

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 November 2015

**Public Authority:** Department for Communities and Local Government

**Address:** Eland House  
Bressenden Place  
London  
SW1E 5DU

### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the extension of the Right to Buy scheme to Housing Associations. The Department for Communities and Local Government refused the request under the exemption for information relating to the formulation or development of government policy (section 35(1)(a) of the FOIA).
2. The Commissioner's decision is that The Department for Communities and Local Government has correctly applied section 35(1)(a) to withhold the requested information and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

### **Request and response**

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4. On 24 April 2015, the complainant wrote to The Department for Communities and Local Government (DCLG) and requested information in the following terms:

*"Please send me a copy of the detailed costings for extending the RTB to housing associations, which have been developed by civil servants for the proposal in the Conservative Party manifesto. I assume these are on a spreadsheet. The electronic format would be fine."*

5. DCLG responded on 12 May 2015 and confirmed that the information was being withheld under the exemption for the formulation or development of government policy (section 35(1)(a) of the FOIA).
6. Following an internal review the DCLG wrote to the complainant on 3 July 2015. It stated that it was maintaining its position.

### **Scope of the case**

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7. On 29 July 2015 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether DCLG had correctly applied section 35(1)(a) in withholding the requested information.

### **Reasons for decision**

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#### **Section 35(1)(a) – formulation or development of government policy**

9. Section 35(1)(a) of the FOIA provides that information held by government departments is exempt if it relates to the "formulation or development of government policy".
10. Section 35(1)(a) FOIA is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
11. The withheld information relates to the statutory Right to Buy scheme (RtB). DCLG explained to the Commissioner that RtB was introduced in October 1980 and gave council tenants the right to buy their own homes. DCLG confirmed that the Conservative Party's Manifesto contained a commitment to extend the RtB to tenants in housing associations. DCLG explained that the Queen's Speech in May 2015 announced that a Housing Bill would be introduced to encompass this extension and that, since then, Ministers have discussed and considered options relating to this – the requested costings being one of the matters under discussion.
12. In view of the above and, in relation to the engagement of the exemption, DCLG maintains that the requested information relates to the development of or formulation of a government policy, namely, the extension of RtB.

13. Having considered DCLG's submissions the Commissioner is satisfied that the information does not relate to the implementation of the original 1980 policy but represents a completely new stage and is closely linked to the formulation of government policy.
14. The complainant has suggested that the transition from a Coalition to a Conservative Government in May 2015 should represent a "cut-off" point for any developing policy; however, for the purposes of engaging the exemption the Commissioner is satisfied that the requested information relates to a Government policy which is in the process of being formulated.
15. The complainant has also suggested that, as the information should be purely statistical in nature, it should fall within the scope of section 35(2) of the FOIA, which provides that, once a policy decision has been taken, any statistical information that was used to provide an informed background to that decision will not engage either section 35(1)(a) or 35(1)(b).
16. The Commissioner does not consider section 35(2) is relevant in this case because he is satisfied that the policy to which the information relates is still in the process of formulation and, in any event, the withheld information is not purely statistical in nature.
17. Having viewed the information and considered the DCLG's response, the Commissioner has concluded that the withheld information relates to the formulation or development of government policy and that the exemption is engaged.
18. As section 35(1)(a) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

*Public interest in disclosing the information*

19. DCLG has acknowledged that the engagement of the exemption is not enough, in itself, to warrant the withholding of information and that the weighting of the public interest in withholding or disclosing the information must also be considered.
20. DCLG acknowledged the generally applicable benefits of transparency and accountability in public life and highlighted the public interest in disclosing information which would assist the public understanding of decision making and promote engagement with policy implementation. DCLG suggested that a possible impact of disclosure would be an increase in public trust and confidence in government.

21. DCLG also confirmed that, more specifically, the impact that RtB would have on citizens provided a strong factor in favour of disclosure.

*Public interest in maintaining the exemption*

22. DCLG has argued that there is a strong public interest in ensuring that there is an appropriate degree of safe space in which officials are able to gather and assess information and provide advice to Ministers which will inform their eventual policy decisions. DCLG has further argued that Ministers must, in turn, feel able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from distraction that such information will be made public. Such safe space, DCLG has argued, is needed where it is appropriate in order to safeguard the effectiveness of the policy process.
23. The Commissioner has acknowledged in many previous decisions that the timing of a request can often be a relevant factor in determining where the balance of the public interest lies. In this case, DCLG has acknowledged that in relation to section 35(1)(a), it is generally accepted that, once the formulation or development of a policy has been completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in maintaining the exemption deserves less weight.
24. DCLG has explicitly confirmed that these latter conditions did not apply at the time of the request and, at the time of writing, still do not apply. DCLG maintains that the need for safe space around the costings analysis, pending Parliamentary debate and final decisions on policy detail are apparent.
25. In addition to maintaining safe space, DCLG has further argued that the need not to adversely affect the policy itself is another important consideration. DCLG acknowledges that the extension of RtB is a high-profile area of Government policy, attracting public and media attention and its effectiveness and success is of great significance to fiscal efficiency and prevalent social issues.
26. DCLG has argued that disclosure would detract from Ministers' ability to reasonably take policy decisions that will help to tackle these issues, as media speculation and public attention might focus on policy options which will not form part of the finalised policy. An outcome of this, DCLG has suggested, would be that a misleading picture of the policy would be presented, damaging buy-in to the policy by tenants and housing associations. DCLG maintains that this could inhibit the effectiveness of the policy and ultimately waste public funds.

*Balance of the public interest*

27. In considering the balance of the public interest arguments, the Commissioner has referred to his own guidance, which sets out his view that there is no inherent public interest in withholding information that falls within the type of information covered by a class based, qualified, exemption<sup>1</sup>. In effect, this means if, after a weighting exercise, the scales are still balanced, the FOIA's inbuilt presumption towards disclosure applies and information should be released.
28. The Commissioner considers that the principal argument presented by the DCLG is essentially about the need for a "safe space" to formulate policy, debate "live issues", and reach decisions without being hindered by external comment and/or media involvement. Safe space arguments are often made within the context of the application of this exemption. Summarised in *Scotland Office v the Information Commissioner* (EA/2007/0070) as "the importance of preserving confidentiality of policy discussion in the interest of good government" this covers the idea that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.
29. In *Department for Education and Skills v the information Commissioner and The Evening Standard* (EA/2006/0006) 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".
30. In *Scotland Office v the information Commissioner* (EA/2007/0128 para 62) the Tribunal again recognised the importance of the safe space concept, but warned that "information created during this process cannot be regarded per se as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption". The Commissioner agrees with this view and notes that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration.

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<sup>1</sup> See the ICO website here:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/the\\_public\\_interest\\_test.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx)

31. The Commissioner acknowledges that, in this case, the process of policy development and formulation was ongoing at the time the request was received. He considers that there is a strong public interest in maintaining the safe space for DCLG to robustly consider all options without been constrained by the fear of having to constantly respond at each stage in public. DCLG has argued that the early disclosure of an incomplete range of representations would be likely to give a misleading and inaccurate picture of how the policy will eventually look.
32. The Commissioner considers that, when making decisions which have far-reaching significance and implications, public authorities should expect these to attract public scrutiny. The RtB policy clearly falls into this category and the Commissioner considers that the fact that information might be misinterpreted is not reason alone for information to be withheld. However, in this case, the Commissioner considers that the potential effects of disclosure whilst the policy remains in a nascent form, transcend mere misunderstanding and, rather than resulting just in further queries to DCLG, could lead to damage to the policy formulation or development process.
33. The Commissioner considers that the severity of the potential effects which disclosure could cause in this case heightens the need for integrity of the safe space identified by DCLG being maintained.
34. The Commissioner considers that DCLG's decision to withhold the information at this time and intention to make the information available once the policy formulation and development process is complete characterises a correct balancing of the public interest in this case.
35. Having considered the relevant arguments the Commissioner has concluded that, in this case, the public interest favours maintaining the exemption.

## Right of appeal

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36. 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: 0870 739 5836

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

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

37. 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.
38. 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 .....**

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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**SK9 5AF**