

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 March 2018

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

Decision (including any steps ordered)

1. The complainant submitted a request to HM Treasury (HMT) seeking communications and minutes of meetings between ministers and the Association of British Bookmakers concerning the review into fixed odds betting terminals. HMT confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of the exemptions contained at sections 35(1)(a) (formulation and development of government policy), 40(2) (personal data) and 43(2) (commercial interests) of FOIA. The Commissioner has concluded that the withheld information is exempt from disclosure on the basis of section 35(1)(a) and that in all the circumstances of the case the public interest favours maintaining the exemption.

Background

2. In 2016 the government launched a review of gaming machines and social responsibility measures associated with the gambling industry. This began in October 2016 with the Department for Digital, Culture, Media & Sport (DCMS) launching a call for evidence.
3. In October 2017 DCMS published the responses it received following its call for evidence and also published a consultation in which covered the government's proposals relating to:
 - Maximum stakes and prizes for all categories of gaming machines permitted under the Gambling Act 2005;

- Social responsibility measures for the industry as a whole to minimise the risk of gambling-related harm, including online gambling advertising, online gambling, gaming machines and research, education and treatment.
4. The consultation ran until 23 January 2018 after which the government will publish its final proposals.

Request and response

5. The complainant submitted the following request to HMT on 7 August 2017:

'Please provide a copy of all communications and the minutes of all meetings between ministers of your department and the Association of British Bookmakers concerning the review into fixed odds betting terminals from December 1st 2016 to date.'

6. HMT responded to the request on 5 September 2017 and confirmed that it held some information falling within the scope of the request. However, it explained that it considered this information to be exempt from disclosure on the basis of the following exemptions within FOIA: sections 35(1)(a) (formulation and development of government policy), 40(2) (personal data) and 43(2) (commercial interests).
7. The complainant contacted HMT on the same day and asked it to conduct an internal review of this response.
8. HMT informed him of the outcome of the internal review on 28 September 2017. The review upheld the application of the exemptions cited in the refusal notice.

Scope of the case

9. The complainant contacted the Commissioner on 29 September 2017 in order to complain about HMT's decision to withhold the information falling within the scope of his request.

Reasons for decision

Section 35 – formulation and development of government policy

10. HMT withheld all of the information falling within the scope of the request on the basis of section 35(1)(a) of FOIA. This exemption states that:

'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

(a) the formulation or development of government policy'

11. 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.
12. 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. '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.
13. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
14. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- the final decision will be made either by the Cabinet or the relevant minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
15. HMT argued that the requested information relates directly to the formulation and development of the review into gaming machines,

including fixed odds betting terminals, and social responsibility measures. HMT noted that the policy was under development at the time the request was submitted on 7 August 2017 and continues to be so.

16. In his submissions to the Commissioner the complainant has questioned whether all of the withheld information would fall within the scope of this exemption. However, having reviewed the withheld information the Commissioner accepts that it clearly relates to the formulation and development of government policy in respect of gaming machines, in particular fixed odds betting terminals. (It should be remembered that in the context of section 35 the phrase 'relates to' should be interpreted broadly.) The entirety of the withheld information is therefore exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Public interest test

17. 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 in disclosure of the withheld information

18. HMT recognised that there is a general public interest in promoting openness in the way in which the public authorities manage high profile policy areas. It acknowledged that at the time of the request there was, and continues to be, public debate into betting terminals. HMT noted that DCMS plans to publish, in due course, a summary of responses to the consultation in the usual way.
19. The complainant argued that there is a strong public interest in gambling regulation that suitably protects both gambling addicts and members of the public from getting into financial trouble and as a result there is a strong interest in the public fully understanding HMT's work on this regulation, including its communications with industry bodies. He argued that this clearly outweighed concerns for any unspecified 'chilling effects' on future policy development.

Public interest in maintaining the exemption

20. HMT argued that the purpose of this exemption was to protect the internal deliberative process as it relates to policy making. In other words, the exemption is intended to ensure that the possibility of public exposure does not deter from full, candid and proper deliberation of policy formulation and development, including the exploration of all options, the keeping of detailed records and the taking of difficult decisions.

21. The information in scope of the request consists of communications between Treasury ministers and the Association of British Bookmakers (ABB). HMT explained that the ABB is an important stakeholder in the gaming industry and HMT considered it important that they have an opportunity to provide their views on the issues affecting the industry and the likely impact of any changes to policy on betting terminals. In this regard, HMT argued that it is important that stakeholders, including ABB, are able to set out their opinions in a free and frank manner without fear of early disclosure – HMT emphasised at the time of the request the policy making remained ongoing - to ensure that frank views are provided. HMT also explained that as an economics and finance ministry it relies on information provided by a range of different stakeholders to better understand the impact of economic policy proposals. It argued that disclosure of information provided to it by stakeholders, such as the withheld information in the scope of this request, could result in stakeholders being less willing to give their views in the future which would mean that government was less well informed. HMT argued that this would be against the public interest.
22. HMT also argued that it was in the public interest that ministers have a free space to seek and understand the views of stakeholders. Premature disclosure would have a detrimental impact on the ongoing policy process and on the chances of the policy being effectively implemented. HMT argued that releasing the views of one stakeholder at this early stage, prior to the completion of the consultation process, might misrepresent the process and prejudice the views of other stakeholders that wish to respond to the consultation.

Balance of the public interest test

23. With regard to the safe space arguments, the Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case the Commissioner accepts that at the time of the complainant's request the information was the subject of active policy formulation and development. The Commissioner also recognises that the subject of potential changes to the regulations concerning fixed odds betting machines is an issue which has gained considerable press and public interest. Consequently, in the Commissioner's opinion disclosure of the information about the government's discussions with one stakeholder, prior to the launch of its consultations on its policy proposals on this areas, would be likely to result in public and media attention and thus interfere with the government's safe space. Therefore, in the circumstances of this case the Commissioner believes that notable weight should be attributed to the safe space arguments.

24. With regard to attributing weight to the chilling effect arguments, the Commissioner notes that HMT's emphasis appears to be on the potential chilling effect to the future contributions of stakeholders if the information was disclosed as opposed to the contributions of civil servants. The Commissioner is somewhat sceptical about the extent to which disclosure of the information would have a significant and wide spread chilling effect on the contributions made by stakeholders. It is clearly in the direct interest of such stakeholders to continue to provide the government with their views on potential policy proposals and moreover to do so in a manner which they would hope to secure the outcome which they wish. Therefore, in the Commissioner's view the likelihood of any potential impact on such future contributions from stakeholders has to be balanced against the inherent interest that these stakeholders have in continuing to engage with government departments in a candid manner, outside of the process provided by any formal consultation exercise. That said, the Commissioner recognises that the withheld material does contain information that the ABB considered to be commercially sensitive, hence the application of section 43(2) to parts of the information, and that ABB expected this information to be treated confidentiality. The Commissioner therefore accepts that the risk of a chilling effect on the contributions of stakeholders engaging with the government, at least in the context of discussions about changes to gaming regulation, cannot be dismissed in their entirety.
25. With regard to the public interest in favour of disclosure, there is, as HMT recognises, a general public interest in government departments being open and transparent in respect of how government policy is created. More specifically, the Commissioner recognises that there is a considerable public interest in the government's policy making in relation to potential changes to regulation regarding fixed odds betting terminals. Furthermore, the Commissioner agrees with the complainant that there is a legitimate interest in the public understanding the nature of the discussions between the government and the gambling industry. In the Commissioner's view disclosure of the withheld information would provide the public with some insight into the government's discussions with the ABB regarding this policy area.
26. However, the Commissioner has ultimately concluded that such arguments are outweighed by the public interest in maintaining the exemption. Whilst she believes that only limited weight should be given to the chilling effect arguments, she believes that significant weight should be given to the safe space arguments and cumulatively she believes that these outweigh the public interest in disclosure of the withheld information.
27. In reaching this conclusion, the Commissioner has taken into account the fact that the responses to the government's consultation will be

disclosed in due course and, when the consultation was announced in October 2017, many of the submissions sent to DCMS in response to the call for evidence were also published. This included the ABB's 98 page submission which was published with minimal redactions. The Commissioner acknowledges that these publications, both actual and proposed, post-date the complainant's request. However, in her opinion they do demonstrate a commitment by the government to ensure an element of transparency in relation to its discussions with the gambling industry by disclosing the formal submissions of interested parties at the appropriate points in the policy making process. Whilst disclosure of the withheld information at the time of the request would provide a different, and indeed earlier insight into the government's discussions with the ABB, in the Commissioner's view this would be at the overall expense of the policy making itself.

28. In light of this decision the Commissioner has not considered whether the withheld information is also exempt from disclosure on the basis of the other exemptions cited by HMT.

Right of appeal

29. 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

30. 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.
31. 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

Jonathan Slee
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