

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 January 2018

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

### Decision (including any steps ordered)

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1. The complainant has requested information regarding the Birmingham Pub Bombings 1974 and legal aid. The Home Office withheld the requested information, citing sections 35(1)(a) (formulation or development of government policy) and 35(1)(b) (Ministerial communications) of FOIA.

The Commissioner's decision is that the sections 35(1)(a) and 35(1)(b) exemptions are engaged. However, she considers that in relation to some of the withheld information the public interest favours disclosure. The Commissioner also considers that the Home Office has breached sections 10 (time for compliance) and 17(1) (refusal of a request) of FOIA.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the first three paragraphs of the withheld information.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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4. On 7 October 2016 the complainant wrote to the Home Office (HO) and requested information in the following terms:

*"I request disclosure of any correspondence between the Home secretary and the Minister of Justice on the subject of the Birmingham Pub Bombings 1974 and legal aid since 24 09 2016. This follows the Home Secretary's statement to me in her letter addressed to me dated 24 09 2016 and now in the public domain that she was contacting her colleague the Minister of Justice on this matter."*

5. The HO responded on 11 November 2016. It withheld the information, citing section 35(1)(b) (Ministerial communications) of FOIA and explaining that it needed to extend the time limit in order to consider the public interest. It also explained that it aimed to have a full response ready by 9 December 2016.
6. On 22 December 2016, the HO responded to the request. It explained that in order to formulate government policy it was in the public interest for there to be a 'safe place' for Ministers and their officials to openly and confidently share and discuss information, as well as personal views. The HO also explained that disclosing the information could undermine the formulation of current and future government policies by exposing the processes and mechanisms behind it. In addition, the HO argued that disclosure could also reveal unannounced or unfinalised policies, which could hinder any future decisions on the case and allow the public to unnecessarily scrutinise information that had not been finalised.
7. The HO also explained that the disclosure of the requested information may also set a precedent for future inquests, potentially impacting on independent findings and allowing personal Ministerial views to influence the outcome of future inquests.
8. The HO further explained that in general terms, disclosure of such information may also result in the release of sensitive personal information relating to the current and previous Ministers, officials, victims of the bombings and their families. It argued that releasing this information could negatively impact on the shaping of future decisions and policies surrounding the inquest into the Birmingham pub bombings. The HO also argued that "releasing this personal information" could enable unwarranted scrutiny of information by the public or facilitate targeted attacks against Ministers or officials involved in the case.
9. Furthermore, the HO also pointed out that the inquest into the Birmingham pub bombings was ongoing and that the case remained

open. It argued that if information was disclosed there was potential for it to jeopardise the running of the inquest.

10. The complainant requested an internal review on 4 January 2017. She accepted that the information requested would be disclosed to the world. She also accepted, to a qualified extent, that Ministers and their officials require a 'safe place' to openly and confidently share and discuss information. However, the complainant explained that she did not accept that this included personal views or that personal views should be taken account in formulating government policy, which is in effect public policy and not personal policy of the Minister or her officials or elected colleagues.
11. The complainant also explained that she did not accept that the requested information could set a precedent for future inquests, unless this implied a precedent regarding the policy underlying a criteria for the provision of public funding for the relatives of victims when Article 2 of the ECHR is engaged triggering the positive procedural investigatory obligation on the government, which means the effective participation by the relatives of the victims in the investigation, in this case by way of an inquest.
12. Furthermore, the complainant explained that as inquests proceed as an independent investigatory mechanism conducted by independent law officers, it was unclear how personal Ministerial views could influence the outcome of future inquests save in terms of denying the effective participation of the relatives of the victims through not making available to them public funding for their legal representation.
13. Following an internal review the HO wrote to the complainant on 1 March 2017 upholding its original decision. It explained that it was also relying on section 35(1)(a) (Formulation of government policy etc.) of FOIA.

### **Scope of the case**

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14. The complainant contacted the Commissioner on 10 March 2017 to complain about the way her request for information had been handled. She explained that she considered that she should have access to the requested information. The Commissioner notes that in her complaint, the complainant raised the issue of whether the Ministers involved were acting in their capacity as Ministers or whether they were acting in their capacity as politicians.

15. The Commissioner will therefore consider whether the HO has applied sections 35 (1)(a) and (b) appropriately. She will also consider the length of time taken to deal with the request.

## **Reasons for decision**

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### **Section 35 – Formulation of government policy, etc**

16. Sections 35 (1)(a) and (b) of FOI state that:

*"(1) Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-*

*(a) the formulation or development of government policy,*

*(b) Ministerial communications".*

17. Section 35 is a class-based exemption, meaning that departments do not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and will catch a wide range of information.
18. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly. This means that the information does not itself have to be created as part of an activity. Any significant link between the information and the activity is enough.
19. By virtue of section 35(5), Ministerial communications means any communications between Ministers of the Crown, between Northern Ireland Ministers, or between members of the Welsh Assembly Government.
20. As section 35 is a qualified exemption it is subject to the public interest test: whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
21. In her guidance, the Commissioner explains that she considers that many (although not all) ministerial communications will concern the formulation or development of government policy and so will engage both section 35(1)(a) and (b).

**Section 35(1)(a) – Formulation of government policy, etc.**

22. In order for section 35(1)(a) to be engaged, it must relate to the formulation or development of government policy. In her guidance on section 35<sup>1</sup> (the guidance) the Commissioner explains that the term 'the formulation or development of government policy' refers to the design of new policy and the process of reviewing or improving existing policy. However, section 35 does not cover information relating purely to the application or implementation of established policy.
23. The Commissioner also recognises that the purpose of section 35(1)(a) is to protect the integrity of the policy making process and prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
24. Consideration of the section 35 exemption involves two stages. First, the exemption will be engaged if the information in question falls within the class described. Secondly, consideration of public interest considerations.

**Does the withheld information relate to the formulation or development of government policy?**

25. The Commissioner's approach to defining government policy is set out in her guidance which indicates that policy can be developed in many ways and in a wide range of circumstances.
26. The HO explained that in the present case, the policy in question relates to the funding of bereaved families' representation at inquests, including families of the victims of the 1974 Birmingham pub bombings.
27. The Commissioner has viewed the withheld information. She notes that it is a letter from the then Lord Chancellor and Secretary of State for Justice, Elizabeth Truss to the Home Secretary, Amber Rudd.
28. The Commissioner is satisfied that the information relates to the development of government policy regarding the funding of bereaved families' representation at inquests, including families of the victims of the Birmingham Pub bombings in 1974.
29. She therefore considers that section 35(1)(a) is engaged.

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<sup>1</sup><https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

30. The Commissioner will go on to consider whether section 35(1)(b) is engaged.

**Section 35(1)(b) – Ministerial communications**

31. In order for section 35(1)(b) to be engaged, the Commissioner must first consider whether the requested information relates to Ministerial communications.
32. The complainant argued that any communication was between not just two government Ministers but between two party colleagues. She explained that clarification was sought as to whether the requested information was held in all or in part by qua (in the role of) politicians or qua government Ministers. She also argued that if any part of the information held was between politicians, as opposed to Ministers, then it was not subject to the exemption as it would not be caught by FOIA, whether the information was “party political” as opposed to official information (whether political or otherwise).
33. The Commissioner notes that the two Ministers in question are members of the same political party, in this case the Conservative party. However, having reviewed the withheld information, the Commissioner is satisfied that the communication in question between the Home Secretary Amber Rudd and the then Minister of Justice was a communication in their roles as Ministers as opposed to their roles as politicians. The Commissioner is also satisfied that all of the withheld information constitutes Ministerial communications for the purposes of section 35(1)(b) by virtue of the fact that it had been sent by one Minister to another.
34. Taking everything into account, the Commissioner is satisfied that the requested information is Ministerial communications and that the section 35(1)(b) exemption is engaged.
35. As the Commissioner considers that sections 35(1)(a) and (b) are engaged, she will go on to consider the public interest arguments.

**Public interest arguments in favour of maintaining the exemption**

36. The HO argued that the public interest in maintaining sections 35 (1)(a) and (b) outweighed the public interest in disclosure.
37. The HO explained that it considered that in order to successfully formulate government policy it was in the public interest for there to be a ‘safe space’ for Ministers and their officials to openly and confidently share and discuss information, as well as personal views. It also argued that this was necessary to avoid any difficulties in delivering policies. In addition, the HO argued that disclosing the requested information could undermine the formulation of current and future government policies by exposing the processes and mechanisms behind it.

38. Furthermore, the HO argued that disclosure could reveal unannounced or unfinalised policies, which could hinder any future decisions on the case and allow the public to unnecessarily scrutinise information that had not been finalised. It also argued that disclosure of the requested information may set a precedent for future inquests, potentially impacting on independent findings and allowing personal Ministerial views to influence the outcome of future inquests.
39. The HO went onto explain that in general terms, disclosure of such information may also result in the release of sensitive personal information relating to current and previous Ministers, officials, victims of the bombings and their families. It argued that it was not in the public interest to reveal this information and could negatively impact on the shaping of future decisions and policies surrounding the inquest into the Birmingham pub bombings. Furthermore, the HO argued that disclosing this personal information could enable unwarranted scrutiny of information by the public or, in extreme circumstances, facilitate targeted attacks against Ministers or officials involved in the case.
40. The HO also pointed out that the inquest into the Birmingham pub bombings was ongoing and the case remained open. It argued that if information relating to the inquest was disclosed, there was the potential for it to jeopardise the running of the inquest.
41. In relation to section 35(1)(b), the HO also argued that the case for maintaining collective Cabinet responsibility in this case was strong. This is a longstanding convention whereby all Ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions: this is a central feature of constitutional government in the UK. Whilst permitted to express their own views in a free and frank manner within Cabinet and in committee, Ministers maintain a united front once decisions have been reached. This relies on maintaining the privacy of opinions expressed in Cabinet and Ministerial committees, including correspondence.

### **Public interest arguments in favour of disclosure**

42. The HO acknowledged that there is a general public interest in transparency and openness in government. It also accepted that disclosure could allow the public to scrutinise the decisions made by government, which could increase the public's understanding of government processes and in turn influence public trust in the decisions it makes. Such openness would also make government more accountable to the victims of terrorist attacks and their families in terms of the quality of decisions made.
43. In her request for an internal review in relation to the application of section 35(1)(b), the complainant explained that she accepted that

disclosure was to the world at large and that, to a certain extent, Ministers and their officials require a 'safe space' to openly and confidentially share and discuss information. However, the complainant explained that she did not accept that this included personal views or that these views should be taken into account when formulating government policy, which in effect, is public policy, not the personal policy of the Minister, her officials, or elected colleagues.

### **Balance of public interest arguments**

44. The Commissioner has considered the public interest arguments from both parties, including the public interest in transparency.
45. She notes that the complainant has pointed out that she is requesting the information referred to in the Home Secretary's letter to her of 23 September 2016.<sup>2</sup>
46. The Commissioner also notes the complainant's argument that not only the letter of the FOIA should be satisfied, but the spirit of FOIA should be too, and that scrutiny of public policy decision making was a core principle ensuring transparency and accountability of Ministers and their officials.
47. The Commissioner accepts that it is important that government is accountable for decisions it makes. However, she also accepts the HO's argument that it needs a safe space to discuss issues, secure in the knowledge that any deliberations would not be made public and become the subject of public debate prematurely.
48. Additionally, the Commissioner notes the complainant's point regarding policy not being the personal policy of the Minister, her officials or elected colleagues. She also notes the explanation set out in paragraph 42, regarding collective Cabinet responsibility and the fact that although Ministers are allowed to express their own views in a free and frank manner within Cabinet and in committee, once a decision has been reached, Ministers maintain a united front. The Commissioner considers that a safe space is needed in order to consider all views and reach a decision which binds all Ministers regarding the development of policy. She considers this ensures that personal views are not allowed to dictate a policy.
49. Regarding the HO's argument that disclosure could set a precedent in relation to future inquests, the Commissioner does not consider that

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<sup>2</sup> <http://www.birminghammail.co.uk/news/midlands-news/pub-bombings-support-prime-minister-11975582>



disclosure under the FOIA could set a precedent regarding any future inquests. She considers that requests under the FOIA should be decided on a case-by-case basis.

50. The Commissioner also notes the HO's argument that in general terms, disclosure may result in releasing sensitive personal information relating to current and previous Ministers, officials, victims of the bombings and their families, as it could negatively impact on the shaping of future decisions and policies surrounding the inquest into the Birmingham bombings. The Commissioner considers that both Ministers and their officials should not be easily deterred from doing their jobs. However, she accepts that if there were security issues surrounding anybody connected to an inquiry, these would be taken into account. However, the Commissioner notes that in the present case, at the time of the request, it was already in the public domain that the Home Secretary Amber Rudd had confirmed that she would be writing to the then Justice Secretary about funding legal representation for bereaved families at inquests, including the Birmingham pub bombings inquest.
51. In relation to section 35(1)(b), the Commissioner notes that in the Home Secretary's published letter to the complainant, she explained that she personally supports the granting of Exceptional Funding for the relatives legal representation at the inquest. The Home Secretary also explains that she believes that by working with the Legal Aid Agency, a suitable level of funding could be achieved. The Commissioner is satisfied that these are the Home Secretary's personal views, rather than the final view of the Cabinet.
52. The Commissioner has considered the public interest arguments presented by both parties. She has concluded that in the circumstances of this case the public interest in maintaining the exemption does not outweigh the public interest in disclosure of some of the requested information ie the first three paragraphs of the requested information. She considers that these paragraphs confirm that the Ministers in question were considering the question of the funding of legal representation for bereaved families at the inquest. She is satisfied that the Home Secretary had already informed the complainant that she was going to pursue this with the then Justice Secretary. The Commissioner therefore considers that, in relation to the first three paragraphs, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
53. However, she considers that the last three paragraphs can be withheld. These paragraphs relate to communications between the two Ministers and to the development of policy and she considers the public interest in maintaining the exemptions in relation to these paragraphs outweighs the public interest in disclosure.

## **Procedural issues**

54. The complainant submitted her request on 7 October 2016. The HO initially responded on 11 December 2016, extending the time for considering the public interest test. It provided its substantive response on 22 December 2016.

### **Section 10 – Time for compliance**

55. Section 10(1) requires that the public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
56. The Commissioner considers that the HO has breached section 10(1).

### **Section 17 – refusal of a request**

57. Section 17(1) of FOIA states that if a public authority wishes to refuse any part of a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemptions.
58. The Commissioner notes that HO contacted the complainant on 11 November 2017 to explain that it was applying section 35(1)(b) to the information but needed more time to consider the public interest test.
59. Where the authority does require an extension of time, it must issue an initial refusal notice, within 20 working days, explaining why the exemption applies and providing an estimated date by which the public interest test will be completed.
60. In the present case the HO did not respond to the complainant within the 20 working day limit to explain to her that it would need to extend the time limit to consider the public interest test. The Commissioner therefore considers that the HO has breached section 17(1).
61. Section 17(3) states that if a public authority is relying on a qualified exemption, the time limit for compliance may be extended in order to consider the public interest in maintaining the exemption or disclosing the information. A public authority may take such time as is "reasonable in the circumstances" and must then either disclose the requested information or explain to the applicant why the public interest in maintaining the exemption outweighs the public interest in disclosure.
62. Although the FOIA does not define what a reasonable time is, the Commissioner considers it reasonable to extend the time to provide a full response including public interest considerations by up to a further 20 working days - which means that the total time spent dealing with the request should not exceed 40 working days. Any extension beyond

40 working days would require there to be exceptional circumstances, fully justified by the public authority.

63. In the circumstances of this case, although the HO informed the complainant of the delay while the public interest was being considered, the total time taken by it exceeded 40 working days. As the Commissioner has not been made aware of any exceptional circumstances in this case she does not consider this to be a reasonable timescale she finds that the Home Office has breached section 17(3).

### **Other matters**

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64. The complainant requested an internal review on 4 January 2017. The HO responded on 1 March 2017.
65. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
66. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
67. The Commissioner is concerned that having not been made aware of any exceptional circumstances it took over 20 working days for the HO to complete the internal review.

## Right of appeal

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68. 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: 0300 1234504  
Fax: 0870 739 5836  
Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

69. 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.

70. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Gerrard Tracey  
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