

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2023

Public Authority: Cabinet Office
Address: 70 Whitehall
London SW1A 2AS

Decision (including any steps ordered)

1. The complainant has requested a report into the Ajax armoured fighting vehicle. The Cabinet Office ("CO") refused to provide it citing section 33 (audit), section 35 (formulation/development of government policy), section 41 (information provided in confidence); and section 43 (prejudice to commercial interests). It upheld this at internal review.
2. The Commissioner's decision is that CO is entitled to rely on section 33 as its basis for withholding the requested information.
3. No steps are required.

Request and response

4. On 10 June 2021, the complainant wrote to the Infrastructure and Projects Authority ("IPA") which is part of the Cabinet Office ("CO") and requested information in the following terms: "Dear Infrastructure and Projects Authority, I wish to see a full copy of the report into the Ajax armoured fighting vehicle referred to this article: [Army's new £3.5bn tanks WILL be delivered on time, Government insists | Daily Mail Online](#)"
5. On 10 June 2021, CO wrote to explain that it would be responding on 8 July 2021. On that date, it wrote to the complainant again to explain

that it would now respond on 9 August 2021. It argued that it was considering the balance of public interest in respect of section 43.

6. On 9 August 2021, the CO provided its response. It confirmed it held information within the scope of the request but argued that it was not obliged to provide it. It cited the following exemptions as its basis for doing so:
 - section 33 (audit),
 - section 35 (formulation/development of government policy),
 - section 41 (information provided in confidence); and
 - section 43 (prejudice to commercial interests).
7. The complainant requested an internal review on 9 August 2021. CO sent him the outcome of its internal review on 27 October 2021. It upheld its position and specified which provisions of each exemption it was relying upon as follows:
 - section 33(1)(b) and section 33(2),
 - section 35(1)(a) and section 35(1)(b),
 - section 41(1); and
 - section 43(2).
8. The Commissioner has made a further comment about this delay in the Other Matters section of this notice.

Scope of the case

9. The complainant contacted the Commissioner on 5 November 2021 to complain about the way his request for information had been handled. The complainant challenged CO's application of the four exemptions (and subsections thereof) that it has cited as its basis for withholding the information it holds within the scope of the 10 June 2021 request.
10. During the course of the investigation, CO withdrew reliance on section 35 of FOIA.
11. The Commissioner has considered whether CO is entitled to withhold the requested information.

Reasons for decision

Background

12. CO set out the following background information:

"The Ajax is an armoured fighting vehicle designed and manufactured by General Dynamics UK (GDUK) for use by the British Army. The Infrastructure and Projects Authority (IPA) carried out a review of the procurement of the Ajax (the Armoured Cavalry Programme) in March 2021 (hereafter, 'the Report'). The Report constitutes the information within the scope of this request."

Section 33

13. Section 33(1)(b) and 33(2) of FOIA states:

14. "(1) This section applies to any public authority which has functions in relation to—

...

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

(2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1)."

15. CO explained that "the IPA has functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions; and the disclosure of the Report would be likely to prejudice the exercise of those functions".

16. In effect the Commissioner had to deduce its arguments as to likely prejudice from its public interest arguments which were more impressionistic and less specific. The Commissioner hopes that, in future, the CO will provide a more structured set of arguments dealing first with likely prejudice and then with the competing public interest arguments for and against disclosure. The Commissioner had set out a series of fairly detailed questions designed to pick out CO's arguments. These are based on the Commissioner's considerable experience in assessing the application of FOIA to a range of circumstances. However, CO neglected to provide specific responses to these questions.

17. The Commissioner has deduced that CO's arguments as to likely prejudice are as follows:

– IPA review reports are not intended for publication. Their purpose is to provide "an evidence based snapshot of [a] programme's/project's status".

-IPA notes are often required for formal HM Treasury approval or business case approval points. It provided a link to the IPA's toolkit to explain more about its work.¹

-The intended audience for the requested review was CO itself, HM Treasury and the Ministry of Defence "with a view to keeping them informed about the delivery of the Armoured Cavalry Programme. What was intended for public consumption on the subject of the Ajax was stated by the (then) Minister for Defence Procurement in the House of Commons on 9 September 2021". It provide a link to Hansard and a ministerial statement which post-dated the request.²

18. The Commissioner would note that evidence which post dates the request cannot be taken into account. However, CO appears to be asserting that it always intended to issue a ministerial statement and the fact that it did so after the request, in its view, demonstrates this.

19. It also said:

"The [IPA's] briefing note also refers to the Code of Conduct adopted by review teams. The Code stresses that the review team will 'maintain confidentiality and allow interviewees to speak freely without ramification (comments will be non-attributable)'.³

This underlines that the cornerstone of an effective review process is that participants should be able to express themselves freely without concern as to the consequences."

20. It then set out details from the withheld information to support its position. The Commissioner does not propose to set these out on the face of this Notice.

21. It summarised its position as follows:

"The disclosure of the Report would undermine a fundamental characteristic of the review process carried out by the IPA - that contributions are confidential and non-attributable. It would serve to discourage participants from taking part in future reviews and would at

¹ <https://www.gov.uk/government/collections/infrastructure-and-projects-authority--assurance-review-toolkit>

² [Ajax Armoured Vehicle Procurement - Hansard - UK Parliament](#)

³ [Review Team Briefing Note Version 1.2021_1 .docx \(publishing.service.gov.uk\)](#)

least inhibit the expression of their views if they did take part. If a review did not have the benefit of the fully expressed views of participants, it would fail in its purpose of giving thorough examination of the status of the project it was intended to review."

Is section 33 engaged?

22. The Commissioner is satisfied that IPA (which is part of the Cabinet Office, a public authority) has "functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions".
23. In order for a prejudice based exemption such as section 33, the Commissioner considers that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view; this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
24. The Commissioner is satisfied that the harm envisaged relates to the applicable interests within section 33. As such, the first criterion is met.
25. CO has demonstrated that there is a causal relationship between disclosure and the harm envisaged. It has shown the importance of confidential submissions in its function in this respect and that those who provide submissions may well be deterred from doing so in the future if the information is disclosed. The Commissioner is therefore satisfied that the second criterion is met.
26. CO appears to assert that the harm envisaged would be likely to happen which means that it must demonstrate that harm is more than a hypothetical risk. The Commissioner is satisfied, having deduced its

position from its submissions outlined above and having read the withheld information, that the harm CO envisages would be likely to happen following disclosure. Any reduction in frankness or in overall cooperation would be likely to have a negative impact on the overall effectiveness of the IPA's work.

27. The Commissioner is therefore satisfied that section 33 is engaged but would again express his disappointment that CO did not answer his specific questions about its position as to likely prejudice.
28. Section 33 is subject to a balance of public interest test. This means that it can only be maintained if the public interest in avoiding the likely harm outweighs the public interest in disclosure.

Balance of public interest

29. Unfortunately, the complainant did not specify any particular arguments as to CO's use of exemptions (although there was no requirement to have done so).
30. According to the newspaper article referred to in the question, there was an apparent leak of an internal report about the Ajax armoured vehicle. The fact that there has allegedly been a leak does not, of itself, add weight to the public interest in disclosure. There is a difference between an official disclosure of information and the prejudice that may arise from such a disclosure and the release of information via a leak.
31. CO acknowledged a public interest in understanding government projects and programmes and a general public interest in transparency so that there can be public scrutiny of whether the assurance process is successful.
32. Its arguments for maintaining the exemption set out the harms it envisaged by disclosure, which are set out above, asserted a stronger public interest in avoiding those harms.
33. The Commissioner notes a very strong public interest in scrutinising IPA's work in respect of the Ajax vehicle. This important piece of equipment has been developed at a significant cost to the public purse. Where there is concern about that equipment, this also inevitably includes a concern about whether the tax payer is obtaining value for their money.
34. Given what the Ajax vehicle is for – a military/combat scenario, lives may depend on the proper performance of the vehicle. While this certainly adds weight to the public interest in knowing more about how it has been evaluated, it also adds to the public interest in ensuring that evaluation process remains effective.

35. Considering all of the above, the Commissioner has concluded, by a narrow margin, that the public interest in the circumstances of this case favours maintaining the exemption and avoiding harm to IPA's evaluation process. Confidentiality is clearly key to that process and the Commissioner recognises the public interest in protecting that.
36. The Commissioner therefore agrees that CO is entitled to rely on section 33 as its basis for withholding the requested information.
37. Given the Commissioner's conclusion on section 33, he has not gone on to consider the other exemptions cited. That said, the Commissioner would note that, in its submissions, CO failed to provide any evidence beyond its own assertion to support section 43. It is a long established requirement for public authorities to do more than assert a prejudicial effect on the commercial interest of third parties. CO said that one of the third parties had "expressed their view" but gave no evidence of this such as a copy of that communication or even a statement as to when and in what circumstances this was made. The Commissioner had specifically asked for such evidence. Its response appeared insufficient for supporting its argument as to the application of section 43.

Other matters

38. The Commissioner notes that there was a delay in responding to the complainant's request for an internal review in respect of his request. Part 5 of the section 45 Code of Practice makes it desirable practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information and that the procedure should encourage a prompt determination of the complaint.⁴
39. While no explicit timescale is laid down by the FOIA, the Commissioner considers that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.⁵ In this case, the time taken to respond was 57 working days.

⁴ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

⁵ [When can we refuse a request for information? | ICO](#)

Right of appeal

40. 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

41. 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.
42. 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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