

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

### **Decision notice**

**Date:** 8 December 2023

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

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

---

1. The complainant has requested information on the government's response to a consultation on metric and imperial units of measurement. DBT refused the request in reliance of FOIA section 35(1) – formulation or development of government policy and section 22(1) – information intended for future publication.
2. The Commissioner's decision is that section 35(1) is engaged but the public interest favours disclosure and section 22(1) is not engaged in the particular circumstances of this case.
3. The Commissioner requires DBT to take the following steps to ensure compliance with the legislation.
  - Disclose the draft government response.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Request and response**

---

5. On 12 April 2023 the complainant wrote to DBT and requested information in the following terms:

"Please provide me with the government's consultation response on: Choice on units of measurement: markings and sales. The link to the consultation can be found here:

<https://www.gov.uk/government/consultations/choice-on-units-of-measurement-markings-and-sales>

6. DBT responded on 3 May 2023. It stated that information was held in the scope of the request but is was withheld under FOIA section 35(1)(a).
7. Following an internal review DBT wrote to the complainant on 8 June 2023 upholding its initial response.

### **Scope of the case**

---

8. The complainant contacted the Commissioner on 19 June 2023 to complain about the way their request for information had been handled. They explained:

"I believe this refusal is flawed as the government's own consultation principles advise that responses should be published within 12 weeks of the consultation closing or provide an explanation of why this is not possible. It has now been far longer than that.

I believe it is unacceptable for the department to continue to claim policy development on this issue is live many months after the consultation response should have been published."

9. At the time of his investigation DBT advised the Commissioner that it also wished to rely on FOIA section 22(1).
10. The Commissioner considers that the scope of his investigation is to determine whether DBT is entitled to withhold the requested information in reliance of FOIA sections 35 and 22. The Commissioner notes that at the time of the request and to date, an 'actual' government response does not exist as it is not finalised and therefore the information held is the draft response.

### **Reasons for decision**

---

#### **Section 35 – Formulation or development of government policy**

11. Section 35(1)(a) 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.”

12. 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 does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.

13. 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<sup>1</sup> advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

14. DBT explained:

“The public consultation was opened for the purpose of identifying how the government could give greater choice to businesses and consumers over the units of measurement they use to buy and sell products. It closed on 26 August 2022. The consultation received over 100,000 responses in a mixture of online responses, emails and written responses. These all included a combination of multiple choice and free text responses. Due to the unexpectedly high number of responses, analysis became a significant project in itself, taking much longer than planned for and drawing resource from across the organisation. It was completed in January 2023.”

15. DBT considers that the machinery of government changes<sup>2</sup> which were announced in February 2023 required it to review the policy direction

---

<sup>1</sup> <https://ico.org.uk/for-organisations/foi-eir-and-access-to-information/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

<sup>2</sup> The machinery of government change split the Department for Business, Energy and Industrial Strategy (BEIS) into three new departments with the new Department for Business and Trade being the lead department for units of measurement policy.

with its new ministerial team. It advised the Commissioner:

"The impact of this large organisational restructuring was to lengthen the policy development process as the department had to prioritise the advice, covering the breadth of the new department's responsibilities, going to ministers in the immediate aftermath of the machinery of government change."

16. DBT added that units of measurement is a complex area which can impact on several other areas and departments and links to important issues. The need to understand these complexities and present them and any potential wider impact to a new ministerial team was an important step before seeking collective agreement and added to the policy development process.
17. DBT explained that during the procedure to seek collective cabinet agreement the relevant Cabinet committees consider the content of the policy proposals via correspondence through a process of writing round to the relevant departmental managers. This process is still live with the policy still in development and information relating to the policy deemed sensitive and subject to change. Once the process has concluded the scope of the policy will be finalised and a government response will be published.
18. DBT stated that, unfortunately, a timeframe has not yet been set for establishing cross-government agreement. Agreement has not been received from all the necessary departments and consequently the final policy is still not agreed. DBT advised:

"Releasing an unagreed, draft document that is still in the process of ongoing intra-government discussions would significantly undermine collective responsibility, which is absolutely essential to the proper functioning of government."
19. DBT acknowledged that a response to the consultation remains outstanding and, in line with Consultation Principles,<sup>3</sup> it would normally aim to publish a response within 12 weeks. It explained:

"This has not happened, due to an abnormally large number of responses which took time to analyse, the intricacies of the policy issue, a subsequent machinery of government change and an ongoing

---

<sup>3</sup> <https://www.gov.uk/government/publications/consultation-principles-guidance>

collective agreement process. The formulation of policy in relation to the consultation continues.”

20. The Commissioner has considered a similar, though not identical, request made in September 2022 and issued his decision<sup>4</sup> in May 2023. In that notice he determined that the requested information related to the formulation and development of government policy. His view has not changed in the intervening period and he is satisfied that the information requested in this case clearly relates to the formulation and development government policy. Section 35(1)(a) is therefore engaged in respect of the withheld information.

### **Public interest test**

21. 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.
22. The complainant provided the following:

“In appeal number EA/2006/0006 the Department for Education and Skills relied on s.35(1)(a) but the Commissioner, in ruling against the then DFES "considered that any need to maintain the exemption was weakened by the passage of time". The Tribunal in this case found the public interest in withholding information after months had passed was "tenuous at best" and the public interest in confidentiality did not outweigh the public interest in disclosure.

This principle that "as a general rule, the public interest in maintaining an exemption diminishes over time" is further reinforced in Guardian Newspapers and Brooke v Information Commissioner.”

23. DBT recognised that the disclosure of a response to the consultation is in the public interest. It explained:

“There is an inherent public interest in transparency in the making of government policy and accountability of public authorities. There is a broad public interest in furthering public understanding of the issues with which public authorities deal. There is also a clear public interest in the work of government departments being transparent and open to

---

<sup>4</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2023/4025268/ic-199993-c810.pdf>

scrutiny to increase diligence and allow for public debate on the units of measurement policy. It is clear that the consultation attracted significant public interest due to the large volume of responses submitted and for this reason the outcome holds equal public interest.”

24. In favour of maintaining the exemption DBT advised:

“Disclosing the information would affect HMG’s ability to discuss and develop policies and to reach well informed conclusions relating to the consultation. At the time of the initial request and the request for an internal review the department was just starting the collective agreement process. Today, the policy work is ongoing relating to the consultation. There is a public interest in ensuring a response is issued in final form avoiding premature speculation on incomplete policy and considerations of alternate options. Premature disclosure could affect the full, candid, and proper deliberation of policy development, including the exhaustive exploration of all options. Releasing an unagreed, draft document that is still in the process of ongoing intra-government discussions would significantly undermine collective responsibility, which is absolutely essential to the proper functioning of government.

As the final policy is not yet agreed, there is a weighty public interest in preserving and protecting the safe space required to discuss and develop good policy and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies.”

**The Commissioner’s view**

25. The Commissioner agrees with DBT’s statement at paragraph 23. He considers that there clearly is a public interest in the disclosure of information which informs public participation in a policy which holds significance for a vast number of people, as demonstrated by the level of participation in the consultation.
26. He notes the complainant’s comments with regard to the passage of time and the withholding of information for an extended period of time. He accepts DBT’s explanation that the number of responses to the consultation was unexpected and it was unable to comply with the Consultation Principles, referenced by the complainant, and publish the government response within 12 weeks.
27. The Commissioner notes DBT’s explanation for the on-going delay from 18 November 2022 (which was 12 weeks after the consultation closed) which includes reference to the machinery of government changes and the gaining of collective agreement across government. He would comment that the machinery of government changes impacted several months after the response should have been published. In terms of achieving collective agreement, he notes that this has only been

underway since 5 April 2023, a significant length of time after the close of the consultation. The Commissioner is therefore concerned that a response has still not been published more than 15 months after the consultation finished, albeit 8 months at the time of the request, and there remains no clear timescale for publication.

28. The Commissioner understands that collective responsibility is the longstanding convention that all Ministers are bound by Cabinet decisions and carry joint responsibility for all government policy and decisions such that Ministers need to present a united front in defending and promoting agreed positions. However, in this case, having viewed the withheld information, he cannot understand how disclosure would undermine this united front by revealing details of diverging views, or undermining ongoing government unity and effectiveness. The Commissioner considered whether disclosure might result in the government being called upon to defend itself in advance of its finalised response or might result in ministers being pushed for their individual views on the subject in advance of a Cabinet decision. He also considered if disclosure might restrict the Cabinet's freedom to come to a different view and/or predetermine their decision. Having pondered on these points the Commissioner determined that he could not attribute much weight to them in his deliberations on collective responsibility given his consideration of the withheld information itself and the strength of the public interest in disclosure in the particular circumstances of this case.
29. The Commissioner accepts that the write round process is on-going and therefore the government response is not decided. Notwithstanding this the Commissioner considers that there is legitimately a distinction to be made between the context of collective responsibility and the public interest test depending on the nature of the information such that, for example, Cabinet Committee minutes in general would carry greater weight in terms of maintaining the exemption than write round information. In this case, the Commissioner is not persuaded that disclosure would impact the write round process and in any event the withheld information would provide insight into a response which has been long-awaited and such insight is very much in the public interest in terms of public participation in this policy formulation and development.
30. Having deliberated on the balance of the public interest the Commissioner has concluded that disclosure of the requested information will allow the public to have an idea of a possible course of action following the high level of public engagement and concern

regarding policy on imperial and metric measurement.<sup>5</sup> The policy paper "Brexit opportunities: regulatory reforms"<sup>6</sup> was published in September 2021 and the public has been waiting since then for the government's actions on this reform. In the specific circumstances of this case his decision is that the public interest in disclosure outweighs the public interest in withholding the information.

## **Section 22 – Information intended for future publication**

31. Section 22(1) of FOIA states:

"Information is exempt information if –

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)".

32. Section 22(1) is qualified by a public interest test.

33. The Commissioner considers the following points are relevant to the application of section 22:

- Is there an intention to publish the requested information at some future date?
- Was the information already held with a view to publication at the time the request was made?

---

<sup>5</sup> <https://www.theguardian.com/politics/2022/sep/18/metric-system-imperial-measures-consultation-brexit>

<https://metricviews.uk/2021/09/17/governments-return-to-imperial-set-to-make-uk-a-laughing-stock/>

<https://www.mirror.co.uk/news/politics/what-law-actually-says-imperial-27095926>

<sup>6</sup>

[https://assets.publishing.service.gov.uk/media/6143351bd3bf7f05b4562b49/Brexit\\_opportunities-\\_regulatory\\_reforms.pdf](https://assets.publishing.service.gov.uk/media/6143351bd3bf7f05b4562b49/Brexit_opportunities-_regulatory_reforms.pdf)



- Is it reasonable to withhold the information from disclosure until the intended date of publication?
  - Does the public interest favour maintaining the exemption or disclosing the information?
34. DBT explained that the intention to publish a response to the consultation was:
- “an expectation set at the point the consultation opened. Responses to consultations are expected in line with Consultation Principles.”
35. DBT confirmed that the published response will include the outcome of the consultation analysis and any next steps for the policy area.
36. The Commissioner accepts that there is, and was, an intention to publish a government response from the outset of the consultation, although this has not been achieved in the timeframe set out in the Consultation Principles and will be at some undetermined time.
37. As set out in paragraph 10, the government response is not yet finalised. The Commissioner notes his guidance<sup>7</sup> which advises:
- “If, in the course of preparing information for publication, some information is discarded or rejected, the exemption under section 22 will not cover that rejected material. Clearly, at the time the decision is made to discard that material, the public authority no longer holds the information with a view to its publication.”
38. DBT explained to the Commissioner that as the write-round process is still on-going nothing has yet been removed from the draft response, and that this draft is the information held in scope of the request, including at the time of the request. However, DBT cannot confirm whether the government’s published consultation response will be identical to the information held by DBT until collective agreement is reached. Consequently there was not, indeed there could not have been, a settled intention at the time of the request to publish all of the in-scope information held.

---

<sup>7</sup> <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

39. Therefore the Commissioner finds that section 22(1) is not engaged in this case. As section 22(1) is not engaged, it has not been necessary to consider the public interest test associated with this exemption.

## Right of appeal

---

40. 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)

41. 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.

42. 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**