

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 January 2016

Public Authority: HM Revenue and Customs
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant submitted a request to the public authority for information relating to the authority's assessment of the potential effect of the introduction of standardised packaging of tobacco products on the illicit tobacco market. The public authority relied on the exemptions at sections 27(1)(a), 35(1)(a) and 44(1)(a) FOIA to withhold information within the scope of the request.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemptions at sections 27(1)(a), 35(1)(a) and 44(1)(a).
3. No steps are required.

Request and response

4. On 17 November 2014 the complainant submitted a request for information to the public authority in the following terms:

'Please could you provide the "assessment of the potential effect of standardised packaging on the illicit tobacco market" referred to under "Recommendation 4" on page 3 of House of Commons Home Affairs Committee Fifth Special Report of Session 2014-15, Tobacco Smuggling: Government Response to the Committee's First Report of Session 2014-15, together with any methodologies or other underlying material on which the assessment is based...'

5. On 15 December 2014 the public authority informed the complainant that it considered the information within the scope of her request exempt from disclosure on the basis of section 35(1)(a) FOIA.
6. On 13 February 2015 the complainant requested an internal review of the public authority's decision.
7. The public authority wrote to the complainant with details of the outcome of the review on 15 May 2015. It stated that some of the information within the scope of the request, including the assessment itself, had actually been published and was widely available.¹ Consequently, it concluded that the exemption at section 35(1)(a) no longer applied to most of the information in scope save for the *'notes of a 2011 HMRC Internal 'futures' workshop involving officials, in which a broad range of tobacco fraud-related issues and scenarios were discussed'*.
8. The public authority also relied on the exemption at section 27(1)(a) FOIA to withhold *'a number of documents provided by the Australian Customs and Border Protection Service and the Australian Department of Health to the Senate Affairs Questions on Notice about levels of illicit trade'*.
9. The exemption at section 44(1)(a) FOIA was also relied on by the public authority to withhold *'...documents relating 'to meetings held between tobacco manufacturers and the Department of Health and a briefing note on the potential impact of standardised packaging on Government revenue and businesses in the UK'*.

Scope of the case

10. The complainant contacted the Commissioner on 14 August 2015 to complain about the public authority's decision.
 11. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to rely on the exemptions at sections 27(1)(a), 35(1)(a) and 44(1)(a) FOIA.
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¹ *The Introduction of Standardised Packaging for Tobacco – HMRC's Assessment of the Potential Impact on the Illicit Market*
https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/403495/HMRC_impact_report.pdf

12. During the course of the Commissioner's investigation, the public authority drew the Commissioner's attention to the fact that information within the scope of the request had been published² since the request was submitted.³
13. For added clarity, the public authority wrote to the complainant on 25 November 2015 setting out all of the information within the scope of the request which was publicly available, including information which had been published by the Department of Health.
14. The Commissioner's investigation therefore was to consider whether the public authority was entitled to withhold information within the scope of the request on the basis of the exemptions at sections 27(1)(a), 35(1)(a) and 44(1)(a). The investigation also covered some of the publicly available information within the scope of the request for reasons which will become clear.

Reasons for decision

Section 27(1)(a)

15. Section 27(1)(a) states:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice relations between the United Kingdom and any other State.'

16. The public authority considers that disclosure of the information withheld in reliance on this exemption would prejudice relations between the United Kingdom (UK) and the Commonwealth of Australia (Australia).
17. Section 27(1)(a) is one of the prejudice based exemptions in the FOIA. This means, in order to engage them, there must be a likelihood that disclosure would cause harm to the interest that the exemption protects.
18. In order to engage a prejudice based exemption, a public authority must identify the applicable interests within the relevant exemption. It must also identify the nature of the prejudice. This means that the public

² Information relevant to the section 35(1)(a) exemption was published on 12 February 2015

³ Some relevant information had also been previously published by the Department of Health.

authority must show that the prejudice claimed is real, actual or of substance and show that there is a causal link between the disclosure and the prejudice claimed. It must also decide on the likelihood of the prejudice occurring. This means deciding whether the prejudice would or would be likely to occur. The Commissioner considers that *would* prejudice means it is more probable than not that disclosure would cause the prejudice envisaged. While he considers that *would be likely to* prejudice does not place the same evidential burden on a public authority, it nonetheless requires a public authority to establish more than a hypothetical or remote possibility of disclosure actually causing the prejudice envisaged.

19. The public authority explained that Australia, being the first country in the world to introduce standardised packaging for tobacco products, agreed to supply the authority with a number of confidential documents (ie the withheld documents) to help the UK government in its assessment of the merits and otherwise of standardised packaging. It stressed that the documents were supplied by the relevant Australian agencies in the expectation that they would be held in confidence given that the documents were equally subject to confidentiality restrictions under relevant legislation in Australia.
20. It argued that Australia and other countries would be much less likely to share similar information with relevant UK agencies if these documents on such a sensitive subject (ie legislation on plain packaging of tobacco products) which were provided to the public authority in confidence by the Australian Customs and Border Protection Service and the Australian Department of Health⁴ were disclosed. The public authority argued that this would have a significant detrimental impact on future policy making because it would severely curtail the authority's ability to learn from the valuable experiences of other nations.
21. The Commissioner considers that the public authority's arguments are relevant to the interest that section 27(1)(a) is designed to protect; relations between States and organs of States.⁵ He is also satisfied the nature of the harm envisaged has been properly identified by the public authority.

⁴ For the avoidance of doubt, these include documents relating to the impact of standardised packaging in Australia which the complainant specifically referred to in her submissions to both the public authority and the Commissioner.

⁵ See section 27(5) FOIA for the full meaning of "State" for the purposes of this exemption.

22. The Commissioner has examined the withheld information and also taken into account the circumstances in which it was provided to the public authority. The Commissioner finds that the Australian agencies provided the information in the expectation that it would be held in confidence by the public authority. On that basis, the Commissioner accepts that disclosure would, more probable than not, prejudice relations between the agencies who provided the information and the public authority.
23. He therefore finds that the exemption at section 27(1)(a) was correctly engaged. Furthermore, although the public authority has not relied on the exemption at section 27(2) FOIA⁶, given the circumstances in which the withheld information was provided, the Commissioner finds that this exemption is equally engaged.

Public interest test

24. The exemptions at section 27 are subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner also considered whether in all the circumstances of the case, the public interest in maintaining the exemption at section 27(1)(a) outweighed the public interest in disclosing the information withheld by the public authority in reliance on this exemption.
25. The public authority noted that there is a general public interest in understanding the process involved in, and the effectiveness of, international consultation when developing policy options. It further acknowledged that there is a public interest in ensuring that it remains transparent about the ways it reaches its decisions and is held accountable for those decisions. The public authority stated that it had included a significant amount of relevant information in the assessment document published at the time it considered the request.

⁶ Sections 27 (2) and (3) state:

(2) Information is also exempt information if it is confidential information obtained from a State other than the United Kingdom or from an international organisation or international court.

(3) For the purposes of this section, any information obtained from a State, organisation or court is confidential at any time while the terms on which it was obtained require it to be held in confidence or while the circumstances in which it was obtained make it reasonable for the State, organisation or court to expect that it will be so held

26. However, it submitted that there is a stronger public interest in not disclosing information which would prejudice relations between the UK and Australia. It further argued that there is a strong public interest in the public authority being able to receive information in confidence with international partners in support of policy formulation. It pointed out that effective discussion with States and international organisations relies on a relationship of trust and confidence, which allows for the free and frank exchange of information on the understanding that it will be treated in confidence. Therefore, it would not be in the public interest to disclose information which would inhibit the willingness of other States to share information with the UK.

Balance of the public interest

27. The proposed introduction of standardised packaging of tobacco products in the UK⁷ was not without its opponents. It was primarily a debate between health campaigners who have long argued that there would be long term health benefits in standardised packaging against those, especially tobacco companies, who consider that the health benefits would at best be minimal, but on the other hand, would be significantly detrimental to the commercial interests of tobacco companies.
28. Against this background, the Commissioner considers that there is a strong public interest in disclosing the remainder of the information within the scope of the request. Generally, the government's assessment of the potential effect of standardised packaging on the illicit tobacco market (which has been published), along with material which informed the assessment, would enhance the transparency of decisions taken in relation to standardised packaging. More specifically, the information withheld in reliance on this exemption would give the public an insight into the factors considered by the government in relation to the impact of standardised packaging on the illicit tobacco market in a comparable jurisdiction.
29. However, that has to be balanced against the equally strong public interest in not harming relations between the UK and Australia for reasons the public authority has clearly explained. Given that Members of Parliament (MPs) subsequently voted on 11 March 2015 to approve the measure, the Commissioner has attached more weight to the public

⁷ The policy had not been finalised at the time of the request. The final decision on introducing standardised packaging for tobacco products was announced in Parliament in January 2015.

interest in not disclosing the withheld information in the circumstances. Set against the very strong public interest in not harming relations between the public authority and the relevant Australian agencies (and the consequent effect that would have more generally), he considers that the public interest in disclosure is slightly weakened by the fact that majority of MPs were content to vote in favour of the measure.

30. Furthermore, the information published at the time the request was considered by the public authority also enhances the public interest in not disclosing information which would have a significant detrimental effect on relations between the UK and Australia. The Commissioner must stress that he does not consider that a substitute for the withheld information. Nevertheless, he considers that the disclosure of the information which is in the public domain does to some extent strike a reasonable balance between the general public interest in transparency in relation to the government's assessment of the potential impact of standardised packaging on the illicit tobacco market, and the significant public interest, in the circumstances of this case, in not prejudicing the UK government's relations with the Australian government.
31. Therefore, in all the circumstances of the case, the Commissioner considers that, on balance, the public interest in maintaining the exemption outweighs the public interest in disclosing the information withheld by the public authority in reliance on section 27(1)(a).

Section 35(1)(a)

32. 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.'

33. The public authority explained that the information withheld in reliance on this exemption contributed to live discussions at the time of the request regarding the proposed introduction of standardised packaging for tobacco products. It noted that when the request was submitted on 17 November 2015, the government's policy on standardised packaging was still very much under consideration by officials and Ministers.
34. Section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. Furthermore, the term '*relates to*' (ie to the formulation or development of government policy) can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation

or development of government policy. Any significant link between the information and those activities is enough.

35. The Commissioner finds that the exemption was correctly engaged. He is satisfied that the withheld information relates to the formulation or development of government policy on standardised packaging of tobacco products including the potential impact of that measure on the illicit tobacco market.

Public interest test

36. The exemption at section 35(1)(a) is subject to the public interest test set out in section 2(2)(b) FOIA. Therefore, the Commissioner also considered whether in all the circumstances of the case, the public interest in maintaining the exemption at section 35(1)(a) outweighed the public interest in disclosing the information withheld by the public authority in reliance on this exemption.
37. The public authority recognised the general public interest in being able to assess the quality of advice Ministers took into account before making their decisions. It also acknowledged the public interest in increasing public awareness and understanding of the analysis and decision-making processes of the measures adopted.
38. The public authority reiterated that the majority of the materials used as evidence in relation to the introduction of standardised packaging including the potential effects of the policy on the illicit trade in tobacco products were included in the assessment document published at the time it considered the request. It also drew the Commissioner's attention to additional publications made by the Department of Health, of notes of a meeting between the department and a tobacco company, and a list of tobacco companies with which the department had held meetings.⁸
39. In light of the timing of the request, the public authority considered that disclosure would have curtailed the safe space for officials to consider various options in relation to the proposed measure. According to the authority, the withheld information did not have a material impact on its published findings in relation to the impact of standardised packaging. However, it does inform wider ongoing development of its anti-fraud policy.

⁸ <https://www.gov.uk/government/publications/meetings-between-department-of-health-and-tobacco-companies-de766508>

Balance of the public interest

40. The Commissioner has previously set out why he considers that there is a public interest in disclosing the remaining information within the scope of the request. Those reasons equally apply in relation to the public interest in disclosing the information withheld in reliance on this exemption.
41. The Commissioner considers that the timing of a request will always be significant in relation to *safe space* arguments. There is a strong public interest in not disclosing information relevant to ongoing discussions in relation to the formulation or development of government policy. Officials and Ministers should generally be afforded the private thinking space to consider various options relating to the formulation or development of a policy free from the distraction of premature public scrutiny.
42. The request, as has been mentioned, was submitted in November 2014 and the government's decision to introduce standardised packaging was announced in Parliament in January 2015. Therefore, at the time of the request, discussions would have been ongoing regarding various options concerning the proposed measure. Given the significance of the policy under consideration and the strongly held views of those for and against, there was, at the time of the request, a significant public interest in maintaining a safe space for officials and Ministers to consider all options without having to routinely address objections from either side before the government had finalised its position.
43. Furthermore, disclosure at the time of the request would have been likely to significantly affect the freeness and frankness of discussions between Officials and Ministers for fear their views could be made public whilst discussions were still ongoing. Under the circumstances, it is likely that their views on the introduction of standardised packaging would have become less candid for fear that they could be subjected to premature public scrutiny.
44. Therefore, the Commissioner finds that, on balance, in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information withheld by the public authority in reliance on section 35(1)(a).

Section 44(1)(a)

45. Section 44(1)(a) states:

'Information is exempt information if its disclosure (otherwise than under this Act) by the public authority holding it is prohibited by or under any enactment.'

46. The public authority withheld two sets of information in reliance on this exemption. The first set of information is contained in documents published by the Department of Health but nonetheless withheld by the public authority.⁹ These consist of notes of a meeting between the department and a tobacco company as well as the department's response to a request under FOIA which identifies four tobacco companies with which it held meetings. The public authority has previously referred to the meeting notes in connection with the assessment of the balance of the public interest in relation to the exemption at section 35(1)(a). The second set of information consists of supplemental information supplied to the Department of Health by representatives of the tobacco industry which has not been published, and is therefore not in the public domain.
47. The public authority argued that the combined provisions in sections 18(1) and 23(1) of the Commissioners for Revenue and Customs Act 2005 (CRCA) prohibit the authority from disclosing the information withheld in reliance on this exemption. To be clear, this includes both the published and unpublished information.
48. Section 18(1) CRCA states:
- 'Revenue and Customs officials may not disclose information which is held by the Revenue and Customs in connection with a function of the Revenue and Customs.'*
49. The Commissioner is satisfied that the withheld information is held by the public authority in connection with its function to assess and collect tax. He accepts that the information relates to the authority's law enforcement capabilities in relation to tobacco smuggling and by extension, is also held in connection with the authority's function of assessing and collecting tax on individual tobacco products.
50. Although there are exceptions to section 18(1) contained in sections 18(2) and (3) CRCA, section 23 CRCA was amended by section 19(4) of the Borders, Citizenship and Immigration Act 2009 to make clear that sections 18(2) and (3) are to be disregarded when considering disclosure of revenue and customs information relating to a person under FOIA.
51. Notwithstanding the above, section 23(1) CRCA states:

⁹ <https://www.gov.uk/government/publications/meetings-between-department-of-health-and-tobacco-companies-de766508>

'Revenue and customs information relating to a person, the disclosure of which is prohibited by section 18(1), is exempt information by virtue of section 44(1)(a) of the Freedom of Information Act 2000.....if its disclosure

(a) would specify the identity of the person to whom the information relates, or

(b) would enable the identity of such a person to be deduced.

(2)Except as specified in subsection (1), information the disclosure of which is prohibited by section 18(1) is not exempt information for the purposes of section 44(1)(a) of the Freedom of Information Act 2000.'

52. Therefore, information prohibited from disclosure by virtue of section 18(1) CRCA is exempt information by virtue of section 44(1)(a) FOIA only if its disclosure would identify the "person" to whom it relates or would enable the identity of such a "person" to be deduced. The term "person" includes both natural and legal persons.
53. The Commissioner accepts that the supplemental information supplied to the Department of Health by representatives of the tobacco industry specifies the identities of the tobacco companies to whom it relates. He also considers that disclosure of the supplemental information would enable the identities of the company to be deduced.
54. The Commissioner therefore finds that the public authority was entitled to withhold this information in reliance on section 44(1)(a) on the basis of the combined effect of the provisions in sections 18(1) and 23(1) CRCA.
55. The Commissioner also accepts that the public authority was entitled to withhold the published information for the same reason. The prohibition on disclosure under the FOIA imposed on the public authority by sections 18(1) and 23(1) does not cease to have effect even if the information held by the authority is publicly available. Only two conditions need to be met for the prohibition on disclosure to take effect. The information must be held by the public authority in connection with its functions, and, disclosure by the public authority under FOIA would result in the identification of the person to whom the information relates. The Commissioner considers that disclosure of the published information would specify the identities of the companies to whom it relates or would enable their identities to be deduced.
56. It is pertinent to mention that section 19(1) CRCA makes it a criminal offence for an official of the public authority to disclose information in contravention of section 23(1).

57. Therefore, the Commissioner equally finds that the public authority was entitled to withhold this information in reliance on section 44(1)(a) on the basis of the combined effect of the provisions in sections 18(1) and 23(1) CRCA.

Right of appeal

58. 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 123 4504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

59. 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.
60. 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

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