

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 25 April 2024

**Public Authority:** HM Treasury  
**Address:** 1 Horse Guards Road  
Westminster  
London  
SW1A 2HQ

### Decision (including any steps ordered)

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1. The complainant has requested information regarding the Infected Blood compensation scheme.
2. HM Treasury (HMT) disclosed a small amount of information but withheld the majority of the requested information. HMT redacted some of the information under sections 35(1)(a) (formulation or development of government policy), 35(1)(b) (Ministerial communications), 35(1)(d) (the operation of any Ministerial private office) and 40(2) (personal information). The complainant challenged the application of the exemptions, except for section 40(2).
3. The Commissioner's decision is that HMT is entitled to rely on sections 35(1)(a), 35(1)(b) and 35(1)(d) in respect of the withheld information. The Commissioner has also considered HMT's delay in providing a response and has found that HMT breached section 10(1) in respect of sections 1(1)(a) and 1(1)(b) of FOIA, as well as section 17(3) in respect of the substantive refusal notice.
4. The Commissioner does not require any further steps as a result of this decision notice.

### Request and response

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5. On 22 August 2022, the complainant wrote to HMT and requested information in the following terms:

"Please provide copies of email and written correspondence held by the Private Office of the Chancellor of the Exchequer

regarding Infected Blood Compensation during the period 1st April 2022 - 20th August 2022.”

6. HMT provided interim responses on 21 September 2022 and 19 October 2022 and said it was considering the public interest test.
7. HMT issued its substantive response on 14 July 2023 and confirmed it held information falling within the scope of the request. HMT released some information and explained that redactions had been made under exemptions 35(1)(a), 35(1)(b), 35(1)(d) and 40(2).
8. The complainant requested an internal review of the handling of their request for information. They confirmed they did not dispute the application of section 40(2) but did wish to challenge the application of sections 35(1)(a), 35(1)(b) and 35(1)(d).
9. HMT provided the outcome of its internal review on 15 August 2023 and upheld its original response.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 6 September 2023 to complain about the way their request for information had been handled.
11. In their request for an internal review the complainant stated that they did not wish to challenge the application of section 40(2).
12. The Commissioner therefore considers that the scope of this case is to determine whether HMT is entitled to rely on the following exemptions to withhold parts of the requested information:
  - Section 35(1)(a) - the formulation or development of government policy;
  - Section 35(1)(b) - Ministerial communications; and
  - Section 35(1)(d) - the operation of any Ministerial office.

### **Reasons for decision**

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#### **Section 35(1)(a) – formulation or development of government policy**

13. 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”.

14. Section 35 is a class-based exemption; therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt. There is no need for the public authority to demonstrate prejudice to these purposes.
15. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy 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 process involved in improving or altering existing policy, such as piloting, monitoring, reviewing, analysing or recording the effect of existing policy.
17. Whether information is related 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 by Cabinet or the relevant minister;
  - the Government intends to achieve a particular outcome of change in the real world;
  - the consequences of the decision will be wide-ranging.
19. Although 'relates to' is given a wide interpretation, as the Court of Appeal noted in *Department for Health v The Information Commissioner and Mr Simon Lewis* [2017] EWCA Civ 374,

"[the phrase] should not be read with uncritical liberalism as extending to the furthest stretch of its indeterminacy but instead must be read in a more limited sense so as to provide an intelligible boundary, suitable to the statutory context" and that a "mere incidental connection between the information and a matter specified in a subparagraph of s.35(1) would not bring the exemption into play; it is the content of the information that must relate to the matter specified in the sub-paragraph".
20. Therefore there must be a clear and tangible relationship between the content of the information withheld under this exemption and the process that is being protected (ie the formulation or development of policy).

21. The Commissioner's guidance on section 35(1)(a)<sup>1</sup> sets out that information does not need to have been created as part of the formulation or development of government policy. Information may 'relate to' the formulation or development of government policy due to its original purpose when created, or its later use, or its subject matter.
22. The exemption is not limited to information that contains policy options, advice or decisions. Pre-existing information about the history or factual background of a policy issue may also be covered.

### **The complainant's arguments**

23. The complainant disputed that the requested information related to the formulation or development of government policy. The complainant cited the Commissioner's guidance which states:

"The exemption does not cover information relating purely to the application or implementation of established policy. It is therefore important to identify where policy formulation or development ends and implementation begins".

24. The complainant went on to say that the Government had already accepted the moral case for compensation,<sup>2</sup> and had paid £100,000 in interim compensation payments to those infected, still alive and bereaved partners. Because of this the complainant argued that it is far more likely that the information requested refers to "the application or implementation of established policy". He suggested that it likely related to what the Paymaster General referred to in the House of Commons as "taking forward work strands" relating to Infected Blood compensation.
25. Therefore, the complainant disputed the assertion that the formulation of policy relates to the principle of Infected Blood compensation itself.
26. Furthermore the complainant stated that:

"the Government asked Sir Robert Francis KC to undertake a compensation framework study some years ago, separately from the Infected Blood Inquiry. Sir Robert's independent study was delivered to the government well over a year ago and the Paymaster General informed the House of Commons in December 2022 that Sir Robert was advising the government on how best to introduce his compensation framework."

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

<sup>2</sup> Citing HC Deb, 15 December 2022, c1249

27. Therefore the complainant questioned why HMT had cited the 'formulation' of policy as reason for redaction of the information. They argued that:

"The term 'formulation' of policy refers to the early stages of the policy process" and this is not the stage at where the Infected Blood compensation policy is at. This is because interim payments have been made and the framework has existed for over a year."

28. The complainant also raised issue with the use of the term "framework" which is specifically used in the Commissioner's guidance. They argued that this is significant because "given that the framework was delivered to government a year ago":

"In this context, the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework sets in stone some fundamental details, but also inevitably leaves more detailed decisions to be made by those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – ie without altering the original objectives or rules – is likely to be an implementation decision rather than policy development."

29. The complainant went on to say "even if some information is shown to be captured by section 35(1)(a) it does not necessarily then follow that the same information is also covered by section 35(1)(b) or section 35(1)(d) and vice versa."

### **HMT's arguments**

30. HMT explained in its refusal notice that the requested information relates to Infected Blood compensation which remains a live issue on which decisions continue to be taken. HMT had therefore applied section 35(1)(a) to a small portion of the information. It went on to reference a recent statement in the House of Commons which went into more detail about the ongoing issue.
31. In its internal review, HMT explained that whilst it had accepted the moral case for the payment of compensation and made interim payments, it maintained that the overall policy remains in its development stages, as referenced by the Prime Minister and the Chancellor of the Exchequer in August 2023 inquiry hearings.
32. HMT argued that the interim report is detailed and it is therefore important that the Government considers the complexities when preparing its response.

33. Following the study carried out by Sir Robert Francis, a report was published in 2022 followed in July of that year by the Public Inquiry which published an interim report recommending the Government pay interim compensation. Interim payments were then made and, in April 2023, a further interim report was published which recommended a broadly scoped compensation scheme. It was expected that the final report would be published in Autumn 2023 but the complexity of the issue meant it was delayed until March 2024.
34. As such HMT considered that "Whilst some of the emails are about interim compensation, where a decision has been reached, this does not mean that this policy area is complete and separate from our ongoing policy development on final compensation. All decisions on interim compensation pertain to our outstanding decisions on final compensations, the two are intrinsically linked and it is not possible to distinguish one from the other."
35. HMT said that this remains a live policy issue as the Government is awaiting the final report from the Inquiry in March 2024 before responding. It added that there are still outstanding decisions meaning that cross-government policy development continues, specifically in relation to the areas where information was withheld.
36. In its submissions to the Commissioner, HMT stated:

"the information within scope is discussing outstanding policy issues such as if the Government will accept all the Inquiry's recommendations, and on areas such as the legality, risk, quantum and delivery of the final compensation scheme."
37. Having reviewed the withheld information and HMT's submissions, the Commissioner accepts that the specified withheld information relates to the formulation and development of government policy, which in this case, is the final Infected Blood compensation scheme.
38. The Commissioner is conscious of the complainant's position that the policy position as to whether compensation should be given had already been made and anything further is implementation.
39. However, the Commissioner's guidance confirms that policy formulation may continue after the announcement of the policy or legislation has been passed:

"For complicated policies, it is possible that formulation may continue even after this point. In some cases the government announces a high-level policy, or passes a 'framework' bill into law, but leaves the finer details of a policy still to be worked out. The high-level policy objective has been finalised, but detailed

policy options are still being assessed and debated. Later information about the formulation of the detailed policy will still engage the exemption.”

40. The Commissioner understands that while the Government had agreed with Sir Robert’s recommendation, and Sir Brian Langstaff’s<sup>3</sup> endorsement, that compensation should be paid, the final compensation scheme had yet to be formulated with key decisions still to be legislated for.
41. HMT went on to explain that although some of the information within scope is emails about interim compensation, this does not mean that the policy is complete. It remained of the position that decisions about policy development and compensation are ongoing.
42. HMT also said that there are still ongoing discussions and unresolved issues in relation to the overall compensation scheme, such as how the Government should establish an arm’s-length body, how delivery will be managed across the UK, and the scope of eligibility for compensation. It set out that “all decisions on interim compensation pertain to our outstanding decisions on final compensations”.
43. Consequently the Commissioner accepts that the information withheld under section 35(1)(a) relates to the development of the final Infected Blood compensation scheme and therefore section 35(1)(a) is engaged. The Commissioner has considered the public interest test in respect of the three limbs of section 35 together as set out below.

### **Section 35(1)(b) - Ministerial communications**

44. Section 35(1)(b) states that:

“Information held by a government department or by the Welsh Government is exempt information if it relates to –(b) Ministerial Communications”.

45. In its submissions to the Commissioner HMT explained that this exemption has been applied to information that references meetings between the Minister for the Cabinet Office and the Deputy Prime Minister/ Chancellor of the Duchy of Lancaster and “a decision on the scope of interim payments at that time given the complexity an further work needed.”
46. Having reviewed the withheld information the Commissioner is satisfied that it constitutes Ministerial communications.

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<sup>3</sup> Currently chairing the public inquiry into the scandal



### **Section 35(1)(d)-**

47. Section 35(1)(d) states that:

“Information held by a government department or by the Welsh Government is exempt information if it relates to – (d) the operation of any Ministerial private office.”

48. In its submissions to the Commissioner HMT explained that:

“The information withheld is the email address of the Chancellor’s, the Chief Secretary to the Treasury’s and the Financial Secretary to the Treasury’s Private Offices used for receiving incoming emails. These are internal mailbox addresses and are not public facing. We consider that section 35(1)(d) is engaged in relation to this information as the orderly receipt of emails is integral to the way that Private Office operates.”

49. Having reviewed the withheld information the Commissioner is satisfied that it relates to the operation of the Ministerial private offices described above.

### **Public interest in disclosing the information**

50. HMT acknowledged the public interest in transparency and accountability of government departments and, specifically in this case, a public interest in the Government’s response to the Infected Blood case.

51. It recognised that it is understandable for people to want to understand more about such a “longstanding injustice, where suffering has gone on for decades.” HMT said that recognition of this interest had been demonstrated in the release of some information.

52. The complainant argued that insufficient weight had been given to the fact that many of those infected and affected by infected blood products do not think that the Government is progressing with the established policy of paying compensation in relation to Infected Blood. They considered that disclosure would increase public confidence that the Government is doing what it says it is doing. They also considered that if the information itself indicates that the Government is not doing what it says it is doing, then the public interest would favour the public knowing that is the case.

53. They went on to say that in light of the lack of transparency from the government in the story of the Infected Blood scandal, increased weight should be given to the disclosure of the requested information.



## **Public interest in maintaining the exemptions**

### **Section 35(1)(a)**

54. In its response to the Commissioner HMT explained that the Infected Blood policy is not finalised, because "it is not distinguishable from the wider compensation scheme which is yet to be finalised". HMT stated that it is necessary for Ministers and officials to have a safe space to develop a live policy away from external interference and distraction.
55. Equally, HMT argued that there are areas of discussion and consideration within the interim compensation scheme which, at the time of the request, remained open. HMT said that "for the purposes of the FOI regime, the interim and wider compensation packages cannot be distinguished from each other because discussion from the former overlap with ongoing discussions from the latter".
56. HMT further explained that there is a risk that disclosing the information at the time of the request would lead to officials becoming less willing to share advice in a free and frank manner, particularly in relation to this sensitive policy area. HMT said "this could have a chilling effect on the candidness and the quality of advice provided, particularly in a policy area like this which draws a very high level of scrutiny and controversy".
57. In this instance at the time of the request, this policy was still very much a live issue, HMT considered that officials needed to be able to express their contributions candidly, and without fear that those contributions will be made public when the wider issue is still ongoing.

### **Sections 35(1)(b) and 35(1)(d)**

58. HMT considered that it is important for Ministers to be able to discuss issues frankly and freely without the fear of release. If this were to be inhibited by the prospect of release, the quality of debate is likely to be restricted which would not be in the public interest. It added that this was because, at the time of the request, the policy was a live issue and conversations were ongoing, and as such could be impacted by the release of the information outside the wider scope of a completed policy.
59. In respect of section 35(1)(b), HMT focused on its argument that withholding the information was necessary to prevent the undermining of ministerial collective responsibility. It explained that the Infected Blood inquiry is a collective inquiry and requires a response across several government departments such as the Cabinet Office and the Department of Health & Social Care. Releasing this information, which includes correspondence regarding the compensation, may discourage similar vital interactions in the future between these departments which would not be in the interests of the public.

60. HMT confirmed that the email address withheld under section 35(1)(d) is not public facing. HMT already has public facing contact details that enable the public to contact the Department and its Ministers. Therefore HMT argued that there was no need to disclose this email address, and that to do so would undermine the effectiveness of the Private Office

### **The balance of the public interest**

61. The Commissioner considers that the exemption at section 35(1)(a) is about the freedom to have free and frank discussion on the formulation and development of policy and the protection of the overall process of policy making. Consideration of the public interest is not limited to the specific content of the information in question, but should examine whether the disclosure of that information would inhibit that process.
62. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are themselves free and frank; equally the information only needs to 'relate' to the formulation or development of policy.
63. Therefore, if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order to not inhibit the free and frank provision of advice and the formulation or development of policy. This will depend on the facts of each case.
64. The Commissioner has inspected the withheld information in detail. He considers that the nature of the information is largely as would be expected, varying from factual information to potential issues and concerns and the direction the development of policy should go. Furthermore, the Commissioner considers that, in relation to the process of giving advice and frank discussions, it is not unreasonable to conclude that there is a real and significant risk that officials would be less candid in future when offering similar information should they consider that this information could be disclosed. Particularly in instances where the requested information is part of a 'live' topic or includes information that is recent.
65. The Commissioner accepts that significant weight should be given to safe space arguments – ie the concept that the Government needs a safe space to develop ideas, debate live issues and reach decisions away from external interference and distraction – where the policy making is live and the requested information relates to that policy making. In this case the Commissioner is satisfied that the infected blood inquiry and the formulation of policy in relation to it is a live issue.

66. The Commissioner acknowledges HMT's argument that withholding the information was necessary to prevent the undermining of ministerial collective responsibility and, considers that this further adds weight to the safe space argument. Specifically, in this case where several Government bodies are contributing to the formulation and development of policy on a 'live' issue.
67. Whilst the Commissioner accepts that the public interest in maintaining the exemption will be strongest while the policy is still being formulated or developed, this does not convert the exemption to an absolute one where information will not be disclosed simply because of the stage that the policy process has reached. There will be occasions where the government policy is at the formulation or development stage and the public interest in disclosure is sufficiently strong that the public interest in maintaining the exemptions will not outweigh this.
68. The Commissioner's guidance on section 35(1)(a) clearly sets out that, in addition to the timing of the request, the relevance and weight of the public interest arguments will depend on the content and sensitivity of the information itself and the effect of its release in all the circumstances of the case.
69. In the specific circumstances of this case, the Commissioner accepts that there is a strong public interest in transparency regarding the Infected Blood Scandal and the Government's handling of the compensation scheme. However, he considers that the public interest in affording the Government the space to develop its policy on the final Infected Blood compensation scheme outweighs this.
70. He notes that, at the time of the request, the Government had not yet formally responded to the second interim report<sup>4</sup> and had confirmed that it intended to await the final report before doing so.<sup>5</sup> In the Commissioner's opinion it would not be in the public interest to release information relating to a policy still in its development stages, since to do so, in this case, would be detrimental to the Government's confidence in a safe space to develop policy through free and frank discussions.
71. The Commissioner acknowledges the public interest in understanding how the government is progressing the Compensation Scheme and that there is dissatisfaction at the time taken so far, as pointed out by the complainant, to provide a finalised position. However, having reviewed

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<sup>4</sup> <https://www.infectedbloodinquiry.org.uk/reports/second-interim-report>

<sup>5</sup> <https://hansard.parliament.uk/Commons/2023-04-19/debates/FF839159-15EB-4102-980F-98EFA3B7775E/InfectedBloodInquiryUpdate>

the withheld information, he is not persuaded that disclosure would significantly further this public interest.

72. Equally the Commissioner recognises that HMT has released some information to the public in relation to the inquiry such as the study carried out by Sir Robert Francis<sup>6</sup> which was published in June 2022. Following this in July 2022 the Public Inquiry published an interim report<sup>7</sup> this was followed by a second interim report<sup>8</sup> which was published in April 2023 with a final report due to be published May 2024<sup>9</sup>. This has further persuaded the Commissioner of the limited value in the withheld information being released to the public.
73. In conclusion, the Commissioner is satisfied that the public interest in maintaining the exemptions outweighs the public interest in disclosure. In reaching this finding, the Commissioner has placed particular weight on the timing of the request, ie that disclosure would have resulted in information relating to the final compensation scheme being placed into the public domain before the Government had made its policy decision on this.

## Procedural matters

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### **Section 1: general right of access**

### **Section 10(1): time for compliance**

### **Section 17: refusal notice**

74. Section 1(1)(a) of FOIA requires a public authority to inform the requester in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the requester unless a valid refusal notice has been issued.
75. Section 10(1) requires that the public authority comply with section 1 promptly, and in any event no later than 20 working days after the date of receipt of the request.
76. Section 17(3) of FOIA states that where a public authority is relying on a qualified exemption, it may have a "reasonable" extension of time to consider the public interest in maintaining the exemption or disclosing the information.

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<sup>6</sup> <https://www.infectedbloodinquiry.org.uk/reports/infected-blood-compensation-framework-study>

<sup>7</sup> <https://www.infectedbloodinquiry.org.uk/reports/first-interim-report>

<sup>8</sup> <https://www.infectedbloodinquiry.org.uk/reports/second-interim-report>

<sup>9</sup> <https://www.infectedbloodinquiry.org.uk/news/publication-inquiry-report-0>

77. FOIA does not define a “reasonable” extension of time. However the Code of Practice issued under section 45 of FOIA<sup>10</sup> states that

“it is best practice for an extension to be for no more than a further 20 working days”.

78. The Commissioner is of the view that the total time spent responding to a request should not exceed 40 working days unless there are exceptional circumstances<sup>11</sup>.

79. In this case the request for information was made on 22 August 2022 and although HMT provided interim responses whilst it assessed the public interest, it did not provide a substantive response until 14 July 2023. At this point it confirmed that it held the requested information and disclosed some information, issuing a refusal notice in respect of the remainder.

80. The Commissioner finds that HMT failed to comply with section 10(1) in conjunction with section 1(1)(a) and 1(1)(b). This is in respect of failing to confirm or deny that the requested information was held, and failing to disclose information that was not exempt, within the 20 day time for compliance.

81. The Commissioner also finds that HMT failed to comply with section 17(3) because it failed to provide the outcome of its public interest consideration within a reasonable time.

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<sup>10</sup> <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

<sup>11</sup> <https://ico.org.uk/for-organisations/foi/guide-to-managing-an-foi-request/timescales/>

## Right of appeal

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82. 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)

83. 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.

84. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Sarah O' Cathain**  
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**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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