

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 January 2022

Public Authority: Ministry of Defence
Address: Whitehall
London
SW1A 2HB

Decision (including any steps ordered)

1. The complainant submitted a request to the Ministry of Defence (MOD) seeking a risk register for the National Flagship project. The MOD confirmed that it held information falling within the scope of his request but it considered this to be exempt from disclosure on the basis of sections 35(1)(a) (formulation or development of government policy) and 43(2) (commercial interests) of FOIA.
2. The Commissioner's decision is that the requested information is exempt from disclosure on the basis of section 35(1)(a) of FOIA and that in all the circumstances of the case the public interest favours maintaining the exemption.
3. No steps are required.

Request and response

4. The complainant submitted the following request to the MOD on 16 June 2021:

'Please provide a copy of the project risk register for national flagship taskforce, and for the flagship delivery project itself if this is a separate entity.'

5. The MOD contacted him on 15 July 2021 and confirmed that it held information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 35 (formulation or development of government policy) and 43 (commercial interests) of FOIA and needed additional time to consider the balance of the public interest.
6. The MOD provided the complainant with a substantive response to his request on 4 August 2021. The MOD explained that it had concluded that the public interest favoured maintaining both of the exemptions it had cited in its previous correspondence and therefore it was withholding the requested information.
7. The complainant contacted the MOD on 4 August 2021 and asked it to conduct an internal review of this refusal. He challenged the MOD's use of both exemptions and argued that at the least a redacted version of the risk register should be disclosed.
8. The MOD informed him of the outcome of the internal review on 27 August 2021. The MOD explained that the information it held falling within the scope of his request consisted of 'a table of probable risks' contained in the 'Outline Business Case' for the National Flagship project.¹ The MOD upheld the decision to withhold this information on the basis of sections 35(1)(a) and 43(2) of FOIA. The MOD also explained that it was not possible to disclose a redacted copy of the risk assessment as the level of redaction required would render the remaining document meaningless.

Scope of the case

9. The complainant contacted the Commissioner on 28 August 2021 in order to challenge the MOD's decision to withhold the information falling within the scope of his request. The complainant's submissions to support his complaint are referred to in the analysis below.

¹ Further information about the project is available here:
<https://www.gov.uk/government/news/new-national-flagship-to-promote-british-businesses-around-the-world>

Reasons for decision

Section 35 – formulation or development of government policy

10. 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'

11. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

12. 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.

13. 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.

14. 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.

15. The MOD argued that the withheld information related to the National Flagship programme. The Commissioner is satisfied that the withheld information, which consists of a table of strategic risks concerning the National Flagship, clearly relates to the formulation of policy in relation to this project. Furthermore, having taken into account the above criteria the Commissioner is satisfied that the policy making in question is one that constitutes government policy making. In addition, although the government announced its intention on 30 May 2021 to build the National Flagship, this does not alter the fact that the withheld

information relates to the formulation of that policy. The withheld information is therefore exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Public interest test

16. 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 arguments in favour of disclosing the information

17. The MOD acknowledged that the National Flagship is a politically controversial programme and that there is a public interest in understanding the government's starting position on risk and mitigation for the ship to inform public debate on this topic. The MOD also acknowledged that release of the information would provide assurance that the risks to this programme are being identified and steps being taken to minimise them, particularly those relating to procurement costs and impact on the UK industry.
18. The complainant provided the Commissioner with detailed arguments to support his view that the public interest favoured disclosure of the information and the Commissioner has set out these arguments below:
19. Firstly, the complainant suggested that it was not clear why the requested information had been withheld in its entirety. He argued that it seemed unlikely that a broad overview of the risks, with the specific information which risked policy formulation redacted, should be withheld after a full public interest test. He questioned the MOD's position, as set out in its internal review, that it was not possible to release a redacted version of the document because any such redaction would result in the document being meaningless.
20. Secondly, the complainant argued that there was a very strong public interest in the disclosure of the information. He noted that, as the MOD had acknowledged, the project is a highly controversial one. He suggested that YouGov polling showed that it has very little public support and there are significant concerns about why considerable sums of public money should be spent on this project at all.
21. The complainant emphasised that it has been widely questioned as to why hundreds of millions of pounds in taxpayer funds should be used on a project for which little empirical evidence of benefit to diplomatic relations or trade has been advanced, in comparison to funding military equipment that could ensure the nation's security or better protect members of the armed forces. He argued that given the recent events in Afghanistan, this disjunct is made all the clearer.

22. The complainant also noted that there is little information on potential budget inflation and failure risks of the project in the public domain with estimates varying significantly from the £150m stated in tender documents², to an upper estimate of £250m made by the defence secretary.³
23. The complainant highlighted that the MOD's internal review had stated that *'the release of information about the strategic risks associated with the National Flagship programme as they are presently known would not assist with a better understanding of either of these issues [ie the empirical evidence for the policy or the budgeted costs].'* However, the complainant argued that it was not clear how the disclosure of information about risks to the project would not assist in holding the management of the project accountable, allow the public to better understand how it is planned to be completed, as well as to feed into public discussions of whether it should be completed at all.
24. Thirdly, the complainant argued that it was not clear how disclosure of the risk register, which was a fact based document setting out risks to a major project, would directly impinge on the formulation of government policy in such a significantly damaging way. The complainant noted that the MOD had argued in the internal review that disclosure *'could raise unrealistic expectations of the project and indeed distort the public appreciation of it'* and that *'disclosing information about options for risk mitigation at this stage could potentially reduce or limit options available in the future and therefore damage the MoD's position.'*
25. He argued that the fact that this information is a best assessment, not a set of policy ideas, must be taken in account, and it was not clear that disclosure of at least some identified risks in relation to the project would hinder policy formation around the project, or that these risks being public would impinge policy making around it.
26. The complainant also argued that it was not clear why officials should come to different policy decisions based on the best assessment of risks, whether these risks were public or private, if these risks have been properly taken into account. He argued that if they have not been, it would suggest the policy formation process is flawed and as a result there was therefore clearly a public interest in disclosing the information.

² <https://www.find-tender.service.gov.uk/Notice/016986-2021>

³ <https://www.bbc.co.uk/news/uk-politics-58002977>

27. The complainant emphasised that disclosure would assist the public in understanding the risks to the project, and that it was not clear why this would 'distort the public appreciation' or 'limit the MOD's options' if these risks are being properly taken into account in the policy formation process as the MOD had argued.
28. In conclusion, the complainant acknowledged that while there is an interest in good policy being made around this project, there is also an interest in good policy being made more generally, to serve the public interest in effective spending of public money. He argued that better public awareness of the risks of taking this project further would clearly allow for better scrutiny of it, either ensuring that the project is kept clearly limited to something that is likely to benefit the public, or be cancelled if that evidence cannot be provided. Consequently, he argued that there is a strong case for disclosure of these records to serve the wider public interest of effective use of public money, and to check the assessed risks are being properly taken into account.

Public interest arguments in favour of maintaining the exemption

29. The MOD explained that while the government's overall strategic intent for the National Flagship programme is clear, it is in its earliest stages. This meant that any listed actions proposed to mitigate risks are strategic in nature, difficult to quantify in detail and many have yet to be tested with industry. The MOD explained that until this process is complete it is expected that the information in the scope of this request will require substantial addition and amendment. The MOD emphasised that the programme is very much 'live', with key policy decisions still being considered and potential areas of risk yet to be fully articulated.
30. The MOD argued that it was important to protect the integrity of the policymaking process that will ensue as the programme proceeds and industry is progressively engaged. Disclosure of the government position on potential risks at the start of this process would infringe upon the 'safe space' to consider policy options in private.
31. In support of this point the MOD argued that disclosure at this early stage could raise unrealistic expectations of the project and indeed distort the public appreciation of it. It explained that it does not routinely disclose risks associated with a competition that is at such an early stage or related to policy decisions that are still being debated.
32. In this case, the MOD argued that disclosing information about options for risk mitigation at this stage could potentially reduce or limit options available in the future and therefore damage the MOD's position. Disclosure at this early stage would intrude upon the private space for policy formulation. In particular, by setting a public set of expectations at this stage of the process it could inhibit change and adversely impact

the process of producing a robust, well considered and effective Risk Register.

33. Taking all these factors into consideration the MOD concluded that the balance of the public interest was in favour of maintaining the exemption at section 35(1)(a). In reaching this decision it emphasised that the National Flagship programme is at its earliest stages and the release of immature/incomplete risk data could have a seriously inhibiting effect on the willingness or ability to adapt the policy in the light of feedback from industry or the public. The MOD argued that the very high profile of the programme would likely exacerbate this effect and that set against these arguments, those in favour of disclosure are largely generic in nature.
34. In addition to the arguments set out above, the MOD also provided the Commissioner with submissions which referenced or directly referred to the content of the withheld information. The Commissioner has not replicated these submissions in this decision notice.

Balance of the public interest arguments

35. With regard to the arguments advanced by the MOD for maintaining the exemption, the Commissioner notes that these specifically cite the need for a safe space but also that parts of its submissions reflect arguments generally referred to as a 'chilling effect'.
36. With regard to the former, the Commissioner accepts that significant weight should be given to the 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.
37. In the circumstances of this case the Commissioner accepts the MOD's position that not only is the policy making live, but it is also in its early stages of formulation. As the Information Tribunal in *DBERR v Information Commissioner and Friends of the Earth* (EA/2007/0072, 29 April 2008) found '*This public interest is strongest at the early stages of policy formulation and development. The weight of this interest will diminish over time as policy becomes more certain and a decision as to policy is made public.*' Therefore, in the Commissioner's view, given that the policy making is in the early stage of the process this adds notable weight to the safe space arguments.
38. Furthermore, the Commissioner considers the safe space arguments to also attract particular weight given both the context of this policy making and the content of the withheld information itself. As both the MOD and the complainant have noted, the National Flagship policy is a

controversial one. In light of this the Commissioner agrees with the MOD that there is clearly a heightened risk that disclosure of the withheld information would infringe on the MOD's ability (and more widely, government's ability) to be able to debate ideas and reach decisions away from external interference and distraction in relation to the National Flagship project. Furthermore, the Commissioner considers such a risk to be a genuine one given the content of the withheld information, ie a frank analysis of the risks of the project.

39. In light of the above, in the Commissioner's view the safe space arguments in the circumstances of this case attract very significant weight.
40. With regard to attributing weight to the chilling effect arguments, 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.
41. 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, and moreover was in the early stages of formulation. Again, having taken into account the content and context of the withheld information, the Commissioner accepts that disclosure of the withheld information risks having some chilling effect on future policy discussions on the National Flagship project, particularly in respect of how risks are identified and presented. In light of this the Commissioner has also concluded that the chilling effect arguments attract considerable weight.
42. In reaching the above findings the Commissioner appreciates that the complainant has questioned the MOD's basis for arguing that disclosure would have such a significant impact on policy formulation. However, having had the benefit of reviewing the information itself, as well as the MOD's submissions which referred directly to it, the Commissioner is satisfied that disclosure would be significantly damaging for the reasons set out above. In reaching this conclusion, the Commissioner has placed particular regard on the MOD's submissions which referred to the information as these contain specific arguments about the harm that would result from disclosure of withheld information, arguments which the Commissioner considers to be persuasive.

43. Furthermore, the Commissioner has given careful consideration to whether parts of the withheld information could be disclosed without, or with less, harm being caused to the policy making process. However, he accepts the MOD's position that the arguments above apply to the entirety of the table outlining the risks to the project and as a result, disclosure of the information in the scope of the request that is not sensitive would, as suggested, render the document meaningless.
44. Turning to the public interest arguments in favour of disclosure, the Commissioner agrees that there is significant public interest in the disclosure of information relating to this project given the controversial nature of it. In particular, the Commissioner acknowledges the complainant's point that there has been widespread concern about the policy rationale for the project, as well as the lack of clarity of its costs. The Commissioner accepts that both factors add to the controversial nature of the project, and in turn, the public interest in disclosure of information about it.
45. Having had the benefit of examining the withheld information, the Commissioner accepts the MOD's point that the information in question would arguably not address these points directly. Nevertheless, in the Commissioner's view there is still a clear public interest in disclosing information which would inform the public about the strategic risks that had been identified early in the formulation of this policy and the MOD's plans to mitigate them. The disclosure of the withheld information would do this and as result of this, and in light of his comments above, the Commissioner considers there to be a significant and weighty public interest in the disclosure of the withheld information. The Commissioner therefore disagrees with the MOD's suggestion that the public interest arguments in favour of disclosure are ones which are largely generic.
46. On balance though, and by a relatively narrow margin, the Commissioner has concluded that the public interest favours maintaining the exemption. In reaching this conclusion the Commissioner wishes to emphasise that he recognises the weighty public interest in disclosure, and in particular the value in better informing the public about the risks of such a controversial project at the early stages in its development. However, in the Commissioner's view it is precisely the early stages, and indeed controversial nature of the project which have lead him to attribute such weight to the safe space arguments, which in his view ultimately tip the balance in favour of maintaining the exemption.
47. In light of this conclusion the Commissioner has not considered the MOD's position that the withheld information is also exempt from disclosure on the basis of section 43(2) of FOIA.

Right of appeal

48. 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

49. 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.

50. 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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