

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 February 2023

Public Authority: Cabinet Office

Address: 70 Whitehall

London

SW1A 2AS

Decision (including any steps ordered)

1. The complainant submitted a request to the Cabinet Office seeking minutes, agendas and briefing materials for the Build Back Better Business Council meetings. The Cabinet Office confirmed that it held information falling within the scope of the request but considered this to be exempt from disclosure on the basis of sections 35(1)(a) (formulation or development of government policy), 35(1)(d) (operation of a Ministerial Office) and 41(1) (information provided in confidence) of FOIA.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a) and that in all the circumstances of the case the public interest favours withholding the information.
3. No steps are required.

Request and response

4. The complainant submitted a request to the Cabinet Office on 5 August 2021 seeking the following information:

'Full copies of all minutes, agendas and briefing materials for the Build Back Better Business Council meetings.'

Please also include any other materials that were handed out or received during the meetings, such as presentations, brochures, reports, and leaflets etc.¹

5. The Cabinet Office responded on 3 September 2021 and explained that it held some information falling within the scope of the request but it considered this to be exempt from disclosure on the basis of sections 35(1)(a) (formulation or development of government policy) and (d) (operation of a Ministerial office) of FOIA.
6. The Cabinet Office upheld this decision in an internal review dated 29 October 2021.

Scope of the case

7. The complainant contacted the Commissioner on 11 November 2021 to complain about the Cabinet Office's refusal to provide him with the information falling within the scope of his request.
8. During the course of the Commissioner's investigation the Cabinet Office explained that in addition to the exemptions cited above it also considered part of the withheld information to be exempt from disclosure of section 41(1) (information provided in confidence) of FOIA.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

9. 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"

10. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this

¹ Further details of the Build Back Better Council are available here <https://www.gov.uk/government/news/prime-minister-and-chancellor-launch-new-business-council>

information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

11. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
12. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
13. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
14. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;
 - the Government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
15. By way of background, the Cabinet Office explained that to help drive the Covid-19 economic recovery and future growth plans, the Build Back Better Business Council (the Council) brought together a broad range of business leaders from across the British economy. Co-chaired by the Prime Minister and Chancellor, with the Business Secretary as a standing member, and other Cabinet Ministers attending as required, the Council was structured to support the three strands of the Plan for Growth: Innovation, Infrastructure, and Skills.
16. The Council comprised 30 members representing a broad range of businesses from across the whole British economy - including retail and hospitality, to finance, science, and technology. All members were appointed directly by the Prime Minister and Chancellor in an individual capacity for a term of 12 months.
17. The Cabinet Office explained that although the Council was advisory and held no policy or decision-making powers, Council members were invited to share frank advice and feedback on the UK's growth plans and to provide a commercial perspective on delivery of government policy to illuminate obstacles and solutions to economic recovery. The Cabinet

Office explained that the Council therefore provided this perspective on policy across the three pillars of the Plan for Growth – ranging from the green economic recovery, to how best equip learners with the skills they need to succeed.

18. The Cabinet Office explained that the withheld information consists of the minutes of meetings held on 18 January 2021, 30 March 2021 and 29 July 2021. The Cabinet Office explained that the minutes were not circulated to Council members and are intended as an internal record only. Rather, Council members received a summary note, and this was also published on gov.uk.²
19. With regard to the engagement of section 35(1)(a), the Cabinet Office argued that the information related to the formulation and development of government policies, including but not limited to:
 - Improving skills by delivering the Lifetime Skills Guarantee
 - Exploring options for increasing the payment threshold for contactless payments
 - Enabling better charging infrastructure for rapid fleet electrification
 - Exploring options to expand ISA offer and pensions reform to support investment.
20. The Cabinet Office explained that all of the above policies were under development at the time of the complainant's request.
21. The Commissioner has examined the withheld information. He accepts that it relates to a range of government policies, including but not limited to, those identified above and moreover that the information relates to the development of these policies. Furthermore, in reaching this finding the Commissioner accepts that the policy making in question meets the criteria of the above bullets at paragraph 14.

² Available at <https://www.gov.uk/government/news/first-meeting-of-the-new-build-back-better-business-council>, <https://www.gov.uk/government/news/pm-build-back-better-business-council> and <https://www.gov.uk/government/news/build-back-better-business-council-meeting-29-july-2021>

Public interest test

22. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosure

23. The Cabinet Office acknowledged that there is a public interest in the work of government departments being transparent and open to scrutiny. It explained that this is why the Council's terms of reference and read-outs of the sessions are issued online for public record.

Public interest arguments in favour of maintaining the exemption

24. The Cabinet Office argued that the Prime Minister relies on information provided by a range of stakeholders to better understand the impact of economic policy proposals on different sectors. It explained that engagement and feedback with representatives of different industries is central to economic policy decision-making. The Cabinet Office argued that should this information be made public, it could deter stakeholders from similar future engagement with the Prime Minister, which would be likely to negatively impact policy development by limiting the range of views that officials can consider. This in turn could damage the effectiveness of the Government's policy outcomes. The Cabinet Office argued that future policy discussions need to be protected, and frank advice may be given by an individual in a personal capacity without necessarily reflecting views of wider associated/affiliated organisation. The Cabinet Office also argued that to publicise such information could risk reputational or market damage to the organisation if the personal views of an individual differ from the company position/line issued externally to shareholders, markets and competitors. If this information were to be released, it would deter external organisations from providing their advice to live policy discussions in the future.
25. The Cabinet Office noted that while the public interest in maintaining the exemption in section 35(1)(a) may diminish over time, at the time of the request the requested information was relatively recent. It also argued that it considered it important not to undermine the 'safe space' required for effective policy development. The Cabinet Office emphasised that section 35(1)(a) is intended to ensure that the possibility of public exposure does not deter from full, timely and effective deliberation of policy formulation and development, including the exploration of all options. It argued that the release of the information at the time the request was made, and any consequential

debate in the media, may have prevented or prejudiced the development of policy by causing undue distraction or hindering the consideration of all options. In the Cabinet Office's view this would have not been in the public interest.

26. The Cabinet Office further explained that it considered that there is a strong public interest in maintaining the sovereignty of the process of policy formulation. It noted that government ministers are rightly answerable for the decisions they take, not for the options they consider or the other inputs to the policy formulation process. It suggested that disclosure of the requested information would be likely to invite judgements about whether the economic recovery plans were sufficient.
27. The Cabinet Office argued that the Government had put considerable effort into these particular policy areas, given the circumstances at the time. In this case, it argued that this further indicates the need for a safe space to properly explore, consider and develop policy. The Cabinet Office's position was that the public interest in disclosure is outweighed by the need to maintain that safe space because disclosure would be likely to undermine the Government's right to determine how to formulate and develop policy, including how and when to engage with major business sectors, and could result in reputational and/or commercial damage to members given the exchange of frank and personal views.
28. Finally, the Cabinet Office argued that the proactive publication of the readouts of the meetings goes a significant way towards satisfying the public interest in disclosure. It explained that it could see no clear, compelling and specific justification that outweighs the obvious interest in protecting the safe space within which ministers receive information to assist in policy development, particularly where disclosure would damage the safe space.

Balance of the public interest test

29. The Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case the Commissioner accepts that policy making in relation to the various policies to which the information relates was ongoing at the point of the request. He also notes that the requested information was generated relatively recently compared to the date of the request (the request being submitted in November 2021 and the minutes ranging in date from January to July 2021).

30. Furthermore, having considered the content of the withheld information the Commissioner accepts that it clearly has the potential to encroach on the safe space of this policy making. As the Cabinet Office noted it includes frank comments on the various policies. The Commissioner also appreciates that the government's plans in respect of economic recovery and growth post the pandemic were clearly a matter of interest to a significant range of stakeholders. The Commissioner accepts that disclosure of the information at the point of the request could have led the government to have to defend or justify particular aspects of policy making in this area. In the Commissioner's view it is therefore reasonable to argue that disclosure of this information would encroach on the safe space the government needed to consider and debate its policies designed to achieve this recovery and growth. The safe space arguments therefore attract significant weight.
31. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.
32. In the circumstances of this case the members of the Council are not civil servants. Rather, they are senior business figures from across various different sectors. Nevertheless, the Commissioner considers that the underlying principles and approach set out above in respect of assessing the chilling effects remain valid here. As noted above, the Commissioner accepts that the policy making in relation to the issues covered in the information was live at the time of the complainant's request. Furthermore, as also noted above the Commissioner accepts that the minutes represent a candid discussion of the issues in question. The Commissioner also notes that the minutes are attributed and thus disclosure of the would reveal the opinions and comments of identifiable individuals. The Commissioner considers the Cabinet Office's point that the personal views of an individual may differ from the company position/line issued externally to shareholders, markets and competitors to be an important one. In light of this the Commissioner considers it is plausible to argue that future contributions by business leaders to similar forums may be impacted and therefore he has concluded that the chilling effect arguments also attract notable weight.

33. Turning to the public interest arguments in favour of disclosure, the Commissioner recognises that the economic recovery of the UK post the pandemic, and more specifically the government's plans to drive this, are an issue which is of interest to a wide range of individuals, companies and organisations. Indeed it is hard to envisage anyone in the UK not affected, if only in an indirect way, by the macroeconomic issues underpinning the various policies to which the information related – ie an economic recovery following the pandemic. Disclosure of the information in the scope of the request would provide a valuable insight into the contributions and views of various business leaders to the policies and governments plans for growth more broadly. However, the Commissioner agrees with the Cabinet Office that the proactive publication of the readouts of the meetings goes a significant way towards satisfying the public interest in disclosure.
34. In light of this, and given the significant weight that the Commissioner believes should be attributed to the safe space and chilling effect arguments, he has concluded that the balance of the public interest favours maintaining the exemption contained at section 35(1)(a).
35. Given the above findings the Commissioner has not considered the other exemptions cited by the Cabinet Office.

Right of appeal

36. 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

37. 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.
38. 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

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