

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 29 February 2024

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

#### Decision (including any steps ordered)

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1. The complainant has requested a copy of a policy on the use of facial recognition in policing from the Home Office. The Home Office refused to disclose the requested information citing section 35(1)(a) (Formulation of government policy) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on this exemption. He does not require further steps.

#### Background

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3. 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 factsheet<sup>1</sup> on 29 October 2023.

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

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

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

“I understand the Home Office has recently produced a document setting out its policy on the use of facial recognition in policing — and that this document was the subject of discussion by a panel of experts last month.

Please provide a copy of this document”.
5. On 30 June 2023, the Home Office responded. It refused to provide the requested information citing section 35(1) of FOIA.
6. The complainant requested an internal review on 6 July 2023.
7. The Home Office provided an internal review on 15 September 2023, in which it maintained its position. However, it clarified that it was relying on section 35(1)(a) of FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 5 September 2023 to complain about the way his request for information had been handled. He said:

“I believe the Home Office has failed to meet the criteria required to invoke Section 35(1) and has neglected to consider a series of compelling factors in favour of disclosing the requested information”.
9. During the Commissioner’s investigation, the Home Office disclosed what it referred to as “the factual background information used to support policy development” to the complainant. However, whilst this may have been of some interest to him, it was not what was specifically requested and the Commissioner has therefore proceeded to a decision notice in respect of the actual document requested.

10. The Commissioner will consider the application of section 35(1)(a) to the requested policy document. He has viewed the withheld information, which consists of a "DRAFT Implementation plan" dated 21 April 2023.

## Reasons for decision

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### Section 35 - Formulation of government policy, etc

11. 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.
12. 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".
13. 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.
14. 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.
15. 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.
16. The Home Office considers that section 35(1)(a) applies to the requested policy document in its entirety.
17. In relation to the requested information, the Home Office told the complainant that its policy on the use of facial recognition in policing was still 'live'. 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.

There is only one document in scope, which was prepared for a meeting held with experts and academics”.

18. When requesting an internal review the complainant argued:

“The use of facial recognition by the police is a hugely contentious and fast-changing area of policy, with significant implications for civil liberties and human rights. Just this week the EU passed a law banning the use of facial recognition for policing in all but a small number of circumstances. In the UK, the police’s use of facial recognition is both broad and accelerating — and has been openly endorsed by the Home Office. Recent press reports state that policing minister Chris Philp told the biometrics and surveillance camera commissioner of ‘his desire to embed facial recognition technology in policing and is considering what more the government can do to support the police on this’.

There is a significant public interest in releasing information that enhances the public’s understanding of the UK government’s position on this issue and the support being offered to UK police forces as they expand their use of this controversial technology.

Adding weight to the public interest in disclosure is the fact that I understand that the requested information is at an advanced stage of development. It is reasonable to expect that government policy should be subject to public consultation and that this exercise should solicit views from a wider audience than a handful of individuals”.

### **Is the exemption engaged?**

19. In his guidance on section 35<sup>2</sup>, 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".
20. 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.
21. The arguments presented by the complainant above indicate that he accepts that the requested information relates to a policy that is under development, but is of the view that it should be open to further public consultation, thereby agreeing with the Home Office about the nature of the request.
22. 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 as the withheld information relates to the on-going development of policy on the use of facial recognition in policing.

### **Public interest test**

23. 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.
24. 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**

25. The complainant's views are included at paragraph 18 above.
26. The Home Office recognised the "general public interest in openness and transparency in government, which will serve to increase public trust". It

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

also understood 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**

27. The Home Office has argued that:

“... it is vital to the process of preparing robust and effective policy, that officials are able to exchange free and frank advice (and opinions) with senior officials, Ministers and stakeholders. Section 35 is a time sensitive exemption provision, and in the context of this request covers a policy area that is 'live'. Arguments against disclosure are at their peak when a policy remains live and ongoing. Allied to this, there are important considerations about providing a safe space for policy development around current areas of HM Government business”.

### **Balance of the public interest test**

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

29. 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.

30. 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.

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

32. 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.

33. 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.

34. 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.
35. 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.
36. 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.
37. 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.

## **Other matters**

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38. Although they do not form part of this notice the Commissioner wishes to highlight the following matter of concern.

## **Timeliness**

39. The complainant did not refer to the length of time taken by the Home Office to respond to both the request and internal review in this case. Accordingly, the Commissioner has not considered either matter. However, as both were late, these delays have been recorded for monitoring purpose.

## **Information Notice**

40. As the Home Office failed to respond to the Commissioner's enquiries in a timely manner it was necessary for him to issue an Information Notice in this case, formally requiring a response. The Information Notice will be published on the Commissioner's website.

41. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual<sup>3</sup>.

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<sup>3</sup> [https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1\\_0.pdf](https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf)



## Right of appeal

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42. 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)

43. 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.
44. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Carolyn Howes**  
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