

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2023

Public Authority: Department for Business and Trade
Address: Old Admiralty Building
London
SW1A 2DY

Decision (including any steps ordered)

1. The complainant has requested information on meetings between the public authority formerly known as the Department for Business, Energy and Industrial Strategy ("BEIS") and McDonald's.
2. The Commissioner's decision is that the public authority formerly known as the Department for Business, Energy and Industrial Strategy ("BEIS") has appropriately relied on FOIA section 35(1)(a) to redact the information provided. The Commissioner finds a breach of FOIA section 17(1) as it did not issue a refusal notice within the required timescales.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 9 November 2020, the complainant wrote to BEIS¹ and requested information in the following terms:

"I am writing to you under the Freedom of Information Act 2000 to request the minutes of meetings and related correspondence between

¹ Although the complainant originally submitted their request to BEIS, on 9 November 2020 BEIS ceased to exist on 7 February 2023 when four new departments were created. This decision notice is therefore served on the Department for Business and Trade.

BEIS and McDonald's including the following 13 meetings as reported in the department's transparency data releases on ministers meetings, travel hospitality and expenses. [The request included a table of meetings from 19 March 2020 until 26 June 2020. The table is included as an annex to this notice]

In addition, I request the minutes and related correspondence of any subsequent (as yet undisclosed) meetings held between the 30th of June 2020 and the date of this request between McDonald's (or their representatives) and BEIS."

5. BEIS responded on 2 March 2021 explaining that it held some information on three of the listed meetings and in addition a meeting on 24 August 2020. It explained that the information was withheld in reliance of section 43(2)- Commercial interests.
6. The complainant requested an internal review on 24 April 2021 which was provided on 21 July 2021. The internal review upheld the application of section 43 (2) and also relied on section 35(1)(a) - formulation and development of government policy - to withhold the requested information.

Background

7. Before the COVID-19 pandemic, the hospitality sector did not have a Government Sponsor Department. Given the potential impact of COVID-19 on the sector, the protective measures needed to reduce transmission and the developing package of business support, Ministers agreed that BEIS should take on the role of representing the interests of the sector across government.
8. In March 2020 the Secretary of State, Alok Sharma, initiated a series of round-table meetings with hospitality sector representatives, including McDonald's, which Minister Scully then took forward on a more regular basis.
9. The meetings were used by the Minister to hear about the pressures facing the sector and potential solutions and to seek evidence to support policy interventions and influence other government departments.

Scope of the case

10. The complainant contacted the Commissioner on 8 September 2021 to complain about the way their request for information had been handled. They explained their expectations that information on other meetings

would be held by BEIS and therefore BEIS had not fully considered his request. They added:

“In terms of section 43 – 2 – I don’t believe McDonald’s would have shared genuinely commercially sensitive information in a room with competitors and trade associations. If there were that that could be redacted and the rest of the minutes given. In terms of the 35 1 a – the Information Tribunal has given short shrift to ideas that commercial lobbyists should enjoy an expectation of confidentiality, or consideration of a ‘chilling effect’ – lobbyists know there’s a foi act and should act accordingly. Similarly for arguments that private space for policy formulation with external lobbyists should be protected when considering the public interest. As scrutiny of what lobbyists are up to will help ensure undue influence doesn’t happen.”

11. During the course of the Commissioner’s investigation BEIS found further information which it had not previously located when responding to the complainant. It confirmed holding nine readouts of the 13 meetings listed in the complainant’s request and identified a further four meetings’ readouts not listed by the complainant but falling within the scope of the request. In addition an email exchange between McDonald’s and BEIS was also identified.
12. In its first submissions to the Commissioner BEIS questioned whether the information it held was actually in the scope of the request as it does not contain details of discussions between BEIS and McDonald’s because the representative of McDonald’s did not contribute any comments contained in the information held.
13. The Commissioner noted BEIS’ view but having seen the withheld information considered that it did fall within the scope of the request as McDonald’s had attended the meetings and was party to the content of those meetings.
14. The complainant confirmed to the Commissioner that they wished to receive any information held within the scope of his request where a McDonald’s representative was in attendance whether or not it included any recorded contribution from that representative to the discussions.
15. Following discussion with the Commissioner, on 4 January 2023, BEIS disclosed redacted copies of all the information listed above in paragraph 11. The redactions were made in reliance of sections 35, 43 and 40(2) – personal data.
16. On 8 February 2023 the complainant advised the Commissioner that they were not satisfied by the disclosures made by BEIS and considered the redactions to the contributors’ comments not to be in the public interest. He did not question the limited section 40(2) reliance to withhold names and contact details of junior officials and third parties.

17. The Commissioner therefore considers the scope of his investigation to be the application of section 35(1)(a) and 43(2) to redact the information provided.

Reasons for decision

Section 35 – Formulation of government policy

18. Section 35(1) states:

“(1) 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.

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 does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough.

20. 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 guidance² advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

21. In the first instance BEIS explained:

“It could therefore be argued that the information held does not constitute minutes of meetings held between BEIS and McDonald’s, rather informal readouts of meetings McDonald’s attended, but did not contribute.”

22. BEIS accepted the Commissioner’s view that the information held was in the scope of the request. However, BEIS provided limited explanation for the engagement of the exemption. It advised:

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

“For these round-table meetings to be effective in informing policy, it is important that attendees can speak openly and candidly, and they are unlikely to do so if the confidence of the meetings cannot be assured. This is important because, while COVID restrictions have now been removed, a combination of COVID related debt, cost increases (including energy) and a skills shortage means the sector is struggling to recover and may still require Government intervention.”

23. BEIS considers that the engagement with representatives of the hospitality sector was vital in ensuring that the Government understood the financial state of the sector and the proportionality of COVID restrictions. While decisions on the public health, economic and regulatory response to the pandemic sat with other government departments the role of BEIS was critical to protecting businesses and jobs. Without providing a safe space to discuss issues openly and honestly with the sector, BEIS would not have been able to gather the data and information required to input into the policy positions of other government departments.
24. The Commissioner notes that in a previous decision notice³ he accepted at paragraph 46 that the development of policy on the Government’s response to the coronavirus pandemic in the UK continued into 2021 with a national lockdown announced on 4 January 2021. He therefore accepts that policy making was on-going at the time of the request in this case.
25. The Commissioner has examined the withheld information and notes that the information comprises informal minutes referred to as “readouts” and limited emails between McDonald’s and BEIS. He notes that in the course of his investigation BEIS has provided a significant amount of information which provides context to the meetings and the topics covered. The redacted information comprises the directly attributable comments of those hospitality sector attendees of the meetings.
26. The Commissioner understands that the complainant has queries regarding the disclosed information. BEIS has located the information in a piecemeal fashion which suggests that thorough searches were not conducted initially, however, the Commissioner is satisfied that the information provided to the complainant comprises all the recorded

³<https://icosearch.ico.org.uk/s/search.html?collection=ico-meta&profile=decisions&query&query=IC-128120-B5N1>

information held in the scope of the request. No document is withheld in full. With regard to the two emails disclosed the complainant commented:

"I am also confused by the email that they've released referencing a telephone conversation, yet there's no minute / note or similar of what was discussed at the telephone call? What were the questions asked?"

27. The Commissioner understands that the emails relate to a specific conversation between BEIS and McDonald's and has been disclosed as "related correspondence" as set out in the request. The existence of the emails and a telephone conversation does not mean that any recorded information was created or held as a result.
28. The Commissioner is satisfied that the redacted information relates to the formulation and development of government policy and on that basis he has concluded that the section 35(1)(a) exemption was correctly engaged.

Public interest test

29. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore considered whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.
30. In requesting an internal review the complainant made the following comments on the public interest test:

"The public interest test in the response only appears to have considered a "general public interest in the disclosure of information" and failed to consider two other aspects of the public interest raised by the request:

a. The information relates to factual information which may have influenced policy decisions about occupational safety and public health in the operation of the hospitality sector during the COVID-19 pandemic with a clear and widespread impact on public health and welfare .

b. The information is also connected to fiscal support for the hospitality sector which McDonald's benefitted from. There is a strong public interest in being able to scrutinise McDonald's communications and government reactions."

31. In its internal review BEIS explained that, in favour of disclosing the withheld information, it had considered the "general, inherent public interest in transparency." It stated:

"Transparency ensures the Government is accountable to the electorate. Furthermore, we have considered the public interest in understanding the Government's response to the coronavirus pandemic and the steps and actions being taken as we progress with the roadmap and easing of restrictions."

32. In favour of maintaining the exemption BEIS explained:

"Ministers and their officials need space in which to develop their thinking and explore different options in communications and discussions. These meetings are pertinent to our ongoing policies concerning the response to the pandemic. These meetings are crucial to this policy making process and the participants in such meetings need to be able to discuss candidly issues that arise, and they need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects. Furthermore, good government depends on good decision making and this needs to be based on the best advice available and a full consideration of all the options. There may be a deterrent effect on external experts or stakeholders who might be reluctant to provide advice because it might be disclosed, which would create a "chilling effect". This would not be in the public interest."

33. BEIS explained to the Commissioner that contributions from attendees were provided in confidence at closed meetings, where all participants agreed not to disclose information beyond those in attendance. Adding that disclosing the information into the public domain would undermine that principle, undermine confidence in the Government, and would undermine the effectiveness of ongoing engagement with the sector on its recovery and ongoing resilience.

34. BEIS concluded that the public interest lies in favour of withholding the requested information.

Balance of the public interest

35. The Commissioner has considered the arguments provided by both parties. He understands the complainant's points set out in paragraph 30 above and agrees that there is a significant public interest in any influences on policy decisions about occupational safety and public health in the operation of the hospitality sector during the COVID-19 pandemic.

36. The Commissioner explained his view on the application of section 35(1)(a) in paragraph 20 above. He considers that the timing of the request is important in this case as the requested information was very recent at the time of the request and the Government's policy on

handling the pandemic alongside the impact on the hospitality sector was on-going.

37. The Commissioner has taken account of the explanation provided by BEIS which demonstrates the expectations of those contributing to the meetings and the importance placed by BEIS on their input. The Commissioner also notes that the focus of the complainant's request, which is information on meetings between BEIS and McDonald's, would not be addressed by any disclosure of the redacted information as no comments from the representative from McDonald's attending the meetings were contained in the information.
38. The Commissioner notes that in his earlier decision notice, referenced in paragraph 24, he ordered disclosure of information relating to comments made by Secretaries of State. In this case BEIS has already disclosed the content of the information relating to comments from government officials and content which is not directly attributable to the external parties.
39. In summary the Commissioner is therefore balancing the weight of the public interest in scrutiny of the hospitality sector contributions, which would allow the public to consider the impact of those comments on the formulation of government policy, against the legitimate representations given in confidence to government at its request, which provided valuable insight at a time when it was required. The Commissioner considers this to be very finely balanced. After much deliberation he has concluded that the public interest lies in favour of maintaining the exemption.
40. BEIS applied the section 43(2) exemption to some of the same information to which it applied section 35(1)(a). As the Commissioner has determined that the information should be withheld under section 35 he has not proceeded to consider the application of section 43.

Section 17 – Refusal of a request

41. Under FOIA section 17(1) a public authority must issue a refusal notice in respect of any exempt information within 20 working days of the request.
42. The complainant made their request on 9 November 2020, BEIS responded after 76 working days, on 2 March 2021.
43. The Commissioner notes this breach of section 17 occurred during the time of the pandemic when public authorities were placed under unprecedented pressure in meeting their obligations.

44. It is clear however that BEIS did not deal with the request for information in accordance with the FOIA. The Commissioner finds a breach of section 17(1) by BEIS failing to respond in accordance with this section within 20 working days.

Other matters

45. FOIA does not impose a statutory time within which internal reviews must be completed albeit that the section 45 Code of Practice explains that such reviews should be completed within a reasonable timeframe. In the Commissioner's view it is reasonable to expect most reviews to be completed within 20 working days and reviews in exceptional cases to be completed within 40 working days.
46. The complainant asked for an internal review of the outcome of his request on 24 April 2021. BEIS did not provide the results of its review until 21 July 2021, 61 working days later.

Right of appeal

47. 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

48. 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.
49. 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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