

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 8 August 2011**

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

### **Summary**

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The complainant requested information relating to the National Identity Scheme Independent Scheme Assurance Panel. The Home Office refused the request citing the exemptions in sections 12 (cost of compliance exceeds appropriate limit), 22 (information intended for future publication) and 35 of the Act (formulation of government policy). The Commissioner has investigated with respect to the information withheld by virtue of section 35 and concluded that the exemption is not engaged. Therefore the Commissioner requires the Home Office to disclose that information to the complainant.

### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### **Background**

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2. The Commissioner understands that the National Identity Scheme Independent Scheme Assurance Panel (ISAP) was formed in autumn 2006 and disbanded at the end of 2009.
3. The Home Secretary announced the decision to cancel ID cards and the National Identity Register on 27 May 2010.

## The Request

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4. The Commissioner notes that under the Act the Identity and Passport Service (IPS) is not a public authority itself, but is an executive agency of the Home Office, which is responsible for the IPS. Therefore, the public authority in this case is actually the Home Office. However, for the sake of clarity this Decision Notice refers, where appropriate, to the IPS as if it were the public authority.
5. The complainant wrote to the Identity and Passport Service (IPS) on 20 August 2010 making the following request:

*"Please send me:*

  - 1) *The 2009 annual report of the National Identity Scheme (NIS) Independent Scheme Assurance Panel (ISAP).*
  - 2) *The Identity and Passport Service official response to the ISAP 2009 report*
  - 3) *The minutes of all meetings of the Independent Scheme Assurance Panel since its inception.*
  - 4) *All papers and presentations presented to meetings of the Independent Scheme Assurance Panel since its inception".*
6. The IPS responded on 21 September 2010 saying that the requested information was *"being considered under the exemption in section 35 of the Act"* (the formulation and development of government policy). It advised the complainant that it required additional time to consider the public interest test in relation to that exemption.
7. The IPS's substantive response of 12 October 2010 confirmed that it held the information requested at points 1) and 2) but withheld it citing the exemption under section 22 of the Act (information intended for future publication). It explained that the IPS would be publishing the report and the IPS response and that it undertook to do so before the end of December 2010.
8. Regarding point 3), the IPS advised that it held information within the scope of the request but that it could not locate the minutes for all the meetings within the costs limit. With respect to those minutes it could locate, the IPS withheld the information citing the exemption in section 35(1)(a) (the formulation and development of government policy).

9. Regarding point 4) the IPS estimated that the cost of answering the request would exceed the cost limit of £600. It cited section 12 of the Act (cost of compliance exceeds appropriate limit).
10. The complainant was advised that if he was not happy with its response, the IPS's review procedure was for reviews to be conducted by the Home Office. The complainant requested an internal review on 29 October 2010 with respect to the IPS's response to points 3) and 4) of his request.
11. The Home Office upheld the IPS's decision in its internal review correspondence which it sent to the complainant on 26 November 2010.

## The Investigation

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### Scope of the case

12. The complainant contacted the Commissioner on 18 February 2011 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following point:

*"One of ISAP's published reports says 'The Panel's remit is restricted to examining the means and method of delivery of the Scheme and the likely efficacy of these plans'. I believe this exemption [section 35(1)(a)] should therefore not be applied, because the information concerned relates to the implementation and operation of government policy rather than its formulation".*

13. With the agreement of the complainant, the Commissioner considers the scope of his investigation to be the Home Office's citing of section 35(1)(a) of the Act in relation to point (3) of the request. He has therefore not addressed the procedural handling of the request.

### Chronology

14. The Commissioner wrote to the Home Office on 22 March 2011 asking for further explanation of its reasons for citing section 35 in relation to the request, including its reasons for concluding that the public interest in maintaining the exemption outweighed the public interest in disclosure of the information requested. The Commissioner also requested the withheld information.
15. The Home Office responded on 20 April 2011, supplying both the withheld information and its reasons for withholding.

## Analysis

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### Exemptions

#### Section 35 formulation and development of government policy

16. As there is disagreement between the parties as to the applicability of section 35, the Commissioner has first considered the scope of the exemption and whether the disputed information falls within it.
17. The exemptions in section 35(1) apply where the information 'relates' to the matters set out in the sub-sections. On the basis of decisions of the Information Tribunal, the Commissioner accepts that the term 'relates to' in section 35(1) can safely be interpreted broadly.
18. The Home Office is relying on section 35(1)(a) in this case. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The exemption is a "class" exemption rather than a prejudice-based exemption. That is to say, in order for the exemption to be engaged the public authority does not need to demonstrate that any specific prejudice or harm would flow from the disclosure of the information in question.
19. The disputed information in this case comprises minutes, including draft minutes, whose purpose was to record the meetings of the Independent Scheme Assurance Panel (ISAP). It is not in dispute that the information is held by a government department. Therefore the matter to be addressed is whether the information "*relates to the formulation or development of government policy*".
20. The Commissioner notes that the Home Office told the complainant in its refusal notice:

*"after careful consideration it has been determined that this information is exempt from disclosure by virtue of section 35(1)(a) of the Freedom of information Act. Section 35(1)(a) allows us to withhold information if it relates to the formulation and development of government policy."*
21. However, the Home Office did not provide the complainant with any explanation as to why it considered the exemption to be engaged. For example, the Commissioner would have expected it to explain which policy or policies it considered the information related to, what the policy decision stage was in this case or how the Panel's input was used by those responsible for making policy decisions.

22. When requesting an internal review, the complainant brought to the Home Office's attention the statement of the Chairman of the ISAP that the Panel was not concerned with examining the desirability of the Scheme and the policy decisions which led to it. He argued:

*"Since [Chairman] states quite clearly that ISAP was not concerned with examining the Scheme's policy decisions, I cannot see how the section 35(1)(a) exemption applies to the minutes of its meetings".*

23. Responding to that point of view about the remit of the Panel, the Home Office told the complainant, in its internal review correspondence, that it had established with the IPS that:

*"this did not prevent it looking at policy decisions being made in the development of the scheme or policy decisions governing such things as how the scheme was to be delivered. It is the discussion of these policies and the process of forming policy in these areas which exempts these minutes from disclosure under section 35(1)(a). What was out of scope for the ISAP was the policy which lead to the decision to build the Scheme, those being questions as to whether or not there should be ID cards and a National Identity Scheme".*

24. In correspondence with the Commissioner, the Home Office confirmed that the remit of the ISAP did not include the policy on the desirability or otherwise of identity cards and the National Identity Register (NIR). However, it told the Commissioner that its remit did include policy on, for example, how identity cards should be delivered and marketed and how the NIR should be developed. In this respect, it said:

*"Proposals on these issues were frequently brought to the ISAP at an early stage of development in order to get their input when it could most effectively influence the emerging policy on these matters.*

*Development of the National Identity Register, in particular, would in our view come within 'formulation or development of government policy' rather than implementation and operation of policy as [the complainant] suggests".*

25. The Home Office also reiterated its argument, which it had made earlier to the complainant, that the ISAP was not a traditional 'assurance' group in the sense that it assured the work that IPS had already carried out. It argued that, although that was part of its remit, it also acted as an advice group, *"seeking to guide the development of the ID cards programme through candid discussion of IPS's plans".*

26. The decision to cancel the ID card scheme had been taken by the time of the request. In correspondence with the Commissioner, the Home Office acknowledged that the deliberations of the ISAP "*are no longer materially relevant*" to Government policy. It argued that, nevertheless, the discussions in the ISAP meetings which were minuted did contribute to the formation of Government policy at the time:

*"and to release them would in the view of IPS set a precedent which they would wish to avoid".*

***Is the exemption engaged?***

27. Essentially, the Home Office appears to be arguing that disclosure in this case would set a precedent for disclosure. The Commissioner has not considered this argument here as he does not consider it to be relevant to the technical question he must first decide: whether the exemption is engaged. However, with respect to the Home Office's concern about the setting of a precedent, the Commissioner would say that he considers each complaint on a case-by-case basis, and that a determination in one case cannot necessarily be seen as setting a precedent in another case.
28. The complainant has argued that he cannot see how the section 35 exemption applies as the ISAP was not concerned with examining the National Identity Scheme's policy decisions.
29. In accordance with the Home Office's citing of the sub-section of the exemption in this case, the Commissioner has considered the extent to which the withheld information relates to the formulation or development of government policy. In doing so, he has considered the arguments put forward by the Home Office and the complainant and has viewed the withheld information. He has also had sight of the Home Office Identity and Passport Service Business Plan 2008 which states:
- "The Independent Scheme Assurance Panel will provide oversight to help to assure that the work under way within IPS and its partners is sensibly planned and executed efficiently to effectively deliver the NIS.*
- The Panel's remit is restricted to examining the means and method of delivery of the NIS and the likely efficacy of these plans."*
30. In considering the circumstances of this case, the Commissioner has taken into account the fact that the purpose of a committee or group, such as the ISAP, does not have to be policy-based for the minutes of its meetings to relate to policy matters.
31. He acknowledges that even after a policy has been decided and is being implemented Ministers may wish to improve the effectiveness of that

policy. He recognises that it may not always be clear whether such improvements are more to do with fine tuning the delivery of a policy or whether it amounts to actual policy development. This will have to be decided on the facts of each case.

32. In the Commissioner's view, the minutes at issue in this case are predominantly project-focussed and operational in nature. He does not consider that the Home Office has clearly explained how its section 35 arguments relate to the withheld information, for example, how the discussions and decisions of the ISAP fed into policy development or provided direction for ongoing policy decisions. Similarly, he has not been provided with any evidence as to how Ministers relied on the minutes for developing or refining policy or how gaps, if any were identified, were acted upon by policy makers. He therefore cannot agree that the arguments put forward by the Home Office relate to the information in this case. As he does not find the arguments substantiated, it follows that he does not find the exemption engaged.

### ***The public interest test***

33. As the Commissioner has not found the exemption engaged, he has not gone on to consider the public interest test.

### **Procedural Requirements**

34. In failing to provide information which was disclosable, the public authority breached its obligations under sections 1(1)(b) and 10(1).

### **The Decision**

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35. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act:
- it improperly withheld information that was not exempt, and thereby breached sections 1(1)(b) and 10(1) of the Act.

### **Steps Required**

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36. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- provide the complainant with the minutes of the Independent Scheme Assurance Panel meetings which it has located.

37. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

### **Failure to comply**

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38. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.



## Right of Appeal

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39. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 8<sup>th</sup> day of August 2011**

**Signed .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**

## Legal Annex

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### General Right of Access

#### **Section 1(1) provides that -**

"Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

#### **Section 2(3) provides that –**

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
  - (i) subsection (1), and
  - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
  - (iii) section 41, and
  - (iv) section 44"

## **Formulation of Government Policy**

### **Section 35(1) provides that –**

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (a) Ministerial communications,
- (b) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (c) the operation of any Ministerial private office.”