

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 30 January 2013

**Public Authority:** Department for Business Innovation and Skills  
**Address:** 1 Victoria Street  
London, SW1H 0ET

### Decision (including any steps ordered)

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1. The complainant has requested information relating to interest rate caps and introducing "a cap on the total cost of credit". The Department for Business Innovation and Skills refused the request, citing the formulation of government policy exemption, section 35.
2. The Commissioner's decision is that the Department for Business Innovation and Skills (DBIS) correctly applied section 35 to the withheld information. He requires no steps to be taken.

### Request and response

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3. On 2 January 2012, the complainant wrote to DBIS and requested information in the following terms:

*'I would like to submit a request for all correspondence and documentation relating to interest rate caps and introducing "a cap on the total cost of credit" for the period of 1 November 2010 to 1 January 2012'.*

4. DBIS responded on 5 January 2012. It stated that an initial search had found several thousand documents and that it had estimated complying with the request would exceed the cost limit of £600. DBIS advised the complainant that it would be helpful if she could refine her request.
5. The complainant wrote to DBIS on 19 February 2012 and revised her request to state *'I would like to submit a request for all correspondence and documentation relating to interest rate caps and introducing "a cap on the total cost of credit" for the period of 16 February 2011 to 1 January 2012 and to refer to correspondence and documentation relating to introducing "a cap on the total cost of credit".'*

6. DBIS responded on 19 March 2012 advising that it did hold information falling within the scope of the request but that it needed more time to consider the request. It further advised that section 35 (formulation of government policy) applied to the requested information.
7. DBIS further advised that it had to consider the balance of the public interest in relation to the requested information, and that by virtue of section 10(3) of the FOIA it did not have to respond until such time as was reasonable in the circumstances.
8. On 18 April 2012 DBIS wrote to the complainant again to advise of a further delay as it had not yet reached a decision on the balance of the public interest. DBIS wrote to the complainant again on 17 May 2012 advising of more delay on the same grounds.
9. On 18 June 2012 DBIS wrote to the complainant and stated that it had now reached a decision on the balance of the public interest regarding section 35.
10. DBIS refused to provide the requested information citing section 35(1)(a) and 35(1)(b) of the FOIA as its basis for doing so, the balance of the public interest favouring withholding the information.
11. Following an internal review, requested on 26 June 2012, DBIS wrote to the complainant on 10 July 2012. It stated that it had reconsidered its position and released two of the emails it held, but with parts of the information redacted under section 35(1)(a), the formulation or development of government policy, section 35(1)(b) Ministerial communications and section 40, personal data. It continued to withhold all the other information within the scope of the request.

## **Scope of the case**

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12. The complainant contacted the Commissioner on 13 August 2012 to complain about the way her request for information had been handled.
13. In its response to the Commissioner, DBIS stated that although not originally cited in its response to the complainant, it was now also seeking in the alternative to section 35(1)(a) to rely on section 36(2)(b)(i) - free and frank provision of advice - and section 36(2)(c) - effective conduct of public affairs - to the undisclosed information contained within document 3 and document 4 of attachment 1 and word document 3 of attachment 2 of its letter to the Commissioner dated 13 December 2012.

14. In addition, DBIS stated that it was also now relying on section 35(1)(a) in respect of all the information which it considered fell within section 35(1)(b).
15. The Commissioner considers the scope of this request to be to determine if DBIS has correctly applied sections 35(1)(a), 35(1)(b), 36(2)(b)(i) and 36(2)(c) to the undisclosed information.

## Reasons for decision

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16. The Commissioner has first considered section 35.

Section 35(1) of FOIA states that:

*"(1) Information held by a government department or the National Assembly for Wales is exempt information if it relates to -*

- (a) the formulation or development of government policy,*
- (b) Ministerial communications,*
- (c) the provision of advice by any of the Law Officer or any request for the provision of such advice, or*
- (d) the operation of any Ministerial private office"*

17. Section 35 is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
18. The thinking behind the section 35 exemption is that it is intended to prevent harm to the internal deliberative process of policy-making. In the Commissioner's view, although 'policy' is not a precise term, it can be about the development of options and priorities for ministers, who determine which options should be translated into political action and when. He also considers that the term 'relates to' can safely be interpreted broadly. This means it can include any information which is concerned with the formulation or development of the policy in question and not information specifically on the formulation of that policy.
19. In correspondence with the Commissioner DBIS stated that the information requested relates to publication of the initial Government response to the Consumer Credit and Personal Insolvency Review (CCPIR) and a proposed amendment to the Financial Services Bill.
20. DBIS further explained that at the start of 2012 the Office of Fair Trading had announced their intention to conduct a year-long review of compliance of payday lenders with their Irresponsible Lending Guidance.

21. The OFT have now published their interim findings and the final report is due in early 2013.
22. DBIS went on to explain that in the early months of 2012, at the time of the original and revised requests, policy around the area of high cost credit was still being developed. At the time of correspondence with the Commissioner the policy was still under development.
23. Having viewed the withheld information, the Commissioner is satisfied that it falls within the category of information relating to the 'formulation or development of government policy'. Accordingly he finds that section 35(1)(a) is engaged in respect of all of the withheld information and has gone on to consider the public interest arguments associated with that exemption.

#### **Public interest arguments in favour of disclosure**

24. In its response to the complainant DBIS stated that it recognised that there is a public interest in favour of disclosure as this would provide greater transparency about the Government's policy position and the process of government policy formulation.
25. In correspondence with the Commissioner, DBIS acknowledged that there is a general public interest in the disclosure of information as greater transparency makes Government more accountable and there is a public interest in being able to assess the quality of information and advice which is used in policy formulation.

#### **Public interest arguments in favour of maintaining the exemption**

26. DBIS told the complainant that there is a public interest in ensuring that there is a space within which Ministers and officials are able to discuss all policy and delivery options freely and frankly. Therefore, it was the view of DBIS that the balance of the public interest favoured withholding the information.
27. With regard to the withheld information, DBIS told the complainant:  
  
*"Disclosing the information we hold that describes the formulation and development of government policy, which is not in the public domain, we judge, would inhibit the frankness of future discussion and hence inhibit policy formulation and development which would not be in the public interest".*
28. In its response to the Commissioner, DBIS stated that there is a public interest in ensuring that the formulation and development of government policy and government decision making can proceed in the self-contained space needed to ensure that it is done well. DBIS believe

that, if officials were conscious that advice made in an internal document or internal communication could be made public, frankness would inevitably be inhibited, and policy decisions would be made without full consideration of the issues.

29. DBIS further stated that at the date of the request it was developing its response to the policy area of high cost credit. DBIS had explained to the complainant that its policy on whether or not to introduce a cap on the total cost of credit was still being developed and told the Commissioner that it would definitely not be in the public interest to release policy advice given to Ministers or discussion between officials on the issue at this stage.
30. DBIS gave the Commissioner a more detailed explanation of the potential impact of premature disclosure of the withheld information in this case, but the Commissioner considers that it would not be appropriate for him to reproduce the details of the DBIS submission in this Notice.
31. In summary, DBIS considered that the public interest in favour of disclosing the requested information is outweighed by the necessity to protect the private space for Ministers and officials to formulate policy in this complex area. When considering the safe space argument in the context of the public interest test, the Commissioner will look at the age of the requested information and whether the formulation and development of the policy in question was still underway at the time of the request.
32. In his view, safe space arguments are more relevant, with regard to maintaining the exemption, if, at the time of the request, policy formulation and development was ongoing. This is because such arguments focus on the need for a private space to develop live policy.
33. Having viewed the withheld information, the Commissioner accepts that it relates directly to the formulation and development of policy, in this case policy making in relation to the credit market. He also accepts that the process was ongoing at the time of the request. He is therefore satisfied that the argument that a safe space was needed to protect the policy making process is a relevant one when considering the public interest arguments in this case.

### **Balance of the public interest arguments**

34. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public

interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

35. The exemption at section 35(1) of the FOIA is intended to prevent harm to the internal deliberative process of policy making. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.
36. The Commissioner acknowledges the high media profile of payday lenders, and the subsequent heightened awareness of the public in relation to this type of lending. He also acknowledges recent media interest in payday lenders' data security. However, having examined all the withheld information in this case, he considers the public interest in disclosure to be relatively low.
37. In reaching a conclusion in this matter, the Commissioner has taken account of the content and context of the withheld information, and, against that background, has considered whether its release would contribute to the general public interest in openness and transparency. In his view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which the disclosure of the information in question will meet that need.
38. The Commissioner has already concluded that the policy process was still live at the time of the request and that the requested information relates to that policy making. He further concludes that the policy process is still ongoing. In light of this, having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at that time was of sufficient significance for him to conclude that maintaining the exemption outweighs the public interest in disclosure.
39. It is the Commissioner's view that DBIS was entitled to withhold the requested information under section 35(1)(a).
40. As all the requested information is covered by section 35(1)(a) the Commissioner has not gone on to consider the application of sections 35(1)(b); 36(2)(b)(i) and 36(2)(c).

## Right of appeal

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41. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

42. 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.
43. 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 .....**

**Graham Smith  
Deputy Commissioner  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**