

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2022

Public Authority: Department for Digital, Culture, Media and Sport

Address: 4th Floor
100 Parliament Street
London
SW1A 2BQ

Decision (including any steps ordered)

1. The complainant has requested minutes of the Culture Renewal Taskforce meetings.
2. The Department for Digital, Culture, Media and Sport (DCMS) refused to provide the requested information, citing section 35(1)(a) (formulation or development of government policy etc.)
3. The Commissioner's decision is the exemption is engaged and the public interest lies in maintaining the exemption.
4. The Commissioner does not require any steps to be taken.

Request and response

5. On 21 October 2020, the complainant wrote to the DCMS and requested the following information:

"I am submitting an FOI request for any minutes, memos, recordings and/or photographs taken at meetings of the Culture Renewal Taskforce since it was established."
6. On 9 April 2021 the DCMS responded. It refused to provide the requested information, citing section 35(1)(a) (formulation or development of government policy, etc.) as its basis for doing so.
7. Following an internal review the DCMS wrote to the complainant on 6 May 2021. It upheld its previous position.

Scope of the case

8. The complainant contacted the Commissioner on 11 April 2021 to complain about the way that their request for information had been handled.
9. The Commissioner considers the scope of his complaint to be to determine if the exemption is engaged and, if so, whether the public interest lies in maintaining the exemption or in disclosure.

Reasons for decision

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

10. Section 35 of FOIA states:

- “(1) Information held by a government department is exempt information if it relates to-
- (a) the formulation or development of government policy.
 - (2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded-
 - (a) For the purposes of subsection (1)(a), as relating to the formulation or development of government policy.”

11. The Commissioner’s guidance ‘Section 35 – Government Policy’¹ states ‘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.’
12. Section 35 is a class-based exemption; this means that information simply has to relate to the formulation or development of government policy; there is no requirement for disclosure to prejudice either of those policy processes. Section 35 only applies to central government departments.

¹ [government-policy-foi-section-35-guidance.pdf \(ico.org.uk\)](https://ico.org.uk/government-policy-foi-section-35-guidance.pdf)

13. Section 35 is also a qualified exemption which means that it is subject to the public interest test. A department may only withhold information if the public interest in maintaining the exemption outweighs the public interest in disclosure.
14. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. Information does not have to contain policy options, advice or decisions; any significant link between the information and the formulation or development of government policy is sufficient.

Formulation or development vs implementation

15. Section 35 is clear, information can only be engaged if it relates to the formulation or development of government policy. The Commissioner understands formulation and development broadly refer to the design of new policy, and the process of reviewing, improving or adjusting existing policy. However, section 35 will not cover information relating purely to the application or implementation of an established policy. It is therefore important to identify where policy development ends and implementation begins.
16. The DCMS has provided the Commissioner with the information it is withholding in response to the request, the minutes of ten Culture Renewal Taskforce ('CRT') meetings which occurred from 22 May 2020 – 27 January 2021.
17. The CRT was established in Spring 2020 and is made up of representatives from the arts, recreation and leisure sectors as well as medical advisors. Its role was to develop guidance for safe reopening following the latest coronavirus guidelines. The Commissioner understands that the CRT remains in place at the writing of this notice.
18. However, the Commissioner notes that this request was made on 21 October 2020 and therefore, only information held at the time that the request was received will fall within scope. Therefore, the Commissioner will only consider the DCMS's decision to withhold the minutes of seven CRT meetings which occurred from 22 May 2020 – 7 October 2020.
19. The DCMS has explained that these minutes discuss 'guidance created for the cultural sectors to allow them to reopen, but also touched on other policies that were being considered and worked on past the final meeting of the taskforce, e.g. the allocation of funding through the Cultural Renewal Fund.'
20. The Commissioner notes that the first set of minutes are from a meeting held on 22 May 2020 - at a time that the UK was under national lockdown restrictions and all arts, recreation and leisure sectors were closed.

21. The last set of minutes are from a meeting held on 7 October 2020 – at this time restrictions were being reintroduced across the UK and the three tier system followed. A second national lockdown followed a month later.²
22. The complainant disputes the DCMS's application of section 35. They are concerned that, at the time that the request was made, there was no formulation or development of policy ongoing.
23. Even though the arts, recreation and leisure sectors may have reopened between May and October 2020, the DCMS has explained 'The assertion that there were no live discussions ongoing at the time of the request in October 2020 are not correct, as the restrictions and actions taken to manage the pandemic remained changing and evolving right up until and beyond the publication of the Spring Roadmap³ on 21 February 2021.'
24. The Commissioner is mindful that any argument which relies upon a continuous process or seamless web of policy review and development must be challenged. For example, information that relates to the design of a policy, and the implementation of that same policy, are not always entirely separate.
25. As the DCMS has indicated, the evolving nature of the pandemic meant that arts, recreation and leisure sectors saw different levels of restrictions up to the point that the request was made. These sectors had already closed and reopened, using the guidance contained within the minutes. However, the DCMS was wary that these sectors may face restrictions again.
26. It is up to the Commissioner to decide whether any modification to the guidance represents decisions on implementation rather than development of the policy itself. This is not always a clear cut distinction.
27. The Commissioner's guidance states 'Not every decision or alteration made after an original policy was settled will amount to the development of that policy. If policy is a plan to achieve a particular outcome in the real world, the development of that policy is likely to involve a review of its intended outcomes, or a significant change to the original plan. By

² [Coronavirus: A history of English lockdown laws - House of Commons Library \(parliament.uk\)](https://www.parliament.uk)

³ [COVID-19 Response - Spring 2021 - GOV.UK \(www.gov.uk\)](https://www.gov.uk)

contrast, minor adjustments made in order to adapt to changing circumstances, avoid unintended consequences, or better achieve the original goals might more accurately be seen as decisions on implementation.'

28. The Commissioner notes that the overall outcome of the CRT, to support the arts, recreation and leisure sectors during the pandemic, remains unchanged by any adjustments made to the policies discussed within the minutes.
29. The DCMS states that the minutes include 'robust discussions on the direction of guidance and of policies on the sectors.' The Commissioner agrees, from the minutes it is obvious that each individual sector was challenged uniquely by the pandemic and the CRT was crucial in gathering feedback from stakeholders and driving the government's response appropriately. These were not insignificant changes to the guidance and the sectors were not affected insignificantly as a result.
30. There are no universal rules to help the Commissioner ascertain whether decisions made in relation to a policy represent the formulation or development of that policy or implementation changes. However, the more limited and case-specific the consequences of a decision, the more likely it is to represent the implementation of a policy. The more wide-ranging the consequences of the decision, the more likely that it involves an element of policy review or development.
31. Any changes to the CRT's guidance and policies will have had wide-reaching consequences for the arts, recreation and leisure sectors and, by extension, the public. Those who are part of the arts are often freelance or self-employed and the CRT helped to formulate and develop financial support packages that sat alongside the government's wider furlough scheme.
32. In determining whether information relates to policy development or implementation, the Commissioner considers the following factors relevant:
 - "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."
33. Whilst the overall role and objective of the CRT remains the same throughout its inception to the time of the request, any adjustments made to that policy invoke changes of such significance that the Commissioner considers they represent policy review or development

rather than policy implementation. Therefore the Commissioner considers the exemption engaged.

34. The Commissioner's guidance states 'If one purpose, use or subject of that document (or section) is a relevant activity, then everything within that document (or section) will relate to it.' The CRT's meetings, and therefore the minutes, have been held to directly inform the guidance and policies in question. The Commissioner therefore considers that the exemption is engaged in relation to the minutes in their entirety.
35. Since section 35(1)(a) is engaged the Commissioner will now go onto consider whether the public interest lies in disclosure or in maintaining the exemption.

Public interest test

Public interest arguments in favour of disclosure

36. The DCMS recognises 'the undoubted public interest in understanding the decisions of the government during the pandemic, and specifically the meetings of the Cultural Renewal Taskforce in that these discussions informed the government's development of policies in relation to the closing and/or reopening of certain sectors at various points throughout the pandemic.'
37. The Commissioner agrees, disclosure would help the public understand how the CRT supported the arts, recreation and leisure sectors and what form this support took.

Public interest arguments in maintaining the exemption

38. There is no inherent or automatic public interest in withholding information falling within this exemption; any public interest arguments should focus on protecting the policy making process and conservation of the safe-space required to do so.
39. The DCMS has stated 'the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. Good government depends on good decision making and officials need to be able to undertake rigorous and candid assessments of the risks to particular programmes and projects.'
40. Furthermore, the DCMS has stated 'Throughout the pandemic, discussions with stakeholders on subjects such as guidance, financial support and future planning, have been fed into the decision making process at the highest levels. Stakeholder contribution, such as that in the Cultural Renewal Taskforce, still remains a valued asset in policy making, ensuring that the voices of the DCMS sectors are heard.'

41. The complainant has suggested that all personal data be redacted from the CRT minutes so specific statements or opinions could not be assigned to individual members of the CRT.
42. However, section 35 is not concerned with the disclosure of personal data but with protecting the safe space that is required to formulate government policy. The Commissioner acknowledges that civil servants, subject experts, scientific advisors and ministers need to be able to speak candidly and engage within free and frank discussion if they are to develop a policy which is as effective as possible.

Balance of the public interest arguments

43. The DCMS believes that the public interest in the CRT and its meetings is met through the information that is already in the public domain⁴, including the summaries of meeting discussions. The DCMS has stated 'We consider that the links provided give greater insight into the Taskforce and the meetings whilst protecting the in depth contributions of all parties.'
44. The complainant disagrees and believes further disclosure is required to meet the public interest. The complainant, at the time of raising their concern with the Commissioner, also stated that some summaries of CRT meetings were missing from the government website. At the time of writing this notice, the Commissioner notes that this appears to have been rectified.
45. At the time that the request was made, the arts, recreation and leisure sectors were still being affected significantly by the pandemic. To disclose the minutes of the CRT meetings at this time would compromise the safe space required by the CRT to formulate and develop its recovery policies for these sectors, at a time when they were still required.
46. With this in mind, the Commissioner has determined that, at the time that the request was made, the DCMS was entitled to rely upon section 35(1)(a) as a basis for refusing to disclose the requested information.

⁴ [Cultural Renewal Taskforce and supporting Working Groups - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/culture-secretary-announces-cultural-renewal-taskforce); [Culture Secretary announces Cultural Renewal Taskforce - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/culture-secretary-announces-cultural-renewal-taskforce)

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: 0300 1234504
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

Alice Gradwell
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