

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2023

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

Decision (including any steps ordered)

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

Request and response

3. On 22 November 2021 the complainant requested information of the following description:

"The equality impact assessment

Your client did not publish the equality impact assessment ("the EIA") conducted prior to the decision in July 2021. Please kindly provide a copy of the same pursuant to your client's duty of candour or, alternatively, under the Freedom of Information Act 2000. If your

client provides a copy of the EIA pursuant to her duty of candour, please confirm that it may be publicised.

Advice to police forces

You state that your client will advise police forces to revert to the position immediately preceding the decision subject to challenge, i.e. that the s60 BUSSS safeguards have not been removed but are suspended pending the above-mentioned reconsideration. Please kindly provide confirmation that this has been done, including details of the means by which it was done."

4. On 6 January 2022 the Home Office responded stating that it holds the requested information but is withholding it under section 35(1)(a) of FOIA.
5. On 26 April 2022 the Home Office conducted an internal review in which it maintained its original decision. In the internal review, the Home Office confirmed to the complainant that its response relates to the request for the EIA in relation to the section 60 of the Criminal Justice and Public Order Act 1994 (CJPOA) contained in the BUSSS.
6. The complainant's request also sought confirmation as to whether police forces had been advised to revert to the position immediately preceding the decision of July 2021, the Home Office confirmed in its internal review that it answered this outside of FOIA.

Reasons for decision

7. This reasoning explains why the Commissioner is satisfied that the Home Office is entitled to rely on section 35(1)(a) of FOIA to refuse the complainant's request for the EIA.

Section 30 - investigations and proceedings

8. Section 35(1)(a) of FOIA states:

"Information held by a government department or the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy

8. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

9. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
10. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
11. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
12. The exemption covers information which 'relates to' the formulation or development of government policy. The Commissioner considers the term 'relates to' can be interpreted broadly.
13. In its internal review, the Home Office explained that the Government announced the permanent relaxations of the BUSSS conditions on the use of Section 60 in July 2021, as part of the Beating Crime Plan. It explained that since the announcement was made the Home Secretary has agreed to reconsider her decision. The Home Office acknowledges that this announcement has attracted scrutiny on the government's position on Section 60 policy. It explained that in addition to the wider ongoing policy development related to stop and search, the information requested forms part of the ongoing advice intended for the Home Secretary and her reconsideration on relaxing the Section 60 BUSSS conditions. The Home Office explained to the complainant that, at the time of the request, the Home Secretary has not yet re-taken her decision and as such, this remains a live Section 60 policy issue.
14. The Commissioner recently issued a decision notice IC-159203-X1L0¹ regarding the Home Office's refusal of a separate request for the EIA. During the Commissioner's investigation of IC-159203-X1L0 he contacted the Home Office to ask whether it remained the case that the information was exempt under section 35(1)(a). The Home Office confirmed that Section 60 remains a live policy issue and whilst conditions of the BUSSS scheme have been permanently relaxed in relation to Section 60 the wider elements are still subject to ongoing

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4023618/ic-159203-x1l0.pdf>

policy consideration and thereby within the policy formulation process, particularly as no final decision has yet been taken on their future standing.

15. In its internal review, the Home Office also referred to the position in the Tribunal's decision in *Weiss v Information Commissioner & Home Office* (EA/2011/0191, 20 February 2012), where the Tribunal found that the exemption was engaged: "the disputed information relates to a scheme being used to evaluate the use of a power, to determine whether it should be used in future and, if so, how and in what circumstances: these are all questions of the formulation and development of government policy." The Decision Notice FS504512542 concluded that the thinking process involved in formulating an official response on future proposals can constitute the formulation or development of government policy.
16. The Home Office confirmed that the EIA forms part of briefings, advice and submissions intended for internal use and limited distribution, in the formulation of government stop and search policy.
17. Based on all the information provided, the Commissioner is satisfied that the information requested relates to the formulation and development of government policy and section 35(1)(a) is engaged.

The public interest test

19. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

20. In its response to the complainant's request, the Home Office acknowledged that there is a public interest in transparency and openness in government. It confirmed that the government has always been transparent on stop and search policy and information regarding the use and operation of stop and search powers, and Section 60 powers specifically are already in the public domain.
21. The Home Office recognised that disclosure of the information requested on the EIA could publicly demonstrate its adherence to the Section 149 Equality Act 2010 Public Sector Equality Duty. It explained that to that end, whilst disclosure of the information will reveal how those deliberations and decisions were made, nevertheless, to do so remains in the public interest and in the spirit of transparency.

22. The Home Office stated that disclosure can enhance Home Office transparency around a contentious issue and dispel any assumptions about the rationale for imposing the relaxed conditions under the Section 60 Scheme.
23. In the complainant's internal review they argued that disclosure of the EIA would support rather than hinder any ongoing policy development and formulation as it would enable input from relevant stakeholders, including those most likely to be adversely affected by Section 60 stop and search.

Public interest arguments in favour of maintaining the exemption

24. The Home Office argued good government and policy making is in the public interest and that the deliberations and exchanges between officials and Ministers around Section 60 policy should not be inaccurately mis-interpreted. It explained that disclosure of the requested information may increase that risk and curtail the ability of officials to do their work effectively what is arguably a contentious policy area. It also explained that there may be a deterrence on official external experts or stakeholders who might be reluctant to provide advice if the information is disclosed. It stated that this can curtail the ability of officials to provide free and frank advice in a safe space and undermine policy making.
25. The Home Office acknowledges the public interest in stop and search powers and the scrutiny they are under. However, it is in the public interest to ensure that policy making on a serious issue such as stop and search is afforded the safe space in which to be deliberated and developed freely to ensure the powers are lawful and proportionate.
26. The Home Office explained that it is committed to ensuring transparency and that accurate information is published. It stated that on 18 November 2021 it published its annual statistical bulletin 'Police Powers and Procedures: Stop and search and arrests, England and Wales, year ending 31 March 2021', which for the first time gathered data on both age and gender, and specifically where and when crimes are taking place.
27. The Home Office explained that the timely and accurate disclosure of information should not be undermined by releasing information which is presently in circulation for internal use and thereby stimulate unhelpful and premature comparisons and conclusions being drawn without understanding the data or research in context. The Home Office explained that disclosure of information that is being utilised in the course of ongoing policy-making can be misinterpreted and taken out of context, unhelpfully stimulate inaccurate and negative discourse which is

not in the public interest especially where trust and confidence in policing is important.

28. The Home Office argued that in the event of inappropriately timed disclosure, Home Office, Ministers and officials then need to respond to any such misinterpretation and scrutiny to remedy any misunderstanding which when based on inaccuracies and that this will unnecessarily divert public resources and inhibit officials from conducting their duties effectively on ongoing policy.
29. It also argued that information, whether officially released or not, is already open to widespread interpretation and susceptible to selective assessment and reporting and that this can curtail the ability of officials to provide free and frank advice in a safe space and undermine policy making. It stated that there is clearly a public interest in maintaining the exemption for officials to be able to freely exchange ideas and deliberate policy, especially in relation to advice for decisions on operational policy or that facilitates law enforcement and in particular as the Section 60 powers empower the police.
30. It concluded that disclosing information on ongoing policy development prematurely and which is not intended for public dissemination would undermine such efforts and fuel unhelpful and inaccurate conclusions on an already controversial issue. It argued that whilst external scrutiny and public debate is always in the public interest, the risk of creating permeating an inaccurate narrative that undermines government policy making intended to save lives and protect the public, clearly is not.

Balance of the public interest

31. The Commissioner agrees that disclosure can enhance transparency around a contentious issue and in this case could dispel any assumptions about the rationale for imposing the relaxed conditions under the Section 60 Scheme.
32. The Commissioner however also accepts that there is a public interest in maintaining the exemption for officials to be able to freely exchange ideas and deliberate policy, especially in relation to advice for decisions on operational policy or that facilitates law enforcement.
33. The Commissioner agrees with the Home Office that there is a public interest argument to ensure that policy making on a serious issue such as stop and search is given the safe space in which to be deliberated and developed freely to ensure the powers are lawful and proportionate.
34. The Commissioner also recognises the need for a safe space will be strongest when the issue is still live and as the Home Office has

confirmed that the material is still being used to formulate policy proposals, the Commissioner believes that disclosure of the information could impact those policy decisions and undermine the safe space needed for policy formulation and development.

35. 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.

Procedural matters

36. Under section 17(1) of FOIA a public authority must issue a refusal notice in respect of any exempt information within 20 working days of the request.
37. In this case, the complainant submitted their request on 22 November 2021 and the Home Office did not issue a refusal notice until 6 January 2022. The Home Office did not therefore comply with section 17(1).

Other Matters

38. Provision of an internal review is not a requirement of FOIA but is a matter of good practice. The FOIA Section 45 Code of Practice advises that an internal review should be provided within 20 working days of a request for one, in the majority of cases. In this case, the complainant requested a review on 15 February 2022 and the Home Office did not provide one until 26 April 2022 which was in excess of the Code of Practice guidance.

Right of appeal

39. 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

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

40. 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.
41. 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