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**ADVERTISING STANDARDS AUTHORITY RESPONSE TO THE MINISTRY
OF JUSTICE'S CONSULTATION ON FREEDOM OF INFORMATION:
DESIGNATION OF ADDITIONAL PUBLIC AUTHORITIES**

Dear Ms Akwarandu

1 Introduction

- 1.1 The Advertising Standards Authority (ASA) welcomes the opportunity to respond to the Ministry of Justice's consultation on the *Freedom of Information Act 2000: Designation of additional public authorities*. We are happy for this response to be published.
- 1.2 The ASA is the UK self-regulatory body for ensuring that all advertisements, wherever they appear, are legal, decent, honest and truthful.
- 1.3 No part of the advertising self-regulatory system is currently covered by the Freedom of Information Act 2005 ('the FOI Act', 'the Act'). However some of the considerations in the Ministry of Justice's consultation document appear to indicate that a regime like the advertising self-regulatory system may be considered for designation under the Act.
- 1.4 The ASA system supports the principle of openness and transparency in its work. The system publishes a great deal of information and responds to information requests fully wherever possible.¹ However, as this response will seek to demonstrate, the unique manner in which the advertising self-regulatory regime must operate makes it entirely inappropriate for formal designation under the FOI Act. At worst, we fear that designation would be severely detrimental to the ability of advertising self-regulation to continue to operate in the UK at all.

¹ In 2007, the ASA responded to 2,939 enquiries from the general public, researchers and various organisations (this excludes complaints and journalist enquiries).

- 1.5 Despite our view that the ASA should not be formally designated under the Act, the ASA's policy is to provide information as freely as possible, where appropriate and we will review our information policy regardless of the outcome of this consultation.
- 1.6 This response will cover:
- How advertising is regulated in the UK - what are the different institutions under the ASA umbrella? (Section 2)
 - The substantial financial and resource burden that would be placed on an organisation the size of the ASA (£8million per annum budget; just over 100 staff).
 - The likely destabilising impact that formal designation under the FOI Act would have on advertising self-regulation's ability to operate as efficiently and effectively as it does now.

2 How is Advertising Regulated in the UK?

- 2.1 The ASA self-regulatory system (see 2.7 below) is responsible for maintaining standards in advertising content in all media in the UK.
- 2.2 The system is based on a concordat between advertisers, agencies and the media that each will act in support of the highest standards in advertising.
- 2.3 The system is both self-regulatory (for non-broadcast advertising) and co-regulatory (for TV and radio advertising). This means that the ASA is a hybrid body, part private and part exercising a public law function.
- 2.4 The self-regulatory system was established in 1962 by the marketing industry to regulate the content of advertisements appearing in the non-broadcast media (e.g. print, poster, cinema).
- 2.5 The system had successfully operated for more than forty years, when in November 2004, it assumed responsibility for broadcast advertising from Ofcom in a co-regulatory partnership. This created, for the first time in the UK, a one-stop shop for all advertising complaints.
- 2.6 The contracting-out of broadcast advertising was able to take place because of provisions in the Communications Act 2003, which required Ofcom to consider the feasibility of deregulation in its areas of responsibility. The move was endorsed by Ministers and approved by Parliament.

- 2.7 The advertising self-regulatory system comprises six separate, but interlinked bodies. The bodies that make up the self-regulatory (non-broadcast) side of the system are the Advertising Standards Authority Ltd (ASA), the Committee of Advertising Practice (CAP) and the Advertising Standards Board of Finance (Asbof). The bodies that make up the co-regulatory (broadcast) side of the system are the Advertising Standards Authority (Broadcast) Ltd (ASAB), the Broadcast Committee of Advertising Practice (BCAP) and the Broadcast Advertising Standards Board of Finance (Basbof).
- 2.8 The ASA one-stop shop system receives no public funding. The entire regime is funded by a 0.1% levy on advertising space (0.2% for Direct Mail), which is collected by the arms-length funding bodies, Asbof and Basbof.
- 2.9 The system has been carefully designed to ensure that there is an appropriate separation of powers. For example, the Advertising Codes are written and maintained by the industry (CAP and BCAP, see 2.12 below), enforced by the independent ASA (see 2.13 below) and the entire system is funded at arms-length through the ‘anonymous’, voluntary levy (see 2.14 below).
- 2.10 The separation of powers means that the system has been able to be effective whilst maintaining its integrity (i.e. the adjudications process is genuinely independent of industry).
- 2.11 The Codes sit within the legal framework, which means that, where appropriate, they reflect the standards required in law, e.g. misleading advertising². Furthermore, the regime is structured so that it does not operate in an unfair or anti-competitive manner or restrict free speech unjustifiably.
- 2.12 **About CAP/BCAP**
- 2.12.1 CAP and BCAP are the industry bodies responsible for writing and maintaining the UK Advertising Codes.
- 2.12.2 The Committee members represent the three main parts of the advertising industry, namely the advertising agencies, media owners

² The ASA is regarded as the ‘established means’ for enforcing the Control of Misleading Advertisements Regulation (1998) as amended; this system will be replicated with the introduction of the new consumer protection regime in the UK in April 2008, under the Unfair Commercial Practices Directive.

(e.g. poster site owners, newspapers, broadcasters) and the advertisers themselves.³

2.12.3 CAP writes and updates:

- the British Code of Advertising, Sales Promotion and Direct Marketing ('the CAP Code'), which governs non-broadcast advertising (e.g. print, poster, cinema, online)

2.12.4 BCAP writes and updates:

- The BCAP TV Advertising Standards Code
- The BCAP Radio Advertising Standards Code
- The BCAP Code on Text Services
- The Rules on the Scheduling of Television Advertisements⁴

2.12.5 CAP also provides a pre-publication advice service to advertisers for non-broadcast advertisements (see 6.9.1 below)⁵. The service is free and confidential and is aimed at improving compliance with the CAP Code.⁶

2.12.6 CAP and BCAP are also responsible for ensuring that ASA adjudications are followed by the industry. They do this by working with the industry; co-ordinating sanctions and disseminating information amongst sectors about landmark ASA adjudications.

2.12.7 In addition to this work, CAP and BCAP also conduct proactive monitoring and compliance work. CAP and BCAP monitor advertisements to ensure that they are compliant with the Advertising Codes and where possible, they aim to resolve problematic advertising by consensus directly with the advertiser. In some cases they take recommendations to the ASA Council.

³ Details of the membership of CAP and BCAP can be found at:

<http://www.bcap.org.uk/cap/links/CAP+Members/>

⁴ All Advertising Codes and accompanying guidance can be accessed at: <http://www.cap.org.uk/cap/codes/>

⁵ CAP also provides online advice and HelpNotes for advertisers, which can be accessed at: http://www.bcap.org.uk/cap/advice_online/

⁶ Pre-clearance for TV commercials is provided by Clearcast (www.bacc.org.uk/clearcast) and radio commercials by the Radio Advertising Clearance Centre (www.racc.co.uk)

2.13 About the ASA

2.13.1 The ASA is the consumer-facing part of the system. The ASA is an independent complaints handling body that administers the Advertising Codes.

2.13.2 The ASA considers complaints from the public and the industry about advertisements that are alleged to have breached the Advertising Codes.

2.13.3 Final adjudications on complaints are decided by the ASA Council. The Council's membership comprises two-thirds members of the public, one-third advertising experts and is chaired by former Culture Secretary, Rt Hon Lord Smith of Finsbury⁷.

2.13.4 ASA adjudications are published every Wednesday online and made available to the media. ASA adjudications remain on our searchable online database for five years⁸, after which time they are available from our archives on request.

2.13.5 Compliance with the Codes and ASA adjudications is binding on all advertisers and broadcasters. It is not a voluntary system.

2.14 About Asbof and Basbof

2.14.1 The system receives no public funding. It is instead funded entirely by the industry via a 0.1% levy on advertising space (0.2% for direct mail). The levy is collected by two arms-length bodies Asbof (www.asbof.co.uk) and Basbof (www.basbof.co.uk).

2.14.2 This is the only aspect of the advertising self-regulatory system that is voluntary; advertisers may choose not to contribute to the levy. The ASA has no knowledge of who contributes what to the levy, which ensures that the ASA Council remains independent from those it regulates. For avoidance of doubt, an advertiser's decision not to contribute to the levy does not affect their responsibility to comply with the Advertising Codes, nor does it affect enforcement of ASA decisions.

2.14.3 The ASA was provided with £8 million to run the system in 2007.

⁷ Details of membership of the ASA Council can be found at: www.asa.org.uk/asa/about/council/

⁸ ASA online searchable database:
www.asa.org.uk/asa/adjudications/Public/Search%20TracFusion%20Adjudications.htm

3 The Benefits of Advertising Self-regulation

3.1 Self regulation is a positive alternative to statutory regulation.

3.2 The advertising self-regulatory regime brings great benefits for consumers and for business:

- **Easier for consumers** – A single complaints body makes it easier for consumers to negotiate the complaints system. Prior to the establishment of the ASA one-stop shop, consumers had to navigate three advertising complaints handling bodies (as well as Trading Standards and the Office of Fair Trading).
- **Free** – The system is funded by the industry, not the tax payer.
- **Simpler for Advertisers** - Advertisers have only to deal with one body during the complaints process.
- **Harmonious decision making** - Cross media advertising decisions, eg. single advertising campaigns running on several media platforms, are made by a single organisation.
- **Corporate Social Responsibility** - Effective self-regulation works because it is powered and driven by a sense of corporate social responsibility amongst advertising stakeholders. Advertisers have an interest in maintaining the system and a level playing field because it:
 - Maintains consumer confidence in commercial communications
 - Reduces costs by ensuring that advertising claims are kept within bounds
 - Is a cost-effective way to resolve grievances, without the requirement for expensive lawyers

3.3 Advertising self-regulation is well established across the EU⁹ and the UK system is recognised as operating to a gold standard.

3.4 The Better Regulation Task Force's 'Principle's of Good Regulation'¹⁰ states that 'Self-regulation and voluntary codes of practice have the advantage of involving stakeholders themselves in the process of

⁹ The ASA is a member of the European Advertising Standards Alliance (EASA). The membership of EASA comprises all of the advertising self-regulatory systems across the EU27 and beyond. www.easa-alliance.org

¹⁰ <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/principlesleaflet.pdf>

regulation, and may be cheaper and more flexible to use than government enforced rules.’

3.5 A recognised system

3.5.1 The system of self-regulation of non-broadcast advertising received strong endorsement from the Government in 2000. The White Paper ‘A New Future for Communications’ commented on the ‘strengths and effectiveness of the Advertising Standards Authority (ASA) system for self-regulation of non-broadcast media, which is well regarded both here and overseas.’ The ASA was also held up as an example of good practice by the Government’s Better Regulation Task Force in its report ‘Alternatives to State Regulation’ in 2000. This followed an earlier White Paper ‘Modern Markets: Confident Consumers’ (1999) which made clear that the Government ‘strongly supports the self-regulatory controls run by the ASA’.

3.5.2 In addition DGSanco’s ‘Self-Regulation in the EU Advertising Sector’ report recognised the valuable role that self-regulation could play in the sector of advertising and noted about the UK system:
 “When non-state organisations are also responsible for the enforcement of the codes, the existence of effective sanctions is crucial. However, in addition to the effectiveness of enforcement the pace of decision making is an important factor as well. UK-advertising regulation seems to be a positive example for this”.

3.5.3 The Government’s support for advertising self-regulation was demonstrated in November 2004, when the ASA assumed responsibility for broadcast advertising from Ofcom.¹¹

4 Is the advertising self-regulatory system caught within the scope of the consultation and should it be?

4.1 The consultation document appears to indicate the advertising self-regulatory regime might be one that the Government is considering making subject to the FOI Act.

¹¹ The Contracting Out (Functions relating to Broadcast Advertising) and Specification of Relevant Functions Order 2004 www.opsi.gov.uk/si/si2004/20041975.htm
 Memorandum of Understanding with Ofcom:
www.ofcom.org.uk/consult/condocs/reg_broad_ad/update/mou/mou.pdf

- 4.2 Although the ASA is fulfilling the responsibilities of a public function and, for broadcast advertising, is operating under contract from Ofcom, the advertising self-regulatory system would argue that its status as a self-regulatory body and its particular constitutional arrangements would make it unsuitable for formal designation under the FOI Act.
- 4.3 The system does not receive any public funding. This is one of the considerable benefits to the taxpayer.
- 4.4 The ASA is not covered by the Environmental Information Regulations 2004, nor is it covered by any other statutory requirements placed on public authorities with regard to record keeping e.g. The Public Records Act 1958.
- 4.5 In the consultation document, the Government states that when considering how and whether to extend the coverage of the Act that a balance will need to be struck to ensure that the advantages of openness are considered alongside the potential impact of the organisations to be covered. In particular the Government acknowledges that it will need to consider the resource burdens on the organisations in question. This response will aim to demonstrate that those burdens would be considerable. However, we would also urge Government to consider the impact that the FOI Act will have on the ability for self-regulation to operate freely and effectively – or even at all.
- 4.6 This response will now highlight some specific potential problems that would be encountered by the advertising self-regulatory regime if it were covered formally by the FOI Act. However, it is by no means an exhaustive critique: other aspects of the ASA's work might also be negatively impacted.

5. The Resource Burdens of being covered by the FOI Act

- 5.1 The advertising self-regulatory regime is concerned that if it were to be designated under s.5 of the FOI Act, this would create a financial burden on the system which would outweigh the positive effects of being covered by the Act.
- 5.2 The ASA employs just over 100 staff and has an operating budget of £8 million per annum.
- 5.3 Since the ASA receives no money from the taxpayer, all extra costs would have to be raised via the levy on advertising space costs.

- Although the levy raise is a significant amount, it is not an endless source of money. Advertising revenue is in decline and we are only too aware that this affects the overall amount of money collected by the levy.
- 5.4 It is unlikely that the industry would be supportive of the additional cost of FOI. One of the benefits for industry of self-regulation is that the cost of regulation is kept at a minimum.
- 5.5 During the process of considering this consultation the ASA met with several bodies that are already covered by the FOI Act.
- 5.6 All of the bodies had employed dedicated Freedom of Information or Information Management Officers and one had a dedicated team of four individuals working on FOI requests.
- 5.7 Advertised salaries for Freedom of Information posts in London appear to range from £26,000 for a low grade executive role up to £50,000 for an experienced management role.¹²
- 5.8 Furthermore, it was noted that as well as employing dedicated FOI staff, responding to FOI requests was the responsibility of all individuals in the organisation and that 'FOI leads' generally had to be established on all teams. In addition, some requests, e.g. those for sensitive information might require an application for an exemption, required significant amounts of senior level management time, including that of the Chief Executive or Director General.
- 5.9 We have also been advised that considerable professional legal support would be required to help us comply with Act, both initially and on-going. In particular FOI disputes which are escalated to the Information Commissioner's Office (ICO) and beyond can require expert legal advice. Some organisations used their in-house legal teams. The ASA system is such that it does not require an in-house lawyer¹³, therefore

¹² Selection of jobs advertised in January 2008. Sources checked included The Guardian, The Telegraph, The Times, The Evening Standard and Totaljobs.com

- Data Protection and Freedom of Information Co-ordinator, House of Commons, London £25,756 - £33,183
- Data Protection and Freedom of Information Executive, Legal Services Commission, London £30,000
- Information Governance Manager, South West London and St Georges Mental Health NHS, £36,112 - £43,335 plus allowances pa
- Information Compliance Manager, Law Society, London £50, 846

¹³ The point of self-regulation is to avoid legal intervention wherever possible.

designation under the Act would significantly increase the cost of our external legal support.

- 5.10 As already noted in the consultation document, because of some of the information requirements that had already been placed on some bodies, this meant that some organisations did not need to employ significant extra resources, but absorbed much of the extra work into the roles of existing staff members. These staff members often carried out similar information management roles such as that of a librarian.
- 5.11 The ASA does not currently employ a member of staff to manage information; therefore it would not be possible to absorb the extra burden into existing resources.
- 5.12 There are concerns about costs around the matter of vexatious requests. We are aware that other bodies have had requests for floor plans of their offices or for details of which room every meeting held at the body has been conducted in over a period of time. Each request must be considered no matter how apparently pointless. One body noted that a single journalist had cost them an estimated £100K in FOI requests in just a few months. These requests could not be considered vexatious because each individual request had been reasonable (even if some had been trivial) and even though the number of requests had been large.
- 5.13 Undoubtedly, if the ASA were to be covered by the FOI Act, then extra human and financial resources, as well as additional legal support would be required to deal with information requests.
- 5.14 While it is difficult to pinpoint an exact expense at this stage, from our research with other regulators, it would appear that the financial costs could be substantial. Taking into account the cost of diverting existing staffing resources, employing dedicated FOI staff and legal fees, even a very conservative estimate points to a compliance figure of over £100K. Other publicly funded bodies currently covered by the Act found it difficult to place an exact figure on the additional financial burden of complying with the Act, though one team estimated that it was in the region of £500K. This equates to a hefty one sixteenth of the ASA's budget.

6 Undermining the Stability of the System

- 6.1 However, the most worrying anticipated cost to the advertising self-regulatory system is the impact that designation might have on our ability to maintain the system, so that it operates as efficiently and effectively as it does at the moment – or even at all.
- 6.2 The UK system is widely recognised, both nationally and internationally, as a gold standard self-regulatory regime.
- 6.3 In recent years, in line with the stated policies promoting better regulation across the EU and the UK, the ASA has received much support from policy makers. The system is widely recognised as an effective and efficient mechanism for achieving consumer protection and creating a level playing field for business.
- 6.4 For the advertising industry, which funds and supports the advertising self-regulatory system, the benefits of advertising self-regulation are clear: it is a system that is simple to negotiate and avoids costly statutory regulation. In particular, one of the greatest attractions for business (and policy makers) is that the ASA system avoids unnecessary recourse to the courts.
- 6.5 Indeed the ASA dealt with 23, 953 complaints in 2007 and undertook a substantial amount of monitoring and compliance work, leading to the removal of around 2400 ads¹⁴. That is without the (difficult-to-estimate) number of non-compliant advertisements that were not run as a result of the work of the self-regulatory system, either because the advertiser sought pre-publication advice; accessed our guidance database; attended our industry advice sessions or read relevant updates in the press as a result of an ASA adjudication or awareness-raising work. These are complaints that have been taken off the hands of statutory enforcers and the courts.
- 6.6 The reason why the system works so well is because it is based on trust. The advertisers trust that information provided to the ASA in the course of an investigation into an advertisement, for example in support of their advertising claims is not revealed to third parties. Those involved in drafting the Advertising Codes and developing policy are able to trust that there can be full and frank discussions and exchanges of information about commercial or other concerns and advertisers and

¹⁴ The final statistic for 2007 is still being compiled

agencies trust that they can share their confidential marketing plans with the Copy Advice team. Finally the complete anonymity of the voluntary funding mechanism is a key constitutional principle of the system, which ensures that the ASA adjudicatory body can conduct its work independently and without fear of undue influence.

6.7 We are concerned that all of these aspects of the system would be subject to disclosure under the FOI Act.

6.8 **Consequences for the ASA adjudicatory body**

6.8.1 The Advertising Codes require that substantiation is held for all advertising claims prior to publication. The Codes also reverse the burden of proof: it is the responsibility of the advertiser to prove that they are entitled to make an advertising claim, not the ASA to disprove the claim.

6.8.2 This means that advertisers offer to the ASA considerable amounts of evidence during the course of an investigation. Evidence might also be provided by the complainant (which might be another advertiser) and independently sourced by the ASA. From time to time the ASA consults independent sectoral experts (e.g. nutritionists or financial experts) or legal advice.

6.8.3 Crucially the information provided by business is often commercially confidential. This is particularly the case for investigations into misleading advertising. Complaints about misleading ads comprise approximately 75% of the ASA's caseload. Misleading advertising is also one of the areas where self-regulation is used instead of statutory enforcement through the courts. Investigations into misleading advertising often relate to claims about a product's ability to achieve a particular effect. Advertisers are generally happy to provide the ASA with large amounts of evidence because they know that it will not fall into the hands of a competitor or appear in the public domain.

6.8.4 However, the ASA is concerned that advertisers may refuse to participate in the self-regulatory system if their evidence can be disclosed under the FOI Act.

6.8.5 This is brought into sharp focus by virtue of the fact that sections 30-32 of the FOI Act provide exemptions for evidence gathered for and provided in, legal cases brought by public authorities. The ASA has no legal powers to bring cases before the courts (and does not seek such

powers). It is specifically relied upon by industry and UK statutory authorities to avoid court action. Given that industry information would be afforded protection in the event that they forced a case to go before the courts, rather than co-operate with the ASA, it is highly probable that businesses engaged in sensitive or contentious cases, in highly competitive industries might well choose to take the legal route and take their chances in court instead.

6.9 Consequences for CAP/BCAP

6.9.1 CAP Copy Advice

- 6.9.1.1 CAP Copy Advice is a voluntary pre-publication advice service for non-broadcast advertisements that can be accessed by advertisers prior to running a campaign. Advertisers frequently provide the Copy Advice team with confidential details of their future marketing plans. Indeed, when the system works at its best, advertisers and agencies consult Copy Advice very early on in the creative development of a campaign.
- 6.9.1.2 Copy Advice invariably involves advertisers providing CAP with commercially sensitive information about their future marketing campaigns.
- 6.9.1.3 Importantly CAP particularly targets its service at so-called 'sensitive sectors' i.e. those sectors for which there are extra social responsibility rules, usually relating to the fact that they are age-restricted products e.g. alcohol and gambling. Businesses in these sectors are particularly encouraged to seek pre-publication advice to increase the likelihood that only socially responsible advertisements are published.
- 6.9.1.4 Many major companies in the 'sensitive sectors' require in their contracts with advertising agencies that Copy Advice should be consulted. In fact, many agencies consult Copy Advice with ideas very early in the creative process that might not have been properly thought through, or even seen by the brand owner (e.g. if they were preparing a pitch for business). In these early stages of development, sometimes ideas that would be entirely unacceptable under the Codes are shared with the Copy Advice team e.g. a creative might not have foreseen that their idea for an advertisement for an age-restricted product might have

strong appeal to children. Consulting Copy Advice ensures that such ideas are not developed further¹⁵.

6.9.1.5 In addition, Copy Advice helps the self-regulatory system to build a relationship with the industry it regulates. Copy Advice can alert the system early on about new advertising techniques or trends in particular sectors.

6.9.1.6 Advertisers from all sectors consult Copy Advice knowing that they can confidentially consult the team in the knowledge that their perhaps more outlandish ideas will not get into the public domain - or be seen by the company who is employing the agency. However, if Copy Advice were covered by the FOI Act, it could no longer claim to be 'confidential'.¹⁶

6.9.1.7 This is primarily because the FOI Act does not permit embarrassment or reputational damage as an acceptable reason for exemption from disclosure. Therefore, there is a significant and realistic risk that companies will not volunteer to use the service at all, or involve them only at late stages in development or for limited aspects of the campaign. This could instead lead companies to employ lawyers or other third parties to provide advice on our Codes.

6.9.1.8 This is obviously undesirable: we want ads to be compliant with the Codes at the point of publication and for Copy Advice to be integral and intelligent aspect of the self-regulatory system. Furthermore, employing third parties to provide advice on the Codes increases the financial burden on business (both small and large) on ensuring that they produce compliant and responsible marketing communications.

6.9.2 CAP Code Policy

6.9.2.1 One of the well understood benefits of self- and co-regulation is that the industry plays a strong role in developing the rules by which they are regulated. This encourages industry buy-in to regulation, increases understanding of the rules and helps to ensure that the rules are appropriate to the sector i.e. it helps to avoid unintended consequences.

¹⁵ It should be noted that consulting Copy Advice does not prevent the ASA for receiving and upholding a complaint about an advertisement. Although, it would be noted in the adjudication if the advertiser has sought and followed Copy Advice.

¹⁶ Copy Advice advertises itself as 'fast, free and confidential'

- 6.9.2.2 CAP and BCAP policy decisions are made through internal decision making and after full and frank discussion. Such discussions may include commercially sensitive information. It also means that regulatory problems can be overcome and agreed quickly.
- 6.9.2.3 Although the internal decision making process and the ability to share sensitive information is a vital component of the constitution of the system, CAP and BCAP do engage with external stakeholders. For example, CAP and BCAP are currently conducting a root and branch review of the Advertising Codes. This review will be subject to public consultation. This means that the results of internal discussions and CAP and BCAP's responses to the public consultation along with justifications for their decisions will be published. However, it is not appropriate for all discussions leading up to those decisions to be made disclosable.
- 6.9.2.4 In fact the FOI Act acknowledges that the policy decision-making process can be extremely sensitive. For example, s.35(1)(a) of the Act states: 'Information held by a government department or by the National Assembly for Wales is exempt information if it relates to – the formulation or development of government policy'.
- 6.9.2.5 However, this acknowledgement of the sensitive nature of policy making is applicable only to government departments. The self-regulatory system is concerned that CAP and BCAP, if designated under the Act, would not have a similar exemption.
- 6.9.2.6 It is perhaps an uncomfortable truth, but a real side effect of the FOI Act is that many minutes of important meetings become bland or incomplete. Major decisions are made beforehand with 'agreed lines' being brokered in 'off-the-record' meetings.
- 6.9.2.7 Such distorted record keeping is counter productive and is not a route that we would ever seek to venture down, regardless of designation. However, being realistic this is what is already happening in bodies that are covered by the Act.
- 6.9.2.8 The self-regulatory system's concerns do not represent a reluctance to be held publicly accountable. On the contrary, the system can only retain the confidence of consumers, the industry and Government if it is able to justify its decisions and processes publicly and engage in debate. This already happens. However, requiring the system to publish all documents, discussions and correspondence relating to the

decisions that it takes might result in more decision-making being taken outside of the Committees and without the involvement of the CAP and BCAP Executive (which would be subject to the information requests). This would be unhelpful and damaging to the operation of self-regulation.

6.10 **Effect on the funding mechanism**

6.10.1 The ASA is currently able to take its decisions independently of undue influence from the advertisers it investigates.

6.10.2 As already noted in this response, the ASA has no idea how much individual advertisers contribute to the levy, if at all.

6.10.3 The arms-length system, administered by Asbof and Basbof is crucial in maintaining the independence of the ASA decision-making process.

6.10.4 Although Council Members would be unlikely to be swayed in their decision making even if they knew who contributed to the levy, it is important for the decision making process in a self-regulatory system to be seen to be independent.

6.10.5 The funding mechanism ensures that the ASA can take on the biggest advertisers without fear. In some cases, the ASA has met some of the biggest advertisers in court as they have sought to take out injunctions or Judicially Review Council decisions.¹⁷

6.10.6 The regime acknowledges that the nature of our work means that it is within the public interest to know how the funding mechanism works and how much the ASA is given by the funding bodies to run the system each year. Rightly all of this information is already on the public record.

6.10.7 However, revealing which companies contribute to the levy is in no one's interest, yet we are aware that this is likely to be the sort of information that will be made available (we have been advised that it would be unlikely for the ICO to agree to exempt the information).

6.10.8 The imperative of maintaining the confidentiality of the funding mechanism cannot be understated. It is a fundamental pillar of the self-regulatory system.

¹⁷ Advertisers that have taken the ASA to court have included SmithKline Beecham (now GlaxoSmithKline), Jamster (the company behind the Crazy frog ringtone), Debt Free Direct, Direct Line and Dixons

7 Is the threat realistic?

- 7.1 The concerns of the system are entirely real. The partnership of self- and co-regulation has been established precisely so that it can operate differently to statutory regulation. The system is intended to cut down on red tape and ensure that regulation is unhindered by some of the barriers that are faced by statutory control. The ability to communicate freely across the organisation means that decisions can be taken by consensus and action can be taken by flexible and inventive persuasion. This is what makes self-regulation fast and economically viable.
- 7.2 One of our chief concerns is that the industry might start to withdraw from co-operating with or using the self-regulatory system should the regime be subject to the FOI Act. This concern is not without foundation. There is already evidence that industry has withdrawn from a voluntary scheme with Ofcom because of an FOI request. Details can be found on Ofcom's website¹⁸, but the general detail of the case is as follows.
- 7.3 Ofcom established a voluntary scheme with the mobile network operators it regulates called 'Sitefinder'. The mobile network operators provided national information to Ofcom about the sites of their mobile phone masts. As a service to the public, a search function was established on Ofcom's website which provided a list of masts in the local area on the basis of an address or postcode. Commercial sensitivities and the threat of vandalism meant that the information was held in trust by Ofcom on the understanding that the complete dataset would not be made available to competitors or the public. Unfortunately there was a request made under the FOI Act asking for all of the underpinning data sets. Ofcom judged that the sensitivity of the information meant that it should not be made available in its entirety and refused the request. However, the ICO disagreed and the case has now gone to the High Court for a final decision.
- 7.4 The request has caused the mobile network providers to withdraw from the voluntary scheme. This means that they are no longer providing Ofcom with updated information about their masts. Depending on the outcome of the High Court case an extremely valuable service could be lost.
- 7.5 The Sitefinder case demonstrates that although there is an exemption for commercially sensitive information under the FOI Act (s.43), it is often difficult to apply. If the risk of publicly revealing the site of every single

¹⁸ <http://www.sitefinder.ofcom.org.uk/>

mobile phone mast in the UK is not considered to be commercially sensitive by the ICO, then it is unlikely that the ICO would consider the vast majority of the information that the ASA system holds on trust to be confidential. This could have far-reaching negative consequences for the advertising self-regulatory regime.

- 7.6 In addition, the case also highlights the sort of lengthy court battles with which the system might have to engage simply to maintain industry support for self-regulation.
- 7.7 It is our opinion that the Sitefinder case clearly demonstrates how the FOI Act can work against self-regulatory mechanisms. The collapse of the advertising self-regulatory system is a worst case scenario, which we sincerely hope would not happen, however if the system is destabilised by FOI, there is nothing stopping the industry from gradually withdrawing, as in the case of 'Sitefinder'. Perhaps a more immediate consequence could be the fragmentation of the system. For example, the industry may choose to remove services such as CopyAdvice from the ASA umbrella and run it as a separate organisation.
- 7.8 Should the withdrawal of support be so serious as to threaten the future of advertising self-regulation, this would mean that all complaints (some 24,000+ each year) would fall to statutory enforcers such as local Trading Standards, OFT, Ofcom and the Gambling Commission. This would result in a much increased burden on local services and the courts that would be out of step with the Government's own Better Regulation principles. It would also create a more confusing regulatory regime for consumers and business to navigate.

8 Suggested Approach

- 8.1 The advertising self-regulatory system is supportive of ensuring that the public is appropriately informed of decisions that are taken within the public interest and agrees that the public has a legitimate right to know how taxpayer's money is spent. However, we firmly believe that self-regulation should be viewed as a special case.
- 8.2 As a transparent regulatory body the ASA system continues to ensure that as much information as possible is available to the public. The ASA ensures this through internal policies and an ethos of transparency.

- 8.3 The ASA strongly favours the status quo remaining: no legal, statutory or other Government initiated duty should be placed on the self-regulatory system to comply with the FOI Act.
- 8.4 From time to time, the ASA does receive requests for information under the FOI Act. While the ASA is not covered by the Act we do attempt to provide all information that is requested. We make it clear to the person or organisation requesting the information that the ASA is not required to provide information under the Act and that the information has therefore been released voluntarily.
- 8.5 However, now that the duties and principles within the FOI Act have been brought fully to the attention of the regime, we do feel that it would be appropriate to review our internal data systems and to draw up a clear policy on what sort of information we would be able to make available. It is our view that freedom of information is, overall, a force for good and the system is willing to demonstrate its commitment to the principles of freedom of information, whilst ensuring that the advertising self-regulatory regime is not destabilised.
- 8.6 As already stated, the system already makes available a vast amount of information, a non-exhaustive list of which can be found in the Annex. In revisiting our policy, we would be more than happy to keep the Government informed about what we intend to do and how we intend to achieve it.
- 8.7 Taking this approach would comply with the Government's own Better Regulation principles. In the Better Regulation Task Force report '*Alternatives to State Regulation*'¹⁹ it was demonstrated that different bodies required different approaches; a 'one size fits all' approach to regulation was not always the best approach. With this in mind, we urge the Government to take into account the possible negative unintended consequences of full designation under FOI on the ability of the ASA to operate.
- 8.8 If the status quo is genuinely not sustainable, then the ASA would support Option 2 in the consultation document. However, we would have concerns about the costs of establishing a self-regulatory mechanism outside of the ASA to decide on disclosure.

¹⁹ <http://archive.cabinetoffice.gov.uk/brc/upload/assets/www.brc.gov.uk/stateregulation.pdf>

- 8.9 At this stage we have no views to offer on how such a scheme might look, but we would recommend that this was a genuine form of self-regulation, taken forward by stakeholders so that the Code could take into account all concerns, rather than Government-imposed initiative. This is important to the ASA. If self-regulation simply means removal of recourse to the ICO and the courts, but still requires all classes of information to be disclosed, regardless of the impact of doing so, then this would still have the potential to harm the operation of advertising self-regulation, albeit while reducing financial and resource burdens.
- 8.10 The Ministry of Justice has identified two potential issues with self-regulation (voluntary or otherwise). Firstly how far and how consistently organisations could be expected to abide by non-statutory guidance and secondly whether any sanctions could be brought to bear on organisations that failed to do so.
- 8.11 The aim of self-regulation is not usually to apply sanctions, but rather to bring about compliance. The ASA's experience of self-regulation demonstrates that organisations do abide by Codes. When developing a self-regulatory system, appropriate non-statutory mechanisms can be simply devised.

9 Conclusion

- 9.1 The advertising self-regulatory system believes in being transparent and open in its work. The system already routinely makes publicly available a large amount of information on its website, on a similar scale to that of other regulators. At the moment, the regime will consider any Freedom of Information requests and always seeks to answer them as fully as possible.
- 9.2 However, given the nature of self-regulation, there are significant concerns that the advertising self-regulatory system might be adversely affected by formal designation under the FOI Act. This is because it might require the system to publish information that affects the constitution of the system or is such that it would cause the industry to lose trust in the system.
- 9.3 The ASA strongly favours the status quo remaining: no legal, statutory or other Government initiated duty should be placed on the self-regulatory system to comply with the FOI Act. However, now that the duties and principles within FOI Act has been brought to the attention of the advertising self-regulatory regime, we do feel that it would be

appropriate to review our internal data systems and to draw up a clear policy on what sort of information we would be able to make available.

Thank you for the opportunity to respond to this consultation. As already stated, this response is not comprehensive in its assessment of the impact of FOI on advertising self-regulation, but is intended to give a strong indication of the likely impact. If the Ministry requires any further detail we are happy to provide it.

Yours sincerely,

A handwritten signature in black ink, appearing to read 'L Taffe', written in a cursive style.

Lynsay Taffe
Communications and Policy Manager
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Annex

A. Information routinely published by the ASA/ CAP/ BCAP

1. The ASA publishes a significant amount of information on its website www.asa.org.uk including:
 - Background information about the ASA
 - the role and purpose of the ASA, including the history of the self-regulatory system;
 - the ASA's Mission, Vision and Values;
 - funding information;
 - the structure of the system;
 - the ASA's Annual Report
 - Key Performance Indicators
 - Complaints
 - Guide on how to make a complaint including information on how to register a complaint online, by post, telephone and fax.
 - Downloadable versions of the procedures for investigating complaints for both broadcast and non-broadcast ads.
 - Data Protection
 - The ASA's data protection statement and privacy policy along with information on how to complain about the use of personal information.
 - ASA Council
 - its operations
 - biographical information on Council Members
 - Internal Structure
 - internal structure
 - information on the management team
 - Publications
 - Consultation responses
 - research and compliance reports
 - articles about advertising issues of public concern

- background briefings on advertising issues
- case studies of recent adjudications
- Other Information
 - e-Newsletters – advertisers and members of the public can sign up to receive e-newsletters from the ASA

2. Information Published by CAP and BCAP

CAP and BCAP publish a large amount of information on their website www.cap.org.uk. This includes:

- General Information about CAP and BCAP
 - CAP/ BCAP remit
 - how the Codes are formed
 - relationship with the ASA
 - funding information.
 - Sanctioning
 - Background information about CAP/BCAP members, including links to their websites
 - Background information on the Advertising Advisory Committee, including its role and members
- Publications
 - The Advertising Codes
 - Consultations
 - News and events including event reports
 - AdviceOnline - a database of HelpNotes which have been issued to help the advertising industry to comply with the Codes.
- Other information
 - e-newsletters – subscription information for e-newsletters and how to keep up to date with CAP news.

3. ASA adjudications are published on our website each Wednesday and remain on our online searchable database for five years. After five years, copies of adjudications are available on request. It is possible to sign up to our website to receive notification of our adjudications, as of 1 February 2008, 4367 individuals had subscribed to the service.

4. The Annual Statement, published each Autumn provides information about:
 - the performance of the ASA and CAP/ BCAP against published standards of service
 - Our progress against published Key Performance Indicators
 - Organisational objectives for the following year
 - A review of the work of the Independent Reviewer
 - Our standards of Service

5. The Annual Report (published in the Spring) provides a complete review of the previous year
 - Significant changes to the system, including significant changes in personnel
 - Comprehensive data on the ASA's complaints and investigations (including details about types of complaint by media and sector and reasons for complaint)
 - Details of the Top 10 most complained about advertisements
 - Financial Reporting
 - Reviews from CAP and BCAP, the Independent Reviewer and the Advertising Advisory Committee

6. Information provided on request

The ASA receives numerous requests for information through its enquiries service. The ASA dealt with 2939 email enquiries last year. The ASA attempts to fulfil all requests for information where possible. Where it is not possible to fulfil a request for information e.g. confidential or copyrighted information, we inform the enquirer as to the reason why we can not deal with their request.