

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 January 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Home Office is entitled to withhold some of the requested information associated with a meeting between the Rt Hon Chris Philp MP and Facewatch Ltd under section 35(1)(a) of FOIA. The information relates to the formulation of government policy and the public interest favours non-disclosure. The Home Office breached sections 1(1), 10(1) and 17(1) of FOIA as it didn't comply with section 1(1) or issue a refusal notice within the statutory timeframe.
2. It's not necessary for the Home Office to take any corrective steps.

Request and response

3. On its website, Facewatch Ltd describes itself as "the UK's leading facial recognition retail security company." The Rt Hon Chris Philp MP is the Minister for Crime, Policing and Fire.
4. The complainant made the following information request to the Home Office on 16 March 2023:

"I am writing to request the following information relating to Facewatch

A copy of any meeting agendas and minutes [virtual or in person] between Chris Philp and Facewatch [or its representatives]

A copy of any emails between Mr Philp and Facewatch [or its representatives] since he took up his post at the Home Office in October 2022

I would like all document sent electronically please..."

5. The Home Office initially advised that it didn't hold any relevant information. In their request for an internal review on 19 May 2023, the complainant pointed out that on social media, Facewatch had referred to a meeting it had had in March 2023 with Minister Philp. This suggested to them that the Home Office would hold relevant information.
6. The Home Office provided an internal review on 24 July 2023. It now confirmed that it did hold information within scope of the [first part of] the request. The Home Office disclosed this information with some information redacted under section 35(1), section 40(2) (personal data) and section 43(2) (commercial interests) of FOIA.
7. As a result of the complaint to the Commissioner, the Home Office reconsidered its response to the request. In its submission to the Commissioner the Home Office advised that it now considers that, as well as sections 40(2) and 43(2), the information it's withholding under section 35(1)(a) of FOIA is also exempt under section 36(2)(b)(ii) (prejudice to the effective conduct of public affairs). The Home Office also confirmed that it doesn't hold information within scope of the second part of the request.

Reasons for decision

8. The complainant confirmed that the focus of their complaint was the Home Office's application of section 35(1)(a), and 43(2) in the alternative, to some of the information they've requested. If and where the Commissioner finds that section 35(1)(a) isn't engaged, he will also consider the Home Office's application of section 36(2)(b)(ii) - and 43(2) - to the withheld information. Finally, the Commissioner will consider procedural aspects of the Home Office's handling of the request.
9. The withheld information, a copy of which the Home Office has provided to the Commissioner, is in a summary of a meeting held on 8 March 2023 between representatives of Facewatch and Minister Philp.

Section 35 – formulation of government policy, etc

10. Section 35(1)(a) of FOIA says that information held by a government department is exempt information if it relates to the formulation or development of government policy.
11. Section 35 isn't a prejudice-based exemption; it's class-based. That means that the information must simply fall within the class of information described. If the withheld information relates to the formulation or development of government policy, it's exempt information. The timing of a request isn't relevant. The question is whether the information relates to the activity, irrespective of when the request was made. However, section 35 is a qualified exemption which means that it's subject to the public interest test.
12. In its submission to the Commissioner, the Home Office has discussed the policy that the requested information relates to but considers that reproducing that detail in this notice "would itself cause prejudice." As above, section 35 is class-based and not prejudice-based; however, the Commissioner won't discuss here all the detail the Home Office provided to him.
13. The Home Office has noted that amendments to a government Bill and the shaping of any future Bill by definition relate to the formulation or development of government policy. It considers that the withheld information relates to the formulation or development of government policy notwithstanding that ultimately there were no legislative changes in this case.
14. The Home Office has told the Commissioner that the policy process was live at the time of the request and to an extent still is; it has provided a link to published letter from the Minister to the police¹ which dates from October 2023. The Home Office notes that facial recognition is still a live policy area "subject to development" and there are still policy decisions being made around the use of facial recognition technology in policing.

¹ <https://www.gov.uk/government/news/letter-to-police-on-ai-enabled-facial-recognition-searches>

15. As such, the Home Office says that there's a need for a safe space to formulate and develop policy in relation to facial recognition technology before this is pre-empted by dealing with early public or media scrutiny.
16. As the Home Office has gone on to note, the First-tier Tribunal has taken the view that the terms 'relates to' and 'formulation and development of policy' should be interpreted broadly (see Department for Education and Skills [DfES] v Information Commissioner and the Evening Standard (EA/2006/0006) (19 February 2007), at paragraph 53). The High Court has agreed that section 35 'is in very wide terms', albeit in the context that it does not create a presumption of a public interest in non-disclosure (Office of Government Commerce v Information Commissioner and HM Attorney General on behalf of the Speaker of the House of Commons, [2008] EWHC 737 (Admin), at paragraph 79).
17. Referring back to the decision in DfES, the Commissioner's guidance on section 35(1) states that: "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."
18. The Home Office has also noted that the following two extracts from the Commissioner's guidance are also relevant:
 - "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."
 - "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."
19. The Home Office says that at least some of the information in the read out – by which the Commissioner understands the Home Office to mean the information it's withholding - relates to policy formulation as characterised above. This is because it represents the Minister's thinking on what the government's position should be and how it might be reflected in legislation. As such, the Home Office's position is that section 35(1)(a) of FOIA is engaged.
20. The Commissioner has taken account of the complainant's arguments; namely:

- From the disclosed information, it appears that significant parts of the meeting consisted of “asks” from Facewatch to the Minister, including a letter to lobby the ICO. This aspect of the information doesn’t fit within the bounds of section 35(1)(a).
 - The information also includes a discussion about the Minister potentially making a speech promoting the benefits of facial recognition. This is something which later occurred, with the Minister mentioning Facewatch specifically.
 - The Minister has since addressed the House of Commons on 19 July 2023 in a debate on retail crime, speaking favourably of the company without referring to it by name. However he made no mention of any policy in relation to the company or its activities, instead suggesting that the ICO has allowed it to proceed.
 - It’s therefore difficult to see how this information relates to an area of live policy development. This is because when the Minister was given a clear opportunity to demonstrate such a policy or the development of one in the House of Commons, the Minister didn’t mention it.
 - Section 35 doesn’t apply to every discussion that occurs within government. It’s incumbent on the public body to be able to show that there’s a live area of policy development. At best this meeting is tangential to government policy on public sector facial recognition. There’s no public evidence that the government is seeking to develop policy on private sector facial recognition.
21. However, having reviewed the withheld information, and in line with the matters discussed at paragraph 11, the Commissioner’s satisfied that the information to which the Home Office has applied section 35 relates to the formulation of a particular policy. The Commissioner is therefore satisfied that the Home Office was entitled to rely on section 35(1)(a) of FOIA to withhold information within scope of the complainant’s request. He’s gone on to consider the associated public interest test.

Public interest test

22. The complainant has presented the following arguments in favour of disclosing the withheld information:
- There’s significant public interest in the issue of Facewatch’s use of live facial recognition. The company has been subject of numerous media article over the past 12 months, as has the growing use of live facial recognition more generally.

- Meetings between ministers and companies that offer controversial technology are inherently of heightened public interest.
 - Parts of the non-redacted information also suggest that there's significant public interest in the remaining information being disclosed. At the time of the meeting and the initial request Facewatch was the subject of an ongoing investigation by the Information Commissioner's Office in relation to its compliance with data protection regulations. The disclosed information indicates that Facewatch asked if the Minister could write to the ICO to support its claims about retail crime, something the Minister agreed to do.
 - If a Minister of the Crown sought to influence an ongoing investigation by the independent data protection regulator, there would be major public interest in information that evidenced that this course of action was agreed.
 - The fact that the Minister referred uncritically to Facewatch, albeit not by name, and its statistics in the House of Commons further adds to the need for general transparency around this meeting.
 - It's clear from the disclosed remarks that the company has the Minister's approval and it's important that the public be made aware of the contents of any meeting which impacts a Minister's viewpoint.
23. The Home Office has repeated the public interest arguments it provided in its internal review. Namely, that there's a clear public interest in transparency and in understanding the policy to which the policy relates. However, while government policy is still being developed and before decisions are made, it's also in the public interest that officials and ministers have a safe space to develop and review policy options, including having discussions with third parties about those policy ideas.
24. In its submission the Home Office has also noted that both the First-tier Tribunal and the High Court have accepted that effective government needs a safe space in which to formulate and develop policy.
25. As noted, the Commissioner has reviewed the withheld information and he doesn't share the complainant's concerns. The information simply evidences a meeting at which certain views, opinions and facts were shared and discussed.
26. Public interest arguments associated with section 35(1)(a) must focus on the effect of disclosing the information in question at the time of the request, rather than the effect of routinely disclosing that type of information. Public interest matters also needs to be considered at the

time the public authority should have responded to the request and take account of the circumstances as they were at that point. In this case, the policy in question was 'live' at the time of the request and time at which the Home Office should have issued its refusal notice, and no final decisions had been made. The Commissioner therefore considers that there was greater public interest in protecting the 'safe space' in which to debate that policy issue, away from external interference and distraction.

27. Since the Commissioner has found that section 35 is engaged and that the balance of the public interest favours maintaining this exemption, it hasn't been necessary to consider the Home Office's application of section 36(2)(b)(ii) and section 43(2) to the same information.

Procedural matters

28. Under section 1(1) of FOIA a public authority must (a) confirm whether it holds information that's been requested and (b) communicate the information to the applicant if it's held and isn't exempt information.
29. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
30. And under section 17(1) a public authority must issue a refusal notice in respect of any exempt information within the same timescale.
31. In this case, the complainant submitted their request on 16 March 2023. Having initially advised it didn't hold any relevant information, it was 24 July 2023 before the Home Office confirmed it did hold relevant information, communicated some of it and issued a refusal notice in respect of the remainder.
32. The Home Office therefore didn't comply with sections 1(1), 10(1) and 17(1) of FOIA.

Other matters

33. Offering an internal review isn't a requirement of FOIA but is a matter of good practice. The Commissioner recommends that a public authority provide an internal review within 20 working days and, in the most complex cases only, within 40 working days as a maximum.

34. In this case, in its response to the request the Home Office offered to provide an internal review. The complainant requested an internal review on 19 May 2023 and the Home Office provided one on 24 July 2023. This was outside the recommended 20 working days and the Commissioner has recorded this for monitoring purposes. The Home Office hadn't indicated that it considered the request was particularly complex, but its review was also provided outside the maximum 40 days recommended.

Right of appeal

35. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

36. 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.
37. 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

Cressida Woodall
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