

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

### **Decision notice**

**Date:** 6 September 2023

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

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the Home Office's response to the independent review into the Judicial Review Process. The Home Office confirmed it holds the requested information, but refused to provide it, citing section 35(1)(a) (Formulation of government policy, etc) 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 to be taken as a result of this decision.

#### **Request and response**

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4. On 8 September 2022, the complainant wrote to the Home Office and requested information in the following terms:  

"Please can you supply a copy of the Home Office's submissions to the Independent Review of Administrative Law's 'Call for Evidence'.
5. The Home Office responded on 27 October 2022. It confirmed it holds the requested information, but refused to provide it, citing section 35(1)(a) (Formulation of government policy, etc) of FOIA.
6. Following an internal review, the Home Office wrote to the complainant maintaining that view.

## **Background**

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7. The Independent Review of Administrative Law [IRAL] Panel was chaired by Lord Faulks QC and was launched in July 2020 with an aim to consider the options for reform to the process of Judicial Review.
8. The panel were asked to consider whether the right balance is being struck between the rights of citizens to challenge executive decisions and the need for effective and efficient government.
9. The panel invited the submission of evidence on how well or effectively judicial review balances the legitimate interest in citizens being able to challenge the lawfulness of executive action with the role of the executive in carrying on the business of government, both locally and centrally.
10. The duration of the call for evidence was from 7 September 2020 to midday 19 October 2020<sup>1</sup>.
11. The Independent Panel submitted their Report to the Lord Chancellor in January 2021. The Report was published on 18 March 2021. At the same time, the Government published a consultation on judicial review reforms.

## **Scope of the case**

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12. The requested information in this case comprises the Home Office response to the IRAL Call for Evidence on Judicial Reviews (Lord Faulks' review).
13. The complainant disputes the application of section 35 to refuse the request. He considers that, as the Judicial Review and Courts Act 2022 has been enacted, there is no longer any need to maintain the exemption on the basis of a safe space. He also considers that the public interest weighs in favour of disclosure.
14. Both the complainant and the Home Office acknowledge that the Commissioner has previously issued a decision notice (DN) regarding a request for the same information as the information under consideration

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/915905/IRAL-call-for-evidence.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/915905/IRAL-call-for-evidence.pdf)

in this case. The request in that case (IC-87622-G6M6)<sup>2</sup> was made on 23 November 2020 and the DN was issued on 23 August 2022. The Commissioner's decision in that case was that section 35(1)(a) was engaged and the balance of the public interest was in favour of maintaining the exemption.

15. While acknowledging the existence of that case having been investigated, the Commissioner's duty is to decide, on a case-by-case basis, whether a request for information has been dealt with in accordance with FOIA.
16. The Commissioner considers that the scope of his investigation, in this case, is to determine whether the Home Office is entitled to apply section 35(1)(a) to withhold the requested information.

## **Reasons for decision**

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### **Section 35 formulation of government policy**

17. The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
18. Section 35(1)(a) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy".
19. Section 35 is class-based, meaning that a public authority does 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 catch a wide range of information.
20. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4021517/ic-87622-g6m6.pdf>

formulates or develops its policy will be sufficient to engage the exemption.

21. This means the information does not have to be created as part of the activity. Any significant link between the information and the activity is enough.

### **Is the exemption engaged?**

22. The purpose of section 35(1)(a), the limb of the exemption relied on in this case, is to protect the integrity of the policymaking process, and to prevent disclosures that 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.

23. In his guidance on section 35<sup>3</sup>, the Commissioner states:

“To be exempt, the information must relate to the formulation or development of government policy. These terms broadly refer to the design of new policy, and the process of reviewing or improving existing policy”.

24. Ultimately 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 timing and precise context of the information in question.
25. In relation to the requested information in this case, the Home Office told the complainant that disclosure of submissions in response to the Call for Evidence from Government Departments would prejudice the development of government policy by prejudicing the maintenance of the convention of the collective responsibility of Ministers of the Crown.
26. Similarly, in its submission to the Commissioner, the Home Office explained that section 35(1)(a) is relied on in this case:  
  
“... to protect the important need for a safe space for policy formulation and development in relation to judicial review and to protect the principle of Cabinet collective responsibility”.

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<sup>3</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

27. The Commissioner recognises that the complainant considers that the policy formulation and development, that was protected by the need for safe space, as recognised in the DN in IC-87622-G6M6, culminated in the Judicial Review and Courts Act 2022. That Act received Royal Assent on 28 April 2022.
28. However, in determining whether the exemption is engaged, the Commissioner has taken into account his guidance on section 35, including where it states:

“The timing of the request is not relevant here. The question is whether the **information** relates to policy formulation or development, irrespective of when the request was made”.
29. He is also mindful of a recent First Tier Tribunal (FTT) finding, in Public Law Project v IC & MoJ (EA/2021/0378)<sup>4</sup>, that the submissions to the IRAL, which included the Home Office’s submission, were information relating to the formulation and development of government policy.
30. In light of the above, the Commissioner is satisfied that the withheld information relates to the formulation or development of government policy. It follows that he is satisfied that the exemption is engaged.

### **Public interest test**

31. 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 outweighs the public interest in disclosing the information.
32. The Commissioner considers that the public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the purpose of the exemption.
33. In accordance with the Upper Tribunal’s decision in Montague, the Commissioner accepts that the public interest balance must be assessed on the basis of how matters stood at the time of an authority’s decision on a request. That is, at the 20 working days limit. This is the time when an authority is required to respond in accordance with the requirements and statutory timeframes in Part I of FOIA.

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[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3011/Public%20Law%20Project%20\(EA-2021-0378\)%2019.03.22.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i3011/Public%20Law%20Project%20(EA-2021-0378)%2019.03.22.pdf)

### **Public interest arguments in favour of disclosing the requested information**

34. The Home Office acknowledges that the issues considered by the IRAL Panel are of constitutional importance, and the evidence on which the Panel's Report was based would provide context to the Panel's conclusions. In other words, there is legitimate public interest in that evidence being released.
35. The Home Office also recognised that disclosure of the requested information would increase transparency.

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

36. In favour of maintaining the exemption, the Home Office made the following points:
  - Ministers should be able to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached;
  - policy development on Judicial Review did not stop with the passing of the Judicial Review & Courts Act, so the need for a safe space for developing policy should be maintained; and
  - a summary of Departmental responses has been published, which addresses the need for transparency.
37. Acknowledging the complainant's argument about the Judicial Review and Courts Act having been enacted, the Home Office told the complainant:

"We recognise that the passage of time may be relevant to the balance of the public interest and that the Judicial Review and Courts Act 2022 was given Royal Assent on 28 April 2022. However, Royal Assent does not necessarily signify the end of the policy development process and is not in any way an absolute cut-off point for the purpose of considering whether the protection of 'safe space' is still required to protect the process. The judicial review reform work, drawing on submissions made to the IRAL, is ongoing in the Ministry of Justice (MOJ)".
38. Similarly, in its submission to the Commissioner, the Home Office told the Commissioner that the MoJ has confirmed that, at the time of the refusal of the request, policy formulation and development on aspects of Judicial Review reform, drawing on the work of IRAL, was taking place.
39. In relation to the principle of collective Cabinet responsibility as an important public interest factor, the Home Office told the Commissioner

that the withheld information represents the then Home Secretary's position on a matter subject to Government policy formulation and development. It therefore argues that considerations around Cabinet collective responsibility apply.

40. In support of that view, the Home Office referred to the FTT decision in (EA/2021/0378), noting that the requested information in this case was among the submissions considered by the FTT in that case.
41. The Home Office considers that the FTT's reasons for finding the public interest in maintaining the section 35 exemption outweighs the public interest in favour of disclosure are relevant in this case.

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

42. In considering the application of the public interest in this case, the Commissioner has had regard to his own guidance as well as the arguments of the two parties and Tribunal decisions.
43. He acknowledges that the relevance and weight of the 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.
44. The weight of these interests varies from case to case, depending on the profile and importance of the issue and the extent to which the content of the information actually adds to public debate.
45. The Commissioner recognises the general public interest in transparency, openness and accountability. In this case he recognises that disclosure of the withheld submission would enable the public to understand the evidence and views that were provided by the Home Office in response to the call for evidence.
46. He accepts that there is a public interest in the disclosure of such information to the extent that it can inform public debate and understanding of how Government develops policy on the subject of judicial review.
47. However, he is also mindful of the publication of the summary document, which he considers goes some way to satisfying the public interest in transparency.
48. The Commissioner has considered the public interest argument relating to preserving a 'safe space' to debate live policy issues away from external interference and distraction.
49. In the circumstances of this case the Commissioner has taken into account the Home Office's position that, at the time of the initial refusal

of the request, policy formulation and development work on aspects of Judicial Review reform was ongoing. He gives weight to the argument that disclosure of the information could impact undermine the safe space needed for policy formulation and development.

50. Turning next to the collective responsibility argument put forward by the Home Office, the Commissioner accepts that collective responsibility is a longstanding convention and a central feature of the UK's constitutional system of government.
51. In his published guidance, the Commissioner accepts that if the information reveals the views of an individual Minister on a government position, arguments about maintaining collective responsibility are likely to carry significant weight. He also accepts that, if collective responsibility arguments are relevant, they always carry significant weight in the public interest test because of the importance of the general constitutional principle.
52. In this case, the Commissioner is satisfied that the withheld information represents the then Home Secretary's position on a matter subject to Government policy formulation and development. Disclosure would therefore identify the position taken by them.
53. The Commissioner is mindful that a summary of Government departments' submissions to Lord Faulks's review has been published. The Commissioner notes that while the summary attributes some comments and views to the relevant Government departments, including the Home Office, the summary also makes reference to the principle of collective responsibility. In that respect it states:

"Ministers must be able to freely and frankly exchange their views as part of the policy making process, of which the Government Departments' submissions are a part. .... This means that this summary cannot necessarily cover every aspect of each of the Government Departments' responses to the Review Panel's call for evidence".
54. While not binding, the Commissioner has also taken into account the views of the FTT with regard to the public interest arguments relating to collective responsibility.
55. In this case, he accepts that, by revealing opinions expressed by the then Home Secretary, disclosure of the Home Office Response to the call for evidence would undermine the principle of collective responsibility.
56. While acknowledging the general public interest in the subject matter, in balancing the public interest factors in this case, the Commissioner considers that greater weight can be afforded to the public interest



arguments in favour of safe space and protecting the convention of collective responsibility.

57. He has therefore concluded that the Home Office is entitled to rely on section 35(1)(a) as its basis for withholding the requested information.

## Right of appeal

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58. 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)

59. 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.

60. 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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SK9 5AF**