

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 August 2021

**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 about meetings and discussions concerning the establishment of the Windrush Cross-Government Working Group. The Home Office initially refused the request in its entirety, citing section 35(1)(a) (formulation of government policy, etc) of FOIA. During the course of the Commissioner's investigation, the Home Office partly revised its position. Whilst the Home Office maintained that section 35(1)(a) applied to the request in its entirety, it cited additional exemptions which it said applied to some parts of the withheld information; namely, section 35(1)(b) (ministerial communications) for one letter, section 38 (health and safety) and section 40(2) (personal information). The Home Office also said that in the event that the Commissioner were to find that section 35(1)(a) is not engaged to any information, or section 35(1)(b) to one Ministerial letter, it would seek to rely on section 36 (prejudice to effective conduct of public affairs) 'in the alternative'.
2. The Commissioner's decision is that the Home Office was not entitled to rely on section 35(1)(a) for any part of the request. However, she finds that section 35(1)(b) is engaged in relation to the one letter, and that the public interest favours maintaining the exemption. Having next considered the Home Office's reliance on section 36 'in the alternative' applied to all the remaining withheld information, the Commissioner finds section 36(2)(b)(i) and (ii) to be engaged (bar the one letter withheld under section 35(1)(b)). She also finds that the balance of the public interest favours maintaining section 36. As a result, she has not found it necessary to consider the Home Office's reliance on section 36(2)(c), also cited for the withheld information in its entirety, nor sections 38 and 40 additionally cited to some parts of the withheld information.

3. The Commissioner does not require any steps as a result of this notice.

## Background

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4. The Windrush Cross-Government Working Group brings together stakeholders and community leaders with senior representatives from a number of government departments. The purpose of, and terms of reference for, the Working Group are published online.<sup>1</sup>
5. The inaugural meeting was held on 25 June 2020.

## Request and response

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6. On 29 June 2020, the complainant wrote to the Home Office via the *WhatDoTheyKnow.com* website<sup>2</sup> and requested information in the following terms:

*"...I would like to request the following information regarding meetings and discussions about the establishment of the Windrush Cross-Government Working Group announced on Monday 22 June 2020:*

- *Please provide the minutes of the internal Home Office or cross-departmental meetings where the establishment of the Windrush Cross-Government Working Group was discussed*
- *Please provide the agenda for these meetings and lists of attendees*
- *Please provide any further documents circulated pertaining to the discussion of the establishment of the working group, basis for decisions on who to invite to participate, and other matters arising from these discussions*

*I would like the information to be provided by email [email address redacted] or through the What Do They Know website. If my request is denied in whole or in part I ask that you justify all deletions by reference to specific exemptions of the act. I will also expect you to release all non-exempt material. I reserve the*

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<sup>1</sup> Windrush Cross-Government Working Group: terms of reference - GOV.UK ([www.gov.uk](http://www.gov.uk))

<sup>2</sup>

[https://www.whatdotheyknow.com/request/windrush\\_cross\\_government\\_workin#outgoing-1071805](https://www.whatdotheyknow.com/request/windrush_cross_government_workin#outgoing-1071805)

*right to appeal your decision to withhold any information or to charge excessive fees...".*

7. The Home Office responded on 21 July 2020 and refused to provide the requested information citing section 35(1)(a) (formulation of government policy) of FOIA. It said that the associated public interest test favoured withholding the requested information.
8. The complainant requested an internal review on 12 August 2020. Despite her reminder emails and the Home Office's assurances that it would provide the review outcome on two separate dates, together with the Commissioner's intervention, the Home Office failed to provide an internal review before the complainant's complaint to the Commissioner (but see 'Scope' section below).

### **Scope of the case**

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9. The complainant contacted the Commissioner on 26 October 2020 to complain about the way her request for information had been handled. She asked the Commissioner to consider her view that section 35 does not apply to the request and complained about the lack of an internal review outcome, which was the case at the time of her complaint.
10. As part of the Home Office's response to the Commissioner's investigation on 21 June 2021, it advised that it had completed an internal review on 10 March 2021, which the Commissioner has now had sight of. This outcome is published and available on the *WhatDoTheyKnow.com* website, so the Commissioner is satisfied that the complainant will also now have seen it. The review maintained that section 35(1)(a) was engaged but provided weblinks to publicly available information on Windrush.<sup>3</sup>
11. However, the internal review was not provided for several months as commented on in the 'Other matters' section of this notice.
12. During the course of the Commissioner's investigation, the Home Office partly reconsidered its position and informed her of the following:
  - Whilst it still wished to rely on section 35 for the request in its entirety, the Home Office said if the Commissioner were to

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<sup>3</sup> <https://www.gov.uk/government/collections/windrush-cross-government-working-group> and [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_)

conclude that it was not engaged, it would seek to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) 'in the alternative'. This exemption and subsections relate to the 'prejudice to effective conduct of public affairs'.

- It said that section 35(1)(b) (ministerial communications) also applied to 'Item 13' of the withheld information provided to the Commissioner. Again, the Home Office said if the Commissioner found that section 35(1)(b) was not engaged, it would rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) 'in the alternative'.
  - In addition to section 35 (or section 36 in the alternative), the Home Office also said that it considered sections 38 (health and safety) and 40 (personal information) to apply to parts of the withheld information.
13. The Home Office set out its rationale and arguments in relation to the foregoing for the Commissioner's consideration. The Home Office highlighted aspects of its investigation response which it said should not be shared in this notice for reasons it has explained to the Commissioner. Although the Commissioner does not accept that all of the points highlighted should remain confidential, she has respected the Home Office's position in regard to certain specific submissions.
  14. On 22 June 2021, the Commissioner asked the Home Office to notify the complainant of its latest position and newly cited additional exemptions. It did so on 6 July 2021.
  15. The Commissioner wrote to the complainant seeking her view on the Home Office's updated position on 6 July 2021, and again on 19 July 2021.
  16. The complainant did not submit any further comments.
  17. The Commissioner has first considered whether the Home Office was entitled to rely on section 35(1)(a) for the withheld information in its entirety.

## **Reasons for decision**

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### **Section 35(1)(a) - formulation or development of government policy**

18. 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.
19. 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.

20. In her guidance on section 35<sup>4</sup>, the Commissioner accepts:

*"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".*

21. In that guidance, the Commissioner also explains:

*"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".*

22. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process, where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister or decision makers.

23. Development of government policy, however, goes beyond this stage to improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.

24. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged.

25. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007<sup>5</sup>) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either

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<sup>4</sup> section-35-government-policy.pdf (ico.org.uk)

<sup>5</sup> Information Tribunal Appeal Number: EA/2006/0010 (tribunals.gov.uk)

formulates or develops its policy will be sufficient to engage the exemption.

26. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
27. In its submissions to the Commissioner, the Home Office said it had taken account of the above Tribunal decision, specifically paragraph 58 which states:

*"When asking the question, whether the minutes of a particular meeting or part of one, a memorandum to a superior, or a Minister or a note of advice fall within section 35(1)(a), a broad approach should be adopted. If the meeting or discussion of a particular topic within it, as whole, concerned with s.35(1)(a) activities, then everything that was said or done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable."*

28. The Home Office said, based on the foregoing, it had, therefore, considered that the scope of the information in its entirety, to be subject to section 35(1)(a) of FOIA.
29. However, as the Tribunal also noted at paragraph 58:

*"...that reassurance is of limited value since the question of the public interest remains"*.

30. The Home Office told the Commissioner:

*"Some members of the Windrush generation who were amongst the hundreds of thousands of people who came from commonwealth countries at the invitation of the UK government to help rebuild the UK and its economy after World War 2, have faced difficulties in demonstrating their lawful status in the UK, and therefore may have suffered losses in proving their right to work, finding a place to live, accessing healthcare, or an impact on their daily life. The Home Secretary commissioned a lessons learned review into the events leading up to Windrush, overseen by Wendy Williams. The Windrush Lessons Learned Review was laid before Parliament on 19 March 2020.*

*As part of the Home Office's response to the Wendy Williams' Review into the events leading to the Windrush Scandal, a cross-government working group was established as one of the ways to engage and work closely with stakeholder representatives from affected communities. The purpose of the Windrush Cross-*

*Government Working Group (WCGWG) is to work with government to co-design and deliver solutions for communities affected by the Windrush scandal. The establishment of that group and the work it continues to do informs policy development across the Home Office.*

*The decision to set up the group, and the subsequent decisions around the design, scope, purpose and membership of the group forms the development of this government policy."*

31. The Home Office explained that WCGWG held its first meeting on 25 June 2020 and that the request under consideration in this notice was received four days later. It said:

*"The Home Office considers that all the information in scope of this request concerns the formulation and development of the government policy relating to the decision to establish the WCGWG, its purpose and membership. At the time the complainant submitted her request, the formation and development of this policy area was ongoing in that the WCGWG had just met for the first time and the Terms of Reference and remit of work had not been finalised. The meeting on 25 June presented the WCGWG with its first opportunity to consider official business which was not finalised and was still in development. Therefore, at the time of the request, we consider that the information in its entirety was subject to section 35."*

32. The Commissioner does not consider that determining the purpose and membership of the WCGWG constitutes a 'policy' even in the broadest interpretation - the Windrush issue has existed since 1948 and the setting up of a working group *per se* does not fall within the definition of 'policy'. In the Commissioner's view, the requested information is more akin to the 'mechanics' of actually forming the working group, as opposed to the formulation or development of any policy.

### *Conclusion*

33. The Commissioner is, therefore, not persuaded by the Home Office's arguments that any of the requested information falls within section 35(1)(a) and finds that the Home Office can not rely on section 35(1)(a) to withhold any of the information in scope of the request.
34. Having concluded that section 35(1)(a) is not engaged, it is not necessary for the Commissioner to consider the associated public interest test.
35. Given that the Home Office has argued it would seek to rely on section 36 'in the alternative' if the Commissioner found section 35 not to be engaged, this is the next step for the Commissioner to address. Before

turning to section 36 however, she will first consider the Home Office's reliance on section 35(1)(b) in relation to 'Item 13' of the withheld information.

### **Section 35(1)(b) – ministerial communications**

36. As stated, in addition to section 35(1)(a), the Home Office also cited section 35(1)(b) in relation to 'Item 13'. It told the Commissioner that :

*"Item 13 is a letter from the Home Secretary to the Prime Minister, containing the views and opinions of the Home Secretary, which we believe engages section 35(1)(b). Release of this information would undermine the principle of collective responsibility."*

37. Section 35(1)(b) states that information held by a government department or by the National Assembly for Wales is exempt information if it relates to Ministerial communications. FOIA explains that in this context 'Ministerial communications' means any communications between the Ministers of the Crown and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet.

38. The purpose of section 35(1)(b) is to protect the operation of government at ministerial level. It prevents disclosures which would significantly undermine ministerial unity and effectiveness or result in less robust, well-considered or effective ministerial debates and decisions. However, it should not be used simply to protect ministers from embarrassment, or from being held accountable for their decisions.

39. The letter under consideration is a communication between Ministers of the Crown dated 18 March 2020 and therefore falls within the definition of the exemption. The Commissioner has reviewed the Ministerial Code<sup>6</sup> which sets out the principle of collective responsibility at paragraphs 2.3 and 2.4. The Code includes the following:

*"The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Neither should the individual views of Ministers or advice provided by civil servants as part of that internal process be disclosed. Decisions reached by the Cabinet or Ministerial Committees are binding on all members of the Government. They*

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/826920/August-2019-MINISTERIAL-CODE-FINAL-FORMATTED-2.pdf)



*are, however, normally announced and explained as the decision of the Minister concerned."*

40. The Home Office explained that:

*"Collective responsibility requires that ministers should be able to discuss and share information in private, while maintaining a collective position when decisions have been reached. This in turn requires that the confidentiality of opinions expressed in ministerial communications, including in correspondence, should be maintained. Collective responsibility is a central tenet of the UK constitution. Protecting collective responsibility is in the public interest as it allows for the maintenance of space to formulate, develop and refine decision making. The space also allows for all options to be considered."*

41. The Commissioner's guidance (see footnote 3) states that section 35(1)(b):

*"...refers to communications between ministers. It will not include a communication from a minister to a non-minister. However, communications do not have to be exclusively between ministers: the exemption will cover communications between two (or more) ministers even if others are copied in"*.

42. As the Commissioner is satisfied that the letter at 'Item 13' of the withheld information falls within the definition of 'Ministerial communications', she accepts that section 35(1)(b) is engaged.

**Public interest test**

43. However, as section 35(1)(b) is a qualified exemption, the Commissioner must now consider the associated public interest test.

**Public interest arguments in favour of disclosure of the letter at 'Item 13'**

44. The complainant did not submit any public interest arguments.

45. Although the Commissioner has not needed to consider the public interest test in relation to section 35(1)(a) given her conclusion that this exemption is not engaged, she finds the Home Office submission below helpful here for reference purposes generally, and also because the publicly available information is referred to in its submissions relating to section 35(1)(b):

*"We recognise there is a specific public interest around disclosing information pertaining to decisions made over the establishment and membership of the WCGWG. The impact of Home Office*

*policy on the Windrush generation is a high-profile issue, and the steps that the Government is taking to provide support and assurances to affected people, the wider Windrush generation and communities are subject to a high degree of public interest and scrutiny. Public interest in this issue, and the efficacy of the Government's response, has been additionally heightened by the publication of the Windrush Lessons Learned Review in March 2020 and, in turn, by the launch of this Group. In recognition of the public interest in the WCGWG, the Terms of Reference, which have now been agreed, and minutes of its meetings are published on gov.uk at the following address (see footnote 1)".*

46. In its public interest submissions relating specifically to section 35(1)(b), the Home Office said:

*"There is a public interest in release of information relating to Windrush generally, and the WCGWG specifically, to increase transparency. This is reflected in the information that has been published, as explained above."*

**Public interest arguments against disclosure of the letter at 'Item 13'**

47. Against disclosure of the letter, the Home Office argued:

*"Collective responsibility requires that ministers should be able to discuss and share information in private, while maintaining a collective position when decisions have been reached. This in turn requires that the confidentiality of opinions expressed in ministerial communications, including in correspondence, should be maintained. Collective responsibility is a central tenet of the UK constitution. Protecting collective responsibility is in the public interest as it allows for the maintenance of space to formulate, develop and refine decision making. The space also allows for all options to be considered.*

*Disclosure of communications between ministers would undermine collective responsibility of the government by revealing the views of individual ministers. This would not be in the public interest."*

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

48. In this case, the letter in question is dated 18 March 2020. It was announced publicly on 22 June 2020<sup>7</sup> that the WCGWG had been launched that day. The inaugural meeting was held on 25 June 2020. The complainant's request of 29 June 2020 post-dates both the 'disputed' letter and the launch of the WCGWG. The Commissioner must consider the prevailing public interest at the time of the request and any internal review, both of which followed the disputed letter and the inaugural meeting of WCGWG on 25 June 2020.
49. The Commissioner recognises the need for transparency and openness particularly given the sensitivities surrounding the Windrush issue in general. She acknowledges that some information relevant to the WCGWG has been placed in the public domain which goes some way towards meeting the public interest.
50. The Commissioner accepts that Ministerial communications require safe and private thinking space to ensure that free and frank deliberations take place about the options available. She acknowledges that good decision making is based on such free and frank exchanges of views and the ability of Ministers to circulate their views among themselves in order to reach a collective decision. The Commissioner agrees that such processes would be hindered and undermined if disclosure was required prior to decisions being made and that this would impact on the overall quality of decision making.
51. In terms of weight to be placed on maintaining the exemption the Commissioner has noted the position set out by the Upper Tribunal in the case of *Cabinet Office v Information Commissioner [2014] UKUT 461 (AAC)* (20 October 2014):

*"[57]. Even where the information sought itself falls squarely within the definition of "ministerial communications", as opposed to being merely information which "relates to" ministerial communications, disclosure may not necessarily, on the facts of the particular case, bring into play to any significant extent any of the policy reasons behind the exemption. I would respectfully endorse what was said in paras. 85 to 87 of the Scotland Office case."*

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<sup>7</sup> New working group launched to address challenges faced by Windrush generation - 1st Citizen Lawyers

52. *In Scotland Office v Information Commissioner EA/2007/0070*, (8 August 2008) the Information Tribunal considered ministerial correspondence relating to Scottish territorial waters. It said:

*"To the extent that the Appellant is suggesting that ... there is some form of presumption against the disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under section 35(1)(b) is inherently weighty, we must disagree." And*

*"...not all information coming within the scope of section 35(1)(b) will bring the convention of collective Cabinet responsibility into play. Some communications may be completely anodyne or may deal with process rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated".*

53. It is therefore important that the Commissioner considers the Ministerial communications on the circumstances of case, assessing the context and the content of the information. On the issue of collective responsibility the Commissioner's guidance on section 35(1)(b) states:

*"If collective responsibility arguments are relevant, they are likely to carry significant weight. However, departments should be careful to ensure that collective responsibility actually applies to the particular information in question: ie that it reveals the view of an individual minister on a government decision. Not all information falling within this exemption will automatically engage the convention of collective responsibility."*

54. The Commissioner accepts that the convention of collective responsibility is engaged here. She must balance the need for transparency and openness with the prejudice that disclosure would have on the ability of ministers to have free and frank discussions in a safe space, in the interests of progressing government policy in high-risk, and politically sensitive areas. Windrush remains a highly sensitive policy area. Disclosing the information would hinder and prejudice future discussions relating to both this group and any future group that government wishes to establish in a highly-sensitive area, as it would inhibit the types of open discussions needed to do so, which would compromise the quality of work government could deliver.

### *Conclusion*

55. She is therefore satisfied that, in the circumstances of the case, the balance of the public interest lies in favour maintaining the exemption and in non-disclosure of the withheld letter.

56. In view of the above decision, the Commissioner does not need to consider the Home Office's additional and alternative reliance on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c), with regard to 'Item 13', (the letter), of the withheld information.
57. Given that the Commissioner has not found section 35(1)(a) to be engaged to any of the withheld information, her next step is to consider the Home Office's reliance on sections 36(2)(b)(i) and (ii) and 36(2)(c) for **all** the remaining withheld information (parts of which have been additionally exempted under sections 38 and 40). However, it is logical for the Commissioner to first consider whether the remainder can be withheld under section 36 of FOIA.

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

58. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
59. The Home Office has said sections 36(2)(b)(i) and 36(2)(b)(ii) and 36(2)(c) would apply to the withheld information in its entirety if the Commissioner found section 35(1)(a) not to be engaged, as is the case here.
60. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
- (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*
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs*
61. Section 36 is a unique exemption within FOIA in that it relies on a particular individual (the 'Qualified Person') within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role in determining whether or not the exemption has been correctly applied is to establish that an opinion has been provided by the Qualified Person, assure herself that that opinion is "reasonable" and to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

### **The Qualified Person's Opinion**

62. The Home Secretary is the Qualified Person for the Home Office, a role defined in the legislation. The Commissioner is satisfied that Priti Patel is the Qualified Person for the purposes of the legislation.
63. The Commissioner has had sight of the Home Office's submissions of 9 June 2020 to the Qualified Person and of her Opinion which was given on 14 June 2020. The Home Office has asked the Commissioner not to include what it has identified as being 'confidential' elements of its submissions.
64. In relation to the cited limbs of the section 36 exemption, the Qualified Person's Opinion aligned with the submissions (emphasis as added by the Home Office) which included:

***"We judge that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged because releasing the information in question, about external stakeholder members of the Windrush Cross-Government Working Group would inhibit the free and frank provision of advice and the free and frank exchange of views. Exchanges of views on the suitability of candidates for an external stakeholder group, particularly of a highly sensitive and high-profile and political nature – such as Windrush, must be free and frank if it is to be of value. Free and frank discussions are integral to creating purposeful and much needed external stakeholder groups, which we rely on to progress government policy, often under intense scrutiny and particularly when affected communities prefer to work with stakeholders they trust rather than with government.***

***In addition, relationships between stakeholders are themselves fragile and sensitive and the release of the information would risk losing the relationships we have taken time to build and develop with our existing stakeholders...Prejudicing future discussions with these stakeholders would inhibit the future provision of advice and exchange of view with these stakeholders (section 36(2)(b)) and would be prejudice to the effective conduct of public affairs (section 36(2)(c)).***

***Release of material would also be likely to have an inhibiting effect on future discussions around the formation of working groups because other government departments would be reluctant to provide detailed and frank views, which are critical to sound and well-reasoned decision-making, if they believed that the information is***

***likely to be released.*** *Some views would also be withheld if they could be seen as controversial or unconventional."*

65. The Qualified Person's Opinion of 14 June 2020 confirmed that release of the information would cause the prejudice specified in section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
66. Section 36 places the Qualified Person's opinion at the centre of exemption. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is not for the Commissioner to substitute her own opinion for that of the Qualified Person. For an opinion to be reasonable, it need not be the most reasonable opinion available. If it is an opinion that a reasonable person could hold, then it is reasonable.
67. The Commissioner considers that an opinion is likely to be unreasonable if it fails to explain why the exemption applies to the particular withheld information or if the explanations do not relate to the limb(s) of the exemption that have been cited.
68. As per the Commissioner's guidance, information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to 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 by the public authority.
69. If it is not evident how the provision of advice or the exchange of views would be inhibited, it may be harder for the ICO to find that the opinion was a reasonable one. It is important to note that these exemptions are about the processes that may be inhibited, rather than what is in the information. The issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views.
70. In this case, the Home Office has not definitively specified whether it considers whether disclosure of the requested information 'would' or 'would be likely' to. The Commissioner has, therefore, adopted the lower level of 'would be likely' and has factored this into her later public interest considerations.
71. The Home Office has provided the Commissioner with its submissions in respect of sections 36(2)(b)(i) and (ii) including those confidential elements which it has asked not to be replicated here.

72. Having considered the withheld information, together with the Qualified Person's Opinion and the Home Office's confidential submissions, the Commissioner's view is that sections 36(2)(b)(i) and (ii) are engaged in relation to the withheld information in its entirety. She must next consider the associated public interest test.

***The public interest test***

73. Section 36 of 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 exemptions contained at sections 36(2)(b)(i) and (ii) outweighs the public interest in disclosing the information.

***Public interest arguments in favour of disclosing the withheld information***

74. The complainant did not provide any specific public interest arguments in favour of disclosure of the withheld information.
75. The Home Office submitted the following in favour of disclosure:

*"As was noted above, we believe there is a very clear public interest in release of information relating to Windrush generally, and the WCGWG specifically, to increase transparency. This is reflected in the information that has been published, as explained above."*

***Public interest arguments against disclosing the withheld information***

76. The Home Office provided the following arguments against disclosure of the withheld information:

*"Release of the material would also be likely to have an inhibiting effect on future discussions, inhibiting the provision of advice and deliberation, around the formation of working groups because other government departments would be reluctant to provide detailed and frank views, which are critical to sound and well-reasoned decision-making, if they believed that the information is likely to be released (section 36(2)(b)(i) and (ii)). This is particularly the case where the request was received only a matter of days after the establishment of the Group and before key decisions such as Terms of Reference had been agreed. Some views would also be withheld if they could be seen as controversial or unconventional. This would not be in the public interest."*



77. It also said:

*"However, similar to the arguments noted under section 35, we must balance the need for transparency and openness with the prejudice that disclosure would have on the ability of government officials and stakeholders to have free and frank discussions in a safe space, in the interests of progressing government policy in high-risk, and politically sensitive areas. As mentioned, Windrush remains a highly sensitive policy area and the WCGWG was only able to be established because free and frank discussions were able to be had in a safe space with officials and stakeholders to ensure that policy could be progressed and developed in the context of the Lessons Learned Review and cross-government interest. Disclosing the information would hinder and prejudice future discussions relating to both this group and any future group that government wishes to establish in a highly-sensitive area, as it would inhibit the types of open discussions needed to do so, which would compromise the quality of work government could deliver."*

**Balance of the public interest test arguments**

78. Again, the Commissioner recognises the need for transparency and openness which is heightened due to the sensitivities surrounding the Windrush issue in general. She acknowledges that the Home Office has considered what it is able to publish about the WCGWG specifically, in the interests of both transparency and in aiding public understanding.
79. The Commissioner accepts that the Home Office's ongoing relationship and exchanges with the WCGWG would be likely to be inhibited and less free and frank if the requested information was to be disclosed.
80. She is also mindful that the WCWG is still in existence and holding meetings.

*Conclusion*

81. In the Commissioner's opinion disclosing the withheld information would be likely to cause inhibition to both the Home Office and to the WCGWG which is not in the public interest. She does not consider that there is a persuasive public interest argument in disclosing information which would outweigh this. It follows that the Commissioner finds that the balance of the public interest favours maintaining the exemptions.
82. Given that the Commissioner accepts that sections 36(2)(b)(i) and (ii) are engaged in relation to all the withheld information, and that the public interest favours maintaining the exemptions, she has not found it necessary to consider the Home Office's reliance on section 36(2)(c),

also cited for all the withheld information, nor sections 38 and 40 cited in addition to section 36 for parts of the withheld information.

## Other matters

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83. In this case, the complainant requested an internal review on 12 August 2020; the Home Office did not provide its internal review until 10 March 2021, despite reminders from the complainant and a request to do so from the Commissioner.
84. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
85. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
86. Although she notes that there are sensitivities around this case because of the subject matter and the exemptions relied on, she is nevertheless concerned that it took six months for an internal review to be completed.
87. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft "*Openness by Design strategy*"<sup>8</sup> to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity

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<sup>8</sup> <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

through targeting of systemic non-compliance, consistent with the approaches set out in her "*Regulatory Action Policy*"<sup>9</sup>.

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<sup>9</sup> <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

## Right of appeal

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88. 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)

89. 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.

90. 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 .....**

**Gerrard Tracey**  
**Principal Adviser**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**