

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **8 March 2023**

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

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for Digital, Culture, Media & Sport (DCMS)¹, seeking details of meetings between it and the Betting & Gaming Council from January 2021 until April 2022. DCMS confirmed that it held information falling within the scope of the request but refused to disclose this relying on sections 35(1)(a) (formulation or development of government policy) and 40(2) (personal data) of FOIA.
2. The Commissioner's decision is that section 35(1)(a) applies to only some of the information which has been withheld on the basis of this exemption. However, for the information which the Commissioner accepts is exempt from disclosure on the basis of section 35(1)(a), the public interest favours maintaining this exemption. The Commissioner is also satisfied that the names of junior officials are exempt from disclosure on the basis of section 40(2) of FOIA.

¹ Following machinery of government changes announced in February 2023, this department is now the Department for Culture, Media & Sport and this decision notice is therefore served on that body.

3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Provide the complainant with copies of documents listed at points d) and e) in the confidential annex. In providing these documents, DCMS can redact the names 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.

Request and response

5. The complainant submitted the following request to DCMS on 14 April 2022:

'I am writing to you under the Freedom of Information Act 2000 to request that you disclose details of meetings held (including but not limited to calls, Zoom or other internet facilitated video conferences, in person meetings) and correspondence between officials from DCMS (including who those representatives of DCMS were) with the Betting & Gaming Council from January 2021 until today.'

6. DCMS responded on 30 May 2022 and explained that it was refusing the request on the basis of section 12 (cost limit) of FOIA because of the time it would take to locate correspondence falling within the scope of the request. DCMS suggested that he submitted a refined request seeking just details of the meetings held within the specified timeframe.
7. In response the complainant submitted the following refined request to DCMS on 30 May 2022:

'In response to your letter, I'm asking for the details of the meetings held within the specified timeframe.

Or as much details as you can muster within the remit of section 12 of the Act.'

8. DCMS responded on 21 July 2022. It provided a list of meetings between DCMS and the Betting & Gaming Council (BGC) officials for the period in question, including what the focus of each meeting was and the names of any senior attendees. However, DCMS explained that minutes of the meetings were considered to be exempt from disclosure on the basis of section 35(1)(a) (formulation or development of

government policy) of FOIA. DCMS also explained that the names of junior officials had been withheld on the basis of section 40(2) (personal data).

9. The complainant contacted DCMS on 22 July 2022 and asked it to conduct an internal review of this refusal. He set out why in his view there was a public interest in the disclosure of information falling within the scope of his request.
10. DCMS did not complete an internal review.

Scope of the case

11. The complainant initially contacted the Commissioner on 2 September 2022 in order to complain about DCMS' failure to complete an internal review. The Commissioner contacted DCMS and asked it to complete the internal review but it did not do so. Therefore, the Commissioner accepted this case for investigation without an internal review being completed. The complainant disputes DCMS' decision to withhold the information falling within the scope of his request of 30 May 2022.

Reasons for decision

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

12. DCMS has applied section 35(1)(a) to the vast majority of the withheld information, the only exception being the names of officials which were redacted on the basis of section 40(2). 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”

13. 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.
14. 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.

15. '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.
16. 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.
17. 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.
18. DCMS explained that the withheld information fell within the scope of section 35(1)(a) because it related to government policy making in relation to the Gambling Act Review.² The Review was launched in December 2020 with the intention of determining whether the balance of regulation in the gambling sector was correct, and more specifically whether the Gambling Act 2005 was fit for the digital age. A public consultation as part of the Review ran until 31 March 2021. Since then, the government has been considering the responses and intends to publish a White Paper outlining conclusions from the review.
19. Having reviewed the information the Commissioner accepts that some of this relates to the government's development of policy in relation to the Review. Furthermore, the Commissioner is satisfied that it is clear from the matters considered by the Review that the government intended to achieve particular outcomes and the consequences of any changes would be wide ranging. In addition, the Commissioner is satisfied that the nature of the potential changes would result in final decisions being taken at ministerial level. For such information, section 35(1)(a) is therefore engaged.

² <https://www.gov.uk/government/publications/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence/review-of-the-gambling-act-2005-terms-of-reference-and-call-for-evidence>

20. However, in the Commissioner's opinion some of the information falling within the scope of the request does not focus on or relate to matters associated with the Review. Rather, they concern other issues that were the focus of discussions between DCMS and BGC. Whilst such discussions (and thus the recorded information associated with them) inevitably concern issues about the gambling industry, the discussions and information is not about the Review. Therefore, for such information the Commissioner does not accept that this can be said to relate to information about the formulation or development of government policy making on the Review. Such information is therefore not exempt from disclosure on the basis of section 35(1)(a) of FOIA.
21. In reaching this conclusion, the Commissioner notes that as part of his investigation he specifically asked DCMS whether all of the withheld information related to government policy making on the Review or whether parts of the information related instead to the formulation/development of other government policies. DCMS did not respond specifically to this point.
22. In summary, in the Commissioner's view only some of the withheld information is exempt from disclosure on the basis of section 35(1)(a). He has identified which information this is in a confidential annex and elaborated briefly in that annex as to why he has reached this conclusion (as the Commissioner's rationale involves referring to the content of the withheld information).

Public interest test

23. 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

24. DCMS argued that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. It emphasised that good government depends on good decision making and officials need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects based on the best available evidence, including from stakeholders. DCMS also argued that it is important that stakeholders, such as the BGC are able to provide candid evidence to ministers, including on commercially sensitive matters, without fear of their precise disclosures being made public. DCMS noted that stakeholder contribution still remains a valued asset in policy making, ensuring that the voices of the sectors are heard.

25. Furthermore, DCMS argued that the Review was a live issue at the point of the request as it was still considering the evidence carefully. This continued to be the case at the point of DCMS's submissions to the Commissioner on this case in late November 2022. DCMS explained at that stage that it aimed to publish a white paper outlining conclusions from the review in the coming weeks, and that document will include the necessary supporting evidence (including from meetings where applicable). Consequently, DCMS argued that as policy deliberations are still ongoing, there may be further risk to its important relationship with stakeholders in releasing minutes from their meetings which could damage how future policy is developed and delivered (especially where it is through voluntary agreements by the industry). Further, DCMS argued that the release of full information at the time of the request may be seen as pre-empting the future publication of government's conclusions.
26. DCMS as noted that it had provided the complainant with the high level subjects of meetings falling within the scope of the request which it considered met the public interest at the time without incurring the disadvantages to the public interest of disclosing the full information.

Public interest in disclosing the information

27. The complainant argued that there is a clear public interest in greater transparency in the workings of public authorities and their decision making processes. Moreover, he argued that key stakeholders within the cultural sector and with core activity in the fields of culture, media and sport will, in fact, benefit from greater transparency around how the department engages with lobbyists of this kind. The complainant suggested that this was particularly the case given the 'MPs financial register [shows] how many thousands is spent by the Betting & Gaming Council on cash in kind benefits to attend sporting events. [sic] hiring of current MPs as consultants and writers for the council as well as the payment of £6,000 to former gambling minister John Whittingdale to attend a speaking event hosted by the council.'
28. The complainant further argued that it was unclear why these meetings are held in private whilst policy is debated in Parliament given the constant delays of the gambling white paper.
29. He also suggested that BGC's views do not represent the best advice available because in his view this would be sourced from those actively working within the sector without what could be deemed additional or ulterior motives for their engagement with the department.
30. The complainant also noted that BGC's remit is focused on driving and improving the standards of gambling, so the correspondence and

meetings with government officials during a time of review is absolutely key to the public interest in ascertaining exactly what information is put forward by the industry during this time. The complainant argued that without disclosure of information such as that requested it was not possible to ascertain whether a full and diverse range of other groups and individuals has been consulted.

31. Finally the complainant argued that disclosure would also allow scrutiny as to whether the BGC has been given disproportionate opportunity to influence or lobby the government. In his view in order to maintain public trust in DCMS and how it conducts its affairs, it is in the public interest to demonstrate that the BGC has not had any undue or disproportionate influence over how policy was arrived at.

Balance of the public interest arguments

32. 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 in April 2022 the government's policy development in gambling regulation remained live and ongoing. Although the public consultation had concluded in March 2021, the Commissioner accepts that the responses were continuing to be analysed and work was ongoing in relation to the White Paper.
33. Furthermore, having considered the content of the information which he accepts is exempt on the basis of section 35(1)(a), the Commissioner accepts that its disclosure clearly has the potential to encroach upon the safe space for this policy making. The area of gambling regulation is a subject of considerable interest to the public, with relevant stakeholders and parties having strong views on the matters under consideration by the review. In addition, the Commissioner notes that the information withheld on the basis of section 35(1)(a) contains views expressed, and information shared, by BGC in a context, ie private meetings with DCMS, in which they would not expect such information to be made public. Consequently, the Commissioner accepts that significant weight should be attributed to the safe space arguments.
34. With regard to the public interest arguments in favour of disclosure, the Commissioner agrees that there is a legitimate interest in the disclosure of information about discussions DCMS has had with key industry stakeholders as part of the review. Disclosure would increase transparency around such discussions and could reassure the public that no one stakeholder was having an undue influence over the

government's approach and consideration of matters falling within the scope of the review. In the Commissioner's view the weight of this public interest should not be underestimated. That said, in the Commissioner's opinion, to some extent the disclosure of the list of meetings between DCMS and BGC - and more specifically, the list of meeting topics - provides some albeit limited insight into the relations between the two.

35. Nevertheless, and by a narrow margin, the Commissioner has concluded that the public interest favours maintaining section 35(1)(a) and withholding the information. In reaching this conclusion the Commissioner does not seek to underestimate the public interest in disclosure of information on this subject. However, the Commissioner accepts that disclosure of information, whilst the policy making is live, would have a significant impact on the effectiveness of policy making in relation to the Review.

Section 40 – personal data

36. DCMS has argued that the names of junior officials contained in the withheld information are exempt from disclosure on the basis of section 40(2) of FOIA.
37. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
38. In this case the relevant condition is contained in section 40(3A)(a).³ This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').
39. It is common practice for a public authority to argue that the names of junior officials are exempt from disclosure under FOIA on the basis of section 40(2) as disclosure would contravene the principles set out in Article 5 of the GDPR. Furthermore, unless there are very case specific circumstances, the Commissioner accepts that the names of the junior officials are exempt from disclosure on the basis of section 40(2) of FOIA. This is in line with approach taken in the Commissioner's section

³ As amended by Schedule 19 Paragraph 58(3) DPA.

40 guidance.⁴ Therefore, in this case the Commissioner adopts the reasoning set out in these previous decision notices which found that the names of junior officials were exempt from disclosure on the basis of section 40(2) of FOIA.⁵

Other matters

40. FOIA does not impose a statutory time within which internal reviews must be completed, albeit that the section 45 Code of Practice⁶ explains that such reviews should be completed within a reasonable timeframe. The Commissioner expects that most internal reviews should be completed within 20 working days, and even for more complicated requests, reviews should be completed within a total of 40 working days.⁷
41. In this case, DCMS failed to carry out an internal review. It explained to the Commissioner that this was due to changes and backlogs within the team. The Commissioner has noted this and would encourage DCMS to ensure that in the future internal reviews are completed within the above timescales.

⁴ https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf see page 12

⁵ IC-114449-B7P7 - <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022310/ic-114449-b7p7.pdf> Paragraphs 49-71 and IC-110922-T9R1 <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022447/ic-110922-t9r1.pdf> paragraphs 39-62.

⁶ <https://www.gov.uk/government/publications/freedom-of-information-code-of-practice>

⁷ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/request-handling-freedom-of-information/#internal>

Right of appeal

42. 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

43. 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.
44. 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

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF