

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 March 2024

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

Decision (including any steps ordered)

1. The complainant has requested a copy of “any action plan or similar document” on how to increase the use of facial recognition in policing. The Home Office refused to disclose the requested information citing section 35(1)(a) of FOIA (the exemption for the formulation or development of government policy). Following its internal review, the Home Office maintained that section 35(1)(a) applied to all the withheld information but additionally relied on sections 31(1)(a) (the exemption for the prevention or detection of crime) and 40(2) (the exemption for personal information) of FOIA for some parts of the information in scope of the request. During the latter stages of the Commissioner’s investigation, the Home Office said it no longer wished to rely on section 31(1)(a) of FOIA. In addition, the complainant confirmed that she was not concerned with the information being withheld under section 40(2) of FOIA so the Commissioner has disregarded this aspect.
2. The Commissioner’s decision is that the Home Office was entitled to rely on section 35(1)(a) of FOIA for the reasons set out in this notice.
3. No steps are required as a result of this decision.

Background

4. The Home Office has explained to the Commissioner:

“This is a fast-moving policy area, and the Home Office understands the importance of providing information to facilitate public debate,

including in Parliament. We therefore published a police use of facial recognition factsheet¹ on 29 October 2023.

Since the original request was received, the Policing Minister has made regular public statements on police use of the technology, including in Parliament. Further information will be provided as the policy develops”.

Request and response

5. On 4 August 2023, the complainant wrote to the Home Office and requested information in the following terms:

“A copy of any action plan or similar document outlining what senior police officers, or police and crime commissioners, could do to increase police use of facial recognition technology.”

6. The Home Office responded on 31 August 2023 and refused to provide the requested information citing and refused to provide the requested information citing section 35(1)(a) of FOIA – the exemption for the formulation or development of government policy.

7. The complainant requested an internal review on 5 September 2023, stating:

“In my view the Home Office has not sufficiently demonstrated that the requested information relates to the development of government policy, and that in any instance the public interest lies in disclosing most of, if not all of, the information requested.”

8. Following its internal review the Home Office wrote to the complainant on 27 September 2023. It maintained that section 35(1)(a) applied to all the requested information but also now said that additional FOIA exemptions applied to parts of the withheld information, as follows:

- Section 31(1)(a) – the prevention or detection of crime
- Section 40(2) – personal information

¹ <https://homeofficemedia.blog.gov.uk/2023/10/29/police-use-of-facial-recognition-factsheet/>

Scope of the case

9. The complainant contacted the Commissioner on 11 October 2023 to complain about the way her request for information had been handled.
10. The complainant submitted detailed grounds of complaint in relation to sections 31 and 35 of FOIA, all of which the Commissioner relayed to the Home Office for its consideration.
11. On 12 December 2023, in response to an enquiry made by the Commissioner, the complainant confirmed she was not concerned with any information being withheld under section 40(2), so the Commissioner has not considered this aspect any further.
12. During the Commissioner's investigation, the Home Office advised that it no longer wished to rely in section 31(1)(a) of FOIA.
13. The Home Office wrote to the complainant on 4 March 2024 to confirm it was still relying on section 35(1)(a) of FOIA. When doing so it disclosed what it referred to as "the factual background information used to support policy development".
14. On 4 March 2024, the Commissioner contacted the complainant for any final comments following the partial disclosure. The complainant replied as follows:

"The disclosed information doesn't adequately respond to my FOIR request, as it provides only very generic information about how facial recognition technology works, rather than how police forces plan to increase its use. Please do continue with your full review."
15. The Commissioner has considered the application of section 35(1)(a) of FOIA to the requested information. He has viewed the withheld information.

Reasons for decision

Section 35 - Formulation of government policy, etc

16. 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.
17. 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".

18. The purpose of section 35(1)(a) is to protect the integrity of the policy making 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.
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 formulates or develops its policy will be sufficient to engage the exemption.
21. The Home Office considers that section 35(1)(a) of FOIA applies to the requested information in its entirety.
22. In its submission to the Commissioner, in support of its view that section 35(1)(a) applies in this case, the Home Office explained:

"At the time of the request the development of the policy was live and ongoing, and still is. The policy development process involves the generation and analysis of options, the identification of risks, consultation with experts, and the submission of recommendations to ministers, who subsequently determine further action to be taken. In this case there are many different policy strands which are at various stages of progress, and depending on decisions taken, could affect the overall policy outcomes.

When the request was received on 4 August 2023 the documents in scope were those prepared for meetings held with policing, experts and academics. The purpose of the meetings was to help inform policy development. Section 35(1)(a) is designed to protect good government and provide a safe space to consider policy options in private. The disclosure of information relating to the development of facial recognition policy, including discussions on policy options and the creation of supporting documents, particularly when the policy itself is still being developed, would

undermine the integrity of the policymaking process and result in less robust, well-considered, and effective policy.”

23. The Commissioner has noted the complainant’s views, expressed in her grounds of complaint, which were as follows:

‘Section 35(1)(a) applies to the formulation of government policy, which the ICO defines as the "design of new policy, and the process of reviewing or improving existing policy". I note that the requested information was a document referred to as an "Action Plan" given to senior policing figures with guidance on what they could do to increase police use of facial recognition technology. An "action plan" or similar document with action points clearly suggests that a path forward [e.g. policy] has broadly been settled and the document contains policy itself, rather than contributing to its development. Given this it is my view that much of the document requested will likely not relate to the formulation of development of policy, as Section 35(1)(a) applies to and is instead a statement of policy or policies that the Home Office has outlined as options for the police forces in receipt of the document. In this case the exemption would cease to apply.

The argument that the government has formulated its policy to encourage police to use facial recognition more widely is reinforced by the letter signed by the Home Secretary and Minister for Policing dated August 28th, where it was stated that the ministers wanted forces to employ PND [Police National Database] facial recognition more frequently. This is clearly a statement of policy and further makes the case that policy on police use of FR [facial recognition] has been broadly decided, and then communicated to PCCs [Police and Crime Commissioners].

There is strong evidence to suggest that the requested information is the expression of what policies the government has decided on, and is communicating these to police - meaning that Section 35(1)(a) does not apply in this case. I asked the Home Office to disclose the information on review, however the Home Office maintained the applicability of the exemption for all the information while offering no evidence to address my arguments about the evidence suggesting that the documents relate to execution rather than formulation of policy.’

Is the exemption engaged?

In his guidance on section 35², 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. The arguments presented by the complainant above indicate that she considers that the requested information relates to a policy that “has broadly been settled” and which “has been broadly decided”. However, the Home Office has argued that the policy development was ‘live’ at the time of the request and remains ‘live’ now in 2024. It has explained that there are a number of policy strands which are ongoing and that will feed into, and impact upon, the overall facial recognition policy.
26. Having regard to these views, and having considered the withheld information, the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged. This is because all of the withheld information relates to the ongoing development of policy on the use of facial recognition in policing.

Public interest test

27. 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.
28. 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.

Public interest arguments in favour of disclosure

29. The complainant’s views in favour of disclosure are as follows:

² <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

"Firstly, the controversial nature of facial recognition technology, the use of which is often criticised in the press, opposition MPs and even by the government's own backbench MPs makes the general public interest in information about facial recognition significant and it should be afforded much greater weight in the Home Office's balancing test.

There is also additional public interest in transparency on how the Home Office influences operational policing and the impact of communications between elected officials [PCCs] and ministers. It is also valuable to the public to present a full picture of how the Home Office is lobbying policing bodies to implement facial recognition, as at present all that is known is vague encouragement in the aforementioned letter in addition to ministerial media comments.

Recent controversy surrounding the policing minister's relationship with private facial recognition companies also adds weight to the public interest in favour of disclosure, as there are questions around influence over independent regulators and the relationship between the state and private companies using LFR [live facial recognition]. Due to the very significant additional arguments in favour of disclosing in the public interest, the Home Office's lack of evidence to prove policy liveness and the dearth of specific arguments advanced by the Home Office relating to disclosing the particular information [as the Home Office instead relies on weak, generic chilling effect and safe space arguments], it is my view that in most if not all circumstances the public interest tips clearly towards disclosure and I ask that the ICO requires the Home Office to release this information."

30. The complainant also provided more details about her views as to disputing that the facial recognition policy is 'live', the need for Ministers and officials to have a 'safe space' and the 'chilling effect' arguments, all of which the Commissioner has taken into account.
31. The Home Office recognised the public interest in members of the public being able to understand the policy on police use of facial recognition and recognised that disclosure could improve public understanding and provide accountability in terms of the quality of policy decision-making.

Public interest arguments in favour of maintaining the exemption

32. The Home Office said it had considered the arguments put forward by the complainant in her grounds of complaint and told the Commissioner that:

"...we respectfully disagree with her assessment that the information requested falls outside section 35(1)(a) and that the

balance of the public interest in disclosure outweighs the public interest in maintaining the exemption. The broader public interest in effective and informed policy making outweighs the arguments she has put forward. The development of the government's policy on police use of facial recognition is an ongoing process, involving many strands, each at different stages, and ICO guidance acknowledges the concept of ongoing policy development. Even if a document contains action points, it may still be intricately linked to the ongoing development of the policy rather than indicating a finalised decision as in this case".

33. The Home Office also argued that:

"...whilst there is clearly public interest in police use of facial recognition, this does not equate to there being a 'public interest' in disclosing the information requested at the time it was requested, because they are policy development documents".

34. In addition the Home Office referred the Commissioner to a previously issued related decision notice (IC-247479-F4W5³) and maintained that the paragraphs 47-50 from that notice apply equally to the current case.

Balance of the public interest test

35. The Commissioner has considered the withheld information and the arguments put forward by both parties.

36. 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.

37. 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.

38. The Commissioner recognises the general public interest in transparency, openness and accountability. In this case, he recognises that disclosure of the withheld information would enable the public to

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028140/ic-247479-f4w5.pdf>

scrutinise government policy relating to what the Commissioner recognises is considered, by some, to be a controversial subject.

39. He accepts that there is a public interest in the disclosure of the withheld information to the extent that it can inform public debate and understanding of how Government develops policy. Disclosure may improve public understanding of the policymaking process and provide accountability in terms of the spending of public money on this area of work.
40. The Commissioner has considered the public interest argument relating to preserving a 'safe space'. He considers that significant weight should be given to safe space arguments – ie the concept that the Government needs a safe space to develop areas, debate live issues and reach decisions away from external interference and distraction – where the policymaking is live and the requested information relates to that policymaking.
41. The Commissioner recognises that policy development needs some degree of freedom to enable the process to work effectively. He accords significant weight to the public interest in not prematurely disclosing information which was, at the time of the request, and still remains, under consideration regarding ongoing policymaking in this area.
42. This is so that policy consideration can be uninhibited and to ensure delivery of the best outcomes in relation to policies that cover the use of facial images and facial recognition technology.
43. It is also noted that, although not available at the time of the request, more information about this subject matter is now available online (via the link in footnote 1) which, the Commissioner considers goes some way to satisfying the public interest in this subject.
44. Having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at the time of the request was of sufficient significance for him to conclude that maintaining the exemption outweighed the public interest in disclosure.
45. It therefore follows that the Commissioner finds that the Home Office has properly relied on section 35(1)(a) of FOIA in relation to the request under consideration in this notice.

Right of appeal

46. 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

47. 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.
48. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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