

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2023

Public Authority: HM Treasury
Address: 1 Horse Guards Road
Westminster
London
SW1A 2HQ

Decision (including any steps ordered)

1. The complainant has requested information relating to VAT in respect of public charging for electric vehicles. His Majesty's Treasury ("HMT") refused to disclose what it held within the scope of the request and cited section 35(1)(a) – formulation/development of government policy – as its basis for doing so.
2. The Commissioner's decision is that HMT is entitled to rely on section 35(1)(a) as its basis for withholding the information in question.
3. The Commissioner does not require further steps.

Request and response

4. On 20 May 2022, the complainant requested information of the following description from HMT: "I note with interest Zara Sultana MP's question to the Treasury about the effective differential VAT rates for home-charging and public charging for electric vehicles: <https://questions-statements.parliament....> In Lucy Frazer's response, the Financial

Secretary to the HM Treasury notes that VAT made around a £130 billion contribution to public finances in 2019-20. However, that figure is for VAT as a whole. Are there any figures or estimates available that point to the specific contribution made by the VAT charged on the electricity used at public electric vehicle charging points? And, if not, why not? Or, if so, can you provide the most recent figures for the total amount of VAT raised on the electricity used at public electric vehicle charging points?"

5. On 15 June 2022, HMT provided its response. It confirmed it held "high level information" within the scope of the request but argued that it was not obliged to provide it. It cited the following exemption as its basis for doing so: - section 35(1)(a) (formulation/development of government policy).
6. The complainant requested an internal review on 15 June 2022.
7. HMT sent them the outcome of its internal review on 8 July 2022. It upheld its position and said: "Neither HM Treasury nor HMRC hold information on VAT revenue from specific products or services, including VAT on public electric vehicle charging. This is because businesses are not required to provide figures at a product level within their VAT returns, as this would impose an excessive administrative burden. However, a core part of tax policy evaluation involves producing financial estimates. This is an iterative process, involving the refining of modelling to ensure estimates are as accurate as possible. It is important that officials and ministers have time to consider and refine policy evaluation (including financial estimates), in order to reach well-formed conclusions. At present, we consider that publishing estimates would be likely to have a detrimental impact on the ongoing formulation and development of policy in this area. On this basis, we continue to conclude that the public interest lies in favour of withholding this information."

Scope of the case

8. The complainant contacted the Commissioner on 8 July 2022 to complain about the way their request for information had been handled.
9. In their complaint, the complainant had asserted that HMT was claiming it did not hold the requested information. The Commissioner explained to the complainant that this was not the case. The Commissioner drew attention to HMT's letter of internal review where it said that it holds "estimates ... that point to the specific contribution made by the VAT charged on the electricity used at public electric vehicle charging points". The Commissioner explained that he would consider the

application of section 35(1)(a) to any information which HMT said it held within the scope of the request for “most recent figures for the total amount of VAT raised on the electricity used at public electric vehicle charging points”. The Commissioner gave the complainant an opportunity to object to this approach and they did not.

10. The Commissioner also drew attention to the part of the complainant’s request which asked HMT “Are there any figures or estimates available that point to the specific contribution made by the VAT charged on the electricity used at public electric vehicle charging points? And, if not, why not?”. The Commissioner explained to the complainant that asking for an explanation such as “why not” is not an FOIA request. He explained that a public authority is only obliged under FOIA to provide recorded information that it holds that is described in a request (assuming no exemption applies). It is not obliged to provide explanations as to why it does not hold requested information. It is not prevented from doing so if it chooses but the Commissioner cannot require it to create new information to respond to a request. In other words, unless HMT actually holds recorded information which sets out why it does not hold the actual figures, it is not obliged under FOIA to create that information. The Commissioner gave the complainant an opportunity to object to this approach and they did not.
11. The Commissioner therefore considers that the scope of his investigation is to decide whether HMT is entitled to rely section 35(1)(a) as its basis for withholding any information it holds within the scope of the request.

Reasons for decision

12. 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”
13. 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.
14. 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 guidance¹ advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

15. 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.

HMT's position

16. HMT explained:

"Currently, electric vehicle (EV) charging at public EV charge points is subject to VAT at the standard rate of 20 per cent. Further detail on this is set out in a [Revenue and Customs brief on the VAT liability of charging of electric vehicles](#), published by HMRC in May 2021.

Neither HM Treasury nor HM Revenue and Customs (HMRC) hold information on VAT revenue from specific products or services, and therefore neither department holds information which explicitly sets out the specific contribution made by the VAT charged on the electricity used at public EV charge points. This is because businesses are not required to provide figures at a product level on their VAT returns, as this would impose an excessive administrative burden.

However, at the time of the request, HM Treasury did hold information provided by HMRC analysts setting out a "crude" estimate of the expected tax revenue loss were the VAT treatment of public EV charging to be changed from the standard rate (20 per cent) to the reduced rate (5 per cent). This could be used to infer an estimate of the specific VAT contribution from public EV charging, as requested by the complainant."

17. When asked to describe the relevant policy in order to rely on section 35, HMT said:

"As stated above, currently, electric vehicle (EV) charging at public EV chargepoints is subject to VAT at the standard rate of 20 per cent. Further detail on this is set out in a Revenue and Customs brief on the VAT liability of charging of electric vehicles, published by HMRC in May

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/>

2021 [The link HMT provided was broken but the Commissioner has determined which webpage it is referring to²].

Since the start of 2022, the current VAT rate of electric vehicle (EV) charging at public EV chargepoints has been subject to a public campaign³. This campaign calls for EV charging at public chargepoints to benefit from the reduced rate of VAT at 5 per cent. As a result of the campaign, officials in HM Treasury and HM Revenue and Customs (HMRC) have been reviewing the current policy with advice currently being prepared for Ministers on this issue.”

18. HMT confirmed that development of the policy had not yet been completed. It said “officials in HM Treasury and HMRC have been reviewing the current policy with advice currently being prepared for Ministers on this issue”. It added:

“At the time that the FOI request was submitted, officials were reviewing the policy area and preparing advice to send to HM Treasury Ministers for their consideration on the case for reforming the current policy. As of today [January 2023], final advice has still not yet been submitted and therefore a decision has not yet been taken on whether to reform or maintain the current policy. No public announcements have been made.”

19. It also confirmed (in response to the Commissioner’s query regarding section 35(2)) that the “decision in relation to the relevant policy has not yet been taken, and therefore the statistical information within scope of the request engages section 35(1)(a)”. ⁴

The complainant’s position

20. The complainant argued in their request for internal review: “My request does not relate to the formulation of policy under the grounds of a Section 35 exemption as it is not seeking correspondence between Ministers or between Ministers and campaigners, it is seeking purely statistical information about tax receipts that meet the public interest test.

The Commissioner’s decision

² [Revenue and Customs Brief 7 \(2021\): VAT liability of charging of electric vehicles - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/briefings/2021/07/revenue-and-customs-brief-7-2021-vat-liability-of-charging-of-electric-vehicles)

³ <https://www.faircharge.co.uk/>

⁴ <https://www.legislation.gov.uk/ukpga/2000/36/section/35> Section 35(1)(a) cannot apply to statistical information once a policy decision has been taken.

21. Having reviewed HMT's submissions and the withheld information itself (which is not lengthy), the Commissioner is satisfied that the information relates to the formulation of government policy, specifically VAT rates at EV public chargepoints. He notes the complainant's argument but disagrees with it.
22. Section 35(1)(a) is therefore engaged in relation to 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 at section 35(1)(a) outweighs the public interest in disclosing the information.

The complainant's argument

24. The complainant argued as follows:
 - The government has said it has no plans to engage with the campaign group mentioned above.
 - Information related to tax receipts should only be withheld if they meet the very highest and strictest test of necessity under Section 35 - which has not been demonstrated.
 - The government had claimed it had no plans to change the VAT rate for EV charging but is claiming the information was sensitive because it was being used to make policy changes (despite publicly claiming no policy changes were being considered).
 - The public interest in disclosing the information is very strong especially amidst a cost-of-living crisis and a drive to get people to adopt electric vehicles and a public refusal to consider changing EV VAT policy.
 - Releasing the information does not provide any barrier to the government's work in considering policy on EV charging VAT.

HMT's arguments

25. HMT recognised an inherent public interest in transparency and accountability of public authorities. It said:

"There is a clear public interest in the work of Government departments being transparent and open to scrutiny to increase diligence. We also recognise the broad public interest in furthering

public understanding of the issues which public authorities deal with such as the policy considerations in setting VAT rates”.

26. It also recognised a particular public interest in “understanding how much tax is being paid as a result of the current policy that sets electric vehicle (EV) charging at public EV chargepoints at the standard rate of 20 per cent, given that there is a public campaign recommending policy reform in this area”.
27. Moving on to its arguments in favour of withholding the information, it explained that:

“Final advice considering the case for reforming the current policy had not been submitted to Ministers at the time the request was received and, as of today [January 2023], still has not yet been submitted to Ministers.”
28. It added that publishing estimates before Ministers had had a chance to “consider and scrutinise advice on the matter would undermine Ministers’ capability to reach well-formed conclusions on the policy”.
29. Referring to the specifics of this case, it said that “publishing data before a policy decision has been reached could increase pressure on the Government to urgently set out a response to the campaign’s requests and make a decision on the policy. This risks undermining the ability of Ministers to take the time necessary to reach well-formed conclusions that take into account the Government’s broader policy on the taxation of electric vehicles. We therefore consider that disclosing the material asked for would prejudice the integrity of the ongoing policy formulation process, and result in a less robust and effective policy making.”
30. It referred to the detrimental effect on policy making by disclosing information of this nature “in the initial stages of reviewing this policy”. It emphasised the importance of a safe space for exchanging views to “inform the ongoing review of this policy”.
31. It added: “As the policy was and is still being reviewed and changes are still being considered, it is crucial that HM Treasury are able to communicate and engage freely with HMRC, given HMRC are the lead department for tax issues, and obtain statistical information for the purposes of policy development”. It then made further arguments with specific reference to the withheld information to illustrate its point.
32. It added that “In the long-term, reforming the current policy would have a significant impact on annual Exchequer revenue and the electric vehicle charging market. Given the magnitude of the impact of reforming the policy to which this data relates, in our assessment for and against publishing the data, we have placed particular significance

on how publication would affect the ability of Ministers to reach objective, well-formed conclusions on the policy that are coherent with the Government's broader approach to taxing electric vehicles. At the time of the request, and as of today [January 2023], this policy is still under review and decisions are yet to be made. We consider that there is a stronger public interest in protecting HM Treasury's safe space for policy development."

33. HMT also referred to the fact that the information was an estimate rather than fully verified figure. It made arguments with specific reference to the information and added: "There is also no other publicly available information on this policy area to help aid their understanding given that the policy is still being reviewed and developed."

The Commissioner's position

34. 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.
35. In the context of this request, the Commissioner accepts that the policy making process was clearly live and ongoing at the point the request was submitted. HMT gave some focus to the fact that the information was a high level estimate rather than fully verified data. It argued that disclosure of it, in the absence of any other more detailed figures, would not serve the public interest in informing public debate about this matter. The Commissioner considers that public authorities are not prevented by FOIA from providing further explanatory detail with any disclosure. However, he accepts that, in this case, it would be difficult to provide sufficiently detailed explanatory information without undermining the safe space in which this live issue is being debated.
36. That said, the Commissioner recognises that there is an extremely important public debate about VAT rates at public charging points for electric vehicles. The costs of purchasing, fuelling and maintaining electric vehicles continue to be important issues in respect of affordability for most car drivers. There is increased pressure to switch to sources other than fossil fuels for energy in order to tackle climate change. There is a strong public interest in informing the public about the data used by government to formulate policy in this area, particularly where it relates to taxation.
37. Having considered the arguments of both sides, the withheld information itself and his own guidance, the Commissioner gives greater weight to

the fact that this information relates to a live policy matter and to the particular circumstances of this particular policy in that respect. The public interest in protecting the safe space in which it is being formulated outweighs the public interest in disclosure. Were it not a live matter, or had it been information relating to a recently published policy, the Commissioner may have reached the opposite view. He recognises a considerable public interest in informing public debate about the cost of moving away from fossil fuels. Disclosure would serve this interest although, in isolation, and without further explanation, the extent to which it would do so would be somewhat limited.

38. In light of the above, the Commissioner has concluded that HMT is entitled to rely on section 35(1)(a) as its basis for withholding the requested information.

Right of appeal

39. 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

40. 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.
41. 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

Gerrard Tracey
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