

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 July 2024

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

#### **Decision (including any steps ordered)**

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1. The complainant made a request for information relating to a Home Office tweet published on 8 September 2023. The Home Office refused to disclose the information, citing section 36(2)(b)(i) (prejudice to the effective conduct of public affairs) and section 40(2) (personal information).
2. The Commissioner's decision is that the Home Office was entitled to apply section 36(2)(b)(i) to refuse the request.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 10 September 2023, the complainant wrote to the Home Office and requested information in the following terms:

"On 8 September, 2023 you published a Tweet (<https://twitter.com/ukhomeoffice/status/1700186887279841567>) on the jailing of "Two members of a mob that attacked French police before illegally crossing to the UK".

I am requesting:

1) all recorded internal communications regarding the preparation of the above Tweet and Press Release, including the drafting of the texts used for each,

2) all recorded internal communications regarding the preparation of video used in the Tweet.

To be clear, I'm interested in correspondence both amongst Home Office officials as well as between them and the Minister for Immigration who is a named author of the press release."

5. The Home Office responded on 13 October 2023 and withheld all of the information under section 36(2)(b)(i) of FOIA
6. The Home Office conducted an internal review on 1 November 2023, maintaining its original position and also citing section 40(2) for some of the withheld information.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 7 November 2023 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of this case to be to determine if the Home Office was entitled to refuse the request under section 36(2)(b)(i) and section 40(2) of FOIA.

### **Reasons for decision**

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#### **Section 36 – prejudice to the effective conduct of public affairs**

9. Section 36(2)(b)(i) of FOIA states:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

(b) would, or would be likely to inhibit-

(i) the free and frank provision of advice"

10. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person ('QP') for that public authority. The QP's opinion must also be a 'reasonable' opinion, and if the Commissioner decides that the

opinion is an unreasonable one, he may find that section 36 exemption has been applied inappropriately.

11. It's not necessary for the Commissioner to agree with the opinion of the QP or for it to be the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that it's an opinion that a reasonable person could hold.
12. The public authority has confirmed that its QP is Minister Jenrick. His opinion was sought on 12 October 2023 and his Private Office indicated on the same date that he agreed with the recommendation that section 36(2)(b)(i) is engaged.
13. The Home Office has applied section 36(2)(b)(i) to withhold the requested information in its entirety. It has relied on the lower threshold of prejudice 'would be likely to' effect this section of FOIA.
14. The Home Office considered section 36(2)(b)(i) is engaged as the email chains show discussions with officials and external parties on the preparation of the video, tweet and press notice relating to the jailing of two individuals who attacked French police before illegally crossing to the UK.
15. It considered that the disclosure of the withheld information would be likely to cause the prejudice described, by discouraging internal conversations and the provision of advice between officials.
16. It argued that releasing the requested information would therefore be very likely to hinder the free and frank provision of advice and deliberation in future, by impacting the quality and ability of officials to engage in reasonable deliberation and provision of advice during the preparation of press releases and tweets for release to the media.
17. The Commissioner has reviewed the withheld information and the submissions sent to the qualified person in this case. 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 discussions and deliberations between officials.
18. The Commissioner refers to his own guidance that notes the exemption at section 36(2)(b)(i) is about the processes that may be inhibited, rather than what is in the information.<sup>1</sup>

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<sup>1</sup> [Section 36 - Prejudice to the effective conduct of public affairs | ICO](#)

19. As stated in the Commissioner's guidance, the issue is whether disclosure would inhibit the processes of providing advice or exchanging views and to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.
20. The Commissioner is therefore satisfied that the qualified person's opinion - that inhibition would be likely to occur through disclosure of the withheld information - was reasonable. He is therefore satisfied that section 36(2)(b)(i) of FOIA was engaged correctly.

### **Public interest test**

21. 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) 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**

22. The Home Office recognised that there is an inherent public interest in transparency and accountability regarding decisions taken by Ministers, even in the case of a relatively minor issue such as the content of a Home Office public communication.
23. It also acknowledged a clear public interest in the work of government departments being transparent and open to scrutiny. It qualified this by suggesting that the public interest in disclosure of these emails is limited in view of their limited content and the fact that the tweet and the press release to which they relate are in the public domain.

### **Public interest in maintaining the exemption**

24. The Home Office argued that the email exchanges constitute relatively recent (at the time of the request) written advice about the content of Home Office public communications and that the communications themselves are already in the public domain. It stated that, however, it does not follow that there is a strong or indeed any public interest in disclosing the background discussions which led up to them as such discussions typically include advice, exchanges of views, ideas which are not followed up and revised and rejected drafts.
25. The Home Office stated that it considers that it has a reasonable expectation that such advice and discussions will take place away from public scrutiny and without an expectation that records of them are liable to disclosure relatively soon after they take place.

26. The Home Office explained that disclosure would be likely to inhibit the future free and frank provision of advice because it would mean that advice would be limited to information which the Home Office would be willing to place in the public domain immediately or shortly after creation. It explained that this would have a limiting and negative effect on the quality of internal and external discussion and decision-making in future and on the quality, honesty and comprehensiveness of advice to Ministers, which would not be in the public interest.
27. It referred to the ICO's guidance on section 36(2) that says Tribunals are generally sceptical of chilling effect arguments and that in *Davies v Information Commissioner and the Cabinet Office (GIA)* [2019] UKUT185 (AAC), 11 June 2019 the Upper Tribunal stated at paragraph 25 that:

"There is a substantial body of case law which establishes that assertions of a 'chilling effect' on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution."
28. The Home Office acknowledged that the reason for this caution is that FOIA has been in place for nearly twenty years and civil servants know it cannot be guaranteed that their advice will remain confidential. It explained that 'officials' are expected to be impartial and robust when giving advice, and not be easily deterred from expressing their views by the possibility of future disclosure.
29. Set against these arguments, it made the following points. First, it noted that while the Tribunal in the case cited above said that assertions of a chilling effect are to be treated with caution, but it did not say that they are necessarily to be dismissed; if that were so, then it would seem to follow that section 36(2)(b)(i) can have little or no application.
30. Secondly, the Home Office noted that the Commissioner's guidance states that the argument for non-disclosure is strongest when the issue is still 'live'. In this case, it argued that the email exchanges date from 4 to 8 September 2023 and the complainant's request was received on 10 September 2023. It stated that it understands that the operative date for consideration of the balance of the public interest is the date of the response, which in this case was 13 October 2023.
31. The Home Office argued that the emails were and still are relatively recent and although the particular incident to which they relate is no longer a live issue, illegal entry via Channel crossing and efforts on both sides of the Channel to prevent such crossings is still a live policy issue.

## **Balance of the public interest**

32. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most cases.
33. The Commissioner recognises that although the decision making was not still 'live' at the time of the request, the email exchanges from 4 to 8 September 2023 occurred only days before the Home Office received the complainant's request on 10 September 2023. In the Commissioner's view, the proximity of the request to the creation of the withheld information adds to the risk of a chilling effect.
34. In addition, the particular incident to which the withheld information and tweet relate to, although no longer a live issue, relates to illegal entry via the Channel crossing and the efforts on both sides of the Channel to prevent such crossings, which the Home Office has confirmed remains a live policy issue.
35. Whilst the Commissioner agrees civil servants cannot guarantee that their advice will remain confidential, the Commissioner has considered appropriate weight must be afforded to the public interest in avoiding harm to deliberation and decision-making processes. For the reasons already set out, there is a clear public interest in the Home Office's officials having the freedom and space to thoroughly explore all options when providing advice on sensitive matters, such as in this case.
36. Having considered the content of the withheld information, the Commissioner accepts that the disclosure of candid observations and recommendations, obtained as a result of free and frank discussions would be likely to have a knock-on chilling effect on the willingness of officials to engage openly and honestly in the future about these sensitive issues.
37. Talking all the above into account, the Commissioner considers the public interest in good decision-making by the Home Office to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the general public interest in openness and transparency would, to some extent, be served if the information was disclosed, on balance, he finds there is a clear public interest in Home Office officials having the freedom and space to thoroughly explore all options when considering recommendations on sensitive matters.

38. The Commissioner therefore concludes that the Home Office was entitled to apply section 36(2)(b)(i) of FOIA to refuse the request.
39. Having decided that section 36(2)(b)(i) was correctly applied, it has not been necessary for the Commissioner to consider the Home Office's application of section 40(2).

## Right of appeal

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40. 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)

41. 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.
42. 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**  
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