It also explained that the Illegal Migration Act (IMA) received Royal Assent on 20 July 2023, after the date of the complainant's request.
18. The Home Office explained that the analytical report relates to drivers and impacts on asylum migration journeys and includes contextual information comparing different European countries' asylum seekers processes and how they relate to the UK system. It stated that the Home Office have used these packs to aid discussion with Ministers prior and in the lead up to the NABA and IMA. It also explained that the evidence packs are the most up to date and are feeding into Ministerial discussion on this topic and the packs are currently in the process of being refreshed.
19. The Commissioner asked the Home Office to confirm why policy development is still live and ongoing in relation to the NABA and IMA and how the Sovereign Borders: International Asylum Comparisons Report is being used to develop such policy/policies.
20. The Home Office responded stating that it is its view that the Sovereign Borders International Asylum Comparisons Report remains part of the wider monitoring and insights process which is supporting the early stages of policy implementation. It did explain that not all of the IMA and NABA policies have been implemented and the process is ongoing.
21. The Home Office also explained that there is evidence available in the public domain relating to the request that the complainant can access, including Section 1 of the report which has been released.

The Commissioner's position

22. Having regard to the above explanation from the Home Office, and having considered the withheld information, the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged. This is because the withheld information relates to live and ongoing policy development for both the NABA and IMA.
23. The Commissioner will now consider the public interest arguments.

Public interest in disclosure of the information

24. The Home Office recognised that there is a general public interest in openness in relation to information pertaining to policy development, as this provides greater transparency on the workings of Government and

how important policy decisions are made. It agreed that this can help to inform public debate and to increase public confidence in the Government.

25. The complainant argued that ministers have made a number of claims around the need for, and effectiveness of 'deterrence' policies while promoting their policies on migration and asylum and there is a clear public interest in making the evidence base relating to those claims public and that the Sovereign Borders report forms part of that evidence base.
26. He also argued that when ministers are implementing radical policies involving significant departures from previous practices and international law, the very least the public can expect is to have the evidence behind those policies made public.
27. The complainant also argued that it is not reasonable to insist that exemptions around information relating to the formulation and development of government policy can continue to be applied after the policy has been developed and announced, and the relevant legislation passed by Parliament. He argued that this risks creating a situation in which the Government could argue that vast swathes of information could never be released, as they may have related to policy development at some point in the past.

Public interest in maintaining the exemption

28. The Home Office argued that while parts of the report in question have already been released, that does not necessarily determine the public interest factors in relation to the parts of the document that have not been disclosed.
29. The Home Office argued that disclosure of evidence collected and assimilated by the department, in an area where the department has recently amended policy would detract from the maintenance of a 'safe space' for public authorities to develop ideas, debate issues and reach decisions away from external interference and distractions.
30. It explained that migration and asylum remain live issues even after a given bill is passed and the government needs a safe space after a decision is made to properly promote, explain and defend its key points. It stated that this is particularly pertinent for the IMA, which only received Royal Assent on 20 July 2023 and disclosure of discussions held during the development of the policies in question would be likely to inhibit free and frank discussions in the future, and that the loss of frankness and candour could damage the quality of advice and lead to poorer decision making.

31. The Home Office argued that whilst there is a public interest in transparency in government and the wide public interest in discussion on migration and asylum matters, the information continues to relate to issues that remain live and under development. It explained that it is important that officials and ministers have a safe space to develop and refine policy to ensure it is robust and effective.

Balance of the public interest

32. The Commissioner considers that the need for a 'safe space' to debate policy and reach decisions without external comment and distraction is a valid argument. It has been generally accepted by both the Commissioner and First-tier Tribunal that significant weight should be given to maintaining the section 35 exemption where a valid need for safe space is identified.
33. The Commissioner's guidance states that the timing of the request is an important factor. This was confirmed by the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008² which states:
- "This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public."
34. As the request was made before the IMA received Royal Assent on 20 July 2023, the Commissioner accepts the Home Office's argument that disclosure of information held relating to and during the development and implement of the policies in question could damage the quality of advice and lead to poorer decision making.
35. The Commissioner recognises that the topic of migration and asylum is a controversial issue as well as highly sensitive and emotive, and as the information continues to relate to issues that remained 'live' and under development at the time of the request, disclosure could detract from the maintenance of a 'safe space' for public authorities to develop ideas, debate issues and reach decisions away from external interference and distractions.
36. The Commissioner also recognises that there is a public interest in disclosure of information that would improve the public understanding of policy surrounding migration and asylum as well as how it is being developed. However, the Commissioner accepts that it is important that

² [Microsoft Word - Document in Microsoft Internet Explorer \(tribunals.gov.uk\)](#)

officials and ministers have a safe space to develop and refine policy to ensure it is robust and effective.

37. The Commissioner is also mindful that the general public interest in transparency has been met to an adequate degree through the Home Office publishing Section 1 of the Sovereign Borders: International Asylum Comparisons Report, as well as a summary of some of the material in the undisclosed report in the Economic Impact Assessment for the IMA³.
38. In this case, as the policies in question were 'live' at the time of the request, the Commissioner accepts that the greater public interest lies in protecting the 'safe space' in order to protect the integrity of the policy-making process.
39. As the Commissioner has decided that section 35(1)(a) was appropriately cited and the public interest favours non-disclosure, he has not gone on to consider section 36(2)(b)(i) and (ii) of FOIA.

Procedural matters

40. Under section 17(3) of FOIA a public authority can, where it is citing a qualified exemption, have a 'reasonable' extension of time to consider the balance of the public interest.
41. However, where a qualified exemption is being considered, under section 17(3) a public authority can have a 'reasonable' extension of time to consider whether the balance of the public interest favours maintaining the exemption or disclosing the information. While FOIA does not define what might constitute a 'reasonable' extension of time, the Commissioner considers that a public authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days.
42. The Commissioner finds that the Home Office failed to comply with section 17(3) in this case as it failed to provide the complainant with the outcome of its public interest consideration within a reasonable time.

³ [Impact Assessment \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Robyn Seery
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF