

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

### **Decision notice**

**Date:** 20 September 2022

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

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

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1. The complainant requested copies of all correspondence sent and received by the office of Priti Patel relating to the decision whether or not to include a public interest defence in the overhaul of the Official Secrets Act. The Home Office refused to provide the information it held in scope of the request citing section 35(1)(a) of FOIA - the exemption for the formulation or development of government policy.
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 notice.

#### **Request and response**

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4. On 23 July 2021, the complainant wrote to the Home Office and requested information in the following terms:

"Please provide a copy of all correspondence sent and received by the office of Priti Patel relating to the decision whether or not to include a public interest defence in the overhaul of the Official Secrets Act, as advised by the Law Commission.

Given the very serious risk of criminalising important public interest disclosures should this policy proceed as currently planned, there is the very strongest of public interest in transparency as to the reasons for this decision, which have not yet been made explicitly clear in public.

If there are other reasons for this decision, there is a strong public interest in this being a public record for scrutiny purposes. The gravity of the harm to the public interest that could occur should this policy be pursued means that the public interest in transparency in this specific case clearly outweighs any limited breach of policy safe space.

Please send me this information by e-mail to [address redacted], in a machine readable format such as .csv or .xlsx where appropriate.”

5. The Home Office responded on 23 August 2021. It refused to provide the requested information citing section 35(1)(a) of FOIA – the exemption for the formulation or development of government policy.
6. On 26 August 2021, the complainant requested an internal review. He focussed on the exemption being applied in a “blanket fashion” (ie the complainant believes there are likely to be sections of correspondence, meta data and other material that is not exempt, and has been withheld unnecessarily), and on there being a strong public interest in the information being released.
7. The Home Office issued its internal review outcome, late, on 18 October 2021 in which it said it had considered both the points above raised by the complainant. The Home Office maintained that section 35(1)(a) applied to all the withheld information.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 20 October 2021 to complain about the way his request for information had been handled. He reiterated his concerns raised at internal review ie that the Home Office had not really engaged with his concerns and had provided non-specific reasons for withholding the information in this specific case. He raised some additional points about the public interest test.
9. The Commissioner asked the Home Office to consider all the complainant’s grounds of complaint when providing its investigation response.
10. The Commissioner has considered whether the Home Office was entitled to rely on section 35 of FOIA to withhold all the information in scope of this request. He has viewed the information.

## Reasons for decision

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### Section 35 – Formulation of government policy

11. Section 35(1)(a) of FOIA provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
12. The purpose of subsection 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.
13. The Commissioner's guidance on section 35<sup>1</sup> states:

"The Modernising Government White Paper (March 1999) describes policymaking as: 'the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world'. In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives."
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 – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
15. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007<sup>2</sup>) the term 'relates to' is 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.

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

<sup>2</sup> <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i70/DF%20ES.pdf>

16. The Home Office has requested that its wider explanation about the withheld information is not reproduced in this notice, which the Commissioner has respected but has taken into account.

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

17. The Home Office has explained that:

“The policy was still being considered and developed at the time of the request, and no legislative changes had commenced or taken effect. Reform of the Official Secrets Act (1989) was, and still is, a current, live policy issue under consideration by Ministers. No decision on the public interest defence has yet been taken. The Government’s position is still under active development and has not been finalised.

As you know, section 35(1)(a) is a class-based exemption and government departments do not need to consider any potential prejudice resulting from disclosure; it is simply a question of whether the information falls into the class described.

The [withheld information] clearly falls into the category of formulation of Government policy and therefore we believe s.35(1)(a) is engaged.”

18. Having viewed the withheld information, the Commissioner is satisfied that it relates to the formulation of government policy and thus that section 35(1)(a) of FOIA is engaged. He does not consider that any part of the withheld information can be disclosed as suggested by the complainant.

**Public interest test**

19. Section 35 is a qualified exemption and so it is necessary to go on to consider whether the public interest would be better served by maintaining the exemption or by disclosing the withheld information.
20. 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 can carry significant weight depending on the circumstances of the case. The need for a safe space will be strongest when the issue is still live. The timing of the request is therefore an important factor.

## **Arguments in favour of disclosing the withheld information**

21. The complainant has argued that there is a legitimate public interest in the disclosure of information concerning any changes to the Official Secrets Act. Specifically, he told the Commissioner that:

"...in this specific case there is a very strong public interest in disclosure. There is widespread concern about the lack of a public interest defence being included in the overhaul of the Official Secrets Act. There is also widespread confusion about the decision to remove this defence from recommendations made by the Law Commission on updating this are [sic] of law. The effect of this would be to put genuine whistleblowers and those that work with them at risk of criminalisation, and to reduce the likelihood that serious state failures causing significant harm would come to light. A public interest defence would not be an exemption from prosecution, and would still allow those who committed genuine security breaches for personal gain or to aid a foreign power to rightly feel the full weight of the law.

As such, while I appreciate the safe space arguments in favour of withholding policy-formation related information, in this specific case there is a clear need to understand that decision making process, to see whether the clear harms of the policy were fully understood at the time of formulation, and to get a sense of the thought process behind the decision not to include a public interest defence. The removal of the public interest defence has not been fully addressed in ministerial responses on the policy, and if the reasons for its removal were different than the publicly stated ones, or the clear harms to the operation of a free press were not properly considered in the formulation of policy, this would suggest shortcomings in the policy formation process itself, something in which there is a very clear public interest in that being on the public record."

22. The Home Office accepted that there is a legitimate public interest in disclosure of information concerning any changes to the Official Secrets Act. It recognised that disclosure of this information would promote transparency and contribute to the Government's wider transparency agenda as well as build public understanding of this important legislation.

23. In its submissions to the Commissioner, the Home Office said it:

"...recognises of course that there is a strong public interest in disclosing information which ensures transparency in the way in which the government operates. However, balanced against this is the public interest in safe-guarding the government's ability to

discuss and develop ideas and to reach well-formed conclusions. The formulation and development of government policy must be protected to provide a free space for Ministers to have free and frank discussions. Therefore, maintaining the confidentiality of such material is in the public interest because the quality of any decision-making process depends on the frankness and candour with which views are presented and policies scrutinised”.

### **Arguments in favour of maintaining the exemption**

24. The Home Office argued that there is a “strong public interest” in ensuring that Ministers and officials are given room to develop policy, without fear of premature disclosure, to ensure decisions are taken in a fully informed setting.

25. Whilst the Home Office recognised that there is a public interest in understanding the government’s decision making process, it said that disclosing information as the decision making process is ongoing would be likely to create a “chilling effect” on free and frank discussions between officials and between officials and Ministers. It submitted that this would jeopardise the ongoing work on this reform which would not be in the public interest.

26. In its submissions to the Commissioner, the Home Office said:

“Reform of the Official Secrets Act (1989) was, and still is, a current, live policy issue under consideration by Ministers. The Government’s position is still under active development and has not been finalised. Disclosure of the information in scope would be prejudicial because it would compromise the ‘safe space’ which Ministers, and officials need in order to formulate and develop policy without risk of premature disclosure under the FOIA. Disclosure of the information would be likely to result in less robust, well considered or effective policies and risk the development of any potential reforms. This would not be in the interest of the general public.”

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

27. In reaching its conclusion that the public interest favours maintaining the section 35(1)(a) exemption, the Home Office told the Commissioner the following:

‘Disclosure therefore would remove the space which allows Ministers to consider issues without inhibition and result in a poorer policy making process. The submission is a classic example of public policy considerations underlying s.35(1)(a). As said above, its disclosure would prejudice the safe space required

at the apex of the Government's decision-making regime and pose a very real risk of a chilling effect.

The Home Office agrees with the following statement of principle from *ECGD v IC* [2008] EWHC 638 (Admin):

"There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments... the weight to be given to those considerations will vary from case to case... But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."

Also, the Home Office believes the following statement of principle from *Cabinet Office v IC* [2014] UKUT 461 (AAC) at section 68 to be useful here:

"If, for example, a tribunal finds (or could on the evidence only properly find) that disclosure of the information would directly impact upon on one or more of the public policy concerns underlying s.35(1)(a) and/or (b) (e.g. "safe space", collective Cabinet responsibility etc), it may be that the only proper finding would then be that there would necessarily be significant general damage to the public interest resulting from the likely effect on ministerial or other official behaviour in the future..."

Our response is based on substantial operational experience at a senior level within the environments in which we operate.'

28. The Commissioner considers that there is a clear public interest in the disclosure of information which can inform public understanding and aid transparency on the reform of a significant piece of legislation, in this case, the Official Secrets Act (1989). The question for the Commissioner to consider is whether the arguments in favour of maintaining the exemption are stronger.
29. Public interest arguments favouring maintaining the exemption at section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption. The relevance and weight of the public interest arguments will depend entirely 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.
30. The Commissioner notes that, at the time of the request, the information in scope was recent. At the same time, policy development on the reform of the Official Secrets Act (1989) was in its early stages.



It was clearly, and is still, a 'live' matter. (It is also noted that there has been a recent update on this subject matter which may assist the complainant to some degree, but that this wasn't available at the time of the request<sup>3</sup>).

31. 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. In this case, 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 their possible implications. This is because, while the withheld information would not reveal details of those policy discussions, it would place in the public domain sensitive information which could be used to interfere with, disrupt or undermine those deliberations by those who disagree with the reform. A safe space is required to prevent policy makers getting unduly distracted or side-tracked, which would be harmful to the quality of the debate underlining effective decision making.
32. 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.
33. The Commissioner understands that this reform is a controversial area of public policy and there is a strong public interest in disclosure of relevant material to further public debate. However, the public interest in the Government being able to develop an effective and well-designed policy on the reform of the Official Secrets Act (1989), without significant disruption, is the overwhelming factor in the circumstances of this case.
34. In these circumstances, the Commissioner considers that greater weight can be added to the public interest argument in favour of protecting the safe space in which policy matters are discussed.
35. The Commissioner's decision is that, in the circumstances of this case, the public interest favours maintaining the exemption. In reaching this view, the Commissioner has given particular weight to the timing of the request. The Commissioner is satisfied that the information was

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<sup>3</sup> <https://www.gov.uk/government/consultations/legislation-to-counter-state-threats/outcome/legislation-to-counter-state-threats-hostile-state-activity-consultation-government-response-accessible>



informing live policy development at the time of the request and that there is a stronger public interest of 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) of FOIA to refuse the request.

36. However, going forward, where circumstances change, and the policy development surrounding the reform is no longer 'live', the Commissioner considers that the balance of the public interest may also change.

## Right of appeal

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37. 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)

38. 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.
39. 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 .....**

**Laura Tomkinson  
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SK9 5AF**