

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 October 2018

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

Decision (including any steps ordered)

1. The complainant requested a copy of all the responses received in relation to the Government's consultation exercise on possible options for reporting and acting on child abuse and neglect. The Home Office withheld the requested information, citing section 35(1)(a) (the formulation or development of government policy) of FOIA.
2. The Commissioner's decision is that section 35(1)(a) was engaged, but that the public interest did not favour maintaining the exemption.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information or issue a fresh response, compliant with section 17, which does not rely on section 35.
4. The Home Office 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

5. The public consultation, Reporting and Acting on Child Abuse and Neglect, was launched on 21 July 2016 and sought views on possible new measures relating to reporting and acting on child abuse and neglect, specifically the introduction of a new mandatory reporting duty, (which is a requirement for certain organisations and employees working with children to report child abuse or neglect if they knew or had reasonable grounds to suspect it was taking place) or a new duty to act (which is a requirement for the same personnel/organisations to take appropriate action in relation to child abuse or neglect). Currently there is no obligation for anyone in the UK working in a regulated activity to report the fact that they have witnessed abuse. The consultation closed on 13 October 2016.¹
6. The resulting report² was published on 5 March 2018 in which the government concluded that it would not introduce a mandatory reporting duty or duty to act “*at this time*” (see paragraph 17 of the report).
7. The report also set out the targeted action the Government is taking in response to the issues raised by the consultation process, which include the importance of understanding and reporting abuse, information sharing between agencies that work with children, best practice and professional training, and continuing to assess the legal framework and evidence to ensure the approach being taken is effective and adequate.
8. The Commissioner is mindful that she has previously issued a related decision notice *FS50669482*³. In that case, another requester had asked the Home Office for the submissions made as part of the above consultation exercise for four specified organisations that had responded. The Commissioner found that, where information was held, section 35(1)(a) was engaged but that the public interest test favoured withholding the requested information. A key point in her considerations

¹https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/539642/Reporting_and_acting_on_child_abuse_and_neglect_-_consultation_document__web_.pdf

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/685465/Reporting_and_acting_on_child_abuse_and_neglect_-_response_to_consultati....pdf

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172803/fs50669482.pdf>

was the timing of that particular request which was made the day the consultation closed (full details can be found in the published decision notice).

9. Although the Commissioner is not bound by her previous decision notices and instead must consider each case on its merits, she has reviewed the earlier decision notice as part of her considerations for the current case.

Request and response

10. On 16 April 2018 the complainant wrote to the Home Office and requested information in the following terms:

"The outcome of the public consultation: REPORTING AND ACTING ON CHILD ABUSE AND NEGLECT was published on 5th March 2018 in a document subtitled 'Summary of consultation responses and Government action'

I wish to be provided with a copy of each submission made to the public consultation. These are listed in Annex B on pages 29–34 inclusive."

11. The Home Office responded on 14 May 2018. It refused to provide the requested information citing section 35(1), the exemption for formulation of government policy, etc.
12. The complainant requested an internal review on 14 May 2018. In the absence of any internal review response, he contacted the Home Office on 14 June 2018 and 3 July 2018, before complaining about this to the Commissioner.

Scope of the case

13. The complainant contacted the Commissioner on 13 July 2018 to complain about the way his request for information had been handled, highlighting the outstanding internal review.
14. On 3 August 2018 the Commissioner wrote to the Home Office asking it to provide its internal review. The Home Office failed either to respond or to issue its internal review.
15. The Commissioner has therefore exercised her discretion in this case and accepted the complaint without the internal review process having been exhausted. She has commented on the Home Office's failure to

provide an internal review under the 'Other matters' section of this notice.

16. The complainant submitted the following comments (which included copies of the relevant attachments):

"The public consultation 'Reporting and Acting on Child Abuse and Neglect' ended on the 5th March 2018 with the long delayed publication of the Summary document and proposed Government action. It was probably the slowest and most delayed consultation any Government has delivered."

And

"For your consideration:

- This was a public consultation on protection of children by adults other than their parents, in settings which are publicly and privately owned and operated.*
- The Government has published tables of responses.*
- Many submissions will not have used the forms provided by Government, such as the Labour Party for example which quite naturally published their submission.*
- The National Police Chiefs Council published its submission, but for reasons unexplained it does not appear in the Home Office list of those who made submissions.*

The Government has taken account of the submissions in order to formulate its published response (MR Consultation document). The future value of the submissions themselves, is now very limited because research, practice and much else evolves and has already done so in a number of respects. Home Office reasoning for rejecting my application seems unjustified."

17. The Commissioner is unable to comment on how participants may have chosen to respond (ie whether they have utilised the provided forms), or why the National Police Chiefs Council's published submission does not appear in the Home Office list as they are not FOIA matters.
18. She has considered whether the Home Office was entitled to rely on section 35(1) of FOIA in relation to this request.

Reasons for decision

Section 35

19. Section 35(1)(a) of FOIA provides an exemption for information that "*relates to*" the formulation or development of government policy.
20. In order for the exemption to be engaged, it must relate to the formulation or development of government policy. In her guidance on section 35⁴ the Commissioner explains that the term 'relates to' can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation or development of government policy. Any significant link between the information and those activities is enough.
21. The guidance also explains that the Commissioner considers that the term 'the formulation or development of government policy' refers to the design of new policy and the process of reviewing or improving existing policy. However, the section 35 exemption does not cover information relating purely to the application or implementation of established policy.
22. The Commissioner also recognises that the purpose of section 35(1)(a) is to protect the integrity of the policy making process and 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.
23. Consideration of this exemption involves two stages. Firstly, section 35 is class-based, meaning government departments do not need to consider the sensitivity of the information in order to engage the exemption; it must simply fall within the class of information described.
24. 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. The prejudicial effect of disclosure would inevitably be

⁴ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

considered within the framework of the competing public interest factors.

25. The Commissioner's approach to defining government policy is set out in her guidance which indicates that policy can be developed in many ways and in a wide range of circumstances.
26. From the published report, it is evident that the government had received responses during its consultation period into child abuse and neglect from a wide range of interests, including practitioners and others in the education, health, social care and local government sectors, children's charities, survivors' groups, the police and members of the public.
27. The Commissioner has viewed a sample of the withheld information which the Home Office provided in the previous case, and notes that it consists of responses made by a number of the named organisations to the 'Reporting and Acting on Child Abuse and Neglect' public consultation.
28. In addition, with reference to the published report, the Home Office has explained:

"The policy in question is the Government's policy in relation to reporting and acting on child abuse and neglect and, in particular, the issue of whether to introduce new statutory measures in this area. See in particular paragraphs 4 and 5 in the Introduction to the document to which the request refers. Paragraph 5 sets out three options which formed the basis of the consultation."

29. The Home Office also highlighted paragraph 17 of the report which includes the following:

*"Having considered all of the evidence and views raised by the consultation, the Government believes that the case for a mandatory reporting duty has not currently been made. **Therefore, we do not intend to introduce a mandatory reporting duty or duty to act at this time.**"*

30. With reference to the above, the Home Office told the Commissioner:

"This would tend to suggest that the policy formulation and development process on the issue of mandatory reporting, at least, was complete for the time being at the date the document was published (5 March 2018). The document also goes on to say (in paragraph 47) that the Government is 'Assessing whether the current legislative framework is able to deal appropriately with

concerns about concealment of child abuse and neglect' and 'We will commit to scoping this issue fully and identify whether there any gaps in the current statutory framework during the current Parliament'. This would tend to suggest that the policy formulation and development process was (and still is) ongoing, although we recognise that... the Tribunal has made it clear in relation to section 35(1)(a) that policy formulation is not one which is a 'seamless web'."

31. It also said:

"In considering whether section 35(1)(a) is engaged, the question is whether the consultation responses related to the policy formulation or development process at the time they were created. Given that they were submitted in response to a Government consultation and that, as the document shows, they informed the Government's conclusions as described in the document, in our view they unquestionably did relate to the policy on reporting and acting on child abuse and neglect at a time when it was in process of formulation or development. Consultation responses on such a matter, in such a context, almost by definition relate to policy formulation or development. This does not change over time (although we recognise that the balance of the public interest will) and we conclude that the exemption at section 35(1)(a) is engaged in respect of the requested information."

32. As she previously found in the related decision notice, and having reviewed the published report (which was not available to her at the time of the earlier case), the Commissioner is satisfied that the requested information relates to the development of government policy regarding reporting and acting on child abuse and neglect the exemption at section 35(1)(a) is therefore engaged. She will return to the point as to whether the policy process was still ongoing at the time of the request in her public interest considerations.
33. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. Section 35(1)(a) is a qualified exemption, so that, even though the exemption is engaged, the information must nevertheless be disclosed if the public interest in maintaining the exemption does not outweigh that in disclosure.

Public interest arguments in favour of disclosure

34. The complainant did not submit any specific public interest arguments in favour of disclosure either as part of his request for internal review or as part of his complaint to the Commissioner.

35. There is a general consideration in favour of openness and transparency in Government to increase public trust and confidence. The Home Office recognises that this topic in particular (ie calls for new statutory duties on all practitioners/ professionals regarding the reporting or acting on child abuse or neglect) and the responses to the public consultation exercise on this topic are matters of legitimate public interest.

Public interest arguments in favour of maintaining the exemption

36. The Home Office told the complainant it does not necessarily follow that, because there is a legitimate public interest in the overall issue, the balance of the public interest is in favour of disclosing all or any specific information relating to it.
37. It also argued that the raw consultation responses could be misleading if made public, especially if presented outside of the context of the overarching analysis, stating:

"They could be used to support arguments for, or against, any of the options offered by the government under its consultation exercise and/or its evidenced response, and not for the purpose for which respondents submitted views, which was to inform the government in formulating its policy."

38. Additionally, it told the complainant that:

"The Government published its full response to the consultation exercise on 5 March 2018, which included full, detailed analysis of all the responses and evidence received. In this document, the government also set out proposals based on the overarching analysis and has committed to review the issue further, pending delivery of other, associated Government commitments. Therefore, as an ongoing policy issue, any misleading debate could be contrary to public interest and disclosure could hamper or prejudice the Government's on-going development of policy. Further, this respects the broad duty of confidentiality to respondents, who would not have expected their individual response on this topic to be made public in full and which was not the purpose for which respondents submitted their views to Government.

The Government's position is still under active development. Disclosure of the consultation responses would compromise the 'safe space' which Ministers and officials need in order to formulate and develop policy without risk of premature disclosure under the FOIA. This would not be in the public interest."

39. In its submissions to the Commissioner, the Home Office has argued that the public interest in disclosure has been met by the publication of "a quite detailed analysis of the consultation responses". It also said:

"The public interest in disclosure of the responses in full is in our view limited and outweighed by the arguments against. [The complainant] has not provided any arguments as to why the balance of the public interest is in favour of disclosure."

40. It further argued that, in terms of the policy development process, the passages from the published report quoted earlier:

"... are equivocal on the question of whether the process was complete in relation to this issue at the time the request was received. The Government's commitment to scope the issue fully and identify any gaps in the current statutory framework certainly suggests that the conclusion in the published document, that a mandatory duty would not be introduced 'at this time', was not the final word on the subject."

41. The Home Office submitted that releasing the consultation responses could be misleading, which was based on the belief that with such a complex and controversial subject, full disclosure could fuel ill-informed public debate which in turn would constrain Government policy-making by generating a public and media "hue and cry" based on a partial or misleading representation of responses.

42. It also argued that:

"More generally, full disclosure of responses to a Government consultation carries a risk that responses to future consultations would be discouraged or inhibited. When the Government invited responses it gave no indication that they would or might be published in full. The Government will sometimes publish a full set of responses to a consultation, but would normally indicate in advance that this might or would be done. Otherwise there is a risk that breaching the confidentiality of the process, which is particularly important for such a sensitive and potentially emotive subject. We have published the names of the organisations which responded, but not the names of individuals who did so (for obvious data protection reasons: they would be exempt under section 40(2) of the FOIA)). Even if a public interest could be identified, we do not consider that we could publish the full set of responses without seeking consent in each case, which would be a substantial exercise for 768 responses and for which we see no justification."

Balance of the public interest arguments

43. The Commissioner has considered the public interest arguments. She recognises the importance of transparency in policymaking and, in this case, the particular public interest in understanding the development of a policy which deals with reporting and acting on child abuse and neglect.
44. The Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential where appropriate.
45. In this case the Home Office argued that a safe space was necessary for the specific policy process to which the requested information relates. Arguments concerning the preservation of a safe space within which to carry out the policy making process are, in general, valid on the grounds that this will assist in the open discussion of all policy options, including any that may be considered politically unpalatable. However, the weight that such arguments carry in each case will vary, depending on the circumstances.
46. The Home Office has argued that the withheld information formed part of an ongoing policy making process, but the terminology it has used is not persuasive and seems to be contradictory regarding whether or not policy formulation is ongoing. However, in the Commissioner's view, whilst it could be argued that the wider consideration of child protection and safeguarding was an ongoing process, when giving close consideration to the withheld information in question here the evidence available to her calls into question whether, at the time of the request, there was still an ongoing policy making process to which that information closely related.
47. The Commissioner's section 35 guidance makes clear that she does not view the policy making process as indefinite; rather she views it as a process that begins and ends within a particular time frame. In this case, the post-consultation review of whether to introduce a mandatory reporting duty, or a duty to act for child abuse and neglect, has not resulted in a policy making process on that specific issue. Instead, and to again quote from the report, such a policy will not be introduced "*at this time*".
48. More often than not, in the Commissioner's view the enactment of a policy signals the end of the policy formulation or development process. She considers that in most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of consultation and implementation in

between. She does not accept that there is inevitably a continuous process or seamless web of policy review and development.

49. Therefore, the Commissioner does not accept the suggestion that the policy development process was ongoing at the time the complainant submitted his request in April 2018. The consultation related to a specific topic within the overarching theme of child protection and safeguarding (ie whether to introduce mandatory reporting or a duty to act) and concluded in October 2016. Following a review of the 768 consultation responses, the government concluded that the case had not been made to introduce mandatory reporting of child abuse and neglect "*at this time*" and published its report on 5 March 2018.
50. Notwithstanding that the government reserved its future position should matters change (stating at paragraph 49 of the report: "*... at the current time, the case for a mandatory reporting duty has not been made, but we will remain open-minded should an emerging body of evidence or a new policy landscape change that*"), the fact that it may decide to introduce such a policy in the future does not automatically mean that the policy development process is still ongoing.
51. Whilst the Commissioner accepted that the withheld information *relates* to a policy making process whereby she found the exemption was engaged, the evidence available to her suggests that the withheld information does not closely relate to any ongoing, live policy making process. The consultation responses have been considered and a decision not to implement has been taken and published. This means that she does not regard there as being any weighty public interest in favour of maintenance of the exemption in order to protect a safe space for an ongoing policy process.
52. Consequently, the Commissioner does not consider that there was a public interest in maintaining a safe space for discussions in relation to the development of the policy at the time of the request. The request was submitted more than eighteen months after the withheld information was produced, and over a month after the government's report was published. The Commissioner has generally acknowledged that officials should be afforded the private thinking space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. Therefore, she considers that the need for safe space will be strongest when the relevant issue is still live. However, once the government has made a decision, the argument for a safe space for deliberation will no longer be required and consequently carries little weight.
53. Where information does not relate to a specific and ongoing process, a wider argument can be made that disclosure in one case could have a chilling effect on other future processes. However, the Commissioner

notes that the Home Office has not raised any such considerations on this occasion and it is not her role to do so on its behalf. She has therefore not made any determination on any potential chilling effect that disclosure could have.

54. In summary, the Commissioner's view is that there is public interest in favour of maintaining the exemption on the basis of the general public interest in preserving a degree of confidentiality for the policy making process. She does not, however, believe that there is significant further weight to this as a result of any convincing safe space arguments.
55. Turning to factors in favour of disclosure of the information in question, brief research of the issue reveals that the proposed introduction of mandatory reporting/duty to act has been the subject of controversy and debate, with arguments for and against such a proposal. The withheld information would add to public knowledge and debate about child protection and the Commissioner regards this as a valid factor in favour of disclosure of the withheld information.
56. It is clearly the case that the protection and safeguarding of children is a matter of public interest. The withheld information relates to this issue as it represents the views of those involved in the child protection system in relation to a potential significant change in the way in which child abuse and neglect in the UK is dealt with. The Commissioner's view is that this illuminates further the public interest in disclosure in respect of this subject matter.
57. The Home Office itself has acknowledged that the balance of the public interest test will change with the passage of time (see paragraph 31 of this notice).
58. Having carefully weighed the public interest arguments, the Commissioner has concluded that the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information.
59. In conclusion, the Commissioner has recognised significant public interest in disclosure of this information on the basis of its subject matter, which means that it is relevant to an issue of public controversy and debate. The public interest in the maintenance of the exemption, however, is limited as the evidence suggests that the withheld information does not closely relate to an ongoing process. This means that the Commissioner's view is that the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure of the information.

Other matters

60. In relation to the withheld information, the Home Office commented:

"The request is slightly ambiguous in that it asks for 'a copy of each submission made to the public consultation', but qualifies this with 'These are listed in Annex B on pages 29–34 inclusive'. As is stated in paragraph 7 of the document, the consultation received 768 responses. These included a large number of responses from individuals: the list of 307 organisations at Annex B accounts for only a proportion of the responses."

61. It said:

"We have interpreted the request as being for all 768 submissions to the consultation, although our response would be the same if the scope of the request were to be restricted to the 307 submissions from organisations."

62. The Commissioner would suggest clarifying the scope of the request with the complainant prior to disclosing any withheld information.

Internal review

63. Part VI of the section 45 Code of Practice makes it 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. As she has made clear in her 'Good Practice Guidance No 5', the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner has decided 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 be reasonable to take longer but in no case should the time taken exceed 40 working days.

64. The Commissioner has made a separate record of the failure by the Home Office to complete the internal review in this case. The Home Office must ensure that it has a system in place to carry out internal reviews promptly. This issue may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

65. 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

66. 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.
67. 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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