

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 July 2016

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

#### Decision (including any steps ordered)

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1. The complainant requested information relating to an error made in the calculations for a new model for police funding. The Home Office refused to disclose this information and cited the exemption provided by section 35(1)(a) (formulation or development of government policy) of the FOIA.
2. The Commissioner's decision is that the Home Office cited section 35(1)(a) correctly so it was not obliged to disclose the requested information.

#### Background

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3. The request refers to the errors that were made in calculations for a new model for police funding<sup>1</sup>. The implementation of that model was subsequently deferred.

#### Request and response

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4. On 24 November 2015 the complainant wrote to the Home Office and requested information in the following terms:
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<sup>1</sup> <http://www.bbc.co.uk/news/uk-34752952>

*"This request relates to the 'statistical error' in the new police funding formula, announced by Police Minister Mike Penning on 9 November 2015.*

*Please provide copies of all briefings to ministers relating to the causes of what went wrong and lessons learnt.*

*Please provide copies of all other reports relating to the causes of what went wrong and lessons learnt".*

5. The Home Office responded on 21 December 2015 and refused the request under sections 36(2)(b)(i) and (ii) (inhibition to the free and frank provision of advice and exchange of views) and 42(1) (legal professional privilege) of the FOIA.
6. The complainant responded on 12 January 2016 and requested an internal review. The Home Office responded with the outcome of the review on 5 February 2016. The conclusion of this was that the refusal of the request was upheld.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 25 February 2016 to complain about the refusal of their information request. The complainant argued that the public interest favoured disclosure of the requested information.
8. During the Commissioner's investigation of this case, the Home Office stated that it did not hold any information falling within the scope of the second part of the request. The refusal notice and internal review response stated that information was held that fell within the scope of the first part of the request and made no mention of the second part of the request. The complainant was, therefore, provided a minimal indication by omission that no information falling within the second part of their request was held, although the Commissioner comments further on the response to the second part of the request in the "Other matters" section below.
9. In correspondence with the ICO, the Home Office stated that it also considered that section 35(1)(a) and, in relation to some of the withheld information, 35(1)(b) were engaged. As covered below, section 36 does not apply to information which is held by a government department and that is exempt by virtue of section 35. It is not, therefore available to a public authority to cite both sections 35 and 36 in relation to the same information, although they can be cited in the alternative.

10. Information that falls within any of the classes described in section 35 cannot be exempt by virtue of section 36, regardless of whether the public authority cited section 35. As a result the Commissioner has considered section 35 first and, as her finding is that this exemption is engaged, this indicates that section 36 was not available in relation to the information in question in this notice.

## Reasons for decision

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### Section 35

11. Section 35(1)(a) provides an exemption for information that relates to the formulation or development of government policy. Consideration of this exemption involves two stages. First, the exemption must be engaged as the information in question falls within the class described in this section. Secondly, this exemption is qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
12. As to whether this exemption is engaged, the question here is whether the information in question relates to the formulation or development of government policy. The Home Office reasoning here was that the information in question related to the development of a new funding model for the police. In order to form a decision as to whether the exemption is engaged on the basis of this argument, it is necessary to consider whether the development of a formula for police funding constitutes formulation or development of government policy, rather than, for example, implementation of an existing policy.
13. The Commissioner accepts that the intention to reform the funding of the police does constitute government policy and that the detail of that process, including changes to the formula for calculating funding to each force, constitutes the formulation and development of that policy. Although this process has taken place within the Home Office, rather than across government, the Commissioner's published guidance on this exemption<sup>2</sup> notes that government policy can be implemented within a single department. The Commissioner has also taken into account that

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

this process has been the subject of a public consultation<sup>3</sup> as a factor that characterises the reform of police funding as a matter of government policy.

14. The withheld information relates to the process of reforming police funding and so to the formulation and development of government policy. This information is, therefore, exempt by virtue of section 35(1)(a).
15. Having found that the exemption is engaged, the next step is to consider the balance of the public interest. Section 35(1)(a) is a qualified exemption, so the information must nevertheless be disclosed if the public interest in maintaining the exemption does not outweigh that in disclosure. In forming a conclusion on the public interest balance in this case, the Commissioner has taken into account the general public interest in the transparency and openness of the Home Office, as well as factors that apply in relation to the specific information in question.
16. Covering first arguments in favour of maintenance of the exemption, when considering the balance of the public interest in relation to section 35(1)(a) the Commissioner will generally always consider it relevant to take into account the public interest in preserving a degree of confidentiality in the policy making process. This is due to the possibility of harm to the quality of that process if those involved were not confident that their contributions would remain confidential.
17. The Commissioner recognises that the argument concerning the preservation of a space within which to carry out the policy making process is, in general, valid on the grounds that this will assist in the open discussion of all policy options, including any that may be considered politically unpalatable. However, the weight that this argument carries in each case will vary, depending on the circumstances.
18. The withheld information consists of a submission to Home Office ministers and the Permanent Secretary about the new police funding model, draft letters and a draft statement, and an explanatory note about the error in calculating levels of police funding. The Commissioner notes that the withheld information dates from shortly before the date of

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/447083/2015\\_07\\_20\\_Police\\_funding\\_consultation\\_doc.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/447083/2015_07_20_Police_funding_consultation_doc.pdf)

the request and that the Home Office stated that the matter it relates to was still "live" at the time of the request.

19. The position of the Home Office as originally explained in relation to the citing of section 36, was that that disclosure in this case would be likely to inhibit Ministers and officials from openly discussing issues in future similar circumstances and so a "safe space" should be maintained for discussions on the police funding issue away from the possibility of disclosure.
20. That this information relates to an error in this policy formulation and development process is relevant to both sides of the public interest balance. In relation to the maintenance of the exemption, it can be cited as a factor in favour on the basis that it is particularly important that the parties involved can discuss in a fully frank manner how the error occurred and what remedial steps are necessary.
21. It is in the public interest for the Government to carry out an effective process for setting the funding levels of police forces and to be able to react effectively following errors made in that process. The view of the Commissioner is that the requirement to maintain a safe space in relation to this ongoing policy process, particularly in light of the specific subject matter of the withheld information, is a valid factor in favour of maintenance of the exemption of considerable weight.
22. Turning to public interest factors in favour of disclosure, that errors were made that gave rise to inaccurate perceptions about the future level of police funding indicates that this was a serious issue and that there is a legitimate public interest in disclosing information that would lead to a better public understanding of what took place and how.
23. The Commissioner also notes that brief research reveals that this was an issue of controversy and debate. She has also taken into account that the wider issue of public spending is a political priority for the Government and is of the view that disclosure of recorded information relating to decisions made in this area will generally be very strongly in the public interest. For these reasons the view of the Commissioner is that there is a legitimate public interest in disclosure of the requested information of considerable weight.
24. In conclusion, the Commissioner has recognised strong public interest in disclosure of the information in question owing to its subject matter. She has also, however, recognised that there was weighty public interest in the Home Office being able to carry out this policy process effectively, which may be disrupted if the safe space away from the possibility of disclosure for carrying out that process was not maintained. The view of the Commissioner is that the public interest in avoiding that disruption

tips the balance in favour of maintenance of the exemption. Her finding is, therefore, that the public interest in the maintenance of the exemption outweighed the public interest in disclosure. The Home Office was not, therefore, obliged to disclose the requested information.

25. Given this conclusion, it has not been necessary to go on to also consider section 42(1).

## Other matters

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26. As noted above, the Home Office did not comment directly on the second part of the request either in the refusal notice or at internal review, although it did state specifically that it held information falling within the scope of the first part of the request. Through this omission it provided the complainant with some indication that it did not hold information falling within the scope of the second part of the request. The Commissioner is of the view, however, that the Home Office should have issued a response that stated clearly whether or not it held information falling within the scope of each part of the request. In future cases where requests are made to it that are broken down into distinct parts, the Home Office should ensure that it clearly addresses each part of the request.
27. During the investigation of this case, it became apparent to the Commissioner that the Home Office had, during the period between the date of the request and the date of the refusal notice, come into ownership of information that it appeared likely would be within the scope of the second part of the complainant's request. The Home Office was advised that the Commissioner accepts some flexibility on the time to apply the provisions of the FOIA; either the date of the request or the date on which the request is actually dealt with, provided this is within 20 working days of receipt. This approach should generally be to the advantage of the requester, as it should mean that information that was created or acquired very shortly after the date of the request will be included within its scope.
28. The Home Office was asked to consider taking that approach and providing a fresh response to the complainant relating to this information likely to be within the scope of the second part of the request. The Home Office was also asked to clarify whether it held a draft version of that information at the time of the request. Its response to this was that it did not hold a draft version of that information at the date of the request and maintained that it would only take into account information it held at the date of the request in this case.

29. This approach does not amount to a breach of the FOIA and the complainant has the option of resubmitting the second part of his request now. The Home Office should, however, ensure that in relation to future requests it bears in mind the Commissioner's approach on when to apply the provisions of the FOIA and take the approach that is most advantageous to the requester.

## Right of appeal

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30. 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@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

31. 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.
32. 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** .....

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