

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 May 2024

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1p 4DF

Decision (including any steps ordered)

1. The complainant requested information relating to the monitoring of immigration legal practitioners, as referenced by the then Minister of State for Immigration.
2. The Home Office confirmed it holds some information within the scope of the request, but refused to provide it, citing sections 36(2)(b)(i)(ii) and 36(2)(c) (prejudice to effective conduct of public affairs) and 31(1)(a) (law enforcement) of FOIA.
3. The Commissioner's decision is that the Home Office was entitled to rely on section 36(2)(c) to withhold the requested information.
4. The Commissioner requires no steps to be taken as a result of this decision.

Request and response

5. On 7 May 2023, the complainant wrote to the Home Office and requested information in the following terms:

"On 20 February 2023, your minister told Parliament that human rights lawyers "abuse and exploit our laws", and that the Home Office is "monitoring the activities ... of a small number of legal practitioners".

Under the Freedom of Information Act, please could you disclose the following information:

1. Any guidance, policy, instruction or other documentation which sets out the purpose, function and parameters of this "monitoring".
 2. Any data protection impact assessment, or other documentation regarding GDPR compliance, relating to this "monitoring".
 3. The number of legal practitioners who have been subject to this "monitoring".
 4. The outcome of such "monitoring" (for example, have any lawyers been referred to their professional regulators?)".
6. Having extended the time for responding to consider the public interest test (PIT), the Home Office provided its substantive response on 5 July 2023. It denied holding information in part (2) of the request but confirmed it holds the remaining requested information. However, it refused to provide it, citing sections 36(2)(b)(i), (ii) and 36(2)(c) (prejudice to effective conduct of public affairs) of FOIA as its basis for doing so.
7. Following an internal review, the Home Office wrote to the complainant on 25 August 2023 maintaining its position.

Scope of the case

8. The complainant disputes the Home Office's application of section 36 to the information in scope of parts (1), (3) and (4) of the request as they consider that the requested information relates to existing policy and process rather than advice or discussions. However, in the event that the exemption is engaged, they consider that the public interest lies in favour of disclosure.
9. They are also dissatisfied with the time taken to carry out the internal review.
10. In its submission to the Commissioner, the Home Office clarified that it considers sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) apply to the withheld information in its entirety. It also advised that, having revisited its handling of the request, it additionally wished to rely on section 31(1)(a) (law enforcement) of FOIA.

11. The Home Office also referenced a recent ICO Decision Notice (IC-243039-L3P6¹), in which the ICO found that section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) were correctly engaged. The Home Office told the Commissioner:

“We will be relying on the same arguments in this case, as the nature of the information is similar to the information requested for this current request”.

12. The analysis below considers the Home Office’s application of section 36(2) to the information in scope of parts (1), (3) and (4) of the request. If the Commissioner finds that section 36 does not apply, he will go on to consider the Home Office’s application of section 31.
13. The Commissioner has addressed the timeliness of the internal review in ‘Other matters’ at the end of this notice.

Reasons for decision

Section 36 – Prejudice to the effect conduct of public affairs

14. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
15. The Home Office has applied sections 36(2)(b)(i) and (ii) and 36(2)(c) to withhold the requested information in its entirety. It has relied on the lower threshold of prejudice ‘would be likely to’ effect these sections of FOIA.
16. In correspondence with the complainant, the Home Office referred to the requested information as relating to ‘ongoing matters’. Similarly, in its submission to the Commissioner, the Home Office argued that releasing the requested information would release details regarding a current Home Office operation. It told the Commissioner that disclosure of the information “would have a detrimental effect on the operation in question and hence the effective conduct of public affairs”.
17. It added:

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4027286/ic-243039-l3p6.pdf>

"The requestor has asked for sight of all guidance policy and documentation which sets out the purpose, function and parameters of this "monitoring", the number of legal practitioners involved and the outcome of the monitoring. We consider that this information would enable the legal practitioners in question, or those that they are criminally engaged with, to identify themselves as being of interest to the Home Office".

18. It went on to explain that releasing information about the nature of the 'monitoring' and its reach:

"... could enable legal practitioners to know how they are being monitored, and provide information on its extent, which would affect the ability of the Home Office to conduct an effective operation and therefore prejudice the conduct of public affairs".

19. With regard to its application of section 36, the Home Office considered that the nature of the prejudice in this case is such that it does not fit neatly into any other prejudice-based exemption in FOIA, hence the use of section 36(2)(c).

Is the exemption engaged?

20. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that Robert Jenrick, the then Immigration Minister, is authorised as the qualified person under section 36(5) of FOIA and that he gave the opinion that the exemption was engaged.
21. While he notes that Mr Jenrick was also the Minister quoted in the request, the Commissioner considers that the two matters can be legitimately separated: the qualified person is being asked to give an opinion as to whether the requested information can be disclosed which does not affect anything that he said in the quoted statement that was made publicly.
22. The Commissioner has some concerns about how the Home Office evidenced, in its submission to him, the process by which the opinion was reached. However, in light of the subject matter of the request, based on the plain meaning of the word, the Commissioner nevertheless accepts that it was reasonable for the qualified person to consider that there was a need to protect the operation. He is also satisfied that the qualified person's opinion - that inhibition would be likely to occur through disclosure of the withheld information - is reasonable. He is therefore satisfied that the exemption was engaged correctly.

Public interest test

23. Arguing in favour of disclosure, the complainant commented that the subject matter was clearly of sufficient public interest for the Minister to raise it in Parliament.
24. They also recognised that while misconduct, or alleged misconduct, by legal practitioners is a very serious matter, the independence of the legal profession is vital to democracy and therefore there should be scrutiny of any surveillance. In that respect, they considered that the absence of a data protection impact assessment in relation to the monitoring of legal representatives is a further factor in favour of disclosure.
25. Recognising the general public interest in transparency and openness in Government, the Home Office acknowledged that disclosure of any information relating to the monitoring of legal representatives could improve public understanding of the policies and provide accountability in terms of the quality of policy decision-making and the spending of public money.
26. However, in favour of maintaining the exemption, the Home Office argued that the public interest does not lie in revealing information about a Home Office operation which, in doing so, would jeopardise the public affairs of the Home Office and the operation itself.

Balance of the public interest

27. The Commissioner considers the public interest in protecting the functioning of live operations to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served, to some extent, if the information was disclosed, on balance, he finds the public interest in protecting the Home Office's ability to conduct an operation that looks to eradicate alleged misconduct to be the considerably stronger argument.
28. Consequently, he is satisfied that, in this case the public interest favours maintaining the exemption. It follows that his decision is that the Home Office was entitled to rely on section 36(2)(c) of FOIA to refuse the request.
29. In light of this decision, he has not gone on to consider the Home Office's application of sections 36(2)(b)(i) and (ii) and 31(1)(a) which the Home Office also cited in respect of all of the withheld information.

Other matters

30. 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.
31. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to the timescales he has set out in his guidance. This concern will be logged for monitoring purposes.

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Carolyn Howes
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