

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 June 2020

Public Authority: Department for Transport
Address: Great Minster House
33 Horseferry Road
London
SW1 4DR

Decision (including any steps ordered)

1. The complainant has requested minutes from a round table discussion between the shipping industry and government ministers. The Department for Transport (DfT) provided a list of attendees but withheld the contents of the minutes under section 35(1)(a) – formulation and development of government policy and section 35(1)(d) – operation of a Ministerial private office.
2. The Commissioner's decision is that section 35(1)(d) is not engaged. Section 35(1)(a) is engaged and for the majority of this information the public interest favours maintaining the exemption. However in respect of a very limited amount of the information the public interest favours disclosure and therefore the DfT cannot rely on section 35(1)(a) to withhold that information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information which cannot be withheld under section 35(1)(a).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 March 2019, the complainant wrote to the DfT and requested information in the following terms:

“Under the Freedom of Information Act 2000, I would like to request information relating to a meeting between the shipping industry and government ministers

In September 2017, various figures from the shipping industry went to 10 Downing Street to attend a round-table discussion (<https://www.ukchamberofshipping.com/latest/shipping-industry-takes-its-cause-downing-street/>). UK Transport Secretary Chris Grayling chaired the debate.

I would therefore like:

- A full list of attendees including names and companies
 - Any minutes produced from the meeting”
6. On 25 April 2019 the DfT responded. It disclosed the list of attendees but withheld minutes of the meeting citing section 35(1)(a) - formulation or development of government of policy, and section 35(1)(d) - the operation of any Ministerial private office, of the FOIA as its basis for doing so.
7. On 28 May 2019 the DfT conducted an internal review of its handling of the request and wrote to the complainant maintaining its original decision.

Scope of the case

8. On 30 May 2019 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner has considered whether the DfT correctly applied sections 35(1)(a) and (d) of the FOIA to withhold the requested information.

Reasons for decision

Section 35(1)(a) - formulation or development of government policy

10. So far as is relevant, section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates to the formulation or development of government policy.

11. For information to be exempt under section 35(1)(a) it simply has to relate to the formulation or development of government policy; there is no requirement for the disclosure of the information to be in any way prejudicial to either of those policy processes.
12. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. This means that any significant link between the information and the policy process is sufficient to engage the exemption.
13. In this case the withheld information consists of the minutes of a meeting between representatives of the shipping industry. The DfT has explained that these are not formal minutes, no agreement was made with attendees to either minute the meeting or circulate and agree the minutes. The record of the meeting was therefore intended for the Secretary of State's office's internal use only. Despite the fact that the note of the meeting is an informal one the Commissioner is satisfied that it can be accurately described as being minutes of the meeting and that they are therefore captured by the request.
14. The actual minutes form part of what is otherwise a very short email. Having viewed this email the Commissioner is satisfied that its header, footer and the brief message that accompanies the minutes, can be sensibly separated from the minutes themselves and this peripheral information is not captured by the request.
15. The Commissioner understands that a round table meeting between representatives of the shipping industry and ministers from the DfT has become a regular event during London International Shipping Weeks. The meetings provide the opportunity for leading figures within the shipping industry to share their views and concerns with ministers and also for ministers to discuss any issues they may have. By the time of the meeting in September 2017 the UK government had invoked Article 50 of the Treaty of European Union which formally started the process of the UK's withdrawal from the EU; Brexit negotiations had begun in June 2017. As one might therefore expect, the 2017 meeting concerned the future direction of the maritime industry following the UK's departure from the EU.
16. The Commissioner has viewed the minutes and is satisfied that the issues discussed relate to the formulation of the government's policies in respect to the maritime industry following Brexit. The Commissioner is therefore satisfied that the exemption is engaged.

Public interest test

17. Although the exemption is engaged simply because the minutes relate to the formulation of government policy, the exemption is subject to the public interest test as set out in section 2 of the FOIA. This means that

the minutes can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.

18. The DfT has recognised the general public interest in disclosing information which increases the public's trust in the way government works. Disclosure would inform the public as to the way government works which would lead to a more effective and broadly based public contribution to the policy making process. In particular, disclosing the minutes would allow the public to understand how industry and the government work together.
19. The complainant has raised further public interest arguments. He contends that there is an increased public interest in releasing the minutes as they would reveal the influence that the representatives of the shipping industry exerted, or tried to exert, over government policy. He has referred to the attendees from the shipping industry as being a delegation led by Maritime UK, which, he says, is, by its own admission, a lobbying group.
20. Lobbying is a legitimate activity and can be a constructive part of developing government policy. However if the information does relate to lobbying there are a number of public interest factors that need to be considered when weighing the public interest in disclosure. Where the representatives of particular interests have access to senior members of the government and are given the opportunity to promote those interests, there is obviously an increased public interest in transparency in order that the public can reach an informed view of the extent to which government is being influenced by such groups. This is particularly true where only the views of one side to a debate enjoy privileged access. The Commissioner is not aware of what opportunity any parties who may hold alternative views on the issues discussed at the meeting were offered, but that is not to say that the government did not consult more broadly.
21. One would normally expect lobbyists to be more resilient to the impacts of disclosing information about their involvement with government, for example a lobbyist intent on taking the opportunity to shape government policy in favour of the interests they represent are less likely to shy away from doing so simply because their input may be revealed. It is arguable therefore that their contribution to the policy process is unlikely to be curtailed or be less candid if the information is disclosed. This reduces the scope for the disclosure to prejudice the formulation or development of policy. These arguments will be revisited when looking at the public interest arguments in favour of maintaining the exemption.

22. The DfT has disputed that the meeting was led by Maritime UK. The DfT argues that Maritime UK's then Chair was joint host of the meeting along with the Secretary of States for Transport and for International Development.

23. The Commissioner notes that, in the article linked to in the complainant's request, the UK Chamber of Shipping described the meeting in the following terms:

"The delegation, led by Maritime UK, took part in a round-table debate with government ministers to discuss both the challenges and opportunities facing the UK's maritime industry, and how the government can strengthen the country's appeal as an attractive business centre."

Therefore one can understand the complainant's reasons for characterising the meeting as being between a delegation, led by Maritime UK, and government ministers.

24. As to the status of Maritime UK the DfT stated that the organisation does not overtly claim to be a lobbying group. The DfT emphasised that one of Maritime UK's stated strategic objectives was to "work in partnership with government". However the Commissioner notes that another of its objectives is given as being to:

"Act as "One Voice" for the common concerns of the sector – amplifying its profile, identifying common issues and promoting joint positions through industry campaigns and messaging".

25. In support of his argument the complainant has also quoted the banner headline from the Maritime UK's website which states that:

"We bring together the UK's shipping, ports, services, engineering and leisure marine industries to drive growth by promoting the sector, influencing government and fostering collaboration".

26. To counter the argument that Maritime UK is a lobbying group, the DfT has explained that its National Council, responsible for setting Maritime UK's strategic objectives, has representatives from a number of government departments and the Royal Navy. The Commissioner also accepts that the meeting had not been specifically requested by the shipping industry, rather it was more of a routine meeting that had become a regular part of London International Shipping Week and could be seen as providing government with a convenient opportunity to canvass the views of leading figures from the industry as much an opportunity for the shipping industry to push its own agenda.

27. It may be that Maritime UK have concerns other than simply promoting the self interest of commercial bodies within the shipping industry. Such

objectives may aim to serve the interests of the wider society. However Maritime UK's prime interest is the promotion of the shipping industry. Furthermore, even where a body may be promoting, what could be viewed as, altruistic objectives (for example where a national charity seeks to influence government), that activity is still a form of lobbying.

28. The Commissioner also considers it would be unrealistic not to recognise that those attending the meeting were representatives from the commercial world and the meeting provided them with the opportunity to input into government policy and steer its direction and that when doing so, they would have regard for their own interests. Therefore the Commissioner, who has viewed the contents of the actual minutes, is satisfied that the meeting could be characterised as an opportunity for the shipping industry to lobby ministers and to influence government policy. There is therefore a strong public interest in disclosing information which reveals the issues raised by the shipping industry, the direction in which they wished to steer government policy and to understand how government ministers responded to the matters raised.
29. The public interest in disclosure is still greater given that the actual subjects under discussion all relate to the government's formulation and development of policies once the UK left the EU. These policies will impact on not only the shipping industry, but also the wider UK economy. On top of this, the whole Brexit debate and process has been very controversial and, certainly at the time of the request, there was uncertainty as to the impact of the UK's departure from the EU.
30. Against these significant public interest arguments in favour of disclosure have to be weighed the public interest arguments in favour of maintaining the exemption. These relate to the extent of any harm that would be caused to the policy process by the disclosure of the minutes.
31. The DfT maintains that the note was made as an aide memoir for officials who would use the information shared by industry to formulate government policy. It argues that releasing the minutes would inhibit the free and frank discussion between the industry and government as industry representatives would be unlikely to be completely open with their opinion if they thought it would be subject to release. If this was the impact of disclosure, it follows that any subsequent policy would not be based on a full understanding of the issues and would be poorer for it.
32. The DfT provided the Commissioner with a copy of the minutes which were annotated to identify the different streams of policy that the issues discussed would feed into. The Commissioner notes that the discussions often relate to policies which are the responsibility of a number of government departments. The DfT has stated that each of the policies to which the discussions relate were and still are under review or at the

formulation stage. The Commissioner is satisfied that the DfT has not just applied a blanket exemption to the information, but instead has considered each of the policies in question and considered their individual sensitivity.

33. The argument that industry representatives would be less candid when expressing their views in the future if they had concerns that those views would be revealed later is often referred to as the chilling effect. The Commissioner recognises the potential for such an effect to occur. One would expect high standards from government officials, that they would be fairly robust and not be easily deterred from entering into full and frank discussions in order to properly perform their duties. The situation may be different for those who volunteer to input into the policy process. If they were concerned about those views being made public they may be less willing to contribute them. However in this case the Commissioner considers that leading figures from the shipping industry would be highly motivated to get their views across to senior members of the government and would not be easily discouraged from doing so. This would reduce, but not eliminate, the chilling effect. The Commissioner considers the chilling effect would be increased by the fact that the minutes in question are informal ones, as the industry representatives would not have agreed they were an accurate record.
34. Since the chilling effect relates to how those involved in the discussions will behave in future discussions, the impact would obviously be greater where it was likely that the same or similar issues would be discussed in the near future. The DfT has not advised the Commissioner whether these same industry representatives would be involved in similar discussions in the future. Nevertheless the Commissioner considers that as the policies were all still live at the time of the request and that since the UK left the EU, trade negotiations are taking place during a transition period, it is quite conceivable that those, or other industry representatives, would need to be consulted by the government.
35. The DfT has also argued that the public interest favours maintaining the exemption because officials need safe space to consider the views of the shipping industry, unhindered by any concern that their deliberations would be subject to release. As set out in her published guidance on section 35, the Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. Obviously the need for safe space is greatest at the time when the issues being debated are still live, which is the case here. The Commissioner also considers that particular weight should be given to this argument as the matters under discussion would relate to both negotiations with the EU on the terms of the UK's withdrawal and later on the subsequent negotiations on a trade deal with the EU.

36. In balancing the competing public interest arguments the Commissioner has taken account of the strong public interest both in the public better understanding the government's policy position on issues around Brexit and in understanding how government works with industry, particularly where the input from industry could be viewed as an opportunity for powerful representatives from an important sector of the economy to lobby ministers. Against these factors is the fact that the subjects discussed in the minutes relate to government policies that were, and still are, being reviewed and formulated. More importantly those policies are all strands of an issue of major importance, i.e. the prosperity of the UK following its departure from the EU. The information is of particular sensitivity because of its relevance to the UK government's negotiations with the EU. Therefore in respect of the majority of the withheld information the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure.
37. However in respect of a very limited amount of information the Commissioner finds that the public interest favours disclosure. This information is less sensitive. The names of attendees have already been disclosed, however it is not clear whether the companies which they represent have already been disclosed. These could easily be obtained by very basic searches of the internet and it would therefore be difficult to justify withholding this information and in the event that the DfT has not already disclosed this information the Commissioner finds that the public interest favours disclosure.
38. The minutes also include very brief note of the 'introductions'. These do not directly discuss any policy issues. Although there is little public interest in disclosing this information there is even less public interest in avoiding the very limited harm that might be caused by its disclosure. The public interest therefore favours disclosure.
39. Having found that a limited amount of the information cannot be withheld under regulation 35(1)(a) the Commissioner will consider whether it can be withheld under section 35(1)(d).

Section 35(1)(d) – operation of any Ministerial private office

40. Section 35(1)(d) of the FOIA states that information is exempt if it relates to the operation of any Ministerial private office. For information to be exempt under section 35(1)(d) it simply has to relate to the operation of a Ministerial office; there is no requirement for the disclosure of the information to be in any way prejudicial to the operation of that office.
41. The DfT has explained that the minutes were produced by a Private Secretary carrying out the duties of the operation of a Ministerial Office and that therefore it considered that section 35(1)(d) applied to both

the actual minutes and the email in which those minutes were embedded. As explained at paragraph 14 above the Commissioner finds that the minutes can sensibly be extracted from the rest of the email and that it is only the actual minutes which are captured by the request. Therefore the Commissioner will only consider whether the actual minutes relate to the operation of a Ministerial private office and so are exempt under section 35(1)(d).

42. So far as is relevant, section 35(5) defines a 'Ministerial private office' as being any part of a government office which provides personal administrative support to a Minister of the Crown. The exemption is engaged where the information 'relates to' the 'operation' of such an office. Although the term 'relates to' is interpreted broadly there still has to be a link between the actual information and the 'operation' of the Ministerial private office. The Commissioner considers the 'operation' of a private office concerns the actual administrative support provided to the Minister. As such the information must relate to the routine administrative and management processes that are required to ensure a Minister can carry out their duties effectively and efficiently. This means that in practice the exemption is interpreted narrowly.
43. Although the minutes were produced by a member of the private office and the email in which those minutes sit was circulated as part of the operation of the private office, the actual minutes themselves are not in any way about the operation of the private office. The focus of the minutes is ministerial business, i.e. the ministers' meeting with the shipping industry rather than the administrative support required for that meeting to take place.
44. The Commissioner therefore finds that the actual minutes do not engage the exemption.
45. Since the Commissioner has found that section 35(1)(d) does not apply to any of the information in the minutes and that section 35(1)(a) can only be relied on to withhold some of the information, the DfT is required to disclose the residual information, i.e. the list of attendees complete with the names of the companies, or organisations they represent, together with the three bullet points under the heading 'Introductions'.

Right of appeal

46. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

Rob Mechan
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