

2 November 2023

**IC-264739-F8F4**

**Request**

You asked us:

*"I am writing to make a Freedom of Information Act request for the response made by the Information Commissioner's consultation to its consultation with you on the development of the draft Data Protection (Fundamental Rights and Freedoms) (Amendment) Regulations 2023:  
<https://www.gov.uk/government/publications/the-data-protection-fundamental-rights-and-freedoms-amendment-regulations-2023> It is stated in the explanatory memorandum that such consultation took place (see [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/1183749/the-data-protection-fundamental-rights-and-freedoms-amendment-regulations-2023-em.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1183749/the-data-protection-fundamental-rights-and-freedoms-amendment-regulations-2023-em.pdf), para. 10.1) but no further information is provided."*

We received your request on 18 October 2023.

We have handled your request under the Freedom of Information Act 2000 (the FOIA).

**Our response**

I can confirm that we hold information in scope of your request.

In line with Article 36(4) of the UK GDPR, the Department for Science, Innovation and Technology (DSIT) consulted with us on the development of the statutory instrument (SI) referenced in your request.

We provided advice to DSIT which falls in scope of your request. However, we are withholding it under section 36 of the FOIA.

Section 36(2)(c) provides that –

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*

*(c) would other prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

Section 36 is not an absolute exemption, and we must consider the prejudice or harm which may be caused by disclosure. We also have to carry out a public interest test to weigh up the factors in favour of disclosure and those against.

We find that disclosure would inhibit the free and frank exchange of views between parties in relation to future A36(4) consultations. This in turn would harm our ability to influence the development of legislation in the future.

The matter is still considered to be open and ongoing at this stage because the SI is yet to be subject to parliamentary scrutiny. The sifting committees in both Houses of Parliament are considering whether the SI should be subject to affirmative or negative resolution procedure.

There is a strong public interest in transparency in respect of A36(4) consultations and in making our views and advice on proposed SIs known. This would lead to wider scrutiny of SIs, which is in the public interest.

However, there is also a strong public interest in maintaining our relationship with DSIT and other external stakeholders. While we note that there is a legal requirement on DSIT to consult with us on the development of legislation, disclosure of information at this stage would reduce the level of candour in future consultations. Stakeholders should feel able to consult with us freely and frankly without fear of exchanges being made public while the matter is still ongoing. This would in turn would enable us to provide the most effective, accurate and informed advice possible.

For the reasons given above, the Qualified Person has approved the use of the Section 36 exemption to the information concerned as the weight in maintaining the exemption outweighs that of disclosure.

This concludes our response to your request.

### **Next steps**

You can ask us to review our response. Please let us know in writing if you want us to carry out a review. Please do so within 40 working days.

You can read a copy of our full review procedure [here](#).

If we perform a review but you are still dissatisfied, you can complain to the ICO as regulator of the FOIA. This complaint will be handled just like a complaint made to the ICO about any other public authority.

You can [raise a complaint through our website](#).

### **Your information**

Our [Privacy notice](#) explains what we do with the personal data you provide to us, and set out your rights. Our retention schedule can be found [here](#).

Yours sincerely



Information Access Team  
Strategic Planning and Transformation  
Information Commissioner's Office, Wycliffe House, Water  
Lane, Wilmslow, Cheshire SK9 5AF  
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