

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 March 2014

**Public Authority:** Advisory Council on the Misuse of Drugs  
**Address:** Third Floor, Seacole Building  
2 Marsham Street  
London  
SW1P 4DF

#### Decision (including any steps ordered)

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1. The complainant requested the names and contact details of the members of the Advisory Council on the Misuse of Drugs (ACMD) who comprised a minority referred to in the report by the ACMD about khat. The ACMD refused to disclose this information and cited the exemption provided by section 40(2) of the FOIA.
2. The Commissioner's decision is that the ACMD cited section 40(2) correctly and so it was not obliged to disclose this information.

#### Background

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3. The ACMD report "*Khat: A review of its potential harms to the individual and communities in the UK*"<sup>1</sup> describes khat as:

*"Khat is a herbal product consisting of the leaves and shoots of the shrub Catha edulis. It is chewed to obtain a mild stimulant effect and is a less potent stimulant than other commonly used drugs, such as amphetamine or cocaine."*

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[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/144120/report-2013.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/144120/report-2013.pdf)

## Request and response

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4. On 31 July 2013 the complainant wrote to the ACMD and requested information in the following terms:

*"for the names and contact details of the [ACMD] members who comprised the minority referred to in the ACMD's covering letter to its advice on khat (published 23 Jan 2013)."*

5. The ACMD responded on 16 September 2013. It stated that the request was refused and cited the exemption provided by section 40(2) (personal information) of the FOIA.
6. The complainant responded on 21 September 2013 and requested an internal review. The ACMD responded with the outcome of the review on 5 November 2013 and stated that the refusal under section 40(2) was upheld.

## Scope of the case

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7. The complainant contacted the Commissioner on 1 December 2013 to complain about the refusal of his information request. He stated that he did not agree that section 40(2) had been cited correctly by the ACMD on the basis that the ACMD is a statutory body and its members should not expect that their contributions would remain private. The complainant also referred to the controversy surrounding the decision to classify khat as a controlled substance against the advice provided by the ACMD and suggested that this indicated a public interest in disclosure.
8. Whilst the complainant specified the Home Office when making his complaint to the ICO, the ACMD is itself listed as a public authority in schedule 1 of the FOIA and it confirmed that the information request had been treated as having been made to the ACMD. This notice is, therefore, served upon the ACMD.

## Reasons for decision

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### Section 40

9. The ACMD cited section 40(2) of the FOIA. This provides an exemption for information that constitutes the personal data of an individual aside from the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.

10. Covering first whether the requested information constitutes the personal data of an individual aside from the requester, which when making his complaint to the ICO the complainant argued it did not, the definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):

*"Personal data' means data which relate to a living individual who can be identified-*

*(a) from those data,*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller."*

11. The request was for "*names and contact details*". The Commissioner considers it clear without going into detailed analysis that this information would both relate to and identify the ACMD members in question and would, therefore, constitute personal data according to the definition in section 1(1) of the DPA.
12. The next step is to address whether disclosure of that personal data would be in breach of any of the data protection principles. The Commissioner has focussed here on the first data protection principle, which states that personal data shall be processed fairly and lawfully, and in particular on whether disclosure would be fair to the individuals referred to in the request. In forming a view on whether disclosure would be fair the Commissioner has taken into account the reasonable expectations of the data subjects, the consequences of disclosure upon the data subjects and whether there would be any legitimate public interest in disclosure of this information.
13. The Commissioner would note at this point that he is aware that the names of the membership of the ACMD are in the public domain. He also recognises that that the professional contact details of at least some of these individuals may be available. However, he has taken the approach that the key question here is whether it would be fair to disclose the position taken on that by individual members of the ACMD, which would be disclosed via the information requested by the complainant.
14. On the issue of the expectations of the data subjects, the ACMD has emphasised that it considers issues and presents conclusions collectively and stated that "*there has been no occasion on which ACMD member(s) have made their own views on ACMD business publicly known*". It acknowledged that members may have commented on issues relevant to the work of the ACMD, but that when doing so they would have been clear that they were speaking "*in their individual professional capacity*",

rather than as a member of the ACMD. Given that the ACMD operates in this way, it argued that individual members would have a reasonable expectation that their individual view expressed as an ACMD member would not be disclosed.

15. The Commissioner notes these representations from the ACMD. His view is also that the nature of the ACMD is that the membership would expect to be able to freely and frankly discuss issues within the confines of the ACMD. The outcome of those discussions would be the expression of the collective view of the ACMD. Given this, the Commissioner accepts that the data subjects would reasonably not expect their individual views expressed during their work for the ACMD to be disclosed.
16. As to the consequences of disclosure, the view of the Commissioner is that disclosure contrary to the reasonable expectation referred to above would be likely to result in distress to the data subjects. The Commissioner also recognises that disclosure has the potential to impact upon the professional reputations of the data subjects. Whether khat should be classified as a controlled substance has been a controversial issue. Disclosure in this case would provide information on the position that individual ACMD members took on khat, and that position may be seen by others as incorrect and in itself controversial. Stemming from that would be the potential for damage to the professional reputations of the data subjects.
17. As to whether there would be a legitimate public interest in the disclosure of this information, whilst section 40(2) is an absolute exemption and not qualified by the public interest, the public interest is relevant here as it is necessary for there to be a legitimate public interest in order for disclosure to be compliant with the DPA. A sufficiently strong interest may outweigh the factors against disclosure described above.
18. The Commissioner recognises that there is some public interest in this information. As mentioned above and as raised by the complainant, the issue of whether khat should be controlled has been one of controversy. The decision on this point was that khat is to be controlled, contrary to the advice given by the ACMD. In this context the Commissioner takes the view that there is some public interest in disclosure of information relating to how the ACMD reached its conclusion, and particularly in how many of its members took a similar position to that eventually adopted by the Government.
19. The Commissioner does not, however, believe that this public interest is sufficient to outweigh the factors against disclosure. The report of the ACMD on khat is publicly available, thus the public interest in understanding the view of the ACMD on khat is largely satisfied. The

remaining public interest in understanding the position of individual members of the ACMD is as a result much reduced; to the point where the Commissioner's view is that the reasonable expectation held by the data subjects that this personal data would not be disclosed, combined with the potential for damage to the professional reputation of the data subjects, means that it would be unfair and in breach of the first data protection principle for this personal data to be disclosed. The exemption provided by section 40(2) of the FOIA is, therefore, engaged and the ACMD was not obliged to disclose this information.

## Right of appeal

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20. 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: 0116 249 4253

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

21. 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.
22. 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 .....**

**Jon Manners**  
**Group Manager**

**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**