

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2022

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

Decision (including any steps ordered)

1. The complainant has requested information on reports and recommendations made following the Government's consultation on the New Plan for Immigration ('NPI'). The Home Office confirmed that it held information falling within scope of the request and it disclosed some statistical data. It refused to disclose the bulk of the information, stating that it was exempt from disclosure under section 35(1)(a) (Formulation of government policy) of FOIA, and that the public interest favoured maintaining the exemption.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(a) to refuse the request.
3. The Commissioner requires no steps.

Background

4. The UK Government intends to overhaul the asylum system in the UK. In March 2021 the Government published a policy statement outlining the NPI:

"The New Plan for Immigration has the following three objectives:

1. To increase the fairness and efficacy of our system so that we can better protect and support those in genuine need of asylum

2. To deter illegal entry into the UK, thereby breaking the business model of criminal trafficking networks and protecting the lives of those they endanger
3. To remove more easily from the UK those with no right to be here¹.
5. The policy statement set out, in very broad terms, the Government's strategic approach to achieving these objectives. The public, and key stakeholders, were then invited to give their views on the proposals via an online questionnaire, targeted meetings, focus groups and interviews.
6. Respondents were invited to provide their views on the Government's proposed strategic approaches for the following areas:
 - Protecting those fleeing persecution, oppression and tyranny
 - Ending anomalies, and delivering fairness in British Nationality Law
 - Reforming the asylum system
 - Streamlining asylum claims and appeals
 - Supporting victims of modern slavery
 - Disrupting criminal networks behind people smuggling
 - Enforcing removals, including foreign national offenders.
7. Two confidential feedback reports (a full report and a summary report) were produced for the Government by consultants, Britain Thinks. The responses and viewpoints expressed by consultees were analysed and summarised and presented alongside key takeaways and overarching findings.
8. The Government's public response to the consultation was published on 22 July 2021². It provided an overview of the findings, acknowledging that the proposals had received some criticism:

¹ <https://www.gov.uk/government/consultations/new-plan-for-immigration>

² https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1005042/CCS207_CCS0621755000-001_Consultation_Response_New_Plan_Immigration_Web_Accessible.pdf

"The consultation has shown that there is some support for these broad ambitions, more so from members of the public. However, the responses sent into the Government consultation also show that around three quarters of those who responded said they opposed many of the policies set out in the New Plan for Immigration. A similar view was also taken by those with direct experience of the asylum system. Having considered the findings from the consultation, the Government recognises that building a system that is fair but firm will require tough decisions, some of which may be unpopular with certain individuals and/or groups".

Request and response

9. On 13 July 2021, the complainant wrote to the Home Office and requested information in the following terms:

"Please provide me with the following information:

 - 1) A copy of the full final report, and any summary reports, compiled by Britain Thinks following the public consultation on the New Plan for Immigration which ran from 24 March to 6 May 2021; and
 - 2) Any documented conclusions or recommendations made by Britain Thinks or Home Office officials as a result of the public consultation on the New Plan for Immigration."
10. The Home Office responded on 21 October 2021. It confirmed that it held information falling within each point of the request. It disclosed some statistical information about the profiles of respondents to the consultation. It said that the remaining information was exempt from disclosure under section 35(1)(a) (Formulation or development of government policy) of FOIA, and that the public interest favoured maintaining the exemption.
11. The complainant requested an internal review on 18 November 2021, setting out a number of public interest arguments as to why the information should be disclosed.
12. The Home Office responded on 19 January 2022. It upheld its decision to withhold information under section 35(1)(a) of FOIA.

Scope of the case

13. The complainant contacted the Commissioner on 4 March 2022 to complain about the way her request for information had been handled.

She disagreed with the Home Office's decision to apply section 35(1)(a) of FOIA to refuse the request.

14. The analysis below considers whether the Home Office was entitled to rely on section 35(1)(a) to refuse the request.
15. The Commissioner has viewed the withheld information.

Reasons for decision

Section 35 – Formulation of government policy

16. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
17. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
18. The Commissioner's guidance on section 35³ states:

"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".
19. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.

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

20. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007⁴) 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.
21. The withheld information in this case comprises two reports (a full report and a summary) of the consultation conducted by Britain Thinks. This is the information that was specified at part (1) of the request. The reports contain conclusions made as a result of the public consultation and this information falls within scope of part (2).

Does the information relate to the formulation or development of government policy?

22. The Home Office said that the withheld information related to the NPI and to the Nationality and Borders Bill ('the Bill'), the latter being introduced into the House of Commons on 6 July 2021.
23. The Home Office said that the NPI is an extensive and complex programme covering many areas of asylum and immigration policy. It said the objectives of the NPI will have a significant and wide ranging impact on people's lives. It identified 31 individual policies to the Commissioner which it said the withheld information relates to.
24. The Home Office said that both the final consultation report and the summary report, including the conclusions provided by Britain Thinks, were carefully considered by officials and they informed and shaped the proposals that were taken forward within the NPI and the Bill. It said that, at the time of the request (and currently), the formulation and development of these policies was 'live'. The Bill was making its way through Parliament and was therefore subject to debate and amendment. As such, the Home Office said that the withheld information clearly related to the formulation or development of government policy.
25. It said:

"...the Bill as introduced, was not finalised. Any Bill introduced into Parliament may be – and often is – amended significantly as it is scrutinised by the Houses of Parliament. Some of these amendments

⁴<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i70/DFES.pdf>

are introduced by the Government, as it further develops its policy. Other amendments are introduced by Parliamentarians who are not members of the Government. The Government must then consider whether it wishes to resist these amendments or whether to adopt them as part of its policy and to agree that they should form part of the Bill. Either way, the Bill that receives Royal Assent and reaches the Statute Book, to become law as an Act of Parliament, is often significantly different from the Bill that was originally introduced."

26. The Home Office said that this was the case with the Bill, as it had been amended multiple times and further amendments were expected:

"At the time of writing, the Bill is at a stage called 'Ping Pong,' a process of reconciliation which involves the Bill passing back and forward between the two Houses until a single version is agreed. Amendments continue to be made. The Government continues to formulate and develop the policy and to introduce new amendments of its own. It also continues to formulate and develop the policy in response to amendments being introduced by Parliamentarians who are not members of the Government. This process will continue until a single version is agreed and the Bill can receive Royal Assent to become an Act of Parliament."

27. The Home Office commented that the Commissioner's guidance on this point states that "...policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation".

28. Finally, the Home Office noted that the Commissioner's guidance states that the following factors will be key indicators of the formulation or development of government policy:

- the final decision will be made either by the Cabinet or the relevant minister;
- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide ranging.

29. The Home Office confirmed that all of these key indicators were met in this case. Taking all the above into consideration it was satisfied that the exemption was engaged.

30. Having viewed the withheld information, the Commissioner is satisfied that it relates very closely to the formulation of emerging Government policy on immigration and asylum. The consultation solicited feedback from respondents on specific policy areas, which is summarised in the reports, and observations are then made. The information has informed the drafting of new legislation and the policies that will be required to

support it. The Government's own response on the consultation, published on 21 July 2021, states:

"The results of the consultation were carefully considered before relevant policy decisions were finalised and ahead of the introduction of the Nationality and Borders Bill in Parliament on 6 July 2021."

31. The Commissioner is therefore satisfied that the reports relate to the formulation of government policy and thus that section 35(1)(a) of FOIA is engaged.

Public interest test

32. Section 35 is a qualified exemption and so it is necessary to go on to consider whether the public interest would be better served by maintaining the exemption or by disclosing the withheld information.
33. The Commissioner accepts that the Government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This can carry significant weight depending on the circumstances of the case. The need for a safe space will be strongest when the issue is still live. The timing of the request is therefore an important factor.

Arguments in favour of disclosing the withheld information

34. The Home Office recognised that asylum and immigration are issues of considerable interest to the public, and that disclosure would aid public understanding of the Government's approach to these policy areas. This would facilitate public debate on the matter.
35. The complainant noted that 8590 respondents took part in the consultation exercise. Despite this high uptake, the Government had introduced the Bill into Parliament prior to publishing its response to the consultation findings. The complainant said that aspects of the draft Bill (in particular, provisions for the criminalisation of those who arrive in the UK by irregular means, and the framework for the 'offshore processing' of asylum applicants) are controversial and have been the subject of intense public debate.
36. Referring to the Government's published response to the consultation, the complainant commented:

"It will be apparent to the ICO from even a cursory skim read of that document that it tells the reader very little indeed about what consultees **actually told** the Home Office in their consultation responses and engagement sessions beyond broad-brush statements, for example to the effect that there is "some support" for the Government's "broad ambitions" but "around three quarters of those

who responded said they opposed many of the policies set out in the New Plan for Immigration”.”

37. The complainant considered that the presence of obvious dissent from such a large number of consultees regarding significant reforms to the immigration system firmly placed disclosure in the public interest. Furthermore, she said that it is customary for the Home Office to publish a ‘consultation grid’ at the point where a significant policy is being finalised. This comprises a table of comments and suggested amendments or deletions from stakeholders with an additional column in which the Home Office explains which aspects of the submissions will or will not be taken on board. The complainant noted that a consultation grid was not published in this case and she believed this was a further indication that there was insufficient external scrutiny of consultees’ responses to the proposals.
38. The complainant has also referred the Commissioner to the Tribunal’s decision in *Sheppard v Information Commissioner EA/2020/0081P*⁵, and particularly to its comments on the balance of the public interest. The information requested in that case was information on polling that had been carried out to gauge the public’s view on the strength of the Union of the UK. The complainant said that the Tribunal found the public interest in disclosure was stronger than that in favour maintaining the exemption, and she considered that similar factors applied in this case.
39. The complainant said:
- “The abstract contents and delayed publication date of the Response gives rise to a real concern that the Home Office is deliberately withholding key information from the public (including Members of Parliament voting on the Bill) to avoid further negative press concerning - and a potential Parliamentary defeat of - its immigration reforms. That is not transparent governance. The Government should be ready and willing to defend its policy choices against criticisms.”

Arguments in favour of maintaining the exemption

40. The Home Office explained that a safe space was required for the policy implementation surrounding the Bill:

“The Commissioner accepts that officials often require a ‘safe space’ in order to develop ideas, debate live issues and reach decisions away

⁵<https://informationrights.decisions.tribunals.gov.uk//DBFiles/Decision/i2858/Shepard,%20Tommy%20EA.2020.0081.pdf>

from external interference and distraction. In addition, both the Tribunal and the High Court have also accepted that effective government requires a safe space in which to formulate and develop policy. In *Department of Health v Information Commissioner (EA/2013/087)*, 17 March 2014, for example, the Tribunal stated (at paragraph 73) 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'."

41. The Home Office explained that the Bill had only recently been introduced into Parliament at the time of the request, and was still being debated. It said it was a 'live' issue, and it believed the weight attached to this argument was particularly compelling:

"In this particular case, we contend that a 'safe space' was needed at the time of the request – and is still needed now - to carefully review the results of the consultation reports (and the conclusions) and then to consider how the results should inform and then shape the formulation and development of the NPI policy, including policy being delivered via the Bill."

42. The Home Office said that the complainant's belief that disclosing the broad analysis of consultees responses, which did not themselves contain information on policy deliberation, would be unlikely to result in significant harm to the policy making process, was incorrect. It provided the Commissioner with information on the policy development process that would be necessary to implement the measures set out in the Bill and eventual legislation. It said that this would happen in phases, whereby different policies will come into effect at different points:

"Across each of these phases, different areas of reforms will become operational at different points, with each requiring varying degrees of policy consideration, including around guidance products; secondary legislation requirements; training products; and other operational considerations, some of which are sensitive. As such, there is both a general risk from premature disclosure, which could prejudice policy development; and some more specific risks, given the nature of our implementation plans."

43. The Home Office explained that the process of policy making was very complex, involving multiple stakeholders, and that the full Britain Thinks report was just one of a number of elements which were feeding into policy development. Disclosure could therefore create an inaccurate and incomplete view of the evidence and factors the Government was using for policy development.

44. The Home Office argued that if the withheld information was released into the public domain it was at risk of misinterpretation, and it would be complex and time consuming for it to mitigate. The Home Office considered that the resultant distraction would compromise its ability to consider policy options in a safe space away from external interference and ultimately this would prejudice the function of good government.
45. The Home Office also explained that the full report contained feedback from respondents with particular experience of the immigration system. These respondents had made specific observations about particular areas of work. This information was not included in any detail in the Government's published response, but it was informing ongoing policy development in related areas.
46. The Home Office pointed to specific examples in the reports. It also explained how the reports were likely to be used in future, and how disclosure would jeopardise these plans. The Commissioner cannot reproduce these arguments in this Decision Notice as to do so would disclose the withheld information. The Home Office said it was necessary to preserve a safe space away from external distraction and commentary, to consider these matters and factor them into specific policy considerations such as guidance, so as to protect the system from unintended consequences.
47. On the specific arguments levelled by the complainant that the Government had not been sufficiently open about opposition to its plans, the Home Office said:

"The Government has recognised the level of opposition to many of the policies in the NPI within its consultation response. There is a further breakdown of responses by chapter within the consultation response.

However, we do not agree that this places a greater weight in favour of disclosure, for the reasons already provided. In addition, the Home Office followed published government guidance on running public consultations⁶... In the Government's consultation response, the Home Office 'explain[ed] the responses that have been received from consultees and how these have informed the policy.' It was also "state[d] how many responses have been received.' The response also stated, chapter by chapter, how the consultation responses informed policy.

⁶[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation Principles_1_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/691383/Consultation_Principles_1_.pdf)

Regarding the point made by the complainant concerning the 'consultation grid', it is **not** customary for the Home Office to provide this".

Balance of the public interest

48. The Commissioner would firstly address the complainant's claim that the circumstances of this case are sufficiently similar to those in Sheppard to merit the Commissioner following the Tribunal's decision in that case.
49. The Commissioner notes that the Tribunal's decision in that case was that section 35 was not engaged (whereas in this case, the Commissioner has accepted that section 35 is engaged). Therefore, its comments regarding the public interest were speculative. The Tribunal observed that, had it found section 35 to be engaged and gone on to consider the public interest, it was doubtful that the public interest in maintaining the exemption was stronger than that in disclosure.
50. As regards the 'safe space' arguments made in that case, the Tribunal said:

"...it is hard to see how the disclosure of this polling information would in any event inhibit upon any 'safe space' that would be required to consider formulation and development of policy. Thus, the results of the polling from the studies described...would be available if the information were disclosed, but nothing would have been made available (because not requested) about any policy development discussed as a consequence of those results."
51. The Commissioner considers it significant that the research information in Sheppard comprised polling responses that had not been analysed in any way, whereas the withheld information in this case comprises a detailed analysis of the responses received, from commentary regarding overall trends identified, to the examination of individual responses. The information therefore has had 'value added' in the form of the detailed analysis of the consultation responses that has been conducted by Britain Thinks. The Home Office's case is that this information, if disclosed prematurely, will likely result in attempts to disrupt or interfere with the policymaking process by those who disagree with the Government's stated aims regarding the NPI. This will undermine and distract from that process, and will ultimately result in poorer policy making. The Commissioner notes that equivalent arguments to this were not considered by the Tribunal in Sheppard.
52. The Commissioner further notes that some of the Tribunal's comments regarding the public interest related to the withholding of information about the costs of the research. No such information was requested or is being withheld in this case.

53. The Commissioner therefore does not agree with the complainant that the two cases are sufficiently similar that Sheppard sets a precedent which should be followed here.
54. The Commissioner considers that there is a clear public interest in the disclosure of information which can inform public debate on government strategies for managing immigration and asylum. There is also a public interest in knowing what information the Home Office was using to gauge public attitudes to its immigration and asylum proposals, when drawing up policy on the NPI. This is particularly the case where it is known that some respondents have voiced disagreement with the NPI's aims. The question for the Commissioner to consider is whether the arguments in favour of maintaining the exemption are stronger.
55. Public interest arguments favouring maintaining the exemption at section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
56. The Commissioner notes that, at the time of the request, the information in scope was recent. At the same time, policy development on NPI was in its early stages. It was clearly a 'live' matter.
57. The Commissioner accepts that the Government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction. In this case, the disclosure of the withheld information at such an early stage of policy development would hinder the ability of officials to explore and discuss all available options in a free and frank manner, and to understand their possible implications. This is because, while the withheld information would not reveal details of those policy discussions, it would place in the public domain sensitive information which could be used to interfere with, disrupt or undermine those deliberations by those who disagree with the overarching aims of the NPI. A safe space is required to prevent policy makers getting unduly distracted or side-tracked, which would be harmful to the quality of the debate underlining effective decision making.
58. It has been generally accepted by both the Commissioner and the First-tier Tribunal that significant weight should be given to maintaining the exemption where a valid need for a safe space is identified. A compelling public interest in favour of disclosure is required when a need for safe space is demonstrated.
59. The complainant has argued that the fact that respondents have disagreed with the NPI proposals set out in the consultation is an

argument in favour of disclosure of considerable weight. She argues that where an unpopular policy which is likely to have wide ranging repercussions is being pursued, despite public opposition, there is a public interest in knowing more about the reservations that were expressed.

60. The Commissioner understands that this is a controversial area of public policy. Given the stated aims of the NPI, it was, perhaps, inevitable that respondents were going to express a wide range of strongly held views, some of which would be critical of the proposals. He notes that the Government has acknowledged the opposition voiced by some consultees in its published consultation response, and so it has been open about the existence of opposition. If the actual details of the responses it received, and how they were analysed, were disclosed, fielding questions and providing explanations would frustrate the safe space needed to deliberate policy options. The public interest in the Government being able to develop an effective and well designed immigration and asylum policy, without significant disruption, is the overwhelming factor in the circumstances of this case.
61. In these circumstances, the Commissioner considers that greater weight can be added to the public interest argument in favour of protecting the safe space in which policy matters are discussed.
62. The Commissioner's decision is that, in the circumstances of this case, the public interest favours maintaining the exemption. In reaching this view, the Commissioner has given particular weight to the timing of the request. The Commissioner is satisfied that the information was informing live policy development at the time of the request and that there is a stronger public interest, in the circumstances of this case, of protecting the space in which that policy is being developed. It follows that the Home Office was entitled to rely on section 35(1)(a) to refuse the request.
63. Going forward, where circumstances change, and the policy development surrounding the NPI and the Bill are no longer 'live', the balance of the public interest may also change.

Right of appeal

64. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.

66. 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
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