

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 3 December 2007**

**Public Authority:** Department for Culture Media and Sport  
**Address:** 2-4 Cockspur Street  
London  
SW1Y 5DH

### Summary

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The complainant made a request for documents held in relation to the takeover of Manchester United. DCMS confirmed it held information relevant to the request but refused to disclose this as it related to the formulation of government policy and was legal advice and therefore exempt under sections 35 and 42 of the Act. The Commissioner investigated and found that section 35 was engaged but that the public interest in maintaining the exemption did not outweigh the public interest in disclosure of the information. The Commissioner also found that section 42 was not engaged as the information did not attract legal advice privilege. The Commissioner requires the public authority to disclose the information within 35 calendar days of this notice.

### The Commissioner's Role

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

### The Request

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2. The complainant has advised that on 8 December 2005 he made the following request for information:

*"1. Department of Culture Media and Sport (DCMS) internal report or assessment of the takeover of Manchester United Plc (MUFCLC) by Red Football limited (Red).  
2. Minutes of internal DCMS meetings concerning the takeover of MUFCLC by Red"*

*3. Minutes of meeting held at Football Association at which Richard Caborn, Sports Minister attended 29 June 2005 pertaining to business plan of Red.*

*4. Email correspondence between DCMS and Office of Fair Trading 13 June 2005 – 5 August 2005 in respect of takeover MUFCLC by Red.*

*5. Email correspondence between DCMS and representatives or agents of Red 2005.*

3. On 4 January 2006 DCMS wrote to the complainant, informing him that it held information relevant to his request but that it considered it was exempt from disclosure under sections 35 and 42 of the Act.
4. The complainant wrote requesting an internal review on 16 January 2006. He asked DCMS to explain how the information withheld related to legal advice and for more information regarding the application of the public interest test.
5. DCMS completed an internal review and communicated the findings to the complainant on 15 March 2006. During the review DCMS found some information which should have been disclosed to the complainant, this was sent to him. As regards the remaining information being withheld the internal review upheld the application of sections 35 and 42. In doing so DCMS explained to the complainant in more detail why the exemptions had been applied and the public interest arguments considered.

## **The Investigation**

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### **Scope of the case**

6. On 8 June 2006 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the application of the public interest test in relation to both exemptions and to consider the application of section 42 to the information requested.

### **Chronology**

7. The Commissioner began his investigation by writing to DCMS on 30 July 2007. He requested copies of the information being withheld and asked DCMS to explain in more detail the application of the two exemptions and for an expansion of the public interest arguments considered both for and against maintaining each exemption.
6. DCMS responded on 19 September 2007 enclosing a copy of the withheld information and expanding on its arguments for withholding the information under sections 35 and 42 of the Act.

7. The Commissioner telephoned DCMS to ask for a copy of the legal advice and to clarify with DCMS if the information provided is all the information being withheld under section 35 and 42 of the Act.
8. The Commissioner wrote to DCMS on 24 September 2007 to ask further questions regarding the application of section 42. DCMS responded on 22 October 2007 providing clarification on its use of section 42.

### Findings of fact

9. The information being withheld is:
  - (i) A submission entitled 'Takeover of Manchester United', dated 7 July 2005, from DCMS Sports Division officials to Richard Cabon (the then Minister for Sport).
  - (ii) A separate submission dated 24 June 2005, prepared by officials in the Department for Trade and Industry for the Minister for Employment Relations and Consumer Affairs (Gerry Sutcliffe) on the takeover of Manchester United

This information is being withheld under section 35 and section 42.

10. The submissions discuss considerations by the Department for Trade and Industry over whether to introduce a new public interest consideration under the Enterprise Act concerning football and what action DCMS wish to take.

### Analysis

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#### Background Information

11. Malcolm Glazier became the majority shareholder of Manchester United in May 2005. His company Red Football Ltd acquired enough shares to force the remaining investors to sell their stock to him. On 22 June 2005 Manchester United was de-listed from the London Stock Exchange.
12. The government has no powers to intervene in the takeover of football clubs; it is for the shareholders to decide on the merits of takeover proposals and the Office of Fair Trading (OFT) as the independent competition authority to consider what effect the takeover would have on competition.
13. The Department for Trade and Industry's Enterprise Act 2002 removed from Ministers the decision making process in all merger cases except those that raise narrowly defined public interest considerations. Only two public interest considerations currently exist and these relate to national security and media. As part of their investigations OFT sought comments on the completed acquisition by Red Football Ltd of Manchester United FC, and in particular, specifically about whether the acquisition had any unfair impact in terms of competition.

14. Under the Enterprise Act and in light of OFT's consultation exercise the DTI recommended that no action should be taken to introduce a new public interest consideration concerning football. On 5 August 2005 the OFT announced that the acquisition by Red Football Ltd of Manchester United FC would not be referred to the Competition Commission.

### **Exemption: Section 35(1) (a) 'Formulation of government policy'**

15. Section 35(1) (a) states that information is exempt if it relates to the formulation or development of government policy. Section 35 is a class based exemption; this means for the exemption to be engaged there is no requirement to consider if disclosure of the information may have any 'harm' attached, merely that the information relates to the formulation or development of policy.
16. DCMS state that the information relates to policy advice provided to DCMS ministers about their role in commercial transactions in the sports sector. This advice relates to the ownership of football clubs, DCMS state this is a matter of ongoing policy development as government will be requested to comment on or to regulate football club and club ownership when fans do not believe it is in the best interests of the club or the game. The information in questions sets out the evolving thinking at the time of both DCMS and DTI officials on whether government should introduce a new public interest consideration under the Enterprise Act 2002 concerning football.
17. 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 or submissions are put to a minister. 'Development' may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. As a general principle, however, he considers that policy is about the development of options and priorities for ministers, who determine which options, should be translated into political action. The Commissioner has obtained and considered the requested information and is satisfied that the information in question relates to the formulation of government policy about this and future acquisitions of football clubs. Section 35 is therefore engaged, however, section 35 is a qualified exemption and the Commissioner must therefore go on to consider the public interest test.

### **Public Interest Test**

18. DCMS considered the public interest test both for and against maintaining the exemption at section 35(1) (a). DCMS acknowledge that there is a public interest in making transparent the advisory and deliberative process of the Department, when formulating government policy. This enables the public to participate in the development of policy and ensures the accountability of government.
19. However, DCMS state that the public interest will not always be advanced by placing in the public domain the content of official's advice to Ministers. The release of such advice, they argue, could give rise to speculation about the

possible direction of policy, which can reduce the ability of officials and ministers to put their views and recommendations candidly to each other. DCMS state that if these views and recommendations are likely to be put into the public domain this may inhibit officials and ministers from expressing themselves fully in the future which could adversely affect their decisions.

20. DCMS also state that it considers that the public interest in transparency has already been met by information disclosed to the complainant; in response to parliamentary questions and in response to MP's correspondence. The government's position on football club takeovers, they argue, has already been made available by public statements on why it decided not to intervene using the Enterprise Act 2002 and the takeover of football clubs is a matter for the Football authorities.
21. In considering the timing of the request DCMS point out that football club ownership remains an ongoing issue and a high profile one. The takeover of Manchester United was a high profile case which attracted world wide attention and since then several high profile cases have attracted similar attention and the government is regularly asked to comment on takeovers or asked to regulate takeovers.
22. DCMS consider that in high profile cases where the policy advice has significant consequences for one or more parties and where particular interest groups could use the advice to further their own aims, there is an even greater risk that the release of internal communications between officials and ministers about policy options and any consequential legislation changes will lead to that policy advice being inhibited. This will result in an adverse impact on the quality of the views and advice tendered and future policy making will be weakened. DCMS concluded that the public interest favoured maintaining the exemption.
23. The Commissioner takes the view that the main arguments in this case are for maintaining the privacy of the information are to allow 'private thinking space', in order to facilitate frank advice and the free and frank exchange of views, and the impact on the quality of the policy advice given to ministers . On the other hand, the factors favouring disclosure are:
  - encouraging good practice and increasing public confidence that decisions have been taken properly and on the basis of the best available information;
  - promoting the accountability of ministers for decisions they make to the public;
  - facilitating public understanding of how government formulates policy;
  - encouraging public debate and participation in the development and formulation of government policy;
  - broadening policy input beyond individuals or groups with an unduly privileged position of influence in policy-making processes.
24. In weighing up these factors, the Commissioner has had regard to the case of *DfES v the Commissioner and the Evening Standard* (EA/2006/0006), in which the Information Tribunal laid down eleven principles guiding how to assess the

public interest in cases involving the section 35 exemption. Some of these are relevant to this case. First, it stated that *'No information within s35 (1) is exempt from...disclosure simply on account of its status'*. The fact that the information relates to the deliberations of very senior officials or government Ministers does not of itself dictate that the information is sensitive, and *'to treat such status as automatically conferring an exemption would be tantamount to inventing within s35 (1) a class of absolutely exempt information'*.

25. Secondly, the Tribunal indicated that it was unimpressed with the argument that the threat of disclosure of civil servants' advice would cause them to be less candid when offering their opinions. It concluded that *'we are entitled to expect of [civil servants] the courage and independence that... [is]...the hallmark of our civil service'*, since civil servants are *'highly educated and politically sophisticated public servants who well understand the importance of their impartial role as counsellors to ministers of conflicting convictions'* and should not be easily discouraged from doing their job properly. The Commissioner does not believe that disclosure in this case would make officials responsible for providing advice and recording information less likely to perform their duties properly. Such public servants would be in breach of their professional duty as public servants should they deliberately withhold relevant information or fail to behave in a manner consistent with the Civil Service Code. It is a matter for the bodies concerned, including DCMS, to ensure that their officials continue to perform their duties according to the required standards.
26. Thirdly, the Tribunal stated that *'The timing of a request is of paramount importance'*. It decided that while policy is in the process of formulation it is highly unlikely that the public interest would favour disclosure, and both ministers and officials are entitled to hammer out policy without the *'threat of lurid headlines depicting that which has been merely broached as agreed policy'*. On the other hand, the Tribunal rejected arguments that once a policy had been formulated there was a policy cycle in which information about its implementation would be fed into further development of the policy, preferring instead the view that a *'parliamentary statement announcing the policy...will normally mark the end of the process of formulation'*. The Commissioner notes that OFT publicly announced its decision not to refer the takeover to the Competition Commission on 5 August 2005; this followed the recommendation by DTI not to introduce a new public interest test under the Enterprise Act. The Commissioner considers the announcement and previous recommendation effectively ends the policy making process.
27. DCMS have also argued that the public interest is already met by the information already disclosed to the complainant and to the public through parliamentary questions and responses to MP letters. The Tribunal concluded that the fact that other information is already in the public domain is not a significant factor.
28. The Commissioner has also considered the significant public interest in the disclosure of information relating to the regulation of football club ownership. There was extensive public debate on ownership at the time of the request. The Commissioner considers that disclosure of the requested information would illuminate the public debate on these issues.



29. In summary, the Commissioner's view is that there must be some clear, specific and credible evidence that the formulation or development of policy would be materially altered for the worse by disclosure under the Act. In this case there are very strong public interest factors favouring disclosure, involving public confidence, accountability and public debate and participation. The Commissioner considers that the factors against disclosure are considerably less significant and he has therefore concluded that the information which was withheld should be disclosed on the grounds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.

### **Exemption: Section 42 'Legal Professional Privilege'**

30. Section 42 provides that information to which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
31. DCMS stated that the information contained in the submissions reflects the advice received by DTI officials from their Corporate Law and Governance team. This legal advice relates not only to UK legislation but also contains advice on the position of EC Merger regulations and the European Convention on Human Rights.
32. Having viewed the information the Commissioner queried the reliance of section 42 as noted in the submissions. Whilst some of the paragraphs discuss the DTI's considerations in relation to the proposals with a reference to consultation with legal advisors the Commissioner was unclear as to whether the content of the paragraphs reflected the legal advice given. Additionally section 42 has also been applied to what could be deemed factual information about the Enterprise Act and the background to its inception. The Commissioner also noted that paragraphs 6, 7, 8 and 9 discuss DCMS opinion on the actions to take, why, and possible implications but make no specific reference to legal advice. In light of this the Commissioner approached DCMS and asked for more information regarding the application of section 42 and to see a copy of the legal advice being relied upon.
33. In response to this DCMS explained that the two submissions contained the advice of DTI and DCMS officials' in relation to any deliberation of whether the Government should create a new public interest consideration concerning football mergers to enable Ministers to intervene on ground of public interest. The submissions were prepared by the competition policy team in the former DTI (now Department for Business, Enterprise and Regulatory Reform) and sport policy colleagues in DCMS and were not prepared by legal advisors. The advice was however, based on consultations with the corporate law and governance team and this related not only to advice on matters of fact about the Enterprise Act but also to wider legal issues that would need to be considered by any widening of the Act's public interest considerations.
34. DCMS explained that due to staff changes since the request was made and since the policy submission were prepared it was unable to ascertain the full background to the advice provided and unable to find any specific records containing or detailing the legal advice underpinning the submission. DCMS state

that it is probable that the advice provided was a result of a number of email and conversations and that these were summarised in the submissions prepared by DCMS sports policy officials for the Minister for Sport.

35. DCMS acknowledged that it was not unreasonable for the Commissioner to make the point that much of the information is factual and likely in the public domain and that this also impacts on some of the corresponding sentences in the submission. DCMS also acknowledged that because the underlying legal advice is a mixture of email and telephone calls which it has not been able to provide to the Commissioner to support its application of section 42; that the Commissioner may question whether it has been able to substantiate that legal professional privilege applies.
36. In reaching a decision as to whether legal professional privilege applies to the information withheld under section 42 the Commissioner has considered whether there is sufficient evidence that the information reiterates legal advice received from the Corporate Law and Governance team as claimed by DCMS.
37. The Commissioner finds that from the content of the information which DCMS claim is privileged it is not clear that this replicates any legal advice given. Two of paragraphs being withheld under section 42 begin with a reference to having consulted legal advisers, however the paragraphs go onto discuss what DTI think the situation is. Without evidence which shows that this opinion is merely reiterating legal advice received the Commissioner cannot accept that this is privileged information.
38. Section 42 has also been applied to a sentence which appears to be a statement of fact relating to EU law and two paragraphs which explain the background to the creation of the Enterprise Act. DCMS have acknowledged that this is factual information and likely to be in the public domain. The Commissioner, as in paragraph 36, has no evidence that this information replicates any legal advice obtained and therefore finds that the information is not privileged.
39. The final paragraphs of the submission dated 24 June 2005 reflects the discussions of DCMS officials and their opinions of the next steps which need to be taken and the possible implications of certain courses of action. There is no reference to legal advice or consultation with legal advisors and DCMS have supplied no evidence that this reflects the legal advice received; the Commissioner cannot therefore accept that this is legal advice privilege.
40. The Commissioner finds that section 42 is not engaged as there is no evidence that the information contained in the submissions summarises or quotes any legal advice received.

## The Decision

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41. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that



(i) The public authority incorrectly withheld the requested information under section 35(1) (a) and 42(1).

### **Steps Required**

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42. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:

Disclose the information withheld under section 35 and 42.

### **Failure to comply**

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43. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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44. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 3rd day of December 2007**

**Signed .....**

**Steve Wood  
Assistant Commissioner**

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