

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

### **Decision notice**

**Date:** 13 February 2023

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

#### **Decision (including any steps ordered)**

---

1. The complainant requested information relating to correspondence sent by and/or to the then Home Secretary, Priti Patel, in 2020 which mentioned the 'death penalty'.
2. The Home Office refused to provide the requested information citing sections 27 (international relations), 35(1)(a), (b) and (d) (formulation of government policy), 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice to effective conduct of public affairs), 40(2) (personal information) and 42(1) (legal professional privilege).
3. The Commissioner has investigated its application of sections 35, 36, and 42 to the information withheld by virtue of those exemptions.
4. The Commissioner's decision is that the Home Office correctly relied on sections 35, 36 and 42 and that the balance of the public interest favoured maintaining the exemptions.
5. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

---

6. On 20 April 2021, following earlier correspondence, the complainant wrote to the Home Office with a refined request for information, namely:

"Would it be possible to refine the request to correspondence and communication sent by and/or to Priti Patel which mentioned the "death penalty" in 2020? This could exclude any disclosures relating to other states, the personal details of civil servants, information which could endanger the safety of any individual or contravene data protection".

7. The Home Office responded on 14 June 2021. It refused to provide the requested information, citing the following exemptions as its basis for doing so:
  - 35(1)(a) and 35(1)(b) (formulation of government policy);
  - 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) (prejudice to effective conduct of public affairs);
  - 40(2) (personal information),
  - 41 (information provided in confidence); and
  - 42(1) (legal professional privilege).
8. Following an internal review, the Home Office wrote to the complainant on 27 August 2021 maintaining its original position.

### **Scope of the case**

---

9. The complaint in this case is about the Home Office's handling of a refined FOI request. It is not in dispute that the earlier request for information, made on 1 January 2021, was for:
  - '- Correspondence and communication between Priti Patel and the Home Office which mentioned the "death penalty" in 2020'....
  - '- Other material within the Home Office which mentioned the "death penalty" in 2020....'.
10. In support of her complaint in this case, the complainant told the Commissioner:

"The information is in the public interest as a subject of human rights debate, with potential wide-ranging repercussions".
11. During the course of the Commissioner's investigation, the Home Office revised its position, confirming that it is no longer relying on section 41 to withhold any information. However, it said that it is now relying on an additional exemption, namely section 27, and an additional limb of an

exemption, namely section 35(1)(d), to withhold information in scope of the request.

12. The Commissioner accepts that a public authority has the right to claim an exemption for the first time before the Commissioner or the Tribunal. The Commissioner does not have discretion as to whether or not to consider a late claim.
13. The Commissioner recognises that the Home Office described the information in scope of the request as 'broad in nature'. It also told the complainant that, due to the focus of the request, ie references to the death penalty, "the information in scope concerns sensitive discussions.....".
14. The Home Office provided the Commissioner with a copy of the withheld information during the course of his investigation. It also explained that, in some instances, it considers that more than one exemption applies to the same information.
15. The Commissioner acknowledges that the wording of the request specifically states that the request is for 'correspondence and communication ....which **mentioned** the "death penalty"...'(emphasis added).
16. The Commissioner recognises that the Home Office considers that a considerable amount of information falls within scope of the request as a result of that wording, and that a high number of exemptions apply.
17. With respect to his consideration of the withheld information, the Commissioner's investigation has been assisted by the Home Office providing the withheld information in individual annexes, one for each exemption relied on.
18. The Commissioner is mindful that the request states that certain types of disclosure, for example disclosures relating to other states and personal information, could be excluded.
19. In light of that having been specified in the request, the Commissioner considers the Home Office's application of sections 27 and 40 of FOIA to be outside the scope of the complaint.
20. Accordingly, the analysis below considers the Home Office's application of sections 35, 36 and 42 of FOIA to the information withheld by virtue of those exemptions.

## Reasons for decision

---

## **Section 42 legal professional privilege**

21. 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. Legal professional privilege protects the confidentiality of communications between a lawyer and client.
22. In this case, the Home Office confirmed that the information is withheld because it is subject to litigation and advice privilege.
23. From the evidence he has seen, the Commissioner is satisfied that the withheld information constitutes confidential legal advice, to the Home Secretary, from lawyers acting in their legal capacity. This means that this information is subject to LPP.
24. 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**

25. 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.
26. 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.
27. 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.
28. 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".

29. 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.
30. He accepts that the complainant referred to the public interest in transparency given the significance of the subject matter.
31. He recognises that the Home Office told the complainant that there is a strong public interest in the protection of the principle of LPP which allows public authorities and individuals to consult their lawyers in confidence, to be able to share information fully and frankly and to seek and obtain advice with the knowledge that such advice is privileged.
32. 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.
33. In all the circumstances of this case, 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. He considers that the balance of the public interest lies in withholding the information and protecting the Home Office's ability to obtain fully informed legal advice on which to make decisions without the fear of premature disclosure.
34. 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.
35. The Commissioner has next considered the Home Office's application of section 35 to the information withheld by virtue of that exemption.

### **Section 35 – formulation of government policy etc**

36. Section 35 sets out four exemptions designed to protect good government and provide a safe space for policymaking. In this case, the Home Office is citing sections 35 1(a), (b) and (d).

- section 35(1)(a) covers any information relating to the formulation and development of government policy;
  - section 35(1)(b) covers communications between Ministers and any information relating to those communications;
  - section 35(1)(d) covers information relating to the operation of Ministerial private offices.
37. The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
38. The exemption is class-based, meaning that the information must simply fall within the class of information described to engage the exemption. The classes are interpreted broadly and will catch a wide range of information. However, the exemption is subject to the public interest test.
39. The Commissioner considers that 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 in its correspondence with the requester.
40. This clearly did not assist the requester, particularly as she was unable to see the material to assess whether the matter was 'self-evident'.
41. The Commissioner, however, having viewed the withheld information and considered the Home Office's arguments which it provided in its submission to him, is satisfied that the information withheld by virtue of subsections (a), (b) and (d) engages those limbs of the exemption.
42. He accepts that a small amount of the withheld information relates to Ministerial communications or the operation of a Ministerial office and that the remaining withheld information broadly relates to the formulation or development of government policy.
43. The Commissioner has next considered the public interest arguments.

### **Public interest arguments in favour of disclosing the information**

44. The Home Office accepts that there is a general public interest in transparency and openness in government. It recognises that openness can increase public understanding, inform public debate, and maintain public trust.
45. Specifically in this case it recognises a clear public interest in issues around the death penalty.

### **Public interest arguments in favour of maintaining the exemption**

46. While the Home Office acknowledged that there is a public interest in the subject matter of correspondence received or sent by a Minister, in this case the Home Secretary, it considers that it is vitally important that Ministers have the 'safe space' required to discuss and consider issues in a free and frank way, without fear that such discussions will be released.
47. In favour of maintaining the exemption, it argued that the effective formulation of ongoing government policy would be impacted if the withheld information was disclosed. It argued that this would have "a limiting and negative effect on the quality of policy formulation and the creativity and ambition of policy formulation".
48. With respect to the small amount of withheld information identified as Ministerial communications, it considers that the openness and frankness of such communications would be impacted if these were disclosed under FOIA in this case.
49. With respect to the information withheld by virtue of section 35(1)(d), the Home Office argued that the effective operation of Ministers' Private Offices would be impacted "if officials' admin communications would be subject to disclosure under the FOIA".
50. It argued that this would have a chilling effect on the quality of internal and external discussions and on the quality, honesty and comprehensiveness of advice to Ministers, which in turn, may impair the operation of the Home Office in the future.

### **The balance of the public interest test arguments**

51. The Commissioner recognises the general public interest in transparency, openness and accountability. He accepts that the request relates to a sensitive subject matter and that the complainant has concerns that transparency has not been given sufficient consideration.
52. He also acknowledges that the relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
53. Having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at the time of the request was of sufficient significance for him to conclude that maintaining the exemption outweighed the public interest in disclosure.

54. The public interest in the Home Office being able to review and develop policy without disruption is a significant factor. He therefore finds that the Home Office was entitled to withhold the information withheld by virtue of section 35(1)(a).
55. With regard to the small amount of information withheld by virtue of section 35(1)(b) the Commissioner has concluded that disclosure would not meet or further the public interest. He has reached this conclusion on the basis of the content and nature of the information.
56. Similarly, having considered the information withheld by virtue of section 35(1)(d), the Commissioner is satisfied that the balance lies in favour of withholding the information. He considers that preserving the Private Office's ability to focus on managing the Home Secretary's work efficiently, and without external interference and distraction, outweighs the public interest in disclosure in this case.
57. The Commissioner has next considered the Home Office's application of section 36 to the information withheld by virtue of that exemption.
58. In doing so, he acknowledges that the section 36 exemption applies only to information that falls outside the scope of section 35. In this case, the Home Office considers that sections 36(2)(b)(i) and (ii) and 36(2)(c) apply.
59. As noted above, the Commissioner has been assisted by the Home Office indicating where multiple exemptions have been applied.
60. The Commissioner accepts that the Home Office considers that the information that is exempt by virtue of section 36(2)(c) is also exempt by virtue of section 35.
61. In light of his finding above, the Commissioner has only considered the Home Office's application of section 36(2)(b)(i) and (ii).

### **Section 36 prejudice to effective conduct of public affairs**

62. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
63. 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.



64. The Home Office provided the Commissioner with a copy of a submission to the qualified person, Priti Patel, the then Home Secretary, and of the qualified person's opinion.
65. It acknowledged that the opinion was sought on 18 March 2021 and received on 25 March 2021.
66. Explaining the reason why those dates pre-date the date of the request under consideration, it explained that the request in this case is a refinement of a previous request, made by the same requester on 1 January 2021.
67. In other words, shortly before the complainant submitted the refined request, the Home Office obtained the Qualified Person's opinion in relation to their original request and that the Qualified Person is of the opinion that disclosure would or would be likely to prejudice the effective conduct of public affairs.
68. The Home Office has relied on that Qualified Person's opinion rather than seeking another opinion following the receipt of the refined request.
69. In the specific circumstances of this case, the Commissioner is satisfied that section 36 can be engaged on the basis of this opinion. From the evidence he has seen, he accepts that the information that the QP considered when they gave their opinion included the information that falls to be considered under section 36 in this case.
70. In light of the short period of time between the opinion being sought and the refined request being made, he accepts that, rather than seeking another opinion, this opinion can be used as evidence of the Qualified Person's opinion on disclosure.
71. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the qualified person's opinion was a reasonable one.
72. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

73. The Home Office confirmed that it was relying on section 36(2)(b)(i) and (ii) and section 36(2)(c).
74. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focussing only on the content of the information.
75. The Commissioner notes that the submission provided to the Qualified Person variously referred to 'sections 36(2)(b)(i) and 36(2)(b)(ii)' and 'sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)'.
76. With regard to the limbs of section 36(2)(b), the issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.
77. With regard to section 36(2)(c), the Commissioner's guidance on section 36<sup>1</sup> states:
- "..., the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".
78. In the Commissioner's view, it is not unreasonable to engage sections 36(2)(b)(i) and (ii) in this case given the range and nature of the withheld correspondence. However, having considered the submission to the Qualified Person, and their opinion, he is not satisfied that the Home

---

<sup>1</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

Office has demonstrated how the prejudice claimed under (c) is different to that claimed under (b).

79. In the absence of some prejudice other than that to the free and frank expression of advice and views, he is unable to find that section 36(2)(c) is engaged.
80. Although he has not found section 36(2)(c) is engaged, there is no information that the Home Office considers is only exempt by virtue of that limb of the exemption and so the Commissioner is satisfied that all the remaining withheld information is caught by section 36(2)(b).
81. Section 36 is subject to the public interest test. The Commissioner notes that the Home Office considers that disclosure would prejudice or inhibit the effective conduct of public affairs.
82. The Commissioner has carried this higher level of likelihood through to the public interest test.

#### **Public interest arguments in favour of disclosing the information**

83. The Home Office put forward similar arguments to those above in respect of section 35, for example recognising that openness can increase public understanding, inform public debate, and maintain public trust.

#### **Public interest arguments in favour of maintaining the exemption**

84. In favour of maintaining the exemption, the Home Office argued that it is in the public interest to maintain the 'safe space' in which Ministers can obtain advice and consider policy and operational issues freely and frankly without risk of disclosure. It argued that it is firmly in the public interest to avoid prejudice to the effective conduct of public affairs and this includes the relationship between government and Parliament.

#### **The balance of the public interest test arguments**

85. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
86. As noted above, the arguments for maintaining the exemption essentially focus on the 'safe space' argument.

87. With respect to the nature of the withheld information in this case, the Commissioner accepts that the requested information relates to what is a sensitive topic. He has also taken into account that the wording of the request resulted in a wide range of information considered to be in scope.
88. With regard to the public interest in favour of disclosing the information, the Commissioner agrees that there is an obvious public interest in correspondence sent to and received by a Minister. He also recognises that there is a legitimate public interest in the subject the information relates to.
89. In this case, disclosure would allow the public to scrutinise exchanges involving the Home Secretary where the death penalty is mentioned. This would enable the public to see the full picture and reach their own view regarding such correspondence.
90. However, the Commissioner also recognises that, having accepted the reasonableness of the qualified person's opinion, he must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
91. In the circumstances of this case, the Commissioner accepts that there is a need for a safe space to provide advice and exchange views free from external comment and examination. Having considered the content of the withheld information, the Commissioner accepts that disclosure would impact on the effectiveness of this process.
92. The Commissioner has been mindful of the public interest in the Home Office having effective processes which allows it to openly debate issues of significant public interest without undue inhibition. In this case, he considers that the severity of the prejudice that may happen as a result of disclosing the withheld information affects the weighting of the public interest in disclosure.
93. The Commissioner has also considered the extent to which the content of the withheld information at the time of the request would add to the public debate and inform the public's understanding.
94. 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.

95. 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

---

96. 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)

97. 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.

98. 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**