

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 30 March 2023

**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 official briefing information relating to reports of people being drugged via drinks or needles. The Home Office refused the request, on the grounds that the information was exempt from disclosure under sections 23 (Information supplied by, or relating to, security bodies), 31 (Law enforcement) and 35 (Formulation of government policy) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(a) to refuse the request.
3. The Commissioner requires no steps as a result of this decision.

#### **Request and response**

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4. On 24 January 2022, the complainant wrote to the Home Office and requested information in the following terms:  
  
"Under the Freedom of Information Act 2000 I wish to see the following:

Full copies of all briefings, reports and presentations received by the Home Secretary regarding reports of people being drugged via drinks or needles from October 2021 onwards.”

5. Having notified the complainant that it required additional time to consider the balance of the public interest in relation to section 35(1)(a), the Home Office responded on 21 March 2022. It confirmed that the requested information was exempt from disclosure under section 35(1)(a) of FOIA, with the public interest favouring maintaining the exemption.
6. The Home Office maintained this position at internal review.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 27 July 2022 to ask the Commissioner to review the Home Office's reliance on section 35 to refuse his request. He did not explain why he disagreed with its decision to withhold the requested information.
8. During the Commissioner's investigation, the Home Office argued that some of the withheld information was also exempt from disclosure under sections 23 and 31 of FOIA.
9. Following the combined cases of the Home Office v Information Commissioner (GIA/2098/2010) and DEFRA v Information Commissioner (GIA/1694/2010) in the Upper Tribunal, a public authority is able to claim a new exemption either before the Commissioner or the First-tier Tribunal, and both must consider any such new claims.
10. The analysis below considers the application of section 35(1)(a) to withhold the requested information. Having found that the Home Office was entitled to rely on that exemption to refuse the request, the Commissioner has not found it necessary to consider the application of sections 23 and 31.
11. The Commissioner has viewed the withheld information.

### **Reasons for decision**

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

12. Section 35(1)(a) provides that information held by a government department is exempt from disclosure if it relates to the formulation or development of government policy. The Commissioner understands these terms to refer to the design of new policy, and to the process of

reviewing or improving existing policy. The exemption is subject to the public interest test.

13. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to 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.
14. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. The Commissioner considers that the term 'relate to' can be interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
15. The Commissioner takes the view that the formulation of policy comprises the early stages of the policymaking process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers.
16. Development may go beyond this stage, to the processes involved in improving or altering existing policy, such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
17. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
18. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
  - The final decision will be made either by the Cabinet or the relevant Minister;
  - The Government intends to achieve a particular outcome or change in the real world; and
  - The consequences of the decision will be wide-ranging.
19. The withheld information in this case comprises briefing information on the subject of 'spiking'. The Home Office has explained that it relates to the formulation of its 'spiking' policy. Spiking is when someone administers, or causes to be administered, a noxious substance to another individual without their knowledge or consent. There are several methods which could be used for spiking, including using a drink or needle to administer a substance.

20. The Home Office said that its spiking policy is a wide ranging and evolving policy area. The Home Office is managing a cross-government response to tackle spiking, working with colleagues in law enforcement, health, education, festivals and the night-time economy.
21. As an example of one area of policy formulation on spiking, it explained that section 71 of the Police, Crime, Sentencing and Courts Act 2022<sup>1</sup> ('the PCSC') places a duty on the Home Secretary to prepare and publish a report on the nature and prevalence of spiking, setting out any steps the Government has taken, or intends to take, in relation to spiking. That report is due to be published in April 2023.
22. The request was received on 24 January 2022, at which point the PCSC was still a Bill, going through the 'ping pong' stage in Parliament (a process of reconciliation which involves a Bill passing back and forward between the two Houses until a single version is agreed). The duty under section 71 was introduced as an amendment to the Bill and at that time it was subject to continued debate and scrutiny in relation to spiking-related amendments. The Home Office argued that, at that point, spiking policy was clearly in the process of being formulated.
23. It argued that the formulation and development process remains ongoing, as the Home Secretary's report, which is still "subject to the ongoing exchange of views and consultation across government" and with stakeholders, will include an examination of the problem, and set out the Government's proposals for combatting it:

"The report intends to have real world impact by providing a comprehensive report of an under-reported crime contributing to the public's understanding of the offence and drawing together best practices and resources for those involved in a spiking incident. The report should contribute to the public's understanding of spiking, effective victim support, and hopefully better prevention or detection of spiking incidents. The statutory report into spiking will be subject to ministerial approval by the Home Secretary. The development of policy positions relating to spiking will be ongoing for some time whilst the research continues, and the report is shaped."
24. Having viewed the withheld information (and mindful of the purpose of the exemption) the Commissioner is satisfied that, at the time of the request, it related directly to the formulation of government policy on spiking and that each of the criteria set out in paragraph 18 is met. The exemption at section 35(1)(a) of FOIA is therefore engaged.

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<sup>1</sup> <https://www.legislation.gov.uk/ukpga/2022/32/contents>

### **Public interest test**

25. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the withheld information.

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

26. The complainant has not commented on the wider public interest in disclosing the information.
27. The Home Office set out the following arguments:

“We recognise that there is a general public interest in openness and transparency in government, which will serve to increase public trust. There is an interest in members of the public being able to understand government action on spiking. The release of information could have the effect of encouraging greater public involvement in the development of policy, thus increasing public participation in the political process and the level of public debate. An improved quality of debate should impact positively on policy outcomes, as proposals would have been subject to a greater degree of public scrutiny and discussion.

To this end, the government has provided several updates to the Home Affairs Select Committee as part of their inquiry on spiking, and on the government’s wider efforts to understand the need for a new criminal offence for spiking:

- July 2022 HASC Update<sup>2</sup>
- Dec 20 Letter – Specific offence and HASC Update<sup>3</sup>
- 30 January<sup>4</sup> (follow up letter on the need for a specific criminal offence).

Further information which we contend meets the public interest includes:

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<sup>2</sup><https://publications.parliament.uk/pa/cm5803/cmselect/cmhaff/508/report.html>

<sup>3</sup><https://committees.parliament.uk/publications/33433/documents/181690/default/>

<sup>4</sup><https://committees.parliament.uk/publications/33800/documents/184596/default/>

- Home Affairs Select Committee Inquiry into Spiking<sup>5</sup>
- Government written evidence<sup>6</sup>
- HASC Report<sup>7</sup>
- Government response to report<sup>8</sup>.

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

28. The Home Office set out the following arguments:

"The Commissioner accepts that officials often require a 'safe space' to develop ideas, debate live issues and reach decisions away from external interference and distraction. In addition, both the Tribunal and the High Court have also accepted that effective government requires a safe space in which to formulate and develop policy. In *Department of Health v Information Commissioner (EA/2013/087)*, 17 March 2014, for example, the Tribunal stated (at paragraph 73) that:

'A safe space is needed in which policy can be formulated and developed in robust discussions, where participants are free to "think the unthinkable" in order to test and develop ideas, without fear of external interference or distraction, whether as a result of premature and lurid media headlines or otherwise'.

In this particular case, we contend that a 'safe space' was needed at the time of the request – and is still needed now – to carefully review intelligence, data, and reports in relation to the emerging issue of spiking; to provide impartial and frank advice to Ministers; and consider how the Government's policy positions should be developed and shaped in relation to spiking.

As the spiking policy was in its infancy at the time the information was requested, with an emerging understanding following increased media reports, subject to parliamentary debate during 'ping pong', and a team newly dedicated to spiking policy, it was clearly a live issue, and

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<sup>5</sup> <https://committees.parliament.uk/committee/83/home-affairs-committee/news/159582/home-affairs-committee-launches-inquiry-into-spiking/>

<sup>6</sup> <https://committees.parliament.uk/writtenevidence/43769/pdf/>

<sup>7</sup> <https://committees.parliament.uk/publications/21969/documents/165662/default/>

<sup>8</sup> <https://committees.parliament.uk/publications/22887/documents/168013/default/>

therefore the weight attached to the safe space argument is particularly compelling.

Moreover, as explained previously it is important to note that the policy is still being formulated and developed as the statutory report into spiking is being drafted. This is being developed through consultation with other government departments, law enforcement, and discussion with stakeholders. This is a key piece of government work and as such, officials handling the report should continue to be afforded a sufficient safe space to ensure they can have free and frank discussion with the Home Secretary, and others, resulting in a statutory report that is as effective as it can be which is in the wider public interest."

### **Balance of the public interest**

29. The Commissioner accepts that there is a public interest in the disclosure of information which can inform public understanding of how widespread the problem of spiking is, and of the Government's strategies for combatting it. The question for the Commissioner to consider is whether the arguments in favour of maintaining the exemption are stronger.
30. The relevance and weight of public interest arguments will depend on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed. As such, the exact timing of a request will be very important.
31. In this case, the Commissioner notes that the withheld information contains highly sensitive intelligence information about reported incidents of spiking, and briefing material regarding the Government's response. The information in scope was recent and the request for it was received while the formulation of spiking policy was in its early stages. It was clearly a 'live' matter then, and it remains so at the time of this notice. As such, the Commissioner considers that there is a clear and strong public interest in protecting this policymaking process.
32. 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 on this matter. The disclosure of the withheld information at such an early stage of policy development would hinder the ability of officials to explore and discuss all available options in a free and frank manner, and to understand all possible



implications. The withheld information would, to some extent, reveal details of policy discussions and options being considered. A safe space is required to prevent disclosure resulting in policy makers being unduly distracted or side-tracked by external debate on the matter, which would be harmful to the process of effective, informed decision making.

33. Disclosure would also place in the public domain highly sensitive intelligence information about spiking. The Commissioner considers it likely that, in future, key stakeholders could be less willing to share sensitive information if they believe it may be disclosed in response to an FOIA request. Clearly, any action which may result in a lack of willing cooperation, and valuable input, from those who can provide expertise from a wide range of backgrounds, would result in poorer, less well informed policymaking.
34. It has been generally accepted by both the Commissioner and the First-tier Tribunal that significant weight should be given to maintaining the exemption where a valid need for a safe space is identified. A compelling public interest in favour of disclosure is required when a need for safe space is demonstrated. The Commissioner has seen no such arguments in this case.
35. The Home Office has published a lot of information on its position on spiking, and it is due to publish a statutory report, setting out a way forward, very shortly. The Commissioner is satisfied that these actions satisfy the public interest in transparency to a considerable degree.
36. The public interest in the Government being able to develop an effective and well designed response to combat spiking, without being subject to unnecessary disruption when doing so, is the overwhelming factor in maintaining the exemption in the circumstances of this case. The Commissioner therefore considers that greater weight can be afforded to the public interest argument in favour of protecting the safe space in which policy matters are discussed.
37. The Commissioner's decision is therefore that, in the circumstances of this case, the public interest favours maintaining the exemption. The Commissioner is satisfied that, at the time of the request, the information related to live policy formulation and that there is a stronger public interest in protecting the space in which that policy is being developed. It follows that the Home Office was entitled to rely on section 35(1)(a) to refuse the request.



## **Other matters**

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38. Going forward, where circumstances change, and policy formulation or development surrounding spiking is no longer 'live', the balance of the public interest with regard to section 35 may change.
39. However, although he has not found it necessary to consider sections 31 and section 23 of FOIA here, the Commissioner considers it likely that much of the withheld information would continue to be exempt under those exemptions, due to its sensitive content with regard to law enforcement matters.

## **Right of appeal**

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40. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

41. 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.
42. 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 .....**

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**