

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 June 2018

Public Authority: Department for Business, Energy
& Industrial Strategy

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information held by the Department for Business, Energy & Industrial Strategy concerning the Star Chamber sessions referenced in the Government's Regulatory Futures Review. The Department originally withheld all the information held within scope of the complainant's request under Section 35(1)(a) (formulation or development of government policy). During the Commissioner's investigation the Department provided the complainant with some of the information requested, with redactions for information exempt under Section 35(1)(a) and Sections 29(1)(a) (economic interests of the United Kingdom or of any part of the United Kingdom) 35(1)(b) (Ministerial communications) and 40(2) (third party personal data), which the Department applied latterly to some of the information held. The Commissioner has found that all the residual withheld information is exempt from disclosure under Section 35(1)(a) and requires no steps to be taken as a result of this notice.

Background

2. The Star Chambers were announced as part of Budget 2015 and were referenced in HM Treasury document '*A better deal: boosting competition to bring down bills for families and firms*' which was

presented to Parliament by the Chancellor of the Exchequer in November 2015¹. Paragraph 4.15 of the document stated that:

'Economic regulators' core functions are to protect the interest of consumers through price controls that make sure that network monopolies set prices fairly and run efficiently; and ensure that competition is promoted wherever possible for the benefit of consumers. Since regulators were created, their functions have grown, which can take away from this focus on consumers. To address this, the government will hold Star Chamber sessions to challenge whether the functions of the economic regulators could be slimmed down to enable a greater focus on their core functions, how they can reduce unnecessary red tape and how they can be as lean as possible in their operations. This work will report alongside an initial assessment of the energy delivery landscape, by Budget 2016'.

Request and response

3. On 27 January 2017, the complainant wrote to Department for Business, Energy & Industrial Strategy (BEIS) and requested information *'held by the Department concerning any review either (a) currently being conducted or (b) completed within the last 12 months of the activities of the UK's economic regulators and, in particular, the review mentioned at paragraph 1.7 (third bullet) of the attached'* [Regulatory Futures Review]².
4. The Department responded to the request on 22 February 2017 and informed the complainant that there was no review currently being conducted into the activities of the UK's economic regulators and that there had been no formal review of the activities of the UK's economic regulators within the past 12 months. Therefore, the Department did not hold any information within scope of the request.
5. However, the Department, in accordance with the duty to provide advice and assistance in Section 16 of the FOIA, advised the complainant that the work referenced in the Regulatory Futures Review was the Star Chamber process that was announced in Budget 2015 and they

¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/480798/a_better_deal_for_families_and_firms_web.pdf

² The first in a series of functional reviews of arm's length bodies, which was led and carried out by regulators and published on 10 January 2017.

highlighted the references to the Star Chamber sessions in that document (paragraph 4.15 cited above).

6. The complainant requested an internal review of the Department's response on 27 February 2017 and noted, *'in particular, I would ask that the review consider whether any information held by the Department concerning the Star Chamber sessions mentioned in the decision (e.g. any minutes of relevant sessions) ought to be provided to me'*. The Commissioner notes that this was in effect a new information request since the Star Chamber sessions' information had not been within the scope of the complainant's original request.
7. On 16 March 2017 the Department provided the complainant with their 'internal review'. Although the review should have confirmed that the Department held no information within scope of the complainant's request of 27 January 2017 and the complainant's communication of 27 February 2017 should have been processed as a new information request, the Department erroneously (but not unhelpfully) subsumed the new request within their internal review. The Department advised the complainant that the Star Chamber sessions information was exempt from disclosure under section 35(1)(a) (formulation or development of government policy).

Scope of the case

8. The complainant contacted the Commissioner on 16 March 2017 to complain about the way his request for information had been handled.
9. In order to avoid the complainant having to submit a new request for the Star Chamber sessions information, which would have entailed unnecessary delay, the Commissioner treated the complainant's internal review request of 27 February 2017 as a new request for the Star Chamber sessions information and the Department's internal review of 16 March 2017 as their response to that request.
10. In submissions to the Commissioner, BEIS advised that they interpreted the complainant's request as seeking information held in relation to the Star Chamber sessions conducted by BEIS³ in the 12 month timeframe referred to in the complainant's original request (28 January 2016 to 27 January 2017). The Department also understood the scope of the request as relating to substantive information concerned with the Star

³ Or its predecessor, the Department for Business, Innovation and Skills (BIS).

Chamber sessions themselves rather than merely logistical information held about the meetings.

11. The Star Chambers in question consisted of three sessions attended by Sajid Javid MP (the then Secretary of State for Business, Innovation and Skills), Oliver Letwin MP (the then Minister for Government Policy and Chancellor of the Duchy of Lancaster) and senior officials of HM Treasury and the following three regulators:
 - a) the Water Services Regulation Authority (Ofwat) which regulates the water and sewerage industries; this session was held on 9 February 2016,
 - b) the Office of Gas and Electricity Markets (Ofgem), which regulates the electricity and downstream gas⁴ sectors; this session was held on 10 February 2016, and
 - c) the Office of Communications (Ofcom), which regulates the broadcasting, telecommunications and postal industries; this session was held on 7 March 2016.
12. BEIS advised the Commissioner that the purpose of these sessions was for the Government (which is responsible for the overall statutory framework for the regulation of the relevant sectors) to challenge each regulator in relation to three key themes:
 - i) reducing unnecessary regulation in the sector,
 - ii) removing any extraneous functions not best delivered by the relevant regulator, and
 - iii) becoming leaner, including a consideration of how regulators might better share resources.
13. The information within scope of the complainant's request comprises 329 pages of emails, briefing documents and slides from the three Star Chamber sessions.
14. During the course of the Commissioner's investigation BEIS, having reviewed the information held within scope of the request, provided the complainant with redacted copies of some of the information. The majority of the information remained withheld by the Department. BEIS maintained section 35(1)(a) to all of the residual withheld information

⁴ Downstream gas includes, amongst other activities, the refining, processing, marketing and distribution of products derived from natural gas.

(including the information redacted from the disclosed documents) and also applied sections 29(1)(a) (economic interests of the UK or any part of the UK) section 35(1)(b) (Ministerial communications) and 40(2) (third party personal data) to some of the withheld information.

15. The scope of the Commissioner's investigation has been to determine whether BEIS were correct to withhold the residual information under the exemptions applied.

Reasons for decision

16. 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'.

17. Section 35(1)(a) is a class-based exemption, which means that there is no requirement to show any harm in order to engage the exemption. The information simply has to fall within the class described. The term 'relates' is interpreted broadly (Cabinet Office v Information Commissioner and Morland [2018] UKUT 67 (AAC)) so that providing the information relates to the process of policy formulation or development, it will be caught by the exemption.
18. The timing of the request is not relevant – the question is whether the information relates to the policy formulation or development process, irrespective of when the request was made. That process does not have to be the sole or even the main focus of the requested information, as long as it is one significant element of it.
19. In submissions to the Commissioner the Department advised that the information had been withheld under section 35(1)(a) because *'it consists of material pertaining to a review of the regulatory framework of certain sectors of the British economy with a view or potential for the Government to bring forward proposals for future regulatory changes. While the Star Chamber sessions have now ended, the material emerging from them is pertinent to a policy development process that is still underway'.*
20. BEIS explained that the policies relate to the regulation of the relevant sectors, both in respect of the substance of the regulatory obligations and burdens placed on each sector as well as future role and functions of the regulators, *'the overarching statutory and policy framework for which Government is responsible'.* The Department stated that the Star Chambers involved a free and frank exchange of views between Government and the regulators, and that information *'resulted in initial*

ideas as to how the regulatory landscape might be changed in the future'.

21. BEIS explained that the sessions were an important 'challenge function', consisting of a free and frank exchange of views in which Ministers could press the regulators on matters connected with current and future delivery. *'Accordingly, the sessions saw the regulators presenting initial proposals against these themes (see paragraph 13 above), followed by an opportunity for Ministers to probe the regulators' ideas further and push regulators in areas where they felt greater improvements could be made'.* The Department stated that as a result the outcome of the Star Chamber sessions were a number of ideas for potential future changes to the regulatory landscape, both to the rules regulating the relevant sectors and to the regulators themselves.
22. BEIS advised the Commissioner that those ideas are subject to on-going Government consideration over a long timeframe, which is to be expected in the regulatory policy context. The Department confirmed that no decisions had been taken in relation to the policies in question, other than some headline announcements in the 2016 Budget⁵ ('Stronger and more focused economic regulators' – para 2.347 onwards).
23. However, apart from what has been publicly announced (a link to which was provided in the Department's original response to the complainant's request) BEIS advised that the material remains 'on the table' for Government to consider and, potentially, decide to turn into proposals for changes to the regulatory landscape. BEIS advised that if the Government did decide to do so, significant changes to the regulatory landscape would be likely to require primary legislation and, given their likely effect on the regulators, regulated industry, investors and consumers, the Government would be likely to consult on them. Equally, however, BEIS advised that the Government may decide not to proceed with those changes.
24. The Department stated that:

'Given the need for predictability and stability in these regulated markets to avoid investor uncertainty with consequent impacts on costs and prices, as well as their significance to consumers and the economy, a relatively slow pace or internal consideration is reasonable in these

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/508196/Budget_2016_print_ready_final.pdf

areas; it is common practice for regulators and Government to take a long-term approach to reform and to engage in detailed, sequential public consultation'.

BEIS gave the example of Ofwat's 2019 price review, which will determine how much water companies are able to invest in their networks and charge consumers, and which is currently in the middle of a five-year cycle and is expected to be supported by extensive consultation at an appropriate stage in the policy development process.

25. The Commissioner understands the term 'formulation' of policy to refer to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a minister who then decides which options should be translated into political action.
26. Having had sight of the withheld information, the Commissioner is satisfied that it does relate to the formulation of government policy, specifically the Government's on-going review of the regulatory framework in the relevant sectors with the view or potential for the Government bringing forward proposals for future regulatory changes. The Star Chamber sessions were clearly designed to generate ideas and options for such policy formulation or development, such that there is a tangible connection between the withheld information and that process.

Public interest test

27. Section 35(1)(a) is subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosing the withheld information

28. In their internal review of 16 March 2017, BEIS recognised the '*general public interest*' in disclosure of '*such*' information and that '*greater transparency enables the public to assess the quality of policy formulation advice and makes government more accountable to the electorate*'.
29. In submissions to the Commissioner, the Department stated that '*most importantly*', disclosure of '*such*' information '*promotes transparency and accountability in the policy development process*'. The Department added some specificity in respect of the actual withheld information by accepting that, in principle, '*scrutiny arising from disclosure of information might lead to valuable input from the public, particularly*

from companies and organisations operating in the relevant sectors and who might be affected by any proposals'.

30. BEIS noted in addition that *'there is considerable interest in allowing companies and individuals to be forewarned of upcoming changes to the regulatory system within which they operate and to prepare for such changes'.* However, BEIS considered that the most appropriate time for soliciting such scrutiny was through a formal public consultation process once the Department was satisfied that it was in a position to bring forward credible and workable proposals.
31. In submissions to the Commissioner, the complainant stated that, *'the various regulators who are participating in the process are meant to operate independently of BEIS and I believe that there is a very strong public interest in knowing why, and in what way, they have chosen to participate in view of the risks posed by their participation to their (actual or perceived) independence'.*
32. The complainant also noted that there was no firm indication as to either the nature or scope of the Department's future plans, or the timescale for implementing the same. He stated that, *'this seems to place me in an invidious position in which I will never be able to know when, or in what context, I may be able to obtain disclosure of the information'.*

Public interest arguments in favour of maintaining the exemption

33. In the internal review BEIS stated that they did not believe that the benefits of releasing information about the Star Chambers outweighed those of protecting the policy making process, *'in particular, the ability for Ministers and other experts such as regulators, to debate matters in a free and frank manner'.* The Department stated that:

'If officials knew that the provision of free and frank information provided in confidence would be subject to publication, it is unlikely they would engage with one another in the same capacity in the future. This would not be in the public interest. Release of this information would have an inhibiting effect because future exchanges could be more reticent and circumscribed with the result that Ministers would have less information on which to base the development of government policy. Releasing the information would be to the detriment of the self-contained space in which policy making proceeds, and have a chilling effect on the free and frank exchange of views that is necessary for decision making in Government'.
34. In submissions to the Commissioner, BEIS contended that the information needed to be withheld in order to provide the Department with the 'safe space' to consider the outcome of the Star Chamber process. BEIS noted that consideration of this particular policy area can take place over a long timeframe and *'disclosure at this stage might*

limit or condition the scope the Department has to consider possible options and to develop them from purely initial ideas to workable proposals'.

35. In support of their position, BEIS cited the judgement of the Information Tribunal in *DfES v Information Commissioner* [EA/2006/006] in which it was stated that, *'Ministers and officials are entitled to time and space, in some instances to considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy'*.
36. BEIS submitted that it was more appropriate to announce proposals at a stage when their policy development had reached a point where they were better placed to do so. Whilst some policies were announced as being under consideration by the Government in the 2016 Budget, the Department stated that detailed policy remains under development and therefore they contended that it would be premature to disclose information the content of which extends beyond the headline policies publicly announced previously.
37. In addition to safe space considerations, BEIS advised that a key strength of the Star Chamber process was to enable the Department to engage with the regulators in free and frank exchanges of views and to receive advice on whether and how these regulators could better meet the needs of UK consumers and to ensure that the UK regulation regime remains fit for purpose. The Department contended that premature disclosure of the information would have a 'chilling effect' in that it might *'lead to the real and considerable risk that the regulators in question would be less willing to engage in similar policy discussions with Government in future'*. BEIS submitted that even if the regulators continued to engage in such discussions to a limited extent, there would likely be a greater reluctance to air complex, controversial or challenging ideas, which would limit Government's ability to explore new policy options in such a free and frank manner.

Balance of the public interest arguments

38. The Commissioner would note at the outset that with regard to the information held within scope of the complainant's request, BEIS revised their original position (of withholding all information held) during the Commissioner's investigation and disclosed some of the Star Chamber related information to the complainant. In doing so, the Department recognised the legitimate and important public interest in transparency and accountability of this particular information, despite their submissions on this point being generic rather than information specific.

39. With regard to the complainant's contention that the regulators are meant to operate independently of BEIS and there is therefore '*a very strong public interest*' in knowing why, and in what way, they have chosen to participate in the Star Chamber process, the Commissioner notes that this point was addressed by BEIS in their submissions.
40. BEIS confirmed that the decision-making of regulators and the fulfilment of their functions is independent of Government. However, the matters they deal with are of significance to the Government's wider policy objectives and so it is usual for Government to take an interest in what they do. The Department noted that in some regulated sectors, there are powers for Government to set Strategic Policy Statements for regulators, which regulators must either have regard to or act in accordance with.
41. Due to the expertise of regulators, the Department advised that it is common for their advice to be sought on matters of policy, and policy-making would tend to be poorer without the input of experts. BEIS stated that, '*regulatory independence does not mean that their remits and powers are not subject to scrutiny or change by Government or Parliament. It is a quite proper feature of policy making and democratic accountability that what regulators do and the outcomes in the sectors for which they are responsible, is kept under review*'. BEIS confirmed that the focus of regulator functions as part of the Star Chambers was in effect to provide views to Government on whether any of the areas of regulator responsibility could be amended. However, this would be for Government and Parliament to act upon – the regulators cannot of their own accord amend any of their functions.
42. Given that Government is responsible for the overarching statutory and policy framework concerning the role and functions of the relevant regulators, the Commissioner considers that it is reasonable and not unusual or inappropriate for the Department to consult with the regulators and for the regulators to participate in such discussions.
43. Safe space arguments of the type advanced by BEIS in this case are central to section 35(1)(a) and there is a well-established strong and legitimate public interest in Government being afforded the safe space in which to develop and finalise policy prior to its implementation. The need for the safe space will very much depend upon the stage at which the relevant policy or policies had reached at the time of the request and the individual circumstances of each case. Such considerations of timing have a very important (often decisive) bearing on the determination of the public interest balance in cases concerning this exemption.
44. The Commissioner notes that the requested information was less than 12 months old at the time of the complainant's request and it is clear from the withheld information that the policy formulation and

development process it relates to was at a very early stage at that time. The proposals and ideas contained in the withheld information were embryonic in nature and were (and indeed remain) *potential* proposals and ideas rather than workable or finalised policies.

45. The Commissioner recognises and accepts that given the impact and influence of the relevant regulators on consumer decisions and behaviour, there is a significant and legitimate public interest in knowing what changes to the regulatory systems are planned or pending. There is similarly a public interest in transparency and accountability of such planned policies and an opportunity for all potentially affected parties, including members of the public, to scrutinise and provide comment or feedback on such changes.
46. However, the Commissioner would agree with BEIS that the appropriate time for due transparency and for soliciting such scrutiny is through a formal public consultation process once the policy formulation and development process had reached a point whereby the Department was in a position to announce and detail credible and workable proposals.
47. The Commissioner considers that if the withheld information were to be disclosed prematurely, with initial ideas and potential proposals being placed in the public domain, rather than carefully considered and agreed policy proposals, this would be likely to cause concern and even alarm amongst the regulated industries, investors and consumers. Such premature disclosure would be extremely unhelpful and damaging, in that it would divert the Department away from the policy formulation or development process, and require BEIS to justify or defend policy ideas or proposals where no agreed position has yet been reached or which may never be taken forward. This distraction would significantly hinder and undermine the policy formulation and development process and would clearly be contrary to the public interest.
48. The complainant has expressed concern that he has no information as to the nature or scope of the Department's plans, or the timetable for implementation, such that he does not know when he can expect to have sight of the information requested. However, given that the information which he has requested relates to the very early stages of the policy formulation process, and no firm or workable policy proposals arising out of the Star Chamber sessions have yet been decided upon by the Department, it is clearly not possible for the complainant to receive the degree of specificity which he is seeking.
49. As BEIS have noted, it is common practice for regulators and Government to take a long-term approach to reform and to engage in detailed, sequential public consultation. Whilst the Commissioner appreciates that the complainant will be naturally interested (as would the public at large) in what plans Government has in mind for the role

and remit of the relevant regulators, any such plans would need to move from being potential plans to actual plans before carrying a legitimate public interest in transparency and accountability. The Commissioner considers that that public interest would be more appropriately and best served by public consultation at a time when the Department has defined and agreed policies to put forward, rather than earlier in the process when such policy ideas remain 'on the table' for discussion and consideration.

50. Whilst the Commissioner considers it unlikely that disclosure of the withheld information would lead the relevant regulators to be less willing to engage in similar policy discussions with Government in future, given that their remits and powers are subject to scrutiny and change by Government (or Parliament), she does agree with BEIS that premature disclosure of such information could result in the regulators being less candid and forthcoming in such discussions, which would adversely affect and limit the Government's ability to explore new policy options and ideas in a free and frank manner. It would also inhibit the Government's ability to best explore how the regulators could better meet the needs of UK consumers and be fit for purpose. Such outcomes would not be in the public interest. The Commissioner has therefore given some weight to the chilling effect arguments put forward by the Department, albeit to a substantially lesser degree than those of the safe space.
51. Having carefully considered the withheld information and the submissions from both parties, the Commissioner has concluded, for the reasons given above, that in all the circumstances of the case, the public interest balance favours maintaining section 35(1)(a) to the withheld information. Given the broad interpretation of 'relates to', the Commissioner is satisfied that all the withheld information is encompassed by this exemption.
52. As the Commissioner has found that all the withheld information is exempt under section 35(1)(a), she has not proceeded to consider the applicability of the other exemptions applied.

Right of appeal

53. 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@hmcts.gsi.gov.uk

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

54. 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.
55. 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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