

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 November 2023

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

Decision (including any steps ordered)

1. The complainant requested a copy of a specified report issued by the Advisory Council for the Misuse of Drugs ('ACMD'). The Home Office refused to provide the report, citing the exemption at section 35(1)(a) (formulation of government policy) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(a) of FOIA to withhold the requested report.
3. No further steps are required as a result of this notice.

Background

4. The Home Office has explained that the complainant had made a similar request previously in March 2020 (considered by the Commissioner under IC-78561-F2S6¹ on 30 September 2021). In that case, the Commissioner upheld the Home Office's reliance upon section 35(1)(a) of FOIA in respect of the report information requested (see decision notice for the full outcome).

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4018604/ic-78561-f2s6.pdf>

5. This decision was subsequently appealed to the First-tier Tribunal [‘FTT’]² by the complainant. The FTT decided that section 35(1)(a) could not be relied upon for Recommendation 5 within the report and ordered the Home Office to release this information to the complainant. It upheld the application of section 35(1)(a) of FOIA to the remainder of the requested report.
6. In its submissions on the current case, the Home Office told the Commissioner:

“We have previously released some aspects of the report, specifically the text for Recommendation 5 which recommended a review of the HO [Home Office]-ACMD Working Protocol, recognising the need for Government to be open and transparent where issues are not related to ongoing policy work. We have considered whether any other parts of the report can be released. However, the remaining four recommendations all hang together, and the contents page, opening summary, etc. all reflect the content of the report and the issues which the ACMD wished to remain confidential. As such, we do not think the balance lies in disclosing at this time.”
7. The Home Office also advised it had not re-disclosed the Recommendation 5 information in response to the request under consideration here as the complainant already has this information.

Request and response

8. On 28 March 2023, the complainant wrote to the Home Office and requested information in the following terms:

“A 2016 Advisory Council on the Misuse of Drugs Act report on the 'Interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016'.”
9. The Home Office responded on 17 April 2023. It refused to provide the requested information citing section 35(1)(a) – the FOI exemption for the formulation or development of government policy.
10. The complainant requested an internal review on 17 April 2023.

² <https://caselaw.nationalarchives.gov.uk/ukftt/grc/2023/305>

11. Following its internal review, the Home Office wrote to the complainant, late, on 5 July 2023 and maintained its original position. It said:

“As explained in the original response, the Government’s Drug Strategy was published in December 2021. However there are important aspects of the Strategy for which policy is still being developed, notably the government’s response to the consultation ‘Swift, Certain Tough: New Consequences for Drug Possession.’ It may be helpful if I explain that although the independent review on drugs has concluded and the Government has now published its Drug Strategy, public authorities must consider requests for information at the time they were originally submitted. Therefore, it is our view that at the time of your request (and in fact, at the time of this internal review) the related policy continues to be developed.”

Scope of the case

12. The complainant contacted the Commissioner on 16 July 2023 to complain about the way his request for information had been handled. He argued that, as the Government’s 10-year Drug Strategy was published in December 2021, that section 35(1)(a) could no longer apply, stating “No policy can perpetually be live.”
13. The Commissioner has noted the parts of the requested report that were disclosed following the FTT tribunal related to the complainant’s previous request and has removed this from the scope of his investigation.
14. The Commissioner has considered whether the Home Office was entitled to rely on section 35(1)(a) of FOIA to withhold the remainder of the requested report. He has viewed the withheld information.

Reasons for decision

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

15. Section 35(1)(a) of FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands ‘formulation’ to broadly refer to the design of new policy, and ‘development’ to the process of reviewing or improving existing policy.
16. The purpose of subsection 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 policy

options in private. In particular, it ensures a safe space to consider policy options in private.

17. The Commissioner is of the opinion that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
18. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
19. 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.
20. 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 precise context and timing of the information in question.
21. The withheld information in this case is a report issued by the ACMD in December 2016, titled "Interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016".
22. The Home Office considers that the exemption in section 35(1)(a) is engaged, stating:

"... we still wish to rely on the arguments that we provided at both of the appeal stages above; and some of those will be referred to in this response. We will also demonstrate ... that due to ongoing live policy decisions and debate directly related to the issues contained in the ACMD confidential report, that the position has not changed during this further passage of time, and that the arguments, including the public interest test, for withholding the report are still just as relevant today".

23. The Home Office has explained that:

"The Drug Strategy is one part of the Government's policies on drug misuse. It does not, however focus to a significant extent on legislative reforms. Policy on legislation is often developed

through advice from officials to Ministers. This sometimes happens as a result of issues raised in the public domain, in the media, real-world events or through the work of experts such as the ACMD.”

24. The Home Office considers the specific issues considered within the confidential report should not be disclosed within this notice. The Commissioner has respected the Home Office’s position.
25. However, the Home Office has explained that:

“The Government’s Drug Strategy makes clear the harms caused by illicit drugs and the importance of controls and enforcement alongside treatment and recovery provision. For that reason, it does not consider fundamental changes to drug legislation. Issues connected to the overall legal framework on drugs are raised regularly and remain the subject of public debate.

For example, the recent policy work to classify nitrous oxide as a Class C drug under the MDA is relevant here. It is a drug currently only covered by the Psychoactive Substances Act 2016 (PSA) under which possession is lawful, but which in future (from 8 November 2023) will be controlled under the MDA. The most significant change being that those caught in possession of nitrous oxide for recreational purposes will face criminal sanctions.

... [Confidential details redacted]...

Calls to reform UK drug laws are debated regularly in Parliament and were considered by a recent Home Affairs Select Committee report on drugs which made several recommendations relating to UK drug laws. That report resulted from evidence hearings in 2022 and 2023 and was published on 31 August 2023, underlining how current these debates are. The Government therefore continues to respond to such calls as a live policy issue.

Additionally, over the summer there was widespread media mis-reporting alleging that the Home Office had changed its policy on the need for a licence to operate drug checking facilities at festivals. There were some calls for forensic testing teams at large events like festivals to be able to possess drugs and to offer drug testing services to the public without any regulatory oversight, and a wider debate in the media about whether Government should be enabling festival-goers to take illicit drugs more safely or whether instead they should continue to prioritise the prevention of such illicit drug use in order to reduce risk of harm. Under the Misuse of Drugs Act 1971, it has long been a requirement for anyone who wishes to possess, supply or

produce controlled drugs to obtain a Home Office controlled drugs licence, (unless an exception applies). This highlights both the ongoing public debate and how this relates to questions of the legal status of controlled drugs”.

26. The Home Office has further argued that:

“...the contents of the ACMD confidential report remains a live issue that relates to drug policy in the broadest sense, and the underlying legislative framework, only part of which is set out in the Government’s Drug Strategy. Ministers consider and respond to these wider questions on a regular basis. We therefore maintain that section 35(1)(a) of the FOIA is still engaged.

We recognise that these issues may at some point in the future no longer be subject to ongoing debate in public and consideration by Ministers, but publishing the report at this time would undermine Ministers current safe space to determine policy on drugs”.

27. The Commissioner is satisfied that the report relates to the Government’s ongoing drug strategy. He accepts the Home Office’s evidence that, although the report was several years old when the complainant requested it, it was nevertheless relevant to the formulation and ongoing development of policy on controlled substances, particularly in relation to the operation of the pieces of legislation it refers to.

28. The Commissioner is therefore satisfied that the report relates to ongoing policy development and thus that section 35(1)(a) of FOIA is engaged.

Public interest test

29. Section 35 is a qualified exemption. The Commissioner must, therefore, consider whether the public interest would be better served by maintaining the exemption or disclosing the withheld information.

Arguments in favour of disclosure

30. The complainant submitted the following in favour of disclosure:

“The Government’s 10-year Drug Strategy was published in December 2021. It is completely anathema to the FOIA that the Home Office can maintain it is still developing aspects of the policy, and thus cannot release the information. No policy can perpetually be live.

Especially considering the information has now been reported in parliament on several occasions, including in detail by Prof [name

redacted] at a committee meeting, and discussed by a minister, and in the Times and VICE in articles I have written, the public interest in getting all the information surely outweighs the interest in retaining the secrecy of the report (the essence of which is already widely known).”

31. The Home Office submitted the following arguments in favour of disclosing the withheld report:

“We recognise the arguments in favour of disclosing, which is that there is a need for the government to be clear, transparent and accountable to the electorate and that there is a general consideration in favour of openness and transparency in Government, to increase public trust and confidence. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all.”

Arguments in favour of maintaining the exemption

32. At internal review, the Home Office told the complainant:

“Whilst I accept there is general public interest in openness and transparency in government, I agree with the responding unit’s decision to protect advice provided to Ministers in order to allow them to make policy decisions. Disclosures of such advice or draft material would in general undermine the policy making process and potentially result in less robust, well-considered or effective advice. The impartiality of the Civil Service might be undermined if information regarding internal deliberations and the consideration of ideas were to be routinely made public as there is a risk that officials would come under political pressure not to challenge ideas in the formulation of policy, thus leading to poorer decision making.

Good government depends on good decision making which needs to be based on the best advice available and a full consideration of all of the options without fear of premature disclosure. Home Office officials are expected to offer impartial and robust advice to Ministers, and release of the information under consideration would be likely to inhibit the free and frank discussions that are necessary to formulate policy. Such discussions are held under the assumption of a ‘safe space’ to debate issues away from external scrutiny.

This safe space allows for a considered assessment of the respective merits or de-merits of different courses of action, which is vital to the foundation and delivery of effective policy and guidance. Without the protection afforded by the safe space

the policy and guidance development process would be markedly more difficult. There is strong public interest in maintaining a safe space in which to allow the development of government policy.”

33. The Home Office reiterated these arguments in its submission to the Commissioner.

Balance of the public interest

34. The Commissioner recognises the public interest in disclosure. The withheld information would enable members of the public to understand more fully the issues considered by the report, together with the legislative framework.
35. The Commissioner also acknowledges the inherent public interest in government accountability and transparency which would be served by disclosure.
36. He accepts that some of the information may potentially have been discussed in other fora as claimed by the complainant. However, he has seen no evidence that the specific and detailed content of the withheld information has been placed into the public domain.
37. Against disclosing the report, the Commissioner recognises that the preservation of a safe 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.
38. The need for a safe space will be strongest when the issue is still live. Once the Government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight.
39. As set out above, the Commissioner accepts that policy development relating to the UK Government’s drug strategy remains active and ongoing. It is a sensitive and sometimes controversial area of government policy making, which remains under constant review. The Commissioner recognises that there is a strong public interest in the preservation of a safe space in which to carry out policy making on drug control related matters. This is in order that policy consideration can be uninhibited and to ensure delivery of the best outcomes in this important area.
40. The age of the information in question and the stage reached in the policy formulation process is relevant when considering safe space arguments. The report in this case was created seven years prior to the

date of the request. It could be argued that the age of this information indicates that the policy formulation process relating to it will have been completed by the time of the request and so the preservation of the safe space was no longer necessary. The Commissioner, however, recognises that policy formulation in relation to matters which fall under the Psychoactive Substances Act 2016 is an ongoing process and he accepts that the report was still relevant to that process at the time of the request. Whilst this does not mean that there is an indefinite requirement for this safe space, the Commissioner accepts that there remained a public interest in preserving that space at the time of the request. Preserving the safe space for this policy formulation process is a valid and weighty factor in favour of maintenance of the exemption in this case.

41. 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. The Commissioner accepts that this content is sensitive and was provided in confidence to the Home Office. He also accepts that for analysis conducted by the ACMD to effectively inform the Government's policy making process (which he considers is in the public interest) it must be full and frank. This in turn is relevant to effective government policy making (ie the interests that section 35(1)(a) of FOIA is intended to protect).
42. The Commissioner further recognises that the preservation of safe space for this work will assist in ensuring that its advice and recommendations continue to be full and frank, and he counts this as a significant public interest factor in favour of maintaining the exemption.
43. Turning to the chilling effect arguments put forward by the Home Office, these hinge on the suggestion that the disclosure of a confidential report, containing as it does the ACMD's observations and recommendations, would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and lead to poorer decision making.
44. The Commissioner will 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 inhibiting effect that the possibility of disclosure could have on free and frank discussions in the future (if those involved are not confident that their contributions will remain confidential, where appropriate), and the consequent harm to the quality of the policy making process.
45. When determining what weight to accord chilling effect arguments, much will depend on the circumstances of the case, including the timing of the request, whether the policy is still live, and the actual content and sensitivity of the information in question.

46. As set out above, the Commissioner is satisfied that the policy that the report relates to is live and that it is subject to ongoing review. The ACMD is a knowledgeable and trusted expert in the field and would be expected to contribute to ongoing government policy development on drugs – indeed, that is one of its key responsibilities.
47. The Commissioner accepts that there was not an intention to publish the report at the point it was provided to the Home Office and he has seen no evidence to suggest that ACMD's expectation in this regard has changed. He therefore places significant weight on the argument that if the report was disclosed it would be likely to have a chilling effect on ACMD's future contributions to Home Office policy making. The resulting reluctance to contribute candidly to policy discussions would result in advice to Ministers, and deliberations on the policy, being less robust and less well informed. This in turn would result in poorer policy making in the area of drugs legislation. It is not in the public interest that deliberations on policies are inhibited by the chilling effect and that policy decisions are made without all the relevant information to hand.
48. The Commissioner acknowledges that the Government's policy in this area is regarded by some as controversial and that there are contrasting views over how substances covered by the Psychoactive Substances Act 2016 should be regulated. However, the Commissioner does not consider this argument to be sufficiently strong to outweigh the considerable public interest factors favouring maintaining the exemption, set out above, at this time.
49. 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. The Home Office was therefore entitled to rely on section 35(1)(a) of FOIA to withhold the report specified in the request.

Other matters

50. Although not complained about by the complainant, the Commissioner has made a record of the late internal review result in this case.
51. He notes the Home Office's explanation that further time was needed to fully investigate the points raised by the complainant, and that this took longer than anticipated.

Right of appeal

52. 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

53. 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.

54. 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
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