Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **26 March 2013**

Public Authority: **Department for Business, Innovation and Skills**
Address: **1 Victoria Street**
London
SW1H 0ET

Decision (including any steps)

1. The complainant has requested information connected to a Select Committee report on Pub Companies. The public authority has provided some information but withheld the remainder citing the exemptions at sections 29, 35(1), 40(2), 41, 42 and 43(2) of the FOIA; the complainant did not contest the citing of section 40(2). The Commissioner's decision is that, except for document 175, sections 35, 42 and 43(3) are all engaged and the public interest in maintaining these exemptions is upheld.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - It should disclose the document numbered 175.

3. 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.

Background

4. The complainant has made a request on behalf of the "All Party Parliamentary Save the Pub Group". It relates to the Government

response to the Business Innovation and Skills Select Committee Report on Pub Companies[1] which was published in November 2011.

Request and response

5. On 2 December 2011, the complainant wrote to the public authority and requested information in the following terms (the full wording of the request has been included to put it into context):

> *"On behalf of the Save the Pub Group, I am making a freedom of information request which is set out below. This relates to the Government response to the Business Innovation and Skills Select Committee Report on Pub Companies.*
>
> *As I am sure you are aware, there has been significant concern within the Governments response to the Select Committee report from many within the pub sector, as well as many MPs. Particular concern has been raised about the process by which the Department for Business Innovation and Skills both negotiated and worked with only some organisations (and excluded others), in what is now being presented as an 'industry' backed solution. There is also concern about what organisations and individuals outside BIS directly or indirectly contributed to the drafting of the Governments response. It would appear that whilst the BBPA [British Beer and Pub Association] were involved in the negotiations on producing a solution to the serious problems in the pub sector, the Independent Pub Confederation (IPC), representing the other side of this long standing dispute had no part in the negotiations.*
>
> *This is deeply concerning not least because as you yourself have said, this is a trade dispute, however, the negotiations that have gone on with regards to bringing forward a solution to this appear to have only involved one side of the dispute. The views of the BBPA, who represent the pub companies, clearly at are odds those* [sic] *of the IPC, hence the reason the BBPA has welcomed the response and the IPC have criticised it. This we and the IPC believe, renders the Government response illegitimate.*

[1] http://www.official-documents.gov.uk/document/cm82/8222/8222.pdf

Furthermore, an allegation has been made to me, as [position removed]*, that* [name and positions removed]*, in fact had sight of the Government response as far as a month in advance of its publication. This is clearly an extremely serious allegation and if it proves to be the case would further bring into question who has been involved in and who has contributed to the Government's response to the Select Committee report. This is not of course to suggest that BIS shared the draft report with him or any other pubco employed individuals directly, in which case, if it is true then, the report must have been sent via another organisation and individual who did have a copy of the draft report and has passed it on. If that is the case, then I wish to know if this was with the knowledge of any BIS Minister, official or special adviser, or anyone from yours or a related office.*

What has emerged is the British Beer and Pub Association did have a copy of the Government response before publication, as they issued their press release on the response at 09.48 on the morning of publication, prior to the actual publication of the report at 10.30am! It is notable that IPC organisations, the Select Committee and the Save the Pub Group did not have copies before publication, which makes the BBPA having one entirely unacceptable and considering the concern about the unfair process that has led to the response, very worrying.

On behalf of the Save the Pub Group I therefore request, under Freedom of Information legislation, the following:

- *Information on and details of any written correspondence related to or following any meetings between Ministers (and their office staff, departmental or parliamentary), officials and special advisers at the department, since the Select Committee Report was published on September 20th 2011 and a full list of all individuals involved in these meetings.*

- *Information on who, aside from Ministers, officials and Special Advisers, had access to or sight of the report or any drafts of it or sections of a draft prior to its publication at 10.30 on Thursday 24th of November 2011. We require full names of all individuals and organisations and date that they received or saw any parts of drafts of the report or the whole draft or the final report itself.*

- *Which BIS officials, Ministers and special advisers authorised distribution to, if anyone, beyond the individuals who were set*

or shown the draft report and who else if anyone was asked to comment on or contribute to any discussions, meetings or correspondence of proposals that influenced the final response.

- *Any and all written correspondence of any kind, and any associated documents or attachments between Ministers (and their office staff), BIS officials and special advisers between the BBPA and any company or individual of a company who are BBPA members.*

Given the speed at which this issue is moving, The Save the Pub Group would appreciate a response as soon as possible on the points that I have laid out above to clarify what I am sure you will agree, is an important matter and a cause of concern for many inside and outside the pub sector".

6. The public authority responded on 3 January 2012. It provided some information and withheld some - contained in 18 documents - citing various exemptions.

7. The complainant requested an internal review on 28 February 2012; he did not contest the citing of section 40(2). The internal review was provided on 30 March 2012 and the public authority maintained its position.

Scope of the case

8. On 17 September 2012, the Commissioner received correspondence from the complainant dated 29 July 2012. In this he complained about the way his request for information had been handled but did not include the necessary background information. Following further correspondence, the complainant provided this on 23 October 2012. The complainant contested the public authority's citing of the various exemptions to the remaining withheld information; he did not contest the citing of section 40(2) so this has not been considered.

9. The public authority was first made aware of the complaint when the Commissioner wrote to it on 5 November 2012. Later, during the investigation, it transpired that it was unable to locate three of the withheld documents as these had been automatically deleted from its email system. As he has been unable to view these documents the Commissioner is unable to make a sound determination about them so he has removed them from the scope of his investigation. He has made further observations about this issue under *'Other matters'* at the end of this notice.

10. During the course of the investigation, the public authority added the exemption at section 29 in respect of one document. This has been considered below.

Reasons for decision

Section 35(1) – formulation of government policy, etc

11. Most of the information has been withheld under section 35(1)(a), only one document being withheld under 35(1)(d). However, it is of note that the information contained in the document withheld under subsection (1)(d) is also part of two other documents which are withheld under section 35(1)(a), being the precursor to two subsequent email chains. Therefore, if the Commissioner concludes that the associated two emails are properly exempt under section 35(1)(a) he will not consider the document in isolation under section 35(1)(d).

Section 35(1)(a)

12. Section 35(1)(a) of the FOIA provides that information held by government departments is exempt if it relates to the *"formulation or development of government policy"*.

13. Section 35(1) is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.

14. The Commissioner has read the withheld information and is satisfied that it all relates to the development of government policy. He is also satisfied that, at the time of the request, it was a 'live' policy that was still in development; this remains the case.

15. The Commissioner has, therefore, concluded that the withheld information relates to the formulation or development of government policy and that the exemption is engaged.

16. As section 35(1)(a) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

17. In its refusal the public authority stated:

"There is a public interest in ensuring that Ministers and officials feel able to explore all plausible scenarios, setting the scene in as full a way as possible".

18. At internal review the public authority added:

"We acknowledge that there is a clear public interest, referred to in your original request, in knowing who the Government spoke to, what topics were discussed and whether the Government released information to some parties but not others. These issues are all addressed in information released under your previous request and which we have since made publically available".

19. In correspondence with the Commissioner the public authority also acknowledged the inherent public interest in ensuring transparency in the policy-making process.

20. The complainant also provided the following argument to the Commissioner in support of disclosure:

"Despite the assertions made by The Department, the Save the Pub Group continues to feel there is a clear public interest case in releasing these documents. The fact that despite the Coalition Government's promises to implement the recommendations of the Select Committee, it appears they had no intention of doing so. The fact that from the sections of the Freedom on Information request that were released it was clear the Minister, [name removed]*, was discussing a self regulatory avenue with the British Beer and public authority Association (BBPA), only one side to the dispute, prior to the Select Committees final report. This seems to demonstrate there was never any intention of this promise being carried through".*

Public interest in favour of maintaining the exemption

21. In its refusal the public authority stated:

"We believe that if this information were made public, frankness and policy development would inevitably be inhibited and the Department would be prevented from taking decisions based on the fullest understanding of the issues involved".

And,

"If Ministers thought that their policy discussions would be revealed publicly after a decision has been made, the nature of those discussions could be very different. It might deter Ministers and officials from having free and frank discussions about all

available possibilities in relation to any given policy or idea. Ministers and their officials need space in which to develop their thinking. In our view, therefore, the balance of the public interest lies in withholding this information".

22. At internal review the public authority added:

"… the exact advice given to Ministers, the working of ministerial offices, and the detailed legal advice given to Government Ministers and officials or to other organisations, is not connected to the core public interest of to whom the Government spoke and corresponded. On the other hand, in each of these cases, releasing advice could threaten free and frank advice to Ministers by officials in future".

23. The public authority further argued that the requested information:

"… only affects a small part of the wider hospitality sector, meaning that it is not of much public interest outside the sector or even to many within this sector".

And that:

"… the policy has no impact on Government spending, a limited impact on Departmental resources, no direct regulatory burden on business and no direct impact on consumers".

Balance of the public interest arguments

24. When balancing the opposing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.

25. The exemption at section 35(1) of FOIA is intended to prevent harm to the internal deliberative process of policy making. In the Commissioner's view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.

26. The Commissioner considers that the principal argument presented by the public authority is essentially about the need for a "safe space" to formulate policy and to have free and frank discussions. Safe space arguments are often made within the context of the application of this

exemption. Summarised in *Scotland Office v the Commissioner* (EA/2007/0070) as *"the importance of preserving confidentiality of policy discussion in the interest of good government"* this covers the idea that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.

27. In *Scotland Office v the Commissioner* (EA/2007/0128) the Tribunal again recognised the importance of the safe space concept, but warned that "*information created during this process cannot be regarded per se as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption*". The Commissioner agrees with this view and notes that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration.

28. When considering these 'safe space' arguments in relation to the public interest test, the Commissioner will look at the age of the requested information and whether the formulation and development of the policy in question was still underway at the time of the request. In his view, safe space arguments are only relevant, with regard to maintaining the exemption, if, at the time of the request, policy formulation and development was ongoing. This is because such arguments focus on the need for a private space to develop live policy.

29. The public authority also advised the Commissioner that this is "*very much a live policy still in development*". Having viewed the withheld information, the Commissioner accepts that it relates directly to the formulation and development of policy. He also accepts that the process was ongoing at the time of the request. He is therefore satisfied that the argument that a safe space was needed to protect the policy making process is a relevant one and he affords it considerable weight.

30. In consideration of the public authority's argument that there is not much public interest about the issues outside the sector concerned, the Commissioner notes that the request has been made on behalf of All Party Parliamentary Save the Pub Group. Its formation was recognised by Parliament[2] and the Commissioner therefore considers it to have a serious purpose which, as it is supported by cross-party Members of Parliament, must necessarily fall to represent a genuine public interest in related matters. He therefore does not afford any weight to this particular argument.

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[2] http://www.parliament.uk/edm/2008-09/715

31. The Commissioner notes the public authority's arguments that the public interest in disclosure is diminished by the policy having no impact on spending or resources, no regulatory burden and no direct impact on consumers. The Commissioner does not accept that because there is no actual 'cost' or 'burden' attributable to the formulation of the policy that there is therefore no interest to the public in knowing its content. Indeed, if that were the case then many policies would be likely to fall under this categorisation as they can often apply to internal processes. In any event, the fact that a policy is being considered in the first place means that there will necessarily be some costs involved as the issues are being considered by those who have salaries paid for by the public purse. He therefore finds that this argument against disclosure fails. Furthermore, in respect of the comments that the policy has no direct impact on consumers so there is no interest in its disclosure, the Commissioner notes that there would nevertheless be an indirect impact on consumers if the outcome of the policy is to effect changes in the hospitality sector. He considers that this would necessarily be the natural impact of such a policy, whether direct or not, and this will in turn have an impact on consumers. He again concludes that this argument fails.

32. The Commissioner also notes the complainant's assertion that the processes being followed whilst formulating the policy are flawed and not representative of all the interested parties. He recognises that it is the complainant's belief that this is apparent from information which has already been provided to him under the FOIA.

33. However, it must be borne in mind that the Commissioner is unable to comment on those parties who have or have not been involved in the process. It is not in his jurisdiction to consider and comment on whom the public authority chose to consult or whether or not the process was representative of all the relevant parties. However, he does note that the public authority has made available some of the information requested and this includes the names of organisations concerned and their representatives. He does also note that the complainant was advised that there had been discussions with various parties in the industry as *"an essential part of securing an industry solution"*.

34. Having viewed the withheld information, the Commissioner can see no evidence to support the complainant's concerns that details about any particular parties have been deliberately withheld. The Commissioner is of the opinion that the withheld information has been considered in connection with the exemption applied rather than being withheld in an attempt to 'hide' the involvement, or lack of involvement, of any particular party.

Conclusion

35. In reaching a conclusion in this matter, the Commissioner has taken account of the content and context of the withheld information, and, against that background, has considered whether its release would contribute to the general public interest in openness and transparency. In his view, the weight given to arguments in favour of disclosure will depend largely on the need for greater transparency in relation to the subject matter and the extent to which disclosure of the information in question will meet that need.

36. The Commissioner has already concluded that the policy process was still live at the time of the request and that the requested information relates to that policy making. In light of this, having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at that time was of sufficient significance for him to conclude that maintaining the exemption outweighs the public interest in disclosure. Accordingly, he has determined that the public authority was entitled to withhold the requested information under section 35(1)(a).

Section 35(1)(d)

37. Section 35(1)(d) provides that information held by government departments is exempt if it relates to the "operation of any Ministerial private office".

38. As the information contained in the document withheld under section 35(1)(d) is also contained, in its entirety, in two documents which the Commissioner has concluded are exempt from disclosure under section 35(1)(a) he has not gone on to consider this subsection.

Section 42 – legal professional privilege

39. This exemption has been cited in respect of part of one document.

40. Section 42(1) states that:

> *"Information in respect of which a claim to legal professional privilege … could be maintained in legal proceedings is exempt information."*

41. Legal Professional Privilege (LPP) protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal (in the case of *Bellamy v the Commissioner and the DTI*) as:

> *"a set of rules or principles which are designed to protect the*

confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and their parties if such communication or exchanges come into being for the purpose of preparing for litigation."

42. There are two types of privilege: litigation privilege and legal advice privilege. The public authority is claiming that the information in this case relates to legal advice privilege.

43. Advice privilege will apply where no litigation is in progress or being contemplated. In these cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice. Communications made between adviser and client in a relevant legal context will attract privilege.

44. The Commissioner's view is that for LPP to apply, information must have been created or brought together for the dominant purpose of litigation or for the provision of legal advice. With regard to 'advice privilege' the information must have been passed to or emanate from a professional legal adviser for the sole or dominant purpose of seeking or providing legal advice. Advice from professional legal advisers in this context can still be regarded as privileged if the normal criteria are met.

45. The Commissioner has obtained and considered a copy of the requested information. It is internal advice passed from one of the public authority's legal professionals to one of its policy officials about the binding nature of a Code which formed part of the basis for the policy under consideration. He is satisfied that the exemption is therefore engaged.

46. Though the exemption is engaged the requested information should still be communicated to the complainant unless in all the circumstances of the case the public interest in maintaining the exemption outweighs that in its release.

47. The public authority advised the complainant as follows:

"Protecting the principle of legal professional privilege is in the public interest, as it ensures that legal advice can be given to Departments freely and frankly, to enable decisions to be made in a fully informed legal context. Without such comprehensive advice the quality of the Government's decision making would be much reduced because it would not be fully informed.

Disclosure of legal advice has a high potential to prejudice the Department's legal interest – both directly by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been presented frankly and impartially. Neither of these is in the public interest. The former could result in serious consequential loss, or at least a waste of resources in defending unnecessary challenges. This may cause poorer decision making because decisions themselves may not be taken on a fully informed basis".

48. The Information Tribunal, in *James Kessler QC v Commissioner* (EA/2007/0043), laid out with clarity the following public interest factors in favour of maintaining the exemption at section 42:

"*a. There is a strong public interest in maintaining legal professional privilege. That is, to an individual or body seeking access to legal advice being able to communicate freely with legal advisors in confidence and being able to receive advice in confidence.*
b. If legal advice were routinely disclosed, there would be disincentive to such advice being sought and/or as a disincentive to seeking advice based on full and frank instructions.
c. If legal advice were routinely disclosed, caveats, qualifications or professional expressions of opinion might be given in advice which would therefore prevent free and frank correspondence between government and its legal advisers.
d. Legal advice in relation to policy matters should be obtained without the risk of that advice being prematurely disclosed.
e. It is important that legal advice includes a full assessment of all aspects of an issue, which may include arguments both for and against a conclusion; publication of this information may undermine public confidence in decision making and without comprehensive advice the quality of decision making would be reduced because it would not be fully informed and balanced.
f. There is a significant risk that the value placed on legal advice would be diminished if there is a lack of confidence that it had been provided without fear that it might be disclosed".

49. Having regard to the application of the public interest test the Commissioner notes that the legal advice is bespoke on this occasion and is concerned with a matter which has a bearing on government policy; he finds that these factors weigh in favour of maintaining the exemption. The Commissioner considers that the public is better served by public authorities being able to obtain legal advice that is not inhibited or constrained by the knowledge or fear that there is a likelihood that it will not remain private between the lawyer and those that s/he advises.

50. Conversely, the inherent policy which relies, to some extent, on this advice affects a fairly large section of the public and thus would strengthen the public interest factors in favour of the advice being publically disseminated. Furthermore, the public authority had already publically stated that the Code referred to in the legal advice was legally binding before the request was made. This therefore diminishes the harm in its disclosure as the conclusion of the advice has been made available.

51. The complainant raised the following concerns with the Commissioner regarding this exemption:

> *"There is also considerable concern from the Save the Pub Group and many within the pub sector about what, if any, legal advice was sought by the* [public authority] *in relation to whether the framework code was legally binding. There was a 'summary' of opinion from a lawyer employed by the BBPA in the* [FOI] *request, however … whilst there may have been an in house opinion by BIS, this too has never been released. This could well be considered a trade dispute and as such it seems inappropriate to accept at face value the opinion of the BBPA lawyer, when we consider the BBPA represent the large pub companies and, therefore, only one side of the argument. We therefore believe it important in the public interest, to see that the legal opinion on whether the framework code was legally binding or not, was only sought from a lawyer representing the large public authority companies was accepted at face value".*

52. The Commissioner recognises the complainant's concerns about the legal advice; however, he has personally viewed the information and, as stated above, he can confirm that it is internally generated. This should be sufficient in itself to alleviate the complainant's concerns on this particular issue.

53. In the circumstances of this case, outside the generic arguments for releasing the advice the Commissioner finds there is little to suggest that the public interest is better served by releasing the information. Those strong factors for maintaining the exemption prevail in this matter and accordingly he finds that the public authority dealt with this element of the complainant's request correctly.

Section 43 – commercial interests

54. The remaining three documents which have not already been considered above have all been withheld under this exemption.

55. Section 43(2) of FOIA states that:

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

56. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner believes that three criteria must be met. First, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

57. In relation to the commercial interests of third parties, the Commissioner does not consider it appropriate to take into account speculative arguments which are advanced by public authorities about how prejudice may occur to third parties. Whilst it may not be necessary to explicitly consult the relevant third party, the Commissioner expects that arguments which are advanced by a public authority should be based on its prior knowledge of the third party's concerns.

The applicable interests

58. Two of the three withheld documents are from a named brewery and they clearly relate to its own commercial and business matters. The nature of the harm envisaged, ie the prejudice to the commercial interests of this party, clearly relates to the interests which section 43(2) is designed to protect. The Commissioner is therefore satisfied that this element is met.

59. However, the third document contains the personal 'views' of an unknown party, from an unknown company, about the related subject matter. Whilst it does contain some commercial facts and figures this information can also be found in the public domain. Whilst the Commissioner understands that the source of this document has been contacted and it does not wish the information to be disclosed, he does

not agree that the public authority can demonstrate that there are any applicable interests associated with the information and he does not find the exemption to be engaged. (As a further exemption has also been cited in relation to this document it will be considered again at a later point).

The nature of the prejudice

A causal link

60. The Commissioner has considered the content of the two related documents. He is of the opinion that they are sufficiently detailed and 'sensitive' for the potential prejudice to the brewery's commercial interests to be of concern. It shows levels of financial details and business plans that would be advantageous to competitors and he therefore concludes that there is a causal relationship.

The likelihood of prejudice

61. In establishing whether prejudice *would* or *would be likely* to occur, it is necessary to consider:

- the range of circumstances in which prejudice could occur (for example, whether it would affect certain types of people or situations);
- how frequently the opportunity for the prejudice arises (ie how likely it is for these circumstances to arise); and,
- how certain it is that the prejudice results in those circumstances.

62. The public authority has confirmed to the Commissioner that it believes that the prejudice to the brewery concerned *would* occur. The Commissioner considers this to mean 'more probable than not'; in other words, there is a more than 50% chance of the disclosure causing the prejudice, even though it is not absolutely certain that it would do so.

63. The Commissioner notes the public authority's assertion that it has:

> *"… considered the impact that releasing the information would have on the effective conduct of relations in maintaining trust and confidence between the Department and companies who engage with us. If the Department does not respect such confidences, its ability to engage meaningfully with companies and other stakeholders will be prejudiced".*

64. The public authority has also liaised with the brewery concerned and has shared that party's concerns with the Commissioner.

65. It is apparent to the Commissioner that the information that was provided to the public authority is sufficiently detailed whereby its disclosure would be advantageous to the brewery's competitors as it includes details of an internal value assessment and other detail about its business practices. This would place it at a distinct disadvantage compared to its competitors and the Commissioner therefore considers that the risk of its disclosure to be real and significant rather than merely speculative.

66. Whilst he is less convinced with the public authority's generic arguments about the impact disclosure would have on its future relations with third parties he is convinced about the harm that *would* occur to the brewery itself. The Commissioner has therefore concluded that the risk of prejudice is real and the exemption is therefore engaged.

Public interest test

67. Section 43(2) is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the interest in maintaining the exemption outweighs the public interest in disclosing the information. If the public interest arguments are equally weighted, the information must be disclosed; to that extent the legislation effectively contains an assumption in favour of disclosure.

Public interest arguments in favour of disclosure

68. The public authority has recognised the general public interest in disclosure as it provides greater transparency and makes Government more accountable for its actions.

Public interest in maintaining the exemption

69. Against disclosure the public authority has argued:

> *"account has to be taken of the need to ensure that the commercial interests of third parties are not prejudiced or undermined by disclosure of information which is not common knowledge, and which could adversely impact on future business".*

And:

> "*It contains detailed financial information regarding the operation of the business concerned and involves information that is a key way in which businesses of this kind compete. Release of such information could be price sensitive and – in extremis – could*

provide highly valuable information for someone seeking to make an offer for the business".

70. In its internal review the public authority also comments that there is no public interest in releasing the information because:

> "*The details of a company's finances do not materially affect the fact that the Government spoke to that company and discussed these matters in broad terms.*"

71. The Commissioner also notes that when it provided the information to the public authority the brewery stipulated that it was "*extremely commercially sensitive*" and "*potentially very damaging*" and it asked the public authority to respect its confidentiality.

Balance of the public interest

72. The Commissioner accepts the general public interest in disclosure of information which has been used by a public authority to assist in determining policy.

73. However, on this particular occasion, he also notes the financial detail of what has been provided by the brewery concerned coupled with that party's understanding that the information was considered to be 'commercially sensitive' and that it would be treated accordingly.

74. Whilst he recognises that the public may be interested in disclosure of the information this is not the same as disclosure being *in* the public interest. Disclosure would show that there has been consultation with a brewery which was prepared to provide a lot of detail to support its own position. Conversely, the detriment to the brewery concerned would, in the Commissioner's view, place it at a distinct disadvantage in the market place.

75. The Commissioner therefore concludes that disclosure of this information is not in the public interest and the public authority was correct to cite the exemption.

Section 29 – the economy

76. The public authority has cited section 29(1)(a), at a late stage, to cover one document.

77. This exemption provides that information is exempt if its disclosure would, or would be likely to, prejudice the economic interest of the United Kingdom or any part of the United Kingdom.

78. This is a prejudice-based exemption which means it should be considered in line with the methodology stated at paragraph 56 above.

The applicable interests

79. Some of the withheld information relates to a person's views on the market and the position of the UK in relation to that. To that limited extent the information does relate to the UK economy.

The nature of the prejudice

80. The public authority has advised that the document is the personal view of someone of high-standing in the industry; the party is not named and neither is their employer. It has been described as their: *"personal view of the commercial situation and its bearing on the policy issues being considered"*.

81. It goes on to acknowledge that some of the information is in the public domain but that releasing the author's own views to this regard could have: *"… a significant commercial impact on both the shares of that company and the wider industry"*. The Commissioner does not accept this view as it is not possible to deduce the author or their employer.

82. The Commissioner is limited in the further arguments offered as repeating them would reveal the content of the withheld document. However, the arguments suggest that releasing the information could affect the share prices of a number of international companies and potentially disrupt investment in the UK.

83. Having read the associated document and undertaken online searches in an effort to ascertain what is already known and what would be revealed by disclosure, the Commissioner considers that much of the information is already in the public domain, for example, named businesses which have experienced difficulties. The majority of the remaining information is a 'personal opinion' of an unknown party.

84. The Commissioner does not accept that there is sufficient detail in the withheld document for any potential prejudice to the UK's economy to occur. As he can find no causal link he concludes that the exemption is not engaged and he will not consider it further

85. Accordingly, the document withheld under this exemption should be disclosed.

Other matters

86. Although they do not form part of this decision notice the Commissioner wishes to highlight the following matters.

Deletion of documents

87. During his investigation the public authority made the Commissioner aware of the deletion of three documents which formed part of the withheld information. It explained to him:

> *"Unfortunately it has not been possible to locate three of the documents withheld at the time of the review. This is because these documents have been deleted by our email system under the automatic one year deletion policy and, unfortunately, were not saved permanently on Matrix, the electronic records management system. Departmental policy is for all information falling within the scope of an FOI request to be saved in Matrix and it is with regret that this was not done on this occasion. We have spoken to [our IT supplier] to ascertain whether it would be possible to retrieve them in any way and they have said that there is not".*

Two of the documents were deleted on 1 November 2012 and the other on 10 November 2012, these dates being a year from when they were created.

88. The public authority was also able to explain the content of the documents. Two were email exchanges which were precursors to a further email which is still retained, being an exchange between two of its officials prior to putting up advice to Ministers, showing some 'minor amendments ' which were made prior to the final document. The other document was described as:

> *"an internal BIS email from the Minister's office to the Parliamentary branch regarding a question as to parliamentary business. As this did not have long-term value, it was unfortunately and inadvertently not preserved".*

89. The Commissioner has been given a fuller explanation by the public authority, which he does not consider is necessary to reproduce in full here, and he accepts the reasoning for the error. Unfortunately, as he is unable to view the documents, he is unable to make a determination as to whether or not they should have been disclosed. However, based on their description and how recently they were written in respect of

the time of the request, he considers it is more likely than not that they were properly withheld.

90. It is disappointing that the documents were not retained, and although he considers this to be poor practice the Commissioner does not have any reason to believe it to have been an intentional act. The situation will be monitored in case it recurs at which point the Commissioner may consider further action.

Right of appeal

91. 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: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

92. 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.

93. 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
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Cheshire
SK9 5AF