

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 April 2016

Public Authority: Department for Communities and Local Government ("DCLG")

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Communities and Local Government ("the DCLG") which concerns the Government's plans to extend the Right To Buy to tenants of Housing Associations. The DCLG confirmed that it holds information relevant to the complainant's request, but withheld it in reliance on sections 35(1)(a) and 35(1)(b) of the FOIA.
2. The Commissioner's decision is that the DCLG has appropriately applied sections 35(1)(a) and 35(1)(b) and therefore it is entitled to withhold the information which the complainant seeks.
3. The Commissioner requires the DCLG to take no further action in this matter.

Request and response

4. On 25 September 2015, the complainant wrote to the Department for Communities and Local Government and requested information in the following terms:

"1. What are the texts of any policy formation documents connected with the proposed Housing Bill that will contain provisions for local authorities being required to sell void properties to fund the sale and discount of Housing Association properties under the proposed Right to Buy?"

2. Is it still proposed in a Housing Bill to require local authorities to sell void properties to fund the sale and discount of Housing Association properties under the proposed Right to Buy?
3. If so, what are the continued reasons for proposing to impose this requirement?"
5. The DCLG responded to the complainant's request on 15 October 2015. The Department confirmed that it held information within scope of his request and that it was able to provide him with some of that information.
6. In respect of item 2, the DCLG confirmed that it is still the Department's intention to legislate on this matter and it referred the complainant to clauses 62-72 of the Housing & Planning Bill published on 13 October¹.
7. In respect of item 3, the DCLG stated that, "councils should make the best use of their assets and manage their housing stock as efficiently as possible. So it is right that as high value council homes become empty they should be sold to fund the building of new homes that better meet their local needs. Our plans will also extend Right to Buy to 1.3 million housing association tenants".
8. The DCLG confirmed that the information which the complainant seeks at item 1 is held by the Department. The DGLC informed the complainant that it was unable to give this to him as that information is exempt from disclosure under section 35(1)(a) of the FOIA. The DCLG advised the complainant that the withheld information relates to the formulation and development of government policy and that ministers still need to make decisions on the Right to Buy extension policy and will need to explore the various options available.
9. On 15 October 2015, the complainant asked the DCLG to undertake a partial review its decision, specifically in respect of the Department's withholding of the policy documentation relevant to item 1 of his request.
10. The complainant provided the DCLG with clarification of his request, emphasising that it included "ministerial communications" etc. as well as purely policy making documents. The complainant also provided the DCLG with his considerations of the public interest arguments, which he

¹ <http://services.parliament.uk/bills/2015-16/housingandplanning.html>

considers outweigh the DCLG's concerns for non-disclosure. He pointed out that the matters will be debated in both Houses of Parliament in due course as the current Bill makes its passage through the legislative process.

11. On 10 November 2015, the DCLG wrote to the complainant to inform him of its final decision. The DCLG confirmed that it holds recorded information relevant to part 1 of the complainant's request and it upheld its decision to withhold this in reliance on section 35(1)(a) of the FOIA. The DCLG restated that the bill has not yet been fully debated in Parliament and the Right to Buy element is still "live" policy, being worked on by departmental staff and Ministers. The withheld Information is being used by Ministers to develop this policy ahead of it being further debated in Parliament.
12. The review also considered in the information covered by the complainant's 'clarification request'. The DCLG confirmed that it holds this information but refused to disclose it in reliance on sections 35(1)(a) and 35(1)(b) of the FOIA. Again, the DCLG stated that the bill is making its way through Parliament and it is therefore "live" policy. The information held relates to Interdepartmental correspondences between Ministers and it is part of the policymaking process through the Home Affairs Committee.

Scope of the case

13. The complainant contacted the Commissioner on 14 November 2015 to complain about the way his request for information had been handled.
14. The Commissioner has investigated whether the DCLG is entitled to rely on sections 35(1)(a) and 35(1)(b) in respect of the information it is withholding. This notice sets out the Commissioner's decision.

Reasons for decision

Background

15. The statutory Right to Buy ("the RtB") was introduced in October 1980 and gave council tenants the right to buy their own homes. To date, approximately 2 million council properties in England have been sold as a consequence of this right. Generally, however, assured tenants of housing associations have not had the right to buy on the same terms as council tenants.

16. The Conservative Party's 2015 Manifesto contained a commitment to "extend the RtB to tenants in housing associations to enable more people to buy a home of their own". It also said that we will fund the replacement of properties sold under the Right to Buy by requiring local authorities to manage their housing assets more efficiently, with the most expensive properties sold off and replaced as they fall vacant.
17. The Queen's Speech in May 2015 announced that a Housing Bill would be introduced to "dramatically extend the RtB to the tenants of housing associations – putting home ownership within the reach of 1.3 million more families". Since then Ministers have considered a range of detailed options, and the withheld information relates to these discussions.
18. The National Housing Federation ("the NHF") put a proposal to Government in September 2015 which, if accepted, would involve the extended RtB being implemented on a voluntary basis.
19. On 7 October 2015, the Prime Minister announced that agreement had been reached on the NHF's offer, which means that implementation of the policy can begin in 2016/17.
20. The discounts offered under the voluntary RtB will be paid for by receipts raised from the sale of vacant "high value" local authority owned housing. The provisions regarding the sale of high value vacant housing were subsequently set out in the Housing and Planning Bill, though Government also confirmed that further details about the high value vacant housing policy would be provided separately.

Section 35 – formulation or development of government policy, etc

21. The DCLG has confirmed to the Commissioner that it is relying on section 35(1)(a) to withhold the information which the complainant has requested.
22. Section 35(1)(a) states –

"Information held by a government department or by the National Assembly of Wales is exempt information if it relates to

(a) the formulation or development of government policy,

The DCLG's representations

23. The information which the complainant seeks clearly relates to the Government's intention to extend the RtB and therefore to 'government policy'.

24. The DCLG has informed the Commissioner that the detail of the policy and the final policy approach remain subject to clearance by the Department's Ministers and Cabinet by way of the Home Affairs Cabinet Committee.
25. The DCLG notes that a voluntary agreement has been reached with the National Housing Federation ("the NHF") to extend RtB discounts to tenants of housing association properties. Nevertheless, the DCLG asserts that the implementation of this policy still needs to be developed and therefore releasing the information could potentially weaken the Government's position in further negotiations with the NHF.
26. The DCLG points out that both the RtB extension and the sale of high value vacant housing have clauses within the Housing and Planning Bill. By disclosing the requested information at this time could potentially weaken the Government's position in Parliament, particularly because it is information which has been provided to Ministers before detailed policy development has taken place.
27. The DCLG understands and accepts the Information Tribunal's view that policy formulation and development is not a "seamless web" and that, in most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between.
28. In the case of the RtB, the original a policy decision stems from 1980. This was followed by an on-going period of implementation.
29. The extension of the RtB is a completely new stage: It requires an entirely fresh policy formulation and development phase, with a decision needed by Ministers and the Home Affairs Cabinet Committee before the detail of the extended RtB and sale of high value vacant housing becomes decided government policy.
30. In the DCLG's opinion, whether the policy process is in the "formulation" as opposed to "development" stage, it will not affect whether the exemption is engaged. The DCLG points out that it has been undertaking a period of discussion with its partner organisations, refining analyses as the policy process progresses. Final detailed decisions by Ministers have yet to be taken in the light of these considerations and this means that the "formulation" stage has not yet been concluded.
31. Whilst the DCLG accept that an announcement about the RtB extension has already been made, it points out that this was a high-level announcement of policy aims: The details of the final policy have still to be worked out.

32. The DCLG assert that this is not an unusual scenario for many policy announcements; particularly in the early days of a new Government and where many policies, such as the RtB extension, are in the process of "formulation or development" as opposed to "implementation" of a decided policy.
33. The DCLG accepts the Commissioner's guidance and case law decisions, in respect of the interpretation of the term "*relates to*". It accepts that the term is capable of being interpreted broadly, and it points out that, where there is sufficient link between the information in question (i.e. policy formulation documents for right to buy extension through the sale of high value vacant housing) and a Government policy or policies (extension of Right to Buy and sale of high value vacant housing) then the exemption will be engaged.
34. At the time the complainant made his request, the policy formulation/development stage had not been completed and at the time the DCLG made its response to the Commissioner, this process is still on-going. This is because the definition of "high value" has not been determined and it will be informed by the data currently being collected from local authorities about their housing stock.
35. At the time the request was made, the Housing and Planning Bill had not been introduced to the House of Commons. This demonstrates that the policy to extend the RtB was not yet completed. As such, the requested information can clearly be seen to concern to the development of this particular policy. The requested information will inform the final policy decision to be taken by Ministers.
36. The policy, and the detail of the extended RtB, including the sale of high value vacant housing, will not be determined until the Housing and Planning Bill has been debated, Royal Assent has been granted, and secondary legislation has been made.
37. The DCLG has considered the provisions of sections 35(2) and 35(4). Whether some of the information could be considered "statistical" or not, the fact is that the policy decision has yet to be made.
38. Where the requested information falls within section 35(1)(a), section 35(4) provides that particular regard shall be had to the public interest served by disclosing factual information used, or to be used, to provide an informed background to decision-taking.
39. In this case, the DCLG considers that section 35(4) does not apply. In the opinion of the DCLG, the information which is the subject of the complainant's request is not reasonably capable of being characterised as factual information which is intended to provide an informed

background. Rather, it is an entirely unique piece of advice setting out key data and policy issues, upon which decisions will be taken.

Section 35(1)(b) Communications between Ministers

40. Some of the withheld information which the DCLG is subject to its application of 35(1)(b). Under this section information is exempt from disclosure if it relates to Ministerial communications.
41. The withheld information comprises a communication between the Secretary of State for Communities and Local Government and the Chair of the Home Affairs Committee at the Cabinet Office.
42. The DCLG informed the Commissioner that it has considered the provisions at section 35(2) and 35(4) of the FOIA. The DCLG advised the Commissioner that the Ministerial communication comprises factual information which states out key data and policy issues, upon which decisions will be taken.
43. The Commissioner has examined the withheld information and has determined that the exemptions provided by sections 31(1)(a) and 35(1)(b) have been properly engaged. The Commissioner is now required to consider whether it is in the public interest for the information to be disclosed or whether it should continue to be withheld.
44. The Commissioner acknowledges that there is some overlap between the two exemptions relied on by the DCLG. He has considered the withheld information as a single body of information and consequently he has considered the public interest in respect of that information. The Commissioner's rationale for this approach is that the Ministerial communication relevant to this case is clearly part of the policy-making process and therefore his public interest considerations apply to both sections 35(1)(a) and 35(1)(b).

The public interest test

Arguments which favour the disclosure of the requested information

45. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of publicly held information. Disclosure of the information in this case would enable the public to better understand of how the Government formulates and develops a policy which will eventually form the basis of a Bill to be laid before Parliament.
46. In this case, the DCLG recognises that disclosure of the withheld information would promote transparency concerning the Government's approach to the extension of the RtB. It acknowledges the strong public

interest in the withheld information, given that the extension of the RtB is a key area of government policy which will impact on a significant number of citizens.

47. The Commissioner recognises the importance of the RtB policy to the public and must ascribe appropriate weight to it.

Arguments which favour the continued withholding of the requested information

48. It is generally recognised 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. This is particularly the case where the advice will be considered by ministers during the formulation and development of a government policy.
49. It is also recognised that Ministers should be able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and distraction. This so-called "safe space" is needed in appropriate circumstances to safeguard the effectiveness of the policy process. This is equally the case for section 35(1)(a) and for section 35(1)(b), where there is significant public interest in protecting Ministerial discussions and the collective decision making process.
50. The protection of the policy process merits safe space and the need prevent the policy itself from being adversely affected. The RtB extension policy is a high-profile area of government policy. It rightly attracts much public and media attention, and its effectiveness and success is of significant importance to the Governments fiscal and social strategies at this time.
51. Disclosure of the requested information would inevitably attract national media coverage and public speculation, giving the public (and the Housing Associations and Public Authorities) a potentially inaccurate and misleading impression of a yet-to-be fully decided policy.
52. Should the withheld information be disclosed at this time, ministers would have to focus their efforts on explaining the various options which will eventually be debated when the Housing and Planning Bill is introduced to the House of Commons. This would represent unnecessary and avoidable effort and it would not necessarily succeed in correcting any misunderstandings which might arise from disclosure. It is possible that officials and Ministers would be prevented from making objective and reliable decisions based on their analysis of the advice.

53. It is important for the local government sector to buy-in to the policy. Disclosure of the requested information may jeopardise this if local authorities are led to believe that government would be putting forward a particular policy approach in terms of the sale of high value vacant homes. This could unnecessarily raise concerns and could ultimately waste public funds if the local authorities were to take action to avoid selling such properties.

The balance of the public interest and the Commissioner's conclusion

54. The timing of the complainant's request is relevant to the Commissioner's decision in this case.
55. It is clear to the Commissioner that the formulation or development of the extension of the RtB policy is yet to be completed and therefore there is a real risk of prejudicing the policy development process by disclosing the requested information.
56. The detail of the RtB extension and its funding through the sale of high value vacant housing is still subject to debate in Parliament. It is through the Parliamentary process that the fully determined policy will be scrutinised, and it is at that juncture that informed transparency of the policy and the accountability of ministers can be gained by the wider public.
57. Having considered the public interest arguments associated with the requested information, the Commissioner has decided that greatest weight should be given to the need to maintain an appropriate degree of safe space. This space will allow ministers to consider what are live policy issues without the distraction and interference which would likely flow from the requested information's premature disclosure.
58. The Commissioner has concluded that the DCLG has properly applied sections 35(1)(a) and 35(1)(b). The Commissioner's decision is therefore that the DCLG is entitled to withhold the requested information.

Right of appeal

59. 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

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

60. 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.
61. 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
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