

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 August 2023

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 then Department for Digital, Culture, Media and Sport (now the Department for Culture, Media and Sport or DCMS) relied on section 35 (formulation or development of government policy) to withhold requested information from the complainant.
3. The Commissioner's decision is that the exemption at section 35 is engaged and he finds that the public interest in maintaining the exemption does outweigh the public interest in disclosure.
4. The Commissioner does not require the Department for Culture, Media and Sport to take any steps.

Background

5. Section 40 (award of costs) of the Crime and Courts Act 2013¹ if enacted, would require 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.
6. 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 2017².
7. 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 first³.

Request and response

8. On 1 November 2022, the complainant wrote to the public authority and requested information by saying as follows.

"On Mon, 31 October 2022 it was reported that: "As Journalism Matters Week gets underway, the Culture Secretary Michelle Donelan has pledged to become a "champion of journalism" and has explained why what we do is more important than ever...We are going to repeal Section 40, which would threaten media freedom and risk financial ruin for publishers."

Q1. Can you please confirm that the Secretary of State expressed such a view? If 'Yes' then:

Q2. When and where was it expressed?

Q3. What tangible evidence has the Secretary of State got that Section 40, which would ... risk financial ruin for publishers?

9. On 25 November 2022, the public authority responded. It refused to provide the requested information. It cited the following exemptions as its basis for doing so:

¹ [Crime and Courts Act 2013 \(legislation.gov.uk\)](https://www.legislation.gov.uk)

² [Consultation on the Leveson Inquiry and its implementation - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

³ [GOVERNMENT RESPONSE TO THE CONSULTATION ON THE LEVESON INQUIRY AND ITS IMPLEMENTATION .pdf \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

- Section 21(1) (information accessible by other means)

And

- Section 35(1)(a) (formulation or development of government policy)
10. The complainant requested an internal review challenging the public authority's use of section 35(1)(a) to withhold requested information from him. The public authority sent him the outcome of its internal review on 28 December 2022. It upheld its original position of its use of section 35(1)(a).

Scope of the case

11. The complainant contacted the Commissioner 9 January 2023 to complain about the way his request for information had been handled.
12. The Commissioner considers he has to determine whether section 35(1)(a) entitled the public authority to withhold requested information from the complainant.

Reasons for decision

13. Section 35(1)(a) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to- "(a) The formulation or development of government policy.
14. The Commissioner's guidance states that,
- "There is no standard form of government policy... not all government policy needs to be discussed in Cabinet or Executive Committee and jointly agreed by Ministers. Some policy is formulated and developed within a single government department and approved by the Minister responsible for that area of government...only Ministers have the mandate to make policy. The final decision is taken by someone other than a Minister, that decision does not in itself constitute government policy."
15. In order to be exempt, the requested information must relate to the formulation or development of government policy. The guidance explains that the terms refer to "the design of a new policy, and the

process of reviewing or improving existing policy". It is important to identify where formulation or development ends and implementation starts as the exemption does not cover the application or implementation of policy that is established. The term "relates to" is a broad term and means that, "Any significant link between the information and the activity is enough". The timing of the request (in terms of engaging the exemption) is not relevant but whether the information relates to the activity. However the timing of the request is relevant to the determination as to the balance of the public interest test.

16. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described.

Public Authority's Submissions

17. It considers the withheld information in question relates to the formulation of policy, and the development of the policies to which this information relates to were ongoing at the time the request was submitted. Policy work remains ongoing on the repeal of section 40, to support its inclusion in the Media Bill.

Commissioner's Reasonings

18. The Commissioner has viewed a copy of the withheld information and it does relate to the government policy issue of the repeal of section 40 of the Crime and Courts Act 2013 as stated by the public authority. In this regard the exemption is engaged.

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 outweighs the public interest in disclosing the withheld information.

Public Authority's Submissions

20. In favour of the release of the information it considered the general, inherent, public interest in governmental transparency. Transparency creates accountability and increases trust. Furthermore, it considered the more specific public interest in understanding the decisions that contribute to the proposed policy in development.
21. However, in favour of maintaining the exemption it considered the fact that this information is relevant to live policy issues and therefore there

is strong public interest in protecting the 'safe space' around ministers and their officials, where they can engage in blue-sky thinking when considering the options for the policy in question. 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.

Complainant's Submissions

22. He draws attention to the ICO Guidance which says:

"Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed"⁴.

23. Any repeal of section 40 would radically defeat Parliament's clear intention in enacting section 40 to protect complainants to the media against the threat of legal proceedings from the wealthy media. The public interest in knowing the full facts behind the Government's policy of repeal is totally warranted.

24. The Commissioner recently adjudicated upon a similar request to the same public authority in IC-178072-N2Q6⁵. Though the Commissioner treats and considers each complaint on its own merits he does not demur from his reasonings in that decision (regarding the application of the public interest test) and therefore after careful consideration replicates them below.

25. The Commissioner accepts that significant weight should be given to safe space arguments - i.e. the concept that the government needs a

⁴ [Section 35 - Government policy | ICO](#)

⁵ [ic-178072-n2q6.pdf \(ico.org.uk\)](#)

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 the development of its policy regarding the repeal of section 40 of the Crime and Courts Act 2013 was live. Furthermore, having considered the content of the withheld information the Commissioner accepts that disclosure of it clearly has the potential to encroach on the safe space of this policy making.

26. That said, the Commissioner also recognises the considerable weight of the public interest in disclosure. Both the relevant House of Commons Select Committee and the Press Recognition Panel (PRP) have 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. The Commissioner notes that considerable public money has been spent to bring the PRP into operation.
27. The Commissioner is satisfied that there is a considerable public 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 policy on this subject. This could enhance public discussion of this important subject.
28. That said, the Commissioner recognises that considerable weight must also be given to the fact that this was a live matter at the time of the request. The public interest in protecting the safe space in which the ongoing development of policy is discussed is particularly strong. Had the matter not been live, the Commissioner may well have reached a different view given the importance of the public interest in informing public discussion of this subject.

The Commissioner's conclusion

29. In light of the above, the Commissioner has concluded by a narrow margin that the public interest favours maintaining the exemption at section 35(1)(a). He has given particular weight to the fact that government policy development was live at the time of the request. The public interest is best served by ensuring the best quality policy making in a safe space for discussion. Therefore, the information was correctly withheld in response to the complainant's request

Right of appeal

30. 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

31. 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.
32. 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

Gerrad Tracey
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