

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

### **Decision notice**

**Date:** 15 May 2023

**Public Authority:** Department for Business and Trade ("DBT")  
**Address:** Old Admiralty Building  
Admiralty Place  
London  
SW1A 2DY  
United Kingdom

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

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1. The complainant has requested information on a consultation regarding the use of imperial and metric units of measurement. The former Department for Business, Energy and Industrial Strategy ("BEIS") responded confirming that it held information in the scope of the request but this was withheld in reliance of FOIA section 35(1)(a) – formulation and development of government policy and section 35(1)(b) – Ministerial communications.
2. The Commissioner's decision is that the public authority is entitled to rely on section 35(1)(a) and the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 18 September 2022, the complainant wrote to BEIS and requested information in the following terms:

"I see you have a consultation entitled 'Choice on units of measurement: markings and sales.'

This consultation asks questions such as: 'If you had a choice, would you want to purchase items: i) in imperial units ii) in imperial units alongside a metric equivalent.'

No option was given for metric-only units. This has been criticized by BBC's More or Less.

Please provide any emails/minutes/notes held on any discussions or mandates on whether to offer a metric-only units' option in the consultation, including any responses and any advice this may include on whether this would affect the outcome of the survey."

5. BEIS responded on 4 October 2022. It confirmed that it was withholding the information held within the scope of the request in reliance of FOIA section 35(1)(a) – formulation and development of government policy and section 35(1)(b) – Ministerial communications.
6. Following an internal review BEIS wrote to the complainant on 1 November 2022. It stated that it was upholding its initial response.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 1 November 2022 to complain about the way their request for information had been handled. They explained:

"I requested information from the Department of BEIS regarding a public consultation over the use of imperial or metric measurements. The consultation did not include the option of metric measurements. This was criticized by outlets including the BBC 'more or less', as it would not provide an accurate reflection of the options available.

They have engaged S35 of the exemptions, stating that the policy is still being developed. Whilst I agree with the engagement, I feel public interest favours disclosure because: - by not offering all options, the consultation is not creating 'good' or 'useful' information in developing policy. Indeed it may be seen as an abuse of process to falsely claim the public is supporting your position, when the public has not been offered any other position! - release of this information would encourage departments and ministers to ensure they are collect [sic] the best available information, open to scrutiny, through recognising the information could be released for public scrutiny. - the PM and government minister has changed in the interim, so policy may well have changed. This may well be historic at the time of the internal review response."

8. At the time of its submissions to the Commissioner BEIS advised that it no longer wished to rely on section 35(1)(b) as it had determined that no Ministerial communications were contained in the withheld information. In addition BEIS wished to rely on section 40(2) – personal information to redact junior officers names in the withheld information.
9. The Commissioner therefore considers that the scope of his investigation is the application of section 35(1)(a) to withhold the requested information.

## **Background**

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10. BEIS provided the Commissioner with background to the consultation which is set out below.
11. The use of units of measurement for all trade purposes and consumer transactions in Great Britain is regulated by the Weights and Measures Act 1985. The Act requires metric units to be used as the primary indication of measurement for the majority of goods sold by quantity.
12. While imperial units can be used alongside metric units, the imperial markings must be less prominent than the metric. There are exceptions to this including the pint for draught beer or cider, the pint for milk in returnable containers, and the troy ounce for precious metals.
13. A review of units of measurement was announced in September 2021 by Lord Frost, and later as part of a 31 January 2022 announcement for the two-year anniversary of Brexit.
14. From 3 June to 26 August 2022, BEIS ran the consultation 'Choice on units of measurement: markings and sales'.
15. The aim of the consultation was to identify whether greater choice can be given to businesses and consumers over the units of measurement they use to buy and sell products. The consultation questions therefore focused on potential changes to the current law to allow increased choice, how they would be best achieved and their potential impact.
16. The Government did not intend to further restrict the use of imperial units or mandate that only metric units would be permitted beyond the current law, and therefore BEIS did not consult on this because it was something that was not within the range of policy options.
17. Answer methods were a mix of pre-set tick boxes and free text boxes. The consultation gave respondents multiple opportunities to provide a

full range of views via the free text boxes. The consultation document also noted "your response will be most useful if it is framed in direct response to the questions posed, though further comments and evidence are also welcome".

18. Over 100,000 consultation responses were received. Given the high number of responses, BEIS published a holding response on gov.uk and intends to publish a government response once analysis has been completed.

### **Reasons for decision**

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#### **Section 35 – Formulation of government policy etc.**

19. Section 35 of FOIA 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."

20. 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.
21. 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.
22. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.
23. 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 sufficient.

24. As set out in paragraph 7 above, the complainant agrees with the engagement of section 35(1)(a).
25. The Commissioner accepts that the formulation and development of the policy regarding the use of metric and imperial measurements is still on-going with policy details still being discussed. The final policy is not yet agreed and will require cross-government agreement via a formal 'Government Write-round'.
26. The Commissioner is satisfied that the requested information relates to the formulation of government policy, specifically units of measurement policy. Section 35(1)(a) is therefore engaged in respect of the withheld information.

### **Public interest test**

27. 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.
28. The complainant considers that the public interest favours disclosure because they consider that by not offering "all options" the information resulting from the consultation is not useful in creating policy.
29. BEIS explained to the Commissioner that it considers there to be public interest in disclosure on the grounds of transparency in the making of government policy which promotes government accountability, increases public understanding and enables public debate and scrutiny.
30. In favour of maintaining the exemption BEIS provided its view that it is important for officials and Ministers to have private thinking space to consider all the implications before reaching a decision. It advised:  
  
"This is particularly true for the units of measurement consultation, which has received significant media and public attention. Premature disclosure of documents in relation to policy development could deter the government from undertaking full, candid, and proper deliberation of policy formulation and development, including the exploration of all options."

### **The Commissioner's view**

31. The Commissioner considers that there is clearly public interest in the disclosure of information which can inform public debate around the units of measurement policy making. He understands the complainant's position that there is a strong public interest in consultations being transparent and not manipulated in any way. He notes the complainant's

comments that disclosure of the information would act as an encouragement to ensure that government departments collect:

"...the best available information through recognising the information could be released for public scrutiny."

32. However, the Commissioner notes BEIS' explanation regarding the options made available for respondents to choose. He accepts that the consultation questions focussed on potential changes to the current law to increase choice and therefore, as the Government's intention was neither to mandate that only metric units would be allowed, nor to further restrict the use of imperial units, there was no consultation on these points as they were not within the range of policy options to be considered. BEIS explained that for this reason, it does not hold significant material relating to 'metric only' options.
33. In balancing the public interest the Commissioner accepts that significant weight should be given to safe space arguments – i.e. 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.
34. 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 and currently remains so. Balanced against this he considers that disclosure of the information would provide the public with sight of brief emails mentioning options which are part of the overall policy development and consequently disclosure would make the policy making process more transparent. The Commissioner notes that there has been no announcement of the results of the consultation and therefore no claims by government of the public supporting any position. The final policy is not yet agreed and will require cross government agreement, with a government response being issued in due course.
35. Nevertheless, in the circumstances of this case he does not consider that disclosure carries a more compelling weight. He has not seen any evidence of an intention to manipulate the consultation and accepts the reasoning why a metric only option was not given. Respondents had the opportunity to make any comments irrespective of the tick box choices. In conclusion, he considers that, taking account of the particular stage of the policy making process, allowing for deliberation of policy formulation in a protected space carries more weight. He therefore finds that the public interest favours maintaining the exemption.

36. As the Commissioner's decision is that the information should be withheld he has not considered the application of section 40(2) to withhold junior officials' names in email correspondence.

## Right of appeal

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

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

38. 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.
39. 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 .....**

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