

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 July 2020

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

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of the responses to a public consultation on the Digital Services Tax. The public authority withheld the requested information relying on section 35(1)(a) FOIA.
2. The Commissioner's decision is that the public authority was entitled to rely on section 35(1)(a).
3. No steps are required.

## Request and response

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4. On 17 June 2019 the complainant submitted a request to the public authority in the following terms:  

“I would be grateful if you could provide me with the responses received to the consultation on the Digital Services Tax.” [sic]
5. The public authority provided its response on 15 July 2019. It withheld the information held within the scope of the request relying on section 35(1)(a) FOIA.
6. On 16 July 2019 the complainant requested an internal review of this decision.
7. On 20 August 2019 the public authority wrote back to the complainant with details of the outcome of the internal review. The review upheld the original decision and further concluded that third party personal data was additionally exempt on the basis of section 40(2) FOIA.

## Scope of the case

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8. The complainant contacted the Commissioner on 12 September 2019 to complain about the way that his request for information had been handled. He specifically disagreed with public's authority refusal to disclose the information held within the scope of his request.
9. The scope of the investigation therefore was to consider whether the public authority was entitled to withhold the information held within the scope of the complainant's request of 17 June 2019 above (the withheld information) relying on the exemptions at sections 35(1)(a) and 40(2) FOIA.

## Reasons for decision

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### The withheld information

10. The withheld information comprises the consultation responses of 79 businesses and individuals to a consultation seeking views on the proposed Digital Services Tax (DST).

### Section 35(1)(a)

11. The Commissioner initially considered whether the public authority was entitled to apply the exemption at section 35(1)(a) to the withheld information in full.
12. Section 35(1)(a) states:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to the formulation or development of government policy.”<sup>1</sup>

### Complainant's submission.

13. The complainant's submission is set out below.
14. The exemption being relied upon is designed primarily to protect the advice of civil servants to ministers. The request was for documents sent by third parties in relation to an open government consultation. These kinds of safe harbour arguments being deployed carry little weight in circumstances where the government has opened up a policy to general comment from external sources.
15. The DST was announced in the 2018 budget and on 11 July the government published draft legislation on this. The decision to implement such a tax clearly was made a long time ago.
16. The DST is limited in scope and there are some obvious companies that have not been included, Netflix for example. It is clearly in the public interest to know why these companies have been excluded, but that is not possible without knowing the representations made by these companies.

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<sup>1</sup> The full text of the exemption is available here:  
<http://www.legislation.gov.uk/ukpga/2000/36/section/35>

17. In a debate on Netflix and Tax in the House of Commons in February, the Financial Secretary to the Treasury was asked whether the Digital Services Tax could be expanded to include other companies. The response was that changing the DST now would be too difficult. It clearly undermines public participation in the policy making process if government holds private conversations with interested parties, which cannot be revealed until after it is too late to change the policy.
18. The OECD BEPS<sup>2</sup> process releases consultation responses to proposed changes to international tax law immediately, publishing all responses from 3rd parties in full a week after they are received. The DST is part of exactly the same international effort to change international tax law with regards to digital companies. The Government is explicit that the DST is a stop-gap pending resolution of the OECD process. There is no prejudice suffered by third parties by the OECD publishing their responses and there have been extensive submissions to that process. It is not clear to me why the UK process is any different in any way that would require a higher level of secrecy.

#### Public authority's submission

19. The public authority's submission is summarised out below.
20. By way of background the public authority explained that the DST is a 2% tax on the UK-linked revenues of social media platforms, search engines, and online marketplaces. It is intended to ensure that these digital businesses pay the tax that reflects the value they derive from UK users. Following announcement at Budget 2018, the government carried out a consultation on the design of the tax. This closed in February 2019, and the responses received are the subject of this request.
21. Responses to this consultation informed the development of draft legislation and guidance, which were published in July 2019. A summary of responses was also published at the same time. The government then carried out further technical consultation, to ensure the tax applies as intended. This consultation ran until 5 September 2019. Final legislation

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<sup>2</sup> OECD - Organisation for Economic Co-operation and Development. BEPS - Base erosion and profit shifting. BEPS "refers to tax planning strategies used by multinational enterprises that exploit gaps and mismatches in tax rules to avoid paying tax." Source: <https://www.oecd.org/tax/beps/about/>

was included in the Finance Bill and the DST came into effect on 1 April 2020<sup>3</sup>.

22. The DST is intended as a temporary measure, in place only until an appropriate global solution on the taxation of digital businesses is implemented. International discussions on a global solution continue and are likely to do so for a number of years. The government will review the need for the DST once a solution is in place, and in 2025.
23. The public authority submitted that the withheld information clearly relates to the formulation of government policy because the consultation responses provide important evidence on the policy design and implementation of the DST.
24. According to the public authority, the initial consultation exercise ran from November 2018 to February 2019. However, at the time of the request (17 June 2019), the government was still considering the responses received and putting together its own response document. The government's response, which included a summary of the consultation responses received and a list of all organisations which had responded, was published on 11 July 2019.<sup>4</sup> Chapter 9 of the government response document outlined the next steps in the policy process. A technical consultation was launched and was open until 5 September 2019, seeking views on the draft legislation published alongside the response document. At the time of the response to the internal review (20 August 2019), the technical consultation was still open and the government was still seeking views from stakeholders.
25. With respect to the balance of the public interest, the public authority acknowledged that there is a general public interest in transparency and accountability of public authorities which may be promoted by the released of the withheld information. It also acknowledged that there is a public interest in furthering public understanding of the issues public authorities deal with. It submitted that the published summary of

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<sup>3</sup> <https://www.gov.uk/government/publications/introduction-of-the-digital-services-tax/digital-services-tax>

<sup>4</sup> The consultation landing page and the government response document can be found in the links below.

<https://www.gov.uk/government/consultations/digital-services-tax-consultation>

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/816389/DST\\_response\\_document\\_web.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/816389/DST_response_document_web.pdf)

responses goes some way to meeting the public interest in transparency and accountability in this case.

26. In favour of maintaining the exemption, the public authority argued that there was a stronger public interest in preserving a safe space for the government to discuss and develop policies relating to the DST. The introduction of the DST was clearly a live and ongoing issue at the time of the request. Indeed, it remains a live issue in view of ongoing international discussions on global reform, and the withheld information directly relates to this. Disclosing the withheld information at the time of the request could have resulted in less robust and effective discussions in relation to the DST.
27. Furthermore, disclosure of the withheld information could have resulted in a chilling effect on the technical consultation launched following the first consultation. Many of the same organisations who responded to the first consultation responded to the technical consultation. Disclosure of the withheld information could have therefore had a chilling effect on the content or the delivery of response to the technical consultation. Additionally, the ability of Ministers to make evidence-based decisions may be restricted by the release of the withheld information. Ministers may be reluctant to respond to stakeholder concerns if this creates an appearance of bias and may make decisions based on this perception rather than the evidence.
28. The purpose of the exemption in section 35(1)(a) is to protect the integrity of the policy-making process and to prevent disclosure which would undermine this process and result in less robust, well-considered or effective policies. Disclosure of the withheld information would be counter to this aim. Therefore, the public interest very clearly lies in maintaining the exemption.
29. The public authority also responded directly to the complainant's submissions in paragraphs 16 – 18 above.
30. In relation to the submission that the DST is limited in scope, the public authority explained that in the House of Commons debate; 'Netflix: Tax Affairs' on 3 February 2020<sup>5</sup>, the government noted that a change to the DST would require significant legislative revision. However, this has not been a factor in determining the scope of the DST. Rather, the scope of the DST has been designed to apply to those business models which

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<sup>5</sup> <https://hansard.parliament.uk/Commons/2020-02-03/debates/D157443C-E763-4976-B0EA-CBD038B252B0/NetflixTaxAffairs>

most rely on their users to create value. It is the government's judgement that this includes search engines, social media platforms, and online marketplaces. It does not include media streaming, which may still utilise user contributions to generate value, but for which this user generated value is not as critical. As with all tax policy, the DST is kept under review to ensure its continued relevance. The Finance Bill, which DST legislation forms a part of, includes a clause which will require the Government to produce a review of the DST and present this to Parliament in 2025, should the DST still be in place at this point.

31. On the submission that the OECD BEPS process routinely publishes consultation responses, the public authority explained that the DST has been subject to extensive consultation and this has been carried out separately to the OECD's works on reform of international corporate tax rules. It argued that to release the withheld information could restrict future engagement and jeopardise the government's ability to develop evidence-based policy.

### **Commissioner's considerations**

#### *Is the exemption engaged?*

32. The exemption in section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that unlike a prejudice-based exemption, there is no requirement to show harm in order to engage it. The relevant information simply has to fall within the class described, and that would be enough to engage the exemption. The prejudicial effect of disclosure would inevitably be considered within the framework of the competing public interest factors.
33. The Commissioner considers 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. 'Development' of policy 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.
34. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information itself does not have to be created as part of the activity. Any significant link between the information and the activity is enough.
35. There is no question that the withheld information comprise of responses to the initial public consultation on the design and

implementation of the Digital Services Tax. The government's intention to introduce the DST was announced at Budget 2018 and, as the public authority has explained, is intended to ensure that digitally-run businesses pay the tax that reflects the value they derive from the UK market. The withheld information therefore relates to the formulation of government policy on the DST.

36. Consequently, the Commissioner finds that the public authority was entitled to engage the exemption in section 35(1)(a).

*Balance of the public interest*

37. The exemption in section 35(1)(a) is one of the qualified exemptions in the FOIA. Therefore, further to the requirement in section 2(2)(b) FOIA, the Commissioner next considered whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
38. The Commissioner considers that there is a general public interest in ensuring that tax due to the UK is paid whether by individuals or corporate bodies. It is in the public interest for the government to be as transparent as possible about any discussions it may have had with corporate organisations regarding their UK tax liabilities.
39. Specifically in this case, it is in the public interest to know why certain companies have been excluded from the scope of the DST. The complainant claims it is not possible to know why without examining the representations made by these companies to the government. He also appears to suggest that the government was not open to expanding the scope of the DST because it is now too difficult to do so.
40. The public authority disagrees with the suggestion that the reason it did not want to expand the scope of the DST is because it would require significant legislative revision. Rather, it says it is because the scope of the DST has been designed to apply to those business models which most rely on their users to create value and in the government's judgement, this includes search engines, social media platforms, and online marketplaces but does not include media streaming. The DST will be kept under review with a report due to be presented to Parliament in 2025.
41. The public authority considers that the DST is separate to ongoing OECD works on reform of the international corporate tax rules and that disclosing the withheld information could have an inhibiting effect on future engagement with stakeholders. It has also submitted that the published summary of responses goes some way to meeting the public interest in transparency and accountability.

42. Whilst the above factors do not significantly diminish the public interest in disclosure, they do carry some weight in circumstances of this case. More crucially though is the timing of the request. It has been established that when the request was submitted on 17 June 2019 the government was still considering the responses to the initial consultation exercise which ended in February 2019. Therefore, the Commissioner has attached significant weight to the public interest in maintaining a safe space for the government to discuss and develop policies in relation to the design and implementation of the DST free from external interference and distraction. Whilst the Commissioner considers that there is a public interest in public participation in the policy formulating and development process, this has to be balanced against the strong public interest in preserving a safe space for policy discussions to take place free from distraction.
43. Following publication of the government's response on 11 July 2019, a technical consultation was launched and remained open until 5 September 2019 and had not been completed by the time the public authority issued its final response to the request on 20 August 2019. There was therefore a significant public interest in maintaining a safe space for related deliberations before the DST consultation process had been finalised. The extent to which disclosure could have impacted on stakeholder engagement with the policy formulation process is arguable. Given they were lobbying for their respective positions, they were less likely to feel inhibited from contributing effectively to this important debate in the Commissioner's view.
44. The Commissioner cannot comment on why the OECD BEPS consultation process appears to differ from the DST consultation process in terms of the timing of the publication of responses. There is some weight in the view that the DST process should have adopted a similar approach. However, the Commissioner considers that there was a stronger public interest in not publishing the withheld information before the DST had been finalised particularly before the technical consultation had concluded. Publishing the responses to the initial consultation at that time could have become a source of distraction from policy deliberations relating to the design and implementation of the DST. The summary of responses published on 11 July 2019 meant that the public had some awareness of the nature of stakeholder responses to the consultation.
45. Given the significant weight of the public interest in preserving a safe space for the government to discuss and develop policies relating to the DST, the Commissioner finds that the public interest in maintaining the exemption outweighed the public interest in disclosing the withheld information.

## Right of appeal

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46. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Terna Waya**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**