

Government policy (section 35)

Freedom of Information Act

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Introduction

1. The Freedom of Information Act 2000 (FOIA) gives rights of public access to information held by public authorities.
2. An overview of the main provisions of FOIA can be found in the [Guide to freedom of information](#).
3. This is part of a series of guidance, which goes into more detail than the Guide, to help public authorities to fully understand their obligations and promote good practice.
4. This guidance explains to central government departments how to apply the four exemptions contained in section 35 to protect good government and ensure a safe space for policymaking.
5. It includes examples of a number of previous cases where the Commissioner or Tribunal upheld the use of section 35, and some where it was rejected. These examples help to illustrate the issues, but it is important to remember that every new request should be considered on its own merits.

Overview

- Section 35 sets out four exemptions designed to protect good government and provide a safe space for policymaking. Only central government can use these exemptions.
- The exemptions are class-based, which means there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. The classes are broad and will catch a wide range of information.
- However, the exemptions are qualified by the public interest test. Even if an exemption is engaged, departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
- There is no automatic public interest in withholding information under a Section 35 exemption.
- Section 35(1)(a) covers any information relating to the formulation and development of government policy. Public interest arguments should focus on potential damage to

policymaking from the content of the specific information and the timing of the request. Arguments will be strongest when there is a live policy process to protect.

- Section 35(1)(b) covers communications between ministers and any information relating to those communications. There will be significant public interest in protecting collective responsibility if the information reveals the views of an individual minister on a government decision.
- Section 35(1)(c) protects legal advice from the Law Officers and decisions about whether to request this advice. Public interest arguments should focus on the extent to which disclosure would undermine the Law Officers' convention of confidentiality.
- Section 35(1)(d) covers information relating to the operation of ministerial private offices. Public interest arguments should focus on potential damage to the effective administration of the private office from the content of the specific information.

General principles of the exemption

6. 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.
7. It only applies to information held by central government departments or the Welsh Assembly Government. Other public authorities holding the same or similar information should instead consider section 36 (prejudice to the effective conduct of public affairs).
8. Section 84 defines "government department" as including a Northern Ireland department, the Northern Ireland Court Service, and any other body or authority exercising statutory functions on behalf of the Crown (not including Scottish bodies or the security services).
9. Section 35 is class-based, meaning departments do 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 will catch a wide range of information.

10. However, it is also qualified. This means that even if the exemption is engaged, departments must go on to apply the public interest test. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
11. Generally speaking, there is no inherent or automatic public interest in withholding information just because it falls within a class-based exemption. Departments will need to consider the content and sensitivity of the particular information and the effect its release would have in all the circumstances of the case before they can justify withholding the information. See the section below on the [public interest test](#) for more information on public interest arguments.
12. Section 35 actually sets out four separate classes of information. Departments should think of these as four separate exemptions. They may sometimes overlap, so that the same information falls within more than one of the exemptions. However, each has a slightly different emphasis. This means that even for the same information, the weight and focus of the public interest factors relevant to each exemption can differ. Departments should identify clearly which of the exemptions applies, and must explain the public interest balance for each one claimed.

‘Relates to’

13. Each of the four exemptions in section 35 covers information which relates to a particular activity. The term ‘relates to’ can be interpreted broadly: see [DfES v Information Commissioner & the Evening Standard \(EA/2006/0006, 19 February 2007\)](#).
14. 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. And information created after the activity was complete may still be covered if it refers back to the activity. See the guidance on each exemption below for more discussion and examples in the context of that exemption.

15. Note that the timing of the request is not relevant here. The question is whether the **information** relates to the activity, irrespective of when the request was made.
16. If the majority of a piece of information relates to a particular activity, any associated or incidental information will also relate to that activity, even if in isolation it would not be covered.
17. In practice, this means that there is generally no need to consider information line by line. If a document is clearly divided into sections which each cover a separate topic, departments can consider it section by section. If they cannot easily divide a document in this way, they can consider the document as a whole. If one purpose, use or subject of that document (or section) is a relevant activity, then everything within that document (or section) will relate to it.

Example

In [DfES v Information Commissioner & the Evening Standard \(EA/2006/0006, 19 February 2007\)](#), the Information Tribunal considered whether minutes of meetings about a funding crisis in schools were exempt. One of these documents gave a summary of the background to the crisis. The decision notice found that one bullet point suggesting a possible policy approach was covered, but the rest of the document was not.

The tribunal found that the whole document was covered: "If the meeting or discussion of a particular topic within it was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable."

18. The activity does not have to be the sole or even the main focus of the document (or section), as long as it is one significant element of it. However, this does not mean that a whole document will be covered just because it contains a minor passing reference to a relevant activity. In such cases only the actual reference itself will be covered.
19. However, in some cases departments will still need to go through a document in detail in order to isolate any statistical information. This is because once a policy decision has been made, any background statistical information cannot be

covered by sections 35(1)(a) or 35(1)(b). See the section below on [statistical information](#) for more details.

The formulation or development of government policy

20. Section 35(1)(a) covers information relating to the formulation or development of government policy:

35.—(1) 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

21. As with the other limbs of section 35, this is qualified by the public interest test. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
22. Once a policy decision has been made, the exemption cannot apply to any background statistical information. See the section below on [statistical information](#) for more details.
23. 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.
24. The Commissioner's understanding of the policy process in this context has been informed by a number of sources, including:
- [The Cabinet Manual](#) (1st edition October 2011)
 - [The Ministerial Code](#) (May 2010)
 - [Understanding the Formulation and Development of Policy in the Context of FOI](#), a UCL Constitution Unit report (2009)
 - [Making Policy Better](#), an Institute for Government report (April 2011)
 - [The Civil Service Reform Plan](#) (June 2012)

Defining government policy

25. FOIA does not define 'government policy'. Section 35(5) states that it will include the policy of the Executive Committee of the

Northern Ireland Assembly and the policy of the Welsh Assembly Government, but does not provide any further guidance.

26. The [Modernising Government](#) White Paper (March 1999) describes policymaking as: “the process by which governments translate their political vision into programmes and action to deliver ‘outcomes’, desired changes in the real world”. 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.
27. There is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms.
28. The Cabinet is the ultimate arbiter of all government policy. Significant policy issues or those which affect more than one department will be jointly agreed by ministers in Cabinet or Cabinet committee (although detailed policy proposals may then be developed within one department). See Chapter 4 of [The Cabinet Manual](#) (1st edition October 2011).
29. However, not all government policy will need to be discussed in Cabinet and jointly agreed by ministers. Some policies will be formulated and developed within a single government department, and approved by the minister responsible for that area of government.
30. It is not only ministers who are involved in making government policy. Civil servants – and, increasingly, external experts and stakeholders – will also be involved at various stages of the policy process. The important point is that government policy will ultimately be signed off either by the Cabinet or the relevant minister. This is because only ministers have the mandate to make policy on behalf of the government. If the final decision is taken by someone other than a minister, that decision will not in itself constitute government policy.
31. However, this does not mean that every decision made by a minister is automatically a policy decision. Ministers may also be involved in some purely political, administrative, presentational or operational decisions.

Example

ICO Decision Notice [FS50083726](#) found that a decision on which department should take the lead on the government's response to an article published in The Lancet was not a government policy decision. It was an operational decision, even though ministers were involved. Ministerial involvement did not automatically elevate it to a policy decision.

32. Departmental policies relating to the internal management and administration of individual departments (eg HR, information security, management structure, or administrative processes) are not government policy. All public and indeed private sector organisations need these sorts of policies in place. They are about managing the organisation, rather than governing the wider world.

Formulation or development: the policy process

33. To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
34. However, the exemption will not cover information relating purely to the application or implementation of established policy. It will therefore be important to identify where policy formulation or development ends and implementation begins.
35. This is not to say that policy design and implementation are always entirely separate. The Commissioner recognises that they are becoming increasingly integrated, and that many implementation issues will also relate to policy formulation. Considering the risks and realities of implementation may be an important factor when assessing policy options. If implementation issues are actively considered as part of the policy design (ie before a policy decision is finalised) and feed into that process, they will also relate to the formulation of the policy. See [Formulation v implementation](#) below for more information.
36. Even after a policy decision has been made, issues arising during implementation may then feed back into a policy improvement process, and some details may be adapted on an ad hoc basis during implementation. However, fine-tuning the details of a policy does not automatically amount to policy

development, and sometimes may more accurately be seen as adjustments to its implementation. Whether a particular change amounts to policy development will depend on the facts of that case. See [Development v implementation](#) below for more information.

37. In particular, the Commissioner does not accept that there is inevitably a continuous process or 'seamless web' of policy review and development. In most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. This was confirmed by the Information Tribunal in [DfES v Information Commissioner & the Evening Standard \(EA/2006/0006, 19 February 2007\)](#) at paragraph 75(v), and [DWP v Information Commissioner \(EA/2006/0040, 5 March 2007\)](#) at paragraph 56.
38. The Commissioner does however recognise that there are no universal rules. Policymaking models are always evolving, and may vary widely between departments and situations. It is likely that some policy areas will follow a more rigid, formal development process to maintain stability and certainty, while other policy areas are inherently more fluid and need to evolve more quickly. Depending on the context, policymaking may also be proactive or reactive, formalised or unstructured, or even made 'on the hoof' as a form of crisis management.

Example

ICO Decision Notice [FS50451254](#) found that the government's response to the PIP breast implants scare was policymaking. The government was reviewing its position in the wake of the decision by the French government to recommend that women have PIP implants removed, and resulting media reports about their safety. There was no planned or formalised policy process, but policy was being made as an impromptu reaction to these events.

39. The key point is that policymaking can take place in a variety of ways: there is no uniform process. Departments should consider whether information relates to the formulation or development of government policy on a case by case basis, focussing on the precise context and timing of the information in question.

40. Examples of different processes which might involve policymaking include:
- White Papers, bills and the legislative process
 - Initiatives to review and improve existing policies
 - Ministerial speeches
 - Press releases
 - Responding to unexpected events
 - Responding to questions put to ministers
 - Unusually sensitive or high-profile operational decisions
41. This list is not intended to be exhaustive. Neither does it imply that all such processes automatically amount to government policymaking – this will depend on the facts of each case.
42. 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 minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.

Formulation v implementation

43. The Commissioner understands the term 'formulation' of policy to refer to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a minister who then decides which options should be translated into political action.
44. Given the variety of different ways in which policy can be made, it is not always easy to identify exactly when a policy is finalised so that formulation ends and implementation begins. Again, there is no single rule: this will depend on the facts of each case.
45. The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy

formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation.

Example

In [Makin v Information Commissioner \(EA/2010/0080, 5 January 2012\)](#), the Information Rights Tribunal considered a request for information about certain provisions in the Legal Services Bill. It found that policy formulation was ongoing while the bill progressed through Parliament, up until the date it received royal assent:

“It is clear that the relevant policy was under debate right through to the end of the parliamentary journey... It is in the nature of the legislative process that provisions remain under review through this process, particularly where they are actively under challenge.”

46. In other cases where legislation is not required, a public announcement of the decision is likely to mark the end of the policy formulation process.

Example

In [DfES v Information Commissioner & the Evening Standard \(EA/2006/0006, 19 February 2007\)](#), the Information Tribunal considered when the formulation of policy in response to a funding crisis in schools was complete. The tribunal concluded:

“We think that a parliamentary statement announcing the policy... will normally mark the end of the process of formulation.”

47. In the context of announcing a new policy, the drafting of the announcement itself (eg a speech or press release) and discussions about its precise wording might itself be part of the policy formulation process.

Example

ICO Decision Notice [FS50451254](#) found that emails discussing a press release on PIP breast implants were part of the policymaking process. The government was reviewing its position in response to widespread media reports about the safety of the implants. The thinking process involved in formulating an official response in these circumstances constituted the formulation or development of government policy.

48. For complicated policies, it is possible that formulation may continue even after this point. In some cases the government announces a high-level policy, or passes a 'framework' bill into law, but leaves the finer details of a policy still to be worked out. The high-level policy objective has been finalised, but detailed policy options are still being assessed and debated. Later information relating to the formulation of the detailed policy will still engage the exemption.

Example

In [DWP v Information Commissioner \(EA/2006/0040, 5 March 2007\)](#), the Information Tribunal considered information about a feasibility study on the introduction of ID cards. A bill was presented to Parliament which established the principle of ID cards, and paved the way for secondary legislation which would set out the details of the scheme.

The tribunal considered that the process of policy formulation could be split into two stages: an initial high-level decision to introduce ID cards, followed by further policy decisions on the detail of the scheme. The study in question had informed the initial high-level policy decision to introduce ID cards, and the exemption was engaged on that basis. But even after that high-level policy was finalised, later decisions on the details of the scheme to be set out in secondary legislation would still have been the formulation of policy.

49. Whether such decisions on detail remain formulation of policy, or are really about implementation, is a matter of degree. In line with the [key indicators](#) of policymaking set out above, decisions on detail are more likely to constitute policy formulation if they require ministerial approval, there are a

range of options with differing outcomes in the wider world, and the consequences of the decisions are wide-ranging.

Example

After legal action by miners, British Coal had to establish schemes to compensate miners for health problems caused by their work (the government later took responsibility for these schemes). The broad parameters for the schemes were initially set by the courts. However, some details were negotiated later between the government and the miners.

These decisions on the details can be seen as more than just implementing the court's decision. Some aspects required the political judgement of ministers taking into account lobbying from MPs of mining areas. There were a range of possible outcomes, and the decisions set a precedent for the future. They can be considered policy formulation or development.

50. On the other hand, if the remaining decisions are taken below ministerial level, are managerial or administrative in nature, or don't significantly affect overall outcomes in the wider world, it is likely that they are really decisions on implementation.

Example

ICO decision notice [FS50110031](#) considered information about the action being taken to 'mainstream' human rights within two government departments. The information covered issues such as management responsibility, staff training, levels of awareness, and departmental procedures to ensure compliance with human rights laws.

The Commissioner accepted that ensuring compliance with human rights laws was a government policy decision. However, organisational procedures to ensure it was properly reflected within each department were implementation rather than policy formulation (or development).

51. In some cases, the government may decide to run a pilot scheme or trial to test a potential policy on a small scale before deciding whether to roll it out in full. Piloting a policy is one way of gathering evidence on its efficacy before making a final decision on whether or not to take it forward. Pilot schemes

may therefore form part of the policy formulation process, particularly if the scheme's limits and end date are clearly defined, and no final decision has yet been taken on whether or in what form the policy should be adopted or rolled out more widely.

Example

In [Weiss v Information Commissioner & Home Office \(EA/2011/0191, 20 February 2012\)](#) the Information Rights Tribunal considered information about a pilot scheme to deport European nationals if they were not exercising a right to reside in the UK or were involved in a criminal activity. Although the government had the power to expel these individuals, no final decision had yet been made on whether to start doing so on a routine basis. Ministers would consider the results of the pilot in order to decide whether to implement the policy in full, and whether it required further development.

The tribunal found that the exemption was engaged: "the disputed information relates to a scheme being used to evaluate the use of a power, to determine whether it should be used in future and, if so, how and in what circumstances: these are all questions of the formulation and development of government policy."

52. However, this does not mean that anything labelled a 'pilot scheme' is automatically covered. It is a decision on the facts of each case and there will be limits. Some schemes may more accurately be seen as implementation of an initial policy decision, even if the government intends to review the scheme after a short time, or is making regular adjustments to the details as it goes. If a decision has been made to roll a scheme out indefinitely, or it will apply across the board (even for a relatively short period of time), it is more likely that a provisional policy decision has been made and the scheme is implementing that decision. However, any subsequent review or adjustment may still amount to a separate stage of policy development. See [Development v implementation](#) below.
53. Note that even if policy formulation is ongoing, this does not mean that all information remains equally sensitive right up to the point the policy is fully completed. The sensitivity of information is likely to wax and wane at different stages of that process. The timing of the request may therefore be very

important when considering the public interest balance. See [Public interest factors](#) below for more information.

Development v implementation

54. The Commissioner understands the term 'development' of policy to include the process of reviewing, improving or adjusting existing policy.
55. Not every decision or alteration made after an original policy was settled will amount to the development of that policy. If policy is a plan to achieve a particular outcome in the real world, the development of that policy is likely to involve a review of its intended outcomes, or a significant change to the original plan. By contrast, minor adjustments made in order to adapt to changing circumstances, avoid unintended consequences, or better achieve the original goals might more accurately be seen as decisions on implementation.
56. In this context, the policy can be seen as a framework of 'rules' put in place to achieve a particular objective. This framework will set some fundamental details in stone, but will also inevitably leave more detailed decisions for those implementing the plan, thus giving some inbuilt flexibility on how it can be delivered. Any such adjustment or decision that can be made within this inbuilt flexibility – ie without altering the original objectives or rules – is likely to be an implementation decision rather than policy development.

Example

ICO decision notice [FS50420602](#) considered whether a review of mathematical factors used to calculate police pension payments related to the development of government policy. The pension payments were governed by the Police Pension Regulations 1987, which provided that the factors would be prepared and updated by the scheme actuary. The Government Actuary's Department (GAD) updated these figures from time to time using actuarial principles and methodology. This was an ongoing process: the factors could be reviewed at any time and no minister was involved in these decisions. The Commissioner found that the process of GAD updating the factors did not amount to policy development. The regulations specifically provided for the factors to be updated in this way: it was built into the policy framework.

57. Who makes the decision will be a helpful indicator here: as ministers have the final say on government policy, only a minister can approve a change to that policy. Any decisions or adjustments made by someone else must therefore be implementation or management decisions, rather than policy development.
58. However, not every decision by a minister is automatically policy development. Ministers may sometimes be involved in making other decisions about the application, implementation or presentation of existing policy.
59. The more limited and case-specific the consequences of a decision, the less likely it is to be policy development. A decision on how existing rules apply to an individual case is likely to be a decision on the application of existing policy. For example, decisions about individual applications for licenses or grants will rarely constitute government policymaking, even if the decision has been made by a minister.
60. Nonetheless, some such decisions may be so novel, high-profile or politically sensitive that they inevitably trigger a decision by the minister on whether the existing policy is appropriate. The more wide-ranging the consequences of the decision and the more unusual or politically sensitive it is, the more likely that it involves an element of policy review or development.

Example

[Cabinet Office v Information Commissioner & Aitchison \(EA/2011/0263, 15 October 2012\)](#) concerned a decision by a minister on whether to allow the 1988 Nestlé takeover of Rowntree's. This was a quasi-judicial decision on one particular takeover, taken in accordance with the existing regulatory regime for takeovers.

However, the Commissioner and Information Rights Tribunal both agreed that the information related to the formulation or development of government policy. There was significant public concern about the effect on the York economy and wider community. In this context, the implications of the decision were so important and politically sensitive that there was inevitably a government decision as to whether the existing process was appropriate, and the decision was raised to the level of government policymaking.

61. Ministers may also respond to questions or comments about the government's position on an issue. Many of these responses will simply involve the explanation, clarification or justification of existing policy. The response itself will only constitute policy formulation or development if the department can show that the question or comment triggered a genuine review of the existing government position, or related to a policy which was already under review.

Example

ICO Decision Notice [FS50083726](#) considered information about the government's response to an article in The Lancet medical journal about the level of civilian casualties in Iraq following the 2003 invasion.

The Commissioner found that information about the government's 'lines to take' to the press and to Parliament in response to the specific article did not amount to government policymaking: "a consequence of this approach would be that every time the government prepared and reacted to some negative (or indeed positive) comment in the media then such a process would constitute the formulation and development of government policy."

However, some information relating to a more general strategic understanding and review of civilian casualties in order to shape future diplomatic and military strategies did relate to the formulation of government policy.

Example

ICO Decision Notice [FS50256412](#) considered briefing notes to the Prime Minister in advance of a meeting with the Countryside Alliance to discuss its concerns about the Hunting Act 2004. Although the Act had already been implemented, the briefing notes considered the feasibility of changes suggested by the Countryside Alliance. It was clear that the notes were in effect a review of aspects of the Act, and therefore related to the development of government policy.

Agencies and other arm's-length bodies

62. Arm's-length bodies are public bodies created to carry out specific government functions at arm's length from ministers, although ministers remain responsible to Parliament for their activities. See Chapter 3 of [The Cabinet Manual](#) (1st edition October 2011).
63. There are three main types of arm's-length body:
- Non-ministerial departments (NMDs) are government departments staffed by civil servants. However, they are not directly controlled by ministers. Instead they have a board, which is usually appointed by a minister. Examples include the Crown Prosecution Service and HM Revenue & Customs.
 - Executive agencies are a well-defined unit within a government department with a focus on delivering specific outcomes. Respective roles and responsibilities of the agency and their department will usually be set out in a framework document. Examples include the Highways Agency, HM Land Registry and the UK Border Agency.
 - Non-departmental public bodies (NDPBs) are independent of central government departments. NDPBs may have advisory, executive, or tribunal functions. They are usually set up as separate legal entities, and employ their own staff. Examples include the Independent Police Complaints Commission, the Law Commission and the ICO.
64. Note that only NMDs and executive agencies are actually government departments (or part of one). As NDPBs are not considered part of a government department, they cannot generally use section 35 and should instead consider section 36 if they hold any policy-related information which is requested under FOIA.
65. In general, arm's-length bodies are created to deliver specialist services which do not require the day to day engagement of ministers, or which need to be independent of government. As only ministers can approve government policy, it follows that the day to day business of these bodies will not involve government policymaking. By delegating an activity to a body at arm's length from ministers, the government has in effect

signalled that the activity is considered operational or otherwise independent of government.

Example

ICO decision notice [FS50420602](#) considered information about the review of factors used to calculate police pension payments. The Government Actuary's Department (GAD), an NMD, was tasked with updating these figures from time to time using actuarial principles and methodology. No minister was involved in this process.

The GAD argued that as responsibility for reviewing the figures had been delegated from the Home Secretary, this indicated it was government policymaking. The Commissioner decided that the delegation of the decision to an NMD without the need for ministerial approval actually indicated the opposite: that the review process was part and parcel of the ongoing business of implementing the policy, rather than a process of policy development.

66. Of course, these bodies may still hold some information about the formulation or development of government policy. They may even advise on the formulation or development of government policy, as they are likely to have significant expertise in particular policy areas. But if they are involved in government policymaking, this will usually be in collaboration with a government department, and the final decision on whether to accept the body's advice or recommendation will rest with a minister.

'Relates to'

67. The exemption covers information which 'relates to' the formulation or development of government policy. This is interpreted broadly: see the main section on ['relates to'](#) above.
68. This means that information which relates to any significant extent to the formulation or development of policy will be covered, even if it also relates to policy implementation or other issues. Policy formulation or development does not have to be the sole or main focus of the information, as long as it is one significant element of it.

69. The exemption is not limited to information directly created as part of the policy process. Information created after a policy is finalised can still be covered if it describes or otherwise refers to its formulation or development. See [O'Brien v Information Commissioner / BERR \(EA/2008/0011, 7 October 2008\)](#): "It is clear in our view that information does not have to come into existence before the policy is formed for section 35(1)(a) to apply".
70. Neither is the exemption limited to information which contains policy options, advice or decisions. Pre-existing information about the history or factual background of a policy issue will also be covered.

Example

In [DfES v Information Commissioner & the Evening Standard \(EA/2006/0006, 19 February 2007\)](#), the Information Tribunal considered minutes of meetings about a funding crisis in schools. One of these documents gave a summary of the factual background to the issue, with only one bullet point suggesting a possible policy approach.

The tribunal found that the whole document related to the formulation or development of government policy, saying: "the immediate background to policy discussions is itself information caught by s35(1)(a), an inference which, we believe, is readily drawn from the wording of s35(4)." (Section 35(4) states there will be particular public interest in disclosing the factual background to a policy.)

71. The timing of the request is not relevant here. The question is whether the **information** relates to policy formulation or development, irrespective of when the request was made.
72. This means that the exemption will catch a wide range of policy information, regardless of its sensitivity. In practice, the main focus is often likely to be on the public interest test.

Public interest factors

73. If the exemption is engaged, departments must go on to conduct a public interest test. They must consider how much public interest there is in maintaining this exemption in the

circumstances of the particular case, and balance this against the public interest in disclosure.

74. This section briefly highlights the particular public interest considerations most relevant to maintaining section 35(1)(a). More information is available in the main [public interest test](#) section below.
75. Public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption. Arguments about other issues (eg the personal impact on individuals, or the commercial interests of stakeholders) are not relevant.
76. There is no inherent or automatic public interest in withholding all information falling within this exemption: see [OGC v Information Commissioner & the Attorney General \[2008\] EWHC 737 \(Admin\)](#).
77. The relevance and weight of the public interest arguments will depend entirely 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.
78. For the same reason, arguments that 'routine' disclosure of a particular type of information would not be in the public interest are misconceived. Each case must be considered on its facts. Even if disclosure is ordered in one particular case, this does not mean that similar information must be disclosed in future. Arguments must focus on the effect of disclosing the particular information in question at the particular time of the request, rather than the effect of routine disclosure of that type of information.
79. The key public interest argument for this exemption will usually relate to preserving a '[safe space](#)' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a '[chilling effect](#)' on free and frank debate in future, and preserving the convention of [collective responsibility](#). See the main [public interest test](#) section below for an overview of these arguments.
80. Although the focus will generally be on the policymaking process, if the department can make convincing arguments that disclosure would directly harm the effectiveness of the policy itself, that will also carry some weight. For example, if

disclosure of identified risks would make those risks more likely to materialise, this may be a relevant factor.

81. The exact timing of a request will be very important. If the information reveals details of policy options and the policy process is still ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight.
82. However, even if the policy process is still live, there may be significant landmarks after which the sensitivity of information starts to wane.
83. For example, once a high-level policy objective has been announced (eg in a White Paper or framework bill), any information about that broad objective will become less sensitive. The safe space to debate that high-level decision in private is no longer required, even if related debate about the details of the policy remains sensitive.

Example

In [DWP v Information Commissioner \(EA/2006/0040, 5 March 2007\)](#), the Information Tribunal considered a feasibility study on the introduction of ID cards. At the time of the request, a high-level decision had already been taken to introduce ID cards and a Bill was already before Parliament. Even though detailed policy work was still at an early stage, information relating primarily to the high-level decision was less sensitive. The tribunal ordered disclosure.

84. In some cases, the formulation or development of policy may not follow a linear path (ie where the policy becomes more and more settled as time goes on). There may actually be several distinct stages of active policy debate, with periods in between where policy is more settled. The importance of a safe space can wax and wane, depending on how fixed the policy is at the exact time in question.

Example

In [Department of Health v Information Commissioner, Healey & Cecil \(EA/2011/0286 & 0287, 5 April 2012\)](#), the request related to the government proposals for NHS reform. The government published a White Paper setting out its proposals, conducted a consultation and presented a draft bill.

The tribunal found that there were several distinct stages of policy formulation during this process. Safe space arguments would carry significant weight at some stages, but the need for a safe space was not constant throughout the process: "there may be a need to, in effect, dip in and out of the safe space during this passage of time so government can continue to consider its options."

The government's high-level policy position had been settled when the White Paper was published. The need for a safe space diminished after this point. However, in this case, the publication of the bill provoked an unusual level of debate and prompted the government to again reconsider its options. So a safe space was once again important at that point.

85. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.
86. See [Formulation v implementation](#) above for more discussion on how to identify the point at which the policy process is complete.
87. The Commissioner does however accept in this context that the government may still need a safe space for a short time after a major policy is finalised in order to properly present, explain and defend its key points without getting unduly distracted or sidetracked. A department would need to explain exactly why a safe space is still required at the time of the request on the facts of each case.
88. However, this safe space will only last for a short time. Once the government has had a chance to properly set out its policy position and frame the debate, a safe space to present the policy is no longer required. And on the other side of the public interest balance, there is likely to be significant public interest in allowing public scrutiny of the details of the policy (including risks and alternatives) while the policy is still in the public consciousness, and before it is implemented.

89. Even if the policy in question is finalised, a department might argue that disclosure would affect other policy debates. The weight of these arguments will depend on the circumstances. A department might still need a safe space for other ongoing policy debates if they are so similar or related that disclosure of one is likely to interfere with the other. Chilling effect arguments may also carry more weight if a department can point to a specific policy debate and explain why it is particularly likely to be affected. However, generic chilling effect arguments about unspecified future policy debates are unlikely to be convincing, especially if the information in question is not particularly recent.
90. In general, there is often likely to be significant public interest in disclosure of policy information, as it is likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at. See the section on [public interest in disclosure](#) below.
91. In particular, departments should always consider whether the information contains factual information about the background to the policy. Section 35(4) specifically provides that there is particular public interest in disclosing background factual information:

In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

92. See the main [public interest test](#) section below for more general information on conducting the public interest test.

Ministerial communications

93. Section 35(1)(b) covers any information relating to ministerial communications:

35.—(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

(b) Ministerial communications

94. As with the other limbs of section 35, this is qualified by the public interest test. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
95. Once a policy decision has been made, the exemption cannot apply to any background statistical information, even if it is contained in a ministerial communication. See the section below on [statistical information](#) for more details.
96. The purpose of section 35(1)(b) is to protect the operation of government at ministerial level. It prevents disclosures which would significantly undermine ministerial unity and effectiveness or result in less robust, well-considered or effective ministerial debates and decisions. However, it should not be used simply to protect ministers from embarrassment, or from being held accountable for their decisions.
97. There is likely to be some overlap with section 35(1)(a). Many (although not all) ministerial communications will concern the formulation or development of government policy, and so will engage both section 35(1)(a) and 35(1)(b). Departments may claim both exemptions for the same information. However, the public interest considerations may differ, and departments should be careful to conduct a separate public interest test and reach a clear conclusion in relation to each of the exemptions.

Engaging the exemption

98. Section 35(5) defines ministerial communications:

“Ministerial communications” means any communications—

- (a) between Ministers of the Crown,
- (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) between members of the Welsh Assembly Government,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the Cabinet of the Welsh Assembly Government.

99. In short, it refers to communications **between** ministers. It will not include a communication from a minister to a non-minister. However, communications do not have to be exclusively between ministers: the exemption will cover communications between two (or more) ministers even if others are copied in.
100. Communications from a private secretary writing on behalf of their minister to another minister are covered: see [Scotland Office \(EA/2007/0070, 8 August 2008\)](#). The Commissioner considers that these are, in effect, communications directly from the minister.
101. A plain reading of the definition indicates that communications between the three categories of minister are not covered – ie communications between a UK minister and a Northern Ireland minister, or between a UK minister and a member of the Welsh Assembly Government, or between a Northern Ireland minister and a member of the Welsh Assembly Government. Departments may instead want to consider section 28 (prejudice to relations within the UK) for this information.
102. The concept of a communication is broad. It includes written communications such as letters, memos, emails and any other documents written to convey information between ministers, and it also includes meetings and telephone conversations between ministers. Section 35(5) specifically includes meetings of the Cabinet or Cabinet committees.
103. The exemption covers information which ‘relates to’ ministerial communications. This is interpreted broadly: see the section on [‘relates to’](#) above. This means that information does not have to ‘be’ a ministerial communication itself; it will also be covered if it recounts or refers to a ministerial communication. For example, letters between civil servants which refer to a previous letter between ministers will relate to that previous ministerial communication, and will be covered.
104. Any documents attached to a letter or email will relate to that communication and so will be covered. Of course, some

attachments may be a communication in their own right, if they were specifically created to convey information between ministers. However, the Commissioner considers that even pre-existing documents which were originally created for another purpose but which are later attached to a ministerial communication will relate to that communication for the purposes of this exemption. (But note that the public interest in withholding a pre-existing document under this particular exemption is likely to be weaker in most cases.)

105. Drafts of ministerial communications will relate to the final communication and so will be covered: [DCMS v Information Commissioner \(EA/2009/0038, 22 February 2010\)](#). In fact, draft communications are still covered even if they are never actually sent: the unsent draft was still written to convey information, and also still relates to potential ministerial communications. The Commissioner does not consider that there needs to be a completed ministerial communication before the exemption can bite, as this would undermine the purpose behind the exemption.
106. Minutes of meetings and notes of conversations will relate to those oral communications, and so will be covered. This includes both formal minutes and more informal handwritten notes or personal aide-memoires. In particular, Cabinet minutes (or minutes of Cabinet committees) are covered as they relate to the communications taking place between ministers at the Cabinet (or committee) meeting.
107. However, this does not mean that all information containing the views of ministers will automatically engage the exemption. For example, if a civil servant writes an email which sets out the minister's view, but is not writing on behalf of that minister to another minister and has not referred to a ministerial communication, this document will neither 'be' nor 'relate to' a ministerial communication.

Public interest factors

108. If the exemption is engaged, departments must go on to conduct a public interest test. They must consider how much public interest there is in maintaining this exemption in the circumstances of the particular case, and balance this against the public interest in disclosure.

109. This section briefly highlights the particular public interest considerations most relevant to maintaining section 35(1)(b). More information is available in the main [public interest test](#) section below.
110. Public interest arguments under section 35(1)(b) should focus on protecting ministerial unity and effectiveness, and protecting ministerial discussions and collective decision making processes. This reflects the underlying purpose of the exemption. Arguments about other issues (eg protecting departmental debates with officials) are not relevant.
111. There is no inherent or automatic public interest in withholding all information falling within this exemption. The relevance and weight of the public interest arguments will depend entirely 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.

Example

In [Scotland Office v Information Commissioner \(EA/2007/0070, 8 August 2008\)](#) the Information Tribunal considered ministerial correspondence relating to Scottish territorial waters. At paragraph 85 it said:

"To the extent that the Appellant is suggesting that ... there is some form of presumption against the disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under section 35(1)(b) is inherently weighty, we must disagree."

Example

Similarly, in [Scotland Office v Information Commissioner \(EA/2007/0128, 5 August 2008\)](#) the Information Tribunal considered information on Gaelic broadcasting policy. At paragraph 77 it said: "it is not possible to raise the exemption to a de facto absolute one simply because the information relates to, or is, ministerial communications."

112. The key public interest argument for this exemption will usually relate to preserving the convention of [collective responsibility](#). There may also be related arguments about preserving a [safe](#)

[space](#) for ministers to debate live issues away from external interference and distraction, and preventing a [‘chilling effect’](#) on free and frank ministerial debate in future. See the main [public interest test](#) section below for an overview of these arguments.

113. If collective responsibility arguments are relevant, they are likely to carry significant weight. However, departments should be careful to ensure that collective responsibility actually applies to the particular information in question: ie that it reveals the view of an individual minister on a government decision. Not all information falling within this exemption will automatically engage the convention of collective responsibility.

Example

In [Scotland Office v Information Commissioner \(EA/2007/0070, 8 August 2008\)](#) the tribunal made clear that: "not all information coming within the scope of section 35(1)(b) will bring the convention of collective Cabinet responsibility into play. Some communications may be completely anodyne or may deal with process rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated."

114. Cabinet minutes will engage collective responsibility. For Cabinet minutes in particular, the public interest in preserving collective responsibility is always substantial, and disclosure of Cabinet minutes has rarely been ordered.

Example

ICO decision notice [FS50185739](#) considered the disclosure of Cabinet minutes about the London 2012 Olympic bid, as well as informal notes taken at the Cabinet meeting. The Commissioner recognised significant public interest in disclosure, due to the level of public funds involved and the wide-ranging consequences for London and the UK of hosting the Olympics. However, this was outweighed by the very strong public interest in maintaining collective responsibility.

115. However, departments should not rely on a blanket policy of non-disclosure, even for Cabinet minutes. It is still possible that

a strong public interest in disclosure might override collective responsibility on the facts of a particular case.

116. There is always significant public interest in the disclosure of an impartial record of Cabinet business, even if other accounts are already available (eg from ministerial statements, memoirs, or leaks). This public interest in disclosure will be particularly strong for politically or historically significant events, or where published accounts are inconsistent.

Example

[Cabinet Office v Information Commissioner \(EA/2010/0031, 13 September 2010\)](#) concerned minutes of a 1986 Cabinet meeting on the Westland affair, during which Michael Heseltine resigned. The Information Rights Tribunal set out some general points of principle at paragraph 48:

"Cabinet minutes are always information of great sensitivity, which will usually outlive the particular administration, often by many years. The general interest in maintaining the exemption in respect of them is therefore always substantial. Disclosure within 30 years will very rarely be ordered."

On the other hand: "There is always significant public interest in reading the impartial record of what was transacted in Cabinet, no matter what other accounts of it have reached the public domain. Where the usual interest in maintaining confidentiality has been significantly weakened, that interest may justify disclosure. The public interest in disclosure will be strengthened where the Cabinet meeting had a particular political or historical significance".

In this case, the strong public interest in protecting Cabinet minutes was decreased to some extent because significant time (20 years) had passed, most of the ministers no longer had an active political career, and memoirs and ministerial statements about the meeting had already been published. There was strong public interest in disclosure due to the significance of the meeting. The tribunal ordered disclosure.

117. See the main [public interest test](#) section below for more general information on conducting the public interest test.

Law Officers' advice

118. Section 35(1)(c) covers information relating to Law Officers' advice:

35.—(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—

- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice

119. As with the other limbs of section 35, this is qualified by the public interest test. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

120. The Law Officers are the principal legal advisers to the government. The core function of the Law Officers is to advise on legal matters, helping ministers to act lawfully and in accordance with the rule of law. They must be consulted by ministers or their officials before the government is committed to critical decisions involving legal considerations. They also have a role in ensuring the lawfulness and constitutional propriety of legislation. See Chapter 6 of [The Cabinet Manual](#) (1st edition October 2011).

121. Section 35(1)(c) reflects the longstanding constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue, or the content of any such advice. The underlying purpose of this confidentiality is to protect fully informed decision making by allowing government to seek legal advice in private, without fear of any adverse inferences being drawn from either the content of the advice or the fact that it was sought. It ensures that government is neither discouraged from seeking advice in appropriate cases, nor pressured to seek advice in inappropriate cases.

122. Law Officers' advice will also usually attract legal professional privilege (LPP). This means that it will also usually engage the LPP exemption in section 42. See [our guidance](#) on section 42 for more information. Departments can claim both of these exemptions for the same piece of advice. However, note that

slightly different arguments will be relevant to the public interest test under each exemption.

123. In some cases departments may want to neither confirm nor deny (NCND) that any information is held in order to conceal whether advice was given. For example, any other response to a specific FOI request for the Attorney General's advice on a particular issue would reveal whether such advice was provided. See the [neither confirm nor deny](#) section below for more information.

Engaging the exemption

124. Section 35(1)(c) encompasses the provision of advice by any of the Law Officers, and also any requests for that advice. The Law Officers are listed in section 35(5):

“the Law Officers” means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government, and the Attorney General for Northern Ireland.

125. This does not include all government lawyers. For example, advice from the Treasury Solicitor's Department (TSol), the Government Legal Service (GLS), the Director of Public Prosecutions (DPP), the Crown Prosecution Service (CPS), or the Office of the Parliamentary Counsel is not covered.

126. Departments holding such advice, or advice given by external counsel, should instead consider the LPP exemption in section 42, or possibly another subsection of section 35 (although note the comments on [legal advice](#) in the main public interest test section below). Section 35(1)(c) will only be relevant if departments need to conceal that the legal advice was not given by the Law Officers.

127. The exemption covers information which 'relates to' the provision of Law Officers' advice (or requests for advice). This is interpreted broadly: see the section on ['relates to'](#) above.

128. This means that information does not itself have to 'be' Law Officers' advice or a request for Law Officers' advice. It will also be covered if it recounts or refers to such advice or any request

for it. For example, any discussions about how to react to Law Officers' advice will relate to that advice, and will be covered.

129. In particular, any discussions about whether or not to seek Law Officers' advice will relate to the provision of advice and will be covered – even if in the end no such advice was sought. The Commissioner does not consider that there needs to be an actual request for advice in order for the exemption to bite. This would undermine the underlying purpose of the convention, which includes confidentiality over whether Law Officers have or have not advised. This means that departments can claim section 35(1)(c) for information that reveals that advice was requested, or for information that reveals no advice was requested. Departments can confirm that the information is held but refuse its content under section 35(1)(c). The refusal notice can explain that the use of the exemption does not imply that advice was in fact requested.
130. If a request encompasses legal advice which could realistically have been given by either Law Officers or other government lawyers, a department should be able to confirm that some legal advice is held and use section 35(1)(c) to conceal whether or not it is Law Officers' advice. In these circumstances the Commissioner considers that any information revealing who advised will reveal whether advice was obtained from the Law Officers, and therefore will 'relate to' the provision of advice. Note that this is not technically an NCND response, but a reason to withhold the content of the advice.
131. A true NCND response is only required if the department needs to NCND whether any requested information (or a defined subset of it) is even held. If a department does wish to NCND whether specified information is even held, it should cite section 35(3). See the [neither confirm nor deny](#) section below for more information.

Public interest factors

132. If the exemption is engaged, departments must go on to conduct a public interest test. They must consider how much public interest there is in maintaining this exemption in the circumstances of the particular case, and balance this against the public interest in disclosure.
133. This section briefly highlights the particular public interest considerations most relevant to maintaining section 35(1)(c).

More information is available in the main [public interest test](#) section below.

134. Public interest arguments under section 35(1)(c) should focus on harm to government decision making processes. This reflects the underlying purpose of the exemption. Arguments about other issues will not be relevant.
135. In particular, broader arguments about the principle of LPP and its fundamental importance to the legal system as a whole are not related to the quality of government decision making and are not therefore relevant under this exception. Departments can instead make these arguments under the LPP exemption in section 42, where they will carry strong inherent weight. See [our guidance](#) on section 42 for more information.
136. The key public interest argument for this exemption will relate to protecting the Law Officers' convention of confidentiality.

Example

In [HM Treasury v Information Commissioner & Evan Owen \[2009\] EWHC 1811 \(Admin\)](#), the High Court considered the Treasury's refusal to confirm or deny whether it held legal advice which confirmed that draft legislation was compatible with the Human Rights Act 1998. The judge concluded:

"Parliament intended real weight should continue to be afforded to this aspect of the Law Officers' Convention ... the general considerations of good government underlining the history and nature of the convention were capable of affording weight to the interest in maintaining the exemption even in the absence of evidence of particular damage."

137. This being the case, the starting point should be to establish whether the Law Officer's convention is engaged for the particular information in question.
138. Where it is engaged, the convention will carry significant weight in the public interest test. However, Section 35 (1)(c) is not an absolute exemption, and the strong public interest in protecting Law Officers' advice may still be overridden in some cases if there are particularly strong factors in favour of disclosure. This reflects the view taken by Judge Blake in the case of [HM Treasury v Information Commissioner & Evan Owen \[2009\] EWHC 1811 \(Admin\)](#).

139. He stated;

"Nothing in this judgment is intended to undermine the important principle of transparency and accountability that the FOIA has brought to government in many ways. ... I can certainly contemplate, for example, that the context for the commencement of hostilities in Iraq was of such public importance that... the strength of the public interest in disclosure of the advice as to the legality of the war might well have out-weighed the exemption". (Para 64)

140. If the relevant issue is still being actively considered by government, there may be some additional public interest in preserving a [safe space](#) to seek and consider any legal advice away from external interference and distraction. As with other safe space arguments, this is only likely to carry additional weight while the issue is still live.

141. See the main [public interest test](#) section below for more general information on safe space and other public interest arguments, and on conducting the public interest test.

The operation of any ministerial private office

142. Section 35(1)(d) covers information relating to the operation of ministerial private offices:

35.—(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
(d) the operation of any Ministerial private office.

143. As with the other limbs of section 35, this is qualified by the public interest test. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure.

144. All government ministers have their own private offices comprising a small team of civil servants. They form the bridge between the minister and their department. The private office's role is to regulate and streamline the ministerial workload and allow the minister to concentrate on attending meetings,

reading documents, weighing facts and advice, and making policy decisions.

145. This exemption is rarely used and so its underlying principles are not as well established as for the other limbs of section 35. However, the Commissioner considers that the purpose of section 35(1)(d) is to ensure that ministerial business is managed effectively and efficiently.

Engaging the exemption

146. Section 35(5) defines 'ministerial private office':

"Ministerial private office" means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister, or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government.

147. The exemption covers information which 'relates to' the operation of the private office. This is generally interpreted broadly: see the section on '[relates to](#)' above. However, this does not mean that all information with any link to a ministerial private office is covered. Section 35(1)(d) refers specifically to the **operation** of a ministerial private office, which itself is defined as providing administrative support. In other words, it covers information about administrative support to a minister.
148. The upshot of this is that this exemption is interpreted fairly narrowly. In effect, it is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about ministerial priorities and similar issues.
149. The exemption is likely to cover information such as routine emails, circulation lists, procedures for handling ministerial papers or prioritising issues, travel expenses, information about staffing, the minister's diary, and any purely internal documents or discussions which have not been circulated outside the private office.

Example

ICO Decision Notice [FS50267857](#) concerned handwritten notes of a meeting taken by the minister's private secretary. The note was taken for private office use, and was not circulated or placed on file. The Commissioner accepted that the task of taking a handwritten note was clearly an administrative task, being the first step towards the production of the official note of the meeting. The handwritten note therefore related to the operation of the private office and section 35(1)(d) was engaged.

150. However, the exemption will not automatically cover the content of a document just because it originated in or passed through the ministerial private office. In particular, it will not automatically cover the content of all ministerial papers, or details of ministerial meetings with third parties.

Example

In ICO decision notice [FS50165511](#) the Commissioner considered emails discussing the ministerial response to a parliamentary question about polygamy and benefits. He accepted that two emails engaged section 35(1)(d), as they could be classified as a routine discussion relating to procedural issues. One was a brief routine email simply confirming the minister's view on the latest draft. The second was a routine procedural email requesting a background note on a particular topic.

However, he found that the exemption was not engaged for four other emails. These contained substantive discussion of the underlying issues, rather than relating to administrative matters.

151. The exemption is not intended to cover information about a minister's private life or private interests (ie information unrelated to their government role). Arguments about maintaining the minister's privacy should instead be considered under the personal data exemption (section 40).

Public interest factors

152. If the exemption is engaged, departments must go on to conduct a public interest test. They must consider how much

public interest there is in maintaining this exemption in the circumstances of the particular case, and balance this against the public interest in disclosure.

153. This section briefly highlights the particular public interest considerations most relevant to maintaining section 35(1)(d). More information is available in the main [public interest test](#) section below.
154. Public interest arguments under section 35(1)(d) should focus on harm to the effectiveness of the private office. This reflects the underlying purpose of the exemption. Arguments about other issues are not relevant and should be made under a more appropriate exemption. For example, arguments about harm to policy debates should be made under section 35(1)(a).
155. There is no inherent or automatic public interest in withholding all information falling within this exemption. The relevance and weight of public interest arguments will depend entirely on the content and sensitivity of the information in question and the effect its release would have in all the circumstances of the case.
156. The key public interest argument for this exemption is likely to relate to preserving a [‘safe space’](#) for the private office to focus on managing the minister’s work efficiently without external interference and distraction.

Example

ICO decision notice [FS50165511](#) considered public interest arguments relating to routine procedural emails about the preparation of a response to a parliamentary question (PQ). The Commissioner rejected arguments that disclosure would have a chilling effect on new approaches to answering PQs, as the information did not contain candid or radical discussions. He did however accept a safe space argument that revealing the methods and processes of the private office might cause a distraction and disrupt its operation. The public interest in preventing this disruption outweighed the public interest in disclosure of this information.

157. There may also be arguments about the [protection of officials](#). Public accountability for decisions should remain with ministers and should not fall on civil servants providing administrative support.

158. Security concerns may also be relevant. For example, disclosure of travel arrangements or working patterns might undermine the security of the minister or officials and make future travel arrangements, diary management or working patterns more difficult.
159. The timing of the request and the age of the information is likely to be an important factor. Purely historical information is likely to be less harmful than information which reveals something about ongoing processes or future events.
160. See the main [public interest test](#) section below for more general information on public interest arguments and conducting the public interest test.

Statistical information

161. Section 35(2) states that, once a policy decision has been taken, any statistical information that was used to provide an informed background to that decision will not engage either section 35(1)(a) or 35(1)(b).

Defining statistical information

162. Statistical information includes statistics (ie factual information presented as figures), and any further mathematical or scientific analysis of those figures. It is not simply a view or opinion which happens to be expressed numerically.

Example

In [DWP v Information Commissioner \(EA/2006/0040, 5 March 2007\)](#), the Information Tribunal considered a study on the impact of the introduction of ID cards on the DWP. It consisted of working assumptions and estimates of factors such as how many people would take up ID cards and how they would be used, and used these assumptions to predict the effect on DWP business. Much of this information was expressed numerically. However, the figures were derived from the judgements and opinions of officials, rather than being generated by mathematical analysis of underlying factual information. The information was not therefore statistical information.

163. Information does not have to be accurate to be statistical. The essence of statistical information is not that it is highly accurate, but that its margins of error can be understood so that it can be used with a high degree of confidence.

164. In the DWP case, the Information Tribunal adopted the following definition (contained in Ministry of Justice guidance and originating from the Office of National Statistics):

Statistical information used to provide an informed background to the government policy and decision... will usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, etc to be derived.

A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being:

- (i) derived from some recorded or repeatable methodology, and
- (ii) qualified by some explicit or implied measures of quality, integrity and relevance.

This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishes statistical information is that the limitations of methodology, and the relevant measures of quality etc, allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy.

Used to provide an informed background

165. In order to fall outside the scope of the exemptions, the statistical information must have been used to provide an informed background to the policy decision. It does not need to have been specifically created for the policy process, as long as

it was actually used or referred to by those assessing options, providing advice, or taking the decision.

166. Of course, if the statistical information was not referred to at some point in the policy process, it is unlikely that it would relate to either the formulation or development of government policy or ministerial communications in order to engage an exemption in any event. Nonetheless, it is possible that some statistics might still be exempt if they were not actually used – eg if they were compiled but then disregarded as unreliable.

Once a policy decision has been taken

167. Statistical information can still be exempt before a policy decision is taken, but cannot be exempt afterwards. It is therefore important to decide whether any relevant policy decision was taken by the time of the request. However, it is not always easy to identify exactly when a policy decision is made. This is a question of fact, and will depend on the nature of the policy process in question.

168. In general, a public announcement will signal that a government policy decision has been made (even if the finer details of a policy are yet to be finalised). See the section above on [Formulation v implementation](#) for more discussion on this point.

Neither confirm nor deny

169. Section 35(3) allows departments to neither confirm nor deny (NCND) whether they hold information that would engage section 35:

35.—(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

Engaging the NCND exemption

170. To engage section 35(3), the department should be able to explain why the requested information would engage one (or more) of the main exemptions. It does not matter whether the

department actually holds the information requested, since section 35(3) refers to information which is exempt, or would be exempt if it were held.

NCND public interest test

171. The NCND exemption is qualified by the public interest test. Departments can only NCND if the public interest in concealing whether information is held outweighs the public interest in knowing whether information is held.
172. In other words, a department cannot automatically NCND whether it holds information that falls within section 35. If it wishes to NCND, it must be able to explain in the public interest test exactly what a hypothetical confirmation or a hypothetical denial would reveal in the context of the particular request, and why at least one of these responses would be harmful to good government.
173. What a hypothetical confirmation or hypothetical denial would reveal will depend on the phrasing of the request. Whether information is actually held is not relevant.
174. These public interest arguments must focus on the specific good government interests protected by the subsection(s) that would be engaged. Relevant sections of this guidance above highlight the particular interests and public interest factors most relevant to each exemption:
 - [Section 35\(1\)\(a\): public interest factors](#)
 - [Section 35\(1\)\(b\): public interest factors](#)
 - [Section 35\(1\)\(c\): public interest factors](#)
 - [Section 35\(1\)\(d\): public interest factors](#)
175. The department must then balance these factors against the specific public interest in knowing whether that information is held by the department. Even if there is significant public interest in using NCND, departments will still need to confirm or deny if there is equal or stronger public interest in knowing whether the information is held by the department.

Example

ICO decision notice [FS50208932](#) considered whether the Ministry of Justice could NCND whether it held information about a review of a particular aspect of the way personal injury damages are calculated.

The Commissioner accepted that section 35(3) was engaged, as this type of information would relate to the development of government policy. He also accepted that confirmation or denial may well reveal whether the policy had been reviewed. However, the department did not clearly explain how revealing whether a review had taken place would cause harm to policymaking. In particular, the Commissioner did not believe that this would pose any threat to a safe space to consider different options. On the other hand, there was specific public interest in knowing whether the policy had been reviewed as the Lord Chancellor had indicated it would be, added to the general public interest in government transparency. The Ministry of Justice was ordered to confirm or deny whether information was held.

176. See [the public interest test](#) section below for more general information on public interest arguments and conducting the public interest test.

Law Officers' advice

177. NCND often arises in the context of requests for Law Officers' advice falling under section 35(1)(c). This is because of the underlying constitutional convention that government does not reveal whether Law Officers have or have not advised on a particular issue. See the section on [Law Officers' advice](#) above for more information.
178. This means that departments will often want to NCND whether Law Officers' advice which is or would be within the scope of the request is held. For example, any response to an FOI request for the Attorney General's advice on a particular issue would reveal whether such advice was provided. This would undermine the Law Officers' convention, and so there will be strong public interest in maintaining section 35(3).

179. An NCND response is only required if the department needs to NCND whether any requested information is even held. This is most likely in specific requests for Law Officers' advice.
180. A department may also NCND whether a distinct subset of information is held. For example, if a request would cover all types of advice on a topic, a department may NCND whether Law Officer's advice is held, but should still confirm whether any other legal advice (or other relevant information) is held.
181. However, departments cannot use NCND provisions to disguise the content of information. This means that if a department confirms that some legal advice is held, it cannot then use section 35(3) to conceal whether or not that advice is Law Officers' advice. Instead, it should use section 35(1)(c) to withhold its content in order to conceal whether or not it is Law Officers' advice. See the section on [engaging section 35\(1\)\(c\)](#) above.
182. There will be strong public interest in using NCND to conceal whether Law Officers' advice was given, due to the fundamental importance of the Law Officers' convention to good government.

Example

In [HM Treasury v Information Commissioner & Evan Owen \[2009\] EWHC 1811 \(Admin\)](#), the High Court considered the Treasury's refusal to confirm or deny whether it held legal advice confirming that draft legislation was compatible with the Human Rights Act 1998. The judge considered the public interest:

"The arrangements available to government as to how to obtain advice whether in-house from its departmental lawyers, or seeking external advice from independent counsel through the Treasury Solicitors, or using the limited resources available of approaching Law Officers themselves is very much a choice the government should be able to make on the appropriate factors in each case, and undeterred by factors that might lead them to seek advice from the apex [ie from the Law Officers] unnecessarily, or to avoid it when it should have been obtained."

183. However, departments should always consider the circumstances of the case. In some cases it might be less sensitive to confirm that advice was given, as it would not significantly undermine the convention – for example, if it is standard procedure to obtain Law Officers’ advice in particular circumstances, or if it is already public knowledge that the advice was given.
184. Further, the strong public interest in protecting the Law Officers’ convention is just one factor which may still be overridden in some cases by equally strong factors in favour of confirming or denying. For example, there may be significant public interest in knowing that the government sought appropriate legal advice on an issue of particular national or international importance.
185. Section 42 provides an exemption for information protected by legal professional privilege. This also contains a NCND provision, where confirming or denying would involve the disclosure of legally privileged information. Our [guidance on section 42](#) explains that the NCND provision in that exemption cannot be used to conceal whether the public authority sought or received legal advice, unless to confirm or deny that fact would itself disclose the substance of the advice. By contrast, the NCND provision in section 35 can be used to avoid confirming or denying whether advice was sought or received. This is because the exemption in section 35(1)(c) is for information that “relates to” the provision of Law Officers’ advice or requests for advice, and section 35(3) refers to information which would be exempt “if it were held”. If a department had not sought Law Officers’ advice on a particular issue, they could still NCND that fact (subject to the public interest test), because, if they had sought it, information about the request for advice would be exempt under section 35(1)(c).

The public interest test

186. A wide range of information will be caught by one or more of the section 35 exemptions. The application of these exemptions will in practice usually be focussed on the public interest test.
187. This section discusses the public interest test in the particular context of section 35. See also [our guidance](#) on the public interest test for more general advice.

188. Public interest arguments under section 35 must focus on the specific good government interests protected by the subsection being claimed. Relevant sections of this guidance above highlight the particular interests and public interest factors most relevant to each exemption:

- [Section 35\(1\)\(a\): public interest factors](#)
- [Section 35\(1\)\(b\): public interest factors](#)
- [Section 35\(1\)\(c\): public interest factors](#)
- [Section 35\(1\)\(d\): public interest factors](#)

189. If the same information engages more than one of these exemptions, departments should conduct a separate public interest test for each one. This is because the weight and focus of public interest arguments may differ depending on the particular exemption being considered. (Although if exactly the same argument is relevant under more than one exemption, there is no need to repeat the details in full each time.)

190. These factors must then be balanced against the public interest in disclosure. Even if there is significant public interest in the exemption, the information will have to be disclosed if there is equal or weightier public interest in disclosure. Departments should bear in mind that, as these exemptions are qualified, it was always intended that in some cases information should be disclosed in the public interest.

191. There is no inherent or automatic public interest in withholding information just because it falls within one of these class-based exemptions.

Example

In [OGC v Information Commissioner & the Attorney General \[2008\] EWHC 737 \(Admin\)](#) the High Court considered an appeal against the disclosure of gateway reviews of the government's identity card programme. Burnton J opted to address some "issues of general importance" in relation to the public interest test under section 35. He said (at para 79):

"I do not think that section 35 creates a presumption of a public interest in non-disclosure... section 35 is in very wide terms, and interpreted literally it covers information that

cannot possibly be confidential. For example, a report of the Law Commission being considered by the Government with a view to deciding whether to implement its proposals would be or include information relating to 'the formulation or development of government policy', yet there could be no public interest in its non-disclosure. It would therefore be unreasonable to attribute to Parliament an intention to create a presumption of a public interest against disclosure."

192. Neither should there be a blanket policy of non-disclosure for particular types or subsets of information. Arguments should always relate to the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case.
193. For the same reason, arguments that 'routine' disclosure would be contrary to the public interest are misconceived. Each case must be considered on its facts. Even if disclosure is ordered in one particular case, this does not mean that disclosure will become 'routine'. Arguments must relate to the effect of disclosing the particular information in question, rather than the effect of routine disclosure of that type of information.
194. Public interest arguments under the section 35 exemptions often relate to preserving a 'safe space' to debate issues away from external scrutiny, preventing a 'chilling effect' on free and frank views in future, and preserving the principle of collective responsibility.
195. The weight of these factors will vary from case to case, depending on the timing of the request and the context of the particular information in question: see [DfES v Information Commissioner and the Evening Standard \(EA/2006/0006, 19 February 2007\)](#).
196. An overview of these common arguments is set out below.

Safe space arguments

197. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This will carry significant weight in some cases.

198. Traditionally safe space arguments relate to internal discussions but modern government sometimes invites external organisations/individuals to participate in their decision making process (eg consultants, lobbyists, interest groups, academics etc). Safe space arguments can still apply where external contributors have been involved, as long as those discussions have not been opened up for general external comment. However this argument will generally carry less weight than if the process only involved internal contributors.

Example

In [The Department for Business, Enterprise and Regulatory Reform \(DBERR\) v the Information Commissioner and Friends of the Earth \(EA/2007/0072, 29 April 2008\)](#) the Tribunal recognised that there was value in government being able to test ideas with informed third parties and knowing what the reaction of a particular group of stakeholders might be in relation to a specific policy. The Tribunal stated; “...we do accept that there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken.” (para 119 DBERR).

199. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request will therefore be an important factor. This was confirmed by the Information Tribunal in [DBERR v Information Commissioner and Friends of the Earth \(EA/2007/0072, 29 April 2008\)](#): “This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.”

200. The government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.

Chilling effect arguments

201. Departments often argue 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 lead to poorer decision making. This is known as the chilling effect.
202. When discussions are purely internal then civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice.
203. Where lobbyists have been involved in the discussions then they are even less likely to be inhibited in their contributions by the possibility of disclosure as they are trying to further their own agenda by influencing departments. Departments should consider therefore how likely it is that lobbyists will actually be deterred from contributing. This is supported by the Tribunal in DBERR in which it agreed with the ICO's argument that "...one could expect that a lobbyist, whose job it is to put views forward to government, would continue to do so robustly notwithstanding fear of disclosure." (para 123 DBERR).
204. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases: see [Friends of the Earth v Information Commissioner & Export Credits Guarantee Department \[2008\] EWHC 638](#) at paragraph 38.
205. However, the Commissioner does not consider that they will automatically carry significant weight. Departments must make arguments based on the circumstances of each case, including the timing of the request, whether the policy is still live, and the actual content and sensitivity of the information in question.
206. Chilling effect arguments operate at various levels. If the policy in question is still live, arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions. For example, see [DfES v Information](#)

[Commissioner & the Evening Standard \(EA/2006/0006, 19 February 2007\)](#), and [Scotland Office v Information Commissioner \(EA/2007/0128, 5 August 2008\)](#).

Record keeping arguments

207. Arguments that disclosure will lead to departments keeping less detailed records of discussions in future, and that this will harm internal deliberation in future, will carry little if any weight. Departments are expected to keep adequate records for their own purposes. If the department endorses or permits a loss of detail in its records, it will be difficult to argue that the loss of detail is harmful.
208. This follows the approach of the Information Tribunal in [Guardian Newspapers Ltd and Heather Brooke v Information Commissioner and BBC \(EA/2006/0011 & 0013, 8 January 2007\)](#) and [DfES v Information Commissioner and the Evening Standard \(EA/2006/0006, 19 February 2007\)](#).
209. However, some record keeping arguments may actually be chilling effect arguments made in a slightly different way (ie that disclosure would result in less detailed advice, which would then inevitably result in less detailed records of that advice). These chilling effect arguments may carry some weight, as discussed above.

Collective responsibility

210. If the information reveals the views of an individual minister on a government position, arguments about maintaining collective responsibility are likely to carry significant weight.
211. Collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of our constitutional system of government. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but once a decision is made they are all bound to uphold and promote that agreed position to Parliament and the public. This principle is set out at paragraph 2.1 of the [Ministerial Code](#) (May 2010):

“The principle of collective responsibility, save where it is explicitly set aside, requires that ministers should be able to

express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. This in turn requires that the privacy of opinions expressed in Cabinet and ministerial committees, including in correspondence, should be maintained.”

212. The convention of collective responsibility incorporates elements of safe space and chilling effect already considered above. However, there is an additional unique element that will carry additional weight: that ministers need to present a united front in defending and promoting agreed positions. If disclosure would undermine this united front by revealing details of diverging views, this would undermine ongoing government unity and effectiveness.
213. If collective responsibility arguments are relevant, they will always carry significant weight in the public interest test because of the fundamental importance of the general constitutional principle.
214. This weight may be reduced **to some extent** if the individuals concerned are no longer politically active, if published memoirs or other public statements have already undermined confidentiality on the particular issue in question, or if there has been a significant passage of time. However, this does not mean that the publication of memoirs will always undermine the confidentiality of the full official record. It will always depend on all the circumstances of each individual case.
215. Whether or not the issue is still ‘live’ will not reduce the public interest in maintaining collective responsibility (although it will affect the weight of related safe space arguments). This is because the need to defend an agreed position will, by its very nature, continue to be relevant after a decision has been taken, and because of the constitutional importance of maintaining the general principle of collective responsibility for the sake of government unity.

Protection of officials

216. Some arguments may relate to the protection of civil servants. Such arguments must focus on how disclosure of information about civil servants would harm good government – for example, that it would affect their perceived neutrality and

undermine their future working relationships, or contribute to a chilling effect, or distract them from their primary task, or weaken the accountability of ministers. However, these arguments will not generally carry much weight, as officials should not be easily deterred from doing their job.

217. This argument will carry even less weight if it is a lobbyist that is being protected. Lobbyists seek to further the aims and agenda of those they represent by influencing government. Given this, it is unlikely that they will be deterred from future involvement.

218. The personal effect on the individual official is not relevant to this exception. However, arguments about unfairness to an individual can and should be made under the personal data exemption in section 40.

Legal advice

219. Relevant information could include advice given by government lawyers on policy issues. If the legal advice is from any of the Law Officers, see [section 35\(1\)\(c\)](#). However, advice from other government lawyers could still be caught by the other subsections.

220. Legal advice will attract legal professional privilege (LPP). However, public interest arguments under section 35 must be focused on harm to government decision making processes. Broader arguments about the principle of LPP and its fundamental importance in legal disputes or to the legal system as a whole are not relevant. These arguments should instead be made under section 42, where they will carry strong inherent weight.

221. Under section 35, there will be some public interest in preserving a safe space to seek and consider legal advice without external interference. As with other safe space arguments, this is only likely to carry weight while the issue is still live.

222. Chilling effect arguments are also likely to carry weight. It may be important to keep legal advice confidential to ensure departments are not discouraged from obtaining fully informed legal advice in appropriate cases. There is likely to be a greater expectation that legal advice will be kept confidential compared to other types of advice, and the resulting chilling effect may

therefore be more pronounced. Although lawyers are subject to professional regulation and should be expected to continue giving full and proper advice, the quality of discussions may deteriorate if a department was deterred from even seeking advice for fear it would later be disclosed.

Public interest in disclosure

223. There will always be some public interest in disclosure of this type of information to promote government transparency and accountability, to increase public awareness, and to enable public participation in the democratic process.
224. The weight of these interests will vary from case to case, depending on the profile and importance of the issue and the extent to which the content of the information will actually add to public debate. However, even if the information would not in fact add much to public understanding, disclosing the full picture will always carry some weight as it will remove any suspicion of 'spin'.
225. Departments should always consider whether there are additional arguments in favour of disclosure, relating to the particular circumstances of the case. For example, these could include transparency in relation to the influence of lobbyists, accountability for spending a large amount of public money, the fact that a proposal has a significant impact on the public, a reasonable suspicion of wrongdoing or flaws in the decision making process, or a potential conflict of interest.
226. If only certain lobbyists/interest groups have been given access to government and the opportunity to influence public policy has not been extended to others then this will increase the public interest in disclosure/transparency. This is especially relevant where the policy is still being formulated and there is still opportunity for others to present their views, as this would broaden the range of opinions being taken into account.

The Committee on Standards in Public Life (www.public-standards.gov.uk) issued a report on [Strengthening Transparency Around Lobbying \(November 2013\)](#) which stated that "lobbying is a legitimate and potentially beneficial activity" and that "Free and open access to government is necessary for a functioning democracy as those who might be affected by decisions need the opportunity to present their case."

However the report went on to say that "...lobbying must be carried out transparently and ethically. Recent individual examples of abuse (real or perceived) have contributed to a growing public cynicism which has led to a lack of trust and confidence in political decision making."

227. Departments should also consider whether disclosure could actually encourage better quality advice and more robust, well-considered and defensible decision making in future.
228. Section 35(4) specifically acknowledges that there is particular public interest in the disclosure of any factual information used to provide an informed background to government decisions. Although this only technically applies to the public interest test under section 35(1)(a), the Commissioner considers that it in fact recognises a generally applicable public interest which should be taken into account when considering background factual information falling under any subsection of section 35.
229. See [our guidance](#) on the public interest test for more information on arguments about the public interest in disclosure.

Other considerations

Historical records (the 20-year rule)

230. Section 63(1) provides that section 35 cannot apply to historical records. In simple terms, this originally meant that the exemption expired after 30 years. It could not cover any information contained in a file more than 30 years old.
231. This 30-year time limit has now been amended to 20 years by the Constitutional Reform and Governance Act 2010. This reduction is being phased in gradually over 10 years. Details are set out in [The Freedom of Information \(Definition of Historical Records\) \(Transitional and Saving Provisions Order 2012 \(SI 2012/3029\)\)](#). In effect, from the end of 2013 the time limit is 29 years. It will reduce by another year every year until it reaches 20 years at the end of 2022.

Interaction with section 36

232. The section 36 exemption (prejudice to the effective conduct of public affairs) protects many of the same interests. However, sections 35 and 36 are mutually exclusive. This means that if any part of section 35 is engaged, section 36 cannot apply - even if the public interest test results in disclosure under section 35.
233. Nonetheless, if a public authority is not sure whether section 35 is engaged, it can still claim section 36 as an alternative or fallback exemption to protect any information falling outside the scope of section 35. This will ensure that its position is protected if the Commissioner or Information Rights Tribunal later decides that section 35 was not in fact engaged.
234. Note that section 36 operates in a slightly different way and the public authority will need to obtain an opinion from its 'qualified person' in order to claim the exemption. Public interest arguments are however likely to be very similar to those relevant under section 35. See [our guidance](#) on section 36 for further information.

Environmental information

235. If the information is environmental, this guidance is not relevant and departments will instead need to consider disclosure under the Environmental Information Regulations 2004 (EIR). The most relevant EIR exceptions are likely to be regulation 12(4)(d) (material in the course of completion, unfinished documents and incomplete data) and regulation 12(4)(e) (internal communications).
236. Additional guidance is available on [our guidance pages](#) if you need further information on the public interest test, other FOIA exemptions, or the EIR.

More information

237. This guidance has been developed drawing on ICO experience. Because of this it may provide more detail on issues that are often referred to the Information Commissioner than on those we rarely see. The guidance will be reviewed and considered from time to time in line with new decisions of the Information Commissioner, Tribunals and courts.

238. It is a guide to our general recommended approach, although individual cases will always be decided on the basis of their particular circumstances.

239. If you need any more information about this or any other aspect of freedom of information, please [contact us: see our website www.ico.org.uk](http://www.ico.org.uk).

Annex: the full text of section 35

35.—(1) 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,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request for the provision of such advice, or
- (d) the operation of any Ministerial private office.

(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

- (a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or
- (b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

(3) The duty to confirm or deny does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1).

(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.

(5) In this section—

“government policy” includes the policy of the Executive Committee of the Northern Ireland Assembly and the policy of the Welsh Assembly Government;

“the Law Officers” means the Attorney General, the Solicitor General, the Advocate General for Scotland, the Lord Advocate, the Solicitor General for Scotland, the Counsel General to the Welsh Assembly Government, and the Attorney General for Northern Ireland;

“Ministerial communications” means any communications—

- (a) between Ministers of the Crown,
 - (b) between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
 - (c) between members of the Welsh Assembly Government,
- and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the Cabinet or any committee of the Cabinet of the Welsh Assembly Government;

“Ministerial private office” means any part of a government department which provides personal administrative support to a Minister of the Crown, to a Northern Ireland Minister or a Northern Ireland junior Minister or any part of the administration of the Welsh Assembly Government providing personal administrative support to the members of the Welsh Assembly Government;

“Northern Ireland junior Minister” means a member of the Northern Ireland Assembly appointed as a junior Minister under section 19 of the Northern Ireland Act 1998.