



NCN: [2023] UKFTT 00305 (GRC)

Case Reference: EA/ 2021/0301

**FIRST-TIER TRIBUNAL
GENERAL REGULATORY CHAMBER
INFORMATION RIGHTS**

Heard: by determination on the papers
Heard on: 16 May and 14 December 2022
Decision given on: 9 January 2023

Before:
Judge Alison McKenna
Tribunal Member Dave Sivers
Tribunal Member Aimée Gasston

MATTHA BUSBY

Appellant

- and -

THE INFORMATION COMMISSIONER

**First
Respondent**

- and -

THE HOME OFFICE

**Second
Respondent**

DECISION

1. The appeal is allowed in part as the Decision Notice contains an error of law.
2. The Tribunal now makes a Substituted Decision Notice, as follows.

SUBSTITUTED DECISION NOTICE

- (a) The Second Respondent must, within 28 days of this Decision being sent to it, provide the Appellant with the information concerning recommendation 5 of the ACMD report dated 1 December 2016, at pages 6, 23 and 24 of the report;**
- (b) The Second Respondent may withhold the remainder of the withheld information, to which s. 35(1) (a) of the Freedom of Information Act 2000 applies.**

REASONS

Mode of Hearing

3. The parties and the Tribunal agreed that this matter was suitable for determination on the papers in accordance with rule 32 Chamber's Procedure Rules¹.
4. The Tribunal considered an agreed open bundle comprising pages 1 to 218. It also considered a closed bundle comprising pages 1 to 56.
5. The Tribunal's reasons referring to the closed bundle are contained in a closed annexe to this Decision.

Background to Appeal

1. The Appellant, who is a journalist, made an information request to the Home Office on 27 March 2020. It was a multi-part request, of which only part 1 now remains relevant to us in determining this appeal.
2. The request concerned an unpublished report which had been sent by the Advisory Council on the Misuse of Drugs ('ACMD') to the Home Office in December 2016. Part 1 of the request was as follows:

¹<https://www.gov.uk/government/publications/general-regulatory-chamber-tribunal-procedure-rules>

In December 2016, the Advisory Council for the Misuse of Drugs sent a report to the home secretary on the 'Interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016'. This included recommendations to divert possessors away from criminal justice processes, and to consider repealing the offence of possession.

I would like you to provide a copy of this report and to provide an explanation of why it was not published....

3. The Home Office refused to provide the requested information on 19 August 2020, after the Information Commissioner had intervened due to the absence of a final internal review response. Following the belated internal review, the Home Office no longer claimed any exemption in relation to part 4 of the request, and that information has now been provided to the Appellant. In relation to part 1 of the request, the Home Office continued to rely on the exemption from the duty to disclose at s. 35(1) (a) of the Freedom of Information Act 2000 ('FOIA')². The Appellant complained to the Information Commissioner.
4. The Information Commissioner issued Decision Notice IC-78561-F2S6 on 30 September 2021, upholding the Home Office's reliance upon s. 35 (1) (a) FOIA in respect of the information requested at part 1. It also found that the Home Office did not hold information about why the ACMD report was not published, and further, directed steps to remedy the failure to disclose the information requested at paragraph 4 (a meeting note) which had not yet been provided even though no exemption had been claimed. Finally, it found that the Home Office had breached its obligations under s. 10(1) and s. 17(3) FOIA.
5. The Appellant appealed to the Tribunal. The Tribunal initially convened on 16 May 2022 but decided that it had insufficient information to fairly determine the appeal. The Tribunal adjourned, making open and closed Case Management Directions which joined the Home Office as the Second Respondent and asked it to provide further evidence and/or submissions in support of the claimed exemption and the balance of public interest.
6. The Tribunal is unsure whether the Appellant also requested the information he seeks from ACMD. The Tribunal enquired whether ACMD (itself a public authority listed under schedule 1 FOIA) wished to be joined as a party and/or to make submissions in this appeal, but it declined to do so.
7. In its Response dated 5 July 2022, the Home Office provided open and closed submissions and evidence. It additionally relied upon the exemption at s. 41 (1) FOIA, raising this argument for the first time. The other parties had an opportunity to file Replies before the Tribunal reconvened on 14 December 2022. All parties remain content for this appeal to be determined without an oral hearing, as does the Tribunal.

The Decision Notice

8. The Decision Notice describes the ACMD as a body which makes recommendations to government on the control of dangerous or otherwise harmful drugs, including

² [Freedom of Information Act 2000 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

classification and scheduling under the Misuse of Drugs Act 1971 and its regulations. It is described as an advisory non-departmental public body, sponsored by the Home Office. The Decision notice records at paragraph 7 that '*ACMD produces reports on a range of subjects, including drug-specific reports. Some of these reports are published; some are not.*'

9. The ACMD report requested by the Appellant was briefly 'gisted' at paragraph 73 of the Information Commissioner's Decision Notice as follows:

As to the specific content of the report, it gives a detailed analysis of the operation of the two pieces of drug legislation, including their similarities and differences.

10. At paragraph 50, the Decision Notice accepts the Home Office's evidence that the report relates to the Government's ongoing drug strategy even though the report was three years old when the Appellant requested it.

11. At paragraph 53, the Decision Notice states that:

Government policy must necessarily be responsive to the evolving threats posed by new drugs and patterns of use. The report clearly relates to a relatively new and emerging drugs market which the Home Office has stated it is monitoring with a view to developing new strategies and amending underlying legislation. The Commissioner is therefore satisfied that the report relates to ongoing policy development and thus that s. 35 (1) (a) of the FOIA is engaged.

12. The Decision Notice accepts that there is a public interest in transparency in this legislative area, but also that there is a public interest in preserving a safe space in which to carry out the policy making process while an issue is still live. At paragraph 80, the Decision Notice concludes that:

Taking all of the above into account and having regard to the purpose of section 35(1)(a) (to protect the integrity of the policymaking process and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies) the Commissioner's decision is that the public interest in maintaining the exemption is stronger than the public interest in disclosing the withheld information.

13. The Decision Notice does not consider whether the covering letter sent with the report falls within the scope of the Appellant's information request. Our view is that it does not. It would be open to the Appellant to make a fresh request for this information.

14. As the Decision Notice considers the report as a whole, rather than its constituent parts, it also does not address the question of whether any part of the report should be disclosed. We are unsure whether the annexes to the report contain documents which are already in the public domain. It would be open to the Appellant to make a fresh request for this information (although we consider that the annexes do fall within the scope of his original request and should have been addressed in the Decision Notice).

The Law

15. The duty of a public authority to disclose requested information is set out in s.1 (1) of FOIA. The exemptions to this duty are referred to in section 2 (2) as follows:

In respect of any information which is exempt information by virtue of any provision of Part II, section 1 (1) (b) does not apply if or to the extent that –

- (a) the information is exempt information by virtue of a provision conferring absolute exemption, or*
- (b) in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.*

16. Section 41 FOIA is an absolute exemption under s. 2 (2) (a) FOIA, and provides as follows:

(1) Information is exempt information if –

- a) It was obtained by the public authority from any other person (including another public authority), and*
- b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

17. An actionable breach of confidence arises where the information concerned has the necessary quality of confidence, has been imparted in circumstances importing an obligation of confidence, and where the unauthorised use of that information is to the detriment of the person imparting it. *See Coco v A N Clark (Engineers) Ltd* [1969] RPC 41.

18. Section 35 (1) (a) FOIA is a qualified exemption under s. 2(2)(b), and provides as follows:

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,*
- (b) ...*

19. The term ‘relates to’ in s. 35 (1) FOIA is to be interpreted broadly, but there must be a sufficient link between the information requested and the process by which policy is being formulated to engage the exemption. This connection is fact specific and to be determined on a case-by-case basis.

20. The powers of the Tribunal in determining this appeal are set out in s.58 of FOIA, as follows:

If on an appeal under section 57 the Tribunal considers -

- (a) that the notice against which the appeal is brought is not in accordance with the law, or*

(b) to the extent that the notice involved an exercise of discretion by the Commissioner, that he ought to have exercised his discretion differently, the Tribunal shall allow the appeal or substitute such other notice as could have been served by the Commissioner, and in any other case the Tribunal shall dismiss the appeal.

On such an appeal, the Tribunal may review any finding of fact on which the notice in question was based.

21. The burden of proof in satisfying the Tribunal that the Commissioner's decision was wrong in law or involved an inappropriate exercise of discretion rests with the Appellant. The relevant standard of proof is the balance of probabilities.

Submissions and Evidence

22. The Appellant's Notice of Appeal dated 15 October 2021 relied on grounds which disputed the engagement of s. 35(1)(a) FOIA by the requested information. He disputed that it related to live policy issue at the time of his request and submitted that the public interest favoured disclosure to ensure the transparency of ACMD's work.
23. The First Respondent's Response dated 17 November 2021 maintained his analysis as set out in the Decision Notice. It explained that the report as a whole cannot be reduced to a binary opposition between decriminalisation and prohibition and in fact covers more policy ground than the Appellant had suggested.
24. The Appellant's Reply dated 3 December 2021 emphasised the public interest argument in ACMD's transparency.
25. The Second Respondent's Response dated 5 July 2022 resisted the appeal and claimed the exemption at s. 41 (1) FOIA for the first time. At paragraph 33, it quotes the ACMD's terms of reference which state that *'Wherever possible, final advice from the ACMD will be placed in the public domain when it is submitted to the Minister. Where advice cannot be made public or cannot be made public for a period of time, this will be explained...'*. It is submitted that ACMD's marking of the report as 'confidential' was consistent with its terms of reference and working protocol. The Second Respondent's submissions further rely on a 'chilling effect' argument in relation to s. 41 (1) FOIA.
26. In respect of the originally claimed s. 35(1)(a) FOIA exemption, it is submitted that the issues raised in the report were at the time of the request being actively considered in relation to the development of the Government's 10 year drugs strategy, published in December 2021; consideration of the Government's response to two Select Committee reports; and the independent review of drugs by Dame Carol Black, part one of which was published in February 2020. The Response accepts at paragraph 27(b) that one recommendation in the report was not specifically the subject of active policy formulation in March 2020 but asks the Tribunal to find that the report as a whole was confidential. In support of the public interest in maintaining the exemption, it was submitted that the public interest in transparency was significantly outweighed by the need to preserve a safe space for ongoing policy discussions on important and controversial matters of policy, avoiding a chilling effect on confidential discussions with expert advisers.

27. In Reply, the Appellant submitted on 21 July 2022 that the Home Office was seeking impermissibly to rely on a ‘seamless web’ approach to policy formulation which implied that information can never safely be released. He submitted that this approach is inconsistent with FOIA. He also submitted that evidence presented to the Home Affairs Select Committee had described the contents of the report so that the Home Office was incorrect to submit that its contents were not in the public domain.
28. The Second Respondent made further submissions on 3 August 2022, as it submitted that the Appellant had raised a novel issue in his Reply (the suggestion that the report was already in the public domain) to which it wished to respond. It provided evidence of the oral response of the Chair of ACMD to the Home Affairs Select Committee on 18 May 2022, in support of a submission that the contents of the report have not been put into the public domain in whole or in part. We note that the current Chair of ACMD declined to reveal the recommendations of the report on that occasion, although a former member of ACMD had referred to the 2016 report when giving written evidence in a personal capacity.
29. The First Respondent’s Reply dated 4 August 2022 offered the Tribunal no assistance on the newly claimed s. 41 (1) (a) FOIA exemption, other than to acknowledge that, as a matter of law, the Second Respondent was entitled to raise it even at this late stage. We found it disappointing that the First Respondent did not assist the Tribunal further, given the Court of Appeal’s description of the Information Commissioner as the ‘guardian of FOIA’ in *Jonathan Browning v IC and DBIS*³ and his unique ability to assist the Tribunal with submissions on the closed material, which the Appellant had not seen.
30. The Tribunal had the benefit of a witness statement made by Marcus Starling on 5 July 2022. With the permission of the Tribunal, a redacted version is contained in the open bundle, and an unredacted version in the closed bundle. We refer to his closed evidence in the closed annexe to this Decision.
31. In his open witness statement, Mr Starling explained that he is the Deputy Director of the Drug Misuse Unit in the Crime Reduction Directorate of the Home Office. He explains the role that ACMD plays in advising Ministers and the need for confidential exchanges between them in order to avoid a chilling effect on the provision of scientific advice which would impede policy making.
32. Mr Starling states that the December 2016 report is the only instance he is aware of when an advisory report from ACMD was sent to the Home Office on a confidential basis and not published. His evidence is that he ‘assumes’ the Chair of ACMD took into account the presumption of transparency when choosing to provide a confidential report rather than adopting the ordinary approach. He refers to the working protocol, which provides that ‘*The ACMD will publish its advice concurrent with its presentation to Ministers, unless there are pressing public or health protection reasons, or other reasons, for not doing so*’.
33. Mr Starling states that the December 2016 report is clearly confidential because it is described as such in the covering letter and the report itself. Also, that the sub-title of the report makes clear that it is ‘an internal report from ACMD to the Home Office’. He

³ [Browning v The Information Commissioner & Anor \[2014\] EWCA Civ 1050 \(30 July 2014\) \(bailii.org\)](#)

states that the report has been treated as confidential by ACMD and the Home Office to date and that its contents are not in the public domain.

34. Mr Starling's witness statement contains a very useful chronology of the key aspects of the development of policy in the areas covered by the report, evidence which does not seem to have been before the Information Commissioner when he issued his Decision Notice. He describes policy formulation in relation to drugs as unlike other Government policies in being 'subject to a constant process of review'.
35. In relation to the public benefit test, Mr Starling explains that the factors supporting the maintenance of the exemption in respect of recommendations 1-4 in the report are the likely prejudice to policy formulation in relation to a controversial issue by failing to preserve a safe space in which expert advice may be given to Ministers and undermining the integrity of the policy formulation process. In relation to recommendation 5, Mr Starling's evidence is that this recommendation does not explicitly address a substantive proposal on drug reform but that it informs the conclusions of the report as a whole, and its disclosure would therefore have a chilling effect on the 'free and frank advice and discussion' between ACMD and Ministers. Mr Starling also states that the disclosure of the report could affect the reputation of ACMD and make it difficult to recruit members in future.

Conclusion

36. As s. 41(1) FOIA is an absolute exemption, we have first considered whether it applies to the information requested at part 1 of the request. We note that this exemption is claimed in respect of the report as a whole.
37. Firstly, we accept that the December 2016 report had not been placed into the public domain, in whole or in part, at the time the Appellant's information request should have received a response. The extent to which any part of it has since been made public is disputed, but that is not an issue we need to determine in this appeal.
38. Secondly, as noted above, s. 41 (1) FOIA applies where disclosure of the information would constitute an actionable breach of confidence. This exemption is often claimed where there is a documented obligation of confidentiality between two parties, such as an exchange of letters or a contract. In this case, we have not been referred to any such agreement. Although the Decision Notice records that some reports are published and others not published, the Home Office has since accepted that the report which is the subject of this request is in fact the only ACMD report that has not been published. We have also been told that the report in question was not commissioned by the Home Office but sent by ACMD of its own volition. The terms of reference between ACMD and the Home Office clearly create a relationship of transparency unless exceptional circumstances apply, and such circumstances are to be explained. We have seen no explanation for the claimed non-transparency in relation to this report. We find it difficult, in these circumstances, to infer a duty of confidence from the surrounding circumstances in which the report was created.
39. We asked the Home Office what it did with the report and were told that no action was taken. There is therefore nothing about the Home Office's response which acknowledged and accepted the creation of a duty of confidence in relation to the report's contents, although it has been submitted that the Home Office simply accepted that it was not

intended for publication, as it was the only ACMD report which was marked 'confidential'. This does not seem to us to be consistent with ACMD's terms of reference (see paragraph 30 above) or working protocol (see paragraph 37 above) which require an explanation to be given for any non-publication.

40. ACMD has not provided us with any evidence about why it affixed the word 'confidential' to the report. The use of the term 'confidential' is not explained in the report itself or its covering letter. The Home Office is not asked in the covering letter to accept a duty of confidence and apparently took no steps to clarify the situation, such as asking for an explanation. It does not seem to us that an actionable duty of confidence can be created merely by the use of the word 'confidential' alone, if the surrounding circumstances do not support the importation of a duty of confidence and especially when it flies in the face of the usual relationship between two public authorities which would have had their FOIA obligations in mind.
41. We note that Marcus Starling's evidence is that he 'assumes' that ACMD took into account its terms of reference and working protocol in choosing to describe the report as 'confidential', but he provides no evidence that an explanation was sought or proffered for ACMD describing the report differently from other reports. As both the terms of reference and the working protocol clearly require an explanation to be given, we find ourselves unable to share his assumption.
42. We conclude that there is insufficient evidence before us for us to be satisfied that the disclosure of the report would create an actionable breach of confidence. It seems extremely unlikely to us that an action for breach of confidence would be brought by ACMD against the Home Office or that any such claim would have any prospect of success in the particular circumstances of this case. We are not satisfied that the withheld information has the necessary quality of confidence, or that it was imparted in circumstances importing an obligation of confidence, or that the unauthorised use of that information would be to the detriment of the person imparting it. We conclude that, in circumstances where the usual course of business between ACMD and the Home Office (both bodies subject to FOIA) is for ACMD reports to be published, that the affixation of the word 'confidential' to a report without any formal agreement between the parties, or any explanation for its use, or any express acknowledgement or agreement on the part of the Home Office that this report would be treated differently from all the others, is insufficient to engage s. 41 (1) FOIA. We also do not accept that the 'chilling effect' arguments advanced by the Second Respondent have any relevance to s. 41 (1) FOIA.
43. Having reached that conclusion, we now turn, thirdly, to consider the claimed exemption at s. 35 (1) (a) FOIA. As is exemplified by the 'gist' of the report quoted at [14] above, the Decision Notice considered the report from a high level as a single document, accepting that its contents as a whole fell under the umbrella of ongoing policy formulation. However, on reading the report in our closed bundle, the Tribunal was troubled by such a broad-brush analysis and directed the Home Office to provide more granular submissions as to the particular areas of policy formulations engaged by each recommendation in the report. This was duly provided (see paragraph 31 above). We consider that the test of 'relates to' in s. 35 (1) (a) FOIA requires an analysis with this degree of granularity and that the Decision Notice took an insufficiently focussed approach to the relationship between the specific contents of the report and the policy formulation to which they did or did not 'relate' in this case. This constitutes an error of law in the Decision Notice.

44. In the light of the Tribunal's more detailed approach, the Home Office accepted that the argument for the engagement of s. 35 (1) (a) FOIA was weak in relation to recommendation 5 of the report. It was in this context that the s. 41 (1) exemption was claimed for the first time, although, as we have found above, this does not apply.
45. Our conclusion is that the Decision Notice erred in law by taking an impermissibly broad approach to the information contained in the report. We find that it considered the engagement of s. 35(1)(a) FOIA to the report as a whole, without considering whether the report contained information which fell outside the scope of that exemption and which could have been disclosed. In our view, part 5 of the report does not engage s. 35 (1) (a) FOIA as it does not 'relate to' an area of policy formulation. For these reasons, we have directed the disclosure of information related to recommendation 5 of the report.
46. As to the remainder of the report, we are satisfied that s. 35 (1) (a) FOIA is engaged by recommendations 1 to 4. The Home Office has, after prompting from the Tribunal, provided us with evidence about the particular policies impacted and satisfied us that they were live at the relevant time. We refer to these in more detail in the closed annexe to this Decision.
47. We have much sympathy with the Appellant's submission that the Second Respondent has relied on an approach of 'seamless policy formulation'. To the extent that the Decision Notice endorsed that approach, we have rejected it and based our Decision on an evidenced relationship between the report's recommendations and the specific mechanics of policy formulation. The Second Respondent has directed us to the process of policy formulation which was relevant to the withheld information and ongoing at the time of the request and response. Accordingly, we are satisfied that s. 35 (1) (a) FOIA is engaged by recommendations 1 to 4 of the report.
48. As s. 41 (1) FOIA is an absolute exemption, we do not need to consider the public interest in this regard. As we have found that recommendation 5 does not relate to policy formulation, s. 35 (1) (a) is not engaged by it and we do not need to consider the public interest test in that context. In relation to the remainder of the report, we find that the public interest in maintaining the exemption outweighs the public interest in disclosure. This, as the Decision Notice states, is because there is a need to preserve a safe space for the development of policy in this area which outweighs the public interest in greater transparency about the process.
49. In all the circumstances, we now make the substituted Decision Notice at paragraph 2 above.
50. Further reasons are contained in the closed annexe to this Decision, which will be made available to the Home Office and the Information Commissioner only.

(Signed)

JUDGE ALISON MCKENNA

DATE: 9 JANUARY 2023