

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 February 2024

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

Decision (including any steps ordered)

1. The complainant requested from the Home Office, information concerning impact assessments for the Nationality and Borders Act 2022. The Home Office confirmed that some of the information requested is either already published or will be published online at a future date. It cited section 22(1) (information intended for future publication) of FOIA to the withheld information.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 22(1) of FOIA to withhold some of the information. Therefore, the Commissioner does not require the Home Office to take any further steps as a result of this decision.

Request and response

3. On 13 June 2023, the complainant wrote to the Home Office and requested information in the following terms:
 1. "Information on whether additional impact assessments, including an economic impact assessment, have been undertaken for the Nationality and Borders Act 2022, and when these were carried out.
 2. Where these impact assessments exist and the Home Office holds these documents, when they will be published.
 3. Copies of all outstanding impact assessments and similar documents including, but not limited to, an economic impact assessment and a child's rights impact assessment.
 4. Any final Equality Impact Assessment where it exists.
 5. If no additional impact assessments will be published, the reasons the Home Office has for this decision.

Where any part of my request cannot be provided, I am happy to receive information on the parts you are able to answer."

4. On 7 August 2023 the Home Office responded. It said 'impact assessments' is a broad term and therefore it interpreted the request as any such assessment completed during the passage of the Nationality and Borders Act (NABA) 2022 relating to economic, equality and children's rights impacts. The Home Office confirmed it holds the information requested, and that some of the information is either already published or will be published online at a future date.
5. The Home Office directed the complainant to a weblink¹ for information already published concerning some parts of the request (NABA and Child's Rights Impact Assessment). The remaining information, the Home Office withheld and cited section 22(1) (information intended for future publication) of FOIA.
6. On 7 September 2023 the complainant asked for an internal review.

¹ <https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment>

7. On 2 November 2023 the Home Office provided its review response and maintained its original position. It stated section 22(1) of FOI was engaged at the time of the original request.

Reasons for decision

8. This reasoning covers why the Home Office was entitled to rely on section 22(1) of FOIA to refuse to provide some of the requested information.

Section 22 – information intended for future publication

9. Section 22(1) of FOIA states that 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).
13. For the exemption in section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in future. This means that it must have a settled expectation that the information will be published at some future date. The exemption does not require a set publication date to be in place.
14. The Home Office confirmed it holds information concerning 'an Economic Impact Assessment undertaken during the passage of the NABA'. However, it decided to withhold this information at the time of the request as it is intended for future publication.
15. The Home Office informed the Commissioner that at the time of the request, there was a settled intention to publish the information requested (NABA IA). This information was published on 2 November 2023, within five months of the complainant's original FOI request. Therefore, the information requested by the complainant, the Home Office said "has now been published".

16. The Home Office stated that its position was section 22(1) of FOI was engaged, and it was always its intention to publish the Nationality and Borders Act Economic Impact Assessment (NABA IA). The Home Office highlighted the fact that the information was published within five months of the complainant's original FOI request.
17. The Home Office explained that its intention to publish the NABA IA at a future date, was reaffirmed by Home Office Ministers to Parliament. In determining the right time to publish the information, the Home Office said it was important for it "to consider the new legislation announced in December 2022 to tackle illegal migration (now the illegal Migration Act (IMA)). This required careful consideration of how the existing delivery of NABA provisions (for which the complainant's requests relates to) linked with this new legislation, and how to avoid any conflation or confusion of impacts by Parliamentarians or the public."
18. The Home Office considered it was reasonable to withhold the NABA IA because:

"the Government needed to ensure that publication of the now, largely historic NABA IA would inform rather than confuse the public and Parliamentarians in light of the newly announced legislation. Earlier publication of the NABA IA could have been taken out of context; or used as a comparator against the more recent IMA assessments. It would also have diverted resources which would be better spent explaining impacts of the IMA rather than explaining why assumptions under the NABA IA were historic and no longer relevant."
19. The Home Office set out its reasons why the timing and handling of the publication needed to be carefully sequenced and managed. It stated that it is important the Government is able to plan its publications to ensure overall cohesion of the Government's position, and avoid the risk of ambiguity and/or incorrect assertions being drawn through premature publication.
20. The Home Office further explained that the publication of the NABA IA needed to be properly sequenced in light of the IMA and other factors, in order to support the public's understanding.
21. The Home Office reiterated that it had always intended to publish the NABA IA. It said that this is a matter of public record, and set out in response to Parliamentary Questions; statements in Parliament; and in response to FOIs.

22. The Home Office also said it was "reasonable to withhold publication of the NABA IA until the IMA had passed through Parliament as otherwise there was a danger of (i) the public or Parliamentarians conflating the impacts of the NABA, described in the Economic Impact Assessment, with the impacts of the IMA; and/or (ii) Government resources being diverted from explaining the IMA into explaining the differences between the impacts in the NABA IA and the impacts of the IMA."
23. The Home Office said a precise date for publication of the NABA IA had not been determined when the complainant's request was received. The Department had been in the process of planning publication, which it was committed to delivering in due course. The Home Office stated that publication before 2 November 2023 in response to individual FOI requests, would have undermined the Home Office pre-planned publication procedure. It also said the Department's ability to use staff resources in a way to avoid undermining reasonable publication timetables, as well as responding to any scrutiny including media interest, in an orderly and co-ordinated manner which benefits the public.
24. The Commissioner is satisfied that the Home Office demonstrated a settled intention (at the time of the request) to publish the withheld information at a future date. As a set date for publication is not required to engage section 22 of FOI, the Commissioner finds it is reasonable for the Home Office to withhold the information until the intended publication, and to rely on this exemption.

Public interest test

25. As section 22 is a qualified exemption, the Commissioner will consider whether, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the information

26. The Home Office recognises that there is a general public interest in the disclosure of information to ensure departmental transparency and accountability. It said there is also a general public interest in providing information to enable the public to understand decisions which may affect them. There is a specific public interest, the Home Office explained, in enabling access to information about legislative changes and their impact. The Home Office confirmed that for this reason, there is an intention to publish this information.

27. The complainant's arguments for disclosure centres around the publication of the withheld information. He highlighted the fact that the 'economic impact assessment' was finally published on 2 November 2023. The complainant argued the information should have been published much earlier and that there are good reasons for this. He believes it should have been published while the Nationality and Borders Bill was passing through Parliament to enable and support scrutiny.
28. The complainant said "Openness is crucial, and especially so regarding the likely effects of legislation on people's lives, particularly vulnerable individuals – in this case those seeking asylum in the UK and those trafficked here, including many children. Without such assessments being made available during the time they are most required, the public, elected representatives and advocacy and human rights organisations are left without information to make an informed judgement on proposed and draft policy and legislation and cannot hold the government to account for the decisions and actions they take."
29. This led the complainant to question how the public can challenge a public authority, as he believes the Home Office has proposed "legislation without the necessary justification". The complainant further argued that it would be concerning if it became in a public authority's own interests to ensure they do not have such information in a publication-ready state for the public to view.

Public interest arguments in favour of maintaining the exemption

30. The Home Office argued it is in the public interest to ensure that the publication of official information is a properly planned and managed process. It said it must be able to plan its publication of information in a managed and cost-effective way, and to ensure the information intended for publication, meets the standards and requirements set for departmental publications. Therefore, the Home Office considers it would not be in the public interest for it to release this information, prior to meeting such standards.
31. The Home Office explained that release of information prior to planned publication, in response to individual FOI requests, "would undermine Home Office procedures and its ability to use staff resources in a way that avoids undermining reasonable publication timetables."
32. The Home Office further explained that had the information (NABA IA) been published prior to the IMA gaining Royal Assent, the Department risked compromising the proper management and planning of publication in the public's interest.

33. The Home Office said this would give rise to the risks of conflation and misunderstanding, which would not be in the public interest. The Home Office went on to say that due to the recent passage of the IMA and associated risks of conflation, the risk of compromising the Department's management of the matter in the public domain was not in the public interest, and earlier publication of the NABA IA in this context would not have served the function such publication would normally serve. Instead, publication would have been of relatively limited value and could present more risks for the public and Parliamentarians than benefits.

Balance of the public interest test

34. The Commissioner acknowledges the public interest in transparency and accountability. Also, in the public having access to information to enable them to understand decisions made by a public authority and how they may affect them, specifically, information about legislative changes and the impact it could have.
35. The Commissioner notes the complainant's arguments and concerns regarding information which he deems should be published earlier, and his reasons for believing this. However, the Commissioner considers there is a stronger public interest in the Home Office being able to publish the requested information in a controlled manner following the necessary procedures. Premature disclosure of the information would be likely to impact on its quality and raise issues which the Home Office would have to divert resources into countering.
36. The Commissioner is satisfied that when the request was made to the Home Office, there was an intention to publish the information requested, once it had met the standards and set requirements for departmental publications.

The Commissioner's conclusion

37. Having taken all the arguments into account, the Commissioner's decision is that the balance of the public interest favours maintaining the exemption. The Home Office was therefore entitled to rely on section 22(1) of FOIA to withhold the information requested.

Right of appeal

38. 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

39. 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.
40. 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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