

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 March 2018

**Public Authority:** Department for Digital, Culture, Media & Sport  
**Address:** [FOI@culture.gov.uk](mailto:FOI@culture.gov.uk)

### Decision (including any steps ordered)

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1. The complainant submitted a request to the Department for Digital, Culture, Media & Sport HM Treasury (DCMS) seeking communications and minutes of meetings between ministers and the Association of British Bookmakers concerning the review into fixed odds betting terminals. DCMS 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 exemption contained at section 35(1)(a) (formulation and development of government policy) 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

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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 DCMS launching a call for evidence.
3. DCMS subsequently published a consultation in October 2017 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**

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5. The complainant submitted the following request to DCMS 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. DCMS responded to the request on 5 September 2017 and 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 section 35(1)(a) (formulation and development of government policy) of FOIA.
7. The complainant contacted DCMS on the same day and asked it to conduct an internal review of this response.
8. DCMS informed him of the outcome of the internal review on 2 October 2017. The review upheld the decision to withhold the requested information on the basis of section 35(1)(a) of FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 2 October 2017 in order to complain about the DCMS' decision to withhold the information falling within the scope his request.

## **Reasons for decision**

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### **Section 35 – formulation and development of government policy**

10. DCMS 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. DCMS 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. DCMS noted that the policy review was under development at the time of the request 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. DCMS acknowledged that disclosure of the withheld information may be of benefit as it could improve transparency and also make the public more confident that decisions were being taken on the basis of the best available information.
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 DCMS' 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. DCMS advanced two key arguments to support its view that the public interest favoured maintaining the exemption. Firstly, that ministers and their officials needed a safe space, away from external interference, in which to develop their thinking and explore different options in communications and discussions. DCMS emphasised that it was continuing to use the withheld information to inform the development of its ongoing policy in relation to this area of gambling regulation.
21. Secondly, DCMS argued that good government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options. It argued that disclosure of the withheld information may have a deterrent effect on external experts or stakeholders who might be reluctant to provide advice because it might be disclosed or may provide less full or frank advice.

*Balance of the public interest test*

22. With regard to the safe space arguments, the Commissioner accepts that significant weight should be given to the 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 regulations concerning the 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.

23. With regard to attributing weight to the chilling effect arguments, the Commissioner notes that DCMS' 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 comprises minutes of meetings which were held on the basis that the points discussed would not be made public. 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.
24. With regard to the public interest in favour of disclosure, there is, as DCMS 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.
25. 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.

26. 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. The Commissioner acknowledges that of 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.

## Right of appeal

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27. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

28. 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.

29. 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**  
**Senior Case Officer**  
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