

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 the evidence that informed the Government's position that the Advanced Research and Invention Agency's (ARIA) exclusion from FOIA.
2. The Commissioner's decision is that BEIS is not entitled to withhold the requested information by relying on FOIA section 35(1)(a) - Formulation or development of government policy, because the public interest favours disclosure of the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information set out in the confidential annex.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Background

5. 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 USA'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.

6. 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

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>

which will proactively provide information about its activities to encourage coalescence around its programmatic goals.”

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 Bill’s progression through the Lords included an amendment making ARIA subject to FOIA 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.
9. The Bill returned to the Commons for consideration of Lords Amendments which took place on Monday 31 January 2022. The 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

10. On 24 May 2021, the complainant wrote to BEIS and requested information in the following terms:

“I would like to request the following information. In an internal review response issued to me (reference number: IR2021/08242), I was informed of the following: That safe space allowed the government to reach a considered and evidence-informed position on the matter of ARIA’s exemption from Freedom of Information laws.

In light of this, I would like to be provided with all copies of evidence that informed the position that ARIA should be exempt from Freedom of Information laws.”

11. BEIS responded on 21 June 2021. It stated that the information it held in the scope of the request was withheld in reliance of section 35(1)(a).
12. Following an internal review BEIS wrote to the complainant on 9 September 2021 upholding the application of section 35(1)(a).
13. This request relates to BEIS’ response to an earlier request concerning ARIA which is the subject of decision notice IC-117483-K5Z3.

Scope of the case

14. The complainant contacted the Commissioner on 8 December 2021 to complain about the way her request for information had been handled. She explained:

“In regards to ARIA, I have so far found BEIS to be quite evasive. I have been asking questions over the evidence which informed its position over whether ARIA should be exempt from FOI. I have not been able to get answers, and many people have expressed concerns over ARIA being exempt. 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.”

The public deserves to know how rigorous this evidence is, and what research has been relied upon to inform its position.”

15. The Commissioner considers his investigation to be the application of the exemption at section 35(1)(a) to the withheld information.

Reasons for decision

Section 35 – Formulation of government policy

16. Section 35(1) 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 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 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. BEIS explained that the withheld information comprises the evidence which informed the Government's position on ARIA's exclusion from the FOIA. It notes that, unlike the linked case IC-117483-K5Z3, the request in this case is not timebound and therefore there is information which was not in the scope of the previous case which falls within the scope of this case.

21. The arguments provided by BEIS in support of its application of section 35(1)(a) reflect the reasoning set out in the previous decision notice. In this case it explained that the request was received on 24 May 2021 and was processed on 28 May 2021. At that time the ARIA Bill had passed the Committee Stage in the House of Commons and was awaiting Report Stage. It had not yet been heard in the House of Lords. BEIS advised that ARIA's exemption from the FOIA faced significant scrutiny in its remaining stages in both Houses, with amendments on the issue tabled in each. BEIS concludes that the policy:

"...must be considered to have been live at the point at which the request was received and processed, and subject to ongoing reflection by Government for many months after."

22. The Commissioner has viewed the withheld information and accepts that it comprises information relating to the formulation or development of government policy in regard to ARIA. The withheld information is contained in three documents which also cover other matters outside the scope of the request. The Commissioner agrees that the majority of the information designated as out of scope is exactly that. However, he considers that some of the information determined as out of scope by BEIS should fall within the scope of the request. The information determined by the Commissioner to be in the scope of the request is set out in a confidential annex.

23. The Commissioner raised this matter with BEIS which explained its view that the material identified by the Commissioner as in the scope of the request does not comprise **evidence** as stated in the request. BEIS advised:

"It does not in our view constitute "evidence that informed the decision" that ARIA should be exempt from the FOI Act. We take evidence in this context to mean the available factual or reported information that

formally informed the Government's decision, as opposed to commentary surrounding the decision, or how it would be implemented and received by stakeholders.”

24. The Commissioner acknowledges BEIS' view. However, he considers that the particular information he has identified should be considered to be 'evidence' for the same reasons as the information determined by BEIS may be considered to be 'evidence'.
25. Notwithstanding this difference BEIS advised:

“Were the information to be deemed in scope of the request, I can confirm we would seek to apply the S35(1)(a) exemption in line with the public interest arguments made in our letter of 4 February.”
26. The Commissioner notes that the withheld information pre-dates Kwasi Kwarteng's appointment as Secretary of State for BEIS and was therefore not included in the withheld information in case reference IC-117483-K5Z3.
27. The Commissioner agrees that the policy process which was on-going at the time of the request, BEIS' response and internal review falls within the scope of formulation or development. However, 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.
28. Having considered all of the above the Commissioner accepts that the exemption at section 35(1)(a) is engaged in regard to both the information considered by BEIS to be in the scope of the request and the additional information identified by the Commissioner as in the scope of the request.
29. 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

30. 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.
31. 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

32. The complainant explained her view to the Commissioner as set out in paragraph 14. She also explained her view that BEIS has not fully considered the public interest in disclosure, adding that:

"...it is vital for the department to release the information sought.

The public deserves to know how rigorous this evidence is, and what research has been relied upon to inform its position."

33. Furthermore the complainant quoted the former Information Commissioner, Elizabeth Denham who commented:

"It is so important that a Minister and senior officials walk the walk when it comes to transparency.... I use the example of Ministers in BEIS, who suggested that the Advanced Research and Invention Agency, the new public body, be exempt from freedom of information. That is really harmful, because that sends a message about transparency and its importance to everyone who works in that Department. I think that is a serious issue.

I was also concerned to see that the new ARIA science and technology public body is going to be excluded from the Freedom of Information Act. I am concerned when new public bodies are created that are not subject to the same transparency requirements as other public bodies."²

34. BEIS acknowledged in its internal review that it understands that there is a public interest in information about ARIA and in the evidence used to reach policy decisions.

Public interest in maintaining the exemption

35. BEIS explained that it is essential that a safe space to debate live policy issues away from external interference and distraction is preserved. It explained that disclosure of the requested information at the time of the request:

² <https://committees.parliament.uk/oralevidence/3069/pdf/>

"...would have undermined the open and proper deliberation of the Government's proposal in Parliament."

It added:

"If this information were made public, we believe the nature of such frank discussion and debates would be inhibited, and the Department would be prevented from taking decisions based on the fullest consideration of the evidence and understanding of the issues involved."

36. It relied on the Commissioner's guidance³ on section 35 to affirm that it is important to promote, explain and defend its key points even after policy and legislative proposals have been announced.

37. BEIS explained:

"The obvious public interest in scrutinising and debating the details of the ARIA Bill and the proposed FOI exemption would go on to be met to a significant extent through parliamentary debate and coverage of that debate in the media. At Committee Stage in the House of Lords, for example, Peers deliberated the FOI exemption at length, before voting on an amendment to the Bill on 14 December."

38. BEIS considers that the rationale underpinning the Government's policy decisions has been scrutinised at length and in public at multiple stages. It concludes that at the time of the request the policy development process was not complete and that the public interest in withholding the information outweighs the public interest in disclosure.

Balance of the public interest

39. As he set out in his decision on IC-117483-K5Z3, 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 to exclude ARIA from legislation applied to other public authorities.

40. The Commissioner notes that DARPA, the successor to ARPA, has always been subject to freedom of information legislation. The Government has

³ <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

made many references to the success of DARPA in its reasoning for establishing ARIA, including the freedom of operation enjoyed by DARPA. The Commissioner therefore finds an apparent contradiction in deviating from the template of DARPA to create an exclusion for ARIA from FOIA.

41. The withheld information comprises documents which also cover content out of the scope of the request. The total amount of in scope information is limited. As referenced above at paragraphs 22 and 23 the Commissioner disagrees with BEIS on the withheld information in the scope of the request. The Commissioner's view is that the scrutiny process which BEIS has referenced and the resulting discussions in the public domain would have been assisted by disclosure of all the information determined by the Commissioner to be in scope at the time of the request.
42. The Commissioner notes that 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 2022.⁴ The full chronology of the Bill at the House of Commons Library⁵ is available online. At point 1.4 it notes:

"Amendment 6 to Clause 2 would subject ARIA to Freedom of Information requests. It was defeated by 126 Content votes to 134 Not Content."
43. The Commissioner notes his guidance at section 35⁶ 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."
44. He considers that the information requested in this case is particularly relevant to an understanding of the unusual policy decision – in respect

⁴ <https://bills.parliament.uk/bills/2836>

⁵ <https://commonslibrary.parliament.uk/research-briefings/cbp-9433/>

⁶ Ibid para 34

to a public body - not to subject ARIA to FOIA requests. The Commissioner notes that the withheld information contains some information already in the public domain at the time of the request. However, he considers that the information determined by BEIS to be that which provides the "considered and evidence-informed position on the matter of ARIA's exemption from Freedom of Information laws"⁷ and additionally the information the Commissioner also considers to be in scope is of significant public interest.

45. The Commissioner notes the consideration of ARIA's exclusion from FOIA in the media⁸ and various civil society groups from before the Government announcements continuing up to the Bill becoming an Act. The Commissioner considers that the public should have the opportunity to further understand why a public body is treated differently from others. Without a sufficiently informed public understanding of why ARIA is excluded from FOIA unwelcome speculation results regarding the role of ARIA and the future of FOIA. He is persuaded by the public concern shown as meriting further transparency on this matter and his consideration that disclosure of the information would have assisted in the public being better informed on the government's actions. This would allow for greater public understanding to enable public debate and scrutiny of both the policy itself and how it was created, greater understanding of the parliamentary debates such as those at the Committee Stage in the House of Lords aiding transparency in general.
46. The Commissioner accepts that the timing of a request is an important factor, with the need for a safe space strongest when the issue is still live. In this case the issue was still live at the time of the request and therefore disclosure may have compromised the safe space to some extent. However, the policy paper of 19 March 2021 referenced in paragraphs 5 and 6, advised that ARIA would not be subject to FOIA and this public announcement was already in the public domain. Although the Commissioner attributes 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 there is a more significant weight to be attributed to the ability of the public to

⁷ Internal review from IC-117483-K5Z3 cited in the request at paragraph 10

⁸ <https://www.theguardian.com/politics/2021/feb/17/defence-research-agency-for-high-risk-projects-on-cards-for-uk>

<https://twitter.com/thetimes/status/1362037910153920513>

understand a particular change in government policy which itself results in restricted scrutiny of a public authority.

47. 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. The weight accorded to such chilling effect arguments depends 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. The Commissioner is not persuaded that there is a significant risk of disclosure in this case resulting in a chilling effect on free and frank discussion in other future policy debates. He considers that the information already in the public domain at the time of the request reduces the sensitivity of the content of the withheld information. Furthermore, as the Commissioner has commented previously he considers ministers and advisors to be robust in their positions and not easily influenced by disclosures to inform the public and he considers this point to be particularly relevant in this case.
48. Having considered the arguments advanced by BEIS, the complainant and his own assessment the Commissioner has decided that in the circumstances of this case the balance of the public interest favours disclosure of the withheld information.
49. The Commissioner has set out the specific information which he is ordering disclosure of in a confidential annex to this notice. Notwithstanding his comment in paragraph 47 the Commissioner considers that an attributed name in the information can be redacted. This is referenced further in the confidential annex along with the reasoning for that redaction.

Right of appeal

50. 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

51. 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.
52. 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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