

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 December 2019

**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 copies of any communications between the Home Office, the Foreign and Commonwealth Office and various current and former ministers, regarding the British Indian Ocean Territory (Citizenship) Bill 2017–19 (“the Bill”) and the immigration status of Chagossians.
2. The Home Office refused the request, stating that the requested information was exempt from disclosure under section 35(1)(a) (formulation of government policy etc) of the FOIA.
3. The Commissioner’s decision is that the Home Office was entitled to rely on the exemption at section 35(1)(a) of the FOIA to withhold the information.
4. The Commissioner requires no steps.

### Background

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5. A Chagossian is a person from the Chagos Islands. The Chagos Islands are a UK Overseas Territory in the Indian Ocean, and their islanders were British citizens. Between 1968 and 1974, all islanders were mandatorily resettled, mainly in Mauritius and the Seychelles, to enable the use of the Islands for US and UK defence purposes.
6. Whilst the resettled Chagossians and their children were entitled to British nationality, the second generation of Chagossians, born outside

the territory, have no citizenship claim and therefore no right of abode in the UK.

7. In 2017, Henry Smith MP introduced a Private Members' Bill, the British Indian Ocean Territory (Citizenship) Bill 2017-19 ("the Bill"). The Bill sought to make provision for individuals descended from the Chagos Islands to register as British overseas territory citizens.
8. The Bill failed to complete its passage through Parliament by the end of the 2017-19 Parliamentary session, meaning that it will make no further progress<sup>1</sup>.
9. The UK has come under considerable international pressure to reconsider its position with regard to the Chagos Islands<sup>2</sup>.

## Request and response

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10. On 2 April 2019, the complainant wrote to the Home Office and requested information in the following terms:

*"Any communications relating to Henry Smith MP's Bill (British Indian Ocean Territory (Citizenship) Bill 2017-19) between any of the following:*

- *Home Office officials or ministers*
- *the Home Secretary, Sajid Javid*
- *the former Home Secretary, Amber Rudd*
- *Foreign Office officials or ministers*
- *the Foreign Secretary, Jeremy Hunt*
- *the former Foreign Secretary, Boris Johnson*

*Any communications relating to the Home Affairs Select Committee's sixth report on Windrush and its recommendations on Henry Smith MP's Bill (British Indian Ocean Territory (Citizenship) bill 2017-19) and the immigration status of Chagossians between:*

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<sup>1</sup> <https://services.parliament.uk/Bills/2017-19/britishindianoceanterritorycitizenship.html>

<sup>2</sup> <https://www.un.org/press/en/2019/ga12146.doc.htm>

- *Home Office officials or ministers*
  - *the Home Secretary, Sajid Javid*
  - *the former Home Secretary, Amber Rudd*
  - *Foreign Office officials or ministers*
  - *the Foreign Secretary, Jeremy Hunt*
  - *the former Foreign Secretary, Boris Johnson.”*
11. The Home Office responded on 17 April 2019. It said that it held some of the information specified in the request, but it was exempt from disclosure under section 35(1)(a) of the FOIA. It said that the requested information was intrinsically linked to the formulation and development of government policy on nationality issues for Chagossians, and that its disclosure would be damaging to that policymaking process, and not in the public interest.
12. The complainant requested an internal review on 1 May 2019, and the Home Office responded on 17 May 2019, upholding its application of section 35(1)(a).

### **Scope of the case**

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13. The complainant contacted the Commissioner on 19 May 2019, to complain about the way her request for information had been handled. She explained that she had submitted a previous request for the information to the Home Office in November 2018, which was refused. She said that, subsequently, on learning that the Bill could no longer progress through Parliament and that the sponsoring MP was not intending to reintroduce it in the next Parliamentary session, she submitted the request again. She disagreed with the Home Office's continued application of section 35(1)(a) of the FOIA to withhold the information. She commented that she had made a similar request to the Foreign and Commonwealth Office, and that information had been disclosed in response.
14. The analysis below considers the Home Office's application of section 35(1)(a) to withhold the information.

## Reasons for decision

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### Section 35 – formulation of government policy

15. The Home Office said that all of the withheld information was exempt from disclosure on the basis of section 35(1)(a) of the FOIA.
16. The complainant disagreed with the Home Office's continued application of section 35(1)(a) of the FOIA, arguing that the information could not be relevant to the formulation or development of government policy, since the failure of the Bill to progress through Parliament meant that the Government was no longer required to either support or oppose its provisions.
17. Section 35(1)(a) of the FOIA states:

*"Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-*

*(a) the formulation or development of government policy".*
18. The Commissioner's guidance on section 35<sup>3</sup> states:

*"Section 35 is class-based, meaning departments do not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and will catch a wide range of information".*
19. In her guidance, the Commissioner also explains that:

*"The Modernising Government White Paper (March 1999) describes policymaking as: "the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world". In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives".*

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

20. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process, where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
21. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard (EA/2006/006, 19 February 2007)* the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
22. The Home Office argued that the withheld information relates to the formulation and development of the UK Government's policy on the citizenship of the Chagos Islanders:

*"The policy in question in the present case is (a) that on the specific matter in Henry Smith's Bill, which attempted to introduce changes to the citizenship rules which would have allowed third generation Chagossians to acquire British Citizenship and (b) the wider policy issue in relation to Chagossians and citizenship."*

23. The Home Office explained:

*"Whether the Government will support or block a Private Member's Bill is, we would submit, by definition a matter of policy formulation in that Ministers will have to take a view on whether to support the changes which the Bill proposes. If they decide to support the Bill, the measures it contains will in effect become part of Government policy. If they decide to oppose it, that will require the Government to consider its policy on the matter under consideration and put forward its reasons for opposing the Bill. That will often include outlining plans for putting forward measures which might have the same effect as the Bill or render it unnecessary".*

24. With regard to the complainant's argument that section 35(1)(a) could not apply now that plans to take the Bill forward had seemingly been abandoned, the Home Office commented that:

*"...existing information does not stop relating to the formulation or development of policy if the issue itself goes away. If the exemption at section 35(1)(a) is engaged in respect of information, at the time a request is received, it remains engaged (although we recognise that the balance of the public interest in maintaining it will change over*

*time). Secondly, the information within scope in this case does not relate solely to Henry Smith's Bill: it also relates to the wider issues of citizenship and re-settlement in relation to the Chagossians and more generally. Henry Smith's Bill is no longer an issue, but the wider question has not gone away."*

25. The Home Office explained that the Home Secretary had given a commitment to the Home Affairs Select Committee to look into nationality issues for Chagossians. It said that the Home Office was considering the most effective and expedient way to address this, as it recognises that there needs to be engagement across government. Home Office officials had provided advice to Ministers on this but no decisions had yet been made as to how to proceed. It said it would not have been appropriate to release correspondence relating to that advice before Ministers had had a chance to fully consider it.
26. The Home Office noted the complainant's claim that the Foreign and Commonwealth Office had disclosed information to her in response to a similar request. It believed that the information in question was not comparable to the policy-related information requested in this case, which includes advice to Ministers. It further noted that a disclosure made by a separate public authority did not set a precedent which the Home Office was obliged to follow. It said it was entitled to make its own decisions on the applicability of the FOIA exemptions to information which it considered should be protected.
27. Having considered the wording of the request, and viewed the withheld information, the Commissioner is satisfied that the withheld information clearly falls within the scope of the exemption contained at section 35(1)(a) of the FOIA. It relates to the Government's consideration of the citizenship arrangements for Chagossians in the UK and it is composed of the type of information described in paragraph 20, above. The Government's decision to either support or oppose the Bill (had it progressed) would have resulted in wide ranging consequences with particular, real world outcomes. Furthermore, the Commissioner is satisfied that it also relates to the ongoing formulation and development of government policy on the wider issue of the future treatment of Chagossians and their descendants.
28. The Commissioner is therefore satisfied that the exemption at section 35(1)(a) is engaged in this case.

*Public interest arguments*

29. Section 35 of the FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at

section 35(1)(a) outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosing the information*

30. The complainant said that she was concerned that the Home Secretary was not taking meaningful action to progress the issue of fair treatment for Chagossians. She argued that it is in the public interest for the Government to be transparent regarding immigration policy, particularly where disclosure is being sought in order to "... *ascertain potential mistreatment of fellow citizens*".
31. The Home Office acknowledged that there is considerable interest in the situation of Chagossians born outside of British Indian Ocean territory, and that the interested parties are keen to see that the Government is taking action to resolve this matter. It accepted that there is a public interest in disclosing the information, as greater transparency will enhance public understanding of the way policy is developed, and the public's contribution to policy discussions may become more informed. There is also a public interest in being able to scrutinise the quality of the advice being given to Home Office Ministers by their officials in the sphere of immigration policy, and any subsequent decision making which arises from that advice.
32. The Commissioner recognises the general public interest in transparency and openness around government decision making, which helps to ensure accountability and public understanding of how government works, spends taxpayers' money and encourages public contribution to policy debates.

*Public interest arguments in favour of maintaining the exemption*

33. The Home Office argued that both the Tribunal and the High Court have accepted that effective government requires a safe space in which to formulate and develop policy. It referred the Commissioner to *Department of Health v Information Commissioner (EA/2013/087)*, where the Tribunal stated that:

*"A safe space is needed in which policy can be formulated and developed in robust discussions, where participants are free to "think the unthinkable" in order to test and develop ideas, without fear of external interference or distraction, whether as a result of premature and lurid media headlines or otherwise"* (at paragraph 73).
34. The Home Office said that as the wider matter of how Chagossians should be treated is still being considered, there is a clear public interest in withholding the requested information, as both Ministers and officials need to be able to conduct rigorous and candid assessments of the options, including consideration of the reasons for and against

developing particular policies. Premature public disclosure of the thinking in this area, at this stage, might close off better options for the departments in the future. Both Ministers and Home Office officials need room to formulate and develop policy in this area without being subject to external scrutiny.

35. The Home Office said that disclosure could also have a chilling effect on the provision of free and frank advice in future, and on the exploration of all relevant considerations in the formulation of policy, if officials and Ministers believe that their discussions will be subject to disclosure under the FOIA a short time after they are held. It argued that this would have a limiting and negative effect on the quality of internal discussion and decision making in future and on the quality, honesty and comprehensiveness of advice to Ministers; this could lead, in the longer term, to poorer policymaking, which would not be in the public interest.

#### *Balance of the public interest*

36. The Commissioner is aware that the UK's position with regard to the Chagos Islands continues to be a matter which attracts considerable attention and commentary, both domestically and internationally. She notes, for example, that in February 2019, the international court of justice in The Hague rejected the UK's claim of sovereignty over the islands and said that they should be reunified with Mauritius<sup>4</sup>.
37. In light of this, the Commissioner acknowledges that there is a clear public interest in the disclosure of information which would give an insight into the Government's thinking on the proposals put forward in the Bill. Disclosure of the withheld information would provide such an insight.
38. With regard to the arguments advanced by the Home Office, the Commissioner considers that these can be categorised as arguments generally known as "safe space" and "chilling effect" arguments.
39. With regard to the former, the Commissioner accepts that significant weight should be given to safe space arguments (ie the concept that the Government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction) where the policymaking process is live and the requested information relates to that policymaking. In the circumstances of this case, at the point that the complainant made her request, the Commissioner notes that the Bill was not expected to progress further, and therefore that the

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<sup>4</sup> <https://www.bbc.co.uk/news/uk-47358602>



Government was no longer required to decide whether to support or oppose it, or to devise the underlying policy that would be needed to support either position. However, she is persuaded that the requested information also relates to the wider issue of the treatment of Chagossians, and that at the time of the request, this was (and continues to be) an area in which government policy was being formulated.

40. Furthermore, the Commissioner recognises that, due to the recent international criticism of the UK's position with regard to the Chagos Islands, disclosure of the requested information would be likely to attract considerable public and media scrutiny of the Government's recent deliberations on the issue of citizenship for Chagossian descendants, it being a closely related issue. Consequently, in the circumstances of this case, the Commissioner believes that significant weight should be attributed to the safe space arguments, particularly while the Government considers how to move forward on the issue.
41. With regard to attributing weight to the Home Office's chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and that they should not be easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question, or a closely related one, is live, the Commissioner accepts that arguments about a chilling effect on ongoing policy discussions are likely to carry significant weight.
42. As noted above, the Commissioner accepts that the policymaking in relation to the treatment of Chagossians was ongoing at the time of the request. In light of the sensitive nature of the matters under discussion and the ongoing nature of the policymaking, the Commissioner accepts that the chilling effect arguments in this case should be given considerable weight in relation to the information withheld on the basis of section 35(1)(a).
43. Taking all the above into account and having had regard to the content of the withheld information, the Commissioner has concluded that, in this case, the public interest in maintaining the exemption is stronger than that in disclosing the information. In reaching this view she fully acknowledges the considerable public debate there is on the UK's position with regard to the Chagos Islands and the Chagossians. However, given that at the time of the request, policymaking in relation to the treatment of Chagossians was ongoing, this, alongside the free and frank nature of the withheld information and the overall sensitivity of this issue, tips the balance of the public interest in favour of maintaining the exemption.

44. The Commissioner's decision is therefore that the Home Office was entitled to apply section 35(1)(a) of the FOIA to withhold the requested information in its entirety.

## **Other matters**

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### *Information Notice*

45. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for her to issue an Information Notice in this case, formally requiring a response.
46. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in her draft "Openness by design"<sup>5</sup> strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in her "Regulatory Action Policy"<sup>6</sup>.

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<sup>5</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

<sup>6</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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47. 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)

48. 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.

49. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**