

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 November 2022

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

#### **Decision**

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1. The Commissioner decided that the Home Office (HO) had complied with FOIA in applying the section 31(1) (Law enforcement), section 42(1) (Legal professional privilege) and section 43(2) (Commercial interests) FOIA exemptions in respect of the information requested.
2. In providing its refusal notice outside 20 working days, the Commissioner found that HO had breached section 17(1) FOIA.
3. He did not require HO to take any steps.

#### **Request and response**

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4. The complainant made the following information request to HO (HO reference 65979) on 9 September 2021:

"Priti Patel [the then Home Secretary] to send boats carrying migrants to UK back across Channel.

Border Force is being trained on 'turn-around' tactics but France warns plan could endanger lives.

1. Please provide legal advice received regarding the legality of UK authorities (Border Force etc.) stopping migrant boats at sea entering UK part of the English Channel and/or turning them back to France?
2. Provide name of the author of the legal advice and the fee note.

3. Provide training material regarding how to execute push back at sea.”
5. The complainant additionally complained of delay by HO and said that HO had not confirmed that it held the requested information.
6. HO withheld the requested information relying on the section 31(1), 42(1), 43(2) and FOIA exemptions. HO also relied on the 40(2) (Personal information) exemption.

## **Scope of the investigation**

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7. The Commissioner’s reasoning covers the scope of the request and application by HO of the section 31(1) (Law enforcement), section 42(1) (Legal professional privilege) and section 43(2) (Commercial interests) FOIA exemptions. He considered the timing of the HO response and whether or not the information was held.
8. The complainant told the Commissioner in his complaint, which included an application for a section 50(2) FOIA Decision Notice, that HO had failed to state if the information was held. He added that he thought that HO had applied the public interest balancing test wrongly to this ‘important issue’.
9. The complainant provided no supporting evidence and made no other representations to the Commissioner or to HO but did complain of delay by HO in addressing his concern.
10. The section 40(2) FOIA exemption is absolute and is therefore not subject to a public interest balancing test.

## **Reasons for decision**

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### **Section 1 – Right of access to information**

11. Section 1(1) FOIA provides that any person requesting information from a public authority is entitled to be informed in writing whether the public authority holds the information specified in the request.
12. HO, in its response to the request, did not explicitly say whether or not it held the requested information. However HO did say that it was withholding information for each of the three parts of the information request.

### **Section 31(1) – Law enforcement**

13. HO noted that information which is not exempt information by virtue of section 30 is exempt if its disclosure under FOIA would, or would be likely to, prejudice –
  - (a) the prevention or detection of crime, ...
  - (e) the operation of the immigration controls ... .
14. HO said that the information requested in parts one and three of the request was being withheld relying on the section 31(1) FOIA exemption. HO added that the exemption related to law enforcement and the operation of immigration controls. Releasing the legal advice regarding maritime tactics, and the training materials used by HO's Border Force to deliver these tactics, would provide insights of value to criminal groups seeking to evade or undermine those tactics. The complainant did not dispute the application of the exemption.
15. The Commissioner decided that the section 31(1) FOIA exemption was engaged for the reasons given by HO.
16. As this is a qualified exemption, the Commissioner considered the balance of the public interest in withholding the information held by HO.

#### **Section 42(1) – Legal professional privilege**

17. The section 42(1) FOIA exemption applies to information in respect of which a claim to legal professional privilege or, in Scotland to confidentiality of communications, could be maintained in legal proceedings. The Commissioner is satisfied that 'legal advice received regarding the legality of UK authorities (Border Force etc.) stopping migrant boats at sea' will be subject to a claim of legal professional privilege in respect of advice privilege. The Commissioner therefore found that section 42(1) is engaged.
18. This is a qualified exemption and so is subject to the public interest test. Accordingly the Commissioner proceeded to consider the balance of the public interest in withholding the information held by HO.
19. The complainant offered no grounds or representations for this exemption beyond saying that he disagreed with HO's assessment of the public interest balance.
20. HO said that, for both the section 31(1) and section 42(1) FOIA exemptions, factors favouring disclosure of the requested information included there being a general public interest in the disclosure of information to ensure transparency and accountability by HO. There was also a general public interest in providing information enabling the public to understand decisions which may affect them. HO accepted that there

was a specific public interest in enabling access to information about immigration enforcement and border control activities.

21. HO added, as regards considerations in favour of maintaining these exemptions, particularly with regard to section 31(1) FOIA, that disclosure of the information would assist those engaged in criminal activities at the UK's borders. The requested information would give them an ability to build a picture of the work of Border Force and identify any strengths or weaknesses, thereby compromising the integrity of immigration controls. This information would substantially prejudice the work that Border Force carried out. It would also enable potential offenders to circumvent the controls by building up a picture of HO's operational priorities, activities and areas of highest risk. There was a public interest in ensuring the integrity of UK borders and HO said it would not be in the public interest to compromise that. HO concluded that the balance of the public interest lay in maintaining the exemption and withholding the information.
22. In addition, for the section 42(1) FOIA exemption, HO added that it was in the public interest for the decisions taken by government to be taken in a fully informed legal context. Government departments needed access to high-quality, comprehensive legal advice for the effective conduct of their business. Disclosure of legal advice had significant potential to prejudice the government's ability to defend its legal interests, both directly, by unfairly exposing its legal position to challenge, and indirectly, by diminishing the reliance it could place on the advice given having been fully considered and presented without fear or favour. Neither of these scenarios was in the public interest. There was a risk that clients and lawyers would avoid making a permanent record of the advice that had been sought or given, or would make only a partial record of it if legal advice were to be routinely disclosed. HO said it was in the public interest for the provision of legal advice to be fully recorded in writing and for the process of decision-making to be described accurately and fully; the legal advice must itself be part of that record.
23. The Commissioner considered the HO case for determining the public interest balance in favour of maintaining the section 31(1) and 42(1) FOIA exemptions. He decided that, essentially for the reasons HO gave, the information had been correctly withheld.

### **Section 43 – commercial interests**

24. Under section 43(2) FOIA, information is exempt if its disclosure under FOIA would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a 'qualified' exemption and is therefore subject to a public interest test.

25. HO applied the section 43(2) FOIA exemption to that part of request 2 which asked for a legal fee note. HO said that the fees were commercially sensitive since they were open to negotiation on a case by case basis in what was a competitive marketplace. The complainant offered no representations.
26. The Commissioner found persuasive HO's argument that providers of legal advice would suffer prejudice if their fees were to be published. He therefore decided, with HO, that the section 43(2) FOIA exemption was engaged in respect of the fee note for the legal advice given.
27. The section 43 FOIA exemption is qualified; HO therefore proceeded to carry out a public interest test. HO said that 'the public interest' was not necessarily the same as what interested the public. HO said it had to consider the greater good or benefit to the community as a whole if the information was released or not. HO said it needed to balance transparency and the 'right to know' against the need to enable effective government and to serve the best interests of the public.
28. HO noted that FOIA is 'applicant blind' so that HO could not, and did not, ask about the motives of anyone who asked for information. In providing a response to one person, HO were expressing a willingness to provide the same response to anyone.
29. HO said that considerations in favour of disclosing the information were that this would help ensure that there was full transparency in HO's use of public funds and in particular to maintain its' accountability to taxpayers. Disclosure of this information would enable the public to assess whether or not HO was getting best value for money in terms of its contracts with private providers and partner agencies. Disclosure of the process HO followed would also lead to greater accountability and reassure the public that its tendering process was fairly run. HO said that there was a public interest in government departments and agencies being able to secure contracts that represented value for money and anything that would undermine its ability to do that would not be in the public interest. Value for money could best be obtained where there was a healthy competitive environment, coupled with the protection of the government's commercial relationship with industry.
30. HO added that disclosure would also prejudice HO's commercial interests by damaging commercial relationships with contractors and service providers. Companies would be discouraged from dealing with the public sector, fearing disclosure of information that might damage them commercially. HO foresaw that companies would withhold information where possible. This would make the HO choice of the best contractor more uncertain as the selection decision would be based on limited and censored data.

31. For these reasons HO concluded that the balance of the public interest lay in maintaining the section 43(2) FOIA exemption and withholding the information. The Commissioner found persuasive the case HO had provided and therefore decided that HO had been correct in withholding the information about legal fees.

#### **Section 40 – personal information**

32. The name of the author of the legal advice was requested at the second part of the request. The Commissioner agrees that a name is clearly personal data, and that section 40(2) would be the relevant exemption.
33. The Commissioner had been asked by the complainant to consider the public interest balance in the exemptions being applied by HO. Since section 40(2) FOIA is an absolute exemption, the need for a public interest balancing test did not arise. Accordingly the Commissioner did not consider the section 40(2) FOIA exemption.

#### **Sections 10/ 17 – timeliness of response**

34. The complaint told the Commissioner that he was concerned at the time HO had taken to address his matter. The complainant made his information request on 9 September 2021; HO did not issue a refusal notice until 21 December 2021.
35. Under section 10(1) FOIA (Time for compliance with requests) a public authority must comply with a request promptly and not later than the twentieth working day following receipt. Where, as here, the public authority issues a refusal notice, in accordance with section 17(1) FOIA, it must issue its refusal notice within the statutory time for compliance. HO did not issue its refusal notice within 20 working days of receiving the request and therefore breached section 17(1) FOIA. Since there is no feasible remedy now available to mitigate this breach, the Commissioner did not require HO to take any steps.
36. On 25 December 2021 the complainant wrote to HO to request an internal review. He said: "I am writing to request an internal review of Home Office's handling of my FOI request 'Migrants crossing english [sic] channel'."
37. HO provided the complainant with the outcome of its internal review on 26 January 2022 which was within the Commissioner's guidance of 20 working days.

## Right of appeal

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38. 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)

39. 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.
40. 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 .....**

**Dr R Wernham**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**