

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2014

Public Authority: Department for Communities and Local Government

Address: Eland House
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Communities and Local Government (DCLG) for information regarding tenancy deposit schemes. DCLG refused the request by relying on the exemptions in section 36(2)(b)(i) (inhibit free and frank provision of advice); section 42 (legal professional privilege) and section 43(2) (commercial interests). The Commissioner has investigated the complaint and found that the exemptions apply and that in each case the public interest in maintaining the exemption outweighs the public interest in disclosure.
2. The Commissioner requires no steps to be taken.

Request and response

3. On 30 November 2012 the complainant made a freedom of information request to DCLG for information regarding the Tenancy Deposit Protection Schemes. The request read as follows:
 1. *Please supply to the RICS in electronic form all written advice provided by CLG officials to their Ministers associated with the decision by CLG Ministers in August 2010, but only made public in July 2010, to agree an amended contract with the provider of the tenancy deposit protection custodial scheme, Computershare Investor Services Plc (The Deposit Protection Service (DPS)). In addition, please supply to the RICS in electronic form the legal advice on which this decision was based, in particular legal advice regarding*

the removal of all government guarantees for the scheme and all associated liabilities in return for a one off payment of £12.7m, and regarding the extension of the original custodial scheme contract with Computershare by a further four years.

2. *Please supply to the RICS in electronic form all information held by CLG associated with the financial assessment by CLG officials in July-September 2012 of all the tenders submitted to the Department in the period 25 May to 11 July 2012 regarding a contract to run a tenancy deposit protection (insurance based) scheme (OJEU REF: 20-12/5 99-165216).*
3. *Please supply to the RICS in electronic form all information relating to any assessment of, or comment by, CLG officials on whether changes to the custodial scheme, including the payment of £12.7m to Copmputershare Investor Services Plc, may give rise to aid under the Treaty on the Functioning of the European Union and/or whether it may impact (or have impacted) upon the recently concluded procurement exercise for contracts to run a tenancy deposit protection (insurance based) scheme (OJEU REF: 20-12/5 99-165216).*
4. DCLG responded to the request on 3 January 2013. For the first question DCLG confirmed that it held the requested information but said that it was being withheld as it was exempt from disclosure. It explained that the information requested in the first part of the question was withheld under section 36(2)(b) (free and frank provision of advice/exchange of views) and the information requested in the second part of the question was withheld under section 42 (legal professional privilege).
5. For the second question DCLG disclosed the assessment criteria on which bids for the contract were assessed as well as a financial pro-forma. All other information was withheld under the exemption in section 43(2) (Commercial interests).
6. For the third question DCLG confirmed it held no information falling within the scope of this part of the request.
7. The complainant asked DCLG to carry out an internal review of its handling of the request and it presented its findings on 26 March 2013. The review upheld the decision to refuse to disclose the requested information by relying on the exemptions cited and confirmed that the public interest in maintaining each exemption outweighed the public interest in disclosure.

Scope of the case

8. On 10 May 2013 the complainant contacted the Commissioner to complain about DCLG's decision to refuse the request.
9. The Commissioner subsequently confirmed with the complainant that he would consider DCLG's decision to refuse to disclose the information in parts 1 and 2 of the request. The Commissioner did not consider the response to the third part of the request as this was not challenged by the complainant.

Reasons for decision

Section 36(2)(b)(i) – inhibit the free and frank provision of advice

10. The Commissioner has first considered the information falling within the scope of the first part of the first request which was withheld by DCLG under the section 36 exemption.
11. Section 36(2) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure-
 - (b) would, or would be likely to inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. In this case DCLG has said that it considers that the information is exempt under section 36(2)(b)(i).
13. For the exemption to be engaged the proper qualified person for the public authority must have given his opinion on the application of the exemption. In this case DCLG has explained that at the time the request was received it sought the opinion of the then Minister of State for Housing to apply the exemption. However it explained that it now felt that the submission provided to the Minister, whilst clearly stating the issues at hand, did not specifically ask for his opinion that the exemption at section 36(2)(b)(i) was engaged. It said that whilst it considered that the Minister was sufficiently informed to make his decision and was

clearly of the opinion that release of the information would be harmful to the effective conduct of public affairs, it had decided to ask the current Parliamentary Under Secretary for Housing to give his own opinion. The Commissioner was provided with a copy of the opinion which was given on 6 December 2013.

14. The Commissioner is satisfied that the DCLG has obtained the opinion of the proper qualified person and so this element of the exemption is met.

15. In order to determine whether the exemption is engaged the Commissioner must then go on to consider:

- whether the prejudice claimed relates to the specific subsection of section 36(2) that the DCLG is relying upon;
- the nature of the information and the timing of the request; and
- the qualified person's knowledge of or involvement in the issue.

16. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."

17. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.

18. Having reviewed all of the information placed before the qualified person the Commissioner is satisfied that the information included the relevant arguments. The qualified person was provided with a detailed submission outlining the possible consequences of disclosure as well as the counter arguments in favour of disclosure. The qualified person had access to the correspondence with the complainant and the withheld information. In the Commissioner's view the qualified person was provided with sufficient information to allow him to form a reasonable view on the application of the exemption.

19. The qualified person has given his opinion that disclosure would be likely to inhibit the free and frank provision of advice. The DCLG and its qualified person argue that this is because:
- Disclosure would be likely to change the nature of advice, with more thought to the likelihood and impact of disclosure than to the value of the advice to ministers. It would also lead ministers to think twice before asking officials to commit advice to paper.
 - The information in the submission was prepared with a specific audience in mind, an audience with personal knowledge of the issues and a specific point of view. If officials felt the need to prepare all advice with a wider audience in mind ministers could no longer be confident that they were receiving the full value of their official's expertise.
20. The Commissioner has reviewed the withheld information and is satisfied that it was reasonable for the qualified person to reach the view that disclosure would be likely to inhibit the free and frank provision of advice. The Commissioner has found the submission to be a very frank and candid discussion of the issues, recommendations and risks associated with the different options for dealing with the problems with the tenancy deposit protection custodial scheme ("the custodial scheme"). This was clearly a controversial area and it is reasonable to conclude that officials might be more guarded in how they present advice to ministers in future if information of this nature were to be disclosed. Therefore the Commissioner finds that the opinion of the qualified person was reasonable and that therefore section 36(2)(b)(i) is engaged. He has now gone on to consider the public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public Interest Test

Public interest arguments in favour of disclosure

21. DCLG has said that it acknowledges that there is a general public interest in disclosure as this promotes the transparency and accountability of government and furthers the understanding of, and participation in the debate of issues of the day. This in turn furthers public trust and confidence in good government. It added that in situations like this, where ministers are considering the contractual arrangements for the delivery of public services using public funds, it indicates to the public whether or not due diligence and propriety have been observed and if decisions have been arrived at in light of full and impartial advice.

22. In this particular case disclosure would also reveal the reasons why the custodial scheme had to be renegotiated and what analysis was made of the situation and the options available.

Public interest arguments in favour of maintaining the exemption

23. The submission withheld under section 36 clearly sets out the risks involved in the different courses of action for responding to the problems with the custodial scheme. DCLG argues that it would be seriously harmful if officials were reluctant to clearly state any risks associated with any future decisions. It suggested that disclosure may also significantly damage the relationships it is able to build with external colleagues, organisations and partners.
24. DCLG said that if officials felt restrained in providing their advice to ministers this would lead to poorer decision making. It would also materially change the nature of the advice given, with more thought to the likelihood and impact of disclosure than to the value of the advice to ministers. If advice to ministers was publically available it would, it argued, significantly reduce the ability of government to react to events as they occur, to plan for the future and to make sound policy decisions. It would also inhibit the ability of the government to innovate.
25. The information in the submission was prepared with a specific audience in mind – an audience with personal knowledge of the wider issues and with a specific point of view. DCLG has said that if officials felt the need to prepare advice with a wider audience in mind ministers could no longer be confident that they were receiving the full value of their officials' expertise.
26. DCLG also suggested that if at the time of the discussions surrounding the scheme officials had felt restrained in committing their advice to paper so that the minister could study it and give the options his due consideration, the wrong decision could have been taken with a subsequent financial loss to the department and possibly a failure of the custodial scheme.

Balance of the public interest arguments

27. Firstly, the Commissioner accepts that there is a public interest in disclosure. The information in the submission would help explain the reasons why the custodial scheme was re-negotiated and the different factors that were taken into consideration and which influenced the government's decision making. Therefore the Commissioner has given the arguments surrounding transparency and accountability particular weight. However, the Commissioner is also aware that the public

interest has already been met to a certain extent by the fact that the government has previously announced, in answers to parliamentary questions, that the custodial scheme had to be renegotiated due to low interest rates leading to a shortfall on the interest gained from the deposits held in the scheme. It was revealed that this renegotiation involved a payment of £12.7 million to the provider of the custodial scheme and a four year extension to the original agreement.

28. As regards the public interest for maintaining the exemption the Commissioner considers that the arguments surrounding the chilling effect on officials to provide uninhibited advice carry weight in this particular case. The information was relatively recent at the time of the request (having been created in July 2010) and is particularly candid. In the Commissioner's view this lends the arguments for maintaining the exemption added weight as the chilling effect on officials' ability to provide advice is likely to be more severe. The Commissioner considers that there is an important public interest in officials being able to provide advice to ministers and discuss issues freely and frankly. Any inhibition would damage the quality of advice and deliberation and lead to poorer decision making. In his view any loss of candour or frankness would lead to poorer quality advice and less formulated policy and decisions.
29. The DCLG had suggested that disclosure could have led to the wrong decision being made and the possible failure of the scheme if officials (at the time they provided their advice to ministers) had felt their advice may be disclosed. The Commissioner has dismissed this argument because at the time the request was received the custodial scheme had already been renegotiated and the decisions had been taken by ministers. When considering the public interest arguments the Commissioner can only take into account the circumstances such as they were at the time the request was received. However, the Commissioner does accept that disclosure could lead to officials being inhibited in future discussions regarding the scheme and in giving advice on other issues in future.
30. The Commissioner has reviewed the withheld information and has decided that on balance, and having given due weight to the opinion of the qualified person, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Section 42 – Legal professional privilege

31. The Commissioner has next considered the application of the section 42 exemption to the information in the second part of the first request. Section 42(1) provides for an exemption for information in respect of

which a claim to legal professional privilege could be maintained in legal proceedings.

32. Legal professional privilege is a common law concept that protects the confidentiality of communications between a lawyer and client. It has been described by the Information Tribunal in *Bellamy v Information Commissioner and Secretary of State for Trade and Industry* as:

"a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and third parties if such communication or exchanges come into being for the purpose of preparing for litigation."

33. There are two types of legal professional privilege: advice privilege and litigation privilege. Litigation privilege will apply where litigation is in prospect or contemplated and legal advice privilege will apply where no litigation is in prospect or contemplated. In this case the DCLG are relying on legal advice privilege and the exemption has been applied to several emails which provide and discuss advice from DCLG lawyers on the proposals regarding the renegotiation of the custodial scheme. The Commissioner has reviewed the withheld information and found that it is communications between the DCLG and its internal lawyers seeking or giving legal advice in a professional capacity. The Commissioner is also satisfied that the information has been kept confidential and has not been made public. Therefore he finds that legal professional privilege can be maintained and that the section 42(1) exemption applies. The Commissioner will now go on to consider the public interest test.

Public Interest test

Public interest arguments in favour of maintaining the exemption

34. In addition to the general public interest arguments referred to above, DCLG acknowledged that there was a public interest in showing that it was seeking and receiving good legal advice and was aware of the risks (surrounding the various options around renegotiating the custodial scheme). It would also have provided clarity regarding the use of public money.

Public interest arguments in favour of maintaining the exemption

35. In favour of maintaining the exemption DCLG explained that the advice related to the important issue of the interpretation of the contract (between the DCLG and the provider of the custodial scheme) and the legal implications of different approaches to renewing the contract, along with the associated risks. It argued that it was of great importance for it to get clear legal advice on these issues without fear of that advice being hampered by future release.
36. DCLG also argued that there was an important general public interest in a person being able to consult his or her lawyer in confidence.

Balance of the public interest arguments

37. In balancing the public interest the Commissioner has given an initial weighting to maintaining the exemption. This is because the Commissioner recognises that the general public interest inherent in the exemption will always be strong due to the importance of the principle behind legal professional privilege: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. In reaching this view the Commissioner has taken into account the findings of the Information Tribunal in the case of *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* in which it states:

"...there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-vailing considerations would need to be adduced to override that inbuilt public interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cut case..."

38. The Commissioner's approach is that the arguments for protecting legal professional privilege will have added weight where the legal advice is recent. This is based on the principle that where legal advice is recent it is likely to be used in a variety of decision making processes which would be likely to be affected by disclosure. In this case the exemption has been applied to two sets of emails containing legal advice, both of which are under 3 years old. The Commissioner considers that in the circumstances the advice is still recent and this weighs in favour of maintaining the exemption.
39. Given the strong public interest in protecting legal professional privilege there will need to be equally weighty arguments for disclosure. In

considering the weight of the arguments in favour of disclosure the Commissioner will take into account:

- The number of people affected by the decision to which the advice relates;
 - The amount of money involved
 - The transparency of the public authority's actions
40. The Commissioner accepts that there is something to be gained by disclosing the legal advice as this would help to explain what factors were taken into account when renegotiating the custodial scheme contract which involved the payment of a relatively large amount of public money. The Commissioner is also aware that the action taken by the government had the potential to affect a large number of people – i.e. all those tenants who had their deposits held in the custodial scheme. However, as far as he is aware, the public were not adversely affected by the government's actions because the decision to renegotiate the contract ensured it was able to continue operating and that deposits were safe.
41. The Commissioner is also mindful that, as noted above, the government has made public its renegotiation of the contract with the custodial scheme's provider and the reasons behind it and he does not consider that there has been any lack of transparency in the government's actions. Nor is he aware of any attempt by the government to misrepresent the nature of the advice it received or a failure to act on advice received, both of which may otherwise weigh the public interest in favour of disclosure.
42. Having considered all the circumstances the Commissioner has decided that the public interest favours maintaining the exemption given that the advice is recent and is in his view sufficiently detailed that it is likely to inhibit the provision of future legal advice both in relation to tenancy deposit protection schemes and unrelated matters. This is clearly not in the public interest.

Section 43(2) – Commercial interests

43. Section 43(2) provides that information is exempt if disclosure would or would be likely to prejudice the commercial interests of any person.
44. In this case section 43(2) has been applied to the information falling within the scope of part 2 of the request which comprises initial bids received from third parties for the contract to run an insurance based tenancy deposit protection scheme. It includes detailed financial estimates and DCLG's assessment of those bids. DCLG argues that

disclosure of this information would be likely to prejudice the commercial interests of the bidders because they operate in a competitive market and it would undermine their ability to participate competitively in a commercial activity.

45. When considering the application of a prejudice based exemption such as section 43 it is necessary to consider the nature of the prejudice claimed. To engage the exemption a public authority must be able to explain the nature of the prejudice and show that there is a causal link between disclosure and the prejudice claimed. Where a public authority claims that section 43 is engaged because disclosure would prejudice the commercial interests of a third party the Commissioner must also be satisfied that the arguments are based on the genuine concerns of the third party. The Commissioner will not accept speculative arguments about how prejudice may occur to third parties.
46. In this case DCLG confirmed that it sought the views of the bidders who objected to disclosure on the basis that it would harm their commercial interests by benefiting their competitors. One of the bidders provided the following comments:

"The Information contains confidential and sensitive material, including operational and financial information, concerning [the bidder's] business. The release of this information to the public, and the likelihood that it would become available to our competitors (both current and potential scheme administrators, and our competitors in other markets) would cause us substantial prejudice. For example:

The Information contains detailed business plans setting out the ways in which we would intend to operate the scheme. This includes information such as financial projections. This could be used by our competitors to influence the manner in which they administer their own businesses and schemes, including (vitaly) their pricing structures. Sensitive financial and operational information which would, in any other circumstances, remain confidential to [the bidder] would be used unfairly to our detriment, and would inhibit our ability to operate in a fair and level market. The Information contains financial information which goes to the core of how we manage our business, the ongoing confidentiality of which is vital to [the bidder], as it would be for any business.

The Information would have a distortive influence on future tendering of tenancy deposit schemes. For example, if our competitors were to have access to this information they would unfairly be placed in a highly beneficial position in the bid process (and this includes competitors who may not have been involved in the current process, and so will not have released any information themselves, creating a further imbalance). [the

bidder's] *ability to provide a competitive tender would be damaged, and so its commercial interests would be prejudiced.*

.... the Information contains business plans which set out innovative and valuable business processes, structures etc. which we have developed as part of the tendering process. [the bidder] has spent time, effort and money developing these. If they were released, even anonymously, they could be used unfairly by competitors to influence their own business operations. Trade secrets are valuable information regardless of their source."

47. In the Commissioner's view, a commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services. The Commissioner recognises that companies compete by offering something different from their rivals. For example, that difference may be the price at which goods or services can be delivered.
48. The Commissioner has reviewed the withheld information and is satisfied that it would be valuable to a competitor. DCLG explained that in accepting bids for the contract it was quite prescriptive about how the service was to be provided, as there were legislative requirements governing most aspects. Therefore it said that the bidders of the services were competing largely on their ability to provide the service in the most efficient manner while remaining financially viable over the life of the contracts. In light of this the Commissioner considers that the financial figures will have added significance in any future bidding process for a similar contract. On this point DCLG has said that the companies bidding for the contract operate in a very competitive market and the Commissioner understands that the contract runs for a period of 5 years and therefore when it comes for a renewal any potential competitors would have a commercial advantage as they would know on what basis previous bids had been successful and so would be able to tailor their own bid accordingly.
49. The withheld information also includes DCLG's assessment of the successful bids with a detailed analysis of their strengths and weaknesses and the reasons why they were successful. Again, the Commissioner is satisfied that disclosure would be likely to prejudice the commercial interests of the successful bidders as it would provide competitors with an advantage in a future bidding process for a similar scheme.
50. DCLG had also suggested that disclosure would prejudice its own commercial interests. However, it is unclear on what basis this prejudice

would occur as this was not explained. Therefore the Commissioner has discounted this argument.

51. The Commissioner has decided that disclosure would be likely to prejudice the commercial interests of the companies that submitted bids for the contract to run the insurance based tenancy deposit protection scheme. Therefore, he finds that section 43(2) is engaged.

Public interest test

Public interest arguments in favour of disclosure

52. In addition to the general public interest arguments as described in relation to section 36, DCLG said that disclosure would show that sufficient information was available to inform its decision and the assessment process, thus demonstrating transparency and accountability in the spending of public money.

Public interest arguments in favour of maintaining the exemption

53. In favour of maintaining the exemption DCLG argued that there is a very strong public interest in ensuring that companies are able to compete fairly. It said that this was a key part of the UK's economic model and to undermine it could seriously damage the public interest.
54. It also said that there was a strong public interest in ensuring that there is genuine competition for public sector contracts. Disclosure would, in its view, undermine confidence that it will treat with care information provided by those competing for commercial contracts and that it would respect their concerns about undermining their ability to compete fairly in future. It argued that if competitors held back from bidding rather than risk disclosure of financial information on the grounds that it might then be revealed to their competitors, it would damage government's ability to obtain goods and services on the most favourable terms.
55. DCLG further argued that disclosure would make it less likely that companies would provide it with information in future, thus undermining its ability to fulfil its role, to contract on the best possible terms, both financially and operationally, and get real value for money when tendering for any service. It is in the public interest to attract the widest range of bidders and disclosure could cause a potential bidder to think twice before submitting a tender.
56. Finally, DCLG also sought to argue that the public interest favoured a smoothly run tenancy deposit market as this works to the benefit of all landlords and tenants. It suggested that distorting the operation of the

market could lead to additional costs or reduced financial security for landlords and tenants.

Balance of the public interest arguments

57. The Commissioner accepts that there are valid arguments in favour of disclosure insofar as the public interest favours accountability and transparency in how government contracts with private companies. However, these arguments are more general in nature and the Commissioner is not aware of anything in the tender process which would call for greater transparency for example a suspicion of wrongdoing or malpractice. Furthermore, the Commissioner has taken into account the fact that DCLG has already disclosed a certain amount of information on the contract. The Commissioner notes that whilst the contract was not subject to EU regulations, being under the £10k threshold for publication, DCLG ran it as if it were and placed it on the OJEU (Official Journal of EU, used to publicise contracts placed by European public authorities) website which included all documentation to show it was open and transparent and which gave any interested party the opportunity to bid. The complainant was also provided with a copy of the evaluation criteria and financial pro-forma relating to the tender process.
58. In favour of maintaining the exemption the Commissioner recognises that the fact that a prejudice-based exemption is engaged means that there is automatically some public interest in maintaining it, and this should be taken into account in the public interest test. In the case of section 43 there is an inherent public interest in ensuring that companies are able to compete fairly and it is not in the public interest to prejudice a company's commercial interests.
59. There is also a public interest in ensuring that there is competition for public sector contracts. The Commissioner has given some weight to DCLG's arguments that disclosure may cause potential bidders to provide less information in the bidding process. However, he is not convinced that disclosure would lead to potential bidders choosing not to submit a tender in future for what may be a very lucrative contract. The Commissioner takes the view that in practice, many companies may be prepared to accept greater public access to information about their business as a cost of doing business with the public sector. And the overall value of public sector contracts is a great incentive to tender for them.
60. However, the Commissioner is of the view that the public interest has already been met to a large extent by the information already disclosed which shows that DCLG gathered enough data from the bidders to enable a thorough analysis, and that the methods for comparing them

were sufficiently robust. The public interest was reasonably and adequately served by that level of disclosure. Releasing the withheld information would only reveal the specific reasons why some of the bidders were successful and details of their financial arrangements. There is no obvious public interest in this information being disclosed except in a general sense that disclosure of any information by public authorities serves the aims of transparency and accountability. When balanced against the harm that would be caused to the commercial interests of the companies concerned, the Commissioner finds that in all the circumstances of the case the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure.

Right of appeal

61. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

62. 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.
63. 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

Pamela Clements
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