

Freedom of Information Act 2000 (FOIA) Decision notice

Date: 10 July 2023

Public Authority: His Majesty's Treasury
Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information relating to equalities impact assessments.
2. The Commissioner's decision is that His Majesty's Treasury (HMT) is entitled to rely on section 35(1)(a) – formulation and development of government policy, to withhold the requested information.
3. The Commissioner does not require HMT to take any steps as a result of this decision notice.

Background

4. On 26 March 2022 the complainant requested information from HMT as follows:

“At this week's spring statement there was no distributional analysis published which looked solely at the impact on households of the new measures. The analysis published looked only at all measures taken since 2019.

Therefore, please provide me with any

- a) Distributional analyses examining the impact on households and
 - b) Equalities impact assessment carried out solely on the measures in the spring statement 2022".
5. HMT provided all the information it held relating to point a) and some information relating to part b). It relied on section 35(1)(a) to withhold the remaining information.
 6. Following a complaint to the Commissioner, it was dealt with under reference IC-181445-Y2S0¹ issued on 21/3/23 in which the complaint was not upheld.

Request and response

7. On 5 April 2023, the complainant wrote to HMT and requested information in the following terms:

"Now that sufficient time has passed since the 2022 spring statement, I would like to request that this information be released. To quote from the ICO ruling, 'the policy making process was clearly live and ongoing at the point the request was submitted'. That position no longer applies. Therefore, I would be grateful if you could now release the information you hold."
8. HMT responded on 22 May 2023. It provided some further information relating to point b) of the original request, namely:
 - welfare option on the extension of the Household Support Fund;
 - options for the Energy Support Package;
 - the Special Administration Regime for Bulb Energy;
 - the option to delay the implementation of a VAT penalty reform by 9 months until January 2023.
9. However, it maintained that section 35(1)(a) was applicable to the remaining information.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024744/ic-181445-y2s0.pdf>

Reasons for decision

10. The following analyses explains why the Commissioner considers HMT is entitled to rely on section 35 to withhold the remaining information.

Section 35: Formulation or development of Government policy

11. Section 35 states:

“(1) 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”

12. The Commissioner’s view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.
13. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well considered and effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance² advises that a public announcement of the decision is likely to mark the end of the policy formulation process.
14. This exemption is a class based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.
15. Given the previous case, it is clear that the exemption is engaged.

HMT’s position

16. HMT explained that the remaining withheld information reflects the formulation and development of Government policy.

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

17. HMT recognised the passage of time, however the information that was withheld in its previous response concerns policy areas that remain ongoing and live.
18. As cited in the Commissioner's previous decision notice the information relates to government taxation and spending in the years up to and including 2023/24. Consequently, certain policy areas remain ongoing.

Public interest test

19. 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 at section 35(1)(a) outweighs the public interest in disclosing the information.
20. HMT reiterated its previous arguments both for and against disclosure, as detailed in the previous decision notice. For brevity the Commissioner has not repeated them all here.
21. In their correspondence to the Commissioner, the complainant argued:

"You [the ICO] said the Treasury was allowed to rely on section 35 because 'the policy making process was clearly live and ongoing at the point the request was submitted' and that 'disclosure of the information at the time of the request would have resulted in particular attention and comment on the analysis set out in it' and so 'would have had a direct and detrimental impact on the policy development process', and therefore 'the safe space arguments therefore need to be given notable weight'.

But you [the ICO] also said that it would 'be difficult to make convincing arguments about a generalised chilling effect on all future discussions'.

After receiving your ruling, I submitted a new request, as more than a year had passed since the budget statement had been released. However, the Treasury has made the same arguments, despite the passage of time, and provided only some inconsequential information.

I strongly suggest that this is an unlawful approach to take."

22. In HMT's original response to the complainant, it explained that there is a public interest in protecting the Government's ability to discuss and develop policies and to reach well-formed conclusions. It explained that the policy process is necessarily an iterative one, and the Information Commissioner has recognised that policy development needs some degree of freedom to enable the process to work effectively.

23. In this case, the policy continues to be live as it relates to tax and spending decisions up to and including 2023/24. HMT explained that the requested information sets out the expected impacts across this timeframe and is directly related to considerations which will be a part of this live, ongoing policy development.
24. HMT explained that the analysis considered in the policy making process that remains unpublished is of many types, and there are a variety of reasons that mean that publishing this analysis would not serve the public interest.

The Commissioner's position

25. 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 is live and the requested information relates to that policy making.
26. In the content of this request, the Commissioner accepts that the policy making process currently remains live and ongoing. As a result, the Commissioner accepts that disclosure of the information would result in particular attention and comment on the analysis set out in it. The Commissioner accepts that this attention would have a direct and detrimental impact on the policy development process. In his view, the safe space arguments therefore need to be given notable weight.
27. With regard to the chilling effect arguments, the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases.
28. If, as in this case, the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight.
29. Turning to the public interest arguments in favour of disclosing the information, clearly, the analysis of how the Tax and Spending policy would impact those with protected characteristics including some of the most vulnerable members of society, are of direct interest to the public. As a result, in the Commissioner's opinion, there is a significant public interest in the disclosure of information as it would aid the public's understanding of policy considerations in these areas.

30. Disclosure of the information would provide the public with sight of the analysis that the government had received and considered as part of its policy development and therefore disclosure would make the policy making process more transparent. In addition, disclosure of the withheld information would also provide interested stakeholders with an insight into the analysis of the issues in question which they could use to engage with the government.
31. The Commissioner acknowledges the complainant's view that "...the Treasury is arguing that it will - in effect - never have to release this information no matter how much time has passed". However, he should be assured that this is not the case. The fact remains that the withheld information relates to an ongoing, live policy formulation. Once the tax and spending decisions have been made, the withheld information will no longer be considered to be part of the formulation and development of government policy.
32. Despite the benefits of disclosure, the Commissioner considers that the balance of the public interest favours maintaining the exemption. He has reached this conclusion given the significant, and ultimately compelling, weight that he considers should be given to the safe space arguments. In his view this, along with the smaller but still substantial weight that he thinks should be attached to the chilling effect arguments, means that the public interest favours withholding the information.

Right of appeal

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

Website: 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

Susan Duffy
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