The Campaign for Freedom of Information

Lower Ground Floor
5-7 Highgate Rd
London NW5 1JY
Email: admin@cfoi.org.uk
Web: www.cfoi.org.uk



Briefing for House of Lords Report stage

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Advanced Research and Invention Agency Bill

About the Campaign for Freedom of Information

The Campaign for Freedom of Information was set up in 1984 and played a key part in persuading the government of the day to introduce the Freedom of Information Act 2000 and securing improvements to it during its Parliamentary passage. Since the Act came into force in 2005 the Campaign has monitored and sought to improve its operation, provided assistance to requesters and trained both requesters and public authorities.

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Introduction

We are concerned at the exclusion of the Advanced Research and Invention Agency (ARIA) from the Freedom of Information Act (FOIA).[1]

We support Amendment 6 in the name of Lord Clement-Jones, which would make ARIA subject to FOIA.

FOI and bureaucracy

1. ARIA will join the handful of major institutions - the Royal Family, security and intelligence bodies such as MI5, MI6 and GCHQ, the special forces and the National Crime Agency – that have been excluded from FOIA altogether. But while these bodies are excluded because of the sensitivity of their information, ARIA would be excluded simply to avoid the 'burden' of complying with FOIA.

2. The Department for Business, Energy & Industrial Strategy (BEIS) has said:

> 'Noting that ARIA will be a small body with minimal administrative capacity, *we will remove the burden* of processing Freedom of Information requests'[2] (emphasis added)

3. According to Amanda Solloway MP, the then Minister for Science, Research and Innovation:

> 'the Bill will not make ARIA subject to the Freedom of Information Act. The intention is for ARIA to have a streamlined operating structure, with a small and agile footprint of decision makers that are enabled to solely focus on ARIA's research goals. The Bill intends to enable ARIA to operate like a high tech start-up, with minimal back-office function.'
>
> 'Removing some of the public sector reporting requirements *frees ARIA's leadership and scientists to find and fund the most cutting-edge research in the UK and the world, and maintain the UK's competitive advantage as a science superpower.*'[3] (emphasis added)

[1] This is because the bill establishing ARIA does not add it to the list of bodies in Schedule 1 of FOIA, which are public authorities under the Act.
[2] BEIS, Advanced Research and Invention Agency (ARIA): policy statement, 19 March 2021
[3] Letter from Amanda Solloway MP, Minister for Science, Research & Innovation to Greg Clark MP, chair of the Science and Technology select committee, 2 March 2021.

4. At Committee stage in the House of Commons, Ms Solloway said:

> 'By not subjecting ARIA to the Freedom of Information Act, ARIA's leadership and scientists *will be free to find and fund the most cutting-edge research in the UK and the world, and to maintain the UK's competitive advantage as a science superpower*.'[4] (emphasis added)

5. At second reading in the House of Lords, Lord Callanan, the Parliamentary Under Secretary of State at BEIS said:

> 'On FoI, the pertinent question to me is where we want ARIA's staff to direct their focus. Earlier, I spoke about people with deep technical expertise and brilliant ideas who are empowered to pursue their objectives. I believe that of course that should apply to all ARIA staff and that *this ambition is the last thing we should move away from if we want this organisation to succeed. In this unique case, I do not think those people should be employed to administrate FoI requests*. This approach should be viewed in the light of ARIA's other statutory commitments to transparency through its reporting and accounts, subject to scrutiny by the NAO, and with the natural incentives towards openness of having an identity to build and collaborators to attract.'[5] (emphasis added)

6. **It is not clear why complying with FOIA should be thought to be an obstacle to the UK becoming or remaining a 'science superpower' or otherwise fulfilling its tasks. The obstacles to innovation by funding bodies have been discussed at length and do not include FOIA.**

7. In February 2021 the House of Commons Science and Technology Committee reported on the proposed new research funding agency.[6] The main problems it identified were those caused by *government* constraints on funding bodies. Several witnesses said that for this reason the proposed body could not succeed if it was to be part of UK Research and Innovation (UKRI), the umbrella body for research funders.

8. Sir Mark Walport, the former UKRI Chief Executive Officer and previous chief scientific adviser to the government told the committee:

> 'one of the challenges for UKRI has been, because it is new and a lot of money is associated with it, that there has been a *desire across*

[4] Hansard (Lords), Advanced Research and Invention Agency Public Bill Committee, 22 April 2021, cols 190-191
[5] Hansard (Lords), 2 November 2021, Col 1168
[6] House of Commons Science and Technology Committee, A new UK research funding agency, Third Report of Session 2019–21, HC 778, 12 February 2021

> *Government for quite a lot of micromanagement of UKRI's activity.'* (emphasis added)

9. The report continued:

> 'This view was shared by the former Science Minister Lord Willetts, who has argued that UKRI has been subject to *"heavy-handed and intrusive supervision"***,** which has made it difficult to "manage its budget efficiently". Current UKRI CEO Dame Ottoline Leyser took a similar view, explaining that "when starting a new programme", if it is "novel and contentious" she requires a **"***whole raft of extra sign-off measures, through Government" which "leads to a slowing down of the process"….'novel' or 'contentious' work requires escalation to BEIS and HM Treasury***.'**[7]*(*emphasis added)

10. The committee recommended that the government should:

> *'reflect on the bureaucratic constraints that apply to the funding bodies operating under the UKRI framework.* It is right that UKRI is held accountable for the public money it spends, *but the temptation to micromanage* it must be considered alongside its need to operate in an agile and efficient way—for example regarding decisions on which projects should be started or stopped'[8] (emphasis added)

11. This was also the view of Dominic Cummings, formerly chief adviser to the Prime Minister, who had vigorously promoted the establishment of ARIA. In evidence to the committee in March 2021 after the report's publication he said:

> *'There are huge veto points everywhere. Everyone can block things, everyone can stop good things happening, but almost nobody can get anything done. This chain of bureaucracy runs all the way down from the people at the bottom of the hierarchy in bodies like the EPSRC*[9] *making decisions about pure maths, through the hierarchy of EPSRC, through UKRI, through BEIS, and then up to the Treasury.* You have these chains of business cases and emails running up and down this hierarchy for month after month after month, driving everybody completely insane**.'**[10] (emphasis added)

12. **At no point did the committee, or Mr Cummings, identify FOIA as a threat to ARIA's success. The bureaucratic problems facing the agency were identified as those caused by *government micromanagement* of funding decisions.**

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[7] Paragraph 112
[8] Paragraph 19
[9] The Engineering and Physical Sciences Research Council
[10] Dominic Cummings, Oral evidence to the Science and Technology Committee, 17 March 2021, Q. 178

ARPA, DARPA and FOIA

13. The government has stated that ARIA will be based on the successful example of a US agency:

> 'ARIA will be based on models that have proved successful in other countries, in particular the influential US Advanced Research Projects Agency (ARPA) model. This was instrumental in creating transformational technologies such as the internet and GPS, changing the way people live and work, while increasing productivity and growth. More recently, ARPA's successor, DARPA was a vital pre-pandemic funder of mRNA vaccines and antibody therapies, leading to critical COVID therapies.' [11]

14. **However, ARPA *was* subject to the US Freedom of Information Act and its successor DARPA (the Defense Advanced Research Projects Agency) *is* subject to it. Their need to answer FOI requests has not prevented them achieving the successes which the government wishes ARIA to emulate.**

15. In the 11 years from 2009 to 2019 an average of 47 requests a year referring to ARPA or DARPA were made to the US Department of Defense.[12]

16. This is almost exactly the number of FOI requests received by individual UK research councils, before they were incorporated into UKRI. In 2017-18, the six research councils for which we have found data received an average of 48 requests each.[13] By comparison, in 2019 the Home Office and Ministry of Justice each received nearly 5,000 requests.[14]

[11] BEIS: policy statement, 19 March 2021
[12] Compiled from data available at the website of the Office of the Secretary of Defense and Joint Staff at: https://www.esd.whs.mil/FOIA/Reading-Room/Reading-Room-List_2/FOIA_Log/
[13] In 2017-18 the number of FOI requests to each of these research councils was Biotechnology and Biological Sciences Research Council (35), Economic and Social Research Council (36), Engineering and Physical Sciences Research Council (58), Medical Research Council (66), Natural Environment Research Council (55) and Science and Technology Facilities Council (37).
[14] Cabinet Office, Freedom of Information statistics: annual tables, 2019, Table 2 (www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2019)

17. **The 47 US FOI requests a year relating to ARPA/DARPA are trivial by comparison. That volume, just under one request a week, could not be regarded as a burden on ARIA, let alone one that might prevent it from achieving its objectives**.

Why the DARPA figures are relevant

18. Lord Callanan has said that the level of FOI requests to DARPA in the US is not a guide to the likely level of requests to ARIA because *fees* are charged under the US FOIA. At second reading he suggested that these deter 'sweeping requests' which he said are made under the UK legislation. Therefore:

> 'it is not right to assume that ARIA will receive a similar amount of FoI requests to DARPA'[15]

19. At committee stage Lord Callanan said:

> 'I would reiterate, as I did at Second Reading, that comparisons between ARIA and DARPA do not hold, precisely because, as I said, DARPA adds a standard fee to the requester, which is not comparable to the situation in the UK, although we should certainly consider it.'[16]

20. **However, under the US FOIA, fees are not charged to the main classes of requesters likely to be interested in DARPA.** Those who don't pay fees are:

- **Representatives of the news media** who pay only for photocopies, except for the first 100 pages which are free of charge.[17] No other charges are made to journalists.
- **Educational staff** at educational institutions and **scientific researchers** at non-commercial scientific research institutions are not charged for requests made for the purpose of scholarly or scientific research respectively. They can only be charged for photocopies, on the same basis as journalists.
- **Other requesters** are entitled to fee waivers where disclosure of the requested information is **in the public interest** because it is likely to contribute significantly to public understanding of the operations or activities of the government.

[15] Hansard (Lords), 2 November 2021, col. 1202
[16] Hansard (Lords), 22 November 2021, col. 147 GC
[17] Photocopying charges can be made for all photocopies provided under the UK FOI Act. There is no automatic waiving of these charges for initial copies.

- The only requesters who face charges are people whose requests **do <u>not</u> attract a public interest fee waiver** and those whose requests are **primarily in their own commercial interest**.[18,19]

21. In the five years from 2016 to 2020 inclusive, the part of the US Department of Defense whose responsibilities include DARPA received a total of 9,774 FOIA requests. It also received 57 requests for fee waivers of which it granted 35 and refused 22.[20] It's not known how many of the 22 who did not receive a fee waiver then withdrew their requests - some may have agreed to pay. However, the 22 probably represents the *maximum* number of people *potentially* deterred from making requests by the prospect of fees during this period. They amount to an average of 4 per year, or 0.2% of all requests to the relevant part of the department, an inconsequential number.

22. **It is extremely unlikely that the low level of requests to DARPA reflects any deterrent effect of fees on US requesters. The requesters most likely to be interested in DARPA - journalists, scientific researchers and those who believe their requests are in the public interest - are either not subject to fees or would be eligible for a fee waiver.** The only other significant group, those with a commercial interest in the information they seek, would presumably pay for it and also not be deterred.

23. Moreover, the UK FOIA provides far greater protection for public authorities against burdensome requests than the US Act. The UK legislation allows a request to be refused where the estimated cost of establishing whether information is held and locating, retrieving and extracting would exceed either £600 or £450 depending on the authority.[21] **In 2020, this provision accounted for 42% of full refusals to disclose information by UK central government bodies**.[22] The US Act has provisions which allow excessively burdensome requests to be refused but these are nowhere near as favourable to government agencies as the UK Act's cost limits.

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[18] US Department of Defense, DOD Freedom of Information Act Handbook, https://open.defense.gov/transparency/FOIA/FOIA-Handbook/

[19] US Department of Justice, Guide to the Freedom of Information Act, Fees and Fee Waivers (posted September 16 2020), https://www.justice.gov/oip/page/file/1206606/download

[20] These figures are taken from the US Department of Defense's annual reports on the Freedom of Information Act, available from https://open.defense.gov/Transparency/FOIA/DoD-Annual-Reports-to-AG/. The relevant section of the DoD is the Office of the Secretary of Defense/Joint Staff ('OSD/JS'). The figures come from Tables V and VIII.B

[21] For government departments, Parliament and the devolved assemblies requests can be refused if a reasonable estimate of the cost of establishing whether the information is held and locating, retrieving and extracting it exceeds £600, equivalent to 24 hours of staff time at a standard rate of £25/hour. For all other authorities the limit is £450, equivalent to 18 hours of time at the same rate. See the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004

[22] Freedom of Information statistics: annual 2020 tables (pdf). https://www.gov.uk/government/statistics/freedom-of-information-statistics-annual-2020

Because of this ARIA should expect to have to respond to *fewer* requests than DARPA.

A small agency?

24. The government says that ARIA will be *"a small body with minimal administrative capacity".*[23] However 'small' is a relative term. A funding body spending £800 million over four years cannot operate without significant support staff to deal with funding applications, decisions on applications, disbursements and project monitoring which BEIS says will include 'weekly or monthly' visits to the projects concerned. ARIA will also offer inducement prizes, take equity stakes in companies and co-fund projects with the private sector.[24]

25. ARIA will be substantially larger than many bodies subject to FOIA including schools, GPs, dentists, opticians and pharmacists (including those that are single handed practices), police and crime commissioners, internal drainage boards, inshore fisheries and conservation authorities, local healthwatch bodies and many others including parish councils and town councils.

26. **Some of these authorities employ fewer than five staff, most employ less than twenty. If these small authorities are able to comply with FOIA so will ARIA. All public authorities have important tasks to fulfil in the public interest and limited resources. ARIA has no greater claim to avoid complying with FOI legislation than any other public authority. On the contrary, its budget, which vastly outstrips that of many FOI bodies, provides compelling grounds for its inclusion.**

Conflicts of interest

27. ARIA is expected to fund *'high risk, high reward research'*, be prepared to fund research *'with a high risk of failure'* and to adopt *'an approach to science that does not shy away from failure.*' That may be a perfectly reasonable objective in the pursuit of major scientific breakthroughs, but carries its own risks which may be exacerbated by the relative lack of scrutiny. **The agency may continue funding a clearly failing project through a reluctance to admit defeat. This may be a particular problem**

[23] BEIS: policy statement, 19 March 2021
[24] BEIS: policy statement, 19 March 2021

if it takes a commercial stake in companies exploiting the funded research, as is envisaged.[25]

28. The scientists appointed to run ARIA may be over-inclined to support projects in their own specialties or fund colleagues at their former institutions. The absence of the FOIA right may prevent other scientists from scrutinising decisions within their fields of expertise. That may be a particular concern given the freedom that ARIA will have to award grants without peer review.[26]

29. In the absence of FOI, there also will be no right of access to the policies, data and internal reports available from all other public authorities, for example, on health and safety, equal opportunities, human resources, whistleblowing, procurement and other matters.

30. However, ARIA cannot opt out of complying with the right of access to environmental information under the Environmental Information Regulations, as it falls within the definition of a public authority under those regulations. It will also have to comply with the right of access to personal information under data protection legislation. It will therefore need to have staff able to respond to requests under access to information legislation, so the supposed benefit to it of being exempt from FOIA is less than may be imagined.

Conflict of interest at DARPA

31. An illustration of the potential for conflict of interest arose in DARPA, some ten years ago. DARPA's director between July 2009 and March 2012 was Dr Regina Dugan who, with her father, had previously founded a military technology company called RedXDefense ('RedX'). After Dr Dugan became DARPA's director her father succeeded her as the company's CEO.

32. The US Department of Defense's (DOD) Inspector General found that while DARPA director Dr Dugan had briefed senior DOD officials using extracts from RedX promotional materials which had '*created potential business opportunities for RedX, which was in a position to deliver an off-the-shelf solution to implement…[a] theory Dr*

[25] The Explanatory Notes on the Bill as brought from the House of Commons state at paragraph 16 that: 'ARIA may take an equity stake in a company with which it has partnered to conduct basic research with the intent of bringing a product to market, for example. ARIA may continue to provide technological input after a product has gone to market.'
[26] According to the BEIS policy statement cited above 'ARIA will design its own decision-making processes, which will highly likely grant significant autonomy for the Programme Managers to make investments. A Programme Manager's specific clearance arrangements may or may not include peer review, this will be a decision of the incoming ARIA leadership.'

Dugan promoted.' This contravened the DOD ethics regulations prohibiting direct or implied endorsement of products or services. Dr Dugan resigned during the investigation, though this was said to be unrelated to it. Disclosures under the US FOIA contributed some background information on earlier contracts between DARPA and RedX. Disclosure of the Inspector General's report was itself the result of an FOIA request.

The protection of sensitive information

33. FOIA would not threaten sensitive information held by ARIA. A raft of FOI exemptions protect such information. Most permit disclosure where it is justified in the public interest.[27] Some of the most relevant apply to:

- **Research interests** which are specifically protected by an exemption for information derived from an ongoing programme of research. The exemption applies if disclosure would prejudice the research, the interests of a participant in the research, the authority holding the information or an authority intending to publish the results (section 22A).

- **Commercial interests** which are protected by an exemption for trade secrets or information whose disclosure would be likely to prejudice the commercial interests of any person, including the authority holding it (section 43).

- **Confidential information** whose disclosure would constitute a breach of confidence (section 41).

- **Information intended for publication** at a future date, even if that date is unknown. Such information is exempt if the intention to publish predated the FOI request and it would be reasonable to withhold it until that date (section 22).

- **Personal information** about an identifiable individual is exempt if disclosure would contravene data protection legislation (section 40).

- **Vexatious requests:** although not technically an exemption, a request can be refused as vexatious if complying would cause a disproportionate or unjustified level of disruption, irritation or distress (section 14(1))

The importance of openness

34. The so-called 'Climategate' affair in 2009 involved the publication of hacked emails from the University of East Anglia's Climatic Research Unit (CRU). It led to unjustified

[27] A public interest test in found in section 2(2)(b) of FOIA applies to the majority of the Act's exemptions

allegations that climate data had been improperly manipulated. An independent review commissioned by the university found that the rigour and honesty of the scientists was not in doubt but that the unit had failed to comply with the letter and spirit of the FOIA and the associated Environmental Information Regulations. It reported:

> 'Public trust in science depends on an inherent culture of honesty, rigour and transparency. **The requirements of FoIA and EIR must not be seen as impositions. They are a necessary part of the implicit contract between the scientist and broader society.** Such an open culture will also lead to the best science.'[28] (emphasis added)

35. **Where questions are raised about ARIA's work, the very fact that it operates outside the statutory regime established to provide openness and accountability for public authorities is likely to undermine public confidence in its work. The reputational consequences of failing to answer FOIA requests is likely to far outweigh any notional benefit to ARIA of avoiding the Act's obligations.**

36. The Supreme Court has observed:

> 'It is common ground that FOIA was enacted in order to promote an important public interest in access to information about public bodies. There are…thousands of public authorities, large and small, which are paid for out of public funds, and whose actions or omissions may have a profound effect on citizens and residents of the United Kingdom. **There is a strong public interest in the press and the general public having the right, subject to appropriate safeguards, to require public authorities to provide information about their activities**. It adds to parliamentary scrutiny a further and more direct route to a measure of public accountability.'[29] (emphasis added)

37. **To set that strong public interest aside - as the government proposes to do for ARIA – would require a weighty countervailing public interest. The government's justification, that it wants '*to enable ARIA to operate like a high tech start-up, with minimal back-office function*' conspicuously fails to provide it.**

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[28] University of East Anglia, 'The Independent Climate Change E-mails Review' , chair Sir Muir Russell, July 2010
[29] Lord Walker in *Sugar v BBC* [2012] UKSC 4 at 76