

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 February 2023

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

#### Decision (including any steps ordered)

---

1. The complainant has requested information relating to copies of 'cover notes' sent to Private Office for requests made under FOIA.
2. The Commissioner's decision is that the Home Office was entitled to apply section 36(2)(b)(i) and (ii) of FOIA to withhold the requested information at parts 1 and 2(a).
3. The Commissioner requires no steps as a result of this decision.

#### Request and response

---

4. On 31 January 2022 the complainant requested information of the following description:  
  
"1. Copies of any and all 'cover notes' sent to Private Office for the following FOIs I previously submitted, which were assigned to the 'ministerial list':  
  
a) 64840  
  
b) 64586

- c) 64632
- d) 64693
- e) 63478/63680
- f) 65641
- g) 65797

For background: I understand that every FOI request which is assigned to the 'ministerial list' is referred to Private Office under cover of a separate note (a 'cover note'). This cover note typically includes the requesters name, profession and a summary of what the request is about and background on the information proposed for disclosure.

If more than one 'cover note' was sent to Private Office for any of the above FOI requests prior to the final disclosure, please provide copies of all cover notes.

2. Copies of the Private Office's reply(s) to each of the above Cover Letters. Please include:

- a) Copies of emails
- b) Copies of messages on any instant messaging platforms (including but not limited to Slack, WhatsApp, Teams)
- c) If you have used instant messaging platforms that automatically delete messages, please state the names of these platforms and, if possible, when they were used
- d) Copies of any SMS messages
- e) Audio recordings of any voicemails or voice notes
- f) Times, dates and written notes from any phone calls, video calls, or in person meetings
- g) If any documents were sent as attachments or exchanged in points a) to f), please also provide copies of them

If this request is too wide or unclear, I would be grateful if you could contact me as soon as possible, as I understand that under the Act you are required to advise and assist requesters. If any of this

information is already in the public domain, please can you direct me to it, with page references and URLs if necessary.”

4. On 23 March 2022 the Home Office responded stating that it holds parts 1 and 2(a) of the requested information but is withholding it under section 36(2)(b)(i), section 40(1) and section 40(2) of FOIA.
5. On the 12 April 2022 the Home Office issued a response in which it maintained its original position and also applied section 36(2)(b)(ii) of FOIA.

### **Reasons for decision**

---

6. This reasoning covers whether the Home Office is entitled to rely on section 36(2)(b)(i) and (ii) of FOIA to refuse parts 1 and 2(a) of the complainant's request.

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

7. 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, inhibit –
  - i) the free and frank provision of advice, or
  - ii) the free and frank exchange of views for the purposes of deliberation
8. The Home Office explained that the majority of responses do not require individual cover notes, and a minority are drawn to the attention of Private Office due to the response and information being disclosed relating to sensitive or high profile subjects, or likely to generate media, parliamentary or other outside interest.
9. The Home Office confirmed that the cover notes serve the following main purposes:
  - To give Private Office advance warning of the disclosure of information which might attract media, parliamentary or other wider interest;
  - To identify any sensitivities associated with the disclosure;
  - To enable Press Office to put in place any media handling arrangements which might be required.

10. The Commissioner's guidance on section 36 states that information may be exempt if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when giving their views as part of the process of deliberation.
11. The Home Office has assessed that disclosure of the requested information under FOIA "would" inhibit the free and frank exchange of views for the purposes of deliberation. It is therefore relying on the higher likelihood of prejudice occurring.
12. In its submission, the Home Office explained that the purpose of Private Officer cover notes is to enable the sensitivities and handling issues around information to be disclosed (or withheld) under FOIA to be considered on a confidential basis before a response is sent.
13. The Home Office also explained that the discussion takes place in a 'safe space' in which an assessment about sensitivities can be made on the basis that it will not be disclosed more widely. It argues that the advice and the views expressed would be inhibited if these cover notes and the responses from Private Office were to be routinely disclosed under FOIA.
14. The Home Office explained that it recognises that FOIA promotes transparency and that the process whereby requests under FOIA are themselves processed by a public authority should, as far as possible, reflect that and to this extent, the Home Office states that there has been no attempt to withhold details of the private office cover note process. The Home Office however argues that it does not consider that the process can be completely transparent to the extent that any aspect of it must be disclosed and that the Department's Ministers and officials must be able to deliberate some matters in private and with an expectation that privacy will be maintained.
15. The Home Office argued that to release information within a cover note which was withheld in the substantive response or which would be exempt were it the subject of a request, would essentially provide a back door to withheld information. It argued that this would undermine the application of the exemptions, would not be in the public interest and would for the reasons discussed above, inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation which cover notes contain.
16. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a Qualified Person. The Commissioner is satisfied that the Minister for Safe and Legal Migration was authorised as a

Qualified Person under section 36(5) of FOIA at the relevant time and that the Home Office did ask for and receive their opinion that the exemptions at section 36(2)(b)(i) and (ii) were engaged.

17. The Commissioner considers that, in relation to the process of giving advice and having frank discussions, it is not unreasonable to conclude that there is a real and significant risk that the Department's Ministers and officials would be less candid in future when providing similar advice and exchange of views should they consider that this information could be disclosed.
18. The Commissioner also accepts the Home Office's argument that disclosure of the cover notes, when the information is considered to be exempt, would provide a back door to the withheld information and that this would undermine the application of the exemptions, inhibit the free and frank discussion, advice and exchange of views for the purpose of deliberation which cover notes contain.
19. The Commissioner is therefore satisfied that the exemption provided by section 36(2)(b)(i) and (ii) are engaged and he will now go on to consider the public interest.

### **The public interest test**

20. Section 36 of the FOIA is a qualified exemption and is subject to the public interest test. The Commissioner must consider whether, in all of the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
21. The complainant argued that there is a strong public interest in with regard to the handling of FOI requests. He stated that the severe delays in responding to a number of the requests for which he has requested cover notes increases the public interest in transparency.
22. The Home Office explained that it recognised that there is a general public interest in transparency and openness in government and a specific public interest in openness about the handling of requests under the FOIA.
23. The Home Office also explained that there is a public interest in ensuring requests made under FOIA are fully considered before responses are issued. It argued that advice and the views expressed would be inhibited if these cover notes and the responses from Private Office were to be routinely disclosed under the FOIA and that would not be in the public interest.

24. In its submission, the Home Office stated that there is a public interest in ensuring that all aspects of responses to requests made to the Home Office are fully considered before they are issued and in avoiding any prejudice to the processes designed to achieve this.
25. The Home Office argued that the cover notes are for a purely internal audience and it sees only limited public interest in their disclosure. It explained that although it might be of interest to a particular requester to see what is said in a cover note relating to a request which they had submitted it does not consider that this can be characterised as a public interest.
26. The Commissioner considers the public interest in protecting good decision-making by the Home Office and whilst he acknowledges the public interest in openness about the handling of requests under the FOIA, on balance he finds the public interest in protecting the Home Office's ability to deliberate on all aspects of responses to requests and access to unfiltered, frank advice to be the stronger argument.
27. The Commissioner accepts that Department Ministers and officials need a 'safe space' in which to deliberate, and to provide free and frank advice in regards to requests made under FOIA. Consequently, he is satisfied that the public interest favoured maintaining the exemption and the Home Office was entitled to rely on section 36(2)(b)(i) and (ii) of FOIA to withhold the information requested at part 1 and 2(a).
28. In light of this decision, he has not gone on to consider the Home Office's application of sections 40(2) and 40(1) of FOIA.

**Right of appeal**

---

29. 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)

30. 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.

31. 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**