

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 17 January 2024

**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 the Home Office biometrics (HOB) programme and the Strategic Facial Matching (SFM) project. The Home Office disclosed some information and withheld some information.
2. The Commissioner has considered its application of sections 31 (law enforcement) and 35 (formulation of government policy) of FOIA to the withheld information in scope of parts 1, 2 and 6 of the request.
3. The Commissioner's decision is that the Home Office was entitled to rely on sections 31(1)(a) and 35(1)(a) of FOIA to withhold the information.
4. The Commissioner requires no steps to be taken as a result of this decision.

#### **Request and response**

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5. On 5 April 2023, the complainant wrote to the Home Office and requested information in the following terms (numbers added for reference):
  - "1. Minutes of the two most recent meetings of the Home Office Biometrics Strategic Facial Matcher Project Board.

2. Any Data Protection Impact Assessments conducted by the Home Office in relation to its Strategic Facial Matcher project.
3. Any Equality Impact Assessments conducted by the Home Office in relation to its Strategic Facial Matcher project.
4. Any Data Protection Impact Assessments [DPIA] conducted by the Home Office in relation to its Immigration Face Search project.
5. Any Equality Impact Assessments [EIA] conducted by the Home Office in relation to its Immigration Face Search project.
6. A paper titled "4.2 HOB Face Algorithm Bias Analysis". This was presented by Home Office advisor Chris Sims to the NPCC Facial Recognition Technology and Visual and Voice ID System Board on 28 January 2021."
6. The Home Office responded on 19 May 2023. It withheld the information in scope of parts (1) and (2), citing section 35(1)(a) (formulation or development of government policy).
7. It denied holding information in scope of part (3), explaining that an EIA "has not yet been conducted on the Strategic Facial Matching project".
8. The Home Office confirmed it holds information within the scope of parts (4) and (5) of the request (a copy of the DPIA and EIA completed for the Immigration Face Search project). It provided that information with redactions applied, citing sections 23(1) (information supplied by, or relating to, bodies dealing with security matters) and section 24(1) (national security), applied in the alternative. Section 40(2) (personal information) was also cited.
9. Information in scope of part (6) was released in part, with the remainder withheld under section 31(1)(a) (law enforcement: the prevention or detection of crime), and section 35(1)(a) (formulation of government policy, etc.).
10. The complainant requested an internal review on 25 May 2023. They were dissatisfied with the Home Office's application of sections 31 and 35 to the information requested in scope of parts (1), (2) and (6) of the request. They did not challenge the use of exemptions under sections 23 and 24 in the alternative, or section 40.
11. The Home Office acknowledged receipt on 26 May 2023, advising that it would aim to send a full response by 23 June 2023. On 26 June 2023, the Home Office acknowledged correspondence dated 26 June 2023, in which the complainant asked about the status of the internal review.

12. Following the Commissioner's intervention, the Home Office wrote to the complainant on 4 August 2023, maintaining its application of sections 31(1)(a) and 35(1)(a) to the withheld information in scope of parts (1), (2) and (6) of the request.

## **Scope of the case**

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13. Following earlier correspondence, the complainant contacted the Commissioner on 8 August 2023, confirming that they remain dissatisfied with the way their request for information has been handled. They dispute that section 35(1)(a) is engaged and, with respect to the information withheld by virtue of section 31(1)(a), they consider that the public interest favours disclosure.
14. In its submission to the Commissioner, the Home Office confirmed its view that the requested information – in scope of parts (1), (2) and relevant parts of (6) - should be withheld under the exemptions cited, and that the overall public interest favours non-disclosure. It also provided the Commissioner with a copy of the withheld information.
15. The Commissioner recognises that, in the course of their correspondence with the Home Office, the complainant disputes that the information relates to government policy. They consider that the information relates to the implementation of a government programme "that was confirmed at least as early as February 2019, when a £4.6m contract was awarded for its delivery". The Home Office responded, acknowledging that while the contract was awarded as part of the Strategic Matcher project within the Home Office Biometrics Programme, it is separate from SFM (Strategic Facial Matching), although the names are similar.
16. In the absence of anything to the contrary from the complainant, the Commissioner has continued his investigation on the basis that they accept that the information in scope relates to Strategic Facial Matching rather than Strategic Matcher.
17. The following analysis considers the Home Office's application of sections 35(1)(a) and 31(1)(a) to the withheld information in scope of parts (1), (2) and (6) of the request and its application of section 31(1)(a) to the information in scope of part (6) of the request.

## **Reasons for decision**

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### **Section 35 formulation of government policy**

18. The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
19. Section 35(1)(a) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

  - (a) the formulation or development of government policy".
20. The purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures that would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
21. Section 35 is class-based, meaning that a public authority does 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 catch a wide range of information.
22. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 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. The Home Office considers that section 35(1)(a) applies to the requested minutes (part 1 of the request) and DPIA (part 2) as well as to the information in slide 8 of the presentation referred to in part (6) of the request.
24. In relation to the requested information, the Home Office told the complainant that the policy area is still under development, without being clear which policy it was referring to.
25. In its submission to the Commissioner, in support of its view that section 35(1)(a) applies in this case, the Home Office explained:

"The requested information relates to policies that cover the use of facial images and facial recognition technology – including the management and retention of police custody images and facial recognition technologies for other use cases across the Home Office. These policies support the Home Office' Strategic Facial Matching (SFM) project".

26. It confirmed that the SFM capability, and the supporting policy and operational guidance, was ongoing at the time of the request. It told the Commissioner that a decision on policies has not yet been taken and discussions remain ongoing between the Home Office and policing partners.
27. It explained to the Commissioner that the policies will support law enforcement's use of biometric technologies in the real world when it comes to preventing and/or detecting crime.
28. It said that the withheld minutes:

"... contain detailed discussions between the Home Office and policing partners in all aspects of the developing and reviewing of facial recognition policies".
29. Arguing that the DPIA clearly relates to the formulation of facial recognition policies, it described that document as "a key supporting document in the development of the facial recognition policy and the future storage and access of facial images". It argued that, on that basis, the information clearly relates to the formulation of facial recognition policies.
30. Writing about the DPIA, the Home Office told the complainant that it is not yet complete "as it is still going through the final approval process".
31. With regard to the withheld information in scope of part 6, which it considers is exempt by virtue of section 35, the Home Office told the Commissioner it contains information related to the use of facial algorithms and provides:

"a better understanding of algorithm use in the development of future facial recognition policies..."

### **Is the exemption engaged?**

32. In his guidance on section 35<sup>1</sup>, the Commissioner states:

"To be exempt, the information must relate to the formulation or development of government policy. These terms broadly refer to

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<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

the design of new policy, and the process of reviewing or improving existing policy”.

33. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case-by-case basis, focussing on the timing and precise context of the information in question.
34. The Commissioner acknowledges that the complainant does not accept the Home Office argument that the requested information relates to a policy area that is still under development.
35. However, having regard to the explanations provided by the Home Office above, and having reviewed the withheld information, the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged as the withheld information relates to the on-going development of policies relating to the use of facial images and facial recognition technology.
36. It follows that he is satisfied that the exemption is engaged.

### **Public interest test**

37. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. The Commissioner considers that the public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the purpose of the exemption.

### **Public interest arguments in favour of disclosing the requested information**

39. In support of their arguments in favour of disclosure, the complainant referred the Home Office to the government’s own Surveillance Camera Code of Practice<sup>2</sup>, particularly where it states “there must be clear responsibility and accountability” for all such systems.
40. The complainant argued that, in the absence of any publicly available review and audit mechanisms or reports, publication of the project

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[https://assets.publishing.service.gov.uk/media/619b7b50e90e07044a559c9b/Surveillance\\_Camera\\_CoP\\_Accessible\\_PDF.pdf](https://assets.publishing.service.gov.uk/media/619b7b50e90e07044a559c9b/Surveillance_Camera_CoP_Accessible_PDF.pdf)

board minutes and the requested DPIA would improve accountability with regards to the project and allow experts and the public to judge whether the project complies with legal requirements, policies and standards.

41. The complainant also argued that the public interest lies in publication of the DPIA:

“... to ensure those who are likely to be affected by the project can assess the impact on their privacy and ensure safeguards can be put in place”.

42. Furthermore, they told the Home Office that, given the size of the investment involved, disclosure in this case would:

“... improve government transparency, allow scrutiny of a significant public contract, and inform the public about the government’s adoption of controversial technology”.

43. They brought similar arguments to the Commissioner’s attention, noting that such a wide-ranging facial recognition project has the potential to affect every citizen of the UK.

44. The Home Office acknowledges the public interest in transparency and openness of government.

45. It accepts that disclosure of information which relates to the formulation or development of facial recognition/facial matching policies may improve public understanding and provide accountability in terms of the quality of policy decision-making and the spending of public money. It also recognises that disclosure may provide reassurance that the Home Office is consulting appropriately and considering a range of options.

46. In that respect, it explained that, once complete, consideration will be given to publishing the system DPIA.

### **Public interest arguments in favour of maintaining the exemption**

47. In favour of maintaining the exemption, the Home Office told the complainant that disclosure in this case could inhibit the development of how options are generated, consultation undertaken, risks assessed and recommendations are put to Ministers.

48. It said that it is widely recognised that the Government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. It told the complainant that good government is supported through the provision of a ‘safe space’ for Ministers and officials to consider policy options.

49. In its submission to the Commissioner, the Home Office argued that disclosure in this case would undermine the integrity of the policymaking process and result in less robust, well-considered and effective policies.
50. With respect to the need to protect the safe space, it also argued that, because disclosure would be likely to generate further debate and enquiry, resources would have to respond to external interference and distraction rather than continuing work to develop the policy.

### **Balance of the public interest test**

51. The Commissioner has considered the withheld information and the arguments put forward by both parties.
52. He acknowledges that the relevance and weight of the public interest arguments will depend 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.
53. The weight of these interests varies from case to case, depending on the profile and importance of the issue and the extent to which the content of the information actually adds to public debate.
54. The Commissioner recognises the general public interest in transparency, openness and accountability. In this case he recognises that disclosure of the withheld information would enable the public to scrutinise government policy relating to what the Commissioner recognises is considered, by some, to be a controversial subject.
55. He accepts that there is a public interest in the disclosure of the withheld information to the extent that it can inform public debate and understanding of how Government develops policy. Disclosure may improve public understanding of the policymaking process and provide accountability in terms of the spending of public money on the SFM project.
56. The Commissioner has considered the public interest argument relating to preserving a 'safe space'. He considers that significant weight should be given to safe space arguments – ie the concept that the Government need a safe space to develop areas, debate live issues and reach decisions away from external interference and distraction – where the policymaking is live and the requested information relates to that policymaking.
57. The Commissioner recognises that policy development needs some degree of freedom to enable the process to work effectively. He accords significant weight to the public interest in not prematurely disclosing information which was, at the time of the request, and still remains, under consideration regarding ongoing policymaking in this area.



58. This is in order that policy consideration can be uninhibited and to ensure delivery of the best outcomes in relation to policies that cover the use of facial images and facial recognition technology.
59. Having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at the time of the request was of sufficient significance for him to conclude that maintaining the exemption outweighed the public interest in disclosure.
60. The Commissioner has next considered the Home Office's application of section 31 to the remaining small amount of withheld information under consideration in this notice. That information comprises information within slides 3 and 4 of the presentation referred to in part (6) of the request.

### **Section 31 law enforcement**

61. Section 31(1) of FOIA creates an exemption from the right to know if disclosing the information would, or would be likely to, prejudice one or more of a range of law enforcement activities.
62. In this case, the Home Office is relying on subsection (1)(a):

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice

- (a) the prevention or detection of crime".
63. In order for the exemption to apply, it must be the case that if the withheld information was disclosed, it would, or would be likely to, cause prejudice (ie harm) to the matters referred to in subsection (a). Three criteria must be met:
  - the prejudice which the Home Office envisages as a result of disclosure, must relate to the prevention or detection of crime;
  - there must be a causal relationship between disclosure and prejudice to those matters. This prejudice must be real, actual or of substance; and
  - the Home Office must show that the level of prejudice it envisages is met – ie it must demonstrate why disclosure 'would be likely' to result in prejudice or, alternatively, why disclosure 'would' result in prejudice.

64. The Home Office told the complainant that the information withheld under section 31(1)(a), provides details of how face algorithms are, or could be, used for law enforcement purposes.

65. It explained that:

“Disclosure would indicate in some detail the extent and scope of the knowledge available to law enforcement agencies and would allow dangerous individuals and Organised Crime Groups to assess the strengths and vulnerabilities regarding the use of HOB in the areas of law enforcement”.

66. With regard to the likelihood of prejudice if the information was disclosed, in its correspondence with the complainant the Home Office cited the higher test of ‘would occur’. However, in its submission to the Commissioner, the Home Office confirmed that it is relying on the lower threshold - that disclosure ‘would be likely’ to have a prejudicial effect on the prevention or detection of crime.

67. It also confirmed that the SFM project is designed to support policing in the crime prevention and/or detection space. It described the withheld information as “information that should be protected” on the basis that it indicates the extent and scope of data that is captured by various Home Office biometric systems.

68. The Home Office also provided information-specific arguments for the information being withheld which cannot be repeated in this notice as they will reveal the contents of the withheld information. These arguments have been taken into account by the Commissioner.

69. In correspondence with the Commissioner, the Home Office also addressed the matter of the age of the material it is withholding. Recognising that the information dates back to 2021, it described the information as “still very much ‘live’ and ‘in-use’”. It told the Commissioner that any disclosure, therefore, would still be likely to prejudice the prevention or detection of crime.

### **Is the exemption engaged?**

70. In a case such as this, it is not enough for the information to relate to an interest protected by section 31(1)(a), its disclosure must also at least be likely to prejudice those interests.

71. With respect to law enforcement activities, the Commissioner recognises in his published guidance<sup>3</sup> that section 31(1)(a) will cover all aspects of the prevention and detection of crime:

“It could apply to information on general policies and methods adopted by law enforcement agencies, as well as information about specific investigations”.

72. As the information in this case comprises details of how face algorithms are, or could be, used for law enforcement purposes, the Commissioner is satisfied that the harm that the Home Office envisages relates to the prevention or detection of crime.

73. As regards a causal relationship between disclosure and prejudice to the above matters, having viewed the withheld information, the Commissioner is satisfied that its disclosure would allow interested parties to assess the strengths and vulnerabilities regarding the use of HOB in the areas of law enforcement.

74. Having considered the arguments put forward by the Home Office, the Commissioner is satisfied that the Home Office has demonstrated that disclosure could be harmful. He considers that disclosure would be likely to represent a real and significant risk to law enforcement matters, specifically the prevention and detection of crime.

75. As the Commissioner accepts that the outcome of disclosure predicted by the Home Office would be likely to occur, he is satisfied that the exemption provided by section 31(1)(a) is engaged.

### **Public interest test**

76. Section 31 is a qualified exemption. The Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption at section 31(1)(a) outweighs the public interest in disclosing the information requested by the complainant.

### **Arguments in favour of disclosure**

77. The Commissioner acknowledges that, with reference both to transparency and accountability in relation to the spending of public

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<sup>3</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-31-law-enforcement/sections-31-1-a-f-criminal-and-civil-law/>

money, the complainant considers the public interest arguments in favour of disclosure are overwhelming.

78. Arguing that people need to understand AI-based outcomes, the complainant told the Home Office that it is in the public interest to disclose the requested information:

“... to deepen understanding of this AI-based facial recognition system”.

79. With regard to transparency, they told the Commissioner:

“Such a wide-ranging facial recognition project has the potential to affect every citizen of the UK. Facial recognition is highly controversial and numerous studies of the technology have found evidence of racial and gender bias...”.

80. The complainant considers that disclosure will serve to either address legitimate public concerns or allow individuals to challenge decisions that affect them directly.

81. They also consider that it is in the public interest to disclose information about the performance of a high-value project, arguing that disclosure will serve to improve scrutiny in relation to the spending of public money.

82. The Home Office recognises there is a public interest in transparency and openness in government. It also accepts that there is a public interest in the use of facial algorithms and that disclosure of the information would provide the public with a greater understanding of their uses across the Home Office and policing in general.

### **Arguments in favour of maintaining the exemption**

83. In favour of maintaining the exemption, the Home Office told the complainant that it is not in the public interest to disclose information that would be likely to prejudice the prevention or detection of crime.
84. Similarly, it told the Commissioner that it is not in the public interest to disclose information which would be likely to assist malicious actors evade or circumvent biometric systems which are put in place to help protect the public and maintain law and order.
85. It argued that it would not be in the public interest to disclose information that would have a detrimental effect on the ability of the Home Office and its partners to conduct work to keep the public safe from crime.

### **Balance of the public interest arguments**

86. In carrying out the statutory balancing exercise in this case, the Commissioner considers that appropriate weight must be afforded to the public interest inherent in the exemption - that is, the public interest in avoiding prejudice to law enforcement matters. Clearly, it is not in the public interest to disclose information that may compromise the ability of a public authority, such as the Home Office, to protect people from the impact of crime.
87. In that respect, the Commissioner recognises that there is a very strong public interest in protecting law enforcement capabilities and he considers that appropriate weight must be afforded to the public interest inherent in the exemption – that is, the public interest in avoiding prejudice to the prevention or detection of crime.
88. The Commissioner recognises the need to ensure transparency and accountability on behalf of the Home Office. However, while he accepts that the complainant has concerns about the ethical and legal use of Automated Facial Recognition, the Commissioner notes that the Home Office has disclosed substantial parts of the paper in question. He considers that this information goes some considerable way to satisfying the public interest in transparency.
89. In the Commissioner's view, disclosure of the withheld information would be to the detriment of the wider public, as those seeking to evade the law may be able to ascertain how best to do so.
90. Having carefully balanced the opposing factors involved in this case, the Commissioner finds that the public interest in maintaining the section 31(1)(a) exemption outweighs the public interest in disclosure.

## **Other matters**

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91. 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 requirement of the FOIA. Rather, they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA which suggests that internal reviews should be responded to within 20 working days, and if complex it is best practice for any extension to be no longer than a further 20 working days.
92. In view of the delay in this case, the matter will be logged for monitoring purposes.

## Right of appeal

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

94. 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.

95. 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  
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Wycliffe House  
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SK9 5AF**