

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 March 2018

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

Decision (including any steps ordered)

1. The complainant has requested information about revisions to the guidance on the Domestic Violence Disclosure Scheme (“the DVDS”). The Home Office confirmed that it held some of the requested information but refused to disclose it on the grounds that it was exempt under section 35(1)(a) (formulation or development of government policy).
2. The Commissioner’s decision is that the Home Office was entitled to rely on section 35(1)(a) to refuse the request.

Background

3. The Home Office explained that the DVDS (often referred to as “Clare’s Law”, in memory of Clare Wood, who was murdered by her former partner in 2009) was rolled out across all police forces in England and Wales in March 2014, following the successful completion of a 14 month pilot. The DVDS sets out the procedures to be used by the police in relation to the disclosure of information about an individual’s history of domestic violence, where this may help protect their subsequent partners from violent and abusive behaviour. A review of the DVDS commenced in 2015 and updated guidance was published in December 2016.
4. In February 2017, the Prime Minister announced a wide-ranging programme of work looking at legislative and non-legislative domestic violence policies across government. All areas of government policy on

domestic violence are currently under review, including the DVDS, and it is expected that one outcome will be the introduction of a Domestic Violence and Abuse Bill.

5. A public consultation on the Government's approach to tackling domestic violence was launched on 8 March 2018¹.

Request and response

6. On 3 April 2017, the complainant wrote to the Home Office and requested information in the following terms:
 - *"Please could you supply me with any electronic copies by e-mail of any and all memoranda, reports, drafts, notes or other documents relating to the revisions to the guidance document on the operation of the Domestic Violence Disclosure Scheme, which was re-published online on or around the 7th of December 2016, compared to the previous version of that guidance, and*
 - *Please could you supply me with electronic copies by e-mail of any and all statistical information on the operation of the Domestic Violence Disclosure Scheme by police forces in the UK, and as possessed by the Home Office, whether organised by financial or calendar year, or otherwise."*
7. The Home Office responded on 25 April 2017. It confirmed that it held some of the information requested.
8. It refused to disclose the information requested in the first bullet point, on the grounds that it was exempt from disclosure under section 35(1)(a).
9. It refused to disclose the information in the second bullet point, on the grounds that such information as it did hold was exempt from disclosure under section 21 of the FOIA. It provided a link to a web page where that information could be found.
10. The complainant requested an internal review of the decision, in which he challenged the application of section 35(1)(a) of the FOIA to withhold the information requested in the first bullet point.

¹ <https://consult.justice.gov.uk/homeoffice-moj/domestic-abuse-consultation/>

11. The Home Office provided the outcome of the internal review on 14 June 2017. It upheld its application of section 35(1)(a) of the FOIA.

Scope of the case

12. The complainant contacted the Commissioner on 14 June 2017 to complain about the way his request for information had been handled. He did not dispute that section 35(1)(a) of the FOIA was engaged in respect of the information requested in the first bullet point, but considered that the Home Office was wrong to conclude that the public interest in maintaining the exemption outweighed that in disclosing the information.
13. When requesting an internal review and when raising his complaint with the Commissioner, the complainant made no reference to disputing the Home Office's response in respect of the second bullet point or its application of section 21 of the FOIA. The Commissioner has therefore not considered them in this decision notice.

Reasons for decision

Section 35 – Formulation of government policy, etc

14. Section 35(1)(a) of the FOIA states that information held by a government department is exempt from disclosure if it relates to the formulation or development of government policy.
15. In order for the exemption to be engaged, the requested information must relate to the formulation or development of government policy. In her guidance on section 35², the Commissioner explains that the term "*relates to*" can be interpreted broadly. The guidance also explains that the Commissioner considers that the term "*the formulation or development of government policy*" refers both to the design of new policy and the process of reviewing or improving existing policy. However, the section 35 exemption does not cover information relating purely to the application or implementation of established policy.
16. The Commissioner also recognises that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process and prevent

² <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

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, and preserves the confidentiality of advisers.

17. Consideration of this exemption involves two stages. First, the exemption will be engaged if the information in question falls within the class described in this section. Secondly, as section 35 is a qualified exemption, it is subject to the public interest test. For information to be withheld, the public interest in maintaining the exemption must outweigh the public interest in disclosing the information.

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

18. The Home Office explained that although the withheld information was produced for the purpose of revising the DVDS guidance, it continues to relate to the development of the Domestic Violence and Abuse Bill which the Government proposes to introduce. The Home Office said that information which relates to a government bill almost by definition relates to the formulation or development of government policy.
19. By way of background, the Home Office explained that the work undertaken in 2015/2016 on updating the DVDS guidance was subsequently absorbed into the Government's current, detailed review of domestic violence policy. It is expected that the DVDS will be revised again as a result of the review. The request was received in April 2017, at which point the review was underway. It remains a "live issue", with a public consultation currently in progress.
20. The Commissioner has examined the information falling within scope of the request. It comprises a series of internal emails between Home Office officials, and correspondence between Home Office officials and various third parties with expertise in the area of domestic violence (including individual police forces, police-related organisations and personal safety charities) who were invited by the Home Office to provide feedback on proposed revisions to the guidance document on the operation of the DVDS.
21. Also included in scope are emails from legal advisors, a submission addressed to a Home Office Minister, and copies of the draft guidance annotated with comments and amendments from the various consultees.
22. Having had regard to the Home Office's explanation, and having viewed the withheld information, the Commissioner is satisfied that the withheld information, produced for the purpose of revising the DVDS guidance in 2016, relates to the design of new policy regarding domestic violence, in that it forms part of a wider body of advice and recommendations which

will inform the drafting of the Domestic Violence and Abuse Bill, and related policy. The Commissioner therefore considers that the withheld information engages the exemption at section 35(1)(a) of the FOIA.

23. As the Commissioner considers the exemption is engaged, she will go on to consider the public interest arguments.

Public interest arguments in favour of disclosing the requested information

24. The complainant argued that the withheld information was produced for the purposes of revising guidance, and that this process had been completed in December 2016. He did not believe that there would be any detriment to wider policymaking processes by disclosing the information, now that the guidance in question was finalised. He also commented that the revised guidance appeared to contradict the provisions of the Rehabilitation of Offenders Act 1974 ("the ROA") with regard to the disclosure of spent convictions. He said he was unable to access background contextual information on the change in Home Office policy in any way other than under the FOIA, since the change was not the result of a published public consultation to which the complainant could have contributed.
25. The Home Office recognised that the disclosure of information relating to policy consideration can serve to increase transparency around government policymaking and provide greater accountability. It also recognised that openness in government increases public trust and engagement. In this particular case, disclosure may promote particular understanding of the Domestic Violence Unit's decision-making processes and the rationale behind its decisions.
26. Referring to the complainant's arguments, the Home Office recognised that there is a clear public interest in being transparent about how the Government tackles domestic abuse, including how its approach to the DVDS was formulated. It also accepted that there may be a particular public interest in knowing the identities of contributing stakeholders, and the advice and feedback which led to the revisions in the DVDS guidance.

Public interest arguments in favour of maintaining the exemption

27. The Home Office advanced "safe space" and "chilling effect" arguments in support of maintaining the exemption.
28. It said that in the interests of good government, a safe space is required to develop ideas, debate live issues and reach decisions away from external interference and distraction. If the Home Office was to disclose the requested information while related government policy was in the process of being formulated and developed, this safe space would be

compromised, and the ability to reach a considered decision could be hindered or influenced by outside interference. This would potentially result in impaired policymaking, which would not be in the wider public interest.

29. The Home Office also said that section 35 is about the processes that may be inhibited if information is disclosed about government policymaking. In other words, it is not only about the specific information itself, but the broader issue of whether disclosure would inhibit the processes of providing advice in general, leading to poorer policymaking. It is based on the concept of the "chilling effect".
30. The chilling effect refers to the concept that the disclosure of the detail of discussions would inhibit free and frank discussions in the future, on any issue, and that the resultant loss of frankness and candour amongst contributing parties would damage the quality of advice provided to decision-makers and would potentially lead to poorer policymaking.
31. When revising the DVDS guidance, the Home Office consulted with external stakeholders who had expertise in domestic violence, stalking and harassment. Their advice, provided freely and in confidence, was used to inform development of that guidance.
32. Although that guidance was finalised in December 2016, the review of the Government's wider policy on tackling domestic abuse is ongoing, and the Home Office considered that disclosing the contributions it had received would be likely to inhibit stakeholders from being completely free and frank when providing advice on this current strand of policy development. Disclosure of the information could deter stakeholders from engaging fully (or at all) for fear of their views being placed in the public domain under the FOIA. This could result in poorer policymaking, with policy being formulated without the full engagement of stakeholders with expertise in the area. This would clearly not be in the wider public interest.

Balance of the public interest

33. In forming a conclusion on the balance of the public interest in this case, the Commissioner has taken into account the general public interest in transparency and openness regarding the work of the Home Office, as it increases public participation in decision-making and facilitates the transparency and accountability of government as a whole. This, in turn, may serve to increase public trust and confidence both in the policy decisions made by Ministers, and in good governance.
34. When considering the balance of the public interest in relation to section 35(1)(a) the Commissioner generally considers it relevant to take into account the public interest in preserving a degree of confidentiality in the policymaking process. This is due to the possibility of harm to the

quality of that process if those involved were not confident that their contributions would be considered away from external interference and would remain confidential, where appropriate.

35. The Commissioner recognises that the argument concerning the preservation of a safe space within which to carry out the policymaking 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 controversial. However, the weight that this argument carries in each case will vary, depending on the circumstances.
36. In this case the Commissioner has taken into account that the information in question relates to domestic violence; this is a sensitive and high profile area of government policymaking for which it has signalled it intends to introduce wide ranging measures, including primary legislation. The Commissioner recognises that there is a very strong public interest in the preservation of a safe space in which to carry out policy formulation on domestic violence related matters. This is in order that policy consideration can be fully uninhibited and deliver the best outcomes in this important area.
37. The age of the information in question and the stage reached in the policy formulation process at the time of the request is also relevant when considering safe space arguments. In this case, the bulk of the information was produced during 2016 for the purpose of revising the existing DVDS guidance. While this was completed in December 2016, in February 2017 the Government announced a detailed review of all domestic violence policy. The complainant's request was submitted in April 2017.
38. The Commissioner recognises that policy formulation in relation to the Government's domestic violence policy is an ongoing process and accepts that, at the time of the request, the withheld information was (and remains) relevant to that process. In view of the currency of the withheld information, and the detail it goes into with regard to the then draft guidance (it includes suggestions, criticisms and questions from a variety of stakeholders and hypothesises about the practical application of the guidance) the Commissioner accepts that it will form part of a wider body of reference material which will be relevant to the policymaking process. Whilst this does not mean that there is an indefinite requirement for this safe space, the Commissioner accepts that there was a public interest in preserving such a 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.
39. With regard to the specific content of the withheld information, the Commissioner accepts that it is of some sensitivity, particularly in terms

of some of the views expressed. The operational implications of the application of the guidance are also discussed by some contributors. The stakeholders involved will, in all likelihood, be invited to contribute to the current policy formulation process.

40. The relevance of this to the interest that section 35(1)(a) is intended to protect (effective government policymaking) is that the Commissioner accepts that for stakeholder contributions to effectively inform the policymaking process (which she considers to be in the public interest) they must be full and frank. The Commissioner further recognises that the preservation of the ability of stakeholders to offer advice and recommendations confidentially will assist in ensuring that these assessments continue to be full and frank and she counts this as a public interest factor in favour of maintenance of the exemption.
41. However, that the information in question relates to a fundamental review of government policy on a particular area may also be cited as a public interest argument in favour of disclosure of the information, and the complainant has signalled that he requires it for the purposes of academic research. There is a legitimate public interest in disclosure of information relating to how the Government proposes to tackle an important issue for which it intends to introduce primary legislation in order to enhance public knowledge and understanding of the work of government in this area. This weighs in favour of disclosure of the information in question in this case.
42. With regard to the complainant's specific concerns about a possible conflict between the DVDS guidance and the ROA, this too may be considered a public interest argument favouring disclosure.
43. However, the Commissioner notes that at the time of the request, the wider policy review was underway and the recently revised DVDS guidance fell within its scope. She also notes that when announcing the review in February 2017, the Prime Minister promised that future policy would be shaped by a consultation with interested parties. A public consultation commenced on 8 March 2018. The Commissioner is satisfied that the consultation gives the complainant a route through which he can raise any areas of the DVDS he considers problematic.
44. As she considers that the Government's intent to hold a consultation was present at the time of the request, she has accorded low weight to this public interest argument for disclosure.
45. In conclusion, the Commissioner has recognised that there are legitimate public interest arguments in favour of disclosure of the information in question. She has also, however, recognised that there is significant public interest in the Home Office being able to carry out this policymaking process effectively, which may be disrupted if the safe

space for carrying out that process, and the confidentiality of contributors, is not protected.

46. The view of the Commissioner is that the public interest in avoiding that disruption tips the balance in favour of maintenance of the exemption. Her decision is, therefore, that at the time of the request, section 35(1)(a) of the FOIA was engaged and the public interest favoured maintaining the exemption. As a result, the Home Office was not obliged to disclose the requested information.

Right of appeal

47. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

48. 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.
49. 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
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