

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 6 February 2023

**Public Authority:** Department for Digital, Culture, Media and Sport

**Address:** 100 Parliament Street  
London  
SW1A 2BQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested from the Department for Digital, Culture, Media and Sport ("DCMS") information regarding the proposed repeal of Section 40 of the Crime and Courts Act 2013. DCMS refused to provide it citing FOIA section 35 (formulation/development of government policy). It upheld this at internal review.
2. The Commissioner's decision is that DCMS was entitled to rely on section 35 as its basis for refusing to provide the requested information.
3. No steps are required.

#### **Request and response**

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4. On 20 May 2022, the complainant requested information of the following description:

"The Queen's speech Lobby Note stated a benefit of the Media Bill would be: 'Removing a threat to the freedom and sustainability of the press by repealing Section 40 of the Crime and Courts Act 2013'. Also, 'Repealing Section 40 of the Crime and Courts Act 2013 which would (if commenced) force new publishers to pay the costs of any court judgment if they were not a member of the approved regulator, regardless of the outcome of the court judgment.'

The Government's 2019 Election Manifesto stated. 'After Brexit we also need to look at the broader aspects of our constitution: ... access to justice for ordinary people.' at page 48.

The Explanatory Notes to the Act state:

'Section 40: Awards of costs

479. Section 40 relates to cases where the relevant publisher is a defendant to a relevant claim. In such cases, when making a decision about whether and to what extent the defendant should pay the claimant's costs of the case, the usual costs rules will not apply and the court will be required either to award, or not to award, costs against the defendant in accordance with subsections (2) and (3) ... The exceptions are that the issues raised by the claim could not have been resolved by using an arbitration scheme provided by the approved regulator, or that in all the circumstances of the case it is just and equitable to make a different order, or no order, as to costs.'

Q1. Does the Department have any evidence or information which shows conclusively that if a publisher joined an approved regulator their freedom to report fairly, openly and honestly would be limited in any way?

Q2. If the answer to Q1 is 'Yes' please may I have copies?

Q3. Does the Department have any evidence or information which shows conclusively the financial costs that a publisher who joined an approved regulator could suffer are greater or lesser compared with a court action against them for relevant claims as defined in s.42 of the Act?

Q4. If the answer to Q3 is 'Yes' please may I have copies?

Q5. Does the Department have any evidence or information which shows that if a publisher does not join an approved regulator then access to justice for ordinary people is easily available?

Q6. If the answer to Q5 is 'Yes' please may I have copies?"

5. On 15 July 2022 (later than the statutory date for compliance and following the Commissioner's intervention), DCMS responded. In respect of Q1, it said that it did not hold information within the scope of this request.
6. In respect of Q2, it said this was therefore not applicable.
7. In respect of Q3, it said it worked with the Ministry of Justice "to collect data on the financial impact for publishers".
8. In respect of Q4, it said it holds information within the scope of this request but that this information was exempt from disclosure under section 35(1)(a) of the FOIA – formulation/development of government policy.

9. In respect of Q5, it said this information was already publicly available and it provided a link to its consultation response as its reply to Q6.
10. The complainant requested an internal review on 19 July 2022 where he disputed its reliance on section 35(1)(a) and also asked it to review its response to Q5. DCMS sent him the outcome of its internal review on 15 September 2022.
11. It upheld its position in respect of Q3 and its use of section 35(1)(a). In respect of Q5 it said that it did "not have anything on file which shows that access to justice is easily accessible for ordinary people if a publisher does not join an approved regulator". It referred him to the Ministry of Justice for information on access to justice. It also suggested he may wish to contact the independent regulators IPSO and IMPRESS.

### **Scope of the case**

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12. The complainant contacted the Commissioner on 16 September 2022 (following a previous exchange regarding DCMS' non-response to their initial request) to complain about DCMS' use of section 35(1)(a) as its basis for withholding the information caught by Q4 which related to Q3.
13. The Commissioner has considered the application of section 35(1)(a) in this case. In its submissions to the Commissioner, DCMS asserted that section 36 (prejudice to the effective conduct of public affairs) would apply if section 35 did not apply. It did not provide any evidence to support this, such as the opinion of its qualified person or an undertaking to provide such evidence, where necessary. Section 36 cannot apply without it.

### **Reasons for decision**

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14. Section 35(1)(a) of FOIA states that:  
  
`Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to- (a) the formulation or development of government policy`
15. 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.
16. 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.

17. 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 content of the information in question and its context.
18. 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.
19. DCMS explained that "[t]his information relates to the repeal of Section 40 of the Crime and Courts Act 2013. This was a manifesto commitment, and it was announced in the Queen's speech that this policy would be taken forward through the 3rd session Media Bill. This Bill is yet to be introduced to parliament."
20. It added that "DCMS considers the development of the policies to which this information relates to have been ongoing at the time the complainant submitted his request. Policy work remains ongoing on the repeal of Section 40, to support its inclusion in the Media Bill".
21. Having read the withheld information, the Commissioner is satisfied that the information relates to the development of government policy. The fact that the policy was asserted as an objective in the manifesto is evidence that the policy has been formulated. However, that policy is being developed in order to introduce it to Parliament in the Media Bill. Section 35(1)(a) is therefore engaged.

### **Public interest test**

22. 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 maintaining the exemption**

23. DCMS argued that "This information is relevant to live policy issues and therefore there is strong public interest in protecting the 'safe space' around ministers and their officials, where they can engage in blue-sky thinking when considering S40 of the Media Bill. Those who take part in the policy development and formulation process need to be able to consider a range of factors and issues that will impact the effectiveness of the policy in question. These options, even if not eventually taken forward, need to be robustly challenged and discussed in great detail to ensure that all options are considered. If those participants in the process are concerned that their opinions will be released, then it would be likely to inhibit the discussions, and reduce the options available to those decision makers. This is likely to reduce the quality of decisions made, which ultimately may result in decisions being made that do not meet the aims of the policy in the most effective way."
24. The Commissioner would characterise these arguments as "protecting the safe space in which policy is discussed" and "avoiding a chilling effect on future policy discussions".

### **Public interest in disclosing the information**

25. The complainant made a number of points. He provided the Commissioner with a copy of the Select Committee for Culture Media and Sport response to the Government's consultation on press regulation.<sup>1</sup> He noted the response urged the commencement of Section 40 of the Crime and Courts Act 2013.
26. He also provided a copy of the Press Recognition Panel ("PRP")'s business plan for 2022/23.<sup>2</sup> He said:
- "[The PRP] was created following the Leveson Inquiry into the Culture, Practices and Ethics of the press to independently oversee the regulation of news publishers in the UK. The background of the failure of successive governments to bring s.40 into force is clearly seen Page 1 of 29 in PRP-Business-Plan-2022-23 (PRP Plan) ... The PRP Plan ... is evidence that there is a great public interest in knowing all and any information as to why section 40 is being considered for repeal as opposed to being brought into force. It is to be noted that the Exchequer granted the PRP £3m of public money to bring the system into operation".

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<sup>1</sup> [CMS Committee reponse to Government consultation on press regulation \(parliament.uk\)](https://www.parliament.uk/business/committees/committees-a-z/culture-media-and-sport/committees/culture-media-and-sport-select-committee/press-regulation-consultation-response/)

<sup>2</sup> [PRP-Business-Plan-2022-23.pdf \(pressrecognitionpanel.org.uk\)](https://www.pressrecognitionpanel.org.uk/wp-content/uploads/2022/03/PRP-Business-Plan-2022-23.pdf)

27. DCMS recognised a public interest in disclosure. It said that it had “considered the general, inherent, public interest in governmental transparency. Transparency creates accountability and increases trust. Furthermore, we considered the more specific public interest in understanding the decisions that contribute to the proposed policy in development.”

### **Balance of the public interest arguments**

28. 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 DCMS’ position that at the time of the request the development of its policy regarding the repeal of section 40 of the Crime and Courts Act 2013 was live. Furthermore, having considered the content of the withheld information the Commissioner accepts that disclosure of it clearly has the potential to encroach on the safe space of this policy making.
29. That said, the Commissioner also recognises the considerable weight of the public interest in disclosure. Both the relevant House of Commons Select Committee and the PRP have urged the government to enact Section 40 rather than repeal it. These are both parties with significant interest in the proper function of press regulation. The Commissioner notes that considerable public money has been spent to bring the PRP into operation.
30. The Commissioner is satisfied that there is a considerable public interest in the proper function of press regulation. Disclosure in this case could serve that interest by showing some of the points being considered in the development of government policy on this subject. This could enhance public discussion of this important subject.
31. That said, the Commissioner recognises that considerable weight must also be given to the fact that this was a live matter at the time of the request. The public interest in protecting the safe space in which the ongoing development of policy is discussed is particularly strong. Had the matter not been live, the Commissioner may well have reached a different view given the importance of the public interest in informing public discussion of this subject.

### **The Commissioner’s conclusion**

32. In light of the above, the Commissioner has concluded by a narrow margin that the public interest favours maintaining the exemption at section 35(1)(a). He has given particular weight to the fact that government policy development was live at the time of the request. The public interest is best served by ensuring the best quality policy making in a safe space for discussion. Therefore, the information was correctly withheld in response to the complainant's request.

## Right of appeal

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

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

34. 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.
35. 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**  
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