

## Written evidence from Liberty<sup>1</sup> (FOI 32)<sup>2</sup>

### Public Administration and Constitutional Affairs Committee The Cabinet Office Freedom of Information Clearing House inquiry

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<sup>1</sup> Liberty is an independent membership organisation. We challenge injustice, defend freedom and campaign to make sure everyone in the UK is treated fairly. We are campaigners, lawyers and policy experts who work together to protect rights and hold the powerful to account.

Liberty Investigates is an editorially independent investigative journalism unit based in the civil liberties NGO Liberty. Our purpose is to publish deeply reported journalistic investigations about human rights topics; we publish them with partners including the Guardian, Observer, Independent, Evening Standard and C4. We started at Liberty in October 2019 and publicly launched with our first stories in April 2020.

<sup>2</sup> This is an amended version of our original submission, made in September, adding evidence from a recently received meta-FOI.

## INTRODUCTION

1. Liberty and Liberty Investigates welcome the opportunity to respond to the Public Administration and Constitutional Affairs Select Committee's Inquiry into The Cabinet Office Freedom of Information ('FOI') Clearing House.
2. Liberty Investigates' journalistic work usually involves holding a public body to account for a harm or alleged harm. This work has real-world impact. For example, our Observer report into deportation flight Esparto 11 led to a judge's ruling that our interviewee (called AA in the judgment, and Omar in our story) should be returned by the Home Secretary to the UK within 14 days.<sup>34</sup> Accessing Home Office records by FOI requests made under the Freedom of Information Act 2000 ('FOIA') was essential to that story. More broadly, FOI requests are a key tool in our work.
3. Liberty Investigates does not often send FOI requests directly to the Cabinet Office. However, two of our three full-time journalists regularly send requests to the Home Office as part of their work on the topic of migrants' rights. It is difficult for us to know for certain whether our requests have been handled by the Cabinet Office's Clearing House. We have sent two Subject Access Requests (SAR) and two meta-FOIs to the Home Office to find out how our FOI requests have been handled. Of these, one SAR and one meta-FOI have been successfully returned, after some delay. The other two are delayed or refused.
4. The evidence we obtained from the response to our journalist Aaron Walawalkar's SAR suggests at least one of our FOI requests was delayed for two months due to "clearing procedures". It is still outstanding.
5. We have also identified systematic delays and other problems in the way our FOIs have been handled. For example, we received documents through a meta-FOI (FOI request as to how a prior FOI request was handled) which show our request for documents about use of force at an immigration removal centre was selected for ministerial clearance. It appears to have been sent for approval, along with "contentious" documents picked out for particular review, along with a cover note referring to the Esparto 11 investigation we published with the Observer, about use of force during immigration detention and deportation.

## DELAYS

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<sup>3</sup> A. Walawalkar, J. Purkiss, E. Rose and M. Townsend, *Uncovered: the brutal secrets of UK deportation flight Esparto 11*, The Guardian, 29 May 2021, available at: <https://www.theguardian.com/uk-news/2021/may/29/asylum-seekers-risked-all-to-get-to-the-uk-then-they-were-deported-at-dawn>

<sup>4</sup> R. Saunt, *Sudanese slavery and torture victim was kicked out of UK because of 'illegal and secret' Home Office Policy and must be brought back, High Court judge rules*, The Mail Online, 6 July 2021, available at: [https://www.dailymail.co.uk/news/article-9761583/Sudanese-slavery-victim-kicked-UK-illegal-secret-Home-Office-Policy-judge-rules.html?ito=social-twitter\\_dailymailUK](https://www.dailymail.co.uk/news/article-9761583/Sudanese-slavery-victim-kicked-UK-illegal-secret-Home-Office-Policy-judge-rules.html?ito=social-twitter_dailymailUK)

6. Thirty-three FOI requests were sent to the Home Office since October 2019 by the two full-time journalists on our team who have most frequently worked on stories about migrants' rights (Eleanor Rose and Aaron Walawalkar). Of those requests, 17 returned final responses (a rejection, or some or all of the information requested) within the legally mandated period of 20 working days (about a month).
7. The shortest time we have waited for a final response was seven working days, but the longest is 135 working days and counting as of mid-October (nearly seven months).
8. We waited 109 working days for a response to our Environmental Information Request (cited above) for plans and contracts for the two proposed camps for asylum seekers at Yarl's Wood and Barton Stacey.
9. We waited 84 working days for a cache of use of force forms (filled out by detention custody officers in relation to each time they used force) from charter flights. In that case, we had to ask the ICO to write to the Home Office twice (as described above). It typically takes about a month for the ICO to process our cases and write these letters.
10. In four cases, after no response was given to a request and no explanation was offered for more than 40 working days, we complained to the Information Commissioner's Office ('ICO'). In all circumstances, the ICO issued a letter asking the Home Office to comply within 10 days; all four times this was ignored, forcing us to go back to the ICO once again. It was only when the ICO issued decision notices requiring the Home Office to respond within 35 days that we received responses in two cases. We await a response from the Home Office on the remaining two, with the 35 day limit yet to elapse.
11. In another incident, Walawalkar asked for use of force forms from an immigration removal centre over a period of two specific months. He was sent a response letter after 44 working days with annexes attached, but no inventory of documents being disclosed. There was nothing provided by the Home Office to help confirm it had fully responded to the request.
12. It later transpired that the Home Office had provided only 27 out of the 48 forms captured by the request. Walawalkar only noticed this because an incident reported in the national press, which took place in the specified time frame, was missing from the forms. When Walawalkar later received a response to his SAR, it also confirmed there were 21 documents missing, which fell within the scope of the request and had simply not been sent.
13. Walawalkar then asked for the missing forms and the Home Office provided them 5 working days later, 49 working days after the original request.

## RECENT DEVELOPMENTS

14. We have unfortunately observed that our requests are increasingly being delayed since we published our Observer report into deportation flight Esparto 11 on May 29 2021. Of the seven FOI requests we have submitted to the Home Office since that date, and which have fallen due since then, all have been subject to delays (this excludes one “meta-FOI” for information about previous FOI requests, which was refused within the time limit).
15. Six of these requests were seriously delayed by more than 20 working days beyond the normal time limit - and one of them (the request cited above) remains unanswered after more than 100 working days (as of the date of submission of this response). One request submitted on 14 June 2021 was delayed by 20 working days, then we received neither a response nor an explanation for a further 28 working days after the second deadline. When members of our team followed up on 20 August, the Home Office said the request is going through “clearance procedures”. On 22 September, the ICO issued the Home Office a decision notice to respond in 35 calendar days. More than four months from the original request, we continue to await a response.
16. The request for which we waited 135 working days and counting is for the recorded audio from a meeting between immigration custody officers which we know was filmed. The response by the Home Office to Walawalkar’s SAR included a letter related to this request. It is addressed to Walawalkar, dated May 2021, and says that the Home Office had “completed [its] consideration” of the request and had disclosed a transcript of the meeting. It bears the words “By email:” alongside Walawalkar’s email address – but he never received this letter. Instead, on 22 September, when the Home Office had still sent to response to Walawalkar, the ICO issued the Home Office a decision notice to respond in 35 calendar days. Four months on, we continue to await a response. We are concerned this information could have been lost or destroyed by the time the request is responded to (although we understand this shouldn’t take place).
17. On August 16, Walawalkar submitted a meta-FOI to the Home Office, asking how his request for use of force forms from an immigration removal centre (cited in points 11 and 12) had been handled, given that it was delayed by 34 working days and forms were missing (as previously described) with no explanation for redactions.
18. This meta-FOI was responded to after 43 working days. The resulting response, which is itself heavily redacted, sheds light on how while we experienced a delay in response time, the request to have been sent for approval, along with “contentious” documents picked out for particular review, and a cover note referring to the Esparto 11 investigation we published with the Observer about use of force during immigration detention and deportation.

19. The response showed that on June 17, an information manager writes to ask an unnamed person to supply the forms. They also alert that person to tell colleagues in the area the IRC is based “to note another FOI from Liberty regarding” the detention centre.
20. By mid-July, a response to Walawalkar was about to fall overdue. The Home Office wrote to Walawalkar on 16 July saying the request was being considered under the law enforcement exemption, balancing the public interest with a “public interest test”, and extending the time limit for responding by 20 working days. However an internal email on 07 July suggests it was being delayed due to time taken for redactions. “This will be a release of use of force forms (ministerial). It is taking a long time to complete the redactions. Currently sec 40 and sec 31 so we can PIT [public interest test] under that.”
21. An email sent on July 20 by an Information Rights Manager carried the subject line: “Private Office cover note for Press Office input”. The body text said: “Please see attached for press lines and forwarding for ministerial clearance”. A further email states the request will be added to the “ministerial list”.
22. An FOI Request lead sent an email on July 20 in relation to the original request with the subject line “RE: UPDATED COVER NOTE” alongside the FOI reference number. In the email, the FOI Request Lead wrote: “Please find attached the updated version ... with the paragraph mentioning the Liberty and Observer investigation”.
23. This appears to show that a cover note was attached during the handling of the FOI, mentioning the Esparto 11 investigation. This could presumably be seen by the press team, minister and/or ministerial team to whom the response was sent at this stage for clearance.
24. On 20 July, an official also writes to another to say: “Please find the attached documents which require your clearance.” The recipient writes back: “I don’t need to see all the forms but pls do send me any that are likely to be contentious. Otherwise cleared.”
25. A person replies: “There are a lot of them that are...” The reply comes: “Okay, let’s submit today. Do we need to do anything systemic on either UoF or UoF reporting? Might as well get ahead of the game as this will be in [REDACTED] within weeks.”
26. An email on 21 July states: “We have selected 10 of the forms for [REDACTED] to view.” Then several sentences are redacted with no explanation for the redactions. An email on 22 July with the subject line “Private Office FOIs” states: “Please find attached an FOI response that requires ministerial and [REDACTED] clearance.”

27. This suggests that 10 “contentious” forms were picked out for particular review and sent for ministerial clearance, as well as the clearance of an unnamed other person, and that this may have been seen alongside a cover note referring to the Esparto 11 investigation we published with the Observer, about use of force during immigration detention and deportation.
28. What we witnessed on our end, as mentioned, was an incomplete response with no signal that it was incomplete, and which was also delayed, with redactions unexplained. We do not know for sure whether or not the fact some forms were missing, the response was delayed, or redactions went unexplained was because of the clearance process described, but it is reasonable to assume that the delay at least was linked to it.
29. We do not think it is was appropriate, in light of the applicant-blind principle enshrined in the FOI Act, to send our FOI request for ministerial clearance with “contentious” documents highlighted along with clear explanations of our previous journalistic work specifically in this area. This raises the possibility that we were penalised as journalists who have previously investigated the Home Office’s oversight and responsibilities in detention centres, in the form of delays and redactions that may impact our current and future journalistic work.
30. Since May, we note that requests for internal review have also been delayed. Three requests for internal review that we submitted to appeal refusals or part-refusals which have been responded to were delayed by several working days.
31. A fourth request for internal review – made in relation to a refused request for minutes from a particular set of Priti Patel’s meetings – took 99 working days to be returned. We complained to the ICO on 29 July about the delay, and it responded on 24 August, sending a letter to the Home Office asking them to respond within 10 days. The Home Office finally sent us the results of its internal review on 8 September (it upheld the original decision, which we will appeal, though the delay has rendered the subject matter historic).
32. We have observed that requests for statistics tend to be returned in time (whether successful, partially successful or refused). Longer delays seem to occur when we request specific documents, like minutes from Priti Patel’s meetings, which could be considered particularly revealing.

## OTHER CONCERNS

33. We have also become concerned about notices of delay being given in generic language and including reasons that aren’t in the ICO’s guidance.<sup>5</sup>

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<sup>5</sup> Information Commissioner’s Office, *When can we refuse a request for information?*, 2021, available at:

34. For example, a letter sent following a request by Walawalkar to the Home Office on 27th July read:

“I regret that we are unable to send you a full response to your request within 20 working days, as required by the FOIA. **This is because of delayed sign off** [emphasis added].”

35. Sign off is not a legitimate reason to delay disclosure under the ICO’s guidance and indeed reinforces our concerns that a centralised scrutiny and sign-off process is unduly delaying our work.

#### EFFORTS TO OBTAIN ANSWERS

36. We became concerned in light of reports by openDemocracy on the Cabinet Office’s Clearing House that, whether because of who we are as journalists or the high-profile information we are requesting, our requests could be being transferred to that team for processing, and subsequently delayed or declined.<sup>6</sup>
37. We wanted to know more. That is why Rose and Walawalkar both submitted Subject Access Requests (‘SAR’) to the Home Office as well as meta-FOIs already mentioned, asking for correspondence around some of their respective FOI requests. Some of the results have already been laid out.
38. Although Walawalkar’s SAR and meta-FOI have been returned after intervention through the ICO (in the former case), Rose’s has not despite intervention through the ICO. Rose’s meta-FOI - which asked for correspondence around the handling of four of her FOI requests (giving reference numbers) and one internal review was refused on the grounds of cost:

*“In order to comply with your request we would need to locate the information across the various business units who are likely to hold information and then review each record, for example, to identify whether the information contains personal data or information which is otherwise exempt from disclosure. The effort required to review, assess and extract that information would be considerable and would require a disproportionate level of staff effort.”*

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<https://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/>

<sup>6</sup> P. Geoghegan, *Why we’re taking the UK government to court to protect Freedom of Information*, openDemocracy, 28 April 2021, available at: <https://www.opendemocracy.net/en/freedom-of-information/why-were-taking-the-uk-government-to-court-to-protect-freedom-of-information/>

39. In her request for an internal review of this FOI enquiry, Rose pointed out that reference numbers are presumably given to FOI requests for the precise reason that they make it easier to handle them internally (and therefore trace).
40. It is unacceptable for our work to be systematically delayed or obstructed by a Clearing House ruling against disclosures that could embarrass the department or its contractors, or both. Yet further delays by the Home Office have made it difficult for us to find out more about how our requests are being handled. We ask why these delays have occurred, and we ask for the Home Office to release the information we have requested in relation to our own data and our FOI requests.

## IMPACT ON OUR JOURNALISM

41. FOI is a tool for transparency and accountability. It is all the more important in an age when the coronavirus pandemic has paved the way for new emergency laws and powers, introduced with little or no parliamentary scrutiny, impinging on civil liberties and changing the way marginalised people - such as asylum seekers and prisoners - are treated by Government departments and their contractors.
42. Where FOI requests are responded to late or not at all - and when it is impossible to predict how long a delay on a request could be, or know the factors affecting how they are being handled - it becomes more difficult to plan and execute effective reporting. In the case of the FOI request for use of force forms from an immigration removal centre, our work in this area has been concretely delayed.
43. With several-months delays now fairly standard, stories that we begin to report in the public interest in a timely way swiftly become historical events. We are determined to continue to report on migrants' rights and the Home Office's role in upholding (or abusing) them - but systematic problems are delaying our journalism, and killing off legitimate opportunities to report, frustrating the FOI Act and abrogating the public's right to know.

## CONCLUSION

44. The right to request and receive timely disclosure of information from Government departments is crucial to enabling transparency in public decision-making. For journalists, the right to make FOI requests is an essential tool that allows us to continue shedding light on human rights issues affecting the most marginalised in our society. Altogether, effective mechanisms of securing accountability – including an effective and vibrant press - are the lifeblood of a functioning democracy.
45. For this reason, we request that Government departments uphold the spirit of FOIA, resource FOI teams and the ICO to respond in a timely fashion, and cease to flag



particular journalists and requests for handling in a central Clearing House or any other ministerial clearance process where requests are systematically delayed or obstructed.

*October 2021*