

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 June 2024

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

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of a report by an external consultant, reviewing the effectiveness of working practices in the Home Office. The Home Office refused to disclose the information, citing sections 23(1) (security bodies), 36(2)(b)(i) and (ii) (prejudice to the effective conduct of public affairs) and 40(2) (personal information) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to apply section 36(2)(b)(i) and (ii) to refuse the request.
3. The Commissioner does not require further steps.

#### Request and response

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4. On 21 August 2023, the complainant wrote to the Home Office and requested information in the following terms:  
  
"Please provide a copy of the report completed by [name redacted] into Home Office 'structures and systems' as referenced in the below The Sunday Times article.  
  
[link redacted]."

5. The Home Office responded on 27 September 2023. It confirmed that it held the requested information, and said it was exempt from disclosure under sections 36(2)(b)(i) and (ii) of FOIA.
6. The complainant requested an internal review on 2 October 2023. The Home Office provided the internal review on 20 November 2023. It maintained the application of the cited exemptions.

## Scope of the case

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7. The complainant contacted the Commissioner on 20 November 2023 to complain about the way his request for information had been handled.
8. During the Commissioner's investigation, the Home Office revised its position slightly, introducing sections 23(1) and 40(2) of FOIA, in addition to the exemptions already cited. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption at this late stage and the Commissioner must consider any such new claims.
9. The complainant disagrees with the application of the additional exemptions, arguing:

"Section 23 material is only likely to constitute a tiny fraction of the report, if any at all. Personal information of senior officials would not be exempt, as they have no reasonable expectation of privacy.

The rest of the report should be disclosed in redacted form, as it won't be subject to either exemption."
10. The analysis below considers the exemptions cited by the Home Office to withhold the report referred to in the request. The Commissioner has viewed the withheld information.

## Reasons for decision

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### Section 36 - Prejudice to the effective conduct of public affairs

11. The Home Office applied section 36(2)(b)(i) (inhibition to the free and frank provision of advice) and section 36(2)(b)(ii) (inhibition to the exchange of views for the purposes of deliberation) to withhold the report in its entirety.

12. The Commissioner's guidance on section 36<sup>1</sup> explains that information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure could inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation. The reason for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision-making.
13. These exemptions are concerned with protecting the processes that may be harmed by the disclosure of the information. The issue to be considered is, therefore, whether disclosure might, in future, inhibit the processes of providing advice and exchanging views.

14. The Home Office told the Commissioner:

"It is our view that the review in its entirety is effectively 'advice' received by the Home Office (Home Secretary) from an external source ([name redacted]). The advice includes recommendations for further consideration by the Home Secretary...The review also contains passages which we deem as free and frank exchange of views...These free and frank exchanges form part of the deliberation process undertaken by the review author...

It is our view that disclosure of the review would be likely to inhibit the free and frank provision of advice thereby impacting the quality and ability of, in this case, an independent consultant, to engage in the provision of advice during what might be considered a 'safe space' (as per the terms of reference of the review). Officials would be less inclined to provide advice if there was a risk that the advice provided (some as a result of free and frank exchange of views) be later disclosed as a result of an information request. To be effective, advice (and feedback gained through consultation which leads to deliberation which informs advice) needs to be free and frank on the subject in question. Releasing such information would be likely to inhibit officials' willingness for such frankness."

15. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a 'qualified person'. In this case, the then Home Secretary gave the opinion that the exemptions were engaged, prior to

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

the response being sent to the complainant. The Commissioner is satisfied that the Home Secretary is authorised as the qualified person under section 36(5) of FOIA.

16. The submission that was put to the qualified person summarised the reasons for applying sections 36(2)(b)(i) and (ii) and they had access to the withheld information. The Commissioner is satisfied that the submission included a clear overview of the request and relevant arguments for, and against, the application of the exemptions. He finds that it was reasonable for the qualified person to reach the view from the submission that there was a need to protect the confidentiality of free and frank discussions and deliberations between officials and those they consult with for advice. He is further satisfied that the qualified person's opinion - that inhibition 'would be likely to' occur through disclosure of the withheld information - was reasonable.
17. The Commissioner is therefore satisfied that sections 36(2)(b)(i) and (ii) of FOIA are engaged in this case.

### **Public interest test**

18. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although sections 36(2)(b)(i) and (ii) are engaged, the withheld information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

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

19. The complainant felt that the 'chilling effect' arguments offered by the Home Office were not sufficiently compelling to overcome the public interest in disclosing the information, given its subject matter. In his complaint to the Commissioner, he argued:

"Firstly, a blanket exemption is not permitted under the act, and it is highly unlikely that every line of this report is exempt. As such, the department must review the report again and release information in at least redacted form.

Secondly, this document reportedly contains significant shortcomings with how the Home Office is operating. If these have been identified, but have yet to be addressed in full, there is a very strong public interest in transparency to ensure accountability for the department in the use of taxpayer money, and providing the service expected by the public.

In its public interest balance, the department fails to mention anything beyond a generic reference to the public interest in

transparency, suggesting it has not properly considered public interest factors.

Thirdly, civil servants are highly trained, professional officials, expected to give robust advice to ministers in challenging circumstances. They are not snowflakes. In this case, junior officials who may have had input can also expect privacy around their identities under section 40 further limiting any potential harm to the provision of free and frank advice.

Section 36 is a qualified exemption, and FOI disclosures are often made when it could apply. Civil servants must expect their views will sometimes be disclosed, and act in the knowledge that FOI exists.

The report was authored by [name redacted], an outspoken newspaper columnist and former advisor to the department, and given his public-facing role he is highly unlikely to be prejudiced in giving his views to the department in future if this report was disclosed.

It is therefore very hard to see how any measurable harm would come from disclosure. The department has made highly generic arguments against disclosure, providing no specific argument as to why disclosure of this record could cause any significant harm to the public interest."

20. The Home Office said:

"We recognise that there is a general public interest in openness and transparency in government, which may serve to increase public trust. The Home Office is a great office of state. Its responsibilities – to control immigration, fight crime, and protect the public from terrorism and threats from hostile states are among the most serious in government. The powers granted to the Department are potentially invasive and often sensitive and controversial, so it is accepted that there is a public interest in matters related to the effectiveness of the working of the Department."

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

21. The Home Office said that disclosing recent advice, views and deliberation would be likely to inhibit such exchanges in the future. This would have a limiting and negative effect on the quality, honesty and comprehensiveness of discussions, advice and decision-making. It said:

"...disclosure of the review would show the advice provided to the independent consultant on the effectiveness of the working practices

of the Home Office. This would be likely to prejudice the free and frank provision of advice because officials would be less inclined to express themselves openly, honesty [sic] and completely when providing advice, if there was a risk that this advice (or likewise, their free and frank discussions which fed into the deliberations which in turn led to the advice) would be disclosed as a result of an information request. If officials were reticent to provide advice, and/or feedback was not free and frank, this would ultimately impair the quality of decision-making in relation to working practices within the Home Office, which would not be in the wider public interest. In short, disclosure would be likely to undermine the safe space required for officials to put forward their candid views and recommendations (leading to advice), on working practices within the Home Office.

...due to the magnitude of its responsibilities, it is imperative that the Home Office needs to be functioning as effectively as possible. It can only strive to do so, if ineffective or poor working practices are challenged in a safe space, such as this review by [name redacted]. If officials are reluctant to provide candid advice or exchange views for fear of disclosure, the effectiveness of the Home Office is diluted. Having an ineffective Home Office is clearly not in the wider public interest, and therefore it is our view that the overall balance of the public interest lies in maintaining the exemption.”

22. The Home Office also argued that it needed a safe space in which to consider the content and recommendations of the report, free from the external distraction that would likely follow if the report was to be disclosed.

### **The balance of the public interest test**

23. When balancing the public interest, the Commissioner will take account of matters as they stood at the time the request was received (in this case, 21 August 2023).
24. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. The disclosure of official information assists the public in understanding how public authorities make their decisions and carry out their functions, and this, in turn, fosters trust in them. Disclosure in this case would allow the public to scrutinise an external consultant's frank observations on the Home Office's working practices, and his recommendations as to how areas of weakness and underperformance he had identified, could be addressed. The question to be considered is whether the public interest is better served by permitting such public scrutiny, or by protecting the integrity of high level advisory and decision-making processes.

25. When considering the application of section 36(2)(b), where the Commissioner finds that the qualified person's opinion was reasonable he will consider the weight of that opinion when applying the public interest test. In this case, the Commissioner considers that the opinion of the Home Secretary that inhibition would be likely to occur, carries considerable weight when balancing the public interest. The Home Secretary had the requisite knowledge of departmental decision-making processes, of the information in scope (having commissioned the report) and the likely consequences of any disclosure, to make that assessment.
26. The Commissioner has also considered the timing of the request. The complainant is correct that civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. However, safe space arguments cannot be dismissed out of hand and may be particularly relevant if the issue underpinning a request is 'live'. In this case, the request was made five months after the completion of the report and its observations and recommendations were still being considered. The Home Office maintained it needed a safe space in which to consider, debate and reach decisions about the report, away from external interference and distraction.
27. The Commissioner considers that, given the remit agreed with the report's author at the outset, its contents would be likely to attract significant public and media commentary, to an extent which would be disruptive to the Home Office's ability to properly consider it. Accordingly, the Commissioner accepts that, at the time of the request, there was a genuine need for a safe space in which officials and Ministers could consider the report's recommendations, free from external comment and input.
28. The Commissioner also accepts that the disclosure of candid observations and recommendations, obtained as a result of free and frank discussions the author has had with particular stakeholders, would be likely to have a knock-on chilling effect on the willingness of stakeholders to engage openly and honestly in future. As a result, the quality of advice received by the Home Office would likely be diminished and the quality of its decision-making, impaired.
29. Finally, the Commissioner has considered the severity and extent of the envisioned inhibition. In carrying out this exercise, appropriate weight must be afforded to the public interest in avoiding harm to deliberation and decision-making processes. There is a clear public interest in Home Office officials having the freedom and space to thoroughly explore all options when considering recommendations on important matters.

30. When reaching a decision in this case, the Commissioner has taken all the above into account. He is particularly mindful of the purpose of the exemption, as set out in paragraph 12, and of the Home Office's comments that the magnitude of its responsibilities require that it function as effectively as possible. On balance, the Commissioner considers the public interest in protecting good decision-making by the Home Office to be more compelling than permitting public scrutiny of this report. While he acknowledges that the general public interest in openness and transparency would be served if the report was disclosed, he finds the public interest in protecting the Home Office's access to unfiltered and frank advice, and the integrity of the decision-making process, to be stronger.
31. Therefore, the Commissioner's decision is that the Home Office was entitled to apply section 36(2)(b)(i) and (ii) of FOIA to refuse the request.
32. The Commissioner has considered the complainant's suggestion that it should be possible to disclose a redacted version of the report. However, he does not consider this viable. Despite its broad scope, the report is relatively brief and is composed of observations and recommendations which the Commissioner is satisfied attract the exemptions at sections 36(2)(b)(i) and (ii). There is no other non-exempt information which could be disclosed.
33. Having decided that sections 36(2)(b)(i) and (ii) were correctly applied, it is not necessary for the Commissioner to consider the Home Office's application of other exemptions to withhold the same information.



## **Right of appeal**

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34. 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)

35. 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.
36. 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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