

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 2 November 2022

**Public Authority:** Department for Business, Energy and Industrial Strategy ("BEIS")

**Address:** 1, Victoria Street  
London  
SW1H 0ET

#### **Decision (including any steps ordered)**

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1. The complainant has requested information on email and instant messenger correspondence sent or received by ministers and their private offices concerning the Advanced Research and Invention Agency ("ARIA") and its exclusion from FOIA.
2. The Commissioner's decision is that BEIS is entitled to rely on FOIA section 35(1)(a) – formulation or development of government policy, to withhold the requested information
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

#### **Request and response**

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4. On 3 March 2021, the complainant wrote to BEIS and requested information in the following terms:  
  
"Please provide a copy of all email and work instant messenger (such as Slack or Teams) correspondence sent or received by ministers, including their private offices, concerning discussion of plans to exempt from and/or not designate the Advanced Research and Invention Agency as a public body covered by the Freedom of Information Act.

Please provide correspondence sent or received since December 1st 2020."

5. BEIS responded on 31 March 2021 with a refusal notice in reliance of section 35(1)(a) – formulation or development of government policy.
6. Following an internal review BEIS wrote to the complainant on 2 June 2021 upholding the initial application of section 35.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 9 June 2021 to complain about the way their request for information had been handled. They explained:

“Firstly, this request has been refused in a blanket manner, without considering whether material could be released in part. Releasable material even without consideration of section 35 could include metadata around the request, such as the dates, recipients and subject headings of correspondence sent concerning the topic.

There is a clear public interest in transparency around a decision to make a public body not subject to freedom of information laws, given that access to government information is a fundamental human right, and it is a key pillar of UK democracy that taxpayers can find out how their money is spent.

This decision to exempt ARIA is very unusual, as the general policy of governments since the introduction of the freedom of information act has been not to exempt newly created public authorities from freedom of information obligations unless they are security bodies. In the US, DARPA, a close equivalent to ARIA, is fully subject to federal FOIA, for example.

The public justification for not making ARIA subject to freedom of information has been on grounds of burden, as referenced in ministerial announcements.

However, this position is illogical, given that sufficient protections already exist under the act (sections 12, 14, 41 and 43). These would allow for commercially sensitive requests and protracted and burdensome requests to be refused, and there seems no reason the BEIS FOI team could not handle requests to the body, as happens for numerous government agencies that are too small to warrant a dedicated FOI team on their own.

Given the illogical nature of these public policy positions there is a strong public interest in trying to establish if there are other reasons for the government to be pursuing this policy other than for reasons of burden and this will only be discoverable if the records related to the decision not to make ARIA subject to FOI are disclosed, given the impact

on public information rights that a failure to make ARIA subject to FOI would have.”

8. The Commissioner considers the scope of his investigation to be the application of FOIA section 35(1)(a) to the withheld information.

### **Reasons for decision**

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9. Section 35 FOIA states:

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to -

(a) The formulation or development of government policy,

10. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.
11. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private. His guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process. The classic and most formal policy process involves turning a White Paper into legislation. In such cases, policy formulation can continue all the way up to the point the Bill finally receives royal assent and becomes legislation. The Commissioner understands the term ‘development’ of policy to include the process of reviewing, improving or adjusting existing policy.
12. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly within the meaning of the class based exemption<sup>1</sup>. This means that the information itself does not have to be created as part of the activity. Any significant link between the information and the activity is sufficient.

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<sup>1</sup> <https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i70/DFES.pdf>

13. BEIS confirmed that in this case the policy development is clearly defined and finite. The withheld information relates to the drafting of the ARIA Bill (now ARIA Act 2022) and in particular the internal discussions about whether to use the bill to exclude ARIA from FOIA. As the ARIA Bill received Royal Assent on 24 February 2022 to become the ARIA Act 2022 the policy development process in question is over. However, the scope of the request (1 December 2020 to 3 March 2021) covers the period when the bill was drafted and parliamentary handling discussions were ongoing.
14. The Commissioner notes the first paragraph of the complainant's concerns, set out above in paragraph 7. The complainant raised this point with BEIS in requesting an internal review. BEIS responded that it considered all the withheld information relates to the formulation and development of ARIA policy.
15. As explained above in paragraph 11 the Commissioner considers that the term 'relates' carries a broad interpretation. The Tribunal in the decision referenced there advised that the whole document was covered: "If the meeting or discussion of a particular topic within it was, as a whole, concerned with s35(1)(a) activities, then everything that was said and done is covered." In this case there are no whole documents or emails containing only the requested information. In the circumstances the Commissioner is minded to include the metadata such as the dates, recipients and subject headings of correspondence as relating to the section 35(1)(a) exemption.
16. The Commissioner has viewed the withheld information and accepts that it clearly comprises information relating to the formulation or development of government policy in regard to ARIA. The majority of the withheld information is contained in emails and email attachments comprising papers, briefings, scripts, handling strategy and comment all relating to the formulation and development of government policy prior to the Bill's introduction in the Commons on 2 March 2021. The Commissioner has set out detailed background to the creation of ARIA, the Bill and Act in his previous decision notices.<sup>2</sup>

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020291/ic-117483-k5z3.pdf>

<https://ico.org.uk/media/action-weve-taken/decision-notice/2022/4020290/ic-144871-h3t3.pdf>

17. Having considered the above the Commissioner accepts that the exemption at section 35(1)(a) is engaged. He has therefore gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **The public interest**

18. The key public interest arguments for this exemption will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There are often related arguments about preventing a 'chilling effect' on free and frank debate in future.
19. 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. This can carry significant weight depending on the circumstances of the case. The need for a safe space will be strongest when the issue is still live. The timing of the request is therefore an important factor.

### **Public interest in favour of disclosure**

20. The complainant explained their view to the Commissioner as set out in paragraph 7. In addition they explained:

"At internal review the department has pointed to the fact that "That full position, and an accompanying rationale, has since been made public in the policy statement on ARIA, published on 19 March, in the closing speech of Amanda Solloway MP (Minister for Science, Research and Innovation) to the House of Commons, during the Second Reading debate on the ARIA Bill on 23 March, and throughout public evidence sessions of the Bill Committee Stage, during which there was extended debate and significant focus on the rationale for the FOI Act exemption."

However review of the referenced documentation further suggest the position to be illogical. The public policy statement of 19th March states that "ARIA will be a small body with minimal administrative capacity, we will remove the burden of processing Freedom of Information requests." In comments to the House on 23rd March Parliamentary Ms Solloway argued that "ARIA will have a very small number of staff, and because of the load that FOI requests would place on the organisation we do not think they are the right way to provide scrutiny."

Both these positions completely fail to consider the point that exemptions under the act exist to prevent exactly this, and that requests could easily be handled by the BEIS central FOI team."

## **Public interest in maintaining the exemption**

21. BEIS provided its view on why it considers that withholding the requested information is in the public interest. It explained:

"Firstly, and most crucially, there is a strong public interest case that ministers should be free to discuss policy positions with officials ahead of legislation being laid before Parliament, without fear of future reprisals for early positions taken. This freedom to exchange ideas and test policy is fundamental to the policy making process and to democracy.

Secondly, significant information on the government's rationale for exempting ARIA from FOIA is already in the public domain, so the upside to releasing early policy thinking is low to the point of redundancy. The in-scope documents reflect the same arguments used in public. The complainant should note in Hansard the transcripts from extensive debates in both Houses of Parliament.<sup>3</sup> The position outlined by ministers in Parliament reflects the synthesis and result of the policy development process."

## **Balance of the public interest**

22. As he set out in his previous decisions cited at footnote 2, the Commissioner considers that there is a significant public interest in the disclosure of information which can inform public debate around the policy making concerned with a new government agency. This is particularly the case when large sums of public money are concerned and unusual steps are taken with newly created public authorities to exclude ARIA from legislation applied to other public authorities.
23. Again, the Commissioner notes that DARPA, the successor to ARPA, has always been subject to freedom of information legislation. The government has made many references to the success of DARPA in its reasoning for establishing ARIA, including the freedom of operation

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<sup>3</sup> 1 For instance, in the Commons: <https://hansard.parliament.uk/Commons/2021-06-07/debates/6982211D-4150-48BD-8986-41F8886216FB/AdvancedResearchAndInventionAgencyBill>

in the Lords:

<https://hansard.parliament.uk/lords/2021-11-02/debates/EFDfE56D-FDF6-4DE4-852F-13FC10B814E9/AdvancedResearchAndInventionAgencyBill>

enjoyed by DARPA. The Commissioner can therefore understand the public's strong concerns about the apparent contradiction in deviating from the template of DARPA to create an exclusion for ARIA from FOIA.

24. The Commissioner notes his guidance at section 35<sup>4</sup> which explains:

"...there is often likely to be significant public interest in disclosure of policy information, as it is likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at."

25. He appreciates the complainant's wish to understand the government's policy in regard to ARIA's exclusion from FOIA. He also acknowledges their conclusion that the "public policy positions" are "illogical". The complainant has made clear that they are attempting to uncover reasons other than those already in the public domain, for the government to be creating the exclusion.

26. The Commissioner considers there to be a weighty public interest in the transparency of the government's decision making with regard to ARIA's exclusion from FOIA. However, he has examined the withheld information and agrees with BEIS that the information reflects the same arguments already in the public domain. He is satisfied that the information would not enable the public to conduct further scrutiny or provide reasoning not already available. He does not find that the content of the information will actually add to public debate. In balancing the public interest the Commissioner has taken into account the importance in ministers and advisers having the space for free and frank discussion away from external distraction protecting the policy making process; the circumstances at the time of the request; the timing of the request, which was at the time when the policy making was still ongoing and therefore carrying significant weight; the subsequent volume of information put into the public domain and the content of the withheld information itself.

27. The Commissioner has therefore concluded that, on balance, the public interest favours withholding the requested information.

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<sup>4</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

## Right of appeal

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28. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

29. 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.

30. 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 .....**

**Susan Hughes**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**