

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2023

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

Decision

1. The complainant has requested information relating to the relaxation conditions of Section 60 of the Criminal Justice and Public Order Act in the Best Use of Stop and Search Scheme (BUSSS).
2. The Commissioner's decision is that the Home Office was entitled to apply section 21(1) and section 35(1)(a) of FOIA to withhold the requested information. The Home Office however breached section 17(1) of FOIA as it did not issue a refusal notice within the required timescales.

Request and responses

3. On 28 July 2021 the complainant requested information of the following description:

"Please may you provide me with:

 - The methodology of the Home Office's evaluation/assessment of the pilot on relaxing the conditions of Section 60 of the Criminal Justice and Public Order Act in the Best Use of Stop and Search Scheme.
 - The quantitative data used as part of the above evaluation/assessment.

- The qualitative data used as part of the above evaluation/assessment.
 - The analysis of the above qualitative and quantitative data that informed the decision to make the changes permanent.
 - The equality impact assessment for the decision to make the changes permanent.”
4. The Home Office’s final position was to withhold the information under section 21(1), section 35(1)(a) and section 40(2) of FOIA.

Reasons for decision

5. This reasoning covers whether the Home Office is entitled to rely on section 21(), section 35(1)(a) and section 40(2) of FOIA to refuse to provide the requested information.

Section 21(1) – information accessible by other means

6. Section 21(1) of FOIA provides that information is exempt from disclosure under FOIA if the information requested is already reasonably accessible to the requester.
7. Section 21 is an absolute exemption which means there is no requirement to carry out a public interest test if the requested information is exempt.
8. In its response and internal review, the Home Office confirmed to the complainant that some of the information within scope of the request is already reasonably accessible. The Home Office provided the complainant with a link to the data at [Police powers and procedures: Stop and search and arrests, England and Wales, year ending 31 March 2021 second edition - GOV.UK \(www.gov.uk\)](#). It explained that the data does not include information on authorisations.
9. In its submission, the Home Office explained that these statistics were published on 27 October 2020 and 18 November 2021 respectively and provide some information about the statistical analysis for the Section 60 advice and decision.
10. The Home Office also stated that further information has been published as of 31 May 2022.

11. The complainant raised concerns with the Home Office and when making a complaint to the Commissioner that they believe the information published does not seem to support the Home Office's decision in July 2021, however it is not the Commissioner's position to determine whether the information published supports a position the Home Office has taken.
12. The Commissioner has reviewed the information available and notes the information accessible provides data on stop and search from police forces and therefore finds that the Home Office was correct to cite section 21 of FOIA as some of the information within the scope of the request is accessible to the complainant by other means. As section 21 does not apply to all the requested information, the Commissioner has gone on to consider HO's application of section 35 to the remaining information.

Section 35(1)(a) - formulation of government policy

13. 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

14. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.
15. The purpose of section 35(1)(a) is 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. In particular, it ensures a safe space to consider policy options in private.
16. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
17. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

18. The exemption covers information which 'relates to' the formulation or development of government policy. The Commissioner considers the term 'relates to' can be interpreted broadly.
19. In its internal review, the Home Office explained that the Government announced the permanent relaxations of the BUSSS conditions on the use of Section 60 stop and search in July 2021, as part of the Beating Crime Plan. It explained that since the announcement was made the Home Secretary has agreed to reconsider her decision. The Home Office acknowledges that this announcement has attracted scrutiny on the government's position on Section 60 policy. It stated that in addition to wider ongoing policy development related to stop and search, the information requested forms part of the ongoing advice intended for the Home Secretary and her reconsideration on relaxing the Section 60 BUSSS conditions.
20. The Home Office explained to the complainant that now and at the time of the request, the Home Secretary had not yet re-taken her decision and as such, this remains a live Section 60 policy issue. The Home Office confirmed that as the policy is being reconsidered by the Home Office, the information held in relation to points 1, 2, 3 and part of the information held in relation to point 5 for the equality impact assessments (EIA) all relate to live policy development.
21. Due to the passage of time the Commissioner contacted the Home Office at the start of his investigation to ask whether the Home Office still considers the information exempt under section 35(1)(a). The Home Office responded explaining that in May 2022 the previous Home Secretary decided to permanently relax Section 60 conditions from BUSSS in order to provide the police with greater flexibility to prevent knife crime and tackle serious violence. The Home Office confirmed to the Commissioner that both Section 60 and wider stop and search policy remains live, with ongoing considerations on the remaining elements of BUSSS and advice to Ministers in development, to which the information requested is directly relevant.
22. In relation to point 5 of the request, the Home Office explained that given one of the BUSSS conditions that was relaxed related to communicating with the public, the 2021 EIA and evaluation reports contain information that will support ongoing policy advice on delivering the former Home Secretary's request and the future of stop and search.
23. The Home Office stated that the former Home Secretary asked when she took the decision on Section 60 in May this year that there is strong guidance on transparent communications with communities to help with

relations and trust, noting that in some instances this might not be possible due to operational tactics. The Home Office explained that given that one of the BUSSS conditions that was relaxed related to communicating with the public, the 2021 EIA and evaluation reports contain information that will support ongoing policy advice on delivering the former Home Secretary's request and the future of stop and search.

24. The Home Office explained that there is also considerable related policy work ongoing on strip search (potential PACE Code amendments) and setting standards for community scrutiny, that are relevant to the context of stop and search policy and improving relations and trust with communities.
25. The Home Office referred to the Commissioner's own guidance¹ which confirms that 'the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review).' The Home Office maintains that, as per the Commissioner's guidance, Section 60 is a live policy issue, and was live (at the time of the request and response of December 2021) and whilst conditions of the BUSSS scheme have been permanently relaxed in relation to Section 60, this occurred after the date of the request and in addition, the wider elements are still subject to ongoing policy consideration and thereby within the policy formulation process, particularly as no final decision has yet been taken on their future standing.
26. The Home Office also referred the Commissioner to the position in the Tribunal's decision in *Weiss v Information Commissioner & Home Office* (EA/2011/0191, 20 February 2012), where the Tribunal found that the exemption was engaged: "the disputed information relates to a scheme being used to evaluate the use of a power, to determine whether it should be used in future and, if so, how and in what circumstances: these are all questions of the formulation and development of government policy." The Decision Notice FS50451254² concluded that the thinking process involved in formulating an official response on

¹ [section-35-government-policy.pdf \(ico.org.uk\)](https://ico.org.uk/section-35-government-policy.pdf)

² [fs_50451254.pdf \(ico.org.uk\)](https://ico.org.uk/fs_50451254.pdf)

future proposals can constitute the formulation or development of government policy.

27. Having considered the withheld information, and mindful of the purpose of the exemption, the Commissioner is satisfied that the requested information in relation to points 1, 2, 3 and the impact assessments in regards to point 5 relate to the formulation and development of government policy and section 35(1)(a) is engaged.

Public interest test

28. 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 contained at section 35(1)(a) outweighs the public interest in disclosing the information

Public interest arguments in favour of disclosure

29. The Home Office stated that there is a public interest in transparency and openness in Government. It stated that the government has always been transparent on stop and search policy and information regarding the use and operation of stop and search powers, and Section 60 powers specifically are already in the public domain.
30. The Home Office recognised that disclosure of the information requested on the EIA could publicly demonstrate its adherence to the s.149 Equality Act 2010 Public Sector Equality Duty and explained that to that end whilst disclosure of the information will reveal how those deliberations and decisions were made, to do so remains in the public interest and in the spirit of openness and transparency.
31. The Home Office stated that it recognises that disclosure can enhance Home Office transparency around a contentious issue and dispel any assumptions about the rationale for imposing the relaxed conditions under the section 60 Scheme.

Public interest arguments in favour of the exemption

32. The Home Office stated that whilst it accepts there is an inherent public interest in releasing a copy of information concerning the pilot scheme relating to the BUSSS, it finds that the requested information should be withheld. This is because good government depends on good decision-making which needs to be based on the best advice available and a full consideration of all the options without fear of premature disclosure. There may be a deterrent effect on external experts or stakeholders who might be reluctant to provide advice if it were to be disclosed. This can

curtail the ability of officials to provide free and frank advice in a safe space and undermine policy making.

33. The Home Office confirmed that it released the updated May 2022 EIA which was submitted to the then Home Secretary as part of the package of advice to support the May 2022 decision. It also explained that it considered that whilst there is an inherent public interest in releasing information relating to the requested EIA, it has already fulfilled the public interest and openness and transparency in government by publishing the more recent May 2022 EIA.
34. The Home Office referred to the Commissioner's guidance which states that 'the public interest should be assessed by reference to the circumstances at or around the time when the request was considered by the public authority (including the time of any internal review).' The Home Office maintains that, as per the ICO guidance, Section 60 is a live policy issue. It explained whilst conditions of the BUSSS scheme have been permanently relaxed in relation to Section 60, the wider elements are subject to ongoing policy consideration, and thereby within the policy formulation process, particularly as no final decision has yet been taken on their future standing.
35. The Home Office explained that whilst the government welcomes scrutiny of the powers, disclosing the information requested before government policy decisions are made may generate inaccurate and unhelpful conclusions that counter the merits of Section 60 powers and the operational reality of the police, and inhibit policy making.
36. The Home Office argued that whilst it acknowledges the public interest in stop and search powers and the scrutiny they are under, it is in the public interest to ensure that policy making on a serious issue such as stop and search is afforded the safe space in which to be deliberated and developed freely to ensure the powers are lawful and proportionate.
37. The Home Office argued that the timely and accurate disclosure of information should not be undermined by releasing information which is limited for internal use and thereby stimulate unhelpful and premature comparisons and conclusions being drawn without understanding the data or research in context. Disclosure of information that is intended for policy making can be mis-interpreted and unhelpfully stimulate inaccurate and negative discourse which is not in the public interest especially where trust and confidence in policing is important.
38. The Home Office stated that information whether officially released or not, is already open to widespread interpretation and susceptible to

selective assessment and reporting. It argued that this can curtail the ability of officials to provide free and frank advice in a safe space and undermine policy making. The Home Office also explained that there is clearly a public interest in maintaining the exemption for officials to be able to freely exchange ideas and deliberate policy, especially in relation to advice for decisions on operational policy or that facilitates law enforcement, and in particular as the section 60 powers do, empower the police.

39. The Home Office stated that mis-placed criticism based on selective information, that the Home Office or government have not been open and transparent is redundant. It argues that disclosing information on ongoing policy development prematurely and which is not intended for public dissemination would undermine such efforts and fuel unhelpful and inaccurate conclusions on an already controversial issue. It stated that whilst external scrutiny and public debate is always in the public interest, the risk of creating an inaccurate narrative that undermines government policy making intended to save lives and protect the public, clearly is not.

The balance of the public interest

40. The Commissioner agrees that disclosure can enhance transparency around a contentious issue and in this case could dispel any assumptions about the rationale for imposing the relaxed conditions under the Section 60 Scheme.
41. The Commissioner however also accepts that there is a public interest in maintaining the exemption for officials to be able to freely exchange ideas and deliberate policy, especially in relation to advice for decisions on operational policy or that facilitates law enforcement.
42. The Commissioner agrees with the Home Office that there is a public interest argument to ensure that policy making on a serious issue such as stop and search is given the safe space in which to be deliberated and developed freely to ensure the powers are lawful and proportionate.
43. The Commissioner also recognises the need for a safe space will be strongest when the issue is still live and as the Home Office has confirmed that the material was and is still being used to formulate policy proposals, the Commissioner believes that disclosure of the information could impact those policy decisions and undermine the safe space needed for policy formulation and development.

44. The Commissioner therefore finds that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosure at the time of the request.
45. Since the Commissioner's decision is that the Home Office was entitled to rely on the exemption at section 35(1)(a) he has not gone on to consider section 40(2) separately.

Procedural matters

46. Under section 17(1) of FOIA a public authority must issue a refusal notice in respect of any exempt information within 20 working days of the request.
47. In this case, the complainant submitted their request on 28 July 2021 and the Home Office did not issue a refusal notice until 10 December 2021. The Home Office did not therefore comply with section 17(1).
48. Provision of an internal review is not a requirement of FOIA but is a matter of good practice. The FOIA Code of Practice advised that an internal review should be provided within 20 working days of a request for one, in the majority of cases. In this case, the complainant requested a review on 17 December 2021 and the Home Office did not provide one until 10 March 2022 which was in excess of the Code of Practice guidance.

Right of appeal

49. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.

51. 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

**Laura Tomkinson
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