

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 December 2020

**Public Authority:** Department for Business, Energy and Industrial Strategy

**Address:** 1 Victoria Street  
London  
SW1H 0ET

#### Decision (including any steps ordered)

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1. The complainant has requested the responses to a consultation on the Pubs Code and Pub Codes Adjudicator. The Department for Business, Energy and Industrial Strategy (BEIS) refused to disclose the requested information, applying section 22 (information intended for future publication) of the FOIA.
2. The Commissioner's decision is that BEIS incorrectly applied section 22 of the FOIA in this case.
3. However, as BEIS have now published much of the information to which the exemption was applied and the complainant does not dispute the additional exemptions subsequently applied to the remaining information, the Commissioner does not require BEIS to take any further steps in this matter.

#### Request and response

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4. On 7 October 2019, the complainant wrote to BEIS and requested information in the following terms:

*'Under an FOI can you please advise us of all the responses to the consultation which has now closed:*

*Pubs Code and Pubs Code Adjudicator: statutory review.*

*We look forward to hearing from you by return'.*

5. BEIS responded on 21 October 2019 and advised that the information requested was exempt from disclosure under section 22 (information intended for future publication) of the FOIA. Addressing the public interest test, the Department advised that they had considered the arguments in favour of disclosure alongside those in favour of maintaining the exemption. BEIS stated that, *'it is our view that, whilst there may be an interest in early sight of this information, there is also a strong public interest to ensure that publication of information takes place in accordance with certain procedures to ensure accuracy and consistency'*. The Department informed the complainant that the requested information was *'due to be published soon'* and therefore they considered that the balance of the public interest fell in favour of maintaining the exemption at that point in time.
6. The complainant requested an internal review of the decision on 21 October 2019. He noted that the Department had not given a date for when the information would be 'published soon' and stated that this was *'unacceptable'*. He also stated that:  
  
*'We note the response to the consultation has in part already been published as you released the PCA's<sup>1</sup> own response to the consultation so it seems nonsensical not to release all the other responses or at least give us a date for publication as there can be no reason for withholding it, given that consent for publication was part of the form you sent out'*.
7. BEIS provided the complainant with their internal review on 18 November 2019. The review did not address the complainant's point about the partial publication and repeated the original response, upholding the same. The Department confirmed that *'work on the publication of the responses to progressing and they will be published once this is complete'*.

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<sup>1</sup> Pub's Code Adjudicator. The PCA is responsible for enforcing the statutory Pubs Code, which regulates the relationship between all pub companies owning 500 or more tied pubs in England and Wales and their tied tenants.

## Scope of the case

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8. The complainant contacted the Commissioner on 18 November 2019 to complain about the way his request for information had been handled. In his complaint to the ICO the complainant stated that, *'one of the responses to the consultation has already been published by the BEIS so this selective withholding of the other responses is wholly without merit'*.
9. In the course of her investigation the Commissioner received detailed submissions from BEIS. Due to significant pressures and disruption caused by the COVID-19 emergency, BEIS inadvertently overlooked the Commissioner's original request for submissions in this case, leading to some delay in the Commissioner's investigation. BEIS also provided the Commissioner with sample copies of the consultation responses.
10. In early November 2020, following the conclusion of the Commissioner's investigation, BEIS published the Pubs Code and Pubs Code Adjudicator Statutory Review and the consultation responses (withheld information).
11. Some of the consultation responses were redacted in accordance with section 40(2)(third party personal data) and section 44(1)(a)(prohibited by or under any enactment - specifically the Enterprise Act 2002). BEIS confirmed to the Commissioner that all responses had been published, except for those where respondents had expressly requested that their response be treated as confidential as provided in the Invitation to Contribute. These responses were withheld under section 41(1)(information provided in confidence by a third party).
12. BEIS wrote to the complainant notifying him of this publication on 9 November 2020. The complainant subsequently confirmed to the Commissioner that he did not wish to challenge the Department's application of the new exemptions for the redacted information but wished the Commissioner to reach a finding on the Department's original refusal of his request under section 22.
13. The Commissioner considers that the scope of her investigation is to determine whether BEIS were entitled to rely on section 22 to refuse the complainant's request.

## Reasons for decision

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14. Section 22(1) of the FOIA states that information is exempt from disclosure if;

*'(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*

*(b) the information was already held with a view to such publication at the time when the request for information was made, and*

*(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).'*

15. In submissions to the Commissioner, BEIS advised that on 30 April 2019, they published an invitation to contribute views and evidence to the first statutory review of the Pubs Code and Pubs Code Adjudicator on GOV.UK<sup>2</sup>. The statutory review is required to be undertaken at intervals under sections 46(4) and 65(6) of the Small Business Enterprise and Employment Act 2015 and regulation 68 of the Pubs Code Regulations 2016, and regulation 7 of the Pubs Code (Fees, Costs and Financial Penalties) Regulations 2016. The report of the review must be published as soon as practicable after the review period.

16. BEIS advised that the invitation to contribute views stated that *'the Government intends to publish all responses to this document'*. The document advised respondents that they could inform BEIS if they wanted their responses to be treated as confidential, but that the Department could not guarantee confidentiality in all circumstances.

17. BEIS initially advised the Commissioner that they received 78 responses to the invitation to contribute views. The Department had considered these responses alongside other evidence and the report on the Review was at an advanced stage. BEIS confirmed that their aim was to publish the responses to the Review alongside the report.

18. BEIS informed the Commissioner that an exact publication date had not yet been determined, as it depended on the date of publication of the report on the Review itself. However, BEIS advised the Commissioner that the responses were being finalised for publication and the report on the Review was at an advanced stage.

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<sup>2</sup> <https://www.gov.uk/government/consultations/pubs-code-and-pubs-code-adjudicator-statutory-review>

19. BEIS contended that the responses should be published alongside the full report on the findings of the Review, which would provide an analysis of the contributions of those providing views, and include other evidence that has been considered so that stakeholders have a full and complete picture. The Department explained that they considered this context is important, given the purpose for which the responses were gathered (to inform the Review) and due to the evidently divided views of stakeholders.
20. The Department advised that the report on the Review must be published and laid in Parliament 'as soon as practicable' after the end of the review period (i.e. after 31 March 2019).
21. The Department contended that the application of the exemption was reasonable because they had already stated, in the invitation document published on the government website, that they intended to publish the responses to the review. In further support of the reasonableness of applying the exemption, BEIS stated that this was so, *'because there is a large body of material to consider individually on FOI terms, and the Department considered that its limited resources were best applied in undertaking the managed process for preparing the material for publication alongside the Minister's Review, as per the commitment in the invitation document'*.
22. In supplemental submissions to the Commissioner, BEIS confirmed that at the time that the complainant's request and subsequent request for an internal review were received (7 and 21 October 2019 respectively), the Department's intention was to publish all of the consultation responses in full, save for the redactions needed to protect personal data. In the invitation to stakeholders to contribute views and evidence, BEIS noted that they had indicated that they would process such material in accordance with data protection laws and referred stakeholders to their privacy policy. They expressly stated that they would not publish personal names, addresses or other contact details.
23. However, BEIS advised the Commissioner that in the course of preparing the material (withheld information) for publication, they identified (on 9 December 2019) that there were statutory restrictions under the Enterprise Act 2002 that they would have to apply in relation to information about individuals and businesses. As a consequence of that, redactions would be needed to comply with the Enterprise Act 2002.
24. Therefore, BEIS advised that whilst it had been their intention to redact information as needed in order to protect personal data, and this was stated in the invitation document, they had not identified the application of the Enterprise Act 2002 at the time of drawing up the invitation document, although, as the Department noted, *'it is implicit in any*

*planned publication or release of material by government that it should always comply with the law'.*

25. Towards the end of the Commissioner's investigation, BEIS advised the Commissioner that if the same request were made at the present time, then they would anticipate that in addition to section 22 of the FOIA, they would also need to consider the exemptions at sections 40(third party personal data) and 44(1)(a)(prohibitions on disclosure) in relation to the material which they were expecting to redact. The Department advised that other exemptions may need to be considered, such as section 41(information provided in confidence) and section 43 (prejudice to commercial interests) but that they could not be conclusive *'as the work on preparing the material for publication is still underway'*.
26. In response to the complainant's contention about the publication of the response of the Pubs Code Adjudicator (PCA), BEIS advised the Commissioner that they (BEIS) did not publish this submission. BEIS explained that the PCA is *'operationally independent of BEIS and has its own section of the GOV.UK website, where it published its response'*. The Department advised that the PCA decision to publish their response did not require BEIS involvement and the PCA was one of several stakeholders which decided to publish their response ahead of the planned publication by BEIS.
27. In submissions to the Commissioner the complainant contended that in order to have had a settled intention to publish the information, the Department would need to have a date. He stated that, *'I accept this could be a range with say a longstop and shortstop date but if they have no date then they have no settled intention to publish and would fall foul of the act'*. In actual fact, the Commissioner would note that the exemption does not require the public authority to have a set publication date. As long as the public authority has decided that it or another person will publish the information at some time in the future, the exemption may apply.
28. The complainant stated that, *'It's clear they have no intention to publish, they have not told their staff the results of the review so they can learn from it (highly unusual in govt departments) they have sat on the report for over a year so no one can see it – their replies are quite bogus and amount to little more than a technical legal argument for continuing to cover up poor performance, this is not the intention of the act'*.
29. In light of the information provided by BEIS in their supplemental submissions, the Commissioner does not accept that at the time of the complainant's request (or his subsequent request for an internal review) BEIS had carried out the activity necessary for it to have had a settled intention to publish the specific information which the complainant had

requested. It is not sufficient, to engage section 22, for a public authority to note that it will identify some, but not all, of the information within the scope of the request, for future publication.

30. At the time of the request it is clear that BEIS had not carried out a sufficiently thorough and careful review of the requested information so as to identify which information could be published and which information would need to be redacted under other exemptions. Had such a thorough and careful review been undertaken, it would doubtless have identified that certain information (beyond information redacted for third party personal data purposes) would need to be redacted in order to comply with other legal or statutory requirements (e.g. the Enterprise Act 2002). If BEIS had known exactly what information was to be published at the time of the request, they would not have only later realised (in December 2019) that in actual fact more redactions to the information held needed to be made in order to comply with the Enterprise Act 2002 and possibly other legal and statutory requirements. That is to say, the further review of the information, which was continuing during the Commissioner's investigation, would not have been necessary.
31. ICO guidance on section 22<sup>3</sup> cites the Commissioner's decision in FS50121803, a 2009 Ministry of Justice (MoJ) case involving a request for prison-related information about several notorious convicted murderers. MoJ relied upon section 22 on the basis that they intended to put some of the requested information into the public domain through The National Archives (TNA). In order to do this, MoJ planned to review all of the information prior to transferring it to TNA at some future date. They would have to undertake this exercise as it was likely other exemptions would apply to some of the sensitive information. In that case the Commissioner rejected MoJ's argument that section 22 was engaged. Although they intended to publish some of the information at a point in the future, MoJ could not identify which information that was. At the date of the request, it was not possible to say that they had an intention or even a settled expectation to publish all of the withheld information.
32. Similarly, in the present case, BEIS made clear in their supplemental submissions to the Commissioner that they intended to redact some of the requested information (such redactions going further than those for third party personal data purposes made clear in the invitation to stakeholders). Therefore, at the time of the request, BEIS could not

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<sup>3</sup> <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

have been sufficiently certain what information was held with a view to publication. The need for the redactions not having been identified or finalised at the time of the request (or indeed by the time of the internal review), it became clear that some of the requested information that BEIS previously said would be published in the future, would now be redacted (e.g. in order to comply with the Enterprise Act 2002) and therefore not published.

33. In light of the above, the Commissioner does not consider that all three conditions (a)–(c) of section 22 were satisfied as although BEIS held the information at the time of the request, they had not at that point identified the information that would be redacted from publication and so did not have the required settled intention to publish the specified information at the time of the request.
34. Since she has found that section 22(1) is not engaged to this request it has not been necessary for the Commissioner to consider any public interest arguments associated with this exemption. As BEIS have now published the previously withheld information (aside from that to which additional exemptions were subsequently applied) and the complainant has confirmed that he does not wish to appeal the application of the other exemptions, the Commissioner does not require BEIS to take any further steps in this matter.
35. The Commissioner is however critical of the Department's handling of this request. The Commissioner recognises that the Department's main failing in this matter pre-dated the request, specifically the surprising failure to appreciate, when giving the commitment to publish the responses at the the time of the consultation, that some information would need to be withheld (redacted) in order to comply with legislative requirements (most notably the Enterprise Act 2002).
36. However, when BEIS were required to consider this information again by virtue of the complainant's request, they again failed to recognise the need for redactions, and this led them to wrongly apply section 22 to the request. Indeed, the necessity for the redactions did not come to light until a late stage in the Commissioner's investigation, a development that obviously affected the Commissioner's consideration of the exemption and caused additional delay to the resolution of this matter.
37. The Commissioner would therefore emphasise to BEIS the importance, when applying section 22 to the totality of a request, of ensuring that, at the time of the request, there is a settled intention to publish, at a future date, *all* of the information requested by a requester.





## Right of appeal

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38. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.
40. 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** .....

**Alexander Ganotis**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**