

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 April 2023

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

Decision (including any steps ordered)

1. The complainant requested correspondence between a named Minister and the Department for Culture, Media and Sport ('DCMS') relating to gambling regulation. DCMS provided some of the requested information and withheld the remainder under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that DCMS was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA and that the balance of the public interest favours maintaining the exemptions.
3. No steps are required as a result of this notice.

Request and response

4. On 9 November 2021, the complainant wrote to DCMS and requested information in the following terms:

"1) Please provide a copy of all correspondence (sent and received) between ministers of your department and Philip Davies MP relating to

- a) Gambling regulation
- b) Entain, formerly GVC Holdings

Please include emails, texts, WhatsApp messages or messages on equivalent platforms such as Signal, internal work instant

messages such as on Slack, Teams or Gchat, and a list of and minutes of any calls.

Please also list the titles of attachments to emails or messages within the scope of this request.

2) Please provide a record of all meetings between ministers of your department and Philip Davies MP concerning or relating to:

- a) Gambling regulation or related issues.
- b) Entain, formerly GVC Holdings

Please provide

- A list of these meetings, including topics.
- A copy of the minutes recorded of these meetings
- A copy of civil service briefings prepared ahead of these meetings for the minister concerned.
- A list of the titles of any documents considered at these meetings.

I am happy to limit my request to electronically held records.

Please provide information held from 1 June 2020 to date.”

5. DCMS responded, late, on 29 April 2022 and provided some information within the scope of the request (with section 40(2) redactions for personal information). DCMS refused to provide the remainder (minutes and briefing for a meeting with the Parliamentary All Party Betting & Gaming Group ('APBGG') regarding the Gambling Act Review, relevant to this request as Philip Davies MP attended as a member and he was previous vice-chair of the APBGG). It cited the following FOIA exemptions as its basis for doing so: sections 36(2)(b)(i) and (ii) (free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation).
6. The complainant requested an internal review on 4 May 2022, referencing some specific pieces of correspondence. He also raised some public interest arguments in favour of the disclosure of the withheld information. No internal review was conducted.

Scope of the case

7. The complainant initially contacted the Commissioner on 18 July 2022 to complain about the then outstanding internal review outcome.

8. The Commissioner contacted DCMS on 1 August 2022 asking it to provide its internal review result. DCMS failed to do so; as a result the case was accepted for investigation without the internal review.
9. DCMS subsequently issued its internal review result, late, on 7 September 2022. It said that one letter referenced by the complainant was not in scope and the other was not held. However, after conducting a further search, DCMS advised it had located additional information in scope of the request (details of which were not specified at that point) to which it applied section 36(2)(c) (prejudice to the effective conduct of public affairs). Having considered the public interest points raised by the complainant, DCMS maintained its original position with regard to the information withheld under sections 36(2)(b)(i) and (ii) of FOIA.
10. The complainant confirmed he was content to focus on the section 36 issue, so the Commissioner will not consider any information withheld under the section 40(2) personal information redactions within the previously disclosed information.
11. The Commissioner has considered whether DCMS was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to withhold the remaining information in scope of the request.

Reasons for decision

Section 36 - prejudice to effective conduct of public affairs

12. DCMS confirmed that it was relying on sections 36(2)(b)(i) and (ii) and section 36(2)(c) of FOIA to withhold the remaining requested information in scope of the request.
13. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of "a qualified person", disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
14. The exemption at section 36 can only be engaged on the basis of the reasonable opinion of a qualified person.
15. DCMS provided the Commissioner with a copy of its section 36(2)(b)(i) and (ii) submission to the qualified person, the then Minister for Sport, Tourism, Heritage and Civil Society, Nigel Huddleston.
16. The Commissioner is satisfied that in seeking the opinion of a Minister of the Crown, DCMS has met the requirements of section 36(5) of FOIA.
17. DCMS acknowledged that this opinion was sought on 26 April 2022 and received on 29 April 2022.

18. DCMS also sought the opinion of the qualified person at the internal review stage, after it had located three letters and one covering email in scope of the request following a further search. This information was withheld under section 36(2)(c) of FOIA.
19. The same qualified person's opinion was sought on 5 September 2022 and given on 6 September 2022 in relation to section 36(2)(c).
20. In the specific circumstances of this case, the Commissioner is satisfied that section 36 can be engaged on the basis of this opinion. From the evidence he has seen, he accepts that the information that the qualified person considered when they gave their opinion included the information that falls to be considered under section 36 in this case.
21. In determining whether the exemption is engaged, the Commissioner must, nevertheless, consider whether the qualified person's opinion was a reasonable one.
22. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
23. The Commissioner considers that the exemptions at section 36(2) are about the processes that may be inhibited, rather than focussing only on the content of the information.
24. With regard to the limbs of section 36(2)(b), the issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information itself does not necessarily have to contain views and advice that are in themselves free and frank. On the other hand, if the information only consists of relatively neutral statements, then it may not be reasonable to think that its disclosure could inhibit the provision of advice or the exchange of views. Therefore, although it may be harder to engage the exemptions if the information in scope consists of neutral statements, circumstances might dictate that the information should be withheld in order not to inhibit the free and frank provision of advice and the free and frank exchange of views. This will depend on the facts of each case.

25. With regard to section 36(2)(c), the Commissioner's guidance on section 36¹ states:

"..., the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b)".

26. In the Commissioner's view, it is not unreasonable to engage sections 36(2)(b)(i) and (ii) in this case given the range and nature of the withheld correspondence. The Commissioner also accepts that it is not unreasonable to engage section 36(2)(c) in respect of the additional three letters and covering email. DCMS has argued that disclosure would be prejudicial to the effective conduct of public affairs and that its release would have a chilling effect on the government's relationship with key stakeholders. The Commissioner is therefore satisfied that the exemptions are properly engaged.

Public interest test

27. Section 36 is subject to the public interest test. With regard to sections 36(2)(b)(i) and (ii), the Commissioner notes that DCMS considers that disclosure **would be likely** to prejudice or inhibit the free and frank provision of advice and the free and frank exchange of views. DCMS also advised that the higher level of **would** prejudice is relevant to its reliance on section 36(2)(c) ie that disclosure would prejudice or inhibit the effective conduct of public affairs.
28. The Commissioner has carried both levels of likelihood through to the public interest test.

Public interest arguments in favour of disclosing the information

29. For all three limbs of section 36 cited, DCMS acknowledged the general inherent public interest in transparency and that transparency makes the government accountable to the electorate.
30. DCMS also recognised that openness can increase public understanding, inform public debate, and develop and maintain public trust.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

Public interest arguments in favour of maintaining the exemption

31. In favour of maintaining the section 36(2)(b)(i) and 36(2)(b)(ii) exemptions, DCMS argued that there is a "strong" public interest in protecting the 'safe space' around officials where they can provide candid briefing to ministers, and other senior officials, free from the fear of the release of their advice. DCMS said that officials need to provide detailed, candid advice to ministers on a range of issues to ensure that the decision makers have all the relevant information to enable them to make a fully informed decision.
32. DCMS argued that if officials are concerned that their briefings to ministers and senior officials will be released, they may be less willing to provide thorough detailed information in briefings. This may leave the ministers and senior officials unprepared for meetings, reducing their effectiveness. This may also result in decision makers having to make a decision with incomplete information, resulting in decisions being taken that may not meet their stated aims, which is not in the public interest.
33. In other words, it is vital that ministers can obtain advice and consider policy and operational issues freely and frankly without risk of disclosure. DCMS has argued that it is firmly in the public interest to avoid prejudice to the effective conduct of public affairs.

34. DCMS also said:

"We also considered that 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 decisionmakers. 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."

35. In relation to its application of section 36(2)(c), DCMS told the complainant that:

"In favour of withholding the information we considered that there is a public interest in preserving a 'safe space' around government officials and ministers so that they can communicate with confidence. In particular, we consider release of the information would have a negative impact on our relationship with key stakeholders. We believe these relationships are of great importance in the continued work the department does,

and it is therefore not in the public interest that these relationships are undermined.”

Balance of the public interest test arguments

36. In considering complaints regarding section 36, where the Commissioner finds that the qualified person's opinion was reasonable, he will consider the weight of that opinion in applying the public interest test. This means that the Commissioner accepts that a reasonable opinion has been expressed that prejudice or inhibition would, or would be likely to, occur but he will go on to consider the severity, extent and frequency of that prejudice or inhibition in forming his own assessment of whether the public interest test dictates disclosure.
37. As noted above, the arguments for maintaining the exemptions essentially focus on the 'safe space' argument.
38. With regard to the public interest in favour of disclosing the information, the Commissioner agrees that there is an obvious public interest in correspondence sent to and received by a Minister. He also recognises that there is a legitimate public interest in the subject the information relates to.
39. However, the Commissioner also recognises that, having accepted the reasonableness of the qualified person's opinions in respect of all three limbs relied on in this case, he must give weight to those opinions as an important piece of evidence in his assessment of the balance of the public interest.
40. In the circumstances of this case, the Commissioner accepts that there is a need for a safe space to provide advice and exchange views free from external comment and examination. Having considered the content of the withheld information, the Commissioner accepts that disclosure **would be likely** to impact on the effectiveness of this process. He also finds that release of the information withheld under section 36(2)(c) of FOIA **would** impact on key stakeholder relationships and thereby otherwise prejudice the effective conduct of public affairs.
41. The Commissioner has been mindful of the public interest in DCMS having effective processes which allows it to openly debate issues of significant public interest without undue inhibition. In this case, he considers that the severity of the prejudice that may happen as a result of disclosing the withheld information affects the weighting of the public interest in disclosure.
42. The Commissioner has also considered the extent to which the content of the withheld information at the time of the request would add to the public debate and inform the public's understanding.

43. The Commissioner has assessed the balance of the public interest. He has weighed the public interest in avoiding the inhibition of the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation against the public interest in openness and transparency. His conclusion is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the section 36(2)(b)(i) and (ii) exemptions outweighs the public interest in disclosure.
44. The Commissioner has also assessed the public interest in avoiding the prejudice to the effective conduct of public affairs against that in openness and transparency. His decision is that the public interest in avoiding this inhibition is a relevant factor and he considers that the public interest in maintaining the section 36(2)(c) exemption outweighs the public interest in disclosure.
45. It follows that his decision is that DCMS was entitled to rely on sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to withhold the requested information.

Other matters

46. In this case, DCMS failed to respond to the request within the statutory 20 working days' timeframe. Although not complained about, the Commissioner has nevertheless logged this delay.
47. The DCMS also took a considerable time to conduct an internal review. The Commissioner cannot consider the amount of time taken to complete an internal review in a decision notice because such matters are not a formal requirement of FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of FOIA.
48. Part 5 of the section 45 Code of Practice² (the Code) states that it is best practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information. The Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by FOIA, the Code states that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may take longer but in no case

²https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases.

49. The Commissioner is concerned that it took over four months for an internal review to be completed.
50. The Commissioner will use intelligence gathered from individual cases to inform his insight and compliance function. This will align with the goal in his draft Openness by Design strategy³ to improve standards of accountability, openness and transparency in a digital age. The Commissioner aims to increase the impact of FOIA enforcement activity through targeting of systemic non-compliance, consistent with the approaches set out in our FOI and Transparency Regulatory Manual⁴.

³ <https://ico.org.uk/media/about-the-ico/consultations/2614120/foi-strategy-document.pdf>

⁴ https://ico.org.uk/media/about-the-ico/documents/4020912/foi-and-transparency-regulatory-manual-v1_0.pdf

Right of appeal

51. 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

52. 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.

53. 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

Carolyn Howes
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