

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 31 October 2019

**Public Authority:** The Department for Environment, Food & Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

#### **Decision (including any steps ordered)**

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1. The complainant has requested the minutes of a meeting that took place on 20 June 2018 between Michael Gove and the Institute of Economic Affairs ("IEA") to discuss UK trade and industry. The Department for Environment, Food & Rural Affairs ("Defra") refused to provide the information citing sections 35(1)(a), 27(1)(d), 29(1)(a), and section 40(2).
2. The Commissioner's decision is that Defra is entitled to withhold the requested information in reliance on section 35(1)(a).
3. The Commissioner does not require Defra to take any further steps.

## Request and response

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4. On 8 November 2018 the complainant made the following request for information:

*"1 - Please can you provide me with a copy of the meeting minutes, ministerial briefing notes and agenda for the following meeting;*

  - *Minister Michael Gove's meeting with the Institute of Economic Affairs (IEA) on the 20 June 2018 to discuss 'UK trade industry'*  
[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/749334/defra\\_mins\\_trans\\_mtgs\\_April\\_June\\_2018.csv/preview](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/749334/defra_mins_trans_mtgs_April_June_2018.csv/preview)"
5. Defra responded to the complainant on 4 December 2018 and provided him with some biographical information concerning the trade commissioners (members of the IEA Trade Unit Advisory Council) involved which had been prepared as a briefing for the meeting but refused to provide the remainder of the information, citing the following exemptions - sections 35(1)(a)(formulation and development of government policy), 27(1)(d)(international relations), 29(1)(a)(the economy).
6. Defra provided an internal review on 12 February 2019 in which it maintained its original position.
7. After the Commissioner contacted Defra, the public authority also cited section 40(2)(personal information) which it was later agreed was out of scope of the request.

## Background

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8. The following description of the IEA is from its own website where it describes itself as a *"free-market think-tank"*.<sup>1</sup> The website also states that it is, *"a charity concerned with the advancement of education for the public benefit"*.

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<sup>1</sup> <https://iea.org.uk/wp-content/uploads/2018/11/Who-Funds-You-IEA.pdf>

9. The IEA explains that its mission is to *"improve understanding of the fundamental institutions of a free society by analysing and expounding the role of markets in solving economic and social problems"*. It seeks *"to promote, sustain and increase individual and collective knowledge and understanding of market solutions to social and economic questions through research, discussion and the communication of ideas."* The IEA states that it is not a political campaign group as charities cannot exist for that purpose but that it is allowed to campaign, *"for a change in the law, policy or decisions where such change would support the charity's aims", where such a campaign "must not be the continuing and sole activity of the charity".'*

## Scope of the case

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10. The complainant contacted the Commissioner on 3 March 2019 to complain about the way his request for information had been handled.
11. The Commissioner firstly considered whether this request should have been looked at under the Environmental Information Regulations 2004. EIR provides an applicant with the right to formally request access to environmental information. Regulation 2(1) of the EIR clearly defines what environmental information is for the purposes of these regulations.
12. Defra stated that it had considered whether the request had been handled under the correct regime. It concluded that the information constitutes details of a meeting with the IEA on 20 June 2018 to discuss "UK trade industry", the information was not "environmental information" and was too far removed from the definition of environmental information in regulation 2 of the EIRs. The Commissioner agrees and this request has been investigated under the correct regime, the FOIA.
13. The Commissioner therefore considers the scope of this request to be whether Defra was entitled to withhold the requested information under sections 35(1)(a), 27(1)(d), and 29(1)(a).

## Reasons for decision

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

14. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

*(a) The formulation or development of government policy...*

15. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
16. The Commissioner's guidance explains that there is no standard form of government policy. Policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant minister. The key point is that policymaking can take place in a variety of ways and there is no uniform process.
17. However, 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.
18. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
19. The complainant has argued that the response Defra provided was not fair or reasonable and he disagreed with the reasons Defra gave for not providing the information. He also said that he found it difficult to understand how the charitable status and nature of the IEA could affect government policy. His view is that a charity should not be lobbying for a particular change or influencing government policy.
20. However, as the Commissioner's guidance explains:

*"It is not only ministers who are involved in making government policy. Civil servants – and, increasingly, external experts and stakeholders – will also be involved at various stages of the policy process..."*
21. Defra argues that the information requested impacts on several aspects of the UK's preparation and negotiations for withdrawal from the EU which are still being formulated and discussed within government. This

includes considerations of the import and export infrastructure in a no deal scenario, to give one example.

22. The Commissioner is satisfied that the information that has been withheld falls into the class of information covered by section 35(1)(a). The information is a record of a meeting (not formal minutes) between the Secretary of State and representatives of the IEA. The meeting record outlines the views that were expressed concerning policy development around the withdrawal from the EU. The policy was ongoing at the time the complainant submitted his request and is still ongoing. The exemption is engaged.

### **Public interest test**

23. Even though the Commissioner considers the exemption to be engaged, the public interest test must be considered because the exemption is qualified. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure. There is no automatic public interest in non-disclosure just because it falls within this exemption.<sup>2</sup>
24. Section 35(1)(a) covers any information relating to the formulation and development of government policy. The Commissioner's guidance states that public interest arguments should focus on potential damage to policymaking from the content of the specific information requested and the timing of the request. Arguments will be strongest when there is a live policy process to protect.

### **Public interest in disclosing the information**

25. The complainant has relied on arguments that suggest the public interest lies in the disclosure of this information as he queries whether the IEA should be allowed to influence government policy and underpins his argument by pointing out that the IEA had been warned by the Charity Commission.<sup>3</sup>

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

<sup>3</sup> [https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/815720/Official\\_Warning\\_Institute\\_of\\_Economic\\_Affairs\\_June\\_2019.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/815720/Official_Warning_Institute_of_Economic_Affairs_June_2019.pdf)

26. The Commissioner understands that this warning from the Charity Commission over a breach of charitable law concerning the IEA's publication about a key government policy was withdrawn in June 2019 because the IEA had taken appropriate steps.
27. The complainant disagrees with the exemptions used for withholding the information, the reasons given and the response which he states is not fair or reasonable. He argues that Defra had previously released the minutes of meetings between Michael Gove and Shanker Singham whilst the latter worked at the Legatum Institute but that the minutes of the Secretary of State's meeting with Shanker Singham as a representative of the IEA were refused.
28. Defra also accepts that the disclosure of this information shows how decisions are made within government and amounts to openness and transparency. Defra recognises that there is a public interest in the disclosure of information concerning meetings between ministers and think tanks.

### **Public interest in maintaining the exemption**

29. However, Defra believes that the argument for disclosure is significantly outweighed by the strong public interest in withholding the information. It contends that there is also a public interest in Defra having a safe space in which ministers and officials can operate and test options, risks and ideas with informed third parties in private, particularly at this crucial stage in the formation of the government's policies regarding withdrawal from the EU.
30. The information that has been withheld forms part of a live policy discussion. Releasing this withheld information would provide an incorrect policy position as it reflects the opinions of Defra as fact and would be misleading to the public as to the government's intentions. Release of this information could affect the department's approach to developing a policy position on this topic.
31. Defra refers the Commissioner to her own guidance on Section 35(1)(a), arguing that the ICO will recognise the importance of protecting '*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*'.
32. Defra explains that disclosing notes of these types of meetings would potentially inhibit the frankness and openness of discussion and, on balance, have the potential to cause speculation and misinformation about the UK government's future negotiating positions.

33. The public authority's conclusion is that all the circumstances of the case favour withholding the information.

### **The Commissioner's view**

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34. Defra has stressed that it looks at information requests on a case by case basis and that previous precedent was not a consideration. It had reached the conclusion that the subject matter of the information warranted the application of the exemptions it had applied. The Commissioner agrees with the view that each case should be judged on its merits and that what is in the public interest depends on the information requested and the timing of the request.
35. The Commissioner has considered the complainant's arguments that disclosure has been made in similar cases but it does not follow that similar information must therefore be disclosed in future. Defra has judged that disclosing this particular information at the time the request was made would not be in the public interest.
36. The Commissioner notes that the warning by the Charity Commission postdated the request but this does not make the complainant's argument irrelevant. The IEA is a think-tank with an educational role:
- "While some of our work is theoretical, such as our work to measure anti-competitive market distortions, ITCU [IEA's international trade and competition unit] is also acting as a resource on all aspects of the UK leaving the EU and developing an independent trade policy."*<sup>4</sup>
37. A think-tank is defined as a body of experts that puts forward ideas or advice on political or economic problems. There are different arguments as to the definition of a think-tank and the dividing lines between a think-tank and a lobby or campaign group are not clear. It is the Commissioner's view that, although not technically a lobby group, the IEA is an influencer and that this means that the same arguments should apply for and against disclosure as those that would be applied to lobbyists.
38. These types of dialogue with government do not warrant the same safe space as purely internal thinking and there is a public interest in making

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<sup>4</sup> [https://iea.org.uk/themencode-pdf-viewer-sc/?file=/wp-content/uploads/2018/07/DP91\\_Freedom-to-flourish\\_web-002.pdf&settings=11111011&lang=en-GB#page=&zoom=75&pagemode=](https://iea.org.uk/themencode-pdf-viewer-sc/?file=/wp-content/uploads/2018/07/DP91_Freedom-to-flourish_web-002.pdf&settings=11111011&lang=en-GB#page=&zoom=75&pagemode=)

the contribution of organisations like the IEA public at a time when policy decisions have not been finalised, to allow counterbalancing views to be presented.

39. In *DBERR v ICO & FoE EA/2007/0072*, which involved information on a series of meetings between a government department and the Confederation of British Industry (CBI) which, as the name suggests, is a representative body and lobbyist for British industry. The Tribunal recognised that there was value in government being able to test ideas with informed third parties and knowing what the reaction of a particular group of stakeholders might be in relation to a specific policy:

*"...we do accept that there is a strong public interest in the value of government being able to test ideas with informed third parties out of the public eye and knowing what the reaction of particular groups of stakeholders might be if particular policy lines/negotiating positions were to be taken."*<sup>5</sup> (paragraph 119).

40. However, it was concluded that if information revealed the influence of lobbyists it increased the public interest in favour of disclosure. The Tribunal's view was that lobbyists were unlikely to be deterred from offering free and frank views as their overriding aim was to exert influence.
41. There are many factors within the formulation and development of government policy particularly in relation to policies that affect the future of the UK. Policy development, though not at an early stage in terms of the time that has gone by since the referendum, has been in a state of indeterminacy because of the political situation, the continuing negotiations and lack of an agreement with the EU. The issue was 'live' at the time of the request and is still 'live' now.
42. The Commissioner accepts that this is a finely balanced decision. The requested information largely reflects the views of an external organisation with a degree of privileged access. She takes on board the complainant's argument that it is in the public interest to see what influences were in play at the time of the request, whilst it is still possible to present different views. Nonetheless, the public interest in favour of maintaining the exemption outweighs that in disclosure because of the timing and content of the information. In view of the ongoing uncertainty regarding Brexit and the fact that policy was being



formulated and developed at the time of the request and this remains the case, the need for a safe space is, on balance, more persuasive. Consequently it is not in the public interest to disclose this information at the current time.

43. As the Commissioner has concluded that Defra is entitled to withhold the requested information under section 35, she has not gone on to consider the application of section 27 and section 29.

## Right of appeal

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44. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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 .....**

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
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