

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2013

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested information relating to self-build housing. The Department for Communities and Local Government (DCLG) provided some of the requested information but withheld other information under the exemption for prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that DCLG has not demonstrated that the exemption is engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclosure the withhold information to the complainant.
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 pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 21 August 2012, the complainant wrote to DCLG and requested information in the following terms:

"With reference to the "self build revolution" would you please provide the following information:

- 1) How many self-build houses were (a) started and (b) completed in financial years 2009-10, 2010-2011, 2011-12 and so far this financial year, and what mechanisms do you use to capture this data?*
- 2) How much of the £30m Custom Build investment fund (<http://www.communities.gov.uk/news/corporate/2175438>¹) has been used to date, how many people were helped, and how many homes have been started?"*

6. DCLG responded on 21 September 2012. It provided the complainant with the information specified in part 2 of the request and, in relation to part 1, confirmed that it was extending the time for response to consider the public interest test in relation to the exemptions for the formulation of government policy and prejudice to the effective conduct of public affairs.
7. On 29 October 2012 DCLG provided a further response, confirming that it was withholding the information under the exemption for prejudice to the effective conduct of public affairs.
8. Following an internal review DCLG wrote to the complainant on 26 November 2012. It stated that it was upholding its decision to refuse the request.

Scope of the case

9. On 28 November 2012 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
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¹ Updated web link: <https://www.gov.uk/government/news/uks-first-self-build-community-to-fast-track-new-homes>

10. The Commissioner's investigation has considered whether DCLG correctly withheld the information requested in part 1 of their request.

Reasons for decision

"How many self-build houses were (a) started and (b) completed in financial years 2009-10, 2010-2011, 2011-12 and so far this financial year, and what mechanisms do you use to capture this data?"

11. In refusing the request, DCLG has cited the exemptions set out in the following sections of the FOIA:

- 36(2)(b)(i) (inhibition to free and frank provision of advice)
- 36(2)(b)(ii) (inhibition to the free and frank exchange of views)

12. Ordinarily, in order for these exemptions to be engaged, a public authority is obliged to first seek the reasonable opinion of a qualified person. In refusing the request DCLG confirmed that, as the requested information was statistical in nature, section 36(4) of the FOIA was applicable and that the aforementioned duty was, therefore, disapplied. Section 36(4) states:

"In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person."

13. The first element of the request consists of data relating to the parameters identified in the request and, having viewed this, the Commissioner is satisfied that the information is statistical in nature. The second element of the request asks for "the mechanisms used to capture this data." Having viewed the relevant withheld information, the Commissioner notes that this provides details of the methodology applied in generating the statistics. The Commissioner's guidance clarifies that "statistical information" has a wider meaning than pure "statistics" and can include mathematical models used to analyse the data or the outcome of this analysis.
14. The Commissioner is satisfied that both elements of the request identify statistical information and he has concluded that section 36(4) is applicable and that DCLG was not obliged to seek the reasonable opinion of the qualified person in applying the exemptions it has cited. He has gone on to consider whether the exemptions are engaged.

Section 36(2)(b)(i) and (ii)

15. DCLG has confirmed that, in applying the exemptions , it considers that disclosure *would* inhibit the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
16. 'Would prejudice' means that it is more likely than not (i.e. a more than 50% chance) that prejudice would occur. The degree of likelihood claimed by the public authority is important because it sets the bar for engaging the exemption and then, if demonstrated, is carried forward into the balance of factors in the public interest test.
17. The Commissioner considers that information may be exempt under the sections cited by DCLG if its disclosure would inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting these processes may impair the quality of an authority's decision making.
18. In its submissions to the Commissioner DCLG directed him to its internal review response, the relevant section of which states
"...the relevant section of the Act recognises that officials and Ministers need a safe space in which they can offer free and frank advice and exchange such views. This "space" allows for thinking to be developed, policy to be explored, delivery options scoped without the fear of having individual advice or views exposed to premature public or media scrutiny. It is reasonable to acknowledge that data from a variety of sources and of varying status will form an important part of this essential process and it is therefore reasonable to conclude that it should have the same degree of protection as other information that may be in play. This is more so given the ongoing discussions within the Department about how best to quantify this particular aspect of housing provision. If this data was made available at a premature stage it would result in weaker discussions, poorer decision-making and the closure of policy options. It is my view that the data you seek falls into this category and that disclosure at this time would indeed adversely impact upon the Department's current work on how to quantify and support the take up of self-build housing."
19. In its submission to the Commissioner DCLG reiterated that the statistics in question were preliminary, internal estimates and that their role was to serve as draft modelling estimates for the purpose of advising Ministers who were considering how best to quantify self-build housing statistics and support for the policy.

20. The Commissioner's guidance notes that it is sometimes argued that public authorities need a 'safe space', away from public scrutiny, in which to develop policy, debate live issues and reach decisions. This argument is more commonly applied to the development of government policy, and as such it relates to the section 35 exemption. The Commissioner's guidance notes that, apart from the development of government policy, there may be a need for any public authority to have a safe space in which to develop policy or make decisions. For example, in relation to section 36(2)(b), it may be that safe space needs to be protected to allow the free and frank exchange of views or the free and frank exchange of advice².
21. DCLG confirmed that, as deliberations regarding how best to quantify self-build statistics were live at the time the request was received there was a need for a private space to be protected. DCLG has argued that the fact that Ministers' considerations were ongoing means that there was a need for a safe space. DCLG has also argued that, separate from the concept of safe space, ongoing considerations about statistical quantification make it reasonable to conclude that disclosure would inhibit the future frankness and candour with which officials would officials would have provided advice in relation to the self-build issue – in other words, disclosure would have a 'chilling effect' and inhibit future advice and exchanges of views.
22. The Commissioner and the Information Tribunal have tended to be more sceptical about any effect on future unrelated discussions but the Commissioner accepts that the chilling effect cannot be dismissed out of hand. Whether it is likely that disclosure would give rise to a chilling effect depends on the circumstances of each case, including the timing of the request in relation to the issue discussed. In any case, civil servants and other public officials charged with giving advice are expected to be impartial and robust in discharging their responsibilities and should not be deterred from expressing their views by the possibility of future disclosure.
23. As evidence for the live nature of these matters, DCLG directed the Commissioner to a written Parliamentary Question (PQ) which asked for similar information to that specified in the request. DCLG's response to the PQ (answered prior to the internal review) stated that it did not hold

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx

official statistics, clarifying that it was currently considering how best to quantify and support the take-up of self-build.

24. The Commissioner's guidance defines "advice" within the context of this exemption as including recommendations from junior to senior staff, professional advice (e.g., legal advice), advice received from external sources or advice provided to external sources. It goes on to state:

"However, an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views."³

25. Although it is possible to distinguish between the withheld information, which is purely statistical in nature, and discussions about how it might be presented or used, this does not mean that disclosure of the information would not have an impact on the latter. The Commissioner accepts that the withheld information may well form part of an exchange of views or discussion about whether it might be published or how it might be presented in a way which assists with the development of the home-building policy.
26. The Commissioner's guidance clarifies that the exemptions applied by DCLG are about the processes that may be inhibited, rather than what is in the information. The focus of considerations, therefore, should be whether disclosure would inhibit the processes of exchanging views or providing advice. So, the withheld information need not itself contain views and advice that are notably free and frank.
27. The FOIA does not generally distinguish between "official" information, i.e., information which is explicitly generated for public consumption and other information held by public authorities. Where information is generated with an implicit or explicit assumption that it will not be disclosed, authorities must be able to provide arguments justifying the withholding of information which are relevant to the exemption being relied upon.
28. The Commissioner accepts that the disclosure of information which is inaccurate or not representative of a final decision might result in public confusion or require a public authority to provide further explanations or respond to press enquiries. However, this is not a justification for avoiding transparency.

³ Ibid.

29. The Commissioner considers, and DCLG has accepted in its submissions, that the fact that data or information is inaccurate or incomplete is not in itself legitimate grounds for it being withheld. Where information falls into this category authorities are free to preface disclosure with narratives or caveats which clarify the relevant context or the limitations of the information.
30. The exemptions cited by DCLG require more than the possible inconvenience in responding to queries about disclosures or the possibility of misinterpretation to be engaged. However, beyond these effects, the Commissioner considers that DCLG has not provided arguments which demonstrate that disclosure would result in the effects required to engage the exemption, namely, the inhibition of the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation.
31. The Commissioner considers that it is an expected part of the role of officials to exchange free and frank views. It has not been explained to the Commissioner how the disclosure of the withheld information would impact on this process or on the provision of free and frank advice, let alone how it would inhibit these processes. In this case DCLG has relied upon the limb of the exemption which requires a higher burden of proof to demonstrate that it is engaged. So, it must be shown that the inhibition described would be more likely than not to occur.
32. Whilst the Commissioner accepts that disclosure of the information would be likely to result in queries being raised, requiring additional work and the generating of responses by DCLG he does not consider that it logically follows that this will result in officials being reluctant to provide free and frank advice or freely exchange views in relation to self-build housing. Since the passing of the FOIA authorities will be aware that no information is automatically exempt or for internal consumption only. Clearly there will be situations in which it is appropriate to withhold information but, in order to do this, authorities must provide arguments which are specific to the exemption being claimed and the information being withheld. In this case, the Commissioner considers that DCLG has simply characterised the outcome of disclosure in the terms described by the exemption rather than shown how these effects would arise.
33. Having considered the withheld information and the arguments provided the Commissioner considers that, in this case, it has not been shown that disclosure would result in the inhibition described by the exemption. Furthermore, although DCLG has not argued this, the Commissioner would add that he considers the lower threshold of prejudice, based on likelihood only, would also not be met on the facts of this case. As he

has concluded that the exemption is not engaged the Commissioner has not gone on to consider the public interest test.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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.

Signed

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF**