

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 April 2022

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

Address: 1 Victoria Street
London
SW1H 0ET

Decision (including any steps ordered)

1. The complainant has requested information on the "Advanced Research and Invention Agency" (ARIA).
2. The Commissioner's decision is that BEIS has appropriately applied 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.

Background

4. The Government explained in its policy paper of 19 March 2021¹ that it is creating ARIA to complement the work of UK Research and Innovation (UKRI). It added that this creation is an adaptation of the US's Advanced Research Projects Agency (ARPA) now renamed Defense Advanced Research Projects Agency (DARPA). The March 2020 Budget confirmed the Government's commitment to an £800 million investment in the creation of a new research funding body, based on the principles of DARPA.

5. The policy statement referenced at footnote 1 explains:

"ARIA will exclusively focus on projects with potential to produce transformative technological change, or a paradigm-shift in an area of science. While it is anticipated that most programmes may fail in achieving their ambitious aims, those which succeed will have profound and positive impact on society."

"Government is committed more widely to taking action to address unnecessary research bureaucracy, for instance, through UKRI's 'Reforming our Business' programme, and within that, the 'Better Funding Service' Programme. The research community have been clear that extra layers of approvals and review in the funding system, while well intentioned, can stifle the creativity and dynamism of scientists. ARIA will be a flagship of this agenda, minimising hurdles across a typical project lifecycle to create an agile and efficient funding body."

"ARIA will be a public body and the Department for Business, Energy, and Industrial Strategy will be its central government departmental sponsor..."

The government will deliver some such operational freedom in legislation. For instance, it seeks to exempt ARIA from public procurement regulations, allowing Programme Managers to quickly access suppliers such as those producing new scientific **equipment**. Noting that ARIA will be a small body with minimal administrative capacity, we will remove the burden of processing Freedom of Information requests). This said, ARIA will be an outward facing body which will proactively provide information about its activities to encourage coalescence around its programmatic goals."

¹ <https://www.gov.uk/government/publications/advanced-research-and-invention-agency-aria-statement-of-policy-intent/advanced-research-and-invention-agency-aria-policy-statement>

6. Government guidance on public procurement policy² explains:

“The over-riding procurement policy requirement is that all public procurement must be based on value for money, defined as “the best mix of quality and effectiveness for the least outlay over the period of use of the goods or services bought”. This should be achieved through competition, unless there are compelling reasons to the contrary.

Public sector procurement is subject to a legal framework which encourages free and open competition and value for money, in line with internationally and nationally agreed obligations and regulations. As part of its strategy, the government aligns procurement policies with this legal framework, as well as with its wider policy objectives.”

7. The Advanced Research and Invention Agency (ARIA) Bill, 2019-21 and 2021-22 [Bill 264] was introduced in the Commons on 2 March 2021 and had completed all its Commons stages by 7 June 2021.
8. The Opposition called particular attention to ARIA’s exemption from “existing Public Contract Regulations” and that it will not be subject to FOIA.
9. The Bill’s progression through the Lords included an amendment making ARIA subject to FOIA and the Public Contract Regulations 2015 which was tabled but defeated. This remained an issue at the Lords report stage and third reading on 10 January 2022. However, Amendment 6 to Clause 2 which would subject ARIA to FOI requests was defeated by 126 Content votes to 134 Not Content.
10. The Bill returned to the Commons for consideration of Lords Amendments which took place on Monday 31 January 2022. The Advanced Research and Invention Agency Bill received Royal Assent on 24 February 2022, meaning it is now an Act of Parliament, the Advanced Research and Invention Agency Act 2022.

Request and response

11. On 19 February 2021 the complainant wrote to BEIS and requested information in the following terms:
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² <https://www.gov.uk/guidance/public-sector-procurement-policy>

"Business Secretary Kwasi Kwarteng said: "From the steam engine to the latest artificial intelligence technologies, the UK is steeped in scientific discovery." Labour's shadow business secretary, Ed Miliband, expressed concern over reports ARIA could be made exempt from Freedom of Information laws. In light of this, I would like to request the following information:

(1) From 12th February 2021 to the day this request is processed, I would like to request all internal emails of the department's press office which refers/relates to the Advanced Research & Invention Agency. Please also include copies of journalistic inquiries, press office responses, and internal emails that relate to ARIA being exempt from freedom of information laws.

(2) For the past six months to the day this request is processed, please provide all internal and external correspondence and communications held by the Business Secretary Kwasi Kwarteng that mention or refer to ARIA. I am happy for you to conduct an electronic search only."

12. BEIS responded on 4 March 2021. It refused the request in reliance of the FOIA exemption at section 35(1)(a).
13. Following an internal review BEIS wrote to the complainant on 13 April 2021 upholding the initial response.

Scope of the case

14. The complainant contacted the Commissioner on 12 July 2021 to complain about the way her request for information had been handled. She explained:

"I requested the information as I am trying to examine how the government reached its decision for ARIA to be exempt from FOI and Public Contract Regulations - and whether there is any evidence to support its position on evading transparency requirements. In the internal review, I was informed that the government reached "a considered and evidence-informed position on the matter of ARIA's exemption from Freedom of Information laws", but the public needs to see that evidence. I am hoping that the information requested - especially part two of the request - will shed further light on this."

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

Reasons for decision

Section 35 – Formulation of government policy

16. Section 35 FOIA states:

“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”

17. 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.

18. 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 guidance³ 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 a Bill finally receives royal assent and becomes legislation. The Commissioner considers the term ‘development’ of policy to include the process of reviewing, improving or adjusting existing policy.

19. The Commissioner considers that the term ‘relates to’ in section 35 can be interpreted broadly within the meaning of the class based exemption. 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.

20. The complainant explained that she considered BEIS to have been quite evasive regarding her questions concerning the evidence which informed the government’s position on whether ARIA should be exempt from FOI. She advised:

³ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

“Tom Brake, a former Liberal Democrat MP and head of Unlock Democracy, said that “the most likely explanation for BEIS's reluctance to make public the logic behind the proposed exemption of ARIA from FOI legislation is that there is none.” The Campaign for FOI said “blanket secrecy will only fuel suspicion that ARIA’s exemption from FOI is based on nothing more than ministerial prejudice.””

21. BEIS explained that in this case the request was received and processed on the day the Government announced its intention to establish ARIA. The announcement’s key elements were the name, the intention to introduce legislation to establish the agency and the intention to recruit its initial leadership. BEIS advised:

“While some related media coverage also focused on plans to exempt ARIA from the FOI Act, this coverage was not based on the Government announcement on 19 February and instead followed separate media reports from 17 February.⁴ The ARIA Bill itself, containing details such as this on the Government’s legislative proposals, was not introduced in the House of Commons until 2 March. Further details were then published in a policy statement on 19 March, which outlined ARIA’s rationale and intended purpose.”

22. BEIS therefore concluded that the announcement on 19 February 2021 was the first of three announcements early in ARIA’s policy formulation process. BEIS added that the weeks immediately before the introduction of the ARIA Bill on 2 March 2021 were a particularly critical period during which the widest consideration of a new and ambitious policy proposal was required across Government by senior officials and Cabinet Ministers. BEIS stressed the importance of protecting a safe space for this consideration of the policy.
23. The range and volume of the withheld information includes journalistic inquiries and press office briefings and emails. The Commissioner asked BEIS whether any of the information could be considered to be operational rather than related to the policy making process. BEIS confirmed that all the withheld information relates to policy making, including the press office material. It explained that press office correspondence reflects and can inform ARIA policymaking considerations and decisions.

⁴ The Guardian (2021). ‘Defence research agency for ‘high-risk’ projects on cards for UK’.

<https://www.theguardian.com/politics/2021/feb/17/defence-research-agency-for-high-risk-projects-on-cards-for-uk>

24. The Commissioner has viewed the withheld information and accepts that the withheld information clearly comprises information relating to the policy process. The information comprises briefings, papers, scripts, handling strategies and many emails all relating to the formulation and development of the policy regarding ARIA. This formulation and development was on-going at the time of the request, BEIS' response and internal review. This timing is not a key factor in the engagement of the exemption; instead it is the content of the information which is of central importance. At the date of this notice the Bill has progressed through the House of Lords and received Royal Assent on 24 February 2022. The Commissioner accepts that the exemption at section 35(1)(a) is engaged.
25. Having accepted that the exemption is engaged the Commissioner has 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

26. The key public interest argument 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.
27. 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

28. In requesting an internal review the complainant explained:

"The new agency is backed by £800 million of government funding. This is a very large amount of taxpayers' money, and combined with the fast pace of setting up ARIA, there must be scrutiny over the development of ARIA as well as the decision-making process. A release of the documents I'm seeking would contribute significantly to the public's understanding.

It is a concern that ARIA is going to be exempt from the existing Public Contract Regulations. In light of recent public procurement scandals - publishing contracts late and accusations of cronyism - there is a need for scrutiny and accountability with the establishment of ARIA. Ed Miliband, the shadow business secretary, said: "The

government's procurement has been riddled by conflicts of interests and lack of transparency. Ministers must not use Aria as cover for further cronyism." Releasing information would enable the public to understand how perhaps this may not be the case. The government needs to be as transparent as possible, especially upon the news that the FOI Act is not going to cover ARIA."

29. The internal review from BEIS acknowledged that the complainant had highlighted important elements of the public interest in disclosure. It also noted the considerable amount of public funding and the attention attracted by ARIA from opposition politicians and campaigners on exemptions relating to public procurement and FOI, during the policy development process. A general public interest in transparency was also noted.

Public interest in maintaining the exemption

30. BEIS explained that few details on ARIA were published by the Government before legislation was introduced on 2 March 2021. BEIS therefore considers that disclosure of the requested information would have:

"...attracted a significant level of media interest, causing further distraction and prejudicing internal assessments of the more developed views that were by then circulating in Government."

31. BEIS considers that disclosure would undermine the convention of collective responsibility in government leading to a chilling effect on Ministers engaging frankly on policy matters:

"...at the very early stages of policy formulation and before the views of Cabinet colleagues are known."

32. BEIS emphasised that the policy questions concerning the significant commitment of public money to ARIA and the exemptions from public procurement and FOI legislation:

"... continue to come under scrutiny of Parliament, they should be considered still subject to ongoing reflection by Government.⁵"

33. BEIS concluded its considerations, finding that the public interest in withholding the information outweighs the public interest in its disclosure.

⁵ As at the time of the submission from BEIS in November 2021.

Balance of the public interest

34. 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 steps are taken to exclude ARIA from legislation applied to other public authorities including UKRI, referenced in paragraph 4.

35. The Commissioner also notes the concerns of "The Campaign for FOI"⁶ including that:

"a body spending £800 million of public funds over four years should be freed from the scrutiny that applies to the whole public sector. Many of the bodies subject to FOIA have tiny resources compared to those that ARIA will enjoy."

Also that whilst some bodies are excluded because of the sensitivity of their information due to, for example security matters, ARIA would be excluded to avoid the "burden"⁷ of complying with FOIA.

36. The Commissioner notes the influence of ARPA, and its successor DARPA, on the Government's decision making in establishing ARIA. He also notes that these USA agencies are subject to the relevant access to information legislation and he therefore understands the concerns expressed in regard to this divergence. It is particularly noteworthy that such access has not prevented ARPA & DARPA being so successful that the Government wishes to use them as a model for ARIA. It may be the case that ARPA and now DARPA have an administrative capacity which the Government has not replicated in ARIA. However if this is the circumstance the Commissioner notes that those public authorities with very small part-time administrative resources such as Parish Councils are nevertheless are subject to FOIA.

37. The Commissioner is aware of transparency and accountability provisions in the Bill such as annual auditing by the National Audit

⁶ <https://www.cfoi.org.uk/wp-content/uploads/2021/03/second-reading-briefing-Advanced-Research-and-Invention-Agency-Bill.pdf>

⁷ BEIS ARIA policy statement 19 March 2021: "Noting that ARIA will be a small body with minimal administrative capacity, we will remove the burden of processing Freedom of Information requests."

Office and a statement of accounts and an annual report on the exercise of its functions to be laid before Parliament by the Secretary of State. However, this does not amount to the same level and nature of transparency and accountability provided by the FOIA.

38. The Commissioner notes that by the time of the internal review (13 April 2021) the Government had issued a policy statement on ARIA (on 19 March 2021) which put into the public domain details of the Government's intentions. Additionally 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 2021 provided further detail regarding the FOIA exclusion.
39. The Commissioner considers that the safe space and chilling effect arguments set out in paragraphs 26 and 27 are not as relevant to the press office information considered in paragraph 23, as to the rest of the withheld information. Nevertheless the Commissioner is prepared to accept that the section 35 exemption applies to the press office material.
40. As set out in paragraph 14 the Commissioner has noted the complainant's reasons for making her request. He understands her wish to examine how the Government reached its decisions to exempt ARIA from obligations adhered to by other public bodies. He also acknowledges the weighty public interest in the transparency of this decision making. However, he has examined the information falling within the scope of the request and as far as the request relates to the FOI exclusion, the withheld information contains no additional arguments that are not already in the public domain. As the opportunity to further inform public debate is therefore lessened the Commissioner considers that this does not add weight to the public interest in favour of disclosure.
41. The Commissioner has therefore considered where the balance of the public interest falls. At the time of the request the information in scope was extremely recent and the Commissioner attributes significant weight to the need for a safe space for government to formulate and develop policy away from external scrutiny. He also considers that in the circumstances of this case, due to the volume, range and content of the withheld information, there is a real risk of disclosure resulting in a chilling effect on free and frank discussion in future policy debates. He is fully aware of the public interest in the requested information and in particular the public interest in the specific information of interest to the complainant. However, ultimately he believes that in the circumstances of this case there is a weightier public interest in ensuring policy making has the best

opportunity to reach well informed conclusions by protecting Government's ability to discuss and develop policies in a safe space.

42. The Commissioner therefore considers that, on balance, the public interest favours maintaining the section 35(1)(a) exemption.

Right of appeal

43. 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

44. 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.
45. 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
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