

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2024

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

Decision (including any steps ordered)

1. The complainant requested information associated with a meeting between the Rt Hon Chris Philp MP and Facewatch Ltd from the Home Office. The Home Office disclosed some information, with redactions under sections 35(1)(a) of FOIA (the formulation or development of government policy), 40 (personal information) and 43 (commercial interests). The Home Office withheld some further information (a briefing document) by virtue of section 36(2)(b)(i) of FOIA (the free and frank provision of advice).
2. The Commissioner's decision is that the Home Office was entitled to withhold the requested information within the readout under section 35(1)(a) of FOIA. As he has found section 35(1)(a) to apply to all the redactions within the disclosed readout, the Commissioner has not needed to consider the Home Office's reliance on sections 40 and 43 of FOIA. He also finds that the Home Office was entitled to withhold the briefing document in its entirety by virtue of section 36(2)(b)(i) of FOIA. In both cases, the Commissioner has concluded that the public interest favours non-disclosure.
3. No steps are required as a result of this notice.

Background

4. 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.
5. A meeting took place on 8 March 2023 between representatives of Facewatch Ltd and the Rt Hon Chris Philp MP.

Request and response

6. On 1 August 2023, the complainant wrote to the Home Office and requested information in the following terms:

“Under the Freedom of Information Act 2000 I wish to see full copies of all minutes, agendas, action logs and briefing materials for the meeting between Chris Philp MP, Home Office officials and Facewatch Limited held on 08 March 2023.

Please also include any other materials that were handed out or received during the meetings, such as presentations, reports, etc..”.

7. Having extended the response time so it could consider the relevant public interest tests, the Home Office responded on 11 September 2023. It provided some information within the scope of the request, namely the minutes (referred to as ‘readout’) of the Facewatch meeting, with redactions under the following exemptions:
 - Section 35(1)(a) – the formulation or development of government policy
 - Section 40(2) – personal information
 - Section 43(2) – commercial interests.
8. The Home Office refused to provide the remaining information in its entirety, namely the Facewatch briefing material. It cited the following FOIA exemption as its basis for doing do:
 - Section 36(2)(b)(i) – disclosure would, or would be likely to, inhibit the free and frank provision of advice.
9. The complainant requested an internal review on 12 September 2023.
10. Following its internal review the Home Office wrote to the complainant, late, on 7 November 2023 and maintained its original position.

Scope of the case

11. The complainant contacted the Commissioner on 8 November 2023 to complain about the way his request for information had been handled, stating:

“As I said in my IR [internal review] review I believe the redactions under sections 35 and 43 are excessive, especially the decision to completely withhold the requested briefing materials in full under section 36.”

12. The complainant subsequently confirmed to the Commissioner that he wanted the information redacted under section 40(2) of FOIA to form part of the investigation.
13. The Commissioner has reviewed all the withheld information and considered the Home Office’s reliance on sections 35, 40 and 43 of FOIA in relation to the redactions made within the disclosed Facewatch readout. He has also considered whether the Home Office was entitled to rely on section 36(2)(b)(i) of FOIA in relation to the withheld Facewatch briefing information.

Reasons for decision

14. In its submissions to the Commissioner, the Home Office has explained that it considers section 35(1)(a) of FOIA to apply to all the redactions within the disclosed readout, with sections 40 and 43 of FOIA being cited in addition to section 35 for some of those redactions within the readout. The Commissioner has therefore first considered the Home Office’s reliance on section 35(1)(a) of FOIA.
15. The Home Office referenced a related decision notice¹ issued in January 2024, in which the Commissioner upheld its reliance on section 35 of FOIA for the same part-disclosed readout. The Commissioner’s previous decision notices are not legally binding, and he does assess each case on its individual merits. However, given the recency and relevance to part of the request under consideration here, the Commissioner has taken the earlier decision into account. The Home Office also confirmed

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4028021/ic-247587-g5w2.pdf>

that it had no further arguments to add beyond those submitted in the earlier decision.

Section 35 – formulation of government policy, etc

16. 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.
17. Section 35 is a class-based exemption. 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 is exempt information. The timing of a request is not 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 is subject to the public interest test.
18. In its submissions 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 has taken heed of the Home Office’s stance and has not reproduced all the detail provided to him in this notice.
19. 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.
20. Further, 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 police² which dates from October 2023 to evidence this. The Home Office stated 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.
21. Consequently, the Home Office has argued that there is a need for a safe space to formulate and develop policy in relation to facial

² <https://www.gov.uk/government/news/letter-to-police-on-ai-enabled-facial-recognition-searches>

recognition technology before this is pre-empted by dealing with early public or media scrutiny.

22. 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).
23. 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).
24. In relation to the decision in DfES, the Commissioner's guidance on section 35(1)³ 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."

25. The Home Office highlighted 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."

26. The Home Office argued that at least some of the information in the readout – by which the Commissioner understands the Home Office to

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

mean the information it has withheld - 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.

27. The complainant has not submitted any particular arguments for the Commissioner to take into account, beyond stating that he considers the extent of the redactions to be excessive.
28. However, having reviewed the withheld information, and in line with the matters discussed at paragraph 17, the Commissioner is satisfied that the information to which the Home Office has applied section 35 relates to the formulation of a particular policy.
29. It follows that the Commissioner is satisfied that the Home Office was entitled to engage section 35(1)(a) of FOIA to withhold the redacted information within the disclosed readout.

Public interest test

30. The Commissioner must next consider the associated public interest test.

Public interest arguments in favour of disclosure

31. The complainant has not submitted any specific public interest arguments in favour of disclosure.
32. The Home Office submitted the following arguments:

"We recognise that there is an inherent public interest in transparency and accountability regarding government documents. We also recognise the public interest in furthering public understanding of the issues with which public authorities deal. There is a clear public interest in the work of government departments being transparent and open to scrutiny."

Public interest arguments in favour of maintaining the exemption

33. In its substantive response to the request, the Home Office argued:

"Redacted information within the meeting minutes [ie readout] provides a record of discussion and advice relating to the development of government policy at the time. Thus, disclosure of this information would undermine the safe space to consider policy options in private which would undermine the development of government policy."

34. Following its internal review, the Home Office stated:

“However, while government policy is still being developed and before decisions are made, it is 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. Releasing information in this case would undermine the development of policy and future free and frank discussion required for effective policymaking.”

Balance of the public interest

35. 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.
36. The Commissioner acknowledges that the Home Office disclosed a redacted version of the readout with a view to being open, transparent and subject to public scrutiny.
37. In this case, the policy in question was ‘live’ both at the time of the request and at the time at which the Home Office issued its refusal notice, and no final decisions had been made. The Commissioner therefore accepts that the greater public interest lies in protecting the ‘safe space’ in which to debate that policy issue, away from external interference and distraction.
38. It follows that he finds the Home Office was entitled to rely on section 35(1)(a) of FOIA to withhold all the redacted information within the disclosed readout. Given that the Commissioner has found section 35(1)(a) to apply, he has not deemed it necessary to go on to consider the Home Office’s additional reliance on sections 40(2) and 43(2) of FOIA for some of the same information.
39. The Commissioner will next examine whether the Home Office was entitled to rely on section 36(2)(b)(i) to withhold the requested Facewatch briefing information.

Section 36 – prejudice to the effective conduct of public affairs

40. The Home Office has applied sections 36(2)(b)(i) to withhold the requested briefing information in its entirety. It said that no other information beyond the briefing document is held. It has relied on the lower threshold of prejudice ‘would be likely to’ effect this section of FOIA.

41. Arguments under section 36(2)(b)(i) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.
42. The Commissioner's guidance on section 36⁴ states that information may be exempt under section 36(2)(b)(i) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice as part of the process of deliberation.
43. The exemptions at section 36 can only be engaged on the basis of the reasonable opinion of a 'qualified person'. The Commissioner is satisfied that a Home Office Minister is authorised as the qualified person under section 36(5) of FOIA and that he gave his opinion on 31 August 2023 that the exemption was engaged. The Home Office stated that the Minister's opinion in this case was provided on the basis of reasoned advice and sight of the information in question.
44. The Commissioner has reviewed the submissions sent to the qualified person in this case. He accepts that it was reasonable for the qualified person to consider that there was a need to protect the confidentiality of discussions and deliberations between Facewatch Ltd and government. He is further satisfied that the qualified person's opinion - that inhibition would be likely to occur through disclosure of the withheld information - was reasonable. He is therefore satisfied that section 36(2)(b)(i) of FOIA was engaged correctly.

Public interest test

45. The Commissioner must next consider the associated public interest test.

Public interest arguments in favour of disclosure

46. The complainant has not submitted any specific public interest arguments in favour of disclosure.

⁴ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

The Home Office again recognised the public interest in transparency, aiding public understanding and being subject to scrutiny.

Public interest arguments in favour of maintaining the exemption

47. In its substantive response to the request, the Home Office argued:

“The briefing material provides a record of advice on the meeting with Simon Gordon [Director of Facewatch Ltd] and advice relating to the development of government policy. Disclosure of this information would likely prevent Ministers, officials or third parties from confidently discussing policies in the future. This would be likely to inhibit the free and frank provision of advice because views could not be held in confidence, which would not be in the public interest.”

48. In its submissions to the Commissioner, the Home Office argued:

“In favour of maintaining the exemption, the briefing constitutes relatively recent (and certainly so at the time of the request) written advice to a Minister from officials. Disclosure would be likely to inhibit the future free and frank provision of advice because it would mean that advice would have to be limited to information which the Home Office would be willing to place in the public domain. This would have a limiting and negative effect on the quality of internal and external discussion and decision-making in future and on the quality, honesty and comprehensiveness of advice to Ministers, which would not be in the public interest.”

49. It also said:

‘We recognise that, as the ICO’s guidance on section 36(2) says, Tribunals are generally sceptical of chilling effect arguments and that in *Davies v Information Commissioner and the Cabinet Office (GIA)* [2019] UKUT185 (AAC), 11 June 2019 the Upper Tribunal stated at paragraph 25 that:

“There is a substantial body of case law which establishes that assertions of a “chilling effect” on provision of advice, exchange of views or effective conduct of affairs are to be treated with some caution.”

We also understand that the reasons for this caution are that the FOIA has been in place for nearly twenty years and civil servants cannot guarantee that their advice will remain confidential. Officials “are expected to be impartial and robust when giving

advice, and not be easily deterred from expressing their views by the possibility of future disclosure”.’

50. Set against these arguments, the Home Office made the following points:

- First, we note that the Tribunal in the case cited above said that assertions of a chilling effect are to be treated with caution: it did not say that they are necessarily to be dismissed. If that were so, then it would seem to follow that section 36(2)(b)(i) and (ii) can have little or no application.
- Secondly, the briefing in this case was for a meeting with an external organisation ... Such briefing will typically contain a background assessment of the organisation and the approach to be taken towards it. We submit that such advice cannot be as candid and as detailed as it needs to be if the officials who draft it know that it could soon be available in the public domain under the FOIA, including to the external organisation in question. If discussions with external organisations are to be effective, then the Minister needs to be as fully briefed as possible. This might involve information which, for the time being at least, must remain confidential between the Minister and officials.
- Thirdly, we note that the ICO guidance says that the argument for non-disclosure is strongest when the issue is still 'live'. In this case, the meeting took place on 8 March 2023 and [complainant's name redacted] request was received on 1 August 2023. The meeting and the briefing were and still are therefore relatively recent.

51. The Home Office reiterated that the subject matter of the meeting is still a live policy area and there are still policy decisions being made around the use of facial recognition technology to tackle crime, there is a need for a safe space to provide candid briefings on companies working on facial recognition technology.

Balance of the public interest

52. The Commissioner considers the public interest in good decision-making by the Home Office to be a compelling argument in favour of maintaining the exemption. While he acknowledges that the public interest in openness and transparency would be served if the information was disclosed, on balance, he finds the public interest in protecting the Home Office's access to unfiltered and frank advice on these policy matters to be the stronger argument.

53. Consequently, the Commissioner is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that the Home Office was entitled to rely on section 36(2)(b)(i) of FOIA to withhold the requested briefing information.

Other matters

54. The Home Office took a considerable time to conduct an internal review. The Commissioner cannot consider the amount of time taken to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
55. Part 5 of the section 45 Code of Practice⁵ (the Code) states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
56. The Commissioner is concerned that it took almost two months for an internal review to be completed.
57. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in his FOI and Transparency Regulatory Manual⁶.

⁵https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

⁶ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

58. 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

59. 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.
60. 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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