

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 September 2017

**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 correspondence relating to refugees and immigration from the Home Office (the "HO"). The HO advised that it did not hold some of the information (which was not disputed) and that the remainder was exempt by virtue of section 35(1)(a) (formulation of government policy, etc). The Commissioner's decision is that the exemption at section 35(1)(a) is only partially engaged and, where it is engaged, that the public interest favours disclosure.
2. The Commissioner requires the HO to take the following steps to ensure compliance with the legislation:
  - disclose the withheld information.
3. The HO must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### Background

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4. The HO has provided the Commissioner with the following background information about the request:

*"The UK has a statutory obligation to provide destitute asylum seekers with accommodation, transportation and cash/subsistence support whilst their application for asylum is being considered. This is in accordance with the Immigration and Asylum Act 1999, the*

*Asylum Support Regulations 2000 and the EC Reception Conditions Directive 2003/9/EC. Asylum seekers who would otherwise be destitute can obtain support under section 95 of the Immigration and Asylum Act 1999 from the time they arrive in the UK, until their claim is fully determined and they have exhausted their appeal rights. Three types of support are provided:*

- *Initial accommodation – provided while a claimant awaits a decision on their support claim;*
- *Dispersal accommodation – provided after the asylum support claim has been granted but prior to a successful asylum claim or appeal process; and*
- *Section 4 accommodation – provided to failed asylum seekers and immigration detainees (released on bail) where there is a legitimate barrier to their removal.*

*UKVI arranges such accommodation via a suite of contracts with external providers, which support the Government's policy of dispersing destitute asylum seekers into areas across the UK where an authority has formally agreed to participate in the dispersal policy.*

*Asylum seekers are housed across the UK under voluntary agreements between national government and local authorities that have been in place since 2000. We work to a maximum agreed dispersal ratio of 1:200 asylum seekers per head of total population. We would not normally go beyond that ratio without the agreement of the relevant local authority. The Home Office works with COMPASS [Commercial and Operational Managers Procuring Asylum Support Services] providers and local authorities to ensure the impacts of dispersal are taken into account when allocating accommodation.*

*We are currently working with other local authorities across the UK to encourage other areas to become dispersal areas. There are now over 120 local authorities currently signed up to asylum dispersal. Since 2015, over 30 new local authority areas have agreed to become dispersal areas and we are in discussions with many more.*

*Portsmouth has participated in the Asylum Dispersal scheme since its introduction in 1999/2000. In October 2015 the Home Office was made aware, via the Strategic Migration Partnership, that Portsmouth City Council had tabled a motion seeking the end to agreements to support the use of housing for asylum seekers – in effect withdrawal from the asylum dispersal scheme. Whilst the absolute dispersed asylum seekers numbers in Portsmouth were*

*low, there were local concerns that neighbouring local authorities had lower populations still.*

*Portsmouth's request to withdraw its participation in the adult asylum seeker dispersal scheme was declined and the population has remained consistently below the 1:200 level".*

5. Further information can be found online. For example, Hansard has published information about policy on the dispersal of asylum seekers<sup>1</sup>.

## **Request and response**

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6. On 27 April 2016 the complainant wrote to the HO and requested information in the following terms (numbering added by the Commissioner for ease of reference):

*"Under Freedom of Information*

*1 - please can you provide the guidance notes for MPs for handling constituency correspondence in relation to issues in relation to refugees and immigration that the Home Office sends out to inform including the standard letter being sent out in response to concerns the Government should take in 3,000 children.*

*2 - can you also provide correspondence between the Home Office and the European Commission regarding the dispersal of refugees across Europe since January 2016 (apply the exemptions where you need to).*

*3 - Can you disclose all correspondence between the Home Office and Portsmouth City Council over COMPASS since May 2014 including correspondence specific to exiting the programme?*

*4 - Can you also disclose whether or not the city council was required to repay any part of the Grant funding above due for example to discrepancies?"*

7. On 26 May 2016 the HO responded. It advised that no information was held in respect of parts (1), (2) and (4). It advised that information was held in respect of part (3) but that this was exempt from disclosure by virtue of section 35(1)(a) of the FOIA.

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<sup>1</sup> <http://researchbriefings.parliament.uk/ResearchBriefing/Summary/CDP-2016-0095>

8. The complainant wrote to the HO about part (3) of his request on 11 October 2016. Following an internal review the HO wrote to the complainant on 3 March 2017; it maintained its position.

### Scope of the case

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9. The complainant contacted the Commissioner on 3 March 2017 to complain about the way his request for information had been handled. He asked her to consider the citing of section 35(1)(a) and provided his grounds of complaint.
10. He explained that:

*"It is important to give context to what the Home Office does not wish to disclose. In October 2015, Executive Members of Portsmouth City Council proposed an inflammatory motion stigmatising refugees in the city and those who helped them. These refugees were dispersed to the city under the COMPASS scheme for which Parliament has given the Home Office specific responsibilities it expects to be discharged. The specific issue also includes agreements on the numbers that each local authority should be willing to host.*

*It is important to recognise this is a matter of public concern particularly as a result of the Home Office's approach whether at Ministerial or Official Level. There are established ways to handle the refugee dispersal issue with networks and groups in place. In October, for ill-advised reasons, Councillors put forward an inflammatory motion misrepresenting the arrangements with the Home Office COMPASS scheme. It led to protests and the police were also called in. It stigmatised asylum seekers and refugees in the city and poisoned perceptions to the work of volunteers and voluntary groups to support them. Instead, the matter was used during toxic political campaigning in order to garner votes e.g. undermining community cohesion in order to reward unacceptable behaviour. I have in writing an acknowledgement from one of the councillors involved that the matter was used in order to place pressure on the Home Office to change its dispersal policy. Therefore, I want to know now if the risk placed to myself, refugees and volunteers justified the approach taken by changing the Home Office's policy".*

11. The Commissioner will consider the citing of section 35(1)(a) in respect of part (3) of the request below.

## Reasons for decision

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### Section 35 – Formulation of government policy, etc.

12. Section 35(1)(a) of the FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner understands these terms to refer to the design of new policy, and the process of reviewing or improving existing policy. However, the exemption will not cover information relating purely to the application or implementation of established policy.
13. The Commissioner recognises that the purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
14. Consideration of this exemption involves two stages. First, the exemption must be engaged by the information in question falling within the class described in this section. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
15. The withheld information in this case consists of the following:
  - an undated 'template' letter which has been prepared by the HO for sending to local authorities;
  - an email chain containing a letter from Portsmouth City Council (PCC) to the HO, with a further PCC letter which is appended for information only; and,
  - a response from the HO to PCC in respect of this letter.
16. In respect of the 'template' letter, which concerns participation in asylum dispersal, the HO advised the Commissioner that this was sent to non-participating local authorities in August 2015. As the complainant believes PCC's correspondence: "*was used in order to place pressure on the Home Office to change its dispersal policy*", the Commissioner believes it is helpful to note that related matters were already under consideration.
17. The Commissioner has viewed the correspondence in full.

*Does the withheld information relate to the formulation or development of government policy?*

18. The Commissioner's approach to defining government policy is set out in her guidance<sup>2</sup>. That guidance clearly indicates that policy can be developed in many ways and in a wide range of circumstances.

19. In its internal review the HO told the complainant:

*"Section 35 of the Act is primarily concerned with the processes involved when it comes to the development and formulation of policy – regardless of the subject-matter. In this case, we are referring to the policy around the dispersal of refugees..."*

*It may be helpful to explain further that the Information Commissioner accepts that the government (including the Home Office), needs a 'safe space' to develop ideas, debate live issues, and reach decisions away from external interference and distraction.*

*If the Department were to disclose the information you requested ... in this case before policy decisions have been reached, this 'safe space' would be compromised and the ability to reach a considered decision could be influenced by outside interests.*

*Negotiations with new and existing local authorities are on-going; matters are still subject to review by Ministers and officials, and policy remains fluid. Disclosure could prejudice these on-going negotiations, which would in turn potentially lead to poorer decision-making, which would not be in the wider public interest".*

20. It also advised the Commissioner that:

*"The correspondence with Portsmouth City Council is about the Council's participation in accommodating dispersed asylum seekers. The matter of adult asylum dispersal remains very much a 'live issue' and negotiations with participating and non-participating local authorities remain ongoing. The Home Office considers that this is a matter of policy development, not simply an implementation or operational matter. The policy in question is the Government's*

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<sup>2</sup>[http://www.ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/government-policy-foi-section-35-guidance.ashx](http://www.ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx)

*policy on how it should meet its legal obligations to provide accommodation and assistance for asylum seekers in general and the policy on dispersal accommodation in particular”.*

21. The complainant has not disputed that the exemption is engaged, his argument is that the public interest favours disclosure. However, having read the correspondence, the Commissioner notes that PCC's letter to the HO relates purely to a motion which was put forward and agreed at a Council meeting. The agenda for the meeting is published and includes the wording of this motion at paragraph 17(d)<sup>3</sup>. The minutes of this meeting are also published and matters relating to that motion can be found on pages 9-12 of these minutes<sup>4</sup>. The agreed outcome is to ask: *"... the Chief Executive to write to the Home Secretary requesting that Portsmouth be removed from the list of cluster areas"*. The withheld letter is in response to that motion, with the exact wording being repeated. Additionally, both of these letters are already available online having previously been disclosed by PCC<sup>5</sup>.
22. The Commissioner does not consider that this correspondence in any way relates to a change of policy, nor is it PCC requesting a change in policy. It is purely PCC making a request to be removed from the scheme in question. The Commissioner does not therefore consider that these matters in themselves relate to the HO's design of new policy, or the process of reviewing or improving existing policy, and she concludes that the exemption at section 35(1)(a) is therefore not engaged.
23. In respect of the remaining 'template' and the HO's response to PCC, although the withheld information is not detailed the Commissioner accepts that it reflects how the HO is considering its handling of asylum seekers and she concludes that it is related, to some extent, to the formulation of government policy in this area. (She does, however, also note that a completed version of the template letter is publically available as she has located it in in the agenda of a different Council's cabinet meeting).

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<sup>3</sup> <http://democracy.portsmouth.gov.uk/documents/g2831/Agenda%20frontsheet%2013th-Oct-2015%2014.15%20Full%20Council.pdf?T=0>

<sup>4</sup> <http://democracy.portsmouth.gov.uk/documents/s9285/Ordinary%20Meeting%20Minutes%2013%20October%202015.pdf>

<sup>5</sup> [https://www.whatdotheyknow.com/request/asylum\\_seeker\\_cluster\\_centre#incoming-766280](https://www.whatdotheyknow.com/request/asylum_seeker_cluster_centre#incoming-766280)

24. As it is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in favour of maintaining the exemption and those in favour of disclosure.

*Public interest in favour of disclosure*

25. The HO has recognised that there is a public interest in the requested information and that disclosure would encourage transparency in the Home Office's current negotiations with local authorities throughout the UK. It also recognised that disclosure could encourage the public to assess whether or not it is managing the dispersal of asylum claimants and refugees with local authorities in an efficient way.
26. The HO further accepted that an *"... improved quality of debate could impact positively on policy outcomes, as proposals would have been subject to a greater degree of public scrutiny and discussion"*.
27. The Commissioner also notes the complainant's views that PCC's motion to the HO was 'inflammatory' and he believes it resulted in a change to HO policy. He considers:

*"It is crucial to know who wrote to Portsmouth City Council and its Executive Members, whether it was officials or Ministers, who was copied in to the correspondence and what was actually said. Political embarrassment is irrelevant"*.

*Public interest in favour of maintaining the exemption*

28. The HO has argued that good Government requires a 'safe space' in order for officials to extend full and proper consideration to the formulation and development of policy. It advised:

*"This safe space allows for a considered assessment of the respective merits or de-merits of different courses of action, which is vital to the foundation and delivery of effective policy. The information requested regarding the formulation of the policy to widen dispersal areas includes sensitive correspondence with existing dispersal areas. The effect of release of this correspondence would prejudice ongoing negotiations with those local authorities, as well as other neighbouring authorities. This would inhibit both official and ministers' ability to consider all policy options. This inhibition of free and frank discussion at this time would damage initiatives to widen dispersal and inhibit development of public policy in the future. Without the protection afforded by the safe space, the policy development process would be markedly more difficult. Allied with this, it is important that officials, when discussing developing areas of Government policy can feel unconstrained in putting forward their views without inhibition."*



*There is an ever-present risk that premature disclosure of information concerning a live area of policy might inhibit the candour of further dialogue undertaken".*

*Balance of the public interest*

29. As mentioned above, the Commissioner was able to locate a completed version of the 'template' letter online, albeit this was published by a different public authority so some parts of the template have been adapted accordingly. Also, as already mentioned, the Commissioner thinks it is relevant that the HO has stated that this letter was sent out to all local authorities in August 2015; this was prior to PCC writing to the HO. Therefore, matters had already been highlighted and sent out for consideration by these authorities.
30. The Commissioner considers that the letter largely reflects the comments which the HO has already provided in that it evidences potential negotiations with new and existing local authorities. As explained, it is a template, without the details of any specific authority included. Furthermore, the authorities' responses to the letter, which would be more likely to influence policy-making, are not within the scope of the request. The Commissioner therefore fails to understand how disclosure of the letter in isolation could possibly prejudice any on-going negotiations.
31. For the same reasons, the Commissioner does not accept that the 'safe space' arguments apply to this letter. She accepts that it is a letter which was circulated to all local authorities and it is likely to have been considered in house either at council meetings or with the relevant parties. It makes no reference to it being unsuitable for public disclosure and no suggestion that it is in any way 'confidential'. Whilst the actual responses may be used to inform future policy, the Commissioner does not agree that this letter in isolation would have the prejudicial effects stated by the HO. There is simply not enough content.
32. The HO's letter to PCC is a direct response to PCC. It reflects PCC's motion seeking withdrawal from the asylum dispersal scheme, and the HO's refusal, but this information is already all in the public domain. The letter also includes some brief statistics and relevant commentary but does not evidence that there will be any policy change as a result of PCC's letter.
33. Whilst the Commissioner accepts that policy development in this area was ongoing at the time of the request, she finds that most of the withheld information only loosely relates to this and the majority is already in the public domain. She notes the complainant's concerns about the information and she finds his arguments regarding the public

interest in disclosure more compelling than those against disclosure that were put forward by the HO.

34. On balance, although the Commissioner accepts there is usually a strong public interest in maintaining the integrity of the policy-making process, on this occasion she is not persuaded that the HO has evidenced any harm in disclosure of this particular information and she considers the correspondence is largely peripheral to the actual policy-making itself. Conversely, she can see that there are a number of significant public concerns raised by the complainant about this matter and she considers disclosure of the withheld information would go some small way to allowing the public to see the way the HO is considering how to handle some of the related issues.
35. The Commissioner's decision is that section 35(1)(a) of the FOIA is engaged in relation to the remaining withheld information, but that the balance of the public interest favours disclosure.
36. The Commissioner requires the HO to disclose all the withheld information to the complainant.

## **Other matters**

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37. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

### *Internal review*

38. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases, which this request was not. This review took in excess of 100 working days.
39. The Commissioner would like to remind the HO that she routinely monitors the performance of public authorities and their compliance with the legislation. Records of procedural breaches are retained to assist the

Commissioner with this process and further remedial work may be required in the future should any patterns of non-compliance emerge.

## 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.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.

**Signed** .....

**Carolyn Howes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**