

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 January 2020

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

Decision (including any steps ordered)

1. The complainant requested from the Home Office information concerning the county Police and Crime Commissioner's proposal to change the governance of the Gloucestershire Fire and Rescue Service.
2. The Commissioner's decision is that the Home Office partly complied with FOIA in withholding much of the information it held, relying on the section 35(1) and 36(2) FOIA exemptions. However, the Home Office must disclose some other information which the public interest balance warrants in accordance with the Commissioner's determination but with some personal information redacted.
3. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation:
 - Disclose the information specified in the confidential annex to this decision notice, issued in confidence to the Home Office only.

4. The Home Office must take these steps within 35 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 Policing and Crime Act 2017 ("the 2017 Act") introduced measures intended to improve collaboration between emergency services. These included provisions to enable Police and Crime Commissioners ("PCCs") to take responsibility for the governance of their local fire and rescue service ("FRS") where a convincing case had been made. The Home Secretary decides whether or not to give effect to any proposals. The information in dispute in this matter relates to a proposal by the Gloucestershire PCC to transfer governance of Gloucestershire FRS to the PCC and away from Gloucestershire County Council which opposed the proposed change.
6. On 20 February 2019, the complainant wrote to the Home Office ("HO") and requested information in the following terms:

Please can I request copies of all correspondence (including emails) in the Home Office's possession on this subject [governance of Gloucestershire FRS]? In the interests of efficacy, I'm happy to constrain this to the last 6 months.
7. On 12 April 2019, HO provided some information, but withheld most of the relevant information it held, relying on the FOIA exemptions in section 21(1) (information reasonably accessible), section 35(1)(a) (formulation or development of government policy), section 36(2)(b) (prejudice to effective conduct of public affairs) and section 40(2) (personal information) FOIA. On 14 June 2019, following an internal review, HO confirmed that this remained its definitive position.

Scope of the case

8. The complainant contacted the Commissioner on 4 July 2019 to complain about the way his request for information had been handled. He said that the policy of enabling a PCC to take over the running of a FRS had been settled with the passing of the 2017 Act and that the section 35 FOIA exemption could not therefore apply.

9. As regards the section 36 FOIA exemption, the complainant said he had seen no evidence of Ministerial involvement in the FOI decisions. He was concerned that HO had applied the exemptions indiscriminately and in a “blanket” fashion and had not given his matter proper and sufficiently detailed consideration.
10. The complainant added that he was unable to comment on the application of the section 40(2) FOIA exemption due to lack of information from HO about the process it had used. He said that HO had provided him with no help or assistance and, at every stage of the process, had delayed matters beyond the relevant statutory and ICO guidance timescales.
11. The Commissioner considered, in view of the six months’ time constraint contained in the request, that the information within the scope of the request was that arising between 20 August 2018 and 20 February 2019.
12. The complainant did not challenge application of the section 21 FOIA exemption so the Commissioner only considered the application of the section 35(1), section 36(2) and 40(2) FOIA exemptions. During her investigation, she considered representations from the complainant and HO. Her staff reviewed the withheld information. She also considered a 14 March 2019 submission put to the HO Qualified Person (“QP”) and the response sent by his private office on 21 March 2019. She noted that HO relied on the section 36 FOIA exemption in the alternative on any occasions when the section 35 FOIA exemption was found not to apply.
13. During her investigation, HO provided the Commissioner with information arising from the resignation of the then Chief Fire Officer for Gloucestershire. The Commissioner considered that information but found that it did not relate sufficiently closely to governance policy to fall within the scope of the request and was not therefore within the scope of her investigation.

Reasons for decision

14. The sections 35 and 36 FOIA exemptions protect 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. If a public authority is not sure whether or not the section 35 FOIA exemption is engaged, it can still claim the section 36 FOIA exemption as an alternative or fallback exemption to protect any

information that may be found to fall outside of the scope of the section 35 FOIA exemption. HO decided at internal review, as it had been entitled to decide, that where the section 35 FOIA exemption did not, after all, apply it could rely instead on the section 36 FOIA exemption.

15. The Commissioner first considered HO's application of the section 35(1)(a) FOIA exemption.

Section 35 FOIA - formulation of government policy

16. Section 35(1)(a) FOIA provides that information held by a government department is exempt if it relates to the formulation or development of government policy. It is subject to a public interest test.
17. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to Ministers. Development of government policy includes improving or altering an existing policy and monitoring, reviewing or analysing its effects.
18. The complainant challenged whether the exemption applied. He told the Commissioner that the 2017 Act had established government policy for improving collaboration between emergency services. He said that HO was now engaged in applying its policy set out two years earlier in the 2017 Act. Some other county FRSs had transferred to PCC control and significant funding had been allocated to developing business cases. He was concerned that HO was seeking to protect potential, unspecified and as yet undetermined future policy development, and said that the section 35 FOIA exemption could not therefore apply.
19. HO said in evidence to the Commissioner that the request related to correspondence about the 2017 Act. With respect to the subject matter of the request, HO said that, at the time of the request, Ministers were reviewing HO priorities, including its future stance on proposals for changes to governance of emergency services. At the time of the request a decision, and the wider policy position, were still being deliberated by Ministers. HO added that no decision had yet been taken and that the matter was not now a matter of active policy formulation although it had been at the date of the request.
20. The Commissioner reviewed the relevant information being withheld under both exemptions, which is voluminous. She found that most of it relates to HO consideration of the Gloucestershire PCC's proposal, including internal communications between officials and Ministers.

21. In her guidance on section 35¹ FOIA the Commissioner says:

"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".

22. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy to engage the exemption. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

23. Accordingly, the Commissioner decided that, at the time of the request, the policy was being actively considered and that the section 35(1) FOIA exemption was therefore engaged. The balance of the public interest is considered below together with that for section 36 FOIA.

Section 36 – prejudice to effective conduct of public affairs

24. Section 36 FOIA provides that:

"(2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act - ... (b) would, or would be likely to, inhibit (i) the free and frank provision of advice, or (ii) the free and frank exchange of views for the purposes of deliberation, ..."

25. HO applied the section 36(2)(b)(i) and (ii) FOIA exemptions to all of the withheld information as an alternative to section 35(1) FOIA.

26. Consideration of the section 36(2) FOIA exemptions is a two-stage process. First, the exemptions must be engaged on the basis of a QP having provided a reasonable opinion. Secondly, these exemptions are qualified by the public interest, which means that the information must

¹ <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-governmentpolicy.pdf>

still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

27. In determining whether the exemptions were correctly engaged by HO, the Commissioner is required to consider the QP's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must: establish that an opinion was given; ascertain who was the QP; ascertain when their opinion was given; and, consider whether that opinion was reasonable.
28. HO said that on 14 March 2019 a submission had been put to Nick Hurd MP, a Minister of the Crown and HO QP, asking him to give his opinion that section 36 was engaged for some of the information in scope.
29. HO provided the Commissioner with copies of the 14 March 2019 submission and the response of 21 March 2019 from the Minister's Private Office. The submission explained that some of the information was regarded as exempt under section 35(1)(a) FOIA. The information being exempted included: all internal communications relating to the Ministerial submission on FRS governance change proposals; and, all internal correspondence relating to developing comments on the principles set out in the Gloucestershire PCC's outline business case in anticipation of a formal proposal from him. The submission said that disclosing the information would inhibit the free and frank provision of advice and the free and frank exchange of views between Ministers and officials. The submission confirmed that 'all internal communications' included communications between officials as well as with Ministers.
30. In considering whether or not the QP's opinion was reasonable, the Commissioner noted that HO had put a reasoned submission to a QP. He had considered it, together with the relevant information. His review had included consideration of the public interest factors.
31. In the light of the submission and the 21 March 2019 confirmation by the Minister's private office, the Commissioner accepted that the QP had given a reasonable opinion. She therefore decided that the section 36(2)(b) FOIA exemption was engaged.
32. HO assured the Commissioner that it had considered the section 35 FOIA exemption before considering that in section 36 FOIA.
33. HO said that the distinction between information which related to the formulation or development of government policy and information which did not was difficult to draw precisely in this case. The reasons for withholding the information – primarily to protect the deliberation and

decision-making process in the department – were the same in each case. HO had simply applied section 35 to information which related to policy formulation and section 36 to information which did not relate to policy formulation.

34. HO applied the section 36 FOIA exemption 'in the alternative', unless the Commissioner were to take the view that all or some of the information related to the formulation or development of government policy, in which case section 35 FOIA would apply. The submission advised the Minister that disclosure "would" inhibit the provision of free and frank advice to Ministers and the free and frank exchange of views with officials; it "would be likely" to prejudice and inhibit future engagement with PCCs, particularly any seeking to change FRS governance.
35. Having decided that both the section 35 and 36 FOIA exemptions are engaged, the Commissioner went on to consider whether the public interest in maintaining the exemptions outweighed the public interest in disclosing the information. In her approach to the competing public interest arguments, the Commissioner had regard for the then Information Tribunal's decision in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC* (the Brooke Case, EA/2006/0011; EA/2006/0013).
36. The Commissioner noted in particular the Tribunal's conclusion that, having accepted the reasonableness of the QP's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner gave due weight to that opinion as an important factor in her own assessment of the balance of the public interest. However, in order to determine the balancing judgment required by section 2(2)(b) FOIA, the Commissioner formed her own view of the severity of, and the extent and frequency with which, any such detrimental effect might occur.

Public interest test

37. Since the section 35(1)(a) and section 36(2)(b) FOIA exemptions are qualified, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs that in disclosing the information.
38. The section 35 and 36 FOIA exemptions operate in a slightly different way in that an opinion from a QP is needed to engage section 36. That aside, the public interest arguments are very similar for both. The purpose of applying the exemptions is to provide Ministers and officials with a 'safe space' to enable free and effective advice to be given and

for there to be a full exchange of views. The Commissioner therefore considered the public interest arguments for both exemptions together.

39. The Commissioner's guidance on section 35 FOIA states that:

"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".

40. The Commissioner's guidance also states that:

"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."

Public interest arguments in favour of disclosure

41. The complainant said that HO had given no consideration to the impact of releasing specific documents, or to releasing documents pertaining to this issue. As such, theirs was a blanket argument against the disclosure of any document, rather than the specific consideration required. The public interest test must be engaged against individual pieces of information, rather than used, as here, to justify withholding all information, irrespective of the arguments for or against any particular document.
42. He added that HO had been wrong to claim that disclosure would prejudice future work with the policing and fire sectors, and that their officials would be unlikely to engage unreservedly with HO in future. He said that officials from the policing and fire service sector were well used to FOIA, and would expect their own correspondence to be subject to it.
43. HO accepted that there was a degree of public interest in possible changes to the governance of Gloucestershire FRS and the general issue of transferring FRS governance to PCCs. HO acknowledged that disclosing the withheld information would provide insight into how such decisions are taken.

Public interest in favour of maintaining the exemptions

44. HO emphasised its need to protect the policy development process. HO said that the purpose of applying the exemption was to protect a 'safe space' in which Ministers and officials could safely consider the issues raised. This would avoid prejudice to the provision of free and effective

advice and exchanges of views, whether on matters relating to policy development or otherwise.

45. HO said that both the Tribunal and the High Court had accepted that effective government required a safe space in which to formulate and develop policy. In *Department of Health v Information Commissioner* (EA/2013/087), 17 March 2014, for example, the Tribunal had stated (at paragraph 73) that:

A safe space is needed in which policy can be formulated and developed in robust discussions, where participants are free to "think the unthinkable" in order to test and develop ideas, without fear of external interference or distraction, whether as a result of premature and lurid media headlines or otherwise.

46. HO added that there would be a 'chilling effect' on the future provision of free and frank advice and the exchange of views, and on the exploration of all relevant considerations in the formulation of policy in relation to this issue, if officials and Ministers believed that their deliberations would be subject to disclosure under the FOIA a short time after they were created. This would have a limiting and negative effect on the quality of future internal discussion and decision making and on the quality, honesty and comprehensiveness of advice to Ministers, something which would not be in the public interest.

Balance of the public interest arguments

47. When determining the balance of the public interest, the Commissioner decides whether it serves the public interest better to disclose the requested information or to withhold it by maintaining the relevant exemption. When the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
48. While FOIA does not list factors that favour disclosure, the Commissioner considers that factors favouring disclosure include: furthering public understanding and debate of issues of the day; greater accountability and transparency of public authorities for decisions taken by them; and, fostering strong accountability and transparency in public expenditure.
49. The public interest test is separate from the QP's opinion. However, his opinion must carry significant weight in the public interest balancing test which the Commissioner has done here.

50. HO told the Commissioner that the higher threshold 'would' prejudice applied rather than the lower level of 'would be likely to'. The Commissioner has accordingly applied the higher level threshold of 'would' within the public interest balancing test.
51. The Commissioner considers there is a strong public interest in openness and transparency, in relation to how Government operates and interacts with other public authorities. She decided that there is significant public interest in understanding the efficiency of HO's systems and processes.
52. The Commissioner recognises the need for Ministers and officials to have a safe space in which to exchange views freely and frankly among themselves and with others to ensure robust and well informed decision making in the operation of public services.
53. However, the Commissioner gives relatively little weight to 'chilling effect' arguments, considering that Ministers, officials and contractors both should be, and are, robust in their views and will not readily be deterred in future from offering sound advice when it is needed.
54. The Commissioner has concluded on balance that, notwithstanding the timing of the request in relation to the age of the information, it could still be in the public interest to make some limited disclosures.
55. The Commissioner considered the representations from both parties and assessed their relative weight, reviewed the withheld information in detail and considered the public interest factors rehearsed above. On balance, she was not satisfied that HO had demonstrated sufficient public interest in maintaining the exemption to warrant withholding all of the relevant information and disclosing none of it.
56. In her determination, the Commissioner drew a distinction between information relating to the process followed by HO in considering and deciding the matter on the one hand, and the substantive content of the advice and discussion of it within HO and between HO officials and other stakeholders and the substance of officials' advice to Ministers.
57. She decided that the balance of the public interest lay in disclosing the former, so that the public could see how HO's decisions were reached, while preserving the safe space Ministers and officials needed to preserve the integrity of the continuing substantive policy development.
58. In giving operational effect to her decision, the Commissioner has provided HO with a confidential annex, relating directly to this Decision Notice, showing the detail of her decision and what information is now to be disclosed.

Section 40 FOIA - personal data

59. The complainant questioned the HO's application of section 40(2) FOIA to the withheld information. He was concerned at a lack of supporting evidence from HO lest it should not accord with the Commissioner's guidance. HO said it was concerned to withhold the personal information of its Ministers and officials. The Commissioner accepts that such information should be withheld in accordance with her guidance *"Requests for personal data about public authority employees"* ²
60. The Commissioner also decided that, in making the above disclosures of further information, HO should redact the personal information of its junior officials, ie those ranking below senior civil service grades, along with the personal contact details of senior officials.

Other matters

61. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal FOIA requirement. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 FOIA. However, the Commissioner has issued guidance stating that internal reviews should take no longer than 20 working days to complete and that, even in exceptional circumstances, the total time taken to complete a review should not exceed 40 working days.
62. HO did not complete the internal review, which was requested by the complainant on 15 April 2019, until 14 June 2019 which was at or beyond the outer limits set out in her guidance. The Commissioner expects HO to ensure that future internal reviews will adhere to the timescales set out in her guidance.
63. The Commissioner uses intelligence gathered from individual cases to inform her insight and compliance function. This aligns with the goal in

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https://ico.org.uk/media/fororganisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

her draft "Openness by Design strategy"³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, as set out in her "Regulatory Action Policy"⁴

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategydocument.pdf>

⁴ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-actionpolicy.pdf>

Right of appeal

64. 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: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

65. 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.
66. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Dr Roy Wernham
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