

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 February 2015

Public Authority: Department for Transport

Address: Great Minster House
33 Horseferry Road
London
SW1P 4DR

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Transport (DfT) for information related to the work of the Cross-Government Working Group on Remote Piloted Aircraft. In response the DfT disclosed some of the information it held but withheld some minutes of meetings of the group under the exemption in section 35(1)(a) (formulation and development of government policy) of FOIA.
2. The Commissioner has investigated the complaint and found that section 35(1)(a) was correctly applied and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

3. On 4 April 2014 the complainant made a freedom of information request to the DfT which asked for the following information.
 - i. *Agendas prepared for meetings of the Cross-Government Working Group on Remote Piloted Aircraft ('the Group') since the formation of the Group.*
 - ii. *Minutes from all meetings of the Group*
 - iii. *Presentations to the Group (whether written, oral or other media)*

- iv. Action and work plans for the Group and members relevant to the work of the Group*
 - v. Current and planned activities for the Group and members relevant to the work of the Group for the year 2014.*
4. The DfT responded to the request initially when it explained that it needed further time to consider the public interest test and so was extending the 20 working day deadline.
 5. The DfT provided a substantive response on 5 June 2014 when it disclosed a quantity of information falling within the scope of the request. However the following information was withheld:
 - Minutes of meetings held on 10 July 2013, 9 October 2013 and 17 March 2014 (section 35(1)(a))
 - Financial information contained in slide 7 of the Defra presentation (section 43)
 - CPNI and CESG paper: Information Risk Management on RPAS (section 22)
 6. The complainant subsequently asked the DfT to carry out an internal review of its handling of the request and it presented its findings on 23 July 2014 which upheld the original decision to withhold some of the requested information.

Scope of the case

7. On 10 October 2014 the complainant contacted the Commissioner to complain about the decision to refuse to disclose some of the requested information.
8. The Commissioner subsequently agreed with the complainant that the scope of his investigation would be to consider whether the DfT should have disclosed the minutes of the meetings of the Cross-Government Working Group on Remote Piloted Aircraft ("the group") which it had sought to withhold under section 35(1)(a). The complainant did not challenge the decision to withhold the other information.
9. During the course of the investigation the DfT informed the Commissioner that should he find that section 35(1)(a) was not engaged it would seek to apply the section 36(2)(b) (free and frank provision of advice/exchange of views) exemption in the alternative. It also applied the section 23 (Security bodies), section 24 (national security), section

26 (defence) and section 40 (personal information) exemptions to specific parts of the withheld information.

Reasons for decision

10. The DfT has applied the section 35(1)(a) exemption to all of the withheld information (the minutes of meetings of the group) and therefore the Commissioner will consider whether this exemption applies in the first instance.
11. Section 35(1)(a) of FOIA 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 "relate to" the formulation and development of government policy.
14. In this case the DfT explained that the Cross-Government Working Group was set up with a view to formulating government policy with respect to the use of RPAS (Remotely Piloted Aircraft Systems) and UAV (Unmanned Aerial Vehicles) technologies within the territorial boundaries of the UK. It said that this includes their use in military, civilian and law enforcement contexts and that policy within the Group is simultaneously in the process of both formulation and development, depending on which aspect of RPAS and UAV is being considered. It highlighted specific policies including allocation of suitable air space for test flights; the establishing of safety and technical standards for RPAS and UAV technologies; the divide and overlap between civilian and military application of those technologies; and data protection and information security policies in respect of RPAS and UAV technologies.

15. In contrast the complainant had argued that the exemption had been applied too broadly and in a blanket fashion. They said that from the information that had been disclosed it appeared that not all of the discussions from the group's meetings would concern government policy.
16. On this point the DfT referred to the decision of the Information Tribunal in the case of *DFES v Information Commissioner and The Evening Standard*, EA/2006/0006, where it noted that, "If the meeting or discussion of a particular topic within it, was, as a whole, concerned with s.35(1)(a) activities, then everything that was said and done is covered. Minute dissection of each sentence for signs of deviation from its main purpose is not required nor desirable". This approach follows the Commissioner's own guidance and he would agree that the main focus of the withheld information is on the formulation and development of government policy. Even if not every element of the discussions is specifically about policy it can still be said to 'relate to' these matters.
17. The Commissioner is satisfied that all of the withheld information relates to the formulation and development of government policies surrounding the use of RPAS and UAV technologies. As such the Commissioner has decided that the section 35(1)(a) exemption is engaged.

Public interest test

18. Section 35(1)(a) is a qualified exemption which means that whilst the exemption may be engaged, information can only be withheld where the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

19. The DfT acknowledged the following arguments in favour of disclosure.
 - Disclosure of the minutes in respect of the Government Working Group on RPAS correspondence would show how and why decisions have been made in the formulation of government policy including discussions in respect of the potential use and operations of RPAS by both Government Departments/Agencies and Commercial/Private sector in the UK, Research and Development of emerging technologies and issues on privacy, data protection and safety.
 - Disclosure would be consistent with the Government's wider transparency agenda. This makes the Government more accountable to the electorate and increases trust in the democratic process.

- Disclosure might allow the public to contribute to this policy which would make it more effective and broadly based, also allowing a more effective contribution to be made to decisions on similar issues in the future.
20. The complaint argued that the DfT had not properly identified the prejudice that would be caused by disclosure of the withheld information. In particular the complainant challenged the claim that a 'safe space' was needed to formulate and develop and that disclosure would have a chilling effect on the frankness of officials' contribution to policy discussions.
21. The complainant also argued that with regard to RPAS there had been a failure to regulate and that this weighed heavily in favour of disclosure.

Public interest arguments for maintaining the exemption

22. As regards the public interest in maintaining the exemption, the DfT said that it had taken the following arguments into account.
- Government Department experts and interested stakeholders would be reluctant to share ideas or provide advice on these matters if they knew it would be routinely disclosed. Officials are discussing sensitive information for future Ministerial approval. Disclosure of such material can be taken out of context and construed as policy when in fact this is not the case.
 - Effective government depends on good decision making which needs to be based on the best advice available. A free and frank exchange of views and ideas and a full consideration of the options. The meetings and the consideration for them, concerned the formulation of government policy and although a number of topics are discussed at the meetings, the Working Group has not yet reached consensus or fully developed proposals that will allow it to make proposals to Ministers. Some of the topics and issues discussed may not necessarily be taken forward.
 - If the minutes were released now then it would set a precedent concerning the release of minutes of other meetings in the same circumstances.
 - The impartiality of the civil service would be undermined if advice and views were routinely made public as there is a risk that officials could come under political pressure not to challenge ideas in the formulation of policy, so leading to poorer decision making.

- There needs to be a free space in which to think and use imagination to develop policies without fear of an idea being ridiculed. This would make it difficult to conduct unbiased policy formulation. Changes to the way which operators use and operate RPAS, are less likely to be proposed if it was subject to routine disclosure.
 - There is a well-established consultation process which could be undermined if draft proposals were made available in advance of formal consultation.
23. At the internal review stage the DfT had also suggested that the public interest favoured maintaining the exemption as disclosure risked undermining the principle of cabinet collective responsibility. It explained that in this case more than one government department has an interest in the policy being developed and so disclosure of interdepartmental considerations and the views of individual ministers may undermine cabinet collective responsibility.

Balance of the public interest arguments

24. The Commissioner has considered the competing arguments and as regards the public interest in disclosure he accepts that this is an area of legitimate public concern and the withheld information would help to increase transparency and accountability surrounding government policy on the use of RPAS. However, the Commissioner is also of the view that the public interest has to some extent been met by the information already disclosed by the DfT.
25. The arguments for maintaining the exemption essentially focus on the concepts of a 'safe space' and 'chilling effect'. The idea behind the safe space argument, accepted by the Commissioner, is that government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.
26. The need for a safe space will be strongest when an issue is still live. In this case the Commissioner has found that the discussions recorded in the minutes are at an early stage. The policies being discussed are still live and no final decisions have been made. As such there is a considerable public interest in allowing the government a safe space to continue its discussions and contribute to the formulation/development of policy without the fear that these early contributions will be made public.

27. The Commissioner would also make clear that whilst some issues are at a later stage of development, such as policies surrounding information security, all of the issues are nevertheless still live and under active consideration. A safe space is still needed.
28. The DfT has also argued that disclosure would have a 'chilling effect' on the ability of officials to contribute to the policy process whereby the frankness and candour of their future discussions would be inhibited. It also suggested that some parties whose input is valuable would be unwilling to participate altogether or if they did continue to participate their advice would become less detailed.
29. The Commissioner has reviewed the withheld information and has found that it includes candid discussions which cover sensitive issues including matters such as national security. Furthermore, further meetings of the group were due to take place after the complainant's request and as such, the Commissioner is prepared to accept that disclosure at that point would have affected the frankness with which officials contribute to future discussions on policies surrounding RPAS. This would not be in the public interest as this would lead to poorer quality advice and less well formulated policy and decisions. Again, timing is a key factor. The issues being discussed were still very much live at the time of the request and the minutes themselves were relatively recent (between 9 months and 1 month old) therefore the Commissioner has given some weight to the chilling effect argument when balancing the public interest.
30. Whilst the Commissioner accepts that the DfT's arguments surrounding a safe space and chilling effect carry weight, he does not accept its arguments regarding undermining cabinet collective responsibility. As the complainant has noted, exemptions within FOIA are distinct and public interest arguments must be relevant to the specific exemption claimed. Arguments concerning collective responsibility are relevant to the exemptions under section 35(1)(b) and 36(2)(a)(i) and so the Commissioner has not given any weight to this particular argument when balancing the public interest with respect to section 35(1)(a).
31. However, notwithstanding this the Commissioner is satisfied that there is a compelling case for maintaining the exemption. He finds that the arguments around safe space and chilling effect together attract significant weight because disclosure would damage the policy making process as any decisions reached would not be based on the best available advice. The Commissioner accepts that there is a public interest in disclosure but given the timing of the request the Commissioner is satisfied that this is outweighed by the public interest in maintaining the exemption.

Other exemptions

32. The Commissioner is satisfied that the withheld minutes are exempt in their entirety under section 35(1)(a) and therefore he has not gone on to consider whether any of the other exemptions relied on by the DfT apply.

Right of appeal

33. 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

34. 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.
35. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Signed

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF