

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2024

Public Authority: Department for Energy Security and Net Zero
Address: 55 Whitehall
London
SW1A 2HP

Decision (including any steps ordered)

1. The complainant submitted a request to Department for Energy Security and Net Zero (DESNZ) seeking material produced by the Energy Efficiency Taskforce. DESNZ withheld the requested information on the basis of section 35(1)(a) (formulation or development of government policy) 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 maintaining the exemption.
3. The Commissioner does not require further steps.

Request and response

4. The complainant submitted the following request to DESNZ on 7 December 2023:

"I'm writing to make a request under the Freedom of Information Act 2000 that relates to the Energy Efficiency Taskforce that was disbanded in September 2023.

Could I please have copies of the following documents:

1. Any reports, briefings, analysis or papers produced by the consultancy McKinsey for the Energy Efficiency Taskforce
 2. Recommendations made to government by McKinsey or the Energy Efficiency Taskforce as part of this work
 3. A list of the services provided by McKinsey to the Energy Efficiency Taskforce, including costs.”
5. DESNZ responded on 20 December 2023. In relation to parts 1 and 2 of the request, DESNZ confirmed that it held information but considered this to be exempt from disclosure on the basis of section 35(1)(a) of FOIA. In relation to part 3 of the request the response explained that:
- “McKinsey were not contracted to provide services to the Department for Energy Security and Net Zero (DESNZ). The Energy Efficiency Taskforce was jointly chaired by DESNZ and Natwest Group. NatWest Group procured McKinsey to support them with their activities. Neither DESNZ nor His Majesty’s Government directly procured or paid for any services from McKinsey for this work.”
6. The complainant contacted DESNZ on 18 January 2024 and asked it to conduct an internal review in relation to the decision to withhold information on the basis of section 35(1)(a) of FOIA.
7. DESNZ informed her on 9 February 2024 that the internal review had concluded that the information in question was exempt from disclosure on the basis of that exemption.

Scope of the case

8. The complainant contacted the Commissioner on 12 February 2024 in order to complain about DESNZ’s decision to withhold the information falling within the scope of her request.

Reasons for decision

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 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. '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.
12. 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 content of the information in question and its context.
13. 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.
14. DESNZ explained that the Energy Efficiency Taskforce (the Taskforce) was in early stages of its work and although a number of draft ideas were being discussed, the Taskforce did not reach a position where any recommendations were fully formed or agreed by all members of the steering group. DESNZ explained that instead, the Secretary of State, after careful deliberation, concluded that the draft work of the Taskforce could be streamlined into ongoing government activity. DESNZ argued that the numerous ideas, discussions and draft recommendations will be instrumental in driving forward energy efficiency. As such, in its view the information falling within the scope of the request related to ongoing work in relation to policy making in respect of energy efficiency.
15. The complainant noted that DESNZ had stated in response to her request that "McKinsey were not contracted" to provide services to DESNZ and that "NatWest Group procured McKinsey". In her view this undermined their claim that any materials produced for the government by the Taskforce should be exempt as they relate to the formulation of government policy. Rather this is an analysis produced by a private business paid for by another private business which has been

subsequently shared with the government. In the complainant's view the section 35 exemption should not apply to documents in which the government had no involvement.

16. Furthermore, she argued that whilst energy efficiency is an issue that DESNZ is responsible for there is little to suggest, since the disbanding of the Taskforce, that there is a specific policy being created as a result of this report. Therefore in her view the policy formulation exemption is being misused in rejecting her request.
17. In relation to the complainant's argument at paragraph 15, whilst the information sought by the request was not produced by the government (or indeed funded by government), in the Commissioner's view this does not prevent it falling within the scope of this exemption. As part of policy making the government uses a range of material and information from a number of sources, and these can include externally produced reports and analysis. The fact that in this case such analysis was not funded by the government does not, in the Commissioner's view prevent it from relating to the formulation or development of government policy.
18. Furthermore, whilst the Commissioner acknowledges the complainant's position regarding tangible policy outputs, he is satisfied based on DESNZ's submissions to him, and consideration of the content of material, that this was actively being used in relation to policy making regarding energy efficiency at the time of the request and can therefore be said to relate to the formulation and development of government policy.
19. The withheld information is therefore exempt from disclosure on the basis of section 35(1)(a) of FOIA.

Public interest test

20. 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

21. The complainant argued that in her view the public interest for disclosure of the information was not sufficiently considered by DESNZ. She noted that although energy bills stabilised in 2023, they remain roughly twice what they were before the gas price crisis in 2021. She argued that this is an urgent public health crisis and reports shared with the government on the matter should be disclosed so that the British people can better understand the challenges that they face and consider any proposals made by experts at McKinsey.

22. For its part, DESNZ acknowledged that there is a public interest in information about energy efficiency and the work of the Taskforce prior to it being discontinued. It accepted that disclosure could provide better insight into the policy and the reasoning behind it. It also acknowledged that decisions that Ministers make may have a significant impact on the lives of citizens and there is a public interest in deliberations on this topic being transparent.

Public interest arguments in favour of maintaining the exemption

23. However, DESNZ argued that against this there is a strong public interest in ensuring that Ministers and officials are able to discuss policy options fully and frankly and for the space in which such discussions take place to be protected.
24. As noted above, DESNZ argued the ideas, discussions and draft recommendations set out in the withheld information were used, following the disbanding of the Taskforce, in ongoing policy work. It argued that disclosure of such information would have a direct adverse impact on the progression of this policy.
25. DESNZ argued that if this information were made public frank discussion and debates on key public policy issues would be inhibited, and the department would be prevented from taking decisions based on the fullest understanding of the issues involved.
26. DESNZ also argued that as part of the formulation of this policy it is essential that officials are able to communicate with external parties with relevant knowledge and experience. It is essential that third parties, such as those involved in the Taskforce, feel they can provide government with candid views without fear that information will be made public, particularly when those views relate to sensitive and ongoing issues. This communication must include the ability to receive information on a confidential basis or the frankness of the communication will inevitably be diminished. Release would lead to significantly less considered and effective policy in this important area.
27. DESNZ explained that it had therefore concluded that there is a significant public interest in withholding the information requested. It is essential that a safe space to debate live policy issues away from external interference and distraction is preserved. In its view the public interest is better served by withholding this information.

Balance of the public interest arguments

28. 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 energy efficiency was ongoing at the point the request was submitted.

29. 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. In reaching this finding the Commissioner acknowledges that the information was created by those involved in the Taskforce prior to September 2023 – as opposed to by the policy officials who were subsequently involved in work in this area. However, the Commissioner accepts that the information includes detailed ideas, discussions and comments about a range of policy options that this work, ie the material produced by McKinsey, fed directly into the department's ongoing policy work in this area. Furthermore, the Commissioner appreciates that the government's plans in energy efficiency were clearly a matter of interest to a significant range of stakeholders. As a result the Commissioner accepts that disclosure of the information at the point of the request could have led the government to have to defend, justify or comment on 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 ongoing policy making in this area. The safe space arguments therefore attract significant weight.
30. 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.
31. In the circumstances of this case the members of the Taskforce were 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, the information in question contains detailed, candid and attributable comments and observations about policy making options in this area. 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.

32. Turning to the public interest arguments in favour of disclosure, the Commissioner recognises that the matters associated with energy efficiency in UK, and more specifically the government's plans to address this, are an issue which is of interest to a wide range of individuals, companies and organisations. As the complainant notes such an issue has a public health dimension, but is also clearly one related to climate change. Disclosure of the information in the scope of the request would provide a valuable insight into the contributions and views of the Taskforce.
33. However 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).

Right of appeal

34. 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

35. 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.
36. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Jonathan Slee
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF