

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

### **Decision notice**

**Date:** 30 April 2024

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

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

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1. The complainant has requested from the Home Office internal correspondence on the reported painting over of child-friendly wall art at an asylum seeker reception centre in Dover. The Home Office refused the request, citing sections 36(2)(b)(i) and (ii) (Prejudice to the effective conduct of public affairs) of FOIA. The Commissioner's decision is that the Home Office was entitled to apply the cited exemptions to refuse the request.
2. The Commissioner requires no steps as a result of this decision.

#### **Request and response**

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3. On 21 August 2023, having had a similar request for information refused under section 12 (Cost exceeds appropriate limit) of FOIA, the complainant wrote to the Home Office and requested information in the following terms:

"I would like to rephrase my request to related correspondence to/from the Private Office of the Right Hon Robert Jenrick MP.

Following reports in the media that a decision was taken to paint over images of Mickey Mouse and Winnie the Pooh at a refugee reception centre in Dover because "they were too welcoming", I would like to request copies of internal emails/correspondence to/from the Right

hon Robert Jenrick MP and/or his private office staff about removal of any cartoons aimed at children in any such centres. I understand the names of non SCS [senior civil servant] members of staff will be redacted. Please use the search terms "cartoon" and/or "children" and/or "Micky [sic] Mouse" and/or "Winnie the Pooh" and Dover.

I would expect that any searches confined to Private Office would be within the designated S12 expenditure limits."

4. The Home Office responded on 19 September 2023. It confirmed that it held information falling in scope but said it was exempt under sections 36(2)(b)(i) and (ii) of FOIA, with the public interest favouring maintaining the exemptions.
5. Following an internal review, the Home Office wrote to the complainant on 4 December 2023. It maintained its application of sections 36(2)(b)(i) and (ii) of FOIA to withhold the information.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 19 December 2023 to complain about the way his request for information had been handled. He disagreed with the application of section 36 to withhold the information. He also queried whether the request should have been dealt with under the Environmental Information Regulations 2004 ("EIR").
7. The analysis below considers whether the request fell to be considered under FOIA or the EIR and the exemptions cited by the Home Office to withhold the requested information.
8. The Commissioner has viewed the withheld information.

### **Reasons for decision**

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#### **Is the requested information environmental?**

9. The complainant suggested that the information he asked for concerned alterations to a building, and as such, the information was environmental and the request fell to be considered under the EIR.

10. Regulation 2(1) of the EIR defines environmental information<sup>1</sup>. It lists categories of information that can inform the public about matters affecting the environment or enable them to participate in decision-making on environmental matters. If the requested information falls within the definition at regulation 2(1), it must be considered for disclosure under the EIR, and not FOIA.
11. Having considered the requested information (which is about the painting of interior walls, in order to cover child-friendly murals) the Commissioner finds that it is not environmental information. This is because it does not fall within any of the categories of information listed in regulation 2(1) of the EIR. He is therefore satisfied that the Home Office was correct to consider the request under FOIA.

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

12. The Home Office said that it only held a small amount of information falling within scope of the request. The Home Office applied sections 36(2)(b)(i) and (ii) of FOIA to withhold a small amount of information contained in two emails.
13. Under section 36, information will be exempt if its disclosure would, or would be likely to, inhibit the free and frank provision of advice (section 36(2)(b)(i)) or exchange of views for the purposes of deliberation (section 36(2)(b)(ii)).
14. The Commissioner's guidance on section 36<sup>2</sup> explains that information may be exempt under section 36(2)(b)(i) and (ii) if its disclosure could inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision-making.
15. The exemption is concerned with protecting the processes that may be harmed by the disclosure of the information. The issue is whether

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/regulation-2-1-what-is-environmental-information/>

<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

disclosure would, in future, inhibit the processes of providing advice and exchanging views.

16. The Home Office is concerned about the impact that disclosure of the information would have on its ability to provide advice on sensitive or complex situations in future. It argued that officials would be in a position of formulating advice bearing in mind that it could be subject to disclosure under the FOIA a short time after it was written. It said this would be likely to have a limiting and negative effect on the quality of internal discussion and decision-making and on the quality, honesty and comprehensiveness of advice to Ministers.
17. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a 'qualified person'.
18. Having been provided with the submissions made to the qualified person, the Commissioner is satisfied that a Home Office Minister gave the opinion that the exemptions were engaged, and that they were authorised to do so as the 'qualified person' under section 36(5)(a) of FOIA. The opinion was given on 19 September 2023, and the Home Office then responded to the request.
19. The Commissioner has gone on to consider whether the qualified person's opinion that the exemptions were engaged was 'reasonable'. He does not need to agree with the opinion in order for the exemption to be engaged. He need only satisfy himself that the qualified person's opinion is an opinion that a reasonable person could hold, in the circumstances.
20. The submission that was put to the qualified person summarised the reasons for applying sections 36(2)(b)(i) & (ii). The Commissioner is satisfied that it included a clear overview of the request, the information in scope and relevant arguments for, and against, the application of the exemptions. He finds that it was reasonable for the qualified person to reach the view from the submission that there was a need to protect the confidentiality of discussions and deliberations between Ministers and officials. He is further satisfied that the qualified person's opinion - that inhibition would be likely to occur through disclosure of the withheld information - was reasonable.
21. The Commissioner is therefore satisfied that sections 36(2)(b)(i) and (ii) of FOIA are engaged in this case.

### **Public interest test**

22. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although sections 36(2)(b)(i) and (ii) are engaged, the withheld information must be disclosed unless the public

interest in maintaining the exemption is stronger than the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

23. The complainant felt that the 'chilling effect' arguments offered by the Home Office were generic and not sufficiently compelling to overcome the public interest in disclosing the information, given its subject matter. He said:

"I would argue that as the information requested is concerning the welfare of vulnerable children, that there is a much higher bar than if the request was concerning adults. It is important that the public have a clear understanding as to how these vulnerable minors are, or are not looked after."

24. The Home Office said:

"...we recognise that there is an inherent public interest in transparency and accountability regarding decisions taken by Ministers, particularly with regard to a matter of sensitivity and public concern. There is also a clear public interest in the work of government departments being transparent and open to scrutiny."

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

25. The Home Office said that disclosing recent advice and views would be likely to inhibit such exchanges in the future. This would be likely to have a limiting and negative effect on the quality of internal discussion and decision-making in future, and thence on the quality, honesty and comprehensiveness of advice to Ministers. It said:

"...the request was dated 21 August 2023 and the emails date from just a couple of months earlier...the advice and response from the Minister were still very recent at that point and the matters discussed were very much live.

Officials do, of course, recognise that their advice cannot remain confidential indefinitely. When the information reaches the age at which it becomes a historical record, which has been significantly reduced over the years, it may well enter the public domain if it has been selected for permanent preservation. We would nevertheless submit that officials do not draft advice to Ministers in the expectation that it could be disclosed to the world at large within a matter of weeks or months."

26. The Home Office also said that the content of the withheld information was very limited, and so the public interest in its disclosure was similarly limited.

## **Balance of the public interest**

27. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. The disclosure of official information assists the public in understanding how public authorities make their decisions and carry out their functions, and this, in turn, fosters trust in them. Disclosure in this case would allow the public to scrutinise particular exchanges regarding a measure which could affect children. However, the Commissioner also notes that the withheld information is extremely limited and that it does not actually offer any further insight into the decision to paint over the murals.
28. When considering the application of section 36(2)(b), where the Commissioner finds that the qualified person's opinion was reasonable he will consider the weight of that opinion when applying the public interest test. In this case, the Commissioner considers that the opinion of a Home Office Minister that inhibition would be likely to occur, carries considerable weight when balancing the public interest. They have the requisite knowledge of departmental decision-making processes, the information and the likely consequences of any disclosure to make that assessment.
29. The Commissioner has also considered the timing of the request. Civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. However, safe space and chilling effect arguments cannot be dismissed out of hand and may be particularly relevant if the issue underpinning a request is 'live'. In this case, the underlying matter was still live at the time the request was received. Accordingly, the Commissioner accepts that there was a need for a safe space in which officials and Ministers could provide advice and exchange views on a sensitive matter, free from external comment and examination. He also accepts that the disclosure of information about a live matter would be likely to have a knock-on chilling effect on future advice and deliberations and that, as a result, the quality of decision-making by the Home Office would be impaired.
30. Finally, the Commissioner has considered the severity and extent of the envisioned inhibition. In carrying out this exercise, appropriate weight must be afforded to the public interest in avoiding harm to deliberation and decision-making processes. For the reasons already set out, there is a clear public interest in the Home Office's officials having the freedom and space to thoroughly explore all options when providing advice on controversial or sensitive matters.
31. Talking all the above into account, the Commissioner considers the public interest in good decision-making by the Home Office to be a

compelling argument in favour of maintaining the exemption. While he acknowledges that the general public interest in openness and transparency would, to some extent, be served if the information was disclosed, on balance, he finds the public interest in protecting the Home Office's access to unfiltered and frank advice to be the stronger argument.

32. Therefore, the Commissioner's decision is that the Home Office was entitled to apply section 36(2)(b)(i) and (ii) of FOIA to refuse the request.

## **Right of appeal**

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33. 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)

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Samantha Bracegirdle**  
**Senior Case Officer**  
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**Water Lane**  
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