

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 16 May 2023

Public Authority: Department for Culture, Media and Sport
Address: 4th Floor
100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested information regarding an assurance of financial support given to the National League by the government.
2. The Commissioner's decision is that Department for Culture, Media and Sport wrongly relied on sections 35 and 43 to withhold requested information from the complainant. However, it can rely on section 40(2) to withhold the personal data of junior officials.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with the withheld information other than the personal information of junior officials.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Background

5. On 27 January 2021, the government confirmed £10 million emergency support for steps 3-6 of the National League system¹. This was part of the Sport Winter Survival Package that the government had announced in November 2020².

Request and response

6. On 22 February 2021, the complainant requested information by saying as follows:

"In Hansard there is a report of a debate on 'Professional and Amateur Sport: Government support' which took place in the House of Commons on 30 September 2020.

Hansard, at column 343, reports Nigel Huddleston MP, Parliamentary Under Secretary of State for Sport, Tourism and Heritage, as saying on 30 September 2020;

"Yesterday we also provided the national league with assurance that financial support from the Government will be forthcoming so that it can start this season this Saturday".

I would be grateful if, under the provisions of the Freedom of Information Act, could you please provide me with all information that you hold regarding the assurance that was given to the National League on 29 September 2020 regarding Government financial support".

7. On 22 June 2021, DCMS responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

Section 35(1) (a) (formulation or development of government policy, etc.) of the Act

8. On 20 July 2021, the complainant requested an internal review.
9. On 11 August 2022, the public authority sent him the outcome of its internal review. In addition to upholding its original position, it also

¹ [Government confirms £10 million emergency support for steps 3-6 of the National League system - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/government-confirms-10-million-emergency-support-for-steps-3-6-of-the-national-league-system)

² [Government announces £300 million Sport Winter Survival Package to help spectator sports in England - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/government-announces-300-million-sport-winter-survival-package-to-help-spectator-sports-in-england)

sought to rely on section 43(2) (commercial interests) to withhold requested information.

Scope of the case

10. The complainant contacted the Commissioner 5 October 2021, to complain about the way his request for information had been handled.
11. The complainant has confirmed with the Commissioner that he does not take issue with the public authority withholding personal data.³
12. The public authority has provided the Commissioner with its submissions and a copy of the withheld information. It also informed the Commissioner that it was also withholding the personal information of junior officials.
13. The Commissioner considers he must determine whether the public authority correctly withheld requested information from the complainant.

Reasons for decision

14. Section 35(1)(a) of FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy.
15. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
16. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process and to prevent disclosures which would undermine this process and result in less robust, well-considered policy options in private.
17. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to a public interest test.

³ 5 May 2023

18. 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.
19. The Commissioner takes the view that the 'formulation' of policy comprises the initial 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.
20. '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.
21. 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.
22. 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.

Public Authority's Submissions

23. The public authority has explained that this information is exempt from disclosure under section 35(1) (a) (formulation or development of government policy, etc.) of the Act. Section 35 is a 'qualified exemption' and requires it to carry out a public interest test to consider whether the balance of interest lies in releasing or withholding the information.

Commissioner's Reasonings

24. Having viewed the withheld information, it loosely can be said to fall within the definition of formulation and development of a government policy. The relevant policy being that as expressed by the government on 27 January 2021 and referred to in paragraph five above.

Public Interest test

Public Authority's Submissions

25. Public interest factors in favour of releasing the withheld information are the general, inherent, public interest factors in government transparency. Transparency creates accountability and increases trust. Furthermore, it considers that there is a stronger, more specific, public interest in understanding the department's response to the pandemic, of which the discussions on the 'funding' arrangements with the National League is a part.
26. However, it considers that there is a strong public interest in protecting the 'safe space' for policy discussions to take place in a candid manner. This 'safe space' is required to ensure that conversations can be free and frank and that discussions can be robust. If participants in these discussions are concerned that their contributions will be released, then this may inhibit future discussions on the policy or future policies. These robust discussions are important for the process as they ensure that decisions can be taken with the fullest of information to hand. Furthermore, the department has worked hard to establish relationships with these representatives, which means there is a level of mutually beneficial information sharing around key decisions. It believes these relationships are important in policy formulation, and it is therefore not in the public interest that these relationships are undermined by the release of the requested information.

Commissioner's Reasonings

27. The Commissioner's guidance 'Section 35 – Government Policy' states 'the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
28. The relevance and weight of the public interest arguments depends entirely on the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case.
29. The Commissioner finds the public authority's public interest arguments in favour of maintaining the exemption to be mainly generic ones. The withheld information is not that which is concerned with a free and frank exchange of views or containing robust discussions.
30. The Commissioner agrees with the public authority that releasing the withheld information would assist the public in understanding the department's response to the pandemic. Additionally, there is always public interest favouring disclosure to facilitate openness and transparency of government. Given that the policy and its implementation had already been announced by the government prior to the complainant's request for information the Commissioner considers

that the application of public interest test favours the release of the withheld information.

Section 43 – commercial interests

31. Section 43(2) of FOIA states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. Section 43 is subject to the public interest test.

Public Authority's submissions

32. The withheld information was provided by an organisation to share the concerns of their sector. This necessitates the provision of commercially sensitive information in order to make the impact known. It considers that to release this information would have an adverse impact on the organisations referenced commercially. If such information were released it would provide competitors details on their thinking and weaken their positions in a competitive environment by revealing market-sensitive information or information of potential usefulness to competitors.

Commissioner's Reasonings

33. The Commissioner, for the reasons that follow, has not been persuaded that the releasing of the withheld information would harm the commercial interests of the public authority or of a third party. The withheld information replicates what was known about the effect of COVID and the suspension of the National League at the time it was produced⁴⁵. Accordingly, the withheld information does not disclose anything above what was already in the public domain prior to and at the time of the request, the Commissioner therefore finds this exemption not to be engaged.

Section 40 – personal information

34. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the

⁴ [Coronavirus: All football below National League to end - BBC Sport](#)

⁵ [Non-league football in funding crisis – Palatinate](#)

requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

35. Section 3(2) of the DPA defines personal data as: "any information relating to an identified or identifiable living individual".
36. The public authority is withholding the personal information (names and email addresses) of junior officials and the complainant has informed the Commissioner that he does not take issue with the withholding of personal data. Accordingly, the Commissioner agrees that the public authority can withhold the personal data of junior officials.

Right of appeal

37. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.

39. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**