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Robert Simpson:
[request-242551-
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Dear Mr Simpson

Freedom of Information request (our ref:33709): internal review

Thank you for your e-mail of 26 February 2015, in which you asked for an internal review of our response to your Freedom of Information (Fol) request about the price of European residence documents. I apologise for the delay in sending you a response.

I have now completed the review. I have examined all the relevant papers, and have consulted the policy unit which provided the original response. I have seen the withheld information and considered whether the correct procedures were followed. I confirm that I was not involved in the initial handling of your request.

My findings are set out in the attached report. My conclusion is that the response correctly withheld the requested information citing section 35 – the formulation and development of government policy but should have specified 35(1)(a). For further explanation see paragraphs 9-19.

Yours sincerely

D Pottinger

Information Access Team

Internal review of response to request under the Freedom of Information (Fol) Act 2000 by Robert Simpson (reference 33709)

Responding Unit: International and Immigration Policy Group (IIPG)

Chronology

Original Fol request:	3 December 2014
Public Interest Test Extension	5 January 2015
IIPG response:	29 January 2015
Request for internal review:	26 Feb 2015

Subject of request

1. The request asked for an explanation of how the £55 fee for European Residence documents was chosen; in particular the benchmark 'similar documents' the charge is considered to be in line with. For the full text of the request see **Annex A**.

The response by IIPG

2. The response confirmed that the requested information was held, and withheld it citing section 35 –the formulation or development of government policy. For the full text of the response see **Annex B**.

The request for an internal review

3. The internal review request stated that Mr Simpson did not want to know how the £55 charge was arrived at; he wanted details of the validation of the fee against the statutory requirement of Directive 2004/38/EC article 3. He asked whether all relevant documents had been reviewed before being refused, and questioned the use of section 35 as the subsection of the exemption relied on had not been specified. He considered that section 35 could no longer apply as the policy had been decided, and he disagreed with the PIT arguments. Mr Simpson also explained how he would have carried out an analysis of charges, and asked why a similar analysis was not supplied to him. For the full text of the internal review request see **Annex C**.

Procedural issues

4. The Home Office received Mr Simpson's request via email on 3 December 2014.
5. On 29 January 2015 the Home Office provided Mr Simpson with a substantive response, which represents 38 working days after the initial request. Where a qualified exemption is being considered, the Act allows an additional 20 days to consider the public interest for and against disclosing the information. In this case, section 35 was under consideration. Therefore, the Home Office complied with section 10(1) by providing a response within the statutory deadline of 20 working days, plus a permitted extension.

6. The response confirmed that information was held relating to the request, and withheld it.
7. Mr Simpson was informed in writing of his right to request an independent internal review of the handling of his request, as required by section 17(7)(a) of the Act.
8. The response also informed Mr Simpson of his right of complaint to the Information Commissioner, as set out in section 17(7)(b) of the Act.

Consideration of the response

9. The response provided Mr Simpson with some relevant information, but withheld one document citing section 35 – formulation and development of government policy.
10. Mr Simpson stated that he did not want to know how the £55 charge was arrived at; he wanted details of the validation of the fee against the statutory requirement of Directive 2004/38/EC article 3.
11. Mr Simpson stated that his request actually 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”?”
12. The very detailed document accessible via the link provided by Mr Simpson in his initial request provides an answer to his question. The table at paragraph 7.7 shows that the average cost to UKBA (as it was at the time of publication) of issuing European Residence documents was £88, and the proposed charge to applicants was £55, so that the charge constituted a partial recovery of the costs from applicants. Further explanation, which specifies which documents were used as comparisons, it provided at paragraph 7.11 of the same document:

7.11 The fee level has been set at £55 following advice from 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 costs £72.50, and the British Nationality Status Letter which costs £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 costs £50); and the estimated cost to the UK Border Agency of issuing the European documentation (£82 per unit).

13. The response letter also repeated the above information in its Annex B.

The use of exemptions – section 35

14. IIPG withheld one relevant document citing section 35. Mr Simpson stated that the part of section 35 being relied on had not been specified. During the course of this internal review, IIPG confirmed that this was 35(1)(a) – the formulation and development of government policy.
15. Mr Simpson asked why section 35 still applied when the fee level had been set, suggesting this meant that the formulation of the policy was no longer in progress.
16. During the course of this internal review, IIPG explained that, prior to the introduction of a fee for these documents in July 2013, full consideration was given to the level at which the fee should be set, to ensure it was in accordance with the requirements of Directive

2004/38/EC (the “Free Movement Directive”). Although a fee level has been set, it is subject to periodical review. When this happens, IIPG revisit and utilise the original materials developed when the fee was first set in July 2013.

17. Therefore, although these materials –in one submission setting out the reasons for setting the fees at a particular level- were originally produced in 2013, they remain relevant to and are of use in current and ongoing policy formulation.
18. IIPG provided a full explanation of section 35. As this is a qualified exemption, this included consideration of the public interest for and against disclosure.
19. In view of the fact that a comprehensive explanation of how the fees were set has been published, the public interest in disclosure of the withheld information is low. I am therefore satisfied that, in all the circumstances of the case, the public interest falls in favour of withholding the additional information.

Conclusion

20. The response was sent within 20 working days; consequently the Home Office complied with section 10(1) of the FOI Act.
21. Section 1(1)(a) was complied with, as the response clearly stated that the requested information was held.
22. Section 35(1)(a) was engaged.
23. The response complied with the requirements in section 17(7)(a) and 17(7)(b) as it provided details of the complaints procedure.

**Information Access Team
Home Office
3 June 2015**

Annex A – full text of request

Dear Home Office,

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/uksi/2013/...> 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.

Annex B – full text of the response letter

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

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.

Annex A to letter: 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 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

Annex C – full text of the internal review request

I am writing to request an internal review of Home Office's handling of my FOI request '£55 charge for European Residence Documents'.

You kindly provide a letter from European Commission's Francoise LE BAIL which notes "In assessing compliance with EU law of the UK plans to introduce charges [...], it is fundamental to examine whether the UK adult passports are the appropriate comparator and that there are no other, better, documents." She continues "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."

You have not provided any information as to whether such a fundamental examination has been completed. You have not stated what comparable documents you actually chose for the comparison or provided the analysis of why "there are no other, better, documents".

You claim "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."

To clarify, I am NOT particularly interested in "details of how the precise £55 fee was" chosen. I did request information relating to the validation of the chosen fee (in this case £55) against the statutory requirements of Directive 2004/38/EC Article 25(2).

My FOI request was for both (a) "the complete document" and (b) "that each relevant document be properly identified with a name and a source". You have refused (a) on the basis of Section 35, but have not addressed part (b) of the request. Can I please have the complete list of the relevant documents and information about their source.

My request also asked "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." This was not done for the documents requested.

Was all the material individually reviewed as part of this FOI response, before being refused?

The refusal refers simply to "Section 35". ICO is clear that "Section 35 actually sets out four separate classes of information. [...] Departments should identify clearly which of the exemptions applies, and must explain the public interest balance for each one claimed." This was not done for any of the material requested.

The "policy formation" stage happened almost two years ago. After policy formation was completed, the fees were announced to Parliament in March 2013 ("Explanatory Memorandum 2013 No. 617"), and fully implemented in April 2013. The "policy formation" phase is long past, though future adjustments of the fee level might occasionally be expected.

Section 35(2) of the FOI legislation is specific that "Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision" can be released. Why has this statistical information and analysis not been released for this request?

I would anticipate that a separate analysis would have been done for each of the four different types of "EEA application", which are issued to different types of applicant and which have different functions. Why was this analysis not provided?

I would anticipate that each analysis will have evaluated the cost and the "equivalence" of at least British passports (adult and child), drivers licenses (new drivers and renewal), birth certificates (initial and replacements). Why was this analysis not provided?

As the EEA documents is only valid for limited periods, I would expect they would have compared the cost per year of various British documents. Why was this analysis not provided?

The analysis would then use this to propose several different ways that "equivalent documents" might be chosen, for the purpose of identifying a specific "must not exceed" level. For instance, they might have assessed whether an adult drivers license or adult passport is a suitable "equivalent document" when an infant is applying for an EEA Residence Card. Why was this analysis not provided?

PIT WAS NOT PERFORMED PROPERLY

ICO says "Public interest arguments [for section 35 refusals] should focus on potential damage to policymaking from the content of the specific information and the timing of the request." Neither the timing of the request (almost two years after it was announced in parliament), nor the specific information being refused was apparently evaluated in this PIT.

The PIT claims that "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."

The attached two letters, one from the Home Office which asks several questions, and the European Commission reply, provide neither "details of the legal framework under which the fee was set" by the Home Office, nor any information about the "approach adopted in the interpretation of that framework" by the Home Office. If there are undisclosed letters or documents which do provide "details of the legal framework under which the fee was set" and the "approach adopted in the interpretation of that framework" then please release those as part of this FOI request.

FOI legislation 35 (4) is clear: "In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking."

The chosen £55 fee MUST meet the statutory requirements of EU free movement law. When the fee exceeds that of equivalent documents, then it is simply unlawful. If the fee was set at levels which are unlawful, then there is a compelling public interest in seeing the background to that decision. It might suggest there was wrongdoing, or raise issues of public policy and of failure of good government.

In addition unlawful fees would have caused direct damage to each applicant who has had to pay the fees, approximately 150,000 individuals. A substantial unlawful fee would also

act as an impediment to prevent EU citizens (and their family members) from exercising their right of free movement, in a manner not allowed by EU free movement law.

There is a substantial public interest in releasing the information to show that there was in fact “informed background to decision-taking” in this case, and that the fee is in fact set at a lawful level.

It is evident from even a rudimentary analysis that the £55 fee for a 5 year validity Residence Card (for non EU family member of an EU citizen) dramatically exceeds the charges of obvious equivalent British documents.

A renewal drivers license costed £20 (10 year validity) at the time the fee was set (£2 per year), and is also equivalent in the sense that it confirms an existing right. A slightly more expensive learners first license is focused on the initial training of the new driver, and appears a less equivalent document. Even an adult passport, which arguably is NOT an equivalent document because it is a specialized travel document (which the applicant already has) costed £78 for 10 year validity (£7.80 per year). Prorated for 5 years, that would limit the fee to £39. I note, in passing, that the prices of each of those British documents have since decreased.

A British birth certificate, which can be used as proof of right to work for a British citizen, is arguably the most equivalent document and costs just £5 (with lifetime validity). Almost all UK born British citizens have one.

It is surprising that the “British nationality status letter” (which costs £88) is even mentioned. It is a uncommon special purpose letter which is issued after an extensive and detailed evaluation of whether the applicant has citizenship. It can only used for the applicant to subsequently apply for a British passport, and can not be used to prove a right to work in the UK. Though it is manifestly not “an equivalent document”, its high price and mention in the FOI refusal suggests it may in fact have been selected simply to for its high price.

It is quite plausible that the £55 fee exceeds the cost of almost all equivalent British documents, but there was a decision to go ahead with the fee at that level in any case. It would be rather embarrassing if that was the real motivation for the refusal to provide the requested information.

The second paragraph of the PIT reads: “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.”

Most eloquent on this point is the ICO guidance for section 35, which reads as follows.

“194. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases.

“195. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required

and this argument will carry little weight. The timing of the request will therefore be an important factor.

“197. Departments often argue that disclosure of internal discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and lead to poorer decision making. This is known as the chilling effect.

“198. On the other hand, civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice.”

A full history of my FOI request and all correspondence is available on the Internet at this address: https://www.whatdotheyknow.com/request/ps55_charge_for_european_residen

Annex D – complaints procedure

This completes the internal review process by the Home Office. If you remain dissatisfied with the response to your FoI request, you have the right of complaint to the Information Commissioner at the following address:

The Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire SK9 5AF