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Mr Robert Simpson  
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FOI Reference: **33709**

29 January 2015

Dear Mr Simpson

I am writing further to my colleague Deborah Morrison's e-mail of 5 January and your request for disclosure of materials relating to the £55 fee which is set for European residence documentation. Your request has been handled as a request for information under the Freedom of Information Act 2000 ("the FOI Act").

In your request, you asked for:

"...documents (or other relevant material) that detail how the £55 fee meets the "similar documents" requirement of Article 25(2) of Directive 2004/38/EC. Specifically how was the fee chosen, and what are the benchmark British "similar documents"?"

I can confirm that the Home Office holds the information that you requested. However, after careful consideration we have decided that the information is exempt from disclosure under section 35 of the FOI Act. This provides that information can be withheld where it relates to the formulation or development of Government policy and the public interest falls in favour of applying the exemption.

Arguments for and against disclosure in terms of the public interest, with the reasons for our conclusion, are set out in Annex A.

Although, the information that you have requested is exempt from disclosure, I have provided below some material in Annex B which is relevant to your enquiry and which we are able to disclose.

If you are dissatisfied with this response you may request an independent internal review of our handling of your request by submitting a complaint within two months to the address below, **quoting reference FOI 33709**. If you ask for an internal review, it would be helpful if you could say why you are dissatisfied with the response.

Information Access Team  
Home Office  
Ground Floor, Seacole Building  
2 Marsham Street  
London SW1P 4DF  
e-mail: [info.access@homeoffice.gsi.gov.uk](mailto:info.access@homeoffice.gsi.gov.uk)

As part of any internal review the Department's handling of your information request will be reassessed by staff who were not involved in providing you with this response. If you remain dissatisfied after this internal review, you would have a right of complaint to the Information Commissioner as established by section 50 of the FOI Act.

Yours sincerely

**B Stern**  
International and Immigration Policy Group (IIPG)

## **Annex A: Public Interest Test**

### **Information Requested**

In your e-mail, you requested that:

*“The Home Office presently charges £55 to issue each of the four different types of European Residence Document. This charge has now been in place for more than a year.*

*Your explanatory memorandum*

*[http://www.legislation.gov.uk/ukxi/2013/617/pdfs/ukxiem\\_20130617\\_en.pdf](http://www.legislation.gov.uk/ukxi/2013/617/pdfs/ukxiem_20130617_en.pdf) explains that any such charge shall not exceed that imposed on British nationals for the issuing of ‘similar documents’.*

*This is a FOI request for documents (or other relevant material) that detail how the £55 fee meets the “similar documents” requirement of Article 25(2) of Directive 2004/38/EC. Specifically how was the fee chosen, and what are the benchmark British “similar documents”?*

*I request the complete document, and that each relevant document be properly identified with a name, and source.*

*If any part of any relevant document is legally with-holdable, I request that only the minimal with-holdable portion be redacted, that the size of the redacted text be specified, that a specific reason be given for each redaction, and that the rest of the document be released un-redacted.”*

### **Response**

The information is exempt from disclosure under Section 35 of the FOI Act. Section 35 of the FOI Act states that information held by a government department is exempt from disclosure under the Act if it relates to the formulation or development of government policy. Section 35 is concerned to ensure that there remains a safe space within which the formulation and development of government policy and government decision-making can proceed, balanced with proper public participation in policy debates. Materials in relation to how the fee was chosen and advice provided to Ministers on fee levels, relate to the formulation and development of government policy; and are thus covered by this exemption.

### **Public Interest**

Section 35 of the FOI Act is a “qualified exemption” and is subject to a public interest test (PIT). This test is used to balance the public interest in disclosure against the public interest in favour of withholding the information, or the considerations for and against the requirement to say whether the information requested is held or not. We must carry out a PIT where we are considering using any of the qualified exemptions in response to a request for information.

The ‘public interest’ is not the same as what interests the public. In carrying out a PIT we consider the greater good or benefit to the community as a whole if the information is released or not. The ‘right to know’ must be balanced against the need to enable effective government and to serve the best interests of the public.

The FOI Act is ‘applicant blind’. This means that we cannot, and do not, ask about the motives of anyone who asks for information. In providing a response to one person, we are expressing a willingness to provide the same response to anyone, including those who might represent a threat to the UK.

## **Considerations in favour of disclosure**

The £55 fee has had a direct impact on those who have applied or will in future apply for documentation issued under the EEA Regulations. There is a public interest in ensuring transparency in the fee-setting process; and in ensuring that the fee-setting process can be externally scrutinized.

## **Considerations in favour of withholding the information**

The Home Office has already published some information relevant to your request (which we have summarised for you in Annex B). This includes details of which documents were considered as “similar documents” for the purposes of the Article 25(2) criteria. In the letters attached at Annex B, the Home Office has also disclosed details of guidance provided by the European Commission. The Home Office has therefore already disclosed some details of the legal framework under which the fee was set and the approach adopted in the interpretation of that framework.

Good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of all the options without fear of disclosure. Ministers and officials need to be able to conduct rigorous, thorough and candid risk assessments of their policies and programmes including considerations of the pros and cons of all the available options without there being a fear of disclosure which might close off options and provide a barrier to good decision making. The fee for European residence documentation is subject to regular review by the Home Office. It is therefore considered that disclosure of these exchanges could also constrain future policy development in this area.

On this basis, we consider that, on balance and including consideration of the information which has already been made publicly available, it would not be in the public interest to disclose specific advice from policy officials and any internal exchanges setting out discussion, options and details of how the precise £55 fee was determined.

## **Conclusion**

I have considered whether in all circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. I have concluded that the balance of the public interest identified lies in favour of maintaining the exemption.

## Annex B: Discloseable information relevant to your request

The following information is relevant to your request and is already available in the public domain.

The UK is required to issue certain documents under Directive 2004/38/EC (known as the “Free Movement Directive”) to EU nationals and their family members who are exercising free movement rights in the UK. The UK has implemented the Directive via the Immigration (European Economic Area) Regulations 2006 (“the EEA Regulations”).

Article 25(2) of the Free Movement Directive states that these documents “*shall be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents*”. On 1 July 2013 in accordance with Article 25(2), the Home Office introduced a fee of £55 for documents issued pursuant to the EEA Regulations.

As set out in the Explanatory Memorandum to the relevant legislation which introduced the charge (and to which you refer in your request) the fee level was set following consultation with the European Commission and after balancing consideration of the following factors: charges for similar documents issued to British nationals (for example, the UK passport which cost £72.50 and the British nationality status letter which cost £88); charges for other documents, which whilst not similar in the rights which they evidence, have a comparable practical effect (for example the UK drivers licence which cost £50); and the estimated cost to the Home Office of issuing the European documentation (£82 per unit). All fee and cost levels set out above were correct at the time that the fee was first set, in July 2013.

As set out in the preceding paragraph, prior to introducing the £55 fee, the Home Office consulted the European Commission about the criteria which ought to be applied when determining if a national document is similar to documentation issued under the Free Movement Directive for the purposes of Article 25(2). I am able to disclose the relevant extracts from the correspondence between the Home Office and the European Commission, which I have copied here for your convenience.

On 12 January 2012, the Home Office wrote to DG Justice, in the European Commission and the letter included the following paragraphs which are relevant to your request:

Following recent discussions, during meetings of the Free Movement Expert group, we are considering possible reforms to the UK's arrangements for issuing documentation under the Directive to EEA nationals and their family members as detailed below. These discussions have been helpful in indicating the Commission's preliminary view that the change in policy which we have in mind may be compatible with the Directive. I would therefore welcome your written advice on these proposals.

### Collecting biometrics from family members of EEA nationals:

We are grateful for the Commission's attention to concerns we have raised regarding the wide variance in format and security provisions seen in some residence cards issued by Member States. We support the Commission's position on encouraging Member States to issue residence cards to family members under the Directive using the uniform format of residence permit issued to third country nationals (governed by Regulation (EC) No 1030/2002 as amended by Regulation (EC) No 380/2008). We consider that this would limit the scope for such documents to be easily forged, building on the political declaration that Member States signed on 10 March 2008 to encourage the use of this format of document (recorded in the minutes of the Council regarding amendments made to Regulation (EC) 1030/2002 reference 1302/07). We will continue to work closely with the Commission and other Member States through the Article 6 Committee and the Free

Movement Expert group, to drive forward work to improve the security standards of residence cards.

To assist the UK's development of these proposals, we would be grateful if the Commission could provide written advice on whether they consider that Member States can require family members of EEA nationals to provide their biometric data under Article 10 of the Directive for the purposes of issuing them with a residence card (potentially in the format of a uniform biometric residence permit). There may be circumstances in which an individual is physically unable to provide their biometrics, but in cases where a person refuses to give their biometrics as part of the residence card application, in the Commission's view, would it be permissible for Member States to refuse to issue the document?

Charging for residence documentation:

The UK is also exploring the possibility of charging for documentation issued to EEA nationals and their family members under the Directive. Currently, the UK Border Agency issues all such documentation free of charge, creating significant financial pressures at a time when budgets are being reduced.

Article 25(2) of the Directive makes clear that Member States shall issue the documents mentioned in paragraph 1 (registration certificates, residence cards, certificates of application and documents certifying permanent residence) *"free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents"*. Although the UK does not issue identity cards to UK citizens, we do not consider that point alone prevents us from charging for documentation under the Directive, and we are considering whether any other documents issued to UK citizens (e.g. UK passports) may be considered "similar documents" for the purposes of Article 25(2) of the Directive.

I would be grateful for the Commission's view on what criteria ought to be applied when determining if a national document is similar to documentation issued under the Directive for the purposes of Article 25(2). In particular, we would be grateful to know whether the UK passport is such a similar document, meaning that the UK could charge for residence documentation under the Directive in line with the standard fee for a UK adult passport.

As these questions have already been raised with colleagues in DG Justice, I would be grateful for a response at your earliest convenience.

I am copying this letter for information to Mr Stefano Manservigi in DG HOME.

Yours sincerely,

On 24 February 2012 the European Commission responded to the Home Office and the letter included the following paragraphs relevant to your request:



Thank you for your letter of 12 January 2012 concerning the UK's implementation of Directive 2004/38/EC.

Concerning use of biometric data in residence documents issued to non-EU family members of EU citizens under Directive 2004/38/EC, I would like to confirm that nothing in the Directive prevents Member States from including biometric data of such family members in residence cards<sup>1</sup> issued to them under Directive 2004/38/EC.

In doing so, Member States must comply with national implementing EU law on data protection. Among other things, they must make sure that principles such as purpose limitation and proportionality of data processed are complied with and that measures to prevent unlawful or unauthorised access and collection of biometric data are implemented.

Another aspect to be taken into account is that according to Article 20 of Directive 95/46/EC Member States shall determine the processing operations likely to present specific risks to the rights and freedoms of data subjects and shall check that these processing operations are examined prior to the start thereof. Consequently, should the United Kingdom determine that the processing of biometric data is likely to present such a risk, the data controller will have to contact the supervisory authority, the UK Information Commissioner's Office (ICO), which will have to carry out prior checks.

Member States may refuse to issue biometric residence card to non-EU family members who have not provided their biometric data. It should be noted that residence cards are documents which merely attest that the underlying right of residence exists, but the right is not conditional upon the residence card and therefore upon providing biometric data.

Regarding charges for residence documents issued to EU citizens and their non-EU family members under Directive 2004/38/EC, Article 25(2) of Directive 2004/38/EC stipulates that such documents should be issued free of charge or for a charge not exceeding that imposed on nationals for the issuing of similar documents.

This provision is expression of the fundamental principle of non-discrimination on the grounds of nationality, as expressed in Article 24(1) of Directive 2004/38/EC and Article 18 of the Treaty on the Functioning of the European Union.

In assessing compliance with EU law of the UK plans to introduce charges which are identical with charges for a UK adult passport<sup>2</sup>, it is fundamental to examine whether the UK adult passports are the appropriate comparator and that there are no other, better, documents.

If that is not the case, the UK policy on passport charges may have been set up to reflect certain aspects which are relevant for passports but may not be relevant for residence documents issued under Directive 2004/38/EC – such as that passports may be issued by the UK embassies abroad, they have more security features, they must be in a harmonised format, they are more voluminous, they have a different period of validity, they are travel documents accepted by all countries or that the charges are set in such a way that the whole service is more or less self-financing.

Compliance of your plans with EU law can be assessed only on the basis of proper justification and in-depth analysis addressing the above issues. Where no appropriate comparable document other than a passport can be identified, the above justification and analysis should also examine an alternative solution – instead of issuing the residence documents free of charge or for a charge for a UK adult passport, which charges would cover the genuine administrative costs the UK authorities incur in issuing these documents<sup>3</sup>.

Yours sincerely,