

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 March 2023

Public Authority: Department for Culture, Media and Sport
Address: 100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested minutes of the Public Service Broadcasting Advisory Panel to the Department for Culture, Media and Sport¹ ('the DCMS'). The DCMS refused the request on the basis that section 35(1)(a) of FOIA applied (formulation of government policy).
2. The Commissioner's decision is that the DCMS was correct to apply section 35(1)(a) of FOIA in order to withhold the information.
 - The Commissioner does not require the DCMS to take any steps.

¹ Although the request was made to the Department for Digital, Culture, Media & Sport, the department has now been renamed the Department for Culture, Media & Sport.

Request and response

3. On 18 January 2022, the complainant wrote to the DCMS and requested information in the following terms:

"In November 2020 the then Culture Secretary, Oliver Dowden, established a Public Service Broadcasting Advisory Panel. While the membership of the panel was public, there have been no records of its meetings, nor any minutes published.

I understand an FOI request from [name redacted by ICO] was refused in July 2021.

The reason given was that "it remains of great importance that a safe space remains to prevent damage to the live policy process. This process is still live in this instance, therefore, it is of great importance that the safe space is protected."

It is not clear if the Panel is still live or whether it has stopped meeting. In the latter then the previous reason for declining an FOI request cannot still hold.

In any event, the current Secretary of State, has now announced her policy intentions – presumably informed by the advice this panel gave.

It seems extremely important, therefore, for the previous secrecy surrounding this panel to be dropped and for the minutes of the proceedings – which do exist – are published.

I hereby ask for the minutes and give notice that, should you refuse them, I will appeal to the ICO."

4. The DCMS responded on 16 February 2022. It refused the request on the basis that section 35(1)(a) of FOIA applied (the formulation or development of government policy).
5. The DCMS did not carry out a review of its decision.

Reasons for decision

6. The following analyses whether the DCMS was correct to refuse the request on the basis that section 35(1)(a) applies.
7. Section 35(1)(a) of FOIA states that:

'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'
8. Section 35 is a class-based exemption. Therefore, if the requested information falls within the description of a particular sub-section of 35(1) then this information will be exempt. There is no need for the public authority to demonstrate prejudice to these purposes. Section 35(1) is however subject to the public interest test set in section 2(1) of FOIA.
9. In his request for information, the complainant noted that as the Secretary of State had now announced her intentions as regards public service broadcasting services, there was no longer a need for the Department to continue to require a safe space in order to develop its policy. He therefore argued that the exemption was no longer applicable to the requested information.
10. The Commissioner must consider the circumstances at the time of the DCMS' response when making his decision.
11. The Commissioner has considered a similar request for the same information. In decision notice IC-115832-J4W6², issued on 23 November 2022, the Commissioner found that the DCMS was correct to apply section 35(1)(a) of FOIA, and that the public interest in maintaining the exemption outweighed that in the information being disclosed in that case.
12. In his decision in IC-115832-J4W6, at paragraph 18 of the decision, the Commissioner accepted the DCMS' argument that: "DCMS emphasised that at the time of the request (*and indeed at the point that this notice is being issued*) policy development in respect of this area remained

² <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022980/ic-115832-j4w6.pdf>

ongoing.” This comment therefore relates to the situation as of 23 November 2022, some months after the DCMS had issued its response to the complainant in this case (i.e., in February 2022). At that time, the Commissioner had concluded that the relevant policy development was still ongoing.

13. The Commissioner also notes that the government subsequently issued a white paper on the issue in April 2022³.
14. Additionally, the Commissioner notes that on 19 May 2022, the Secretary of State for Digital, Culture, Media and Sport at that time, Nadine Dorries, indicated to the Digital, Culture, Media and Sport Committee that work on the project was ongoing within her department⁴.
15. The Commissioner is therefore satisfied that at the time that the DCMS responded to the complainant's request for information in this case, work was still ongoing to develop the policy in question.
16. The Commissioner's decision notice in IC-115832-J4W6 provides his reasons for deciding that section 35(1)(a) was applicable to the information, and his reasons for deciding that the public interest rested in the exemption being maintained at that time.
17. Therefore, given the Commissioner's decision in IC-115832-J4W6, and for the same reasons outlined in that decision notice, the Commissioner's decision is that the DCMS was correct to apply section 35(1)(a) to refuse the request in this instance.

³ <https://www.gov.uk/government/publications/up-next-the-governments-vision-for-the-broadcasting-sector>

⁴ <https://www.stevebrine.com/news/mp-quizzes-secretary-state-future-channel-4>

Right of appeal

18. 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

19. 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.
20. 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

Ian Walley
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