

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2015

Public Authority: HM Treasury
Address: 1 Horse Guards Road
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant requested information relating to a Government consultation on introducing a statutory code for large pub-owning companies. The public authority subsequently disclosed most of the information held within the scope of the request. The authority however withheld a small amount of information in reliance on the exemptions at sections 35(1)(a), 40(2) and 43(2) FOIA.
2. The Commissioner's decision is that;
 - The public authority was entitled to rely on the exemption at section 35(1)(a) to withhold all the information within the scope of the request not previously disclosed to the complainant (the disputed information).
3. No steps required.

Request and response

4. On 6 February 2014, the complainant wrote to the public authority and requested information in the following terms:

'I am writing on behalf of the All-Party Parliamentary Save the Pub Group requesting under the Freedom of Information Act, the following information regarding the Business Innovation and Skills Consultation on introducing a statutory code for large pub-owning companies. I am requesting in each case this documentation from the date that the BIS announced their consultation, 22nd April 2013, and 31st December 2013.'

1. *All correspondence (letters and emails and other) between the Treasury and BIS officials, Special Advisers or Ministers that refer to or relate to the pub company business model BIS consultation.*
2. *All correspondence (letters and emails and other) between the Treasury and the following*
 - a) *The British Beer and Pub Association*
 - b) *Any members of the British Beer and Pub Association*
 - c) *Any members of the Independent Family Brewers of Britain*
3. *All correspondence between the Treasury and DCLG Ministers that relate to pub companies or the BIS consultation.*
4. *All Treasury documents, including minutes of meetings that are in relation to or refer to pub companies or to the consultation.*
5. *Any written correspondence that mentions the need for research to be commissioned by BIS or the subsequent brief issued and the report by London Economics to the Department of Business, Innovation and Skills entitled 'Modelling the impact of proposed policies on pubs and the pub sector' dated December 2013.'*
5. The public authority responded on 4 March 2014. The authority explained that it held some information within the scope of the request, specifically, information on the Department for Business Innovation and Skills (BIS) Consultation on introducing a statutory code for large pub-owning companies and correspondence between HM Treasury and BIS, HM Treasury and the British Beer and Pub Association (and representatives), and HM Treasury and the Independent Family Brewers of Britain (and representatives). The public authority however explained that it did not hold information relating to correspondence between HM Treasury and the Department of Communities and Local Government, and information relating to the need for research to be commissioned.
6. The information held within the scope of the request was withheld by the public authority on the basis of the exemption at section 35(1)(a) FOIA.
7. On 13 March 2014 the complainant wrote back to the public authority in the following terms:
'We recently made an FOI request to which HM Treasury gave the attached response.'

The reply says "I can confirm that HM Treasury does hold some of the information in scope of your request....I can also confirm that we hold information relating to correspondence between HM Treasury and BIS, HM Treasury and the British Beer and Pub Association (and representative), and HM Treasury and the Independent Family Brewers of Britain (and representatives).", but you have refused to disclose any of it.

We disagree with the decision made, to not disclose anything out of what we requested. We wish to request a review as we believe there is a strong case in favour of the public interest to disclose all the correspondence we have referred to, particularly over how government may have been lobbied and influenced by external bodies....'

8. The public authority did not provide the complainant with details of the outcome of the internal review until 23 May 2014, a day after the Commissioner had written to the authority following a complaint received from the complainant regarding the delay.
9. The review specifically addressed the complainant's concerns regarding the public authority's reliance on the exemption at section 35(1)(a) to withhold the information held within the scope of his request and possible influence by external bodies on the government. With regards to the former, the public authority upheld its original decision to engage the exemption at section 35(1)(a). With regards to the latter, the public authority explained that it was aware BIS had published all the responses to the consultation as well as a letter from the Minister for Consumer Affairs at;
<https://www.gov.uk/government/consultations/pub-companies-and-tenants-consultation>

Scope of the case

10. On 17 July 2014 the complainant confirmed to the Commissioner that he wanted to challenge the public authority's decision to withhold information within the scope of his request.
11. On 21 July 2014 the Commissioner wrote to the complainant explaining that he understood that the scope of the complaint and consequently the scope of the Commissioner's investigation was restricted to the decision by the public authority to withhold the following information in reliance on section 35(1)(a): information on the BIS Consultation on introducing a statutory code for large pub-owning companies and information relating to correspondence between HM Treasury and BIS, HM Treasury and the British Beer and Pub Association (and

representatives), and HM Treasury and the Independent Family Brewers of Britain (and representatives).

12. On 23 July 2014 the complainant wrote to the Commissioner and explained that although he was happy for the investigation to consider the public authority's reliance on section 35(1)(a) to withhold the information referred to above, he would also like the investigation to focus on Parts 1 and 4 of his request as he did not consider that the public authority's responses had sufficiently addressed those parts of his request.
13. The Commissioner explained to the complainant that he was not obliged to consider Parts 1 and 4 of the request because the complainant had not raised any concerns with the public authority in relation to the adequacy of the authority's response to his request when he requested an internal review on 13 March 2014, and had in fact restricted his review request to the authority's decision to withhold information within the scope of his request in reliance on section 35(1)(a). The Commissioner however decided to make an exception in the circumstances of this case and informed the complainant that he would ask the public authority to clarify its position in relation to Parts 1 and 4 of the request.
14. On 29 July 2014 the Commissioner wrote to the public authority. He invited the authority to provide detailed submissions in support of its reliance on the exemption at section 35(1)(a) to withhold: information on the Business Innovation and Skills (BIS) Consultation on introducing a statutory code for large pub-owning companies and information relating to correspondence between HM Treasury and BIS, HM Treasury and the British Beer and Pub Association (and representatives), and HM Treasury and the Independent Family Brewers of Britain (and representatives). The Commissioner also asked the public authority to clarify its position in relation to Parts 1 and 4 of the request.
15. On 30 September 2014 the public authority informed the Commissioner that it had voluntarily disclosed most of the information within the scope of the request¹ to the complainant because having reconsidered the request, it had come to the view that the policy development process which was pertinent to its decision to withhold the information in the first place had ended on 3 June 2014 when BIS published the government's response to the consultation alongside their response to

¹ Initially only provided electronically. Hard copies were however subsequently supplied to the complainant on 19 December 2014.

the Business, Innovation and Skills Committee Fourth Report on the Statutory Code for Pub Companies. The authority was however keen to stress that it considered the exemption at section 35(1)(a) was properly engaged with respect to the disclosed information at the time that the request was made in February 2014.

16. On 30 December 2014 the public authority clarified its position to the Commissioner as follows:

- The information held (which is contained in 16 documents) only relates to Parts 2 and 4 of the request and that it did not hold any information in relation to Parts 1, 3 and 5 of the request.
- The majority of the information redacted from the 16 documents does not fall within the scope of the request. A small amount of the redacted information was however withheld on the basis of the exemptions at sections 35(1)(a), (and section 36(2)(c) in the alternative), 40(2) and 43(2) FOIA.

17. On 19 January 2015, following a number of email exchanges between the Commissioner and the complainant in which the Commissioner sought to clarify whether the complainant still considered that his request had been narrowly interpreted by the public authority, the Commissioner advised that unless the complainant informed him otherwise, he understood from his latest email of 15 January 2015 that the complainant was only challenging the application of exemptions. The complainant did not express disagreement with this view.

18. The scope of the investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 35(1)(a) (and section 36(2)(c) in the alternative), 40(2) and 43(2) to withhold the information redacted from the documents supplied to the complainant (the disputed information).

Reasons for decision

Disputed information

19. The small amount of information withheld in reliance on section 35(1)(a) can be found respectively on pages 4 and 3 of the following briefing documents: '*Briefing: Cross Whitehall Ministerial Group on Pubs meeting – Monday 1 July*' and '*Briefing: Cross Whitehall Ministerial Group on Pubs – Wednesday 18 December*' and in an email from an official in the Alcohol, Tobacco and Indirect Tax Strategy Team on 15 October 2013 at 18:13.

20. Information in two slides in an email of 26 November 2013 at 18:35 from an official in the Alcohol, Tobacco and Indirect Tax Strategy Team was withheld in reliance on section 43(2).
21. The exemption at section 40(2) was applied to the names, job titles and contact details of junior officials throughout the disclosed documents.

Section 35(1)(a)

22. Although it is not completely clear whether the public authority has continued to rely on the exemption at section 35(1)(a) to withhold all of the disputed information, the Commissioner has proactively considered whether the disputed information engaged this exemption in the first instance for reasons explained below.
23. Information is exempt from disclosure on the basis of section 35(1)(a) if it is held by a government department and it relates to the formulation or development of government policy.
24. In the Commissioner view, because section 35(1)(a) is a classed based² exemption, the term 'relates to' in the context of the exemption can be interpreted broadly. This means that any significant link between the information and section 35(1)(a) activities would be enough to engage the exemption. In the Information Tribunal's view:

*'If the meeting or discussion of a particular topic within [a document] was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable.'*³

25. The Commissioner shares this view.
26. The public authority explained that the information within the scope of the request relates to the government's policy; '*Making it easier to trade*' which is part of a BIS led policy on '*Consumer rights and issues*'. It explained that the development of this policy was ongoing on at the time of the request. As part of the development of the policy, a BIS and UK Export Finance sponsored consultation ran from 22 April to 14 June

² This means that there is no need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described.

³ DfES v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007)

2013. As mentioned, BIS published the Government's response to the consultation on 3 June 2014.

27. The Commissioner is satisfied that the disputed information 'relates to' the development of the government's policy on *Consumer rights and issues*. This is particularly in relation to the pub company business model which is concerned with ownership and management of pub premises, especially regarding what has been described as a free of tie option (ie whether publicans should be free to buy their alcohol from any supplier or whether they have to continue to buy it through their landlord).
28. The Commissioner therefore finds that the exemption at section 35(1)(a) was correctly engaged.

Public interest test

29. The exemption at section 35(1)(a) is qualified. Therefore, the Commissioner must also consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.
30. The public authority's public interest arguments are summarised below.
31. At the time of the request, the policy on introducing a statutory code for large pub-owning companies was being led by BIS and was ongoing with lots of views from different stakeholders setting out how they felt the government should proceed. Accordingly, the role of officials at BIS was to assess and weight the diverging opinions before providing advice to Ministers.
32. Therefore, in addition to the general public interest in promoting transparency and accountability in Government, the public authority also recognised that there was (at the time of the request) a public interest in increasing public understanding of, and encouraging debates regarding the policy given its widespread impact on the pub sector and local communities. It was therefore keen to point out that in December 2013, the government had published, as part of its evidence base, a list of individuals and parties who needed to be consulted to ensure that a full range of views of all stakeholders were captured.
33. The public authority however argued that there was a strong public interest in not disclosing the disputed information at the time of the request because pub industry stakeholders could have been less willing to engage with the Government on various proposals and options for fear that views would be made public whilst discussions were ongoing.

34. It further argued that disclosure at the time of the request would have made officials less candid when providing advice to Ministers for fear that their views could be disclosed prematurely during ongoing discussions.

Balance of the public interest

35. Given the significance of the policy under consideration and strength of feelings amongst stakeholders, the Commissioner considers that there is a public interest in disclosing all the information within the scope of the request. He notes that the public authority has also acknowledged this and voluntarily disclosed most of the information in scope.
36. However, the Commissioner can only consider circumstances as they were at the time of the request. He also cannot take into account the fact that information within the scope of the request has now been disclosed in determining whether the public interest favours disclosure of the disputed information. This is because the public authority has not withdrawn reliance on section 35(1)(a). It has merely decided to voluntarily disclose most of the information in scope given the change in circumstances since the request. However, that does not affect its position that the public interest did not favour disclosure at the time the request was submitted.
37. Therefore, the Commissioner is persuaded by the public authority's argument that at the time of the request, disclosure could have been prejudicial to ongoing discussions with stakeholders as they could have been less willing to fully engage with the discussions for fear that their views could be made public. That would have been detrimental to the policy development process and consequently not in the public interest.
38. The Commissioner is further persuaded by the argument that disclosure at the time of the request could have resulted in officials being less candid when providing advice to Ministers for fear that their views could be prematurely criticised or subjected to public ridicule.
39. The Commissioner also considers that there was a strong public interest in protecting the private space for officials to consider and discuss various options in connection with the policy. Disclosure in the middle of those discussions would have meant that officials would have needed to spend time defending their views which might not have yet been fully formed rather than concentrating on finding workable proposals. That would have been detrimental to the policy development process and consequently not in the public interest.
40. The Commissioner therefore finds that in all the circumstances of the case, the public interest in maintaining the exemption at section

35(1)(a) outweighed the public interest in disclosing the disputed information.

41. In view of his decision, the Commissioner did not consider the applicability of the remaining exemptions relied on by the public authority.

Other Matters

42. Although there is no statutory time limit for completing internal reviews, as a matter of good practice, the Commissioner expects internal reviews to take no longer than 20 working days and in exceptional circumstances, 40 working days.
43. The Commissioner therefore expresses concern that the public authority took over 40 working days to complete the internal review in this case. The authority explained that the internal review was delayed due to competing work pressures including the need to divert resource for a significant undertaking to improve the timeliness in responding to internal reviews
44. The Commissioner appreciates the position that the public authority was in at the time of the request. Nevertheless, he is equally very keen to ensure that internal reviews generally do not take longer than 20 working days whenever possible. Specifically in this case, the Commissioner does not consider that it was reasonable for the internal review to take nearly 50 days and he trusts that the processes now in place would ensure that internal reviews are completed in a much more timely manner.

Right of appeal

45. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

46. 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.
47. 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

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