

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 August 2024

Public Authority: Ministry of Housing, Communities and Local Government (MHCLG)

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested information from the Department for Levelling Up, Housing and Communities ("DLUHC") about a report on the Independent Review of the UK Government's Prevent Strategy. The DLUHC withheld the requested information under section 35(1)(a) (formulation or development of government policy), and parts of it under sections 24(1) (national security), 40(2) (personal information), and 42 (legal professional privilege) of FOIA.
2. DLUHC has recently changed name to the Ministry of Housing, Communities and Local Government ("MHCLG"). As this occurred after DLUHC's most recent correspondence with the Commissioner regarding this case, this decision notice refers to DLUHC throughout.
3. The Commissioner's decision is that the DLUHC is entitled to withhold the information under section 35(1)(a).
4. The Commissioner does not require further steps.

Request and response

5. On 13 October 2023, the complainant wrote to the DLUHC and requested information in the following terms:
 - "a. The DLUHC has confirmed that it holds communications between the DLUHC and Prevent Directorate in the Home Office regarding the draft report of the Independent Review of Prevent published 8 February 2023. Please provide records of any communications (such as emails, WhatsApp or text messages as well as records of any phone calls) between the Secretary of State / any other DLUHC officials and the Prevent Directorate in the Home Office relating to amendments to or comments on the draft report on the Independent Review of Prevent between 8 February 2022 and 8 February 2023. For the avoidance of doubt, RSI requests communications both sent and received by DLUHC officials relating to comments/amendments to the draft report during the relevant period.
 - b. Records of any meetings both in person and virtual (including appointments in diaries and/or meeting minutes) that took place between the Prevent Directorate in the Home Office and any DLUHC officials between 8 February 2022 and 8 February 2023 regarding the Independent Review of Prevent."
6. The DLUHC responded on 8 November 2023. It stated that the request was refused on the grounds of cost (section 12 of FOIA).
7. Following an internal review the DLUHC wrote to the complainant on 16 January 2024. It revised its response. It stated that the information was held but was exempt under sections 24(1) and 35(1)(a), and that parts of it were also exempt under section 40(2).

Scope of the case

8. The complainant contacted the Commissioner on 15 February 2024 to complain about the way their request for information had been handled, and specifically that the DLUHC was not entitled to withhold the information.
9. During the course of investigation, the DLUHC informed the Commissioner that it also sought to withhold part of the information under section 42 (legal professional privilege).
10. The scope of the following analysis is whether the DLUHC is entitled to withhold the information under section 35(1)(a). For the reasons given

in this decision, he has not considered it necessary to consider the DLUHC's reliance upon sections 24(1), 40(2), or 42.

Reasons for decision

Section 35(1)(a) – Formulation of Government Policy

11. Section 35 of FOIA states:

“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to—

(a) The formulation or development of government policy”

12. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

13. The Commissioner's guidance explains that there is no standard form of government policy. Policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant ministers. The key point is that policymaking can take place in a variety of ways and there is no uniform process.

14. However, 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 either by the Cabinet or the relevant ministers;
- The government intends to achieve a particular outcome or change in the real world; and
- The consequences of the decision will be wide-ranging.

15. Section 35 of FOIA is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described, in this case being the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.

16. The DLUHC advised that the policy to which the information relates is the Independent Review of Prevent, and the associated Prevent Programme. The DLUHC has explained that the request was received on 13 October 2023, by which date the Independent Review had already been published. However, the 12-month period to address recommendations through policy development and future application is ongoing. In particular, the DLUHC is still developing its counter-extremism action plan that was agreed as part of the Independent Review.
17. The DLUHC has advised that, whilst some statistical information has been withheld, this relates to ongoing work and no final decisions have been taken.
18. The DLUHC has provided a copy of the withheld information to the Commissioner. As this information is voluminous, representing approximately 1200 pages, the MHCLG has also indicated a sample that it considers to be representative of the whole. The Commissioner has reviewed this sample, and the arguments provided by the DLUHC. He is satisfied that the information relates to the stated policy, and at the time of the request was in the formulation or development stage.
19. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which 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.
20. The Commissioner is satisfied that the withheld information relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

The public interest test

21. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner has considered the context of the information in order to determine whether the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

The public interest arguments in favour of disclosure

22. The DLUHC acknowledges that "There is an interest in providing the public with insight into how the policy process takes place, and translates ministerial directions into changes at the operational level."
23. The DLUHC also considers that, as the Independent Review is a publicly available document, and will inform how the Prevent system eventually

operates, the disclosure of information about how the government negotiated its response to the review would allow greater understanding by the public of this.

24. The Commissioner perceives that there is a public interest in understanding how the government has responded to the review, as this will provide transparency about the submissions that were considered in by it, and how the Government may address its recommendations . Disclosure of the information may allow the public to understand the Government's approach to this and facilitate public debate.

Arguments in favour of maintaining the exception

25. The DLUHC argues that disclosure of the information would undermine the policymaking process relating to Prevent, and that policy officials must be able to "provide frank and occasionally critical advice to one another and ministers to strengthen the delivery of a policy". If policy advice and discussion is released without careful consideration, this may chill future discussion and hinder effective challenge and development of policy, and therefore hinder delivery of the Government's work.
26. The DLUHC further argues that the disclosure of the information, representing live discussions between the DLUHC and the Home Office, "could be used to undermine the delivery of both departments' work with respect to Prevent and communities/counter extremism policy by framing cooperation as collaboration and implying the securitisation of communities and counter-extremism to further national security."
27. The Commissioner notes that 'safe space' arguments will be at their strongest when the matter is still live. In this case the Commissioner understands that the request was submitted during a 12-month that was set to discuss the recommendations of the Independent Review and potential ways that these could be effected. As such, the Commissioner accepts that disclosure could result in a chilling effect, where officials would be less inclined to have fully effective and robust conversations due to concerns about public scrutiny.

Balance of the public interest

28. The Commissioner has considered the DLUHC's position, and a sample of the withheld information.
29. The Commissioner understands that, at the time of the request, the Independent Review had been published, but that the discussions on how its recommendations will be implemented through policy were ongoing.

30. The Commissioner accepts that the sensitivity of the subject matter will require careful consideration by Ministers when reaching a final view on the implementation of these recommendations. In particular, the Commissioner notes that the purpose of Prevent, and the aspects that need to be considered, means that this consideration will likely need to take into account matters related to national security, and the Commissioner notes that a substantial part of the information has also been withheld under the associated exemption (section 24(1)) of FOIA.
31. The Commissioner recognises that there is a public interest that matters relating to the development of Prevent are subject to appropriate transparency, and the Commissioner is aware that Prevent has been subject to significant scrutiny since its implementation. However, in this case the Commissioner perceives that the public interest in transparency is addressed by the publishing of the Independent Report¹, as this contains the independent analysis and recommendations that will inform the development of the Government's policy.
32. In the Commissioner's view, the balance of the public interest therefore lies in maintaining the exemption.
33. The Commissioner's decision is that the DLUHC has correctly applied section 35(1)(a) of FOIA to withhold the information.
34. Since the Commissioner has decided that the DLUHC is entitled to withhold the requested information under section 35(1)(a), he does not need to go onto consider the DLUHC's application of sections 24(1), 40(2) or 42 to some parts of the information.

¹ <https://www.gov.uk/government/publications/independent-review-of-prevents-report-and-government-response>

Right of appeal

35. 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

36. 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.
37. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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