

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** **13 November 2024**

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

### **Decision (including any steps ordered)**

---

1. The complainant has requested information relating to the National Business Crime Solution ('NBCS'). The Home Office agreed to disclose a transcript of a speech, but it said a meeting note was exempt under section 35(1)(a) (Formulation of government policy) of FOIA. In the event that the Commissioner disagreed, its reserve position was that sections 36(2)(b)(i) and (ii) (Prejudice to conduct of public affairs) applied to the information.
2. The Commissioner's decision is that sections 35(1)(a) and 36(2)(b)(i) are not engaged. As regards section 36(2)(b)(ii), the Commissioner's decision is that the exemption is engaged, but that in view of related information in the public domain at the time of the request, the public interest favours disclosure.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
  - Disclose the 'readout' requested in the second bullet point. Personal data of junior civil servants and private sector attendees who are not already identified in the published summary of the meeting, may be redacted. The information that the Commissioner has identified in paragraph 16 as falling outside of the scope of the request may also be redacted.

4. The Home Office must take these steps within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

---

5. On 17 November 2023, the complainant wrote to the Home Office and requested information in the following terms:

“I am writing to request the following information relating to Chris Philp's video for the National Business Crime Solution conference on 16th November:

1. A copy of the video message recorded by Chris Philp for that conference, any script or transcript of this video
  2. A copy of any meeting minutes, agenda or readout for any meetings between Mr Philp and the NBCS in 2023”.
6. The Home Office responded on 28 February 2024. It refused both parts of the request, citing:
    - section 35(1)(a) (formulation of government policy etc);
    - sections 36(2)(b)(i) and (ii) (prejudice to effective conduct of public affairs); and
    - sections 40(2) and 40(3A) (personal information).
  7. The complainant asked for an internal review on 29 February 2024, arguing that sections 35 and 36 are mutually exclusive and cannot be engaged by the same information. He also believed that the public interest had been considered incorrectly, and would be weakened once one of the exemptions was disappplied.
  8. The Home Office provided the internal review on 18 April 2024. It was satisfied that section 36(2)(b)(i) and (ii) applied to the information. However, in the event that any of the withheld information did not engage these exemptions, it said section 35(1)(a) applied to that information. It said that it had correctly assessed the public interest balance. It also maintained that section 40 had been correctly applied.

## Scope of the case

---

9. The complainant contacted the Commissioner on 14 May 2024 to complain about the way his request for information had been handled. He remained concerned about the application of section 35 and 36 to withhold the information. He was also concerned about the way the public interest test had been considered.
10. During the Commissioner's investigation, the Home Office revised its position on the request. It disclosed the transcript of the video, requested in the first bullet point of the request.
11. The complainant was clear in his complaint to the Commissioner that he wanted to receive a copy of the video address, or a transcript of it. The Commissioner therefore considers that the disclosure of the transcript satisfies the first bullet point of the request, and he has not considered it further in this decision notice.
12. As regards the second bullet point, the Home Office said it now considered that section 35(1)(a) provided the more compelling basis for withholding that information. However, in the event that the Commissioner disagreed, it also submitted supporting arguments in respect of section 36.
13. The analysis below considers the application of section 35 and section 36 of FOIA in respect of the second bullet point of the request.
14. The complainant has not disputed the application of section 40 to withhold personal data, and so the Commissioner has not considered the application of that exemption in this decision notice.

## Reasons for decision

---

### Information in scope

15. The Home Office maintains that the information requested in the second bullet point should be withheld. That information comprises a "readout" (a summary of the points discussed) of a meeting between Chris Philp MP (the former Minister for Crime and Policing), leading figures in policing and retail, and a representative of the NBCS.
16. The Commissioner has viewed the readout. While it is overwhelmingly concerned with the Retail Crime Action Plan and supporting measures, a small amount of the information in it (specifically, action point (4) and the section "AOB") refers to completely different law enforcement

matters, which do not pertain to retail crime or the NBCS. Bearing in mind that the request was specifically for information on Chris Phelps' engagement with the NBCS, and this information is not about that, the Commissioner is satisfied that this small amount of information falls outside the scope of the information described in the request. He has therefore excluded it from his consideration of the exemptions, and it need not be disclosed in response to this request.

### **Section 35 – Formulation of government policy etc**

17. Section 35(1)(a) of FOIA states:

“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. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes. However, it is then necessary to consider whether disclosure would nevertheless be in the public interest.
19. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations/submissions are put to a minister or decision makers.
20. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
21. 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 precise context and timing of the information in question. However, the Commissioner's guidance on section 35 is clear that the exemption does not cover information relating purely to the application or implementation of established policy<sup>1</sup>.

---

<sup>1</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#whatconstitutesformulation>

22. The Commissioner asked the Home Office to clarify which government policy or policies it considers the withheld information to relate to.

23. The Home Office said:

“The information relates to the Retail Crime Action Plan, which is a government initiative to tackle retail crime by setting out guidance to police and retailers, including new measures that will make it easier for police and businesses alike to deploy new technology and techniques to catch perpetrators and prevent new offences. The information withheld consists of readouts from a meeting between Chris Philp MP, the former Minister for Crime and Policing, leads in policing and retail, and the NBCS.

...

The former Minister for Crime and Policing met with members of the NBCS as part of discussions on the Retail Crime Action Plan. This was an important piece of engagement with stakeholders that contributed to live policy discussions on retail crime. This policy was in the process of being operationalised and was under development and formulation. The readout of the meeting reflects live discussions and intended direction of the policy. This policy has been in constant review and therefore further development since the time of the initial request and remains in review in light of the new administration’s focus on safer streets. The safer streets work will encompass retail crime and anti-social behaviour and so the release of minutes of the roundtable meeting would be likely to prejudice the discussions and engagement that will be taking place in future as this policy goes through further development.”

24. Having viewed the withheld information (and mindful of the purpose of the exemption) the Commissioner notes that the purpose of the meeting was to launch the Retail Crime Action Plan to key stakeholders. It is clear from the withheld information that the plan had, by then, been finalised and it had reached the ‘roll out’ stage. There was no discussion of other possible policy options documented in the record of the meeting. It therefore appears to the Commissioner that the withheld information only relates to the implementation of government policy and **not** to its formulation or development. As set out above, the exemption at section 35 does not apply to information which relates only to the implementation of a policy.

25. The Commissioner is therefore not satisfied that, in this case, the withheld information relates directly to the formulation or development of government policy. His decision is therefore that section 35(1)(a) of FOIA is not engaged.

## **Section 36 - Prejudice to the effective conduct of public affairs**

26. The Home Office said that in the event that the Commissioner disagreed that section 35 was engaged, he should consider instead the application of section 36(2)(b)(i) (inhibition to the free and frank provision of advice) and section 36(2)(b)(ii) (inhibition to the exchange of views for the purposes of deliberation) to withhold the readout.
27. To find that any part of section 36(2) is engaged, the Commissioner must establish that a 'qualified person' gave an opinion which found that the exemption applied and also that the opinion was 'reasonable'. If the Commissioner decides that the opinion is an unreasonable one, or that an opinion was not given, he may find that section 36 has been applied inappropriately.
28. The qualified person in this case was the then Minister for Crime, Policing and Fire, Chris Phelps (who is mentioned in the request) and the opinion was requested on 26 February 2024.
29. The submission that was put to him argued that section 36(2)(b)(i) was engaged in respect of the transcript requested in the first bullet point, while section 36(2)(b)(ii) was engaged in respect of the readout, requested in the second bullet point.
30. The qualified person gave his opinion on 28 February 2024 agreeing "...with the recommendation to engage sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA".
31. Although the Home Office says that the readout engages both section 36(2)(b)(i) and section 36(2)(b)(ii), as can be seen above, the qualified person was only asked to give his opinion on whether section 26(2)(b)(ii) applied to it.
32. Therefore, the Commissioner is unable to conclude that section 36(2)(b)(i) of FOIA is engaged in respect of the readout, as the qualified person was not asked to give an opinion on whether that particular exemption was engaged. The Commissioner has considered only the application of section 36(2)(b)(ii) from this point.

### **Was the opinion that section 36(2)(b)(ii) was engaged, 'reasonable'?**

33. When determining whether the exemption is correctly engaged, the Commissioner must decide whether the qualified person's opinion was a reasonable one. In doing so, the Commissioner will consider relevant factors. His primary consideration will be whether the prejudice or inhibition relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged does not relate to the specific subsection, the opinion is unlikely to be reasonable.

34. The Commissioner employs the plain meaning of the word reasonable - "in accordance with reason; not irrational or absurd". If it is an opinion that a reasonable person could hold, then it is reasonable.
35. With regard to the nature of the prejudice to which section 36(2)(b)(ii) relates, the Commissioner's guidance<sup>2</sup> explains that information may be exempt under section 36(2)(b)(ii) if its disclosure could inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when giving their views as part of the process of deliberation. The reason for this is that inhibiting the exchange of views may impair the quality of decision-making.
36. The exemption is concerned with protecting the processes that may be harmed by the disclosure of the information, rather than what is actually **in** the information. The issue to be considered is whether disclosure in this case, might, in future, inhibit the process of exchanging views for the purpose of deliberation. To engage the exemption, the information in question does not necessarily have to contain views that are in themselves notably free and frank. However, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could, realistically, inhibit the future exchange of views.
37. The qualified person had access to the request and to the withheld information when making his decision. The submission argued that the withheld information outlines "...various sensitive discussions around live policy" and that "Release of this information would then undermine the safe space to consider policy options in private and undermine the development of government policy."
38. The Commissioner would question the extent to which the readout outlines "sensitive discussions", but he acknowledges that it does record, in very general terms, the topics discussed in the meeting, and also that attendees (both internal and external) are identified. On balance, he finds that it was reasonable for the qualified person to reach the view from the submission that there was a need to protect the free and frank exchange of views between officials and those they consult, for the purposes of deliberation. He is further satisfied that the qualified

---

<sup>2</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

person's opinion - that inhibition 'would be likely to' occur through disclosure of the withheld information - was reasonable.

39. The Commissioner is therefore satisfied that section 36(2)(b)(ii) of FOIA is engaged in this case.

### **Public interest test**

40. Section 36 is subject to the public interest test, as set out in section 2 of FOIA. This means that although section 36(2)(b)(ii) is engaged, the withheld information must be disclosed unless the public interest in maintaining the exemption is stronger than the public interest in disclosure.

### **Public interest arguments in favour of disclosure**

41. The complainant advanced the following arguments in favour of disclosure:

"There is a specific public interest in transparency in the issue of retail crime due to the Home Office's focus on it.

There is also additional public interest in how parties with a direct interest in retail crime policy, such as the NBCS, lobby ministers in order to shape government policy. It is my view that on the balance of probabilities that such advocacy is contained in the those [sic] minutes and there is a specific public interest in disclosing information that outlines how ministers may have taken on board views from a limited subset of third party stakeholders.

Previous FOI disclosures from the Home Office have demonstrated that the Home Office has agreed to lean on independent regulators on behalf of certain companies in the area of retail crime.

This prior evidence creates an acute public interest in the public knowing how companies with a financial interest in anti-retail crime measures are lobbying and influencing ministers developing policy.

Project Pegasus, an anti-retail crime measure that may have been discussed, is also a subject of controversy in the media and any information on this also has connected specific public interest in transparency.

These arguments add significant weight to the scale in favour of disclosure and I ask that they please be accounted for by the Commissioner."

42. The Home Office said:



"We recognise that there is an inherent public interest in Ministerial meetings. We also recognise the public interest in furthering public understanding of governmental processes. There is a clear public interest in the work of government departments being transparent and open to scrutiny to increase diligence."

### **Public interest arguments in favour of maintaining the exemption**

43. The Home Office said that disclosing details of a recent meeting with external stakeholders would be likely to inhibit future, similar engagement:

"Discussion at the roundtable meeting were in a safe space of key industry experts and policing. Discussions were around live operational details, and policy discussions to tackle these are ongoing. It is important to safeguard these spaces so that a chilling effect does not inhibit future conversations."

44. The Home Office said this would have a limiting and negative effect on the quality, honesty and comprehensiveness of discussions, advice and decision-making.
45. It also offered arguments regarding the need to protect a 'safe space' to develop ideas, debate live issues, and reach decisions away from external interference and distraction.

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

46. The Commissioner considers that there is a presumption running through FOIA that openness is, in itself, to be regarded as something which is in the public interest. The disclosure of official information assists the public in understanding how public authorities make their decisions and carry out their functions, and this, in turn, fosters trust in them. Disclosure in this case would reveal something of the government's engagement with the policing and private sectors, regarding law enforcement policy. The question to be considered is whether the public interest is better served by permitting such public scrutiny, or by protecting the integrity of high level advisory and decision-making processes.
47. When balancing the public interest, the Commissioner will take account of matters as they stood between the time the request was received (17 November 2023) and the statutory time for compliance, 20 working days later. This is significant because, as regards safe space arguments, the Commissioner's guidance notes that such arguments only carry particular weight when policy development is still 'live'. Once a policy has been finalised, a safe space for deliberation will no longer be needed.

48. As set out in paragraph 24, the Commissioner considers that at the time of the request, the policy which the Home Office said the information relates to (the Retail Crime Action Plan) had been finalised and was in the implementation phase. The content of the readout appears to reflect this and it does not contain discussions of, or reference to, other policy options.
49. The Home Office has argued that the policy remains live, as the new government will likely make amendments in light of its policy focus on 'safer streets'. While this may be the case, such factors were not relevant considerations at the time the Home Office received and considered the request, which was some months before the election of a new UK government in July 2024. Accordingly, the Commissioner places little weight on the safe space arguments the Home Office has made.
50. When considering the application of section 36(2)(b), where the Commissioner finds that the qualified person's opinion was reasonable he will consider the weight of that opinion when applying the public interest test. In this case, the Commissioner recognises that the Minister had some involvement in the meeting in question and would likely be sensitive to the expectations of stakeholders regarding what information might, or might not, be shared more widely. These considerations feed into the wider 'chilling effect' arguments the Home Office has made.
51. The Commissioner has considered the Home Office's claim that disclosure would be likely to have a 'chilling effect' on future discussions and exchanges. It is his view that senior civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. However, he recognises that, in this case, external, private sector representatives were also present at the meeting, and that they do not habitually operate subject to FOIA. Were the withheld information to document their candid observations, or to attribute particular views to particular parties, obtained as a result of free and frank discussions with particular stakeholders, the Commissioner accepts that this could have a knock-on chilling effect on the willingness of private sector stakeholders to engage openly and honestly in future; the quality of advice received by the Home Office would likely be diminished and the quality of its decision-making, impaired.
52. However, the withheld information in this case does not contain any such contentious or sensitive material. The description of the discussions that took place is general, and it is restricted to overall topics, rather than specific details. The focus of the meeting was very much the roll-out of the policy.

53. Furthermore, on the day of the meeting, the government published a summary of it, on its website<sup>3</sup>. The summary outlines the Retail Crime Action Plan, its aims and implementation and includes direct quotes from several of the private sector stakeholders present. The summary goes into significantly more detail about the meeting, the policy and the views of particular stakeholders, than the withheld information does. As the Home Office saw fit to place that information in the public domain straight away, it is not clear to the Commissioner why it considers that the readout remains sufficiently sensitive that the public interest favours its continued withholding. The Commissioner cannot see that it contains anything of such sensitivity that, if disclosed, would be likely to result in significant prejudice to the willingness of stakeholders to engage on matters of public policy in future.
54. The Commissioner's guidance on the public interest test notes that chilling effect arguments about prejudice will not carry significant weight when there is already very similar information in the public domain, at the time of the request<sup>4</sup>.
55. Taking account of the information that was in the public domain about the matter, and the limited sensitivity of the withheld information, the Commissioner's decision in this case is that the public interest in transparency regarding public/private sector engagement over a piece of law enforcement policy is greater than that in maintaining the exemption.
56. His decision is therefore that the Home Office was not entitled to rely on section 36(2)(b)(ii) to withhold the readout. It must now take the steps in paragraph 3.

## **Procedural matters**

---

57. The Home Office breached sections 1 and 10 of FOIA by failing to issue a valid response within the 20 working day statutory time for compliance. The Commissioner has made a note of this for monitoring purposes.

---

<sup>3</sup> <https://www.gov.uk/government/news/action-plan-to-tackle-shoplifting-launched>

<sup>4</sup> <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/information-in-the-public-domain/>

## **Other matters**

---

58. It was necessary for the Commissioner to issue an information notice to obtain the Home Office's submissions on its handling of the request in a timely manner.
59. The notice will be published on the Commissioner's web site<sup>5</sup> in due course.

---

<sup>5</sup> <https://ico.org.uk/action-weve-taken/foi-regulatory-action/#information>

## Right of appeal

---

60. 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)

61. 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.
62. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Samantha Bracegirdle**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**