

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2021

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

Decision (including any steps ordered)

1. The complainant has requested from the Home Office a copy of a report issued by the Advisory Council for the Misuse of Drugs (ACMD) and an explanation why it was not published. He also asked for a note of a particular meeting he believed had been held to discuss the appointment of certain members to the ACMD.
2. The Home Office refused the request, citing the exemption at section 35(1)(a) (Formulation of government policy) of the FOIA. It said that it did not hold recorded information on why the report was not published. It subsequently withdrew its reliance on section 35(1)(a) to withhold the meeting note, and said it would disclose that information. However, to date it has not done so.
3. The Commissioner's decision is that the Home Office was entitled to rely on section 35(1)(a) to withhold the report issued by the ACMD. She is also satisfied that it does not hold recorded information on why the report was not published. However, by failing to disclose the meeting note, which it had conceded was not exempt under section 35, the Home Office breached section 1(1) and section 10(1) of the FOIA. It also failed to complete its deliberations on the balance of the public interest within a reasonable time, thus breaching section 17(3) of the FOIA.

4. The Commissioner requires the Home Office to take the following steps to ensure compliance with the legislation.
 - Disclose the information the Home Office has identified as falling within scope of part (4) of the request, redacting the personal data of any junior members of staff.
5. The Home Office must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

6. The ACMD makes recommendations to government on the control of dangerous or otherwise harmful drugs, including classification and scheduling under the Misuse of Drugs Act 1971 and its regulations. It is an advisory non-departmental public body, sponsored by the Home Office.¹

7. The Home Office provided the following information on the ACMD:

"The Advisory Council on the Misuse of Drugs (ACMD) is responsible for:

- *making recommendations to government on the control of dangerous or otherwise harmful drugs, including classification and scheduling under the Misuse of Drugs Act 1971 and its regulations*
- *considering any substances which are being or appears to be misused and of which is having or appears to be capable of having harmful effects sufficient to cause a social problem*
- *carrying out in-depth inquiries into aspects of drug use that are causing particular concern in the UK, with the aim of producing considered reports that will be helpful to policy makers and practitioners.*

Its formal terms of reference are as follows:

¹ <https://www.gov.uk/government/organisations/advisory-council-on-the-misuse-of-drugs/about>

It shall be the duty of the Advisory Council to keep under review the situation in the United Kingdom with respect to drugs which are being or appear to them likely to be misused and of which the misuse is having or appears to them capable of having harmful effects sufficient to constitute a social problem, and to give to any one or more of the ministers, where either council consider it expedient to do so or they are consulted by the minister or ministers in question, advice on measures (whether or not involving alteration of the law) which in the opinion of the council ought to be taken for preventing the misuse of such drugs or dealing with social problems connected with their misuse, and in particular on measures which in the opinion of the council, ought to be taken.

A further duty is placed on the Advisory Council to consider any matter relating to drug dependence or the misuse of drugs which may be referred to it by any government minister (as defined in the Act). Ministers - ordinarily the Home Secretary - are obliged to consult the Advisory Council before laying orders before parliament or before making regulations (or any changes to the same) under the Act.

The ACMD produces reports on a range of subjects, including drug-specific reports. Some of these reports are published; some are not."

Request and response

8. On 27 March 2020, the complainant wrote to the Home Office and requested information in the following terms²:

"1) 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.

² Although the request comprised seven parts, the complainant has only challenged the Home Office's response to two parts, which are reproduced here. The full request can be found in the annex at the end of this decision notice.

I would like you to provide a copy of this report and to provide an explanation on why it was not published. I note that the working protocol between the home secretary and the ACMD states: "The ACMD and ministers are committed to ensuring that the best evidence-based advice is available to government on drug misuse, working together with the common purpose of reducing drug-related harms in the UK."

...

4) An internal Home Office email dated 28 November 2017 said that the Home Office permanent secretary Phillip Rutnam called for a meeting to discuss a way forward on whether two ACMD candidates were not appointed based on political due diligence checks and referenced the fact that the home secretary was not content to approve the appointment of [name redacted]. I would like to request minutes from this meeting".

9. On 28 April 2020, the Home Office told the complainant that it required further time to consider the public interest test under section 35 of the FOIA. It said that it aimed to provide a full response by 28 May 2020.
10. No such response was provided and on 16 June 2020 the complainant contacted the Home Office to complain. In the continued absence of a response, on 10 August 2020 the Commissioner wrote to the Home Office, asking it to respond to the request. It did so on 19 August 2020, citing section 35(1)(a) (Formulation of government policy) of the FOIA to refuse parts (1) and (4) of the request.
11. The complainant requested an internal review of the response to parts (1) and (4) of the request on 2 September 2020.
12. The complainant did not receive a response so he contacted the Commissioner. On 3 November 2020, the Commissioner wrote to the Home Office, asking it to complete the internal review within 10 working days, but the complainant heard nothing further regarding the internal review; this remains outstanding.

Scope of the case

13. The complainant contacted the Commissioner on 11 December 2020 to complain that he had still not received the outcome of the internal review. He asked the Commissioner to examine the Home Office's refusal of parts (1) and (4) of his request.
14. As the Commissioner had already asked the Home Office to complete the internal review and it had not done so, she accepted the complaint

for investigation without requiring the complainant to exhaust the Home Office's internal review mechanism.

15. During the investigation, on 6 September 2021 the Home Office told the Commissioner that it had revised its position on the information it held in respect of part (4) of the request. It was satisfied that section 35(1)(a) was not engaged, and that the information should be disclosed to the complainant. However, as of the date of this decision notice, it has not disclosed the information, despite the Commissioner asking it to do so.
16. The analysis below considers whether the Home Office was entitled to rely on section 35(1)(a) of the FOIA to withhold the report described in part (1) of the request. The Commissioner has also considered its claim that it does not hold recorded information about why the report was not published, under section 1 of the FOIA. The Home Office's delay in disclosing non-exempt information falling within scope of part (4) of the request is considered under section 10 of the FOIA.
17. The Commissioner has commented on the Home Office's failure to conduct an internal review in the 'Other matters' section at the end of this decision notice.

Reasons for decision

Section 1 – general right of access

Section 10 – time for compliance

Section 17 – refusal of request

18. Section 1(1) of the FOIA states that an individual who asks for information is entitled to be informed whether the information is held and, if the information is held, to have that information communicated to them.
19. Section 10(1) of the FOIA states that on receipt of a request for information, a public authority should respond to the applicant within 20 working days.
20. Section 17(3) of the FOIA provides that where a public authority is relying on a qualified exemption, it may have a "*reasonable*" extension of time to consider the public interest in maintaining the exemption or disclosing the information.
21. The complainant submitted his request on 27 March 2020. The Home Office contacted the complainant on 28 April 2020 and confirmed that it held the requested information, but said it needed further time to consider the balance of the public interest under section 35.

22. Although the FOIA does not define what constitutes a "*reasonable*" extension, the Commissioner considers it reasonable to extend the time to provide a full response, including public interest considerations, by up to a further 20 working days. This means that the total time spent dealing with the request should not exceed 40 working days, unless there are exceptional circumstances. A public authority would need to fully justify any extension beyond 40 working days.
23. In this case, as it responded on 19 August 2020, the total time taken by the Home Office has exceeded 40 working days. While it apologised for the delay, the Home Office did not state that it was caused by any exceptional circumstances and the Commissioner does not consider there to be any. Therefore, by failing to complete its deliberations on the public interest within a reasonable time frame, the Home Office did not comply with section 17(3) of the FOIA.
24. The Home Office also confirmed to the Commissioner that it holds information falling within the scope of part (4) of the request (an email exchange containing a note of the meeting in question) which it concedes is not exempt under section 35(1)(a) and which it has failed to disclose to the complainant. The Home Office has therefore also breached section 1(1)(b) and section 10(1) of the FOIA in failing to disclose this information.
25. The Commissioner now requires the Home Office to take the action specified in paragraph 4, above.

Section 1 –General right of access

26. The Home Office told the Commissioner that it did not hold recorded information on why the report requested in part (1) of the request had not been published.
27. In cases where a public authority says that it does not hold the information that a complainant has requested, the Commissioner – following the lead of a number of First-tier Tribunal decisions – applies the civil standard of the balance of probabilities when assessing its claim. In essence, the Commissioner will determine whether it is likely, or unlikely, that the public authority holds information relevant to the complainant's request.
28. The Commissioner will consider the actions taken by the public authority to check whether the information is held, and any other reasons offered by the public authority to explain why the information is not held. She will also consider any reason why it is inherently likely or unlikely that information is not held. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of proof of the balance of probabilities.

The Home Office's position

29. The Commissioner asked the Home Office a series of detailed questions about its reasons for believing that it did not hold recorded information falling within the scope of the request.

30. The Home Office responded as follows:

"The request is for an explanation of why the ACMD report Interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016 was not published. Given that this is a request under the FOIA, we interpret this to mean a request for any information which would constitute such an explanation which was held when the request was received on 27 March 2020. We understand that the ICO's interpretation is the same.

Such an explanation would exist only if the normal or default position were that the ACMD reports are all published as a matter of course. The ACMD does routinely publish its advice to Government. However, this report is a rare occasion of a piece of advice from the ACMD to Ministers which was explicitly described by the ACMD as confidential and was not intended to be released into the public domain at any point. It was not advice which was commissioned by the Department and it was intended by the ACMD Chair at that time to be a private sharing of views on a very controversial topic... The question of publication thus never arose and there is therefore no reason why an explanation of non-publication should ever have been needed or recorded. It was taken as read that the report would not be published, given its confidential nature."

31. As it was known that there would never have been an intention to publish the report, given its 'confidential' marking, the Home Office felt it was not necessary to conduct extensive searches to verify it held no recorded information on this point. However, it said it had contacted staff in the business area who would be aware of whether such an explanation had ever existed and they had confirmed that the question of publication never arose and so no explanation had been required or recorded.

The Commissioner's decision

32. When, as in this case, the Commissioner is considering whether a public authority holds information which has been requested, it is seldom possible to prove with absolute certainty that it holds no relevant information. However, as set out in paragraphs 27 and 28, above, the Commissioner is required to make a finding on the balance of probabilities.

33. The Commissioner has considered the Home Office's arguments that, as there would be no intention of publishing this report, which was received as 'confidential', no recorded information on that point is held. She has also viewed the report itself. She notes that the covering letter from the ACMD presenting the report to the Home Secretary, refers to previous 'closed' debates it has had with the Home Office on topics covered by the report, and that it describes the report as 'confidential'.
34. The Commissioner considers it implicit that the material was intended to have a restricted circulation, and so she finds the Home Office's arguments that publication was never considered, credible. She is therefore satisfied that, on the balance of probabilities, the Home Office holds no recorded information on why the report requested in part (1) of the request had not been published. It follows that she finds no breach of section 1(1)(b) of the FOIA with regard to this part of the request.

Section 35 – Formulation of government policy

35. The Home Office refused to disclose a copy of the report described at part (1) of the request, citing the exemption at section 35(1)(a) of the FOIA.
36. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy.
37. 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 or effective policies. In particular, it ensures a safe space to consider policy options in private.
38. The Commissioner's guidance on section 35³ states:

"The Modernising Government White Paper (March 1999) describes policymaking as: 'the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world'. In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives".

³ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

39. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process, where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a Minister or decision makers.
40. Development of government policy goes beyond this stage, to improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.
41. The exemption is class based and it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged. However, it is subject to the public interest test.
42. In accordance with the Tribunal decision in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006, 19 February 2007⁴) 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.
43. 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.
44. 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*".
45. In his request for an internal review, the complainant commented as follows on the application of section 35(1)(a), given the age of the information in question:

"While the section 35 exemption provides substantial protection for information requested while discussions are taking place, these discussions regarding my first question occurred about five years ago and a decision has since been reached, through the psychoactive substances act."

⁴<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i70/DFES.pdf>

46. In its submissions to the Commissioner, the Home Office said it had taken account of the aforementioned Tribunal decision's comments on the broad interpretation of 'relates to'.

*"Given the ACMD's purpose and terms of reference, the reports which it submits to the Government almost by definition relate to policy formulation and development. One of the ACMD's key responsibilities is to 'produce considered reports that will be helpful to **policy makers** and practitioners' (emphasis added). We nevertheless recognise that each case must be considered individually on its merits."*

47. The Home Office provided further information about the ongoing nature of the policy work which the withheld information relates to:

"The policy in question is that on the interaction and relationship between the Misuse of Drugs Act 1971 and the Psychoactive Substances Act 2016 and, more specifically, on the matters which are the subject of the ACMD's conclusions and recommendations on pages 2-3 of the covering letter to the report and on page 24 of the report itself."

These are wide issues, which touch on the Government's core policies in relation to drugs. It is very difficult to identify a point at which formulation or development of these policies is complete, given that they are subject to continual development. This is reflected in the frequency with which the underlying legislation is amended. We recognise the position of the Tribunal and the Commissioner that policy development is not seamless and we acknowledge that the report was submitted in December 2016 and [the complainant's] request was received in March 2020. Nevertheless, the policy issues around the relationship between the 1971 Act and the 2016 Act and the control of drugs are by no means resolved and remain the subject of active consideration, formulation and development. They certainly were so at the time of the request."

Contrary to [the complainant's] contention, it is not the case that 'a decision has since been reached, through the psychoactive substances act'... First, the ACMD report goes much wider than any specific questions which [the complainant] has raised. Secondly, although the Psychoactive Substances Act 2016 is in place, the report is about the relationship between that Act and the Misuse of Drugs Act 1971 and raises issues which the 2016 Act did not resolve."

48. The Commissioner has reviewed the report and the ACMD's accompanying letter to the Home Secretary, which states: "This confidential report summarises our evidence-informed conclusions and is

intended to offer constructive advice and recommendations with regards to the operation of the two legislative regimes."

49. It goes on to state that the report is intended to facilitate informed debate between the ACMD and Ministers on the areas covered by the report and to aid in the future review of the Psychoactive Substances Act 2016.
50. The Commissioner is satisfied that the report relates to the Government's ongoing drug strategy and she accepts the Home Office's evidence that, although the report was three 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.
51. A Home Office blog on the GOV.UK website states⁵:

"Synthetic cannabinoids have emerged in the UK since 2008. The third generation synthetic cannabinoids such as those found in Spice were re-classified as class B drugs in December 2016. We continue to monitor their impact."
52. It further notes that the Government passed the Psychoactive Substances Act 2016 to restrict the production and supply of so-called 'legal highs' such as Spice.
53. 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 section 35(1)(a) of the FOIA is engaged.

Public interest test

54. Section 35 is a qualified exemption and so it is necessary to go on to consider whether the public interest would be better served by maintaining the exemption or disclosing the withheld information.

⁵ <https://homeofficemedia.blog.gov.uk/2017/04/12/sarah-newton-education-and-support-are-key-to-tackle-spice-in-governments-new-drug-strategy/>

Arguments in favour of disclosing the withheld information

55. The complainant argued that the disclosure of the report would not impinge on the convention of preserving a 'safe space' for considering policy options, nor would it have a 'chilling effect' on future discussions:

"...I am not requesting information regarding ministerial or civil servant discussions, therefore am not infringing whatsoever on a safe space for discussion.

Nor would disclosure create a chilling effect for discussion, as I understand the document I have requested was intended for publication and the expert advisory committee are less likely to be concerned with such an effect as they are asserting their professional evidence-based view, indeed, one of the authors informed me about this report due to frustration over it remaining unpublished."

56. He believed that the report had made certain recommendations which were not subsequently reflected in government policy and he felt that the public interest strongly favoured disclosure.
57. The Home Office acknowledged that there is a genuine public interest in understanding how government policy in relation to the misuse of drugs is developed and reflected in legislation. It accepted that disclosure of the report would increase public understanding of these issues and inform public debate on the UK's drug strategy.
58. The Commissioner recognises the significant public interest in disclosure. The withheld information would enable members of the public to understand more fully the interplay, and any tensions, between the two pieces of legislation considered in the report.
59. The Commissioner also recognises the inherent public interest in government accountability and transparency which would be served by disclosure.

Arguments in favour of maintaining the exemption

60. The Home Office argued that effective government requires a safe space in which to formulate and develop policy, and that this concept had been recognised by the Tribunal and the High Court:

"In Department of Health v Information Commissioner (EA/2013/087), 17 March 2014, for example, the Tribunal stated (at paragraph 73) that:

A safe space is needed in which policy can be formulated and developed in robust discussions, where participants are free to "think the unthinkable" in order to test and develop ideas, without

fear of external interference or distraction, whether as a result of premature and lurid media headlines or otherwise."

61. The Home Office said that disclosure of the report would erode the safe space required to develop, inform and implement government policy on the areas covered by the report. Disclosure might appear to pre-empt decisions still to be made and undermine the integrity of the policy formulation and development process. Disclosure would also be likely to result in significant public comment, and possible controversy, and would undermine the relationship between the Home Office and its independent experts.
62. The Home Office said that contrary to the complainant's suggestion, the reference to confidentiality in the ACMD's covering letter made it clear that the report was not intended to be made public, and its disclosure would have a chilling effect on the future provision of confidential advice on sensitive topics:

*"Section 35(1)(a) is relied on in this case to protect the important need for a safe space for policy formulation and development in relation to the operation of the two pieces of legislation referred to in the title of the report and reach decisions on the interaction between them away from external interference and distraction. If the report were to be made public, an effect would be that officials and Ministers would be forced to divert resources to deal with explaining and justifying its position in relation to the two Acts and the ACMD's recommendations, rather than considering what actions are required by the Government in relation to the issues which the ACMD has raised. This would prejudice the policy development process. The safe space allows for a considered assessment of risk and different courses of action, which is vital to the foundation and delivery of effective policy. In this instance the report was provided to the Government by an external advisory body who themselves explicitly described the report as 'confidential'. We also note the comment in the introduction that 'This report arose as a result of the ACMD's involvement in its constructive '**closed**' debate with the Home Office regarding the development of the Psychoactive Substances 4 Bill during its passage through to becoming the Psychoactive Substances Act 2016 (PSA)' (emphasis added). We consider that this is particularly relevant, as disclosure would have a significant chilling effect on the policy discussions between the ACMD and the Government. In the field of drugs legislation and policy the Government places a great deal of importance on the ability to receive advice from and have discussions with the ACMD on a confidential basis."*

63. The Home Office also argued that the fact that the withheld information is on an important and high profile area of government policy does not necessarily mean that there is a corresponding significant weight in

favour of disclosure. Where a subject is controversial, the level of public concern, media interest and general 'noise' in relation to it means that the effects of disclosure of information about it can be inflammatory. In such a context, it is all the more important that Ministers and public officials are able to carry out the necessary analysis and communicate the results without the distraction that would result from disclosure.

64. The Home Office also countered the complainant's arguments as follows:

"We would also disagree with [the complainant's] argument that he has not requested information regarding Ministerial or civil servant discussions and is therefore not infringing on a safe space for discussion. The 'safe space' is not confined to discussions between Ministers and officials and would certainly encompass advice and recommendations from an advisory body such as the ACMD, particularly where the ACMD have themselves indicated that the content of a report is confidential."

Balance of the public interest

65. In forming a conclusion on the public interest balance in this case, the Commissioner has taken into account the general public interest in the Home Office being transparent and open with regard to the information it holds.
66. The Commissioner also accepts that disclosure would allow the public to scrutinise the extent to which policy recommendations have been translated into legislation in the area of controlled substances, and particularly those which are relatively new to the drugs landscape.
67. With regard to the arguments in favour of maintaining the exemption, when considering the public interest in relation to section 35(1)(a) of the FOIA, 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.
68. Traditionally, safe space arguments relate to internal discussions but modern government sometimes invites external organisations to participate in their decision-making process (eg consultants, lobbyists, interest groups, academics etc). Safe space arguments can still apply where external contributors have been involved, as long as those discussions have not been opened up for general external comment.
69. The Commissioner is satisfied that the ACMD is an external participant in the Government's decision making process. While the complainant claims to have discussed the content of the report with a member of the

ACMD, the Commissioner has seen no evidence to suggest that the ACMD has formally opened up its discussions with the Home Office for general external comment or scrutiny, and so she accepts that they remain confidential.

70. 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.
71. 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 deliver the best outcomes in this important area.
72. 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 three 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 she 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.
73. 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. The relevance of this to the interests that section 35(1)(a) is intended to protect (effective government policy making) is that the Commissioner also accepts that for analysis conducted by the ACMD to effectively inform the Government's policy making process (which she considers is in the public interest) it must be full and frank. 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 she counts this as a significant public interest factor in favour of maintaining the exemption.

74. 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.
75. 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.
76. 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.
77. 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.
78. As covered previously, the Commissioner accepts that there was not an intention to publish the report at the point it was provided to the Home Office and she has seen no evidence to suggest that ACMD's expectation in this regard has changed. She 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.
79. 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, although the complainant believes that certain recommendations were made by the ACMD which were not acted on by the Government, this argument for disclosure is not sufficiently strong to outweigh the considerable public interest factors favouring maintaining the exemption, set out above.

80. 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) to withhold the report specified in part (1) of the request.

Other matters

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

Internal review

82. 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 the FOIA.
83. Part VI of the section 45 Code of Practice states that it is desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.
84. The complainant requested an internal review on 2 September 2020. The Commissioner contacted the Home Office and asked it to complete the internal review on 3 December 2020, but it did not do so.
85. The Commissioner commenced her investigation into the complaint on 4 August 2021, and in its response to her initial letter, the Home Office commented that the internal review had been nearing its completion at that point. It offered no explanation for why the internal review had taken nearly twelve months to complete.

86. The Commissioner considers that by failing to complete the internal review within the timescales set out above, the Home Office did not comply with the section 45 code.
87. The Commissioner uses intelligence gathered from individual cases to inform the ICO's insight and compliance function. This aligns with the goal in her draft "Openness by design"⁶ strategy to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting systemic non-compliance, consistent with the approaches set out in the ICO's "Regulatory Action Policy"⁷.

⁶ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁷ <https://ico.org.uk/media/about-the-ico/documents/2259467/regulatory-action-policy.pdf>

Right of appeal

88. 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

89. 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.
90. 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

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex – full text of request

"1) 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 on why it was not published. I note that the working protocol between the home secretary and the ACMD states: "The ACMD and ministers are committed to ensuring that the best evidence-based advice is available to government on drug misuse, working together with the common purpose of reducing drug-related harms in the UK."

2) On 25 July, the minister for crime's office sent an email titled "FW: Submission: ACMD member appointments - for clearance". It asked for advice on not appointing [name redacted] and another person to the ACMD due to their past social media activity. Who is the other person?

3) An internal Home Office email dated 17 January 2018 said that information on [name redacted] regarding the decision not to appoint him to the ACMD had been included in a draft note to the No. 10 public appointments team. Please provide a copy of this note and any response from No. 10.

4) An internal Home Office email dated 28 November 2017 said that the Home Office permanent secretary Phillip Rutnam called for a meeting to discuss a way forward on whether two ACMD candidates were not appointed based on political due diligence checks and referenced the fact that the home secretary was not content to approve the appointment of [name redacted]. I would like to request minutes from this meeting.

5) How many people in each of the last eight years, broken down by year, have appealed to the Home Office public appointments team about a failure to appoint them to roles on public bodies which they had been interviewed for and had been deemed appointable by the advisory assessment panel? Please provide a list of the public bodies concerned, along with the roles in question.

6) I understand that interviews for the latest set of prospective ACMD members have only recently taken place, despite interviews being slated to be conducted in May 2019. Why has there been such a delay?

7) Please provide all documents, including memos, internal emails and correspondence, within the Drugs and Alcohol Unit mentioning "[name redacted]" between 10 June to 24 June 2019.

There is a clear public interest in the disclosure of this information on transparency and accountability grounds."