

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

### **Decision notice**

**Date:** 17 October 2022

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

### **Decision (including any steps ordered)**

---

1. The complainant made a request for information relating to the 63<sup>rd</sup> Session of the UN's Commission on Narcotic Drugs. The Home Office stated that it does hold information falling within the scope of the request but considered part of the information exempt from disclosure under section 27(1)(a) (international relations) or section 40(2) (third party personal data) and the remainder exempt under section 35(1)(a) (formulation or development of government policy) of FOIA.
2. The Commissioner's decision is that the Home Office was entitled to rely on section 27(1)(a) and (b), section 35(1)(a) and section 40(2) to withhold the remaining information.
3. The Commissioner does not require the Home Office to take any steps.

### **Request and response**

---

4. On 2 March 2020, the complainant wrote to the Home Office and requested information in the following terms:  
  
"I would like to make a freedom of information request for all HO [Home Office] documents and emails in regards to the 63<sup>rd</sup> Session of the UN's Commission on Narcotic Drugs (UN-CND)."

I would like this to include all emails and documents that have either of these people involved:

Theresa May, Savid Javis [Javid], Priti Patel, Victoria Atkins, any ministers who were to be present at the now delayed meeting to discuss the World Health Organisations recommendation for the global classification of cannabis and any emails between civil servants that touch on this topic."

5. The Home Office responded on 15 April 2020 and refused to provide the information citing section 35(1)(a) of FOIA.
6. The Home Office provided an internal review on 30 June 2020 in which it changed its position and cited section 12 of FOIA.
7. On 4 January 2021 the Commissioner issued a decision notice IC-43077-N3Z1<sup>1</sup> stating that the Home Office was not entitled to rely on section 12(1) of FOIA and must issue a fresh response to the request.
8. On 6 February 2021 the Home Office issued a fresh response to the complainant stating that it was refusing to provide the requested information as sections 35(1), 27(1) and 27(2) of FOIA apply. It is this response from the Home Office that this decision notice addresses.

## Background

---

9. The Home Office provided the Commissioner with a background to the UN Commission on Narcotic Drugs (CND) which is as follows:

"The UN Commission on Narcotic Drugs (CND) which (comprised of 53 UN Member States including the UK) is the UN's primary policy making forum for international cooperation on drugs. It meets annually and involves bilateral meetings, negotiating UN resolutions, voting on the international control of substances and discussions on international drug policy. UK Minister's would not normally routinely attend these sessions, however, they would be sighted on the running of the session and UK involvement, are requested to approve the UK voting position on recommendations put forward and provided with a summary on the outcome of the CND. As part of the UN Conventions on Drugs, the UK

---

<sup>1</sup> [IC-43077-N3Z1 \(ico.org.uk\)](https://ico.org.uk/decision-notice/IC-43077-N3Z1)

has agreed to abide by the obligations under the 1961 Single Convention on Narcotics Drugs ('the 1961 Convention'), and the 1971 Convention on Psychotropic Substances ('the 1971 Convention').

The purpose of the 1961 Convention is to address the problems posed by narcotic drugs. Parties are required to ensure drugs listed in Schedule 1, which includes cannabis, "are subject to all measures of control applicable to drugs under this Convention". Article 4 requires parties to, among other things, take "such legislative and administrative measures as may be necessary (a) [to] give effect to and carry out the provisions of this Convention within their own territories". Article 4(c) further requires parties "[s]ubject to the provisions of this Convention, to limit exclusively to medical and scientific purposes the production, manufacture, export, import, distribution of, trade in, use and possession of drugs".

The licensing of cannabis for personal and commercial manufacture/production/supply/use beyond "medical and scientific use" and allowing for importation and exportation are not exempted activities under the 1961 Convention.

Every year the CND vote on substances and drug precursors to be internationally controlled under the UN drug conventions. The vote is based on recommendations of the World Health Organisation Expert Committee on Drugs and Drug Dependence (WHO-ECDD), who provide independent advice on international scheduling of drugs, and the International Narcotics Control Board (INCB), who provide recommendations on drug precursor chemical control. As part of the 63rd CND session, which took place between 2 – 6 March 2020 (the FOI request was received on the first day of the session - 2 March 2020), as well as the recommendations from the WHO-ECDD to control 12 new psychoactive substances, they also published six recommendations relating to previous voting in 2019 on the recommendations from the WHO regarding the critical review of cannabis and cannabis-related substances. This vote was initially postponed to enable States more time to consider the recommendations. At the March 2020 session, the Commission decided the voting on these scheduled recommendations should be given further consideration due to their complexity and the vote was reconvened at the 63rd session in December 2020. As such, when the request was submitted, the March session was still underway and the voting had not yet taken place, being postponed until December."

## Scope of the case

---

10. The complainant contacted the Commissioner on 6 July 2020 to complain about the way his request for information had been handled.
11. In its submission to the Commissioner the Home Office stated that it was also applying section 27(1)(b) and 40(2) to parts of the withheld information. The Home Office also advised the Commissioner that due to the passage of time some of the information has now been made publicly available<sup>2</sup>. This information is therefore out of scope.
12. The Commissioner has therefore considered whether the Home Office was entitled to rely on section 27(1)(a) and (b), section 27(2), section 35(1)(a), and section 40(2) to withhold the information.

## Reasons for decision

---

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

13. In its submission to the Commissioner, the Home Office explained that a large portion of the requested information falls under section 35(1)(a) as it is information which relates to the formulation and development of government policy, both at the time of the request was received and in relation to ongoing policy issues relating to cannabis and wider drug policy and legislative controls.
  14. 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. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
  15. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosure which would undermine this process and result in less robust, well-considered policy options.
  16. The Commissioner's guidance on section 35 states:
- 

<sup>2</sup> [The Commission on Narcotic Drugs \(unodc.org\)](https://www.unodc.org/) and [Current scheduling recommendations \(unodc.org\)](https://www.unodc.org/).

"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".

17. The exemption is class based and so it is only necessary 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.
18. 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.

**Does the information relate to the formulation or development of government policy?**

19. In its submission, the Home Office explained that the information it was seeking to withhold under section 35(1)(a) includes communications and related material such as emails, briefings and presentations, generated in the course of the Home Office considering and developing the UK Government policies in this area and response to the recommendations at the 63<sup>rd</sup> session.
20. The Home Office explained that the policies and ideas were developed and informed by working with other Government Departments with the Advisory Council on the Misuse of Drugs (ACMD), as well as discussions and views held with other countries and Non-Government Organisations.
21. The Home Office also stated that the withheld information contains meeting details and explanation from the WHO on the recommendations they had put forward. It stated that information also related to briefings relevant to meetings with other countries outlining their policy in response to the recommendations under consideration.
22. The Home Office stated that due to the passage of time, the 63<sup>rd</sup> CND has taken place since the original request, 2 March 2020. The CND took place from 2 March 2020 to 6 March 2020 and the postponed voting

from that session concluded in December 2020. It explained however, that it is clear at the time of the request, the session had just begun and the information held clearly relates to the formulation and development of government policy. It explained that the policy and the controls placed on cannabis and cannabis-related substances continues to be a live issue, being researched and assessed.

23. The Home Office explained that the classification of cannabis is controlled under the Misuse of Drugs Act 1971 (MDA) which is regularly under review. It stated that the MDA can be amended to enable new substances to be added, the removal or the movement of substances covered by the Psychoactive Substances Act 2016 to the MDA and/or if advised by the ACMD to do so due to new risks identified.
24. The Commissioner accepts that the information withheld on the basis of this exemption falls within the scope of section 35(1)(a) of FOIA as it clearly relates to both the formulation and development of government policy for the reasons set out by the Home Office above.

#### **Public interest arguments in favour of disclosure**

25. The Home Office stated that it acknowledged the public interest in transparency and that there is a clear public interest in understanding the UK's position on Narcotic Drugs and specifically the UK policy on the classification of cannabis and understanding the discussions that have taken place about this.

#### **Public interest arguments in favour of withholding the information**

26. In its submission, the Home Office explained that the policy on cannabis classification involves discussions with a wide breadth of actors, both nationally and with international partners and there is a clear public interest in ensuring those discussions involving Ministers, officials and with independent organisations and other countries are able to take place without external interference.
27. It explained that the request was received on the first day of the session, 2 March 2020. It argued that release would hinder those and future discussions and prejudice the ability of officials and ministers to reach decisions with the best information available. Debates and the assessment of substances, not just cannabis, are continually being reviewed and release of information prematurely would prejudice policy development in this area and the wider discussions on drugs regulations more generally.

28. The Home Office stated that it has concluded that the balance of the public interest lies in maintaining the exemption and withholding the information. While it concedes that there is a public interest in disclosing the requested information, this is outweighed by the public interest in ensuring that policy can be developed effectively and without prejudice.

### **The balance of the public interest**

29. The Commissioner accepts that disclosure of the information would provide a detailed insight into the government's policy work on this topic.
30. However, the Commissioner also accepts there is a clear public interest in ensuring policy formulation and development takes place in the context of free and frank discussion and deliberation. He recognises that that a safe space is needed to develop ideas, debate live issues, and reach decisions away from external interference and that the need for a safe space will be strongest when the issue is live. The Commissioner understands that the policy making in relation to this issue was live at the time of the complainant's request.
31. The Commissioner accepts that policies and the assessment of substances are continually reviewed, therefore the release of information prematurely would likely prejudice policy development in this area and the wider discussions on drug regulations more generally.
32. The Commissioner agrees with the Home Office that release of the information could potentially hinder those and future discussions and prejudice the ability of officials and ministers to reach decisions with the information available to them.
33. 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.

### **Section 27 – International relations**

34. The Home Office confirmed to the Commissioner that some of the information it is withholding is exempt from disclosure on the basis of section 27(1)(a) and (b) of FOIA. This states that:
- ‘(1) Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice—
- (a) relations between the United Kingdom and any other State’



(b) relations between the United Kingdom and any international organisation or international court'

35. Like with any prejudice-based exemption, the Commissioner follows the three step test set out in *Hogan and Oxford City Council v Information Commissioner* (EA/2005/0026 and 0030). First, the public authority must identify an applicable interest, then it must demonstrate a causal link between disclosure and a harm to that interest that is "real, actual and of substance", finally, it must decide on the likelihood of that harm occurring.
36. In support of its position the Home Office provided the Commissioner with samples of some of the withheld information and a spreadsheet summarising the remaining parts of the withheld information.
37. The Home Office explained that the CND provides the platform for setting the international obligations in regard to drugs and that this creates opportunity to share information and understand the range of issues from a host of different countries. The Home Office explained that for the UK to fully participate, influence and explore the issues on drug policy and build an informed understanding on a range of views and evidence presented, the UK, through Ministers, officials and partners need to be able to have free and frank discussions on drug policy developments taking place overseas.
38. The Home Office stated that the CND provides a platform for this engagement, with bilateral meetings between the UK and other countries taking place in the lead up to, during, and after CND. It explained that in the lead up to the 63rd session, meetings between the UK and the WHO, following their recommendations were undertaken to enable further discussion on the proposals being put forward, which set out the narrative and evidence, wider considerations in play and how it could inform the UK's decision on their voting outcome.
39. The Home Office argued that the UK's involvement at the CND brings with it a level of expectation that engagement across the international landscape would be undertaken in confidence. It explained that the details of those discussions and the steers provided to aid those attending the meeting, if released, would result to impact on the extent of information on policy development being shared in the future. It argued that this would prejudice the UK's ability to understand issues and build relations with other states and international organisations on these issues.



40. The Home Office explained that through engagement and sharing of information it enables support for a cross-Government position on emerging international policies and trends and how they impact the UK, including its responsibility for complying with the UN Conventions. It explained that the CND also provides the platform for the UK to showcase what we are doing and demonstrate our commitment and leading role in tackling drug misuse, both domestically and internationally.

### **The Commissioner's view**

41. In order for a prejudice based exemption, such as section 27, to be engaged the Commissioner believes that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
  - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
  - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure would be likely to result in prejudice or disclosure would result in prejudice. If the likelihood of prejudice occurring is one that is only hypothetical or remote the exemption will not be engaged.
42. Furthermore, the Commissioner has been guided by the comments of the Information Tribunal which suggested that in the context of section 27(1), prejudice can be real and of substance 'if it makes relations more difficult or calls for a particular damage limitation response to contain or limit damage which would not have otherwise have been necessary'.
43. With regard to the first criterion of the test set out above, the Commissioner accepts that the type of harm that the Home Office believes would be likely to occur if the information was disclosed is applicable to the interests protected by section 27(1)(a) and (b).
44. The Commissioner has taken into account the content of the information and is satisfied that there a causal link between disclosure of the

information and prejudice occurring to the UK's relations with other states and international organisations.

45. Furthermore, and for the same reasoning, the Commissioner is satisfied that the risk of prejudice occurring is clearly more than a hypothetical one and therefore the third criterion is met.
46. Section 27(1)(a) and (b) is therefore engaged.

### **Public interest test**

47. Section 27 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 27(1)(a) and (b) outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of releasing the information**

48. The Home Office stated that it acknowledged the public interest in transparency and that there is a clear public interest in the UK's position on Narcotic Drugs and specifically the global classification of cannabis and understanding the discussions that have taken place about this.

### **Public interest arguments in favour of withholding the information**

49. The Home Office argued that the release of the information would prejudice the UK's relations with other states and international organisations. There is a significant public interest in ensuring that the UK's relations with other states and international organisations is not undermined so that in turn the UK's ability to protect and promote its interests is not harmed.
50. The Home Office explained that the UK is one of the 53 member states of the CND and success and influence on the international stage requires engagement at ministerial and official level with other countries within an environment of trust. It argued that disclosing the information would diminish the UK's ability to constructively engage with other states. It also argued that damaging these channels of communication would have implications for the success and viability of the UK's international relations, which in turn would prejudice the UK's influence in the area of cannabis classification and that such an outcome would be clearly against the public interest. It explained that in this case, for the reasons it provided, the Home Office believe the public interest clearly falls in favour of withholding this information.

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

51. The Commissioner agrees that there is clear public interest in the UK's position on Narcotic Drugs and specifically the global classification of cannabis and understanding the discussions that have taken place.
52. As with the information withheld on the basis of section 35(1)(a), the disclosure of the information withheld on the basis of section 27(1) would clearly provide insight into the governments work on this topic.
53. In the circumstances of this case the Commissioner accepts that there is a particularly strong public interest in ensuring that the UK maintains effective relations with other states, especially given that at the time of the request the discussions in relation to these issues remained ongoing.
54. Furthermore, the Commissioner considers the fact that disclosure of information risks harming the UK's relations with other states adds additional weight to maintaining the exemptions contained at section 27(1).
55. In light of the above, the Commissioner has concluded that the public interest favours maintaining the exemptions contained at sections 27(1)(a), (b) and (c) of FOIA. The Commissioner has not gone onto consider section 27(2).

#### **Section 40 – personal information**

56. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
57. The Home Office has stated that the remaining part of the requested information is being withheld under section 40(2). The Home Office has provided a summary of this information and a sample of some of the information withheld.
58. In this case, the relevant condition is contained in section 40(3A)(a)<sup>3</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the UK General Data Protection Regulation ("UK GDPR").

---

<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

59. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then section 40 cannot apply.
60. Secondly, if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

61. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual."

62. The two main elements of personal data are that the data must relate to a living person and that the person must be identifiable.
63. An individual is "identifiable" if they can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
64. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
65. The Home Office has explained that the information it holds includes the names, job titles and email addresses/contact details of Home Office officials and other civil servants and third parties, contained within email chains and other communications.
66. The Commissioner has been provided with a summary and a sample of the withheld information and is satisfied that the information contains names of individuals and contains email addresses that identify those individuals.
67. The Commissioner is satisfied that the information the Home Office has described and provided falls within the definition of "personal data" in section 3(2) of the DPA.

**Would disclosure of the information contravene any of the DP principles?**

68. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
69. The most relevant DP principle in this case is the one contained within Article 5(1)(a) of the GDPR, which states:
- “Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
70. In the case of a FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
71. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

**Lawful processing: Article 6(1)(f) of the UK GDPR**

72. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
73. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:
- “processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>4</sup>.

---

<sup>4</sup> Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

74. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
  - ii) Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
75. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

76. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
77. In its submission the Home Office explained that officials and third parties have a legitimate expectation that their names and contact details (or other identifying information) will not be released in response to requests made under FOIA and it does not believe there is a legitimate interest in release of this information. It explained that it

---

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

believes release would breach the first data protection principle, since it would be unlawful and unfair to disclose the information.

78. In the circumstances of this case, for the reasons discussed above, the Commissioner accepts that there is a legitimate interest in the disclosure of information about this subject. However, he is not persuaded that there is a particularly strong or compelling interest in the disclosure of the email addresses or the names of officials named in the withheld information in order to add to the public's understanding of this subject.

**Is disclosure necessary?**

79. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity which involves the consideration of alternative measures, and so a measure would not be necessary if the legitimate aim could be achieved by something less. Disclosure under FOIA must therefore be the least restrictive means of achieving the legitimate aim in question.
80. In the Commissioner's view it is not sustainable to argue that disclosure of the names and email addresses of the officials is necessary; disclosure of such information would not add to the public's understanding of this subject matter.
81. Given this finding the Commissioner has concluded that disclosure of the names would not be lawful and therefore article 6(1)(f) of the GDPR is not met. Disclosure of the names would therefore breach the first data protection principle and thus such information is exempt from disclosure on the basis of section 40(2) of FOIA.
82. The Commissioner has not gone on to consider the application of section 27(2) given he has concluded that all the withheld information is exempt under section 27(1), section 3(1) and section 40(2).



## Right of appeal

---

83. 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: 0300 1234504  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

84. 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.
85. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**