

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 December 2022

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

Decision (including any steps ordered)

1. The complainant requested information relating to the vigil held for Sarah Everard on Clapham Common. The Home Office provided some information but withheld the remainder, citing sections 21 (information accessible to applicant by other means), 24 (national security), 31 (law enforcement), 35 (formulation of government policy), 36 (prejudice to effective conduct of public affairs) and 40(2) (personal information) of FOIA.
2. The Commissioner has considered the application of sections 31, 35 and 36 to the information withheld by virtue of those exemptions.
3. The Commissioner's decision is that the Home Office has correctly applied those exemptions and that the public interest lies in withholding the information.
4. The Commissioner requires no steps to be taken as a result of this decision

Request and response

5. On 19 March 2021, the complainant wrote to the Home Office and requested information in the following terms:

"I would like to request the following information, from 8th March 2021 to the day this request is processed:

(1) All internal correspondence and communications held by the Home Secretary Priti Patel which mentions/refers/relates to the Sarah Everard vigil on Clapham Common.

(2) All external correspondence and communications between the Home Secretary and the Metropolitan Police which mentions/refers/relates to the Sarah Everard vigil on Clapham Common.

By "correspondence and communications", I define this as including, but not limited to:

Emails (and their attachments)

Letters

Briefings

Research documents

WhatsApp messages and other similar communications

Minutes taken during meetings".

6. The request was made via 'whatdotheyknow'.
7. It was not until 7 July 2021 that the Home Office provided its substantive response. It disclosed some information but withheld the remainder, citing the following sections of FOIA:
 - 21(1) (information accessible to applicant by other means)
 - 24(1) (national security)
 - 31(1)(a) (law enforcement)
 - 35(1)(a) (formulation of government policy),
 - 36(2)(b)(i), 36(2)(b)(ii), 36(2)(c) (prejudice to effective conduct of public affairs) and
 - 40(2) (personal information).
8. At internal review, while maintaining its application of the other exemptions cited, the Home Office said that it no longer considers section 35 is engaged.

Scope of the case

9. While the complainant did not provide any specific grounds or comments in her request for an internal review, in correspondence with the Commissioner she challenged the application of sections 24, 36, 31 and 40 – both in relation to the application of the exemption and, if engaged, with respect to the public interest test.
10. In support of disclosure, she argued that the public interest lies in the requested information being fully released, to enable the public to understand how the Home Office and the Metropolitan Police handled the policing of the vigil.
11. She acknowledged that much has been published since that time, including a number of reports, but considered that the public must be able to scrutinise the original documents.
12. Having revisited the request, the Home Office re-introduced reliance on section 35, telling the Commissioner that it considered that section 35(1)(a) applied to a limited amount of the withheld information. It also explained the reason why it withheld a small amount of information by virtue of section 24.
13. The Home Office provided the Commissioner with a copy of the withheld information, together with a schedule identifying which of the exemptions is relied on in respect of each of the withheld documents.
14. The Commissioner considers that, prior to his involvement, the Home Office relied to a large degree on the requested material being self-evidently exempt, without making extensive effort to provide supporting material or penetrating analysis. It was not until his investigation that the Home Office provided substantive arguments.
15. The Commissioner is mindful that the complainant told him that she was struggling to understand why section 24 is engaged in this case. She also argued, with respect to section 40(2), that the names of ministers, special advisers and senior officials should not be redacted due to data protection.
16. The Home Office confirmed that no such information has been withheld under section 40.
17. The Commissioner accepts the Home Office's explanation as to why the information withheld by section 24 was considered to be in scope and notes that the exemption is only applied to a very small amount of information.
18. Having taken account of the complainant's concerns, the Home Office's explanation about its application of the exemptions at sections 24 and 40(2) and the information withheld by virtue of those exemptions, the

Commissioner is of the view that it is not necessary for him to consider either of those exemptions in this notice.

19. The following analysis sets out why the Commissioner has concluded that the Home Office was entitled to rely on sections 31(1)(a), 35, and 36(2)(b) of FOIA in this particular case.

Reasons for decision

20. Section 31(1)(a) of FOIA says that:

“Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(a) the prevention or detection of crime,”

21. In correspondence with the complainant, the Home Office described the information withheld by virtue of section 31 as follows:

“The correspondence between the Home Secretary’s Private Office, including the Home Secretary herself and the Metropolitan Police Service is sensitive in nature as it relates to operational decisions and internal police procedures”.

22. In its submission to the Commissioner, it argued that disclosure of such information would be useful to anyone seeking to use occasions such as the vigil to create disorder and frustrate police operations designed to maintain public order.
23. The Commissioner accepts that the potential prejudice described by the Home Office clearly relates to the interests which the exemption contained at section 31(1)(a) of FOIA is designed to protect.
24. The Commissioner is also satisfied that the prejudice being claimed is “real, actual or of substance”, and that there is a causal link between disclosure and the prejudice claimed. It is clearly logical to argue that the disclosure of operational decisions and internal police procedures would make it easier for those intent on criminal activity to commit crime. The Commissioner therefore considers that the exemption is engaged.

The public interest test

25. Section 31(1)(a) is a qualified exemption. Therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31(1)(a) outweighs the public interest in disclosing the information.

26. In balancing the public interest arguments, the Commissioner acknowledges that disclosure would increase transparency and may shed some light on the policing of the Sarah Everard vigil.
27. However, he also recognises the strong public interest in protecting the ability of public authorities to enforce the law.
28. The Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption – in this case, the public interest in avoiding likely prejudice to the ability of the Metropolitan Police to detect and prevent crime.
29. The Commissioner considers it clear that there is a very substantial public interest in avoiding that outcome and that this is a public interest factor of considerable weight in favour of maintenance of the exemption.
30. Having taken the above into account, the Commissioner is satisfied that, in the particular circumstances of this case, the public interest in maintaining the exemption outweighs that in disclosing the requested information.

Section 35 – formulation of government policy etc

31. Section 35(1)(a) of FOIA says that:

“Information held by a government department ... is exempt information if it relates to-

(a) the formulation of development of government policy,”.

32. The Commissioner understands ‘formulation’ to broadly refer to the design of new policy, and ‘development’ to the process of reviewing or improving existing policy.
33. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered policy options in private.
34. The exemption is class based and so it is only necessary for the withheld information to ‘relate to’ the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
35. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term ‘relates to’ is interpreted broadly. Any significant link between the information and the process by which government either

formulates or develops its policy will be sufficient to engage the exemption.

36. In this case, the Home Office explained to the Commissioner that section 35(1)(a) is relied on to protect the need for a safe space for policy formulation and development in relation to a 'fairly recent Bill' (namely the Policing, Crime, Sentencing and Courts Bill) and reach decisions away from external interference and distraction.
37. Having viewed the withheld information, and mindful of the wide interpretation of 'relates to', the Commissioner is satisfied that section 35(1)(a) is engaged.

The public interest test

38. Section 35(1)(a) is a qualified exemption. Therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosing the information.
39. The Home Office recognised that there is a genuine public interest in understanding how the Government's policy in relation to policing, crime and sentencing is developed and reflected in legislation. However, it argued that disclosure would erode the safe space required to develop, inform and implement Government policy in these important areas.
40. The Commissioner has considered the arguments, both in favour of disclosure of the information and of maintaining the exemption.
41. He is mindful of the general public interest in openness and transparency of information generated by public authorities and recognises the value in the disclosure of information in respect of this area of policy.
42. The Commissioner also accepts that a safe space is needed to develop ideas, debate live issues, and reach decisions away from external interference and that the need for a safe space will be strongest when the issue is still live.
43. In the circumstances of this case, the Commissioner finds that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosure at the time of the request.

Section 36 – Prejudice to the effective conduct of public affairs

44. Section 36(2) of FOIA says that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—

(b) would, or would be likely to, inhibit—

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”.

45. The Home Office has applied sections 36(2)(b)(i) and (ii) and 36(2)(c) in this case.
46. Arguments under sections 36(2)(b)(i) and (ii) are usually based on the concept of a ‘chilling effect’. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
47. The Commissioner takes the view that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. In other words, if section 36(2)(c) is used in conjunction with any another exemption, the prejudice envisaged must be different to that covered by the other exemption. Therefore, in this case, the prejudice claimed under 36(2)(c) must be different to that claimed under 36(2)(b).
48. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner is satisfied that the Home Secretary is authorised as the qualified person under section 36(5) of FOIA.
49. The Home Office provided the Commissioner with a copy of the submission to the qualified person, Priti Patel, the then Home Secretary, and of the qualified person’s opinion.
50. It is not clear from the submission which subset of the information was withheld by virtue of section 36(2)(c), nor how the qualified person considered that the prejudice envisaged by that subsection may arise.
51. Having viewed all the information withheld by virtue of section 36(2), the Commissioner is satisfied that the information clearly represents a free and frank exchange of advice and/or views.
52. He has therefore first considered the application of section 36(2)(b)(i) and (ii).

53. The Commissioner accepts that it was reasonable for the qualified person to consider that there was a need to protect the free and frank provision of advice and the free and frank exchange of views, thus avoiding an inhibiting effect on the quality, openness and comprehensiveness of advice to Ministers and of internal and external discussions.
54. The Commissioner has taken into account that the submission specified both 'would' and 'would be likely' and that the qualified person did not specify the level of prejudice they considered applied. He also recognises that the Home Office confirmed that the lower level of likelihood was intended.
55. In the absence of clear evidence that the qualified person meant 'would', the Commissioner accepts that the lower level of prejudice, 'would be likely to', was applied.
56. The Commissioner is satisfied that that the overall conclusion of the process was correct. In other words, given the nature of the requested information, the qualified person's opinion - that inhibition relevant to those subsections would be likely to occur through disclosure of the withheld information - is reasonable. He therefore finds the exemption engaged in respect of sections 36(2)(b)(i) and (ii).
57. In light of that finding, he has not considered whether section 36(2)(c) also applied.

Public interest test

58. Even where the qualified person has concluded that the exemption applies, the public interest test must be applied to the decision whether or not to disclose the withheld information.
59. The Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
60. In favour of disclosing the requested information, the Home Office recognised that there is a general public interest in transparency and openness in governments. It also acknowledged that there is a legitimate public interest surrounding "this high-profile case which has been extensively reported in the media and has generated widespread debate on public safety and policing".
61. in favour of maintaining the exemption, the Home Office argued that it was not in the public interest to incur the prejudice it envisaged, namely an inhibition of free and frank advice and the free and frank exchange of

views in the future. It argued that the fact that a subject is high profile, and of significant interest to the media and the public, does not equate to there being a public interest in disclosure. It also argued that the amount of information about the vigil in the public domain diminishes the level of public interest in disclosure of the communications withheld by section 36(2) in this case.

62. When considering whether the public interest favours maintaining the exemption or disclosing the requested information, the Commissioner has considered how much weight to attach to the alleged chilling effect and the extent to which disclosure of this particular information would be likely to cause detriment to similar processes in the future. He considers that the chilling effect argument will always be strongest when an issue is still live.
63. With respect to the nature of the information and timing of the request in this case, the Commissioner notes that the requested information relates to what remains a sensitive topic. He considers this gives weight to the public interest in maintaining the exemption.
64. The Commissioner has also considered the extent to which the content of the withheld information would add to the public debate and inform the public's understanding. He considers that disclosure of the information would add little to the overall debate given the information that is already in the public domain.
65. The Commissioner also recognises that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be likely to have the stated detrimental effect, he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
66. The Commissioner has assessed the balance of the public interest. He has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation against the public interest in openness and transparency. His conclusion is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the exemption outweighs the public interest in disclosure.
67. It follows that his decision is that the Home Office was entitled to rely on sections 36(2)(b)(i) and (ii) of FOIA to withhold the requested information.

Right of appeal

68. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

69. 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.

70. 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
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