

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 18 September 2020

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant has requested information, such as meeting notes and correspondence relating to the Tonnage Tax Working Group. The DfT provided the dates of the meetings and the senior attendees and confirmed that no formal minutes were taken. For any correspondence held the DfT cited section 35(1)(a) of the FOIA as a basis for withholding this.
2. During the course of the Commissioner's investigation the Department for Transport (DfT) disclosed some of the information to the complainant but continued to withhold the correspondence between various parties on the development of the UK Tonnage Tax Policy on the basis of section 35(1)(a) of the FOIA.
3. The Commissioner's decision is that the DfT has correctly applied the section 35(1)(a) exemption and the public interest favours maintaining the exemption and withholding the remaining information in the scope of the request. She requires no steps to be taken.

Request and response

4. On 25 July 2019 the complainant made a request to the DfT in the following terms:

"I would like to request information relating to the Tonnage Tax Working Group.

Please could you tell me what meetings and correspondence there have been relating to the Tonnage Tax Working Group, announced in the DfT's Maritime Annual Report, in the last six months.

In respect of each meeting, please provide the following details:

- The dates of the meetings*
- Who participated in the meeting (Names, and/or position/rank)*
- Minutes from the meeting(s)*
- Correspondence between the parties"*

5. The DfT responded on 21 August 2019 and confirmed it held the requested information. The DfT stated it could disclose the dates of meetings and a list of participants with positions (unless they were junior staff). The DfT considered that minutes from the meetings and correspondence between the parties could not be disclosed as it engaged the section 35(1)(a) exemption.
6. The complainant requested an internal review of this decision on 22 August 2019. He stressed the public interest in the disclosure of the information.
7. The DfT conducted an internal review and responded on 30 September 2019. The internal review clarified that no minutes of the meetings were taken and the exemption had been applied to only the information that was held – correspondence between relevant parties. The DfT also clarified the policy to which the information related was the UK Tonnage Tax Policy which was a live policy process still being developed. The DfT went on to explain the public interest arguments it considered relevant in reaching its decision.
8. During the course of the Commissioner's investigation, the DfT revised its position and disclosed to the complainant the correspondence relating to the administration of the meetings including drafts and the final agenda for each meeting, emails containing draft and final versions of a meeting note from a meeting of 15 April 2019 and the DfT stated this was the only meeting note that was made.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.

10. The Commissioner considers the scope of her investigation to be to determine if the DfT has correctly withheld the remaining requested information on the basis of section 35(1)(a) of the FOIA.

Reasons for decision

Section 35(1)(a)

11. Section 35(1)(a) provides that information is exempt if it relates to the formulation and development of government policy.
12. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
13. Section 35(1)(a) is a class based exemption which means that it is not necessary to demonstrate any prejudice arising from disclosure for the exemption to be engaged. Instead the exemption is engaged so long as the requested information falls within the class of information described in the exemption. In the case of section 35(1)(a) the Commissioner's approach is that the exemption can be given a broad interpretation given that it only requires that information 'relates to' the formulation and development of government policy.
14. In the Commissioner's guidance¹ on the section 35 exemption she considers that a number of factors contribute towards the establishment of a policy in formulation or being developed, including the intention to achieve a particular outcome or change where the consequences are wide ranging.
15. The DfT has explained the policy being formulated is the UK Tonnage Tax Policy.
16. Tonnage tax is an optional tax regime that provides an alternative method for calculating the taxable profits of shipping companies. The UK Government introduced the tonnage tax regime in Schedule 22 of the

¹ <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

Finance Act 2000 allowing shipping companies to opt to pay corporation tax liabilities based on the tonnage of the ships they operated rather than paying against the level of their actual profits.

17. A Tonnage Tax Working Group was established in 2018 to appraise the current tonnage tax regime and consider possible future improvements to the regime. The draft report formed from this was used to inform discussions between the DfT, UK Ship Register, UK Chamber of Shipping, Maritime UK and Carnival UK about the options with regard to developing the UK Tonnage Tax Policy.
18. The DfT therefore considers the information, which amounts to emails discussing the report and options arising from this, relates to the improvement and adjustment of an existing policy.
19. The exemption is interpreted broadly and will capture a wide variety of information. The Commissioner understands that the current policy on tonnage tax was under review to determine if improvements could be made and therefore she accepts the information that is being withheld relates to this and therefore falls under the definition of development of government policy. Section 35(1)(a) is therefore engaged.

Public interest arguments in favour of disclosure

20. The DfT recognises that releasing information and details of meetings increases trust and allowing the public to see the way Government works could lead to more effective and broadly based public contribution to the policy making process.
21. The complainant stated to the Commissioner that the main public interest argument is understanding the role of lobbying and its impact on government. The complainant pointed to two Information Tribunal cases² in which it was determined there was a public interest in seeing how lobbyists interact with government. He argued that the parties involved in this case (UK Ship Register, UK Chamber of Shipping, Maritime UK and Carnival UK) are not neutral as they stand to benefit from the policy they are shaping the development of and that there is therefore a public interest in seeing the discussions between them and Government to ensure transparency.

Public interest arguments in favour of withholding the information

² Evans v ICO and MoD EA/2006/0064 and DBERR v IC and FoE EA/2007/0072

22. The DfT argues that releasing the correspondence between DfT officials and external attendees outside of the Working Group would inhibit the free and frank communication between industry and Government as industry representatives would be unlikely to be completely open with their opinion if they thought it would be subject to release.
23. The DfT further argues that DfT officials need a safe space to consider views unhindered by any concerns that their deliberations would be subject to disclosure. As the policy is still under review, disclosure could jeopardise the review process and the development of the policy. This, in turn, could jeopardise the development of an effective policy in this area leading to a decline in ships operating under the UK flag and hence a decrease in tax revenue which would not be in the public interest.

Balance of the public interest arguments

24. The Commissioner considers there is a strong public interest in transparency behind a policy relating to tax. There is also public interest generally in public authorities being transparent in their decision making.
25. The key issue here appears to be the role of the third parties in terms of their contributions to discussions on the development of the tonnage tax policy and whether this could be characterised as lobbying. The Commissioner recognises there have been decisions at the Tribunal which have touched on the relationship between lobbyists and Government but she does not consider that the third parties in this case were lobbying their own agenda. Having viewed the withheld information the Commissioner is of the view that the third parties were employed as subject matter experts in consultancy capacities to provide their insight into the policy and how it could be improved.
26. The Tribunal recognised that safe space is required for third parties who are advisors to Government to be able to offer their views and deliberate on matters relating to policy development away from scrutiny. The DfT also points to comments from the Tribunal that there is a strong public interest in the value of Government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines are taken.
27. The Commissioner does not consider the involvement of these third parties to be particularly unusual; it is not uncommon for stakeholders to be involved in policy discussions where they have a valuable insight and can help to improve the decision making process. She does not see, from having viewed the withheld information, that their contributions could be seen as exerting their influence and lobbying a particular

position and the safe space argument can be extended to any parties involved in policy development discussions.

28. The Commissioner does not consider there is a sufficient public interest in undermining the working relationship between industry and Government in this case and eroding the safe space needed to have meaningful discussions on how to revise and improve the tonnage tax policy that are not influenced by fear of disclosure or outside influences. A policy developed in this way is likely to be less robust and based on lesser inputs and this would not be in the public interest.
29. On balance in this case, the Commissioner considers that the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

Right of appeal

30. 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: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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

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