

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 March 2025

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

Decision (including any steps ordered)

1. The complainant requested information about a meeting between the Home Office (HO) and Facewatch. HO originally withheld all the information under sections 35(1), 43(2) and 40(2) of FOIA, which concern the formulation of government policy etc, commercial interests and personal data respectively. HO has now withdrawn its application of the exemptions to some of the information and has confirmed that it will disclose this.
2. The Commissioner's decision is that the remaining information that HO continues to withhold is exempt information under sections 35(1)(a) and 43(2) of FOIA. Because it's communicating some of the requested information at this point, HO didn't comply with sections 1(1) and 10(1) of FOIA, which concern timeliness.
3. The Commissioner requires HO to take the following step to ensure compliance with the legislation:
 - If it hasn't already done so, disclose to the complainant the information in the briefing document that HO has identified it can release.
4. HO must take this step within 30 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. The complainant made the following information request to HO on 8 July 2024:

"- Any minutes, notes and agendas relating to a meeting held on May 22, 2024 between Chris Philp, then Minister of State in the Home Office, and Nick Fisher, CEO of the company "Facewatch".

If possible, please also include any slides/materials circulated at any such meeting, any supporting documents, the schedule and an attendee list."

6. Facewatch is a facial recognition retail security company.
7. HO responded the request on 2 September 2024, withholding the information under sections 35(1)(a), 35(1)(d), 43(2) and 40(2) of FOIA. HO maintained this position following its internal review of 10 October 2024.
8. Having reconsidered its response in light of the complaint to the Commissioner, HO confirmed that it could disclose some information in a briefing document that it had previously withheld in full. It's continuing to withhold the minutes of the meeting in question.
9. The briefing and minutes documents are all the information that HO holds that's relevant to the request and it has provided a copy of this information to the Commissioner.

Reasons for decision

10. This reasoning focusses on HO's application of section 35(1)(a) and 43(2) of FOIA to information the complainant has requested. If necessary, it will consider HO's application of sections 40(2) and 35(1)(d), which concerns information that relates specifically to the operation of any Ministerial private office.

Section 35 – formulation of government policy, etc

11. Information is exempt information under section 35(1)(a) of FOIA if it relates to the formulation or development of government policy.
12. The complainant has argued that because Chris Philp is no longer in government, section 35 couldn't apply.

13. In its submission to the Commissioner HO says that, nonetheless, the subject matter was, and is still, a live policy area. As such, it says, officials and Ministers should have a safe space to develop and discuss policy options, including with third parties, without the risk of news reports or headlines which might interfere or distract. HO also says that, in order to offset the balance of public interest, the department published the meeting's purpose - 'to discuss the use of technology to combat shop theft' - in its transparency data.
14. HO says that the policy area being formulated relates to 'facial recognition technology to combat shop theft'. The meeting's purpose was about the use of live facial recognition technology, how it's being used in the sector and its effectiveness. The meeting enabled a deeper discussion and understanding of this issue.
15. HO says that facial recognition is still a live policy area subject to development. There are also policy decisions being made around the use of facial recognition technology in policing. Because of this, there's a need for a safe space to formulate and develop policy in relation to facial recognition technology before this is pre-empted by dealing with early public or media scrutiny.
16. Regarding section 35(1)(a), HO says that the information in the minutes relates to policy formulation in the way characterised above in that it represents the Minister's thinking on what the government's position should be and how it might be reflected in legislation. For similar reasoning, the briefing also contains detailed lines to take and discussion for the Minister to consider prior to the meeting.
17. HO has also discussed section 35(1)(d). It says that the minute was taken by a Private Secretary, and there are references to administrative tasks assigned to Private Secretaries, such as certain bullet points actions. HO considers that disclosing this would be likely to inhibit civil servants in future from providing such informative and succinct work. This would compromise the ability of Private Offices to operate effectively.
18. The Commissioner is satisfied that the information in the meeting minute and the information in the briefing document that HO intends to continue to withhold relates to the formulation of government policy – namely how shop theft might be combatted through technology including facial recognition technology. HO was therefore entitled to apply section 35(1)(a) of FOIA to this information.
19. Because he's found that section 35(1)(a) is engaged, the Commissioner hasn't considered HO's application of section 35(1)(d). He will observe, however, that he would have been likely to have found that exemption

engaged too. But that would have been because the administrative tasks in the minute relate to the operation of a Ministerial private office, not because disclosing this information might prejudice how that office operates in future, which is the focus of HO's argument.

20. The Commissioner has gone on to consider the public interest test associated with section 35(1)(a).

Public interest test

21. The complainant argues that "scrutiny is needed to understand whether there has been a conflict of interest of technology that can potentially cause harm."
22. In its correspondence to the complainant, HO acknowledged that there's a general public interest in Government being transparent and open. Such openness can inform public debate and increase public trust and confidence. HO also acknowledged that there's a legitimate public interest in HO being transparent about its ministerial meetings and correspondence. And in this case, there's a clear public interest in this subject matter, particularly around data protection.
23. However, HO argued, the matter of shop theft, particularly when it involves violence too, is also of significant public interest and it's important that the government tackles it. Facewatch is a significant stakeholder in this policy area. HO considers that Facewatch would clearly be less likely to engage in future discussions on the same free and frank basis if it felt that disclosure was a possibility. This would inhibit the progression of the policy.
24. Public interest arguments associated with section 35(1)(a) must focus on the effect of disclosing the information at the time of the request, rather than the effect of routinely disclosing that type of information.
25. The Commissioner doesn't consider HO's argument to be particularly compelling. Private companies are aware that public authorities are subject to FOIA, and he isn't persuaded that, in this case, Facewatch would be less willing to engage with HO if information about this policy area – and which isn't commercially sensitive for Facewatch – were to be disclosed.
26. That said, the Commissioner does consider that, while a policy is being still being formulated, as in this case, there's a strong public interest in protecting the 'safe space' individuals need to identify and analyse options, identify risks, consult and make recommendations.
27. Putting information related to the policy into the public domain – while the policy is still being formulated – may generate attention, comment

and queries from interested stakeholders. This would potentially distract HO from its role and undermine the process of developing an important policy.

28. The Commissioner recognises that there's a public interest in facial recognition technologies and the consequences for people's privacy, freedoms and rights. But, on balance and having considered the information being withheld, the Commissioner finds that the public interest favours withholding the information in this case.
29. The Commissioner's decision is that section 35(1)(a) is engaged and the public interest favours withholding this information. However, for completeness, the Commissioner will also consider HO's application of section 43(2) to the information it's withholding.

Section 43 – commercial interests.

30. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
31. The complainant has said the following,

“There has been no explanation of why disclosing specific information would lead to specific harm to commercial interests. It cannot be assumed that it would be commercially damaging to Facewatch. Companies have an expectation that such meetings are subject to FOI logs and have been so since the act was introduced so the risk of deterrence seems implausible.”
32. In its submission to the Commissioner, HO says that the commercial sensitivity of the meeting was explicitly referenced in the briefing lines. This was, it says, a clear indicator that the meeting was understood to have commercial sensitivities that required managing even within the room.
33. HO has also said that the complainant has also narrowly interpreted the use of this exemption as referring to the commercial interests of Facewatch alone. However, it notes, the meeting notes refer to several other companies which are customers of Facewatch, and whose commercial interests could therefore be prejudiced by disclosure. HO says that Facewatch representatives opted to name these companies within the confines of the meeting but would not have had an expectation that the company names would subsequently be revealed publicly.
34. In its submission HO has explained why it consider that disclosing the information would be likely to prejudice the commercial interests of

Facewatch and other companies. It has asked the Commissioner not to reproduce that detail in this notice. HO considers this information to be sensitive and confidential and that releasing it could cause the commercial prejudice it wants to prevent.

35. The Commissioner is satisfied, first, that the prejudice HO envisages relates to commercial interests – Facewatch's and those of other companies referred to in the withheld information. Second, the Commissioner accepts that a causal link exists between disclosure and commercial prejudice; those which HO has detailed in its submission to the Commissioner.
36. Finally, the Commissioner will accept HO's position that the envisioned prejudice would be likely to happen, rather than would happen.
37. The Commissioner's decision is therefore that HO is entitled to apply section 43(2) to the withheld information, and he'll go on to consider the associated public interest test.

Public interest test

38. Again, in its correspondence to the complainant HO acknowledged that there's a general public interest in Government being transparent and open. Such openness can inform public debate and increase public trust and confidence. HO again acknowledge there's a legitimate public interest in the transparency of Home Office ministerial meetings and correspondence.
39. However, HO said, this must be balanced against the need to ensure that the commercial interests of third parties aren't prejudiced by HO voluntarily disclosing commercially sensitive material. In addition, HO argued that it's in the public interest that ministers and officials have the safe space to understand the policy issues in detail before decisions are made. If third parties are reluctant to share such information, including commercially sensitive information, with the department, then decision making will be prejudiced.
40. The Commissioner has found that disclosing the withheld information would be likely to prejudice third parties' commercial interests.
41. He acknowledges the complainant's interest in the information and the wider public interest in the subject that's the focus of the meeting minute and briefing. However, he doesn't consider that the information being withheld has sufficient wider public interest to justify possibly causing the envisioned prejudice. He's satisfied that the public interest in preventing crime through technology including facial recognition technology is met to a sufficient degree at this time by information that HO publishes on its website.

42. The Commissioner considers that there's greater public interest in a range of parties – including private companies – being willing to share their views and experience with HO openly, as HO formulates this important policy area.
43. The Commissioner's decision is therefore that section 43(2) of FOIA is also engaged and the public interest favours maintaining this exemption.
44. Because he's found that the withheld information engages both section 35(1)(a) and 43(2), it's not necessary for the Commissioner to consider HO's application of section 40(2) to a little of the same information.

Procedural matters

45. Under section 1(1) of FOIA a public authority must confirm whether it holds information an applicant has requested and communicate the information if it's held and isn't exempt information.
46. Section 10(1) requires the authority to comply with section 1(1) promptly and within 20 working days following the date of the request.
47. HO has confirmed that it incorrectly applied exemptions to some of the requested information, and it will now communicate that information. As such, HO didn't comply with sections 1(1) and 10(1) of FOIA.

Right of appeal

48. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals
PO Box 9300
LEICESTER
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

49. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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