Freedom of Information Act 2000 (FOIA)

Decision notice

Date:	**3 October 2024**
Public Authority:	**Department for Culture, Media and Sport**
Address:	**100 Parliament Street** **London** **SW1A 2BQ**

Decision (including any steps ordered)

1. The complainant has requested information about the repeal of section 40 of the Crime and Courts Act 2013.

2. The Department for Digital, Culture, Media and Sport (DCMS) relied on section 35(1)(a) (formulation or development of government policy) to withhold the requested information from the complainant.

3. The Commissioner's decision is that the exemption at section 35 is engaged but he finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

4. The Commissioner requires DCMS to take the following steps to ensure compliance with the legislation:

    - Disclose the information falling within the scope of the request (including the .xlsx attachment to the email chain of 23 September 2016), subject to any appropriate redactions for personal data.[1]

[1] The Commissioner expects the public authority to take appropriate precautions to protect any personal data when disclosing information in a spreadsheet or similar format; https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/information-commissioner-s-office-advisory-note-to-public-authorities/e - Advisory note to public authorities | ICO

5. The public authority must take these steps within 30 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

6. Section 40(3) (award of costs) of the Crime and Courts Act 2013 if enacted, would have required publishers who are not members of an approved regulator to pay costs in the event of a legal claim brought against them, regardless of the outcome[2].

7. The government's consultation on whether to commence or repeal section 40 of the Crime and Courts Act 2013 ran from 1 November 2016 to 10 January 2017. On 1 March 2018, the government announced it had decided to repeal section 40 of the Crime and Courts Act 2013 at the first appropriate opportunity, without commencing it first.

8. DCMS introduced the Media Bill on 8 November 2023[3]. The Bill's explanatory notes stated that the Bill would repeal Section 40 of the Crime and Courts Act 2013.

9. The Media Bill was considered by a Public Bill Committee over six sittings between 5 and 12 December 2023 where technical government amendments were made.

10. On 30 January 2024, the government made further minor and technical amendments to the Bill. There were divisions/voting on non-government amendments relating to the repeal of parts of section 40 of the Crime and Courts Act 2013 but none of these amendments were agreed.

11. As reported in Hansard[4], on 30 January 2024, the proposed amendments were not about whether or not to repeal section 40(3) of the Crime and Courts Act 2013. George Eustice MP reiterated the repeal of this was established government policy and a Conservative Party

[2] https://www.legislation.gov.uk/ukpga/2013/22/section/40/enacted

[3] https://commonslibrary.parliament.uk/research-briefings/cbp-9916/

[4] https://hansard.parliament.uk/commons/2024-01-30/debates/60B0BCEC-E10B-4768-83E8-E930CB15739B/MediaBill

manifesto commitment. Rather, the amendments were about other subsections of section 40 relating to the Royal Charter on self-regulation of the press and his proposal for a call for evidence to examine what other possible incentives might encourage publishers to join that royal charter.

12. The Bill was introduced in the House of Lords on 31 January 2024. It had its second reading on 28 February 2024.

13. The Bill was considered by a Committee of the Whole House over four sittings between 8 May and 22 May 2024. Minor and technical government amendments were agreed.

14. At report stage on 23 May 2024, the previous government agreed to two further amendments but they did not relate to the repeal of section 40(3).

15. The Media Act 2024[5] received Royal Assent on 24 May 2024, during the wash-up period prior to the prorogation of Parliament on the same day. Section 40 of the Crime and Courts Act 2013 was repealed in full.

Request and response

16. On 13 January 2024, the complainant wrote to DCMS and requested information in the following terms:

> "What tangible evidence has the Secretary of State or the Department got that Section 40 of the Crime and Courts Act 2013, would risk financial ruin for publishers?
>
> I previously asked for this information on 1 November 2022. The Department relied on section 35 (formulation or development of government policy) to withhold the requested information. The Information Commissioner reviewed the decision to withhold the information and held that the exemption at section 35 was engaged, and he found that then the public interest in maintaining the exemption outweighed the public interest in disclosure.
>
> The Commissioner's Decision Notice ic-208973-x3z2 included [paras 18, 19, 25 -29 were quoted]:

[5] https://www.legislation.gov.uk/ukpga/2024/15/contents/enacted

> As Parliament is presently considering the repeal of section 40 in the Media Bill please can the information requested, and already seen by the Commissioner, be sent to me forthwith..”

17. DCMS responded on 12 February 2024. It stated that, “As the policy issue in question is still live, we consider the information to remain exempt under section 35 (1)(a).”

18. Following an internal review, DCMS wrote to the complainant on 26 March 2024 and maintained its position. It stated that, “The Media Bill is still at the House of Lords Committee stage so amendments could still be made and therefore it is still considered live policy until the Bill receives Royal Assent.”

Scope of the case

19. The complainant contacted the Commissioner on 2 April 2024 to complain about the way their request for information had been handled.

20. The Commissioner considers that the scope of his investigation is to determine whether section 35(1)(a) entitled DCMS to withhold the requested information from the complainant.

21. It should be noted that the Commissioner’s role is limited to considering the application of any exemptions (including the balance of the public interest test) at the point the request was submitted (or at the latest, the time for compliance with the request, ie 20 working days after it was submitted). Therefore, the scope of the Commissioner’s investigation is to determine the circumstances as they existed at the time of the request on 13 January 2024 or at the latest, the time of the response on 12 February 2024.

Reasons for decision

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

22. 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”

23. 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.

24. 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.

25. '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.

26. 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.

27. The Commissioner's guidance on section 35[6] includes examples of different processes that might involve formulation of policy including White Papers, bills and the legislative process. It also 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.

28. The Commissioner's guidance further states that:

> "The term 'formulation' of policy refers to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister who then decides which options to translate into political action… The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy formulation can continue

[6] https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/

all the way up to the point the bill finally receives royal assent and becomes legislation."

29. DCMS explained to the Commissioner that:

"…the development of the policy was ongoing at the time of the request as the Media Act (then Bill) was still subject to potential amendments until it gained Royal Assent on 24 May 2024."

30. It added that:

"A number of amendments were proposed in both Houses throughout the Act's passage from November 2023 to May 2024. Details of the amendments tabled can be found here[7]".

31. Having read the withheld information, the Commissioner is satisfied that the information relates to the formulation and development of government policy. The Commissioner notes that one of the withheld documents is already in the public domain[8] and available to the complainant. Therefore in effect DCMS has already accepted that this information is not exempt and ought to have disclosed it to the complainant. Alternatively DCMS would have been entitled to rely on the exemption at section 21 of FOIA (information reasonably accessible to the applicant).

32. The fact that on 8 November 2023, the Media Bill's explanatory notes stated that the Bill would repeal Section 40 of the Crime and Courts Act is evidence that the policy had been formulated. However, the Commissioner accepts that policy formulation and development can in some cases continue all the way up to the point the bill finally receives royal assent and becomes legislation. In the specific circumstances of this case, he accepts that the withheld information relates to the development of government policy that still needed to be enacted into legislation.

33. The Commissioner is satisfied that the withheld information falls within the scope of the exemption contained at section 35(1)(a) on that basis. Section 35(1)(a) is therefore engaged.

[7] https://bills.parliament.uk/bills/3505/publications

[8] https://newsmediauk.org/wp-content/uploads/2022/10/FINAL_-_NMA_response_to_Government_consultation_on_S40_and_Leveson_10.1.17.pdf

Public interest test

34. 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 favour of disclosing the information

35. In the complainant's view, the policy making process in relation to the repeal of section 40(3) was not live at the time of the request. He said:

> "As the repeal of s.40 is now set out in clause 50 of the Media Bill before Parliament it is false to claim that the policy of repeal is still under consideration."

36. For its part, DCMS acknowledged there is a public interest in greater transparency and accountability.

Public interest in favour of maintaining the exemption

37. In support of its position that the public interest favoured maintaining the exemption, DCMS noted that:

> "As the policy was live at the time of the request, it was considered that the public interest in protecting the safe space in which the ongoing development of policy is discussed was particularly strong."

38. DCMS also said:

> "..we also considered that there is a very strong public interest in protecting the 'safe space' for policy development to take place in a candid manner, and this was required throughout the Media Bill's passage as Government responded to amendments. 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 very important for the process as they ensure that decisions can be taken with the fullest of information to hand.
>
> On balance we have determined that the public interest in exempting the information outweighed the public interest in disclosure because of the importance of privacy in creating policy. The public interest is best served by ensuring the best quality policy making in a safe space for discussion."

39. DCMS was therefore satisfied that in this instance the public interest in maintaining the exemption outweighed the public interest in disclosure.

Balance of the public interest test

40. The Commissioner understands that the requested information contains an analysis of the cost burden on the media industry if section 40 of the Crime and Courts Act 2013 had been commenced.

41. The Commissioner recently adjudicated upon two similar requests by the complainant to DCMS in IC-178072-N2Q65[9] and IC-208973-X3Z2[10]. Both these decision notices found that the public interest favoured maintaining the exemption at section 35. However, the Commissioner treats and considers each complaint on its own merits and facts.

42. The Commissioner further notes that the Media Bill was introduced on 8 November 2023, ie after the two previous decision notices and before the request that is the subject of this decision notice. Consequently the Commissioner does not consider his analysis of the public interest in maintaining the exemption set out in the two decision notices to be of particular assistance in this case. The Commissioner is mindful that circumstances have changed since those decision notices were issued.

43. The Commissioner accepts that significant weight should usually be given to safe space arguments. These reflect 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. Officials and ministers often need space to consider a range of policy issues, in a free and open way.

44. However, the Commissioner also accepts that the public interest in maintaining the exemption will be strongest while the policy is still being formulated or developed. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy generally starts to wane, and the public interest arguments for protecting the policy become weaker. If the request is made after the policy process is complete, it is arguable that the process can no longer be harmed.

[9] https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4024101/ic-178072-n2q6.pdf

[10] https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4026856/ic-208973-x3z2.pdf

45. The Commissioner's guidance on section 35(1)(a) supports this view as it states:

> "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.
>
> For the same reason, arguments that 'routine' disclosure of a particular type of information are not in the public interest are misconceived. Each case must be considered on its facts. Even if disclosure is ordered in one case, this does not mean that similar information must be disclosed in future.
>
> Arguments must therefore focus on the effect of disclosing the information in question at the time of the request, rather than the effect of routine disclosure of that type of information.
>
> The exact timing of a request is very important. If the information reveals details of policy options and the policy process remains on going at the time of the request, safe space and chilling effect arguments may carry significant weight.
>
> However, even if the policy process is still live, there may be significant landmarks after which sensitivity of information starts to wane.
>
> For example, once a high-level policy objective has been announced (eg in a White Paper or framework bill), any information about that broad objective becomes less sensitive. The safe space to debate that high-level decision in private is no longer required, even if related debate about the details of the policy remains sensitive.
>
> In some cases, the formulation or development of policy may not follow a linear path (ie where the policy becomes more and more settled as time goes on). There may be several distinct stages of active policy debate, with periods in between where policy is more settled. The importance of a safe space can wax and wane, depending on how fixed the policy is at the exact time in question.
>
> Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy generally starts to wane, and the public interest arguments for protecting the policy become weaker. If the request is made after the policy process is complete, that process can no longer be harmed.
>
> Tackling some policy issues may require a range of initiatives, implemented over a number of years. However, this does not mean that the policy thinking on each, individual initiative can still be considered live until the issue is finally resolved".

46. In the circumstances of this case, the Commissioner accepts that even though the Media Bill had not been enacted into law at the date of the request, the policy decision to repeal the relevant part of section 40 – section 40(3) - had clearly been finalised and was settled government policy. This was reiterated when the Media Bill was introduced in November 2023 and the Commissioner notes that, as far as he is aware, no amendments to the Bill were proposed after this date which deviated from the established position that section 40(3) was to be repealed. On 30 January 2024, while there were amendments proposed and voting on other parts of section 40, they were not related to the repeal of section 40(3) of the Crime and Courts Act 2013.

47. Therefore, the Commissioner does not consider that the policy process about the repeal of section 40(3) was still live at the date of the request as DCMS contends. Nor was the safe space to debate that high-level decision in private still required. Since the policy decision had clearly been finalised, it cannot still be considered live right up until the legislation was officially enacted. As the policy in question to repeal section 40(3) was decided, the Commissioner also does not accept that the implications of a chilling effect on those ongoing policy discussions carry significant weight. This is because in his view disclosure of the particular information that has been withheld would be unlikely to have a significant impact on the frankness or candour of future contributions by officials or by Ministers.

48. The Commissioner finds that there is a particularly strong public interest in disclosure of information relating to DCMS's analysis of the cost burden on the media industry if section 40 of the Crime and Courts Act 2013 had been commenced in full or in part. The Commissioner considers that the public is entitled to scrutinise this information. The Commissioner also notes that both the relevant House of Commons Select Committee[11] and the Press Recognition Panel[12] 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. Disclosure in this case could serve that interest by showing some of the points being considered in the development of government

[11] https://www.parliament.uk/globalassets/documents/commons-committees/culture-media-and-sport/culture-media-sport-committee-reponse-to-government-consultation-on-press-regulation.pdf

[12] https://pressrecognitionpanel.org.uk/wp-content/uploads/2022/05/PRP-Business-Plan-2022-23.pdf

policy. This could enhance transparency and public understanding of the policy in question.

49. In the Commissioner's opinion, disclosure of the requested information would allow the public insight into the decision making process and an understanding of the decisions made. Furthermore, it would also provide some insight into the information being considered by ministers and officials in relation to the implementation or repeal of section 40(3). The Commissioner recognised the significant public interest in the issues in the previous two decision notices, and finds that at the time of the request in this case, it attracted even more weight. As a result, in the Commissioner's opinion, disclosure of the withheld information would add to transparency and accountability around this issue. The Commissioner considers that the public is entitled to be well informed as to the analysis behind a settled policy decision. The Commissioner notes that this is consistent with other decision notices dealing with government policy that had been finalised[13].

50. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding allowing DCMS the space to develop policy away from external interference, the Commissioner is not persuaded that in this particular case this is sufficient to outweigh the strong public interest in disclosure at the time this request was made.

51. Consequently the Commissioner requires DCMS to disclose the withheld information falling within the scope of the request (including the .xlsx attachment to the email chain of 23 September 2016), subject to any appropriate redactions for personal data.

Procedural matters

52. Section 1(1) of FOIA states that: "Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him."

[13] https://ico.org.uk/media/action-weve-taken/decision-notices/2024/4029984/ic-278083-p5l6.pdf

53. Section 10(1) of FOIA states that a public authority must comply with section 1 promptly and "not later than the twentieth working day following the date of receipt".

54. Section 17(1) of FOIA states that a public authority wishing to rely on an exemption must issue a refusal notice within 20 working days.

55. The complainant advised the Commissioner that DCMS had failed to respond within 20 working days. From the evidence provided to the Commissioner in this case, the complainant submitted their request on Saturday 13 January 2023, which is a non-working day. The request is not considered to have been received until the first working day, ie Monday 15 January 2023, and the 20 working days would run from the day after the request is received, ie 16 January 2023. DCMS responded on 12 February 2023, which is the twentieth working day after 16 January 2023.

56. In light of the above the Commissioner finds that DCMS's response did not breach section 10(1) in respect of section 1(1)(a), because it did confirm that it held the requested information within 20 working days. It also complied with section 17(1) in issuing the refusal notice within 20 working days.

57. However for the reasons set out above the Commissioner finds that DCMS ought to have disclosed the requested information at the time of the request. Consequently the Commissioner finds that DCMS breached section 10(1) in conjunction with section 1(1)(b) in this regard.

Right of appeal

58. 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

59. 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.

60. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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