

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 October 2014

Public Authority: Cabinet Office

Address: 70 Whitehall
London
SW1A 2AS

Decision (including any steps ordered)

1. The complainant requested information in connection with the decision by the Privy Council to recommend that Association for Project Management, a representative body for Project Managers, should be granted a Royal Charter following an application received by the body.
2. The Commissioner's decision is that the public authority was entitled to rely on the exemption at section 35(1)(a) to withhold information within the scope of the request which was not disclosed to the complainant (referred to as "the disputed information" in this notice).
3. The Commissioner however finds the public authority in breach of sections 10(1) and 17(3) FOIA.
4. No steps required.

Request and response

5. On 26 October 2012 the complainant wrote to the public authority and requested information in the following terms:
- '1. All internal notes, email, memoranda, advice and other documents (including electronic documents) created since 1 September 2010 and held by policy officials in the Major Projects Authority or the former Office of Government Commerce relating to the Cabinet Office's decision on or around 3 February 2012 to recommend grant of a Royal Charter of the Association for Project Management ("APM") and concerning the formulation of the "Annex - APM Charter Application Letter - 3 February 2012" document provided to the Privy Council Office on or around that date.*
- 2. Any and all correspondence dated since 1 September 2010 relating to APM's application for grant of a Royal Charter (including emails and other electronic communications) between policy officials in the Major Projects Authority or the former Office of Government Commerce and any addressee at:*
- i. APM;*
 - ii. APM Group Limited;*
 - iii. the Privy Council Office; and*
 - iv. the Department for Business, Innovation and Skills.'*
6. The public authority wrote back to the complainant on 23 November 2012. It confirmed that it held information within the scope of the request and explained that it considered the information held exempt from disclosure on the basis of the exemptions at sections 35(1)(a) and 42(1) FOIA. The complainant was however also informed by the authority that it needed an additional 20 working days to consider the balance of the public interest and that it hoped to issue a substantive response by 21 December 2012.
7. On 21 December 2012 the public authority informed the complainant that it had not yet reached a decision on the balance of the public interest but hoped to do so by 23 January 2013. On 25 January 2013 the authority still had not yet reached a decision on the balance of the public interest and advised the complainant that it hoped to do so by 20 February 2013. On 21 February 2013 the authority again advised the complainant that it hoped to have made its decision on the balance of the public interest by 21 March 2013.

On 20 March 2013 the authority informed the complainant it hoped to have made the decision by 19 April 2013.

8. The public authority eventually issued a substantive response to the complainant in a letter dated 30 July 2013. An *'APM letter of February 2011'* was withheld on the basis of section 21 FOIA¹ because it had previously been supplied to the complainant by the authority. It however continued to withhold the remaining information within the scope of the request on the basis of the exemptions at sections 35(1)(a) and 42(1). It further relied on the exemption at section 40(2) to withhold the names of junior officials and *'information that references an individual's personal circumstances.'*
9. On 8 September 2013 the complainant requested an internal review of the public authority's decision above.
10. On 11 April 2014 the public authority wrote to the complainant with details of the outcome of the internal review. It withheld additional information on the basis of the exemption at section 21 because the information had been supplied to the complainant in the context of their client's ongoing judicial review against the public authority. The following information was additionally withheld under section 21: *'a submission to the Minister for the Cabinet Office dated October 2011, the table of MPA [Major Projects Authority] officials which records those officials' contacts with APM, some correspondence on MPA officials' attendance at APM events, and information containing objections from members of the public.'*
11. The public authority however upheld the application of sections 35(1)(a) and 42(1) to the remaining information within the scope of the request.

Scope of the case

12. On 22 May 2014, the complainant contacted the Commissioner to complain about the way the request for information had been handled. He specifically disagreed with the public authority's conclusions in relation to the balance of the public interest. The
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¹ Information is exempt from disclosure under FOIA on the basis of section 21 if it is reasonably accessible to an applicant via other means.

Commissioner has addressed the complainant's submissions in this regard further below.

13. In terms of the public authority's reliance on the exemptions at sections 21 and 40(2), the complainant did not disagree with the application of section 21. He also did not disagree with the authority's position in respect of the application of section 40(2) in so far as the relevant withheld information relates to the '*personal circumstances of junior officials which does not relate to the potential grant of a Royal Charter.*'
14. During the course of the Commissioner's investigation, the public authority clarified that section 35(1)(a) was applied to all of the remaining information within the scope of the request (ie excluding the information withheld under section 21) and section 42(1) was applied to majority of the remaining information in scope.
15. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to withhold the remaining information within the scope of the request of 12 October 2012 (the disputed information) on the basis of the exemptions at section 35(1)(a), 42(1) and 40(2).

Reasons for decision

Background & Disputed Information

16. The disputed information relates to an application for a Royal Charter in April 2008 by the Association for Project Management (APM), a professional representative body for the Project Management profession. APM's application was opposed in the same month by another professional representative body for Project Management known as the Project Management Institute (PMI). The public authority explained that in the intervening years, there have been procedural complexities including changes in the membership and lead of the Committee of the Privy Council (PC), and voluminous correspondence from PMI including FOIA requests to the various Government entities involved in processing the application. During that time it became increasingly clear that the matter would result in litigation.
17. According to the public authority, in April 2012 PMI issued their letter before claim in anticipation of bringing a judicial review if the PC decided to recommend grant of a Charter to APM. On 4 July 2013 the Treasury Solicitor notified PMI that a Committee of Privy Councillors had decided to recommend to Her Majesty the Queen in

Council that a Royal Charter should be granted to APM. PMI duly issued their Judicial Review alleging that the decision was irrational and that the decision was vitiated by apparent bias and pre-determination. The High Court dismissed PMI's claim following a hearing in July 2014. The Judgement (of Mitting J) is available at: <http://www.bailii.org/ew/cases/EWHC/Admin/2014/2438.html> However, according to the public authority, the litigation remains ongoing as PMI have applied to the Court of Appeal for permission to appeal the High Court's decision.

18. As will be apparent from the request, the disputed documents primarily consist of deliberations between officials and between officials, APM, the Privy Council Office (PCO) and PMI on the merits of APM's application for a Royal Charter. The Commissioner further notes that the majority of the exchanges are between the Government's lawyers and between other officials and the lawyers.

Section 35(1)(a)

19. As mentioned, the public authority considers the disputed information exempt from disclosure on the basis of section 35(1)(a). The Commissioner has therefore initially considered the application of this exemption.
20. Information is exempt from disclosure by virtue of section 35(1)(a) if it is held by a government department and relates to the formulation or development of *government policy*.
21. There is no definition in FOIA of what actually constitutes *government policy*. In the Commissioner's view, government policy can be seen as a government plan to achieve a particular outcome or change. It can include both high-level objectives and more detailed proposals on how to achieve those objectives. The Cabinet is the ultimate arbiter of all government policy. However, not all government policy will need to be discussed and jointly agreed by Ministers. Some policies will be formulated and developed within a single government department, and approved by the Minister responsible for that area of government. Only Ministers have the mandate to make policy on behalf of the government. However, this does not mean that every decision made by a Minister is automatically a policy decision. Ministers may also be involved in some purely political, administrative, presentational or operational decisions.
22. The public authority submitted that the decision as to whether the Committee of Privy Councillors ought to recommend to the Queen that APM should be granted a Royal Charter is *government policy*

within the meaning in section 35(1)(a) for the reasons summarised below.

23. The grant of a Royal Charter is an exercise of prerogative power, which is vested in the Queen but which by Constitutional Convention will only be exercised on the advice of the Government – which for these purposes is constituted as the PC. The decision of the PC to recommend that the Queen exercises her power to grant a Royal Charter is therefore properly described as “Government Business”.
24. When a body applies for a Royal Charter, a Committee of Privy Councillors consisting exclusively of senior Government Ministers is established to consider the application. They actively consider the application as against the prerogative powers in question and with regard to the policy as expressed in the “criteria” published by the PCO. As a matter of public law the Committee of the PC must consider the application as against the public interest and their decision is not fettered by the criteria set out in the policy although, of course, the criteria are highly relevant to their decisions. It is an active and collaborative decision-making process between the Government Ministers.
25. The rest of the public authority’s submissions in this regard have not been reproduced in this notice because they were provided to the Commissioner in confidence. For the avoidance of doubt, the Commissioner considered all of the relevant submissions in full.
26. The Commissioner notes that the PCO sets down a number of criteria that a body applying for a Royal Charter would normally be expected to satisfy before grant of a Charter is recommended by the Committee of Privy Councillors to the Queen. The criteria are summarised below.
 - i. The institution concerned should comprise members of a unique profession, and should have as members most of the eligible field for membership, without significant overlap with other bodies.
 - ii. Corporate members of the institution should be qualified to at least first degree level in a relevant discipline.
 - iii. The institution should be financially sound and able to demonstrate a track record of achievement over a number of years.

- iv. Incorporation by Charter is a form of Government regulation as future amendments to the Charter and by-laws of the body require Privy Council (i.e. Government) approval. There therefore needs to be a convincing case that it would be in the public interest to regulate the body in this way.
 - v. The institution is normally expected to be of substantial size (5,000 members or more).
27. It would appear that once all of the above criteria and any other conditions are met by the applicant, a recommendation in favour of granting a Charter is more likely than not. Therefore, it would appear that the Committee of Privy Councillors' role in deciding whether to recommend grant of a Charter is akin to an administrative role rather than in formulating or developing *government policy* per se. It is difficult in that sense to see how Ministers recommending whether or not a Charter should be granted in their capacity as members of the Committee of the PC are strictly speaking formulating or developing *government policy*. Therefore, the Commissioner does not share the view that any recommendation to grant a Charter automatically relates to government policy.
28. However, the Commissioner has considered the particular circumstances of this case and he is prepared to accept that the decision to recommend grant of a Charter to APM relates to government policy in the circumstances of this case for the reasons explained below.
29. The Commissioner notes from the useful summary of the case by Mitting J in paragraphs 19 to 26 of his decision (mentioned above) that APM did not satisfy all of the 5 criteria set down by the PCO and that the recommendation that APM should be granted a Royal Charter was significantly influenced by public interest considerations. The Commissioner understands the main public interest considerations were; whether there is a need for a Chartered Project Management profession and whether APM are best suited to represent the profession.
30. These questions were subsequently answered by a senior official as follows:
- '...The application of the public interest consideration in this case is crucial. My view, based on experience in dealing with the UK Government's Major Projects, is that the demand for well-qualified project managers most definitely exceeds supply and that having a body with chartered status would raise the profile of Project*

Management and makes a substantial difference. There is no doubt that APM is the appropriate body.'

31. In the Commissioner's view, Ministers were no longer only acting in an administrative capacity when they had to consider whether to recommend grant of a Charter to APM for public interest reasons despite the fact that APM had not met all of the requisite criteria. Ministers would have had to therefore also consider whether, in light of the concerns raised about the shortage of qualified project managers, a body with chartered status would increase the appeal of Project Management as career choice. Under those circumstances, recommending grant of a Charter to APM was one way of achieving the government's objective of boosting the number of qualified project managers in the country.
32. Therefore, the decision as to whether the Committee of Privy Councillors ought to recommend grant of a Charter to APM was a matter of government policy. This is because the application was also assessed in the context of achieving the Government's objective of addressing the shortage of suitably qualified project managers in the country.
33. As mentioned, information is exempt from disclosure by virtue of section 35(1)(a) if it is held by a government department and *relates to* the formulation or development of government policy.
34. Therefore, the disputed information must also *relate to* the formulation or development of government policy.
35. The Commissioner considers that the term '*relates to*' in section 35(1)(a) can be interpreted broadly. Support for this view can be found in the comments expressed by the Information Tribunal in *DfES v Information Commissioner & the Evening Standard* (EA/2006/0006).
36. The Commissioner finds that the disputed information relates to the formulation or development of the Government's objective of boosting the number of qualified project managers in the country. Although the disputed information is about the merits of APM's application for a Royal Charter, the nature of the public interest considerations in relation to the application means that it is linked to the Government's overall objective of addressing the shortage of qualified project managers in the country and the disputed information consequently also relates to that policy.
37. The Commissioner therefore finds that the exemption at section 35(1)(a) was correctly engaged by the public authority.

Public interest test

38. Section 35(1)(a) is a qualified exemption which means that it is subject to a public interest test. Therefore, the Commissioner must also decide whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the disputed information.

Complainant's arguments

39. The complainant's public interest arguments in support of disclosing the disputed information are summarised below.
40. The information relates to a decision by the Government (acting through the Privy Council) to recommend that APM be granted a Royal Charter. There is a general public interest in openness in the formulation of policy and decisions underlying Government policy and ensuring that public authorities are accountable for the quality of their decision making. That public interest is all the stronger when the policy in question is advanced by prerogative legislation and so without any of the public scrutiny inherent in the normal legislative process. In these circumstances, there is a very strong public interest in openness as to how and in what circumstances the Government chooses to advance policy by prerogative legislation. Similarly, as to how and on what basis decisions to grant a Royal Charter are made, as well as the general interest in holding the public authority accountable for the quality of its decision making.
41. Disclosure would not seriously inhibit the effective formation of Government policy and the ability of Ministers and officials to assess policy options in a candid way. The suggestion that experienced officials or Ministers would be persuaded to assess policy options other than candidly or by reference to their own genuine views simply because of the possibility of subsequent disclosure of internal documents is not realistic.

Public authority's arguments

42. The public authority's public interest arguments in favour of, and against maintaining the exemption are summarised below.
43. There is a general public interest in the Government being open and transparent. There is specifically a public interest in openness around the processing of the application from APM to be granted Royal Charter status. The disputed information would allow the public to better understand the Government's aims in promoting

effective project management across the civil service, and the decision taken to realise these aims.

44. However, the public interest arguments in favour of disclosure are outweighed by the stronger public interest in withholding the disputed information.
45. The timing of the request is crucial to the assessment of the public interest in this case. At the time of the request in October 2012, the Minister for the Cabinet Office and other Privy Councillors still had yet to make the policy decision on what to recommend to the Queen. The Privy Councillors' decision on that policy question was still under debate at the time of the request. Disclosure would have been likely therefore to undermine that policy work. The expectation of the participants in the decision making process was that their consideration of policy options would not be made public. If these participants had to have constant regard to the potential public reaction to their advice, presentational concerns would assume disproportionate importance over the content of the advice. This would undermine accountability since decision makers could claim that decisions made that are subsequently considered to be poor arose from inadequate advice.
46. The release of information relating to grant of a Royal Charter, particularly where a 'live' application is subject to consultation and approval would have a detrimental effect on the whole process. There must be a space within which Ministers and officials are able to discuss policy options and delivery, freely and frankly. Government Ministers are rightly answerable for the decisions they take, not for the options they consider during the policy formulation process. The public disclosure of information about how the decision to grant a Royal Charter to APM was taken risks inviting commentary on the processes leading to this particular Ministerial decision (in circumstances where a court has judged that there are no arguable grounds for challenging the process in the more appropriate forum of a judicial review) and damage for future charter applications, the viability of the well established procedures for exercise of these ancient prerogative powers of the Queen. Ultimately, this would be corrosive of parliamentary democracy since it would hold Ministers and their advisers accountable for the discussion rather than the decision.
47. There is a very strong public interest in maintaining the confidentiality of the policy process and the disclosure of the relatively recent (at the time of the request) disputed information would erode this. Good government depends on good decision making and this needs to be based on the best advice available and

involve full consideration of all the options without fear of premature disclosure. There is of course a place for public participation in the policy making process, and for public debate of policy options. However, it is not in the best interests of policy formulation, and therefore not in the public interest, that every stage of the policy making process should be made accountable via exposure to public scrutiny.

Balance of the public interest

48. The Commissioner is prepared to accept that there is a strong public interest in openness and transparency as to how and under what circumstances the Government chooses to advance policy through prerogative legislation. That public interest, he also accepts, extends to recommending grant of a Royal Charter resulting in the formulation or development of policy because a Royal Charter is a form of prerogative legislation. It is, as has been mentioned, an exercise of executive power which is not subject to the normal legislative process. Disclosing the disputed information would allow the public to scrutinise the potential exercise of prerogative power in formulating or developing government policy.
49. He agrees with the public authority that the disputed information would also allow the public to better understand the Government's aims in promoting effective project management.
50. The Commissioner however accepts that the timing of the request is crucial to the balance of the public interest in this case. As he understands it, the decision to recommend grant of a Charter to APM had not been made at the time of the request in October 2012. Although it is not actually clear when the decision was made, the Commissioner notes that it was not communicated to the complainant until July 2013. It is therefore safe to say that officials and Ministers were still actively considering the APM's application at the time of the request. The Commissioner has given considerable weight to the argument that disclosure at the time of the request would have been likely to seriously undermine the process of fairly assessing APM's application, and consequently also undermine the ability of the Government to advance its policy objective of increasing the number of qualified project managers in the country.
51. He accepts that disclosure while the application was under consideration would have made officials less inclined to freely and frankly discuss the merits of the application particularly in the context of whether Ministers should exercise their discretion to recommend that the Charter should be granted on public interest grounds for fear that their views could expose them to premature

public scrutiny. This is far from being an unreasonable view for the public authority to hold given that the complainant was, and remains, strongly opposed to APM being granted chartered status.

52. Have weighed the public interest factors for disclosing the disputed information and the factors for maintaining the exemption, the Commissioner is persuaded that, in all the circumstances of the case, there was a stronger public interest in maintaining the exemption at the time of the complainant's request in October 2012.
53. The Commissioner therefore finds that the public authority was entitled to withhold the disputed information on the basis of section 35(1)(a).
54. In view of his decision that the disputed information was correctly withheld on the basis of section 35(1)(a), the Commissioner has not considered the applicability of the exemptions at sections 42(1) and 40(2).

Procedural Matters

55. A public authority is required by virtue of section 10(1) FOIA to respond to a request promptly and in any event no later than 20 working days. However, by virtue of section 10(3) FOIA, a public authority may extend the time limit to comply with a request when it is necessary to do so in order to properly consider the public interest in maintaining the relevant exemption. In such cases, a public authority is still required to cite the exemption claimed and explain the reasons for relying on it within 20 working days. Section 17(3) further states that the public interest assessment must be completed within a reasonable time. As a matter of good practice, the Commissioner expects that the extension to consider the public interest should not exceed an additional 20 working days, i.e. 40 working days in total to provide a response to the request.
56. The Commissioner therefore finds the public authority in breach of section 10(1) for not providing the complainant with a substantive response to the request within 20 working days. He further finds the authority in breach of section 17(3) for failing to complete its public interest assessment within a reasonable time – 20 working days in the Commissioner's view
57. The public authority explained to the Commissioner that despite its best efforts to provide its response in a timely manner, the required resource was simply not available at the time.

58. Although the Commissioner appreciates the public authority's position, he is very concerned that it took the authority 9 months to issue a substantive response to the request. That length of time is completely unjustifiable in the Commissioner's view.

Other matters

59. Although there is no statutory time limit to complete internal reviews, as a matter of good practice, the Commissioner expects internal reviews should take no longer than 20 working days and in exceptional circumstances, 40 working days.
60. The Commissioner would therefore like to also record his concern at the lengthy and in his view, unjustifiable delay in completing the internal review in this case.

Right of appeal

61. 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

62. 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.
63. 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.....

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