

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 5 February 2021

**Public Authority:** Department for Digital, Media and Sport  
**Address:** 100 Parliament Street  
London  
SW1A 2BQ

#### Decision (including any steps ordered)

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1. The complainant has requested the Department for Digital, Media and Sport (DCMS) to disclose information relating to the government's announcement on 16<sup>th</sup> October 2019 to not commence Part 3 of the Digital Economy Act 2017 (DEA). DCMS refused to disclose the requested information citing section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that DCMS is entitled to refuse to disclose the requested information in accordance with section 35(1)(a) of the FOIA. She does not require any further action to be taken.

#### Request and response

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3. On 4 November 2019, the complainant wrote to DCMS and requested information in the following terms:

"On 16<sup>th</sup> October 2019, the Government announced that it would not be commencing Part 3 of the Digital Economy Act 2017. I would like access, under the Freedom of Information Act 2000, to any memoranda and/or advice relating to that decision and/or providing the basis for that decision."

4. The DCMS responded on 21 November 2019. It refused to disclose the requested information citing section 35(1)(a) of the FOIA.
5. The complainant requested an internal review on 17 December 2019.

6. The DCMS carried out an internal review and notified the complainant of its findings on 20 January 2020. It upheld its application of section 35(1)(a) of the FOIA.

## Scope of the case

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7. The complainant contacted the Commissioner on 1 March 2020 to complain about the way his request for information had been handled. He stated that the request relates to the government's decision to abandon a high-profile policy, which was announced in Parliament with minimal reasons. He considers there is a strong public interest in knowing the reasons for this change in policy in order to hold government to account and to learn lessons from it. The complainant is of the opinion that the government's interest in withholding the information is weaker, given that the decision has already been taken to abandon the specific policy. He believes the specific policy is no longer under consideration so any chilling effect from disclosure is reduced.
8. The Commissioner considers the scope of her investigation to be to determine whether DCMS is entitled to refuse to disclose the requested information in accordance with section 35(1)(a) of the FOIA.

## Reasons for decision

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### Section 35(1)(a) – formulation or development of government policy

9. So far as is relevant, section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates to the formulation or development of government policy.
10. For information to be exempt under section 35(1)(a) it simply has to relate to the formulation or development of government policy; there is no requirement for the disclosure of the information to be in any way prejudicial to either of those policy processes.
11. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. This means that any significant link between the information and the policy process is sufficient to engage the exemption.
12. DCMS confirmed that the Secretary of State announced the decision not to commence Part 3 of the DEA concerning age verification for online pornography on 16 October 2019. The Secretary of State said that the

government had concluded that the correct policy option was to deliver age verification as part of the Online Harms regulatory framework.

13. DCMS advised that while the decision was taken not to commence Part 3 of the DEA, both the use of age verification technology, and the protection of children from accessing online pornography (i.e. the objectives of Part 3 of the DEA) would be incorporated within the Online Harms regulatory framework. At the time of the complainant's request the Online Harms policy team were conducting a review of how best to incorporate the objectives of Part 3 of the DEA into the more coherent and comprehensive framework of the Online Harms regime.
14. It argued that since the decision was taken not to commence Part 3 of the DEA in October 2019 the policy on how children will be protected from accessing online pornography has been kept under review and is still actively under review at this time. DCMS advised that an initial articulation of how the objectives of the DEA will be met through the Online Harms regulatory framework was included in the [Online Harms White Paper – Initial Government response](#) published in February 2020 and in the [Online Harms White Paper: Full Government Response](#) to the consultation published December 2020. The approach to protecting children from online pornography is still being kept under review following the publication of the Full Government Response to ensure the most comprehensive protections are delivered to children online.
15. The Commissioner has reviewed the withheld information and she is satisfied that it relates to the formulation and ongoing development of policy on how children will be protected from accessing online pornography and how this will be best achieved and incorporated into the Online Harms regulatory framework. She is therefore satisfied that section 35(1)(a) of the FOIA applies.

### **Public interest test**

16. DCMS confirmed that there is an inherent public interest in government transparency. It acknowledged that transparency allows the electorate to hold the government to account and ensures that the electorate can be confident in the decisions taken. It confirmed that transparency also increases the trust the electorate has in the government.
17. It stated that the protection of children and the aims of this policy being met are of strong public interest and it acknowledges a range of stakeholders (children's charities, parliamentarians and the general public) hold a strong public interest in its development and ultimately implementation. DCMS noted that the policy objectives were and continues to be controversial to the public, with many contrasting views held on how the policy objectives should be delivered. There were

concerns from different sections of society about data privacy, noting the sensitivity of some of the information that may be collected and the websites in scope of the policy.

18. DCMS added that the delays in implementing the policy also added to the public interest. It stated that the public money spent on this policy, the delays and the decision not to commence Part 3 of the DEA increased the public interest in disclosure.
19. However, DCMS considers there are stronger public interest arguments in favour of maintaining the exemption and preserving a 'safe space' where ministers and their officials can engage in candid discussion on policy issues without concerns that their contributions would be disclosed into the public domain. It argued that this 'safe space' is imperative when making such significant policy decisions and applied particularly to this decision when one considers the controversial nature of the policy, the challenges expected due to the strong public interest in the policy objectives, and the implications for the expenditure of public money on the policy.
20. DCMS confirmed that if ministers and their officials are concerned that their discussions on policies, including in emails and submissions, will be released into the public domain then this is likely to result in a chilling effect whereby discussions are less candid. It commented that this chilling effect and the resulting reluctance to contribute candidly to policy discussions would result in advice to ministers and deliberations on the policy being less robust and less well informed. This would directly impact any policy decisions made as a result of these discussions, potentially resulting in policy decisions being made that do not necessarily provide the most effective means of achieving the stated objectives. DCMS advised that it is not in the public interest that deliberations on policies are inhibited by the chilling effect and the policy decisions made without all the relevant information to hand.
21. Furthermore, DCMS argued that, to release this information, which relates to its internal discussion on concerns with the existing approach and potential future policy direction, would be likely to impact on the ongoing policy making process. With decisions still to be made on how government would implement the policy objectives through the Online Harms regulatory framework, the release of this information could have the impact of forcing a change of direction on the decision, not for the benefit of the policy, but to adverse stakeholder reactions. It stated that decisions which are made to avoid adverse publicity as opposed to furthering the policy's aims are not in the public interest.
22. It stated that original policy objectives were complex with significant policy and regulatory challenges. It considered a great number of issues

when deciding not to implement the objectives through Part 3 of the DEA and to release this information would be to the detriment of the current policy formulation process.

23. DCMS considers that it will be clear from the Secretary of State's [statement](#) to Parliament that while it would not be commencing Part 3 of the DEA it would instead be committed to working to protect children online through the forthcoming Online Harms regulatory framework. Additionally, DCMS ministers acknowledged the shortcomings of the DEA and highlighted the opportunities of delivering its objectives through the Online Harm framework in response to urgent questions tabled in the [House of Commons](#) and [House of Lords](#) which provides further explanation of the government's decision. DCMS is of the view that the information given in Parliament, provides a sufficient level of information to meet the public interest in understanding the decision made.
24. The Commissioner recognises the significant public interest in disclosure. The withheld information would enable members of the public to understand more fully why DCMS decided not to commence Part 3 of the DEA and to work towards delivering the objectives to protect children on line through the Online Harms regulatory framework. She acknowledges the delays and resources already spent on the formulation and delivery of this policy adds to the public interest in disclosure.
25. She also acknowledges that the objectives are controversial and there are contrasting views and significant concerns over how the objectives should be delivered.
26. However, at the time of the request DCMS had only just announced the decision not to commence Part 3 of the DEA and were in the process of considering and reviewing how best to deliver the objectives via the Online Harms regulatory framework. The Commissioner accepts that there was still the need for 'safe space' and the policy process was still ongoing at the time of the request. DCMS was still in the process of formulating and developing the delivery of the objectives via the Online Harms regulatory framework.
27. The Commissioner's guidance notes that once a high-level policy objective has been announced (for example a White Paper or framework bill) any information about the broad objective will become less sensitive, accepting that the 'safe space' to debate that high-level decision in private is no longer required. In this case, the announcement to not commence Part 3 of the DEA took place in October 2019. The complainant's request was made November 2019. DCMS did not publish its initial articulation of how the objectives of the DEA will be met through the Online Harms regulatory framework until February 2020 - the Online Harms White Paper – Initial Government response. Again

supporting the view that at the time of the request 'safe space' was still required for ministers and their officials to discuss and formulate how the objectives would now be delivered.

28. The Commissioner accepts that if the policy development process is still live and there is a need for private space to discuss, debate and formulate policy options, there will be strong public interest arguments in favour of maintaining the exemption. She acknowledges that disclosure at this stage would be likely to prejudice policy development and the ability of ministers and their officials to discuss and ultimately decide openly and candidly how the objectives should be delivered and integrated into the Online Harms regulatory framework.
29. Although there are weighty public interest arguments in favour of disclosure in this case, the Commissioner considers that given the timing of the request and the stage that DCMS was at, at that time, the public interest rests in maintaining the exemption.

## Right of appeal

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30. 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@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)

31. 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.
32. 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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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