

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2023

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

Decision (including any steps ordered)

1. The complainant requested a copy of a specified Windrush report which was withheld by the Home Office on the basis of section 36 of FOIA (effective conduct of public affairs).
2. The Commissioner's decision is that the Home Office was entitled to rely on subsections 36(2)(b)(i) and (ii) and 36(2)(c) in refusing to provide the requested report, and that in all the circumstances of the case the public interest favours maintaining these exemptions.
3. No steps are required as a result of this notice.

Request and response

4. On 22 August 2022, the complainant wrote to the Home Office and requested information in the following terms:

'To whom it may concern,

I request the Home Office should release the report "The Historical Roots of the Windrush Scandal" publicly as source from news Guardian:

<https://www.theguardian.com/uk-news/2022/may/29/windrush-scandal-caused-by-30-years-of-racist-immigration-laws-report>

Quote from the newspaper:

The stark conclusion was set out in a Home Office commissioned paper that officials have repeatedly tried to suppress over the past year.

The 52-page analysis by an unnamed historian, which has been seen by the Guardian, describes how “the British Empire depended on racist ideology in order to function”, and sets out how this affected the laws passed in the postwar period.

It concludes that the origins of the “deep-rooted racism of the Windrush scandal” lie in the fact that “during the period 1950-1981, every single piece of immigration or citizenship legislation was designed at least in part to reduce the number of people with black or brown skin who were permitted to live and work in the UK”.

It finds that the scandal was caused by a failure to recognise that changes to British immigration law over the past 70 years had a more negative impact on black people than on other racial and ethnic groups.

“As a result, the experiences of Britain’s black communities of the Home Office, of the law, and of life in the UK have been fundamentally different from those of white communities,” the report states. “Major immigration legislation in 1962, 1968 and 1971 was designed to reduce the proportion of people living in the United Kingdom who did not have white skin.”

It is in the public interest to know why certain UK nationals are subject to immigration control and whether it is legal under Human Rights Act 1998 and Equality Act 2010.’

5. The Home Office responded, late, on 29 November 2022 and refused to provide the requested report, citing the following FOIA exemptions:
 - Section 36(2)(b)(i) exempts information from release if disclosure of the information under FOIA would, or would be likely to, inhibit the free and frank provision of advice.
 - Section 36(2)(b)(ii) exempts information from release if disclosure of the information under FOIA would, or would be likely to, inhibit the free and frank exchange of views for the purposes of deliberation.
 - Section 36(2)(c) exempts information from release if disclosure of the information under FOIA would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

6. The complainant requested an internal review on 8 December 2022.
7. The Home Office provided its internal review, late, on 9 February 2023, maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 16 February 2023 to complain about the way their request for information had been handled.
9. The Commissioner raised the complainant's grounds of complaint with the Home Office and has also taken into account the complainant's post scope email of 22 March 2023. The Commissioner has set out the Home Office's responses in full to the grounds of complaint in the 'Other matters' section of this notice, so that the complainant has the opportunity to review and consider those responses together with the content of this notice.
10. The Commissioner has considered whether the Home Office was entitled to rely on section 36 of FOIA to refuse to comply with the request.
11. The Home Office provided some useful context to the requested report as follows:

"The requested/withheld information – the 'Historical Roots of the Windrush Scandal' Report (hereafter known as the Report) – was commissioned by the Home Office in March 2020. The Report is intended for Home Office staff only. Its purpose is to build knowledge and understanding of the historical development of immigration policy at the Home Office, and how this history was shaped by the history of race in the British Empire. The Report is intended to prompt discussion and debate on the development of immigration policy, and how this gave rise to circumstances which allowed the Windrush Scandal to happen. It was written by an independent academic and brought together a body of evidence and sources – already in the public domain – into one coherent document. The time frame covers Roman Britain up to 1981, with a particular focus on policies and legislation since 1945.

Under Recommendation 6 in the Comprehensive Improvement Plan (the Home Office's response to the Windrush Lessons Learned Review), we also committed to developing a UK history training programme, working with academic experts to do so. While the Report is suggested reading for that course, it did not inform the development of that

externally procured programme, nor does it form part of the package of materials created for it.”

Section 36 – prejudice to the effective conduct of public affairs

12. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a Qualified Person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
13. The Home Office has applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold the requested information in its entirety. Paragraph 5 of this notice sets out what these exemptions relate to.
14. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a Qualified Person. The Commissioner is satisfied that Minister Jenrick was authorised as a Qualified Person for the Home Office under section 36(5) of FOIA at the relevant time. He notes that the opinion was sought on 1 November 2022 and that the Qualified Person had access to the withheld report.
15. The Commissioner is satisfied that on 17 November 2022 the Qualified Person gave the opinion that all three subsections of the section 36 exemption were engaged.
16. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the Qualified Person’s opinion was a reasonable one.
17. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The Qualified Person’s opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the Qualified Person’s position could hold. The Qualified Person’s opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
18. With regard to **section 36(2)(b)(i)**, the Qualified Person acknowledged that the requested report was not intended for external publication. He considered that a hypothetical future author commissioned to write a similar report may self-censor in fear of future disclosure, thereby affecting the quality of the advice provided by the Home Office.
19. The Commissioner understands from the Home Office that the report does not represent government policy and the views included in it are

those of the author who is a historian, who was independent from the Home Office. He accepts it was reasonable for the Qualified Person to conclude that Ministers may also be reluctant to commission, or be asked to commission, similar reports that may include criticism of their predecessors or could become associated with current policies.

20. The Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the free and frank provision of advice for the reasons set out above.
21. In relation to **section 36(2)(b)(ii)**, the Qualified Person's opinion was that disclosure of the requested report would be likely to inhibit the ability of Home Office officials to partake in free and frank exchange of views needed to ensure effective future policy development. He considered that release of the report would be likely to result in negative media coverage and may mean staff participating in the training do not feel that there is a safe enough space to express themselves as openly and completely as they otherwise would have. He also explained that there would be likely to be a concern that the Home Office cannot provide a 'safe space' for controversial discussions, so staff would be less inclined to attend the training, and that even if they did attend, they would be less inclined to voice their opinions and fully participate in debate.
22. The Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the free and frank free and frank exchange of views for the purposes of deliberation based on the reasons set out above.
23. For **section 36(2)(c)**, the Qualified Person's opinion was that it was engaged because reaction to the requested report is likely to be unfavourable and reflect the Home Office in a poor light, as demonstrated by Guardian reporting in 2022 (Windrush scandal caused by '30 years of racist immigration laws' – report | Windrush scandal | The Guardian¹).
24. The Qualified Person believes that this negativity would be likely to influence Home Office staff and may deter them from engaging in training programmes on the history of migration. Further, any material staff disengagement from the Recommendation 6 learning package in line with Ministerial decisions, would not only have cost and resource

¹ <https://www.theguardian.com/uk-news/2022/may/29/windrush-scandal-caused-by-30-years-of-racist-immigration-laws-report>

implications (as the course might have to be redesigned and redelivered), but would also be likely to affect the development of staff and their ability to develop future government policies - particularly on immigration, thus having a counter-effect to the purpose for which the report was designed.

25. In accordance with the description of reasonableness at paragraph 17, the Commissioner accepts that it was reasonable for the Qualified Person to consider that there was a need to protect the effective conduct of public affairs on the basis set out above.
26. The Commissioner is also satisfied that the Qualified Person's opinion, namely that inhibition relevant to subsections 36(2)(b)(i) and (ii) and 36(2)(c) would be likely to occur through disclosure of the withheld information, is reasonable.
27. The Commissioner is therefore satisfied that all three limbs of section 36(2) were engaged correctly.

Public interest test

28. As sections 36(2)(b)(i) and (ii) and 36(2)(c) are qualified exemptions, and as the Commissioner is satisfied the exemptions were applied correctly in this case, he has next considered the balance of the public interest test.

Public interest in disclosing the information

29. The complainant submitted public interest arguments to support his view that the information should be disclosed, all of which were relayed to the Home Office by the Commissioner. The following argument was specific to the interests protected by section 36 of FOIA:

"It is in the public interest to know why certain UK nationals are subject to immigration control and whether it is legal under Human Rights Act 1998 and Equality Act 2010."

30. The Commissioner notes that the remaining public interest arguments are not specific to section 36 of FOIA. These issues have been considered and the Home Office's stance is set out in the 'Other matters' section of this notice.
31. In favour of disclosure, the Home Office said:

"We recognise that there is a general public interest in openness and transparency in government, which will serve to increase public trust. There is an interest in members of the public being able to understand the development (and consequences) of

immigration policies of the past, and how they helped create circumstances which allowed the Windrush scandal. The information is not new – its source material is in the public domain - it brings together in one document commissioned by the Home Office, the historical roots of the Windrush scandal including in terms of legislation that is still in use. Therefore, there is interest in this issue, and interest in this Report.

Moreover, the act of disclosing the Report would promote transparency and may help build trust and understanding on Windrush.

Furthermore, the release of information could have the effect of encouraging greater public involvement in immigration policy, thus increasing public participation in the political process and the level of public debate.”

Public interest in maintaining the exemption

32. In favour of maintaining the section 36 exemption, the Home Office submitted the following:

“Against the above, it is our view that disclosure of the Report would be likely to damage communities’ trust in government ways of working, principally its future development of immigration policy and/or legislation, if the Report were – as is likely to be the case if disclosed - seen through the lens of government actions taken in the past.

Moreover, it is also our view that disclosure would be likely to undermine the learning and development of staff, and therefore impede the effectiveness of this learning on the development and implementation of current and future policies. Adverse media coverage of the Report would be likely to have a negative effect on staff morale and in turn lead to a detrimental effect on their level of engagement in the important training. Staff may feel less secure in expressing candour, this would restrict the breadth and depth of debate and reduce the value and effectiveness of the training. Impeding the effect of this learning on future policy development would be likely to lead to poorer decision-making: this would not be in the wider public interest.

Likewise, future authors of Reports may be deterred from providing their full advice in case they are subject to intrusion... It is not in the wider public interest for ministers and officials to base future decisions on reports which the authors have felt obliged to self-censor because of potential intrusion”.

Balance of the public interest

33. The Commissioner must assess whether, in all the circumstances of this case, the Home Office has properly applied section 36 and the associated public interest test.
34. In considering complaints regarding section 36, where the Commissioner finds that the Qualified Person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or, as in this case, would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
35. The Commissioner accepts there is a general public interest in openness and transparency, and in increasing the public's involvement in immigration policy, which in turn would increase public participation in the political process and the level of public debate.
36. The Commissioner acknowledges that there is an ongoing strong and significant public interest in the subject of Windrush and the incumbent sensitivities surrounding this matter.
37. However, the Commissioner also recognises that, having accepted the reasonableness of the Qualified Person's opinions in respect of all three limbs relied on in this case, he must give weight to those opinions as an important piece of evidence in his assessment of the balance of the public interest.
38. In the circumstances of this case, the Commissioner accepts that there is a need for a safe space to provide advice and exchange views free from external comment and examination. He also finds that there is a need to protect Home Office staff from negative media coverage and its impact. He also finds that release of the information withheld under section 36(2)(c) of FOIA would be likely to impact on the participation of its staff in learning and development, particularly on the history of migration training and on immigration, thus having a counter-effect to the purpose for which the report was designed. This in turn would impact on the development of current and future policies and thereby otherwise prejudice the effective conduct of public affairs.
39. Having considered the content of the withheld report, the Commissioner accepts that disclosure would be likely to impact on the effectiveness of these processes.
40. The Commissioner has assessed the balance of the public interest. He has weighed the public interest in avoiding the inhibition of the free and

frank provision of advice and the free and frank exchange of views for the purposes of deliberation against the public interest in openness and transparency. His conclusion is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.

41. The Commissioner has also assessed the public interest in avoiding the prejudice to the effective conduct of public affairs against that in openness and transparency. His decision is that the public interest in avoiding this prejudice is a relevant factor and he considers that the public interest in maintaining the section 36(2)(c) exemption outweighs the public interest in disclosure.
42. It follows that the Commissioner finds that the Home Office was entitled to rely on sections 36(2)(b)(i) and (ii) and 36(2)(c) to withhold the requested report.

Other matters

43. In this case, the Home Office failed to respond to the request within the statutory 20 working days' timeframe. Although not complained about, the Commissioner has nevertheless logged this delay.
44. Although the complainant has also not complained about the delay in the Home Office issuing its internal review, the Commissioner has made a record of this delay. He notes that the Home Office exceeded both the recommended 20 working days' timeframe and that suggested for more complex cases of 40 working days.

Home Office's responses to other grounds of complaint raised by the complainant

45. The Commissioner has included below the complainant's grounds of complaint and the Home Office's replies. Whilst they have not formed part of the material decision, the Commissioner considers it important to include them here so the complainant has sight of those replies and can see that they have been considered by the Home Office.
46. The complainant submitted the following points:

'I am dissatisfied with If [sic] this report was to be disclosed, it would be likely to prejudice the ability of the department to develop further training material in the future with regards to the lessons learnt in a 'safe space'. Disclosure would inhibit discussions and the ability of officials to provide and receive

advice in a free and frank way. This would not be conducive to the effective conduct of public affairs as it would result in a less robust, well-considered package.

The leaked part of the report already tells "Major immigration legislation in 1962, 1968 and 1971 was designed to reduce the proportion of people living in the United Kingdom who did not have white skin." There is no safe space in hiding ongoing institutional racist fact by using exemption(s) in Freedom of Information Act 2000. It still continually hindered the rights of millions of UK nationals without the right of abode.

The Equality Act 2010 Section 149 (1) has specified that A public authority must, in the exercise of its functions, have due regard to the need to— (a)eliminate discrimination, harassment, victimisation and any other conduct that is prohibited by or under this Act; This is a legitimate legal requirement in favour of disclosing a clear evidence of ongoing discrimination.

The undisclosed report states. "Major immigration legislation in 1962, 1968 and 1971 was designed to reduce the proportion of people living in the United Kingdom who did not have white skin." Only open information and releasing the requested report can help to eliminate discrimination and fulfill the legal requirement in Section 149(1) of Equality Act 2010.'

47. In reply, the Home Office has said the following:

'The Home Office would accept that it is not possible to address past mistakes without first acknowledging them. The Home Office's response to the Windrush scandal and the Windrush Lessons Learned Review, including, but not only, the internal publication of the historical Report referred to, illustrate that the Department has both acknowledged past mistakes and is addressing them.

Successive Home Secretaries have been clear that mistakes were made throughout the period covered by the Windrush scandal. In response to publication of the Windrush Lessons Learned Review, then Home Secretary Priti Patel said to Parliament in March 2020 that she was "truly sorry" and noted that "as this review makes clear, some members of this generation suffered terrible injustices spurred by institutional failings spanning successive governments over several decades, including "ignorance and thoughtlessness towards the race and the history of the Windrush generation". She acknowledged that "there are lessons to learn for the Home Office" because "ministers did not

sufficiently question unintended consequences” and “officials should and could have done more.”

Writing in the Home Office’s Comprehensive Improvement Plan in response to the Lessons Learned Review, the Permanent Secretaries “reiterate[d] our own unreserved apologies for the appalling mistreatment that some members of the Windrush generation suffered as a result of the policies and actions of this Department. They had and have every right to be here in the UK. Their treatment was inexcusable, and we are truly sorry”. They said that “we have taken the lessons to heart”.

It may also be useful to know that the Department is subject to significant external scrutiny across its functions. In a Written Ministerial Statement to Parliament in January 2023, the Home Secretary said that she remains committed to the importance of scrutiny, both internal and external.

There are a number of ways in which we are inviting further challenge and scrutiny. In October 2022, the Department established the Independent Examiner for Complaints (IEC).² This office will ensure that customers who are not satisfied with the final response to their complaints have an opportunity to have their case reviewed independently by the IEC, helping the Home Office to identify learning and wider lessons from complaints to improve its service. The IEC provides scrutiny of the Department’s complaints procedure.

Beyond this, the Home Secretary welcomed the insight and challenge that she and the wider Department have received from the Windrush Working Group. Professor [name redacted], in his role as Independent Advisor, has been constructively challenging and very supportive in the development of the Windrush Compensation Scheme. This has included proactively providing suggestions on improvements to the Scheme, such as enhancing linkages between the Compensation Scheme and the Windrush Status Scheme, which the Department is now actively working on delivering.

External bodies are not the only source of scrutiny. As Wendy Williams (the Independent Advisor to the Windrush Lessons Learned Review) identified, the very culture of the Department

² https://en.wikipedia.org/wiki/International_Electrotechnical_Commission

needed a fundamental shift, bringing policy development and service delivery into contact with those who are impacted by it, including those who might not agree with it. This is how we shift culture and subject ourselves to scrutiny and this is how we are changing.

We have also had regard to the specific point raised by the complainant concerning the Equality Act 2010.

The Equality Act 2010

The Equality Act 2010 protects people from discrimination in the workplace and in wider society. It replaced previous anti-discrimination laws with a single Act, making the law easier to understand and strengthening protection in some situations. It sets out the different ways in which it's unlawful to treat someone.

The Public Sector Equality Duty (PSED)

The PSED is a legal duty which is placed on public bodies, including the Civil Service to consider the needs of all individuals with protected characteristics in their day-to-day work – in shaping policy, in delivering services, and in relation to their own employees.

The PSED was created under the Equality Act 2010. It replaced the separate race, disability and gender equality duties. The race duty (2001) was introduced after the Macpherson Report on the murder of Stephen Lawrence, which revealed institutional racism. Previous legislation looked at rectifying discrimination after it occurred, rather than preventing it from happening, therefore for the first time the race duty was designed placing obligations on public authorities to positively promote equality, rather than just to avoid discrimination. The race duty led to the introduction of the disability duty (2006) and the gender equality duty (2007). In 2011 the PSED came into force and was developed to unite the previous duties under one duty and to cover six further protected characteristics.

Equality Impact Assessments

It may be useful to know that the Home Office must integrate equality considerations into decision-making processes from the outset, including in the development, implementation and review of policies and services and this may be achieved, where appropriate, by completion of an Equality Impact Assessment (EIA). Independent reports, such as the Historical Roots of the

Windrush Scandal report, may be among the sources consulted when officials are considering and providing advice on the Public Sector Equality Duty. It is useful to note again that the Historical Report has been published for all staff internally, and that our Windrush-related training packages (mentioned above, as well as others) can help colleagues make more informed assessments around equality impacts, discrimination risks and PSED compliance.

Not all EIA's are published, but as part of commitment to openness, many are published especially pertaining to primary legislation. For example, an Equality Impact Assessment for the Nationality and Borders Bill was published on 16 September 2021 on gov.uk³ and an EIA has also been published on gov.uk⁴ for the Illegal Migration Bill currently going through Parliament.

We would like to emphasise that from receipt of the original request, right through to this investigation, we have given very careful consideration to this case – including the 'Grounds of complaint' - and that our decision to maintain reliance on section 36 and determine that the overall public interest favours non-disclosure, is not one that has been taken lightly.'

³ <https://www.gov.uk/government/publications/the-nationality-and-borders-bill-equality-impact-assessment>

⁴

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1155534/2023-05-03_Illegal_Migration_Bill_-_Overarching_EIA_FINAL.pdf

Right of appeal

48. 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

49. 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.

50. 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

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