

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 November 2019

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

#### Decision (including any steps ordered)

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1. The complainant has requested records about the appointment of the Independent Reviewer of Terrorism Legislation (“IRTL”) from the Home Office (“HO”). The HO disclosed some information but refused to provide the remainder citing section 35(1)(a) (formulation of government policy) of the FOIA.
2. The Commissioner’s decision is that section 35 is not engaged.
3. The Commissioner requires the HO to take the following steps to ensure compliance with the legislation:
  - disclose the requested information.
4. The HO 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.

## Background

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5. The vacant role which this request relates to has since been filled. Information about the current post holder can be found online<sup>1</sup>.

## Request and response

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6. On 18 February 2019 the complainant wrote to the HO and requested information in the following terms:

*"... the position of Independent Reviewer of Terrorism Legislation has been vacant since the previous officeholder has been appointed. The indicative timetable was for final interviews to be held "w[EEK] c[ommencing] 14 January 2019", see*

*<https://publicappointments.cabinetoffice...>*

*I would like to request any records you hold on the delay in the appointments and the resulting vacancy in the office. I would also request any records pertaining to discussions on whether an Interim / Acting Independent Reviewer should be appointed during the vacancy.*

*For the avoidance of doubt, I am (of course) not asking for information relating to individual candidates for the above vacancy or discussion of individual candidates' profiles. I am only interested in correspondence, submissions etc. that relate to the process and timetable".*

7. Following a time extension in which it considered the public interest in disclosure, the HO responded on 15 April 2019. It provided some information within the scope of the request but refused to provide the remainder citing section 35(1)(a) of the FOIA as its basis for doing so.
8. Following an internal review the HO wrote to the complainant on 8 May 2019. It maintained its position.
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<sup>1</sup> <https://www.gov.uk/government/news/independent-reviewer-of-terrorism-legislation-appointed>

## Scope of the case

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9. The complainant contacted the Commissioner on 8 May 2019 to complain about the way his request for information had been handled. His clearly stated grounds of complaint were essentially the same as the reasons he gave when seeking an internal review, ie as follows:

*"I disagree that some of the information you hold (which you have not particularized) is exempt by virtue of s35(1)(a).*

*Firstly, I would submit that s35(1)(a) is not engaged at all, as the information requested does not relate to the formulation or development of government policy. The appointment of a new Independent Reviewer does not involve the formulation or development of a new policy. It is a legal requirement for an Independent Reviewer to be appointed and thus the appointment of a new person to the post is simply the implementation of that policy. The s35(1)(a) exception, however, does not cover information "relating purely to the application or implementation of established policy" (ICO guidance on s35, para 34).*

*Secondly, even if the exemption is engaged, I submit that the public interest is in favour of disclosure. With respect, the 'considerations in favour of maintaining the exemption in section 35' you have listed are entirely generic. In fact, the purported public interest considerations are simply a rationale of why section 35 exists in the first place. This, I'm afraid, is circular logic: you essentially argue that the public interest is in favour of withholding because there are good reasons why s35 exists. This is not what is meant by a public interest test. You have not actually listed any factors specific to the issue at hand.*

*More pertinently, it is my case that given the significant lapse of time since the last appointment, the public interest in the mechanics of the process (as opposed to the merits/consideration of individual candidates, which I have excluded from my request) is now very high. In particular, I note your assertion that the January 'final interviews' mentioned in the indicative timeline to which I had linked were not actually the final stage of the process. Given that another 3 months have now elapsed since those purported final interviews, there is even higher public interest as to why there has now been another delay. You will note that my request also covered any records of discussions around the appointment of an Interim / Acting Independent Reviewer, and it is also in the public interest to learn whether this was considered, given that the vacancy arose unexpectedly".*

10. The HO has provided the withheld information to the Commissioner which it described as "four email chains and a Ministerial submission". It further advised that:

*"It is debatable whether all the information in all five items is within scope of the request, which was primarily for records 'on the delay in the appointments and the resulting vacancy in the office'".*

11. The Commissioner considers this to be a very narrow interpretation by the HO of the request which, although it does focus on the delay, also refers to: "any records pertaining to discussions on whether an Interim / Acting Independent Reviewer should be appointed".
12. Having viewed the withheld information the Commissioner considers it all to fall within the scope of the request.
13. During the Commissioner's investigation, the HO also made reference to section 40 (personal information) of the FOIA in respect of any names of staff below SCS level contained within the withheld information. The Commissioner contacted the complainant who confirmed that, whilst he would like job titles to be provided, names were not required. The application of section 40 has therefore not been further considered as non-senior names can be properly withheld by the HO.

## Reasons for decision

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### Section 35 – formulation of government policy

14. Section 35(1)(a) of the FOIA provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
15. 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 a minister. Development of government policy, however, goes beyond this stage to improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.
16. With respect to the subject matter of the request, in response to the Commissioner's enquiries the HO stated:

*"This is a matter for Home Office Ministers to decide, as evidenced by the submission of 26 September 2018, which and is [sic] a matter of policy as opposed to a political, administrative, presentational or operational decision.*

*The information as a whole sets out the considerations relevant to a decision which was ultimately taken by Ministers on the range of options for how the Government would respond to the resignation of the Independent Reviewer of Terrorism Legislation and the need to appoint a new one. This was a sensitive, high profile, and potentially contentious decision, with implications for public confidence in the oversight of a sensitive area of law, for the Government's reputation, and for handling of sensitive legislation then going through Parliament (the Counter Terrorism and Border Security Bill, now the Counter Terrorism and Border Security Act 2019). It was not merely an administrative or managerial matter. At the time of the request this was a live and ongoing policy issue, given that a new Independent Reviewer of Terrorism Legislation had yet to be appointed.*

*... The Home Office thus considers that the information within scope relates to the formulation and development of government policy and that section 35(1)(a) is therefore engaged".*

17. In her guidance on section 35<sup>2</sup>, the Commissioner accepts:

*"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".*

18. It is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. 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.

19. However, in her guidance the Commissioner also explains that:

*"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*

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-governmentpolicy.pdf>

*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.*

*... 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”.*

20. Having viewed the withheld information, the Commissioner considers that it comprises primarily of operational decisions about administrative arrangements, or alternative options, for appointing someone new into the IRTL post. Whilst this may have involved approaching a Minister for their view, she does not agree that this means that this process in itself amounts to policy-making, rather it consists of the deliberation of options for filling the position of IRTL. In her guidance, the Commissioner makes it clear that not every decision made by a Minister is automatically a policy decision. This is because Ministers may also be involved in some purely political, administrative, presentational or operational decisions.
21. The HO advises that the process is “*primarily a review of existing policy*”. However, the Commissioner does not consider the requested information to relate either to the early stages of the policy process or to the development of further government policy. Put simply, she considers that the request seeks to ascertain the reasons for the delay in appointing a new IRTL and why this was happening. It is about an operational process for replacing a vacancy. The withheld information provides an explanation about the delay and demonstrates various options which were considered at the time, none of which the Commissioner considers to be policy-related.
22. The Commissioner does not find that the withheld information sufficiently relates to the formulation or development of government policy in order to engage this exemption. Accordingly, she finds it is not engaged.

## **Other matters**

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23. Although they do not form part of this notice the Commissioner wishes to highlight the following matters of concern.

*Service of Information Notice*

24. The Commissioner found it necessary to issue an information Notice in this case as the HO failed to respond to her initial enquiries.
25. The Commissioner will use intelligence gathered from individual cases to inform her insight and compliance function. This will align with the goal in her draft Openness by Design strategy<sup>3</sup> 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 of systemic non-compliance, consistent with the approaches set out in our Regulatory Action Policy<sup>4</sup>.

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

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

## Right of appeal

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26. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

27. 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.
28. 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** .....

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