

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 November 2022

Public Authority: Department for Digital, Culture, Media & Sport

Address: 100 Parliament Street

London

SW1A 2BQ

Decision (including any steps ordered)

1. The complainant submitted a request to the Department for Digital, Culture, Media & Sport (DCMS) seeking copies of the minutes, agendas and briefing materials for meetings of the Public Service Broadcasting Advisory Panel. DCMS confirmed that it held the requested information but considered it to be exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a) and that in all the circumstances of the case the public interest favours withholding the information.
3. No steps are required.

Request and response

4. The complainant submitted the following request to DCMS on 20 May 2021:

'I wish to see full copies of the minutes, agendas and briefing materials for the Public Service Broadcasting Advisory Panel meetings.'

Please also include any other materials that were handed out or received during the meetings, such as presentations, brochures, reports, and leaflets etc.'

5. DCMS responded on 7 June 2021 and confirmed that it held information falling within the scope of the request, namely agendas for, and minutes of, the Public Service Broadcasting Advisory Panel (PSBAP) meetings and items circulated during the meetings.¹ However, DCMS explained that it considered such information to be exempt from disclosure on the basis of section 35(1)(a) of FOIA and that the public interest favoured maintaining the exemption.
6. The complainant contacted DCMS on the same day and asked it to conduct an internal review of this refusal.
7. The DCMS informed him of the outcome of the internal review on 1 July 2021. It upheld the decision to withhold the requested information on the basis of section 35(1)(a) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner 2 July 2021 to complain about DCMS' decision to withhold the information falling within the scope of his request. He argued that the public interest favoured disclosure of this information.²

Reasons for decision

9. Section 35(1)(a) of FOIA states that:

'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy'
 10. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this
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¹ See here for further details of the panel:
<https://www.gov.uk/government/collections/public-service-broadcasting-advisory-panel>

² It should be noted that the Commissioner's role is limited to considering the application of exemptions at the time of the request.

information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

11. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
12. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
13. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant Minister;
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
14. DCMS explained that the PSBAP formed part of the Government's strategic review of public service broadcasting. The policy issues discussed by the PSBAP therefore relate to public service broadcasting. DCMS noted that the terms of reference for the PSBAP included consideration of the following policy matters:
 - Whether the concept of public service broadcasting (PSB) is still needed, and, if so, what a modern PSB system should contribute to economic, cultural and democratic life across the United Kingdom;
 - How PSB should be delivered in an age where media consumption is increasingly diversified, including considering the roles of different organisations, platforms, and services. This will include, for example, consideration of the future role of the Channel 4 Television Corporation;
 - Whether the legislative and regulatory framework for PSB, when viewed in the context of the media landscape as a whole, needs to change to ensure that the PSB system can continue to deliver sustainably on its objectives; and

- Whether the current funding model for PSB is sustainable in the longer term and remains fit for purpose.³
15. The Commissioner accepts that the withheld information clearly relates to the Government's development of policy in relation to PSB given that it formed part of the work considered as part of the strategic review of policy in this area. In the Commissioner's opinion it is clear from the matters considered by the review, and as evidenced by the terms of the reference of the PSBAP, that the Government intended to achieve particular outcomes and the consequences of any changes would be wide ranging. In addition, the Commissioner is satisfied that the nature of the potential changes would result in final decisions being taken at ministerial level.
 16. Section 35(1)(a) is therefore engaged.

Public interest test

17. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in maintaining the exemption

18. DCMS argued that ministers, their officials and other panel members need a safe space to debate live policy issues away from external interference and distraction. Although the panel members themselves may come from outside government, the agendas, papers and minutes all give an insight into current government thinking, including the views of the Minister personally. DCMS emphasised that at the time of the request (and indeed at the point that this notice is being issued) policy development in respect of this area remained ongoing.
19. As a result of this DCMS argued that there is great importance that the safe space is protected. DCMS emphasised that good government depends on good decision making and officials need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects. The release of this information could put undue pressure on the policymaking process by opening it up to intense public scrutiny and speculation. This would result in decisions being continuously questioned, including why the PSBAP had discussed some

³ <https://www.gov.uk/guidance/public-service-broadcasting-advisory-panel-terms-of-reference>

aspects in depth, as opposed to others. This intense scrutiny may result in decisions being taken that are made simply to avoid adverse public backlash rather than to further the quality of the decision. DCMS argued that this was clearly not in the public interest, nor would it represent an efficient use of public money.

20. In addition, DCMS argued that disclosure of the documents requested at the time of the request may create a chilling effect on further discussions. It explained that at the point of the request future discussions by the PSBAP had yet to take place. It argued that the chilling effect argument was particularly relevant in the case of the minutes, which, although not generally attributed, may allow individual contributions to be identified. DCMS argued that this is important as proceedings and discussions of the Panel shall remain confidential unless or until otherwise instructed by the Chair. The purpose of that provision was to allow free and frank discussion. DCMS argued that if parties are concerned that their candid engagements with the department will be made public then they would be less likely to contribute fully to the process. In DCMS' view this was not in the best interests of the policy itself. Rather, it argued that decisions need to be made with a full appreciation of the facts and taking into account all considerations, which it could only gain through free and frank discussion with stakeholders, including PSBAP members.

Public interest in disclosing the information

21. The complainant argued that there was overwhelming public interest argument that the records of these meetings should be made public as these discussions relate to the future of the PSB in the UK. He noted that 'In May [2021] more than 120 public figures, published an open letter warning that advice from the government's public service broadcasting advisory panel could lead to funding cuts for the BBC and weakened impartiality rules'.⁴
22. For its part, DCMS acknowledged that there was a public interest in disclosure of this type of information, to promote government transparency and accountability, to increase public awareness, and to enable public participation in the democratic process. It also recognised the specific, current public interest in understanding the government's thinking on PSB.

⁴ <https://britishbroadcastingchallenge.com/open-letter/>

Balance of the public interest arguments

23. The Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case the Commissioner accepts DCMS' position that the time of the request in May 2021 the government's policy development of PSB remained live and ongoing. This is evidenced by the events within this area which occurred after this date, for example the publication of the White Paper in May 2022 setting out the future of government's vision for the broadcasting sector.⁵
24. Furthermore, having considered the content of the withheld information the Commissioner accepts that it clearly has the potential to encroach on the safe space of this policy making. The issue of PSB is clearly a matter of considerable interest to the public, with various stakeholders and interested parties having strong views on the matters under consideration (as evidenced by the open letter cited by the complainant). Furthermore, the Commissioner is also conscious that the meetings of the minutes contain candid comments and assessments of this policy area. In addition, the briefing papers contain detailed information about the current issues (at the point they were written) being considered and the officials' initial views on them. As a result of this, the Commissioner considers that the safe space arguments attract significant weight.
25. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

⁵ <https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector>

26. In the circumstances of this case the members of the PSBAP are not civil servants. Rather, they are experts drawn from across the media landscape who have volunteered to be part of the panel. Nevertheless, the Commissioner considers that the underlying principles and approach set out above in respect of assessing the chilling effects remain valid here. As noted above, the Commissioner accepts that the policy making in relation to this issue was live at the time of the complainant's request. Furthermore, as also noted above the Commissioner accepts that the minutes represent a candid discussion of the issues in question. Although unattributed, he agrees with DCMS that it would be possible for the contributors of some comments to be established. In light of this the Commissioner considers it plausible to argue that future contributions may be impacted and therefore he has concluded that the chilling effect arguments also attract weight.
27. Turning to the public interest arguments in favour of disclosure, the Commissioner recognises that the policy issues around PSB in the UK are ones of considerable public interest. This includes not only those directly involved in the broadcasting sector but also the millions of people of who watch PSB. The Commissioner also recognises the significant strength of feeling in respect of some of the issues considered as part of this policy review (again illustrated by the letter cited by the complainant). In the Commissioner's view these factors add significant weight to the public interest in disclosure of information regarding the Government's approach to PSB. With regard to the content of the information itself, in the Commissioner's view disclosure of this would give a direct insight into not only the views of the PSBAP but also, from the papers provided to the panel, a detailed insight into the matters considered by officials and initial government thinking on a range of issues. Consequently, there is a significant public interest in the disclosure of the information.
28. Nevertheless, and by a narrow margin, the Commissioner has concluded that the public interest favours maintaining section 35(1)(a) and withholding the information. In reaching this conclusion the Commissioner does not seek to underestimate or undervalue the public interest in, and significance of, the debate around the future of PSB in the UK. However, the Commissioner has been persuaded by DCMS' arguments that disclosure of the information would have a very significant impact on the effectiveness of live policy making directly related to this area. Ultimately, in the Commissioner's view, the public interest is best served by ensuring the best quality policy making and therefore the information should be withheld.

Right of appeal

29. 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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

30. 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.

31. 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

Jonathan Slee
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