

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 22 July 2020

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

#### Decision (including any steps ordered)

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1. The complainant requested a Policy Equality Statement. The Home Office refused to provide the requested information, citing section 22 (information intended for future publication) of the FOIA.
2. The Commissioner's decision is that the Home Office incorrectly applied section 22 to withhold the requested information.
3. The Commissioner requires the Home Office to take the following step to ensure compliance with the legislation:
  - disclose the withheld information to the complainant.
4. The Home Office must take this step 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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5. The EU Settlement Scheme enables EU citizens and their family members resident in the UK before a specified date to apply for leave under the Immigration Act 1971.
6. By way of background to the request in this case, and with reference to section 149 of the Equality Act 2010, the Home Office told the Commissioner:

*"The public sector equality duty requires the Home Office to have due regard to the need to eliminate discrimination, advance equality of opportunity, and foster good relations when developing policies and delivering services.*

...

*These considerations are set out in a Policy Equality Statement (PES), which demonstrates that officials and Ministers have effectively discharged their public sector equality duty and identifies and assesses any equality considerations relating to persons sharing protected characteristics (e.g. race, age, sex, religion or belief etc.)".*

## **Request and response**

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7. On 29 August 2019, the complainant wrote to the Home Office and requested information in the following terms:

*"On 11 June 2019 the Immigration Minister, Caroline Nokes, confirmed the existence of an unpublished Policy Equality Statement which she said 'sets out the Government's consideration of the impacts of the EU Settlement Scheme on those who share a protected characteristic'. (PQ 252534)*

*On 2 July 2019 Caroline Nokes again confirmed the existence of this document, which remained unpublished. (PQ 270377), and again on 17 July 2019 (PQ 252532).*

*Please could you provide me with a copy of this Policy Equality Statement?"*

8. The request was made via the 'whatdotheyknow' website.
9. The Home Office acknowledged receipt on 30 August 2019 and allocated a reference number to the case.
10. On 13 September 2019, the Home Office responded, citing a different reference number. The response was to a different request for information. That request was also made via the 'whatdotheyknow' website, on 29 August 2019, by the same complainant.
11. The complainant wrote to the Home Office on 13 September 2019 reminding it of the nature of his request for information in this case – the, as yet unpublished, Policy Equality Statement.
12. The Home Office provided its substantive response to the request in this case on 19 September 2019. It confirmed it held a Policy Equality

Statement, but refused to provide it, citing section 22 (information intended for future publication) of the FOIA as its basis for doing so. It advised the complainant that, if he was dissatisfied with its handling of the request, he could ask for an internal review.

13. Meanwhile, the Home Office interpreted his correspondence of 13 September 2019 as a request for internal review. The Home Office sent him the outcome of its internal review on 6 November 2019. That review, which upheld its original position, covered its handling of his two requests dated 29 August 2019.
14. The complainant requested an internal review of the request in this case on 15 November 2019. The Home Office responded saying that it was unable to conduct a second review.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 17 December 2019 to complain about the way his request for information had been handled.
16. He disputed the Home Office's application of section 22 of the FOIA in this case telling the Commissioner:

*"I first requested the PES [Policy Equality Statement] in August this year (i.e. 4 months ago). The request has been refused on the basis that publication is imminent. But that simply doesn't seem to be so, ...*

*In the circumstances, it does not appear to me that the Home Office has any genuine intention to publish the PES. If that is the case, s.22 FOIA 2010 is not engaged".*

17. As is her practice, the Commissioner wrote to both parties setting out the scope of her investigation. In light of the passage of time, she asked the Home Office, if applicable, to confirm the date of publication and to send her the link to the published information. Alternatively, she asked to be provided with a copy of the withheld information in order to reach a decision in this case.
18. Following a lengthy delay, the Home Office confirmed that the PES had not yet been published. It also confirmed its application of section 22.
19. With regard to her request to be provided with a copy of the withheld information, the Home Office provided the Commissioner with what it described as:

*"... a copy of the latest version of the PES on which work is being done".*

20. For the avoidance of doubt, the Commissioner asked the Home Office to confirm how that version of the PES comprised the information held at the time of the request and, therefore, the information that it considered engaged section 22.
21. Following a further delay, the Home Office provided the Commissioner with what it described as:

*"... a copy of the PES that was held at the time of the request".*
22. That document was undated, and was marked '*OFFICIAL – SENSITIVE (PRE-PUBLICATION)*'.
23. The analysis below considers the Home Office's application of section 22(1) to the requested information, namely the version of the PES that was held at the time of the request.

## **Reasons for decision**

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### *Section 22 – information intended for future publication*

24. Section 22(1) of the 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)."*

25. In order to determine whether section 22 is engaged the Commissioner has therefore considered the following questions:
  - When the complainant submitted the request, did the Home Office intend the information to be published at some date in the future?
  - If so, in all the circumstances of the case, was it 'reasonable' that the Home Office should withhold the information from disclosure until some future date (whether determined or not)?

*Was the information held at the time of the request with a view to its publication at a future date?*

26. The Home Office's position is that the information was held at the date of the request with a view to its future publication.
27. In correspondence dated 19 September 2019, the Home Office told the complainant:

*"In response to your request, I can confirm that the Home Office does hold a Policy Equality Statement, which sets out the Government's consideration of the impacts of the EU Settlement Scheme on those who share a protected characteristic, and this will be published shortly".*

28. Following an internal review it told him:

*"This review still confirms that it is intended for future publication".*

29. It also told him:

*"The HO is not obliged to give an exact date when it intends to publish the information when citing Section 22".*

30. During the course of the Commissioner's investigation, the Home Office told her:

*"A PES is produced for all new policies and is not generally published, but due to the public interest in the EU Settlement Scheme we have committed to publishing the PES relating to the Scheme".*

31. With regard to there being a settled intention to publish the PES, the Home Office told the Commissioner:

*"This is evidenced in the responses to parliamentary questions by the then Immigration Minister made prior to the receipt of the FOI on 29 August that confirm this intention".*

32. With respect to timing, it told her:

*"It was further confirmed in the government's response to the Independent Chief Inspector of Borders and Immigration's second report on the EU Settlement Scheme that the aim is to publish the information in Spring 2020".*

33. The Commissioner understands that that response to the second report<sup>1</sup>, dated 27 February 2020, was in answer to one of the recommendations made by the Independent Chief Inspector of Borders and Immigration in their report '*An Inspection of the EU Settlement Scheme (April 2019 to August 2019)*'<sup>2</sup>. The relevant recommendation in that report was:

*"In the interests of promoting the EU Settlement Scheme (EUSS) and being recognised as its "authoritative voice", publish the department's Policy Equality Statement (PES) for the EUSS or such parts of the PES that provide reassurance that the impacts of the EUSS have been fully considered, in particular for vulnerable and hard-to-reach individuals and groups".*

34. The Home Office also told the Commissioner:

*"As noted above, there was a settled intention to publish at the time of the request, but there was not a confirmed date for publication.*

*The Home Office has committed to publishing the PES by Spring 2020. We are not able to be more specific about the publication date at present due to Covid-19 reprioritisation of resources within the department, but it remains our intention to publish as soon as possible".*

35. In support of its view that section 22 is engaged in this case, the Home Office referred, in its submission, to various decision notices in which the Commissioner upheld the use of section 22 with regard to information that was held in earlier versions of a document at the time of the request.

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<sup>1</sup> <https://www.gov.uk/government/publications/response-to-an-inspection-of-the-eu-settlement-scheme-april-to-august-2019/the-home-office-response-to-the-icibi-report-an-inspection-of-the-eu-settlement-scheme>

<sup>2</sup>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/868259/ICIBI\\_Inspection\\_of\\_the\\_EU\\_Settlement\\_Scheme\\_Apr\\_2019\\_to\\_Aug\\_2019\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/868259/ICIBI_Inspection_of_the_EU_Settlement_Scheme_Apr_2019_to_Aug_2019_.pdf)

*The Commissioner's view*

36. The Commissioner's guidance on section 22 of the FOIA<sup>3</sup> states that the intention to publish must pre-date the request.

37. Her guidance also states:

*"A general intention to publish some information will not suffice. It is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.*

*The information that the public authority intends to be published must be the specific information the applicant has requested.*

*If, in the course of preparing information for publication, some information is discarded or rejected, the exemption under section 22 will not cover that rejected material. Clearly, at the time the decision is made to discard that material, the public authority no longer holds the information with a view to its publication".*

38. In this case, the Commissioner is satisfied that, at the time of the request, the Home Office held information that fell within the scope of the request. She is also satisfied that, at the time of the request, the Home Office intended to publish a PES at some time in the future but that the actual publication date was not determined.

39. However, she is mindful that during the course of her investigation, the Home Office provided her with both "*the latest version of the PES*" and the version that it described as "*a copy of the PES that was held at the time of the request*".

40. She acknowledges that, with regard to "*the latest version of the PES*", the Home Office explained:

*"The PES provided is a later version of the information held at the time of the request. As a living document, the PES held at the time of the request has since been updated to reflect various policy*

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

*changes introduced during the period in question..... This updating process is still ongoing".*

41. The Commissioner accepts that she has considered a number of previous cases concerning the application of section 22 of the FOIA to draft information.
42. However, whereas in those cases, she was satisfied that the public authority had demonstrated that there was an intention to publish the information held at the time of the request, in this case, she considers that the Home Office failed to discharge that burden satisfactorily.
43. With respect to her consideration of the withheld material, the Commissioner accepts that the Home Office provided her with two versions of the PES during the course of her investigation. She accepts that it explained that the PES held at the time of the request had since been updated. She recognises that while there was a settled intention to publish, but no confirmed date for publication, the Home Office may not have held the final version of the PES at the time of the request.
44. However, the Commissioner considers that, in order to engage section 22 in this case, it was appropriate and necessary for the Home Office to explain how the information held at the time of the request appears in the later version. In the absence of that level of detail, the Commissioner cannot be satisfied that information held at the time of the request was not subsequently discarded or rejected during the updating process.
45. Despite her concerns as to the extent to which the information held at the time of the request was the exact information that the Home Office intended to publish, the Commissioner has considered whether it was reasonable that the information should be withheld from disclosure until the intended date of publication, whether determined or not.

*Was it reasonable to withhold the information?*

46. For the exemption to be relied on, section 22(1)(c) requires that the application is 'reasonable' in all the circumstances of the request.
47. The Commissioner recognises in her guidance:

*"There is some overlap between the factors to consider when deciding what is reasonable, and those which are relevant to the application of the public interest test. However, before applying the public interest test, a public authority must first determine whether or not it is reasonable, in all the circumstances, to withhold the information".*

48. She also states:



*"The closer to the date of publication, the more reasonable it is likely to be for the public authority to withhold the information until publication has taken place".*

#### *The complainant's view*

49. The complainant told the Home Office:

*"It is not sufficient to claim that it will be 'published shortly'. The Minister claimed it would be "published shortly" on 11 June ( PQ 261207). It is now 13 September and the document has still not been published. It is unreasonable to expect me to rely on any further assurance to that effect, given the failure to publish as promised".*

50. In support of his complaint, the complainant told the Commissioner:

*"This is a highly time-sensitive issue".*

51. He referred the Commissioner to a Policy Paper<sup>4</sup>, described as being updated on 21 December 2018, which stated:

*"The equalities impacts of the Settlement Scheme have therefore been outlined below, although a separate PES which evaluates the detailed equalities impacts of the Settlement Scheme has also been completed".*

52. In support of his view that refusal to disclose the requested information on the basis of section 22 was wrong, the complainant told the Commissioner:

*"... the EUSS is open for only a limited period of time and the PES is key to understanding whether the Home Office complied with the public sector equality duty ('PSED') in s.149 EA 2010 in its design and implementation".*

#### *The Home Office's view*

53. In its correspondence with the Commissioner, the Home Office said:

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<sup>4</sup> <https://www.gov.uk/government/publications/immigration-and-social-security-co-ordination-eu-withdrawal-bill/policy-equality-statement-immigration>

*"...we acknowledge that there is significant interest in the PES given the high-profile nature of the EU Settlement Scheme and its impact on a large cohort of individuals. For this reason, the Home Office has committed to publish the PES".*

54. However, it told the Commissioner:

*"The Home Office believes it is reasonable to withhold the information until the date of publication.*

...

*Releasing an earlier version of the PES could lead to the release of inaccurate information and could be misleading and misinforming which could undermine confidence in the EU Settlement Scheme".*

55. In its submission to the Commissioner, the Home Office confirmed that it had an intention to publish the requested information at the point the request was made. It also confirmed that it had made a public commitment to publish the PES in Spring 2020. However, it explained that this publication was now delayed for reasons of the pandemic and, at the time of writing, still has not occurred.

#### *The Commissioner's view*

56. The Commissioner has considered the submissions of both parties and her own guidance on this matter.

57. She has also taken into account the public statements regarding publication. For example, on 11 June 2019, in response to Written question 261207, the then Immigration Minister stated:

*"A Policy Equality Statement, which sets out the Government's consideration of the impacts of the EU Settlement Scheme on those who share a protected characteristic, will be published shortly.*

58. Similarly, on 17 July 2019, in response to Written question 252532, the then Immigration Minister stated:

*"As part of this process, we have had due regard, in accordance with the public sector equality duty under section 149 of the Equality Act 2010, to impacts on those who share a protected characteristic. This is reflected in the Policy Equality Statement for the EU Settlement Scheme, and a copy of this will be placed in the Library shortly".*

59. She considers that these responses understandably gave the impression that the PES would be published shortly, even if the actual publication date had not been determined.

60. With respect to the Home Office's reference to its commitment to publish the PES in Spring 2020, the Commissioner acknowledges that that commitment was made following the Independent Chief Inspector of Borders and Immigration's second report on the EU Settlement Scheme.
61. The Commissioner accepts that that report was dated 27 February 2020 and shown as being presented to Parliament in February 2020.
62. However, the Commissioner is mindful that the foreword to that report included the following statement by the Independent Chief Inspector of Borders and Immigration:

*".. As with all inspections, I will press the HO to implement my recommendations without waiting for the report to be published.*

...

*This report was sent to the Home Secretary on 30 September 2019".*

63. Given the nature of one of its recommendations, the Commissioner considers the existence, and timing, of that report is relevant to her consideration in this case.
64. The Commissioner notes that the Home Office cited reprioritisation of resources within the department, due to the pandemic, as the reason for the delay in publication.
65. While the Commissioner accepts that public authorities face challenges since March 2020, she is not satisfied that the Home Office demonstrated that, at the time of the request, it was reasonable, in all the circumstances, to refuse to provide the requested information.
66. In reaching her decision in this case, the Commissioner has taken into account the purpose of a PES, the remit of the EU Settlement Scheme and the consequences for those who fail to apply by the deadline.
67. In the circumstances of this case, she does not consider it reasonable to ask the public to wait, particularly given what the Home Office itself described as:

*"... the high-profile nature of the EU Settlement Scheme and its impact on a large cohort of individuals".*

#### *The public interest test*

68. Section 22(1) is qualified by the public interest test.

69. However, in light of her finding above, the Commissioner has not gone on to consider the public interest test.

### *Conclusion*

70. As the Commissioner does not find the exemption afforded by section 22 to be engaged she requires the Home Office to disclose the requested information – the version of the PES held at the time of the request.
71. The Commissioner recognises the Home Office expressed concern that releasing an earlier version of the PES could lead to the release of inaccurate information and could be misleading and misinforming. However, she notes that it did not provide any evidence to substantiate that view or give any reason why it could not provide context to the information held at the time of the request.

## **Other matters**

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### *Records management*

72. The Code of Practice issued under section 46 of the FOIA (the 'Code') provides guidance to public authorities as to desirable practice in connection with the keeping, management and destruction of records. In relation to decisions about what records should be kept in order to meet corporate requirements, paragraph 8.1(d) recommends that authorities should take the following into account:

*"The need to explain, and if necessary justify, past actions in the event of an audit, public inquiry or other investigation. For example, the Audit Commission will expect to find accurate records of expenditure of public funds. Or, if an applicant complains to the Information Commissioner's Office (ICO) about the handling or outcome of an FOI request, the ICO will expect the authority to provide details of how the request was handled and, if applicable, why it refused to provide the information."*

73. When she receives a complaint which she considers eligible for formal consideration under section 50 of the FOIA, it is the Commissioner's practice to write to the relevant public authority advising them of the case. In her correspondence, the Commissioner clearly states that she expects the public to be fully prepared and ready to provide its detailed and final submissions to the Commissioner when these are asked for.

74. Similarly, her guidance<sup>5</sup> states:

*"If a requester makes a complaint to the ICO, one of our case officers will contact you and explain what we need from you. If you know a complaint has been made, you should make sure you keep all the relevant correspondence, as well as the requested information".*

75. The Commissioner notes that, in this case, the Home Office appeared to have some considerable difficulty in providing her with a copy of the information that was held at the time of the request. This caused a delay in her investigation.

76. The Commissioner directs the Home Office to the Code and expects that it will have due regard for its recommendations in its future handling of requests.

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<sup>5</sup> <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/complaints/>

## Right of appeal

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77. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

78. 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.

79. 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 .....**

**Laura Tomkinson  
Group Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**