

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 31 May 2012

**Public Authority:** Her Majesty's Land Registry  
**Address:** 32 Lincoln's Inn Fields  
London  
WC2A 3PH

#### Decision (including any steps ordered)

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1. The complainant requested information "in relation to the Land Registry's proposed entry into the provision of the land charges information sector". The Land Registry informed the complainant that it held the requested information but it was exempt from disclosure by virtue of sections 35(1)(a) and (b) of the Act. During the Commissioner's investigation, the Land Registry confirmed that it held additional requested information and that it was relying solely on section 35(1)(a).
2. The Commissioner's decision is that the withheld information does engage section 35(1)(a) and the public interest test favours the maintenance of the exemption for the majority of it.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To provide the complainant with the withheld information that constitutes the fees charged by various local authorities for local land charge searches and the information the Land Registry categorises as being in the public domain.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background

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5. The Land Registry is a non-ministerial government department and an executive agency of Department for Business, Innovation and Skills<sup>1, 2</sup>. Its main statutory function is to keep a register of title to freehold and leasehold land throughout England and Wales.
6. The Land Registry was/is exploring the possibility of widening its range of information services to include searches of the Local Land Charges Register and other information currently supplied by local authorities<sup>3</sup>. A charge on property is a formal restriction on its use or development that is incumbent upon both existing and future owners and as such is registered with the property's relevant local authority.

## Request and response

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7. On 3 May 2011, the complainant wrote to the Land Registry and requested the following information -
  - information in relation to the Land Registry's proposed entry into the provision of Land Charges information sector
8. The Land Registry provided its response on 4 July 2011 in which it disclosed part of the information requested but withheld the remainder of the information on the basis of the exemptions contained in sections 35(1)(a) and (b) of the Act.
9. The complainant requested an internal review of the decision on 4 July 2011. On 29 July 2011, the Land Registry wrote to the complainant with the details of the result of the internal review it had carried out. The result was the upholding of the original decision to withhold the remainder of the information, it also confirmed it was relying solely on section 35(1)(a).

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<sup>1</sup> <http://www1.landregistry.gov.uk/about-us/press-listing/2011/land-registry-joins-dbis>

<sup>2</sup> Formerly it was an executive agency of the Ministry of Justice

<sup>3</sup> <http://www1.landregistry.gov.uk/info/noticeboard/land-registry-considers-provision-of-local-land-charges-services>

## Scope of the case

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10. On 4 August 2011, the complainant contacted the Commissioner to complain about the Land Registry's handling of his request for information.
11. On 19 October 2012, the Land Registry provided the Commissioner with a copy of the withheld information.
12. The withheld information, as disclosed to the Commissioner, consisted of one document. However, the document itself alluded to, amongst other things, meetings the minutes of which, if such existed, had not been provided to the Commissioner. This prompted an exchange of correspondence between the Commissioner and the Land Registry as to whether there was further information falling within the ambit of the request yet to be accounted for.
13. On or about 30 January 2012 the Land Registry provided the Commissioner with a schedule that listed 173 documents. The Land Registry said that this newly discovered information was also exempt by virtue of 35(1)(a) of the Act. On 9 March 2012, the Land Registry provided the Commissioner with a copy of this withheld information.
14. The withheld information falls into three broad categories: (a) background briefings; (b) public domain information; and (c) questionnaires and replies thereto.
15. The information in category (a) is of two types. The first is fees currently charged by various local authorities for local land charges. The second type of information in this category comprises comments, observations and perceptions on how specific local authorities deal with the matter of local land charges. The Land Registry describes the information in category (b) as being already in the public domain. Information in category (c) is comprised of questionnaires and answers received by the Land Registry from various local authorities.

## Reasons for decision

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16. The Land Registry relies on section 35(1)(a) to withhold the requested information.
17. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class-based exemption. If the information

relates to the formulation or development of government policy, it falls under this exemption.

18. The Commissioner must consider whether the withheld information "relates" to the formulation and development of government policy. In the Commissioner's view, the term 'relates to' warrants a broad interpretation. It includes any information that is concerned with the formulation or development of the policy in question. However, it does not have to be information specifically on the formulation or development of that policy. Whilst "relates to" may capture a lot of information, the fact that the exemption is qualified means that public authorities are obliged to disclose any information which causes no significant harm to the public interest.
19. On 19 October 2011, the Commissioner asked the Land Registry, amongst other things, to confirm the nature of the government policy involved.
20. On 9 November 2011, the Land Registry said that the government policy to which the withheld information relates is the potential policy of diversification of Land Registry's services, for instance to include the provision of Local Land Charges (LLC) information. It went on to say that this matter relates to government policy and not just Land Registry departmental policy. It involves other government departments and is not merely confined to the internal workings of the Land Registry.
21. On 16 November 2011, the Commissioner asked the Land Registry to be more specific regarding its assertion that "this matter relates to government policy".
22. On 30 November 2011, the Land Registry explained that in the government's 2009 budget statement the government had said as follows:

*"In light of current market conditions and recognising the need to retain responsibility for the creation, recording and guaranteeing of title to land within Government, the following improvements to the operating framework of the business have been identified and will be delivered;*

- Identifying synergies with the functions and data requirements of other public sector bodies with a view to achieving efficiency improvements through greater collaboration; and*
- Exploring opportunities to accelerate these initiatives through joint ventures and/or outsourcing activities to third party providers."*

23. The complainant states that the exemption is only available to public authorities that have a function relating to the formulation of government policy whilst the Land Registry is not a government department.
24. The Commissioner rejects the complainant's argument that the Land Registry is not a government department. As stated in paragraph five above it is both an executive agency of DBIS (and therefore forms part of that department) and is a non-ministerial department in its own right.
25. The Commissioner is satisfied that the Land Registry, as an executive agency of a government department, is engaged in developing a policy, possibly to be pursued and developed at a ministerial and inter-departmental level. The relevant policy is the Land Registry's potential widening of its range of information services to include searches of the Local Land Charges Register in accordance with the extract of the government's budget speech laid out above. The Commissioner having viewed a copy of the withheld information finds that it is as described by the Land Registry. The Commissioner's decision is therefore that the withheld information does relate to the development or formulation of government policy undertaken by the Land Registry and this engages the exemption.

#### **Public interest test**

26. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the Act. That is whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
27. The Land Registry made the following remarks about the application of the public interest test:

#### **Public interest arguments in favour of disclosing the requested information**

- Promotion of transparency and accountability.

#### **Public interest arguments in favour of maintaining the exemption**

- The early stages of the policy process where options are being considered, risks identified and recommendations still need to be proposed to Ministers.
28. In his complaint to the Commissioner, the complainant put forward public interest factors that he believed favoured the release of the withheld information. A précis of the factors he identified are as follows:

- The function of the Land Registry is critical to the operation of conveyancing and the economic activity of the country.
- Previous government IT contracts have failed at a huge cost to the taxpayers.
- It is necessary to know what and who are the drivers of this initiative and have they declared their interest formally.
- Released information so far consists of leaked information giving the impression that policy has been formulated already.
- The frankness and candour of the participants in this process will not be compromised by the knowledge that the record of their contributions may later be subject to disclosure. The process itself needs examination and input received from all stakeholders, not least of which being the public.
- It would be of interest to hear whether any of the group have received assurances (and if so from whom) as to the confidential nature of their contributions. Further, it would be of interest to hear from any such contributor the impact/relevance of those assurances. By this I mean, would they have declined to become involved or contribute had no such assurances been given. If this were to be the case, this in itself, does rather beg further questions as to the necessity for secrecy.
- It is in the public interest to be able to not just contribute evidentially, but also in the determining the make-up and remit of any such group.
- Disclosure of the information requested will give a wider number of people (including all stakeholders) the opportunity to contribute to the debate and increase the trust in the quality of decision-making.
- Disclosure will ensure that the government department with overall control of the group can clearly demonstrate an appropriate and efficient use of governmental and taxpayers resources.
- Disclosure allows the public to judge the quality of the decisions being made in relation to the Land Registry that

will impact financially on thousands of people the housing and UK economy.

- Disclosure as requested would potentially allay some (or all) suspicions and ensure that the government was not unwittingly being drawn into any wrongdoing.
29. The Commissioner is disappointed at the apparently little analysis the Land Registry undertook in the application of the public interest test. The complainant though severely hampered by not knowing the withheld information has nonetheless put forward cogent thoughts regarding the application of the public interest test.
  30. Though the Land Registry's consideration of the public interest factors is properly describable as formulaic, factors such as the "promotion of transparency and accountability" remain important. It is generally accepted that public access to government information aids the democratic process of government.
  31. The Land Registry is obliquely relying on (for the maintenance of the exemption) the "safe space" and "chilling effect" arguments which have been considered in a number of Information Tribunal decisions.
  32. The safe space argument recognises the importance of government having the freedom to debate policy and make decisions without hindrance from external comment. In *Department for Education and Skills v the information Commissioner and The Evening Standard* the Tribunal recognised the importance of this argument stating:  
  
*"Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."*
  33. As regards the "chilling effect" the Commissioner would generally give some weight to arguments that disclosing information relating to a particular policy whilst that policy is still being formulated/developed, could effect the frankness and candour with which relevant parties would continue to contribute to that particular policy making process.
  34. As explained in paragraph 18 above the phrase "relates to the development or formulation of a policy" casts a wide net that can capture quite insignificant or inconsequential information.
  35. Such information, in this case, being the fees currently charged by various local authorities for local land charges and the information in the "Public Domain Information" category (see paragraph 14 above). These

two types of information are (or are said by the Land Registry to be) already in the public domain<sup>4</sup>. There is therefore no public interest in maintaining the exemption afforded by section 35 and the Commissioner's decision is that their communication to the complainant is not prevented by section 35(1)(a).

36. The Commissioner next applies the public interest test to the balance of information in category (a) Background Briefings (minus the current fees information) and to the entire information in category (c) Questionnaires and Replies thereto.
37. It is apparent from the content of this information that the Land Registry's formulation of policy (when the request was made) was in its early stages when it was seeking the views of interested parties. These include the opinions and thoughts of local authorities, their employees and other interested parties. It is clear to the Commissioner that the Land Registry is entitled to, and would benefit from, pursuing the development of policy assisted by participants who can make suggestions or considerations free from the fear that these may be placed in the public sphere. Accordingly, the Commissioner gives significant weight to both the safe space and chilling effect arguments, given the early stage of policy development.
38. Whilst the Commissioner only specifically addresses the more salient points made by the complainant, as regards the public interest test, he has taken cognisance of them all.
39. The Commissioner accepts, as said by the complainant, that the proper functioning of the Land Registry is critical to the operation of the conveyancing processes and thus to the country's economy. However, the Commissioner is concerned that releasing information generated or considered in this early policy formulation stage could lead to less candid and frank debate. This may adversely influence and impact upon the current property market and this is not in the public interest.
40. The complainant makes a valid point about the need for those currently outside the process to participate in it. However, this is tempered by the fact that if legislation were to follow from this policy formulation those who wish to contribute would have an opportunity to do so by existing democratic processes. Legislative change would be necessary if the Land Registry, as a creature of statute, wishes to adopt new functions

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<sup>4</sup> The Land Registry did not rely on the exemption provided by section 21 (1) FOIA, that the information is accessible by other means



41. Notwithstanding the paucity of the Land Registry's analysis, the Commissioner considers that the public interest arguments, as regards section 35(1)(a), heavily favour the maintenance of the exemption rather than disclosing the withheld information contained in category (a) Background Briefings (minus the current fees information) and category (c) Questionnaires and replies thereto. This is primarily due to the formulation of policy being in its relative infancy when there is a need to obtain disparate and, perhaps, challenging views. An early release may inhibit others from being so forthright.
42. In conclusion, the Commissioner finds that the withheld information, as described in paragraph 36 above is exempt information by section 35(1)(a), and that the public interest favours the maintenance of the exemption.

## Right of appeal

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43. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

44. 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.
45. 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** .....

**Gerrard Tracey**  
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