

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 August 2022

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

#### Decision (including any steps ordered)

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1. The complainant made a request for information relating to the Home Office's response to Lord Faulk's independent review into the Judicial Review Process.
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 does not require the Home Office to take any steps as a result of this notice.

#### Request and response

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4. On 23 November 2020, the complainant wrote to the Home Office and requested information in the following terms:  
  
"I would be grateful if you could please provide the following information:  
  
The Home Office's response to Lord Faulk's independent review into the Judicial Review Process."
5. On 5 January 2021 the Home Office refused the request under section 36(2)(c).

6. The Home Office provided an internal review on the 17 March 2021 upholding its original decision and explaining that it was additionally engaging section 35(1)(a) to withhold the requested information.

## 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. The Independent Panel submitted their Report to the Lord Chancellor and the Chancellor of the Duchy Lancaster in January 2021 and has now been disbanded.
8. The IRAL was created as a result of the Government's manifesto commitment. The commitment was to ensure that Judicial Review is available to protect the rights of individuals against an overbearing state, whilst also making sure it is not abused to conduct politics by another means or to create needless delays.
9. The Panel was 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.
10. The review looked at a range of data and evidence including relevant caselaw on the development of Judicial Review and went on to consider whether reform is justified.
11. The task formed part of the Lord Chancellor's duty to defend our world-class and independent courts and judiciary that lie at the heart of the British justice and the rule of law.
12. The Panel was disbanded in January 2021, following the submission of their report to Government.<sup>1</sup>
13. 14 Government Departments responded to the call for evidence which the IRAL conducted from 7 September to 26 October 2020, the following document provides a summary of those responses:  
[summaryofgovernmentstothelRAL.pdf \(justice.gov.uk\)](#).

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<sup>1</sup> [The Independent Review of Administrative Law \(justice.gov.uk\)](#)

14. The Government response to the consultation which ran from 18 March to 29 April 2021 can be viewed at: [Judicial Review: Proposals for Reform - Ministry of Justice - Citizen Space](#).

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## Scope of the case

15. The complainant contacted the Commissioner in 2021 to complain about the way his request for information had been handled.
16. The Commissioner has therefore considered whether the Home Office was correct to refuse this request under section 35(1)(a) and 36(2)(c).

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## Reasons for decision

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### Section 35 – Formulation of government policy

17. Section 35(1)(a) provides that information held by government departments 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.
18. 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 policy options in private.
19. The Commissioner's guidance on section 35<sup>2</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".

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<sup>2</sup> [government-policy-foi-section-35-guidance.pdf \(ico.org.uk\)](#)

20. 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.
21. 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 formulates or develops its policy will be sufficient to engage the exemption.

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

22. In its submission to the Commissioner, the Home Office confirmed that at the time of internal review it was now applying section 35(1)(a). It confirmed that at the internal review stage the Ministry of Justice had received Lord Faulks's report and evidence base and was using that material to formulate policy proposals. It therefore concluded that the Home Office submission to the review relates to the formulation or development of government policy.
23. In its submission the Home Office referred to paragraph 14 of the Tribunal decision in *DFES v Information Commissioner and the Evening Standard* that states:

"This means the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough. Information may 'relate to' the activity due to its original purpose when created, or its later use. Or its subject matter. Information created before the activity started may still be covered if it was used in or affected the activity at a later date".
24. It also referred to the following at paragraph 6 and 26 of the decision which it claimed were relevant to its argument:

"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 and options in private." [paragraph 6]

"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." [paragraph 26]

25. The Home Office explained that the process that was undertaken is a typical process of policy formulation, from review, to consultation, to Government proposal reform. It explained that Lord Faulk's review was commissioned by the government and even at that stage, and notwithstanding the reservations expressed when the original response to the request was formulated, it considers that the Home Office response to the review did relate to the formulation or development of Government policy. It pointed out that it certainly did so by the time the internal review was conducted.
26. The Commissioner notes that policy and its development is not defined in FOIA, however the Commissioner's own guidance states:

"...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 proposal on how to achieve those objectives."
27. The Commissioner's guidance at paragraph 27 also states:

"There is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms."
28. The Commissioner is mindful that a recent First Tier Tribunal in Public Law Project v IC & MoJ EA/2021/0378 found that the submissions to the IRAL, including the Home Office's submission, were information relating to the formulation and development of government policy:

"As to the question of whether the Unpublished Submissions "relate to" the formulation and development of government policy on the reform of judicial review, in our conclusion an affirmative answer to this question is beyond dispute. The content of the Unpublished Submissions is far from being incidental to the formulation and development of the Government's policy. The Unpublished Submissions cover a range of broad themes, all relating to the reform of judicial review."
29. Therefore, having viewed the withheld information, the Commissioner is satisfied that the information relates to the formulation or development of government policy.

## **Public interest test**

30. 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.

#### Considerations in favour of disclosure

31. The Home Office recognised that there will always be some public interest in disclosure of this type of information to promote government transparency and accountability to increase public awareness.
32. The Home Office explained that the issues under consideration by the IRAL are of constitutional importance, and the evidence on which the Panel's report is based will provide context to the Panel's conclusions. It therefore acknowledges that there is legitimate public interest in that evidence being released.

#### Considerations in favour of maintaining the exemption

33. The Home Office explained that the Panel must have a safe space to develop ideas, debate live issues, and reach decisions away from external interference. It also explained that the Panel's Report relates to a live policy issue with further details yet to be announced and further advice to be put before Ministers before they reach a decision. It stated that the live nature of this policy requires that the information requested should not be disclosed as this would impact on decisions taken by the Government in relation to the development of this policy.
34. The Home Office argued that the disclosure of the requested information would inhibit the free and frank discussions by Ministers and government officials relating to this policy, producing a 'chilling effect' and thereby damaging the quality of the advice given and potentially lead to poor quality decisions being made. This would result in a lower standard of Government service provided to the public.
35. In its submission to the Commissioner the Home Office referred to both the Tribunal and High Court which have accepted that effective government required a safe space in which to formulate and develop policy; in *Department of Health v Information Commissioner* (EA/2013/087), 17 March 2014, the Tribunal stated:

"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.”

The balance of the public interest

36. The Commissioner agrees that the evidence on which the Panel’s report is based will provide context to the Panel’s conclusions. The Commissioner also accepts that there is legitimate public interest in that evidence being released.
37. The Commissioner however accepts that a safe space is needed to develop ideas, debate live issues, and reach decisions away from external interference and that the need for a safe space will be strongest when the issue is still live. As the Home Office has confirmed that the Ministry of Justice was using the material at the time of the request and internal review response to formulate policy proposals, the Commissioner believes that disclosure of the information could impact those policy decisions and undermine the safe space needed for policy formulation and development.
38. The Commissioner therefore finds that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosure at the time of the request.
39. Since the Commissioner’s decision is that the Home Office was entitled to rely on the exemption at section 35(1)(a) in respect of all of the withheld information, he has not gone on to consider section 36 separately.

## 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: 0300 1234504

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 .....**

**Laura Tomkinson**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**