

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 August 2014

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Government's application to the European Commission to extend the rural fuel duty rebate scheme to the UK mainland.
2. The Commissioner's decision is that;
 - on the balance of probabilities, the public authority did not hold any information within the scope of item 7 of the request, and
 - the public authority was entitled to withhold the information held within the scope of item 6 of the request on the basis of the exemption at section 35(1)(a) FOIA.
3. No steps required.

Request and response

4. On 18 October 2013, the complainant wrote to the public authority and requested information in the following terms:

'With regards to the ten rural towns that the Treasury is putting forward to the European Commission for consideration to receive 5p off fuel duty:

1a. How many areas were asked to apply?

1b. Please send a list of these areas.

2a. How many areas applied?

2b. Please send a list of these areas.

3a. How many were rejected?

3b. Please send a list of these areas.

4. Please send a copy of the criteria used to determine which areas were accepted or rejected.

5. For each area that was rejected, please indicate on what basis that area was rejected

6. Please send a copy of all submissions to ministers relating to this scheme.

7. Please send a copy of all records of discussions of all meetings which decided on whether areas should or should not have been accepted.'

5. The public authority responded on 15 November 2013. It stated that most of the information in scope was publicly available and provided a web links to access the relevant information.
6. The public authority also informed the complainant that it considered the submissions and meeting records requested in items 6 and 7 of the request exempt from disclosure on the basis of section 35(1)(a) FOIA.
7. Following an internal review the public authority wrote to the complainant on 20 December 2013. It provided additional context to the information available in respect of items 1a, 1b, 2a, 2b, 3a, 3b, 4 and 5 and confirmed that it considered the relevant information publicly available and therefore exempt on the basis of section 21 FOIA.

Specifically, in relation to items 2a and 2b, the complainant was advised that the Government had received 35 responses from individual service stations across the United Kingdom (UK). 21 responses were received from Scotland, 10 from England, 3 from Wales and 1 from Northern Ireland. The public authority upheld the application of section 35(1)(a) in relation to the information it considered fell within the scope of items 6 and 7.

Scope of the case

8. The complainant contacted the Commissioner on 5 February 2014 to complain about the way her request for information had been handled. She specifically disagreed with the public authority's response in relation to items 2b, 6 and 7 of her request.
9. In terms of item 2b, although the public authority did supply a breakdown by nation, the complainant felt that the breakdown should have also been by county or local authority area. The reasons given for her disagreement with the application of section 35(1)(a) are addressed further below.
10. During the course of the investigation, the public authority agreed to provide a breakdown by local authority area in relation to item 2b even though it did not accept that that was within the scope of the request. This information was disclosed to the complainant on 1 August 2014.
11. The public authority also revised its position in relation to item 7 of the request. It explained that it had re-considered the request and decided that it did not hold any information within scope.
12. The public authority also advised that it considered one of the submissions within the scope of item 6 additionally exempt from disclosure on the basis of section 27(1)(b) FOIA.
13. The scope of the investigation therefore was to consider;
 - whether the public authority held any information within the scope of item 7, and
 - whether the public authority was entitled to withhold all of the information within the scope of item 6 on the basis of section 35(1)(a), and if necessary, consider the application of section 27(1)(b) to the one submission also withheld on that basis.

Reasons for decision

Section 1(1)(a) – Information held/not held

14. The public authority explained that meetings were held to discuss the overall approach to extending the rural fuel duty rebate scheme (the scheme) including the criteria to define the scope of the extension. However, as areas to include within the scheme flow directly from the approach and criteria, there were no meetings to “decide whether areas should or should not be accepted”. Discussions in relation to the criteria for the extension of the scheme are covered in the submissions within the scope of item 6 of the request.
15. Although it is possible to interpret item 7 as a request for copies of records of meetings held to discuss the overall approach to extending the scheme, the Commissioner can understand why the public authority subsequently decided that it did not hold information matching the wording of the request. In any case, the Commissioner accepts that information relating to the criteria on extending the scheme can be found in the submissions within the scope of item 6 of the request.
16. The Commissioner therefore finds that, on the balance of probabilities,¹ the public authority does not hold information within the scope of item 7. Any information relevant to the request can be found in the submissions relevant to item 6.

Section 35(1)(a)

17. Information is exempt from disclosure on the basis of the section 35(1)(a) if it is held by a government department and it relates to the formulation or development of government policy.
 18. The withheld information consists of advice by officials to Ministers regarding the overall approach to extending the scheme including the criteria to define the scope of the extension.
 19. The public authority explained that the withheld information relates to the development of the Government’s policy on fuel duty. On 1 August
-

¹ In deciding whether or not information is held by a public authority, the Commissioner relies on the civil standard of proof – ie on the balance of probabilities – irrespective of how certain he might be regarding the actual position.

2013 the Government launched a call for information which invited remote rural filling stations in a number of areas across the UK to submit data on their pump prices. On 18 October 2013, the Government submitted an application to the European Commission for permission to extend the scheme to ten areas in the UK mainland.² The list of areas was selected based on objective criteria, using the data received through the call for information as well as data previously held. Following another call for information on 7 November 2013 to give retailers a further opportunity to submit information to the public authority, the application submitted to the European Commission on 18 October was withdrawn.

20. On 24 January 2014, the Government submitted a new application to the European Commission to extend the scheme, adding 7 further areas to the original list of 10. The scheme will provide a 5 pence per litre discount on fuel purchased in the 17 areas that have been selected for inclusion.
21. According to the public authority, the Government is currently awaiting the outcome of its application, which is due later in the year. If the European Commission approves the request, the application will be passed on to the European Council for review. All Member States will need to approve the scheme's extension for the scheme to be introduced to the UK mainland. The European Commission may request further information from the UK before making a final decision on the application.
22. The Commissioner is satisfied that the extending the rural fuel duty rebate scheme is government policy within the meaning in section 35(1)(a).
23. As mentioned, the withheld information consists of advice to Ministers on the overall approach to extending the scheme including the criteria to define the scope of the extension. The Commissioner is satisfied that the withheld information relates to the development of the Government's policy on extending the scheme.
24. In view of the above, the Commissioner finds the exemption at section 35(1)(a) was correctly engaged.

² The scheme is currently in place for the Scottish Islands and the Isles of Scilly.

Public interest test

25. The exemption at section 35(1)(a) is qualified. Therefore, the Commissioner must also consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

Complainant's arguments

26. The complainant's public interest arguments in support of disclosure are summarised below.
27. The Government made its submission to the European Commission on 24 January 2014, therefore, the policy cannot really be considered to be under active development since the policy on deciding which areas should be included in the submission has clearly already been made.
28. Although the extension of the scheme to the UK mainland is still subject to agreement by Member States of the European Commission, there is no reason that the disclosure of information about submissions to Ministers and records of meetings which decided on the areas which would go forward would affect the decisions of the 27 Member States.
29. There is a public interest in disclosing factual information which has been used, or is intended to be used, to provide an informed background to decision-making. This is specifically recognised in section 35(4) FOIA. Disclosing the withheld information would satisfy this particular public interest.
30. On a broader level, disclosing the withheld information would promote accountability and transparency in government decision making, and ensure that all areas that applied to be part of the scheme know that they were treated equitably.

Public authority's arguments

31. The public authority acknowledged the general public interest in transparency around policy decisions, to promote accountability for government decisions, as well as public understanding and engagement.
32. It also recognised the strong public interest in disclosing information regarding tax and spending decisions.
33. The public authority however argued that there is a legitimate public interest in maintaining the confidentiality of advice within and between

government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision.

34. In the circumstances, where the withheld information is recent and the policy development is still ongoing, there is a strong public interest in providing a safe space for officials to be able to advise Ministers without the fear that their views could be subjected to premature scrutiny and/or ridicule.
35. Given the sensitivity of the policy under consideration, there is also a real and significant possibility that disclosure would result in officials drafting more narrowly or expressing their views more candidly through direct verbal briefings which would affect the quality of public records.
36. The public authority pointed out that it has published information on the objective selection criteria that was used to select the areas for the scheme.³ Similarly, it argued that it has been transparent about its approach to data collection through the calls for information which sought to actively engage service stations, allowing the public to put forward data to ensure the Government had up to date information on pump prices.

Balance of the public interest

37. The Commissioner considers that the policy development is still ongoing. As mentioned, the European Commission has yet to approve the Government's application to extend the scheme. It is therefore quite possible that additional information could be requested by the Commission before approval is given. As at 18 October when the request was made, the initial application had in fact been withdrawn. However, the intention to extend the scheme remained, hence the call for information in November and the subsequent re-application in January 2014. Therefore, the public interest in protecting the safe space for officials to provide free and frank advice to Ministers regarding the proposed extension to the scheme remained relevant at the time of the request and is still the case now.
38. Disclosing details of options considered by the Government in relation to the application to extend the scheme in the UK before it is approved could conceivably weaken the strength of the Government's position

³ www.gov.uk/government/news/ten-rural-areas-in-uk-could-get-fuel-duty-tax-cut

before other Member States. The Commissioner does not accept the view that disclosure would have no effect on the decisions of the other Member States or indeed the European Commission.

39. Having had the benefit of reviewing the withheld information, the Commissioner does not consider that it is strictly factual information. Any factual information contained in the submissions has been included in the context of the advice provided. In any event, given that the policy development is still *live*, the Commissioner considers that under those circumstances, the information already published by the public authority satisfies the public interest in providing an informed background to the selection criteria and the broader transparency of the process.
40. The Commissioner accepts that there is a strong public interest in maintaining the confidentiality of discussions between officials and advice to Ministers while awaiting the outcome of the Government's application to extend the scheme.
41. He also accepts that disclosure is likely to constrain officials if called upon to advise on the scheme before the outcome of the application is known. If officials felt constrained in providing advice in relation to extending the scheme, it could harm the Government's ability to reach an agreement on fuel duty measures that would be of benefit to UK citizens.
42. In view of the above, the Commissioner finds that in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
43. Having upheld the application of section 35(1)(a), the Commissioner did not have to consider the application of section 27(1)(b).

Right of appeal

44. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. 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
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF