

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 October 2017

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

Decision (including any steps ordered)

1. The complainant requested information relating to the Syrian Vulnerable Persons Resettlement (VPR) Scheme in relation to Guernsey, Jersey and the Isle of Man.
2. The Home Office confirmed that it held some relevant information but refused to disclose it citing sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) and 36(2)(c) (other prejudice to the effective conduct of public affairs) and section 40(2) (personal information) of the FOIA.
3. The Commissioner is satisfied that section 36(2)(c) of the FOIA is engaged and that the public interest in disclosure is outweighed by the public interest in maintaining the exemption. However, in failing to respond to the request within the statutory time limit the Home Office breached section 10(1) of the FOIA (time for compliance).
4. The Commissioner requires no steps to be taken as a result of this decision.

Background

5. By way of background to this request, the Home Office told the Commissioner:

"The Syrian Vulnerable Persons Resettlement (VPR) scheme was expanded in September 2015 to resettle 20,000 refugees up to

2020. ... On arrival, refugees are provided with twelve months of support, including accommodation. Participation in the scheme is voluntary for local authorities and devolved administrations and the success of the scheme is therefore critically dependent on the goodwill and offers of accommodation provided by local authorities".

Request and response

6. On 23 August 2016, the complainant wrote to the Home Office and requested information in the following terms:

"Could you please provide details of the approaches made by Guernsey, Jersey and the Isle of Man governments in respect of assisting with the Syrian refugee situation. Please provide copies of the correspondence between them and the UK government concerning this".

7. He sought an acknowledgment of his request on 15 September 2016.
8. The Home Office responded on 12 October 2016 stating that the request was being considered under section 36 of the FOIA and that it needed further time to consider the public interest test. It said that it aimed to respond by 9 November 2017.
9. The Home Office provided its substantive response on 8 November 2016. It confirmed that it held information within the scope of the request but refused to provide it citing section 36(2)(b) of the FOIA (prejudice to effective conduct of public affairs).
10. Following an internal review the Home Office wrote to the complainant on 25 January 2017 upholding that position.

Scope of the case

11. The complainant contacted the Commissioner on 3 February 2017 to complain about the way his request for information had been handled. He disputed that the public interest in the maintenance of the exemption outweighed the public interest in disclosure.
12. He also complained about the length of time the Home Office had taken to respond to his request. He told the Commissioner:

"It seems that excuses were made to delay responding and in the end there was effectively a nil answer response".

13. During the course of the Commissioner's investigation, the Home Office revisited its handling of the request as a result of which it clarified the amount of information it held within the scope of the request. It confirmed its application of section 36 of the FOIA to that information, citing sections 36(2)(b)(i) and (ii) and 36(2)(c). It also stated that it considered section 40(2) (personal information) of the FOIA applied to some of the withheld information.
14. Although the Commissioner understands from the complainant that some local authorities would appear to have complied with similar requests for information, this does not set an automatic precedent for disclosure under the FOIA. Each case must be considered on its merits.
15. The analysis below considers the Home Office's application of exemptions to the requested information. The Commissioner has also considered the timeliness of the Home Office's response.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

16. Section 36 can only be cited on the basis of the reasonable opinion of a specified qualified person that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur.
17. In this case, the Home Office has cited sections 36(2)(b)(i), (ii) and (c) in relation to the requested information. Section 36(2)(b)(i) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice. Section 36(2)(b)(ii) provides the same in relation to the exchange of views. Section 36(2)(c) provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a manner other than that specified elsewhere in section 36.
18. To find that any part of section 36(2) is engaged, the Commissioner must establish that a qualified person gave an opinion which found that the exemption applied and also that the opinion was reasonable.
19. This exemption is also qualified by the public interest, meaning that if the exemption is engaged, the information should nonetheless be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.

The qualified opinion

20. For government departments the qualified person is any Minister of the Crown. In this case, an opinion was sought from the Minister of State for

Immigration – the Rt Hon Robert Goodwill MP – on 20 October 2016.

The opinion on the application of section 36(2) was provided on 8 November 2016. The Commissioner is satisfied that Robert Goodwill, as a Minister of the Crown, is a qualified person for the purposes of section 36.

21. In determining whether the exemption is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
 - whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of, or involvement in, the issue.
22. In determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. The qualified person's opinion does not have to be the most reasonable opinion that could be held: it only has to be a reasonable opinion.
23. The Commissioner has seen the submission produced by officials at the Home Office upon which the opinion of the Qualified Person was based. This included a summary of the information to be withheld, an explanation of the section 36 exemption, a discussion of the harm arising from disclosure and a brief analysis of the public interest arguments both for and against the release of the information.
24. It was recommended that the qualified person "*agree to the use of section 36*".
25. The submission explained why the Home Office considered disclosure could be detrimental to the VPR scheme. For example, it argued that disclosing such information could lead the Crown Dependencies to be reluctant to engage with the UK Government in future.
26. As a prejudice-based exemption, section 36(2) of FOIA requires the qualified person to decide either that there 'would' be a prejudicial or inhibiting effect or that it 'would be likely' that the prejudicial or inhibiting effect would occur; 'would' imposing a stronger evidential burden than the lower threshold of 'would be likely'.

27. Having considered the submission, the Commissioner notes that it was the view of officials at the Home Office, and endorsed by the Qualified Person, that disclosure would be likely to inhibit the free and frank provision of advice or otherwise prejudice the effective conduct of public affairs should the requested information be released.
28. During the course of the Commissioner's investigation, the Home Office confirmed that the qualified person considered that sections 36(2)(b)(i) and (ii) as well as 36(2)(c) were engaged. It acknowledged that the submission to the qualified person "*could have made this clearer*".
29. In correspondence with the Commissioner, the Home Office stated that it considered that section 36(2)(c) "*is the primary limb*" in terms of its arguments for withholding the requested information.

Is the opinion reasonable?

30. The Commissioner has first considered whether the qualified person's opinion on section 36(2)(c) was reasonable.
31. The Commissioner's approach to section 36(2)(c) is that this should only be cited where none of the other exemptions in part II of the FOIA are relevant. That section 36(2)(c) uses the phrase 'otherwise prejudice' means that it relates to prejudice not covered by sections 36(2)(a) or (b).
32. In other words, information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b).
33. In this case, the submission put before the Qualified Person covered the exemptions in sections 36(2)(b)(i) and (ii) as well as 36(2)(c).
34. The Commissioner considered that the submission lacked clarity as to how the arguments the Qualified Person was asked to give an opinion on applied to each of those subsections of the exemption.
35. During the course of her investigation, the Commissioner asked the Home Office to clarify the nature of the prejudice in relation to section 36(2)(c).
36. In correspondence with the Commissioner, the Home Office explained that it considered that disclosure in this case would be likely to discourage other authorities from participating in the resettlement scheme.
37. In support of its view, the Home Office told the Commissioner that the development of the Syrian VPR is ongoing and the cooperation of local authorities is crucial to this development.

38. With regard to section 36(2)(c), the Commissioner recognises that this may refer to an adverse effect on a public authority's ability to offer an effective public service or to meet its wider objectives or purpose. In the Home Office's view, it is reasonable to consider that the disclosure of the requested information may lead to a number of outcomes, including other authorities – not just the Crown Dependencies – being less willing to participate in the Syrian VPR scheme.
39. Notwithstanding her concerns about the quality of the submission to the qualified person, the Commissioner is satisfied that the overall conclusion of the process was correct. In her view it is not unreasonable to engage section 36(2)(c) given the nature of the withheld correspondence.
40. Having found the section 36(2)(c) exemption engaged, the Commissioner carried the lower level of likelihood through to the public interest test.

The public interest

41. A public authority can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

42. The complainant told the Commissioner that *"At the time that the questions were asked, this matter was a public interest one"*.
43. He provided the Commissioner with comprehensive arguments in favour of disclosing the requested information. For example, he told the Commissioner:

"... in each of the three islands the public had raised very strong objections when the subject of them being involved in the Syrian resettlement scheme had first been proposed This was at a time of elections ... It was not in the public interest to have any communications with UK authorities kept secret ..."

"Indeed this subject made not just the local, but the national media, at the time, who clearly were reporting on a subject of public interest".

"A number of people across the three Crown Dependencies feel very strongly about this issue and the need for full transparency and openness".

44. The complainant also expressed the following views in favour of disclosure:

"This is also a "good governance" issue and the UK government is responsible for the good governance of the Islands.

...There is also a strong argument that non-disclosure on this matter cultivates a feeling of mistrust between the Islands' governments and their local citizens, which means the local citizens are less likely to believe what they are told and more likely to have increased mistrust with their governments.

It is also likely to foster mistrust between the motivations of the UK government and the citizens of the Crown Dependencies.

...It is in the interests of the public across the British Isles to have disclosure of information, particularly when decisions made affect how their taxes and rates are spent and any pressure on their health, education, housing, social and other services are affected."

45. The Home Office recognised the generic public interest in transparency and openness in government. It acknowledged that such openness would lead to a deeper public understanding and awareness in general regarding the conduct of public affairs and specifically in matters relating to the decision-making process on whether the Crown Dependencies would participate in the Syrian VPR scheme. It accepted that this would "help generate confidence in how the government is responding to the resettlement of refugees".

Public interest arguments in favour of maintaining the exemption

46. In favour of maintaining the exemption, the Home Office told the complainant :

"The overall public interest lies in ensuring that the Home Office can continue to operate an effective public service or to meet its wider objectives or purpose".

47. It argued that disclosure in this case could damage future relationships between the Government and the Crown Dependencies and may jeopardise any possible future cooperation on resettlement schemes or other issues.

48. In correspondence with the complainant, the Home Office told him:

"The requested correspondence represents the free and frank exchange of views and provision of advice and disclosure of this correspondence could damage future relationships between the Government and the Crown Dependencies as it might inhibit such conversations. Disclosure could also therefore jeopardise any possible future cooperation on resettlement schemes or other issues".

49. With regard to section 36(2)(c) (the effective conduct of public affairs) the Commissioner considers that the relevant public interest arguments in favour of maintaining the exemption follow on from the other limbs of the exemption (36(2)(b)(i) and (ii)) that the Home Office also cited. If discussions with the Islands on current thinking on resettlement were released, this could impact inter-governmental discussions on policy and inhibit their participation in free and frank discussions. That in turn could impact the United Kingdom's ability to fulfil its obligations and commitment in respect of providing support to Syrian refugees or other similar schemes in the future.
50. In correspondence with the Commissioner, the Home Office explained that participation in the VPR scheme is voluntary for local authorities. It told her that it relies on close relationships with local authorities and that if they believed that the Home Office might disclose details of their discussion with them about the issues surrounding their participation in the scheme:

"...there is a very real possibility that they would no longer wish to participate and this would jeopardise the UK Government's ability to deliver on its promise to resettle 20,000 Syrian refugees by 2020".

Balance of the public interest

51. In the Commissioner's view, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, the Commissioner must give weight to that opinion as a valid piece of evidence in her assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b) of the FOIA, the Commissioner is entitled, and will need, to form her own view as to the severity, extent and frequency of that detrimental effect.
52. In reaching her decision in this case, the Commissioner has taken into account that the request for information was made in the context of a national, voluntary, resettlement scheme.
53. The Commissioner recognises that the aim of the resettlement programme is to accommodate refugees and that the success of the scheme is dependent on the goodwill and offers of accommodation provided by local authorities and devolved administrations. She gives weight to the argument that, in a voluntary scheme such as the VPR scheme, local authorities and partners play a vital role in providing appropriate support and in helping those arriving in the UK to settle into a new life.
54. The Commissioner is aware that there has been media coverage about the scheme. She is mindful, however, that the public interest is not necessarily the same as what interests the public. The fact that a topic is

discussed in the media does not automatically mean that there is a public interest in disclosing the information that has been requested about it¹. The public interest means the public good, not what is of interest to the public, and not the private interests of the requester.

55. In forming a view on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in the openness and transparency of the Home Office as well as a range of public interest factors that apply in relation to the specific information in question:

- she acknowledges that the information relates to an area of interest to those affected – not only those directly affected but also with respect to the impact the programme has on those in the wider community;
- she accepts that there is public interest in avoiding potential disruption to an ongoing project, in this case one that aims to provide a response to a refugee crisis;
- she has taken account the timing of the request and the timeframe of the resettlement programme.

56. In this case she does not consider that the public interest in disclosure is an interest which would counteract the public interest in the Home Office's ability to conduct its affairs effectively, namely Government's ability to deliver on its promise to resettle 20,000 Syrian refugees by 2020. Her conclusion is that the public interest in avoiding this prejudice is a strong factor and she considers that the public interest in maintaining the exemption outweighs that in disclosure.

57. The Commissioner is satisfied that the Home Office has correctly withheld the information under section 36(2)(c) of the FOIA. In light of that finding, she has not gone on to consider its application of the exemption at section 40(2) of the FOIA to some of that information.

Section 10 time for compliance

58. Section 1(1) of the FOIA states that upon receipt of a request a public authority must confirm or deny whether information is held, and if that information is held it must be communicated to the requester.

59. Section 10(1) of FOIA states that public authorities must comply with section 1(1) within 20 working days of receipt of the request.

¹ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

60. In light of the complainant's concerns about the timeliness of its response, the Commissioner asked the Home Office to explain how it dealt with the request.
61. The Home Office told the Commissioner that its records show that the request was received on 15 September 2016, meaning that a response was due on 13 October 2016.
62. It advised that a PIT extension letter was issued to the complainant on 12 October extending the deadline to 9 November 2016.
63. The Commissioner recognises that the FOIA says that a public authority can have a 'reasonable' extension of time to consider the public interest test. She considers that this should normally be no more than an extra 20 working days, which is 40 working days in total to deal with the request.
64. Where additional time beyond the initial 20 working days is required, the public authority must:
 - contact the requester in writing within the standard time for compliance;
 - specify which exemption(s) it is seeking to rely on; and
 - give an estimate of when it will have completed the public interest test.
65. The Commissioner acknowledges that the Home Office provided its substantive response on 8 November 2016. She also accepts that the Home Office notified the complainant that it required extra time to consider the public interest test and communicated the outcome of its consideration within the timeframe it specified.
66. However, despite its records apparently showing that the request was received on 15 September 2016, the Commissioner notes that in its correspondence with the complainant, the Home Office refers to '*your FOI request of 23 August*' and '*your email of 23 August*'.
67. Therefore, from the evidence she has seen in this case, notwithstanding the additional time allowed for consideration of the public interest test, the Home Office failed to respond to the complainant within the statutory time frame and so it is in breach of section 10(1) of the FOIA.

Other matters

68. 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 the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA. However, the Commissioner has issued guidance in which she has stated that, in her view, internal reviews should take no longer than 20 working days to complete, and even in exceptional circumstances the total time taken should not exceed 40 working days.

69. In this case, the internal review was not completed in accordance with that guidance.
70. The Commissioner expects the Home Office to ensure that the internal reviews it handles in the future adhere to the timescales she has set out in her guidance.

Right of appeal

71. 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: 0300 1234504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

72. 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.

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

Signed

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