

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 July 2015

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

Decision (including any steps ordered)

1. The complainant requested information relating to the formation of the terms of reference of the non-statutory child abuse inquiry that was underway at the time of the request. The Home Office refused this request under section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 35(1)(a) correctly and so it was not obliged to disclose the requested information.

Background

3. The request relates to the Independent Panel Inquiry into Child Sexual Abuse. That non-statutory inquiry was in its early stages at the time of the request, but has since been disbanded and replaced with the statutory Independent Inquiry into Child Sexual Abuse¹.

Request and response

4. On 24 October 2014 the complainant wrote to the Home Office and requested information in the following terms:

¹ <https://childsexualabuseinquiry.independent.gov.uk/>

"Please would you let me know in writing if you hold information of the following description:

Information about how the terms of reference for the inquiry into historical child sexual abuse were decided including drafts and messages about what should be in the final version.

Please can I see the information."

5. After a lengthy delay, which the Commissioner comments on elsewhere in this notice, the Home Office responded substantively on 4 March 2015. It refused the request and cited the exemption provided by section 35(1)(a) (formulation or development of government policy) of the FOIA.
6. The complainant responded on 24 March 2015 and requested an internal review. The complainant noted that the refusal notice was brief and questioned why the lengthy delay in responding was necessary for the production of such a limited response
7. The Home Office responded with the outcome of the review on 1 April 2015. The conclusion of this was that the refusal of the request under section 35(1)(a) was upheld, but it did acknowledge that a more detailed explanation could have been given in the refusal notice and that the lengthy delay to the response was *"regrettable"*.

Scope of the case

8. The complainant contacted the Commissioner on 1 April 2015 to complain about the refusal of his information request and indicated that he did not agree with the reasoning of the Home Office as to why the information should be withheld.
9. During the Commissioner's investigation the Home Office also cited section 40(2) in relation to names of individuals recorded within the withheld information.

Reasons for decision

Sections 10 and 17

10. Where a public authority has found that an exemption qualified by the public interest is engaged in relation to the information requested, it may extend the usual 20 working day time limit for the provision of a response in order to consider the balance of the public interest.

Compliance is then required within such time as is reasonable in the circumstances. The approach of the Commissioner is that an extension should normally be for no more than a further 20 working days, meaning that a request should be responded to within a maximum of 40 working days, unless there are specific circumstances justifying a longer period.

11. In this case the Home Office took over four months to respond substantively. The Commissioner also notes that a holding response sent to the complainant on 21 November 2014 referred to a different exemption than was eventually relied on, suggesting that the Home Office had not reached a settled view on which exemption was engaged within 20 working days of receipt of the request as it is required to; the time extension applies only in relation to the consideration of the balance of the public interest where a qualified exemption has already been found to be engaged. Furthermore, the Commissioner agrees with the complainant that it is surprising that four months of introspection resulted in a refusal notice that verged on the cursory.
12. The Commissioner's view is that the delay in responding to the request was unreasonable and, in failing to respond more promptly, the Home Office breached sections 10 and 17(3) of the FOIA.

Section 35

13. Section 35(1)(a) provides an exemption for information that relates to the formulation or development of government policy. Consideration of this exemption involves two stages. First, the exemption must be engaged as the information in question falls within the class described in this section. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
14. As to whether this exemption is engaged, the question here is whether the information in question relates to the formulation or development of government policy. The Home Office reasoning here was that the government policy in question was on the broad issue of how government should respond to a possible failure by institutions to protect children from abuse and how to protect children from abuse in future.
15. The Commissioner, however, has considered a more focussed argument; whether the setting of the terms of reference for the Independent Panel Inquiry into Child Sexual Abuse (the inquiry) constituted the formulation or development of government policy. Whilst that non-statutory inquiry has since been disbanded in favour of a statutory inquiry, this notice

concerns the situation at the time of the request. At that time, the non-statutory inquiry was expected to proceed.

16. On this point the Commissioner has taken into account the wording of a statement made by the Home Secretary and the content of the withheld information. In a statement to the House of Commons on 7 July 2014², the Home Secretary referred to the inquiry as being established by the Government. Having viewed the content of the information, the Commissioner also notes that this records that the process of setting the inquiry terms of reference involved several government departments.
17. The statement made by the Home Secretary supports that the inquiry was a government initiative and the withheld information shows that the setting of the terms of reference was a cross-government process. On the basis of this evidence, the Commissioner finds that the information falling within the scope of the complainant's request does relate to the formulation and development of government policy and so the exemption provided by section 35(1)(a) of the FOIA is engaged.
18. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. Section 35(1)(a) is a qualified exemption, so the information must nevertheless be disclosed if the public interest in maintaining the exemption does not outweigh that in disclosure. In forming a conclusion on the public interest balance in this case, the Commissioner has taken into account the general public interest in the transparency and openness of the Home Office, as well as factors that apply in relation to the specific information in question.
19. Covering first arguments in favour of maintenance of the exemption, when considering the balance of the public interest in relation to section 35(1)(a) the Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential.
20. The Commissioner recognises that the argument concerning the preservation of a space within which to carry out the policy making process is, in general, valid on the grounds that this will assist in the open discussion of all policy options, including those that may be considered politically unpalatable. However, the weight that this

² <https://www.gov.uk/government/news/home-secretary-oral-statement-on-child-abuse>

argument carries in each case will vary, depending on the circumstances.

21. As noted above, only factors that applied at the time of the request are relevant here. The terms of reference for the inquiry had been announced a few days before the date of the request. Progressing the inquiry until that point had already proved problematic, with the first person appointed as chair having stepped down after some of the inquiry stakeholders objected to the appointment of that individual. The Commissioner recognises that disclosure of the information in question could have disrupted the inquiry further.
22. That the initial chair stepped down proves the ability of pressure from stakeholders to disrupt the inquiry. The Commissioner recognises the potential for disclosure of the information to have resulted in a public debate on the merits of the inquiry terms of reference and how they were arrived at. The history until that point of the difficult inception of the inquiry suggests that this could have resulted in further disruption to its operation.
23. The ability of the inquiry to operate effectively was clearly a matter of fundamental public interest. Given the difficulties in establishing the inquiry and that the request was made so soon after the terms of reference had been set, the view of the Commissioner is that it is reasonable to expect that disclosure of the information in question may have disrupted the operation of the inquiry further. Avoiding such disruption was in the public interest and this is a factor in favour of maintenance of the exemption of very significant weight.
24. Turning to factors in favour of disclosure of the information, the Commissioner recognises that there is a very strong public interest in information relating to the forming of the terms of reference for the inquiry. This inquiry was set up to look into allegations of utmost seriousness and, as already covered, the public interest in its successful operation was of fundamental weight. It follows from this that there is a strong public interest in the record of the constituting of this inquiry that is contained within the information in question.
25. Already by the time of the request the major cause of difficulty in establishing the inquiry had been the appointment of a suitable chair. The Commissioner has commented elsewhere in this notice on the weight of the public interest in information relating to that appointment. That specific factor is not, however, relevant in this case. The wording of the request specifically targets information about the formulation of the terms of reference and the information that falls within its scope does not directly concern the appointment of the chair. Whilst the general

public interest in the successful operation of the inquiry is relevant here, the specific matter of the difficulty in appointing a chair is not.

26. In conclusion, the Commissioner has recognised strong public interest in disclosure of the information in question owing to its subject matter. He has also, however, recognised that there was public interest of fundamental weight in ensuring that the inquiry could function effectively and his view is that it is reasonable to expect that it may have been disrupted by disclosure of the information in question. The view of the Commissioner is that the public interest in avoiding that disruption tips the balance in favour of maintenance of the exemption. His finding is, therefore, that the public interest in the maintenance of the exemption outweighed the public interest in disclosure. The Home Office was not, therefore, obliged to disclose the requested information.

Other matters

27. As well as his finding above that the Home Office breached the FOIA through failing to respond to the request promptly, the Commissioner has made a separate record of that issue. This issue may be revisited should evidence from other cases suggest that this is necessary.

Right of appeal

28. 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@hmcts.gsi.gov.uk

Website: <http://www.justice.gov.uk/tribunals/general-regulatory-chamber>

29. 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.
30. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF