

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 December 2022

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

#### Decision (including any steps ordered)

---

1. The complainant requested legal advice relating to the housing of unaccompanied asylum-seeking children in hotels. The Home Office confirmed it held information within the scope of the request but refused to provide it, citing section 42(1) (legal professional privilege) of FOIA.
2. The Commissioner's decision is that the Home Office is entitled to rely on section 42(1) of FOIA to withhold the requested information.
3. The Commissioner requires no steps to be taken as a result of this decision.

#### Request and response

---

4. On 3 November 2021, the complainant wrote to the Home Office and requested information in the following terms:

"Please can you provide me with any legal advice the Home Office has received this year surrounding the keeping of unaccompanied asylum-seeking children living in hotels?"

Including (but not limited to): advice on the question of whether establishing these hotels could constitute 'unregistered' or 'unregulated' care; advice on who the corporate parent would be for unaccompanied children living in hotels".

5. The Home Office responded on 7 December 2021. It confirmed it held information within the scope of the request but refused to provide it, citing section 42(1) (legal professional privilege) of FOIA.
6. Following an internal review, the Home Office wrote to the complainant on 21 January 2022 maintaining its position.

### **Scope of the case**

---

7. The complainant contacted the Commissioner on 4 April 2022 to complain about the way his request for information had been handled.
8. He considered that disclosure of the requested information would further public debate around the issue of how unaccompanied asylum-seeking children (UASC) should be best looked after and provide greater transparency around the government's decision-making on this issue.
9. The analysis below considers the Home Office's application of section 42(1) of FOIA to the requested legal advice.

### **Reasons for decision**

---

10. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. LPP protects the confidentiality of communications between a lawyer and client.
11. In this case, the complainant has requested legal advice received by the Home Office relating to the keeping of unaccompanied asylum-seeking children living in hotels.
12. From the evidence he has seen, the Commissioner is satisfied that the information falling within the scope of this request constitutes confidential legal advice provided by a qualified legal adviser to their client. This means that this information is subject to LPP. The Commissioner is not aware of any evidence suggesting that this privilege has been waived. The exemption provided by section 42(1) of FOIA is, therefore, engaged in relation to this information.

### **The public interest test**

13. Section 42 is a qualified exemption and the Commissioner has therefore considered the balance of the public interest to determine whether it

favours the disclosure of the information, or favours the exemption being maintained.

14. In balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege. The general public interest inherent in this exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice. A weakening of the confidence that parties have that legal advice will remain confidential undermines the ability of parties to seek advice and conduct litigation appropriately and thus erodes the rule of law and the individual rights it guarantees.
15. It is well established that, where section 42(1) of FOIA is engaged, the public interest in maintaining the exemption carries strong, in-built weight, such that very strong countervailing factors are required for disclosure to be appropriate. The Commissioner notes the decision in the *Cabinet Office v Information Commissioner and Gavin Aitchison* (GIA 4281 2012) where, at paragraph 58, Upper Tribunal Judge Williams said:

“...it is also, in my view, difficult to imagine anything other than the rarest case where legal professional privilege should be waived in favour of public disclosure without the consent of the two parties to it”.
16. While the Commissioner acknowledges the complainant’s argument that there is a public interest in ensuring that public authorities are transparent in their actions, he must also take into account that there is a public interest in the maintenance of a system of law which includes legal professional privilege as one of its tenets.
17. In reaching his decision in this case, the Commissioner has considered the prior findings of the Commissioner and the Information Tribunal in relation to legal professional privilege. He has also had regard to the content of the withheld information.
18. The Commissioner is mindful that, while the inbuilt weight in favour of the maintenance of legal professional privilege is a significant factor in favour of maintaining the exemption, the information should nevertheless be disclosed if that public interest is equalled or outweighed by the factors favouring disclosure.

19. In all the circumstances of this case, however, the Commissioner is not satisfied, from the evidence he has seen, that there are factors present that would equal or outweigh the strong public interest inherent in this exemption.
20. The Commissioner has therefore concluded that the public interest in maintaining the exemption at section 42(1) outweighs the public interest in disclosure. It follows that the Home Office has correctly applied section 42(1) in this case.

**Right of appeal**

---

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

22. 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.
23. 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**