

Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice

Date: 25 January 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 from BEIS regarding the Low Oil and Covid-19 Contingency ("LOCC") team. BEIS refused the request in reliance of FOIA sections 35(1)(a) – formulation of government policy, 43(2) – commercial interests, 42(1) – legal professional privilege and 40(2) – personal information. BEIS also relied on the EIR regulations 12(4)(e) – internal communications, 12(5)(e) – confidentiality of commercial or industrial information, 12(5)(b) – the course of justice and 13(1) personal data.
2. The Commissioner's decision is that BEIS has appropriately applied FOIA section 35(1)(a) to the withheld information and the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Background

4. The Low Oil and Covid Contingency (LOCC) team was established in April 2020 to address the impact for the UK of the UK oil and gas sector facing both a low and falling oil price along with COVID-19. The work considered the impacts on the UK, of insolvencies in the UK

continental shelf¹ (UKCS), and focussed on the resilience of individual companies.

5. By October 2020 pressures elsewhere in government required a number of the cross-government team to be returned to their business as usual work. At this point work was and remains on-going to finalise the policy position. BEIS advised that currently the policy development work is evolving more slowly in the context of other priorities and resource pressures. Consequently no final policy has been approved or announced, nevertheless the importance of this policy work necessitates that it will be completed to provide a clear response to future insolvency risks.

Request and response

6. On 10 August 2020, the complainant wrote to BEIS and requested information in the following terms:

"1 - please provide a copy of all meeting minutes for the BEIS Low Oil and COVID-19 Contingency (LOCC) Team Please limit the date range of the search to 01/03/20 and present day."

7. BEIS responded on 3 November 2020. It explained that the requested information included material that would be covered by both the FOIA and the EIR and therefore it had considered the request under both regimes. It advised that the information was withheld, primarily, under both FOIA section 35(1)(a) and EIR regulation 12(4)(e). The other exemptions relied on were section 43(2), 42(1), 40(2) along with exceptions 12(4)(e), 12(5)(e), 12(5)(b) and 13(1).
8. Following an internal review BEIS wrote to the complainant on 19 November 2020 upholding the application of the exemptions and exceptions stated in the initial response.

Scope of the case

¹ Responsibility for the mineral rights of the UKCS rests with the Oil and Gas Authority ("OGA"). BEIS sets the overall policy and legislative framework within which the OGA operates, however, the OGA has day-to-day operational independence from BEIS.

9. The complainant contacted the Commissioner on 3 December 2020 to complain about the way his request for information had been handled. He explained:

"I don't believe it is acceptable to withhold ALL documentation associated with my request furthermore certain sensitive information could have been redacted and the reaming [sic] documents released."

10. The Commissioner considers the scope of the case to be whether BEIS is entitled to withhold the requested information under the exemptions and exceptions cited.

Reasons for decision

The appropriate access regime.

11. BEIS explained that it had relied on both access regimes because it considers that there could be a potential effect on the environment from operational challenges arising from identified risks.
12. The Commissioner understands BEIS' reasoning that, for example, if a company became insolvent this could lead to oil/gas operations closing earlier than planned which would, for example, have an impact on overall carbon emissions. Information on such emissions would fall for consideration under the EIR.
13. However, having seen the withheld information the Commissioner does not consider that the specific content of the information falls within the interpretation of environmental information as set out in regulation 2. He therefore considers that the information cannot be considered to be environmental information.
14. The Commissioner has therefore considered the application of the FOIA with regard to the specific withheld information.

Section 35 - Formulation or development of government policy

15. Section 35(1)(a) 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."

16. The Commissioner's view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are

presented to a Minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.

17. 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 information which relates to any significant extent to the formulation or development of policy will be caught by the exemption even if it also relates to policy implementation or other issues. Policy formulation or development does not have to be the sole or main focus of the information as long as it is one significant element of the information.
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. The Commissioner's guidance² advises that a public announcement of the decision is likely to mark the end of the policy formulation process.
19. 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.
20. BEIS explained that the requested information relates to the formulation and development of policy regarding the government's response to the impacts of a low oil price scenario and Covid-19. The minutes of the LOCC team meetings record discussions between officials across a number of workstreams supporting the overall policy development.
21. BEIS went on to explain that at the time of the request the LOCC team was meeting on a regular basis and policy development work was continuing at pace. Although, as explained above, resources were reprioritised, the development of the policy remains incomplete. It is likely that further work will be carried out before the policy position is finalised.

² <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

22. The Commissioner accepts that the withheld information clearly comprises information relating to the formulation and development of government policy. The information comprises minutes of the LOCC team meetings. At the time of the request the oldest information held by BEIS was only four months old and therefore very recent. The policy development work being undertaken by the LOCC team was still ongoing. The Commissioner understands that due to the change in priorities the work did not complete and therefore the policy was not finalised. He is unaware of any public announcement in this regard and has located little information at all in the public domain save for two sets of minutes of the Oil and Gas Authority³ ("OGA") which briefly mention the work of the LOCC. He also notes that work undertaken in 2020 was in part a continuation of earlier policy formulation which had been carried out during previous low oil price events and which had been put on hold following a recovery in oil prices. The Commissioner therefore accepts that the exemption at section 35(1)(a) is engaged.
23. 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

24. 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 may also be related arguments about preventing a 'chilling effect' on free and frank debate in future.
25. 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 will 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.

³ <https://www.ogauthority.co.uk/media/6553/minutes-of-oga-board-meeting-on-20-may-2020.pdf>

<https://www.ogauthority.co.uk/media/6711/minutes-of-oga-board-meeting-on-16-july-2020.pdf>

26. Departments often argue that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and lead to poorer decision making, known as the chilling effect. Chilling effect arguments operate at various levels. The weight accorded to such arguments will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question
27. BEIS accepts that there is a public interest in information on the evolving work of government in response to a combination of a low oil price scenario and Covid-19. It acknowledges that disclosure could provide better insight into the developing policy and the reasoning behind it.
28. In favour of maintaining the exemption BEIS explained its view that there is a strong public interest in ensuring that Ministers and officials are able to discuss policy options fully and frankly in a protected space. It explained:

"We believe the nature of such frank discussion and debates on key public policy issues would be inhibited and the Department would be prevented from taking decisions on the fullest understanding of the issues involved."

29. BEIS added that it considers it to be essential that, as part of the formulation of this policy, the relevant public bodies can exchange candid views openly without concern that the discussions would be put into the public domain. BEIS added that this is particularly the case when those views relate to sensitive and on-going issues. BEIS considers that disclosure would lead to:

"significantly less considered and effective policy in this important area."

Balance of the public interest

30. The Commissioner considers that there will always be a public interest in disclosing official information in the interests of openness and transparency. Specifically in this case, the Commissioner shares the view that there is a public interest in understanding the Government's preparedness for potential difficulties arising out of a combination of low oil prices and the impact of the COVID-19 pandemic.

31. In favour of maintaining the exemption, the Commissioner considers that the live and on-going circumstances of the policy making at the time of the request carries significant weight. He considers that disclosing the withheld information is likely to result in a chilling effect on future discussions relating to the work regarding the UKCS and potential companies' insolvency and, in the circumstances of this case, there is a strong public interest in preventing that outcome. As the Commissioner has often noted, civil servants should not be easily deterred from giving impartial and robust advice by the possibility of future disclosure. However, the impact of a chilling effect on discussions, in relation to this policy, between civil servants and others should not be underestimated, particularly when free and frank advice is required in order to deal with complicated situations, such as those facing the LOCC team at the time of the request. In addition, some of the information contained in the minutes is commercially sensitive. If the withheld information is disclosed, stakeholders may be less willing to share information with officials in future for fear that it could also be published prematurely, damaging the relevant entities' interests and this would have a detrimental effect on the formulation or development of policy in respect of potential insolvencies.
32. Furthermore, the Commissioner considers that there is a strong public interest in protecting the private thinking space for officials and Ministers to consider options in relation to the possibility of company insolvency and the resultant impact on the UK. Whilst disclosure would inform the public of the discussions and planning taking place in the event of actions being necessary, the Commissioner considers that there is a stronger public interest in allowing for uninhibited debate of the necessary policy development.
33. The Commissioner notes the complainant's comment regarding partial disclosure of the requested information. The complainant suggests; "*certain sensitive information could have been redacted*". Having viewed the entirety of the information the Commissioner considers that it is not possible to redact some parts of the minutes and disclose other parts as all the information contained in the minutes relates to the formulation of government policy. He considers that all the content of the minutes has been appropriately withheld and the public interest favours maintaining the exemption at section 35(1)(a).
34. As the Commissioner finds the information exempt from disclosure under section 35(1)(a) he has not considered the application of the other exemptions applied by BEIS.

Right of appeal

35. 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

36. 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.
37. 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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