

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

### **Decision notice**

**Date:** 24 May 2024

**Public Authority:** Department of Health and Social Care (DHSC)  
**Address:** 39 Victoria Street  
London  
SW1H 0EU

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

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1. The complainant has requested a list of responders to a consultation on planned advertising restriction for foods high in fat, salt and sugar along with the submissions from these responders. The DHSC provided the list of responders and the request was refined to the first five pages of submissions which the DHSC provided in redacted form with information exempt under section 35(1)(a) and 43(2) FOIA.
2. The Commissioner's decision is that the DHSC has failed to demonstrate that the section 43(2) exemption is engaged. Section 35(1)(a) is engaged but the public interest favours disclosure.
3. The Commissioner requires DHSC to take the following steps to ensure compliance with the legislation
  - Provide the complainant with a copy of the information it withheld from the submissions under section 35(1)(a) and 43(2)
4. The public authority must take these steps within 30 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

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5. On 21 July 2023, the complainant wrote to the DHSC in relation to a 2022 consultation with food companies, advertising bodies and industry associations about planned restrictions on advertising for foods high in fat, salt and sugar. The request was in the following terms:
  - 1) "Please provide a list of all food companies, advertising companies, and their industry bodies, who provided submissions to this consultation.
  - 2) Please could you provide a copy of these submissions."
6. The DHSC responded on 25 August 2023 confirming information was held in relation to the list of responders but some of this was being withheld under section 41 FOIA (information provided in confidence) as the DHSC stated it did not have permission from some of the responders to disclose their identities. For those responders who had published their responses, the DHSC cited section 21 FOIA (information accessible by other means) and provided links to access the information.
7. For the remaining information – the submissions – the DHSC relied on section 35 FOIA (the formulation and development of government policy) to withhold the information.
8. Following an internal review the DHSC provided a response to the complainant on 12 December 2023. The DHSC stated it was now able to provide the names of responders so was withdrawing its reliance on section 41. The DHSC reviewed its use of section 35 and found it could now disclose the first five pages of the consultation responses with some redactions remaining under section 35 for information relating to the draft statutory instrument (SI). The DHSC also introduced reliance on section 43 (commercial interests) for some information on the first page of the submission from Haribo.

## Scope of the case

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9. The complainant contacted the Commissioner on 26 October 2023 to complain about the way their request for information had been handled.
10. The Commissioner accepted the case for investigation without the completion of an internal review and the internal review was then completed on 12 December 2023. The scope of the Commissioner's investigation is therefore to consider if the DHSC has correctly applied

section 35 or 43 to withhold information from the pages of the submissions that have been disclosed.

11. The complainant made a further information request for the remaining pages of the submissions for five specific responders which is being considered by the Commissioner separately.

## **Reasons for decision**

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### **Section 43 – commercial interests**

12. Section 43 of FOIA states that a public authority is entitled to refuse to disclose information if its disclosure would or would be likely to prejudice the commercial interests of the public authority itself and/or a third party. It is subject to the public interest test.
13. The DHSC has provided the Commissioner with the Haribo submission as well as a copy of the consultation it had with Haribo about the submission. The comments Haribo are concerned about in the submission relate to their commercial strategies. The Commissioner accepts therefore that the information that has been redacted from the Haribo submission is commercial in nature.
14. Haribo has argued that the comments show a strategy they enacted with their customers that could be advantageous to competitors and encourage anti-competitive behaviour. It also provides an insight into how Haribo compares itself with rival products and gives specific information about products that was not intended to be made public. One sentence also reveals detail about Haribo's advertising strategy.
15. The Commissioner has viewed these statements and considers they are quite brief and generalised statements. It is not clear from Haribo or the DHSC's submissions how this information would be likely to prejudice Haribo's commercial interests given the lack of detail and the broad statements made. For section 43(2) to be engaged a public authority must be able to demonstrate there is a clear causal link between the information and the envisaged prejudice and in this case the Commissioner has not been persuaded that there is a real risk of prejudice to Haribo's commercial interests if the information withheld on the first page of the submission was disclosed.
16. As such the Commissioner finds that the section 43(2) exemption is not engaged and the DHSC should disclose this information in the Haribo submission.

## **Section 35 – formulation and development of government policy**

17. 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.”

18. 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.
19. 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.
20. The Commissioner asked the DHSC to provide further detail explaining how the consultation fed into the policy formulation/development process and how much weight was given to opinions expressed in the consultation responses when policy decisions were being considered.
21. The DHSC explained that the Government will introduce a UK-wide 21:00 TV watershed for advertising less healthy products and a restriction of paid-for advertising of these products online from 1 October 2025. Government and regulators are working through the consultations, finalising guidance and laying regulations.
22. The 16 week technical consultation ran between December 2022 and March 2023 and invited interested parties to comment on the details of the draft SI. This included specific questions regarding the clarity of products, businesses, and services in scope within the draft regulations.
23. The DHSC explained many of the responses received were comprehensive and detailed and the responses and feedback are now being considered by Government officials to ensure the final regulations are clear, robust and enforceable before being laid before Parliament.
24. The responses have been categorised by stakeholder and then themed, grouped, analysed and interpreted. The Government response will outline specific policy decisions and feedback shared as part of this

consultation may result in changes to the wording of the regulations or to further consultations.

25. The DHSC states that for these reasons the text within the consultation responses that directly relates to the draft regulations has been redacted as this was a live policy area and continues to be a live policy area.
26. There is no question the information withheld from the submissions is part of the consultation response intended to aid the development of a robust regulation and SI to support the Government's new stance on advertising. The Commissioner therefore accepts the information is directly linked to the formulation of government policy in this area.
27. Consequently, the Commissioner finds that the DHSC was entitled to engage the exemption in section 35(1)(a).

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

28. The DHSC accepts that there is an inherent public interest in transparency and accountability of public authorities. It also recognises the broad public interest in furthering public understanding of the issues which public authorities deal with. There is a clear public interest in the work of government departments being transparent and open to scrutiny to increase diligence and particularly in the disclosure of factual information which has been used to provide an informed background to decision-taking.
29. It recognised that nutrition, obesity and in particular, the role of the food industry, is a high profile issue which generates significant discussion, and attracts public, parliamentary and media attention. The Government published and consulted on a draft version of the secondary legislation for the further advertising regulations that are due to come into force in October 2025. There is public interest in understanding stakeholder views on the clarity of the regulations in detailing the products, businesses and services in scope, as asked as part of the consultation, and any subsequent amendments to these regulations.
30. The complainant argues there is a clear public interest in transparency that outweighs any generic 'safe space' arguments put forward by the DHSC. They argue that submissions put forward by interested parties, particularly corporations, are not likely to be disinterested and amount to impartial policy advice but are an exercise in lobbying in the interests of the company. Whilst the complainant acknowledges that corporate interests can in some cases align with public interests, such as when a policy will have little public benefit but reduce in losses to a company,

but this issue is very much in the public interest with a significant benefit to the public.

31. The complainant argues that transparency about what companies are saying to the Government about policies is important to avoid a democratic deficit with the company's views not being challenged even if they minimise public health issues or make unreasonable claims about the costs of the policy on their business.
32. Statistics quoted by the complainant indicate 37.8 percent of 10-11 year olds are obese or overweight and the complainant argues this shows that childhood obesity is a major issue causing the UK, the NHS and ultimately the taxpayer huge costs.
33. The complainant believes measure to restrict High in Fat, Salt and Sugar (HFSS) advertising are an important part of the policy mix needed to target childhood obesity. 80 percent of adults back the idea of new laws to prevent the advertising of unhealthy food on television and online<sup>1</sup> but advertising restrictions are repeatedly delayed and it is not clear why. The complainant considers if there is any corporate lobbying that is leading to these delays then it is in the public interest to know and to hold the Government to account.
34. In support of their position the complainant has pointed to sections of the redacted submissions that were disclosed that show that lobbying by advertisers and food companies played a significant role in delaying the policy. In particular, in the Haribo submission it states that it "appreciated that government listened to the concerns of the food manufacturing sectors and advertisers", and the complainant suggests that it was this pressure that led to the delay, yet publicly, the government argued it was a cost-of-living concern.
35. As such the complainant argues that given the apparent influence of the food and advertising industries on the policy process, there is a clear public interest in knowing what it has been telling government to influence it in delaying this policy.
36. Countering the DHSC's argument that because the policy is still live there is a significant public interest in protecting official's safe space to consider the formulation of policy; the complainant asserts that there is no clear argument as to how disclosing this information would cause civil servants to offer different policy advice in this specific case.

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<sup>1</sup> [Voters have big appetite for laws curbing junk food adverts \(thetimes.co.uk\)](http://www.thetimes.co.uk)

37. It is argued that it is hard to see how the redacted information would meaningfully prejudice the policy formation process for DHSC civil servants, given these are simply proposals on what changes the lobbyist wishes to see.

### **Public interest in favour of withholding the information**

38. The DHSC explained that the secondary legislation for the further Advertising restrictions is to be laid before Parliament at least 6 months prior to its implementation on 1 October 2025. The wording included in the regulations is not yet finalised and Government are working through stakeholder feedback on the draft regulations in order to finalise the wording. A summary of stakeholder views will be published in the Government response, and in particular, common themes raised will be drawn out and responded to. Individual responses are not published to maintain a level of anonymity; however, figures are included to demonstrate to the public how many stakeholders were in agreement with particular points raised.
39. The DHSC argues there is significant public interest in protecting the Government's ability to discuss and develop policies and to reach well-formed conclusions. It considers the Commissioner has recognised this argument before and accepts that policy development needs some degree of freedom to enable the process to work effectively.
40. The DHSC believes there is a strong public interest in protecting information where release would be likely to have a detrimental impact on the ongoing development of policy. There is also a strong public interest in protecting against encroachment on the ability of ministers and/or officials to formulate and develop policy options freely and frankly.
41. The DHSC considers the information relates to areas of live policy development. Once the Government consultation response is published and subsequent policy decisions confirmed it can disclose information relating to these details. The only exception to this would be if there are any further questions for stakeholders or considerations following the publication of this consultation where the decisions are still live.
42. It argues it is in the interest of the public to finalise secondary legislation that is effective, enforceable and fit for purpose. By disclosing commercially sensitive information, submitted by respondents to support the development of the restrictions but not for the public domain, it may compromise the integrity of consultation process and deter people from feeling secure in submitting helpful and accurate responses to future consultations.

## **Balance of the public interest**

43. The purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures that 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.
44. Whilst the Commissioner accepts that the public interest in maintaining the exemption will be strongest while the policy is still being formulated or developed, this does not convert the exemption to an absolute one where information will not be disclosed simply because of the stage that the policy process has reached. There will be occasions where the government policy is at the formulation or development stage and the public interest in disclosure is sufficiently strong that the public interest in maintaining the exemption will not outweigh this.
45. The Commissioner's guidance on section 35(1)(a)<sup>2</sup> clearly sets out that the relevance and weight of the public interest arguments depend entirely on the content and sensitivity of the information itself and the effect of its release in all the circumstances of the case. The guidance confirms that the Commissioner's position is that arguments that routine publication of particular types of information are not in the public interest are misconceived as each case must be considered on its individual circumstances.
46. The formal consultation on the intention to implement a 9pm watershed for advertising HFSS products initially ran in 2019 and a second consultation followed in 2020. The formal consultation response was published in June 2021<sup>3</sup>, this announced the UK-wide policy of introducing the 9pm watershed as well as included policy detail on businesses in scope of the regulations, how products will be defined and any exemptions to the policy.
47. Secondary legislation was then proposed to take forward some policy elements. This would cover defining products in scope of the advertising restrictions and defining various services. Draft regulations were published and a consultation launched on the specific text of the regulations to ensure they were clear and unambiguous.
48. It is the consultation responses on the proposed wording of the SI that is the subject of this request. The Commissioner notes that this

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<sup>2</sup> [Section 35 - Government policy | ICO](#)

<sup>3</sup> [Introducing further advertising restrictions on TV and online for products high in fat, salt and sugar: government response - GOV.UK \(www.gov.uk\)](#)



consultation was limited in scope and it was made clear that any general comments about the wider policy would not be considered.

49. The Commissioner considers the policy development was quite advanced at this stage – the overall policy aims had been made clear and public and what remained was ensuring the secondary legislation (the SI) was appropriately worded and clear as to what/who was covered by the imposed regulations. Clearly the parties most likely to engage with this consultation would be those most likely to be impacted ie businesses/services in the industry.
50. This consultation ended in March 2023 and the request was made in July 2023. The safe space needed to consider the responses and whether there should be any changes to the secondary legislation before being laid before Parliament may still have been needed at this time as it was relatively close to the end of the consultation period. There is a public interest in preserving this process to allow for debate and deliberation and to ensure policies are effectively made.
51. The complainant has pointed out that implementation of the Government policy in this area has continually been delayed. The DHSC announced in December 2022 that implementation would be delayed until 1 October 2025. The Commissioner recognises that the public interest in transparency is increased to an extent because of this. The original date for the new advertising restrictions to take effect was 1 January 2023 so there is a public interest in understanding what progress there has been and in understanding what issues are being raised by industry bodies and businesses that may be leading to extended debates on the drafting of the secondary legislation.
52. The Commissioner considers there is a clearly a strong public interest in disclosure of information that would improve the public understanding of this important policy and how it is being developed given its role in the Government's overall strategy to combat childhood obesity and the risks obesity presents to the whole population and the health service.
53. The disputed information provides insight and understanding of how the policy and associated legislation is being developed, the factors considered and the quality of the information used to inform the policy process. The complainant has expressed concerns that the businesses who have responded to the consultation are essentially 'lobbying' and exerting influence on the policy process. The Commissioner considers disclosure of the information in this case will allow the public the opportunity to scrutinise the submission themselves and provide transparency in the process at an early opportunity rather than retrospectively.

54. The extent to which disclosure would impact on engagement with the process is arguable both now and in the future. Given there is a clear interest for responders in getting their views across it is hard to see how they would feel less likely to contribute to future consultations if their views and inputs were disclosed to the public once the consultation has closed. The Commissioner recognises there is validity to this kind of 'chilling effect' argument in many circumstances but given the specific scenario here and the importance and impact of the proposed advertising regulations to the responders it is difficult for the Commissioner to envisage that disclosure would prevent them from contributing to further debates on this policy.
55. Whilst the Commissioner accepts that there is some weight to the public interest arguments regarding allowing the DHSC the space to develop policy away from external interference, the Commissioner is not persuaded that this is sufficient to outweigh the strong public interest in disclosure.
56. The Commissioner therefore requires the DHSC to disclose the withheld information.

## **Right of appeal**

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57. 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)

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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