

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 8 July 2014

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

#### Decision (including any steps ordered)

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1. The complainant requested information relating to internal Home Office correspondence about requests for information made on a public website.
2. The Home Office refused to disclose the requested information citing sections 36(2)(b)(ii) (effective conduct of public affairs) and 40(2) (personal information) of FOIA.
3. The Commissioner's decision is that the Home Office was entitled to rely on section 36(2)(b)(ii). However, he found that the Home Office breached section 10 and section 17 of the FOIA in respect of the time it took to respond to the request.
4. He requires no steps to be taken as a result of this decision.

#### Request and response

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5. On 11 September 2013, the complainant wrote to the Home Office and requested information in the following terms:

*"There seem to be lot of delays in your answering to the FOI requests re "Go Home" Van campaign.*

*I request you to release all the internal correspondence sent/received to the date re following requests:*

[https://www.whatdotheyknow.com/request/returns\\_pilot\\_evaluation](https://www.whatdotheyknow.com/request/returns_pilot_evaluation)

[https://www.whatdotheyknow.com/request/returns\\_pilot](https://www.whatdotheyknow.com/request/returns_pilot)

[https://www.whatdotheyknow.com/request/go\\_home\\_van\\_information](https://www.whatdotheyknow.com/request/go_home_van_information)

[https://www.whatdotheyknow.com/request/go\\_home\\_ad\\_campaign](https://www.whatdotheyknow.com/request/go_home_ad_campaign)

6. The Commissioner understands that the four references within the request for information refer to requests for information made on the 'whatdotheyknow' website by individuals other than the complainant.
7. Following the Commissioner's intervention, the Home Office provided its substantive response on 18 March 2014. It refused to provide the requested information. It cited the following exemption as its basis for doing so:
  - section 40(2) (personal information).
8. The complainant requested an internal review on 18 March 2014. The Home Office sent him the outcome of its internal review on 16 April 2014. It upheld its original position.

## Scope of the case

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9. The complainant contacted the Commissioner on 16 April 2014 to complain about the way his request for information had been handled.
10. He told the Commissioner:

*"My request was for the INTERNAL correspondence (I. e. correspondence between members of Home Office staff), not for the correspondence between requesters and Home Office. Furthermore, the correspondence between requestors and Home Office is also public as it appears on WhatDoTheyKnow website.*

*I fail to see how the correspondence between members of HO staff is a personal data".*
11. During the course of the Commissioner's investigation, the Home Office wrote to the complainant saying:

*"Our original response was that the information is exempt from disclosure under section 40(2) (personal information) of the FOI Act, which was confirmed by an internal review. That remains our view, but we now consider that the information is also exempt under section 36(2)(b)(ii) (prejudice to the effective conduct of public affairs: inhibition of the free and frank exchange of views for the purposes of deliberation)".*

12. In correspondence with the complainant, the Home Office described the withheld information as follows:

*"The requested information relates to FOI requests submitted to the Home Office by a number of individuals other than [the complainant].... All the requests were submitted via the Whatdotheyknow website".*

13. The Commissioner considers the scope of his investigation to be the Home Office's application of section 36 and section 40(2) of FOIA to that information. He will also consider the timeliness of the Home Office's handling of the request.

## **Reasons for decision**

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

14. The Commissioner has first considered the Home Office's application of section 36. To engage section 36, the qualified person must give an opinion that the prejudice or inhibition specified in section 36(2)(a)-(c) would or would be likely to occur. However, that in itself is not sufficient - the opinion must be reasonable.
15. In this case the Home Office considers that section 36(2)(b)(ii) applies to all the withheld information.
16. Section 36(2) of FOIA states that:

*"Information to which this section applies is exempt information if in the reasonable opinion of a qualified person disclosure of the information under this Act—*

*(b) 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".*

17. In determining whether section 36(2)(b)(ii) was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - establish that an opinion was given;
  - ascertain who was the qualified person or persons;
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
18. In this case, the Commissioner is satisfied that an opinion was sought from Lord Taylor, the Minister for Criminal Information, on 2 June 2014 and given on 3 June 2014.
19. The Commissioner is satisfied that Lord Taylor is a qualified person for the purposes of section 36.
20. In determining whether the exemption is engaged, the Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
  - whether the prejudice relates to the specific subsection of section 36(2) that is being claimed;
  - the nature of the information and the timing of the request; and
  - the qualified person's knowledge of, or involvement in, the issue.
21. Further, in determining whether the opinion is a reasonable one, 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 not reasonable 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.

22. In the Commissioner's view, if the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
23. In this case, the Commissioner considers that, in its correspondence with the complainant when it introduced the section 36 exemption, the Home Office relied to a large degree on the requested material being self-evidently exempt. While explaining that it still considers that section 40(2) applies, it simply told him:

*"but we now consider that the information is also exempt under section 36(2)(b)(ii) (prejudice to the effective conduct of public affairs: inhibition of the free and frank exchange of views for the purposes of deliberation".*

24. It was only in correspondence with the Commissioner that it explained why it considered disclosure would inhibit the free and frank exchange of views for the purposes of deliberation. For example it explained why disclosure would inhibit internal discussions within the Department and why it has a need to protect the 'safe space' in which it conducts its business.
25. Having considered both the withheld information and the submission provided to the qualified person, the Commissioner is satisfied that the qualified person's opinion – that disclosure would (as opposed to would be likely to) inhibit the free and frank exchange of views for the purposes of deliberation - is reasonable. It follows that he finds the exemption engaged.

#### *The public interest test*

26. The fact that the exemption is engaged by the qualified person's opinion does not automatically mean that the information should be withheld. The public interest test is separate from the qualified person's opinion.
27. The Commissioner has gone on to consider, in accordance with section 2(2)(b) of FOIA, whether the public interest requires disclosure, despite the valid application of the exemption.

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

28. In correspondence with the Commissioner about the Home Office's application of section 36, the complainant said:

*"Please kindly take into account that if we consider HO creative interpretation of FOI Act correct, it would effectively mean that ALL the internal correspondence is except from disclosure as it was use to 'conduct public affairs' ".*

29. The complainant also argued that there is a strong public interest in disclosure due to his suspicion:

*"that Home Office is covering up the true reasons why ALL the requests regarding 'Vans Of Hate' were delayed until political announcement was made public. Therefore I believe there is a strong public interest to demonstrate if Home Office prioritise political interest of Tory Party above the letter of law".*

30. Recognising the public interest in disclosure, the Home Office told the complainant:

*"Disclosure would provide the public with knowledge of the measures taken by the Department to ensure that FOI requests are handled correctly and given the correct level of consideration. It would also provide some information about these responses were delayed beyond the statutory deadline [sic]. Disclosure would increase transparency and provide insight into the decision making process surrounding FOI responses".*

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

31. In favour of maintaining the exemption the Home Office told the complainant:

*"It would not be in the public interest to release the information concerning the processing of FOI requests by the Home Office, which is contained within the information within the scope of this request. Ministers and officials need to be able to think through all the implications of particular options. In particular, they need to be able to undertake rigorous and candid assessments of the risks responding to particular FOI responses. This includes the assessment of whether any exemptions are engaged and ensuring that concerns about security are properly considered".*

#### *Balance of the public interest arguments*

32. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
33. The Commissioner recognises that there is a general public interest in promoting transparency, accountability, public understanding and involvement in the democratic process. The FOIA is a means of helping

to meet that public interest, so it must always be given some weight in the public interest test and it is clearly relevant here.

34. The Commissioner also notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.
35. In this case, the Home Office has argued that the Department needs a 'safe space' to manage its business and carry out its procedures for handling FOI requests, away from external interference and distraction. In that respect, the Commissioner notes that the exemption being relied on is about the processes that may be inhibited, rather than what is in the information itself.
36. Having taken into account the weight in the public interest balance that he must afford to the qualified person's opinion, the Commissioner considers that in this case the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(ii) FOIA was therefore correctly applied in this case.

#### *Section 40 Personal Information*

37. As the Commissioner has concluded that section 36 has been correctly applied to the withheld information he has not gone on to consider the Home Office's application of section 40 to the same information.

#### *Section 1 and section 10 - general right of access and time for compliance*

38. Section 1(1) of FOIA provides that:

*"Any person making a request for information to a public authority is entitled –*

*to be informed in writing by the public authority whether it holds information of the description specified in the request".*

39. Section 10(1) of the FOIA provides that:

*"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt".*

40. In this case the complainant submitted the request to the Home Office on 11 September 2013. He received an automated acknowledgement from the Home Office confirming receipt of the email on the same day.

However the Home Office did not issue its substantive response until March 2014.

41. By not complying with section 1(1) within twenty working days of receipt of the request, the Home Office breached section 10(1).

### **Other matters**

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42. In bringing his complaint to the Commissioner's attention, the complainant specifically mentioned the timeliness with which the Home Office dealt with his request. He also queried the dates quoted by the Home Office in its correspondence with him.
43. In correspondence with the Commissioner, the Home Office apologised for "*the very poor handling of this request*".
44. While he accepts that, during the course of his investigation, the Home Office tried to explain to the Commissioner the timeline of the request and the discrepancies in the dates of its responses to the complainant, the Commissioner is disappointed that the Home Office made no such attempt to explain the situation to the complainant himself. In future, he would expect the Home Office, as a matter of good practice, to provide an explanation directly to the complainant should a situation such as this arise again.



## Right of appeal

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45. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

46. 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.
47. 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 .....**

**Jon Manners**  
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**Information Commissioner's Office**  
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