

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 1 July 2019

**Public Authority:** The Department for Environment, Food & Rural Affairs

**Address:** Nobel House  
17 Smith Square  
London  
SW1P 3JR

### Decision (including any steps ordered)

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1. The complainant has requested information from The Department for Environment, Food & Rural Affairs ("Defra") about a multi-agency working group looking at issues around unlicensed moored houseboats. Defra responded and provided some of the requested information but withheld some of it under section 35(1)(a) and section 40(2) of the FOIA.
2. The Commissioner's decision is that Defra was correct in relying on section 35(1)(a) to withhold the information.
3. The Commissioner does not require any steps to be taken.

## Request and response

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4. On 24 May 2018 the complainant made the following request for information under the FOIA:

*"I refer to a letter from Dr Therese Coffey MP, Parliamentary Under Secretary of State for the Environment, sent from Nobel House, dated 18th April 2018 (the date is handwritten so it might be 15th April 2018), which reads as follows:*

*"Thank you for your letter of 29th March on behalf of your constituent about congestion on the River Lea. The responsibility for individual waterways sits with the respective navigation authority. I am aware, however, that the rise in the number of houseboats is an issue for all navigation authorities as more people choose to make houseboats along our waterways their homes.*

*My officials have pulled together a group comprising of representatives from a number of interested organisations, including local government, the Environment Agency and a number of navigation authorities which includes Canal & River Trust. The group's remit is to serve as a platform for discussions to take place on a number of issues around moored houseboats. Although these discussions are at an early stage, I can reassure your constituent that there is a clear wish amongst the members of the group to find appropriate solutions that balance the needs of waterways users against those who choose to live on our inland waterways."*

*Please provide me with the following information regarding the above letter:*

*The name of the group;*

*The date the group was established;*

*A list of the organisations represented in the group and the job title of each organisation's representative including any DEFRA representative(s);*

*The dates of the group meetings to date;*

*The group's terms of reference;*

*The contact details for how the public may contact the group;*

*Communications from DEFRA to the group members inviting them to*

*join the group, with any explanatory memoranda or reports that were sent with the invitations;*

*The agendas for the group meetings;*

*The reports, spreadsheets, documents and other information created by or for the group; and the minutes or notes of the group meetings to date."*

5. Defra responded on 22 June 2018 and confirmed that parts one, two, five and six of the request were not held. It provided some information within the scope of the request under parts three and four. However, Defra cited section 40(2) regarding parts seven and eight of the request and some of part three, and section 35(1)(a) as its reason for withholding information at parts seven, eight and nine of the request.
6. The complainant asked for an internal review which Defra provided on 13 September 2019. The review looked solely at the application of section 35(1)(a) as the complainant had accepted that some of the requested information was third party personal data and did not ask for this to be reviewed. Defra maintained its position regarding section 35(1)(a).
7. Prior to the review, the complainant had sent Defra the following information request on 17 August 2018:

*"Please treat this request for information as a request under the Freedom of Information Act 2000. I refer to your response to my information request [reference number given]. Please provide the following information:*

  1. *The document with the file name "170510\_background-brief.docx" that was attached to the email from DEFRA dated 7th November 2017 inviting potential participants to indicate preferred dates for an initial meeting.*
  2. *The letter from Secretary of State Michael Gove in response to letters from MPs raising concerns around illegally [sic] moored houseboats that was referred to in the DEFRA email of 7th November 2017 above."*
8. Defra responded to this request on 18 September 2018 and withheld the requested information under part one, citing section 35(1)(a) but provided the information at part two of the request with redactions made for third party personal data.

9. The complainant asked for an internal review on 4 October 2018 about the application of section 35(1)(a) to part one. Defra did not provide an internal review and a complaint was made to the Commissioner.
10. It was agreed during the Commissioner's investigation into both these complaints that there was nothing further to investigate regarding the second request detailed in paragraphs 7-9 because the information that had been withheld under part one (the background brief) had actually formed part of the scope of the first request. It was probably not clear to the complainant that the attachment she subsequently requested from the response to her first request had also been withheld under the section 35 exemption. In requesting it again, part one became a repeat request.
11. As Defra had provided the complainant with the information requested at part two of her second request, the Commissioner suggested that there was nothing further to investigate and the complainant agreed that her second complaint could be closed as the outstanding information (the background brief) would be investigated as part of her first complaint.
12. On 7 June 2019, after the Commissioner's investigation had begun, Defra released the agenda which had been previously withheld under section 35. This was now provided in its entirety minus some redactions for third party personal data.

## **Scope of the case**

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13. The EIR provides an applicant with the right to formally request access to environmental information. Regulation 2(1) of the EIR clearly defines what environmental information is for the purposes of these regulations. Defra has stated that the request does not fall within the definitions of environmental information as set out in the regulations. The Commissioner's view is that, as no policy has been determined, the requested information is too far removed from affecting or being likely to affect the elements of the environment. Additionally, the complainant has not suggested that the EIR should have been considered. Therefore this request has been investigated under the FOIA.
14. The complainant contacted the Commissioner on 10 December 2018 to complain about the way her request for information had been handled.
15. The Commissioner considers the scope of this request to cover what was withheld from the complainant under section 35(1)(a) of the FOIA.

## Reasons for decision

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

16. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

*(a) The formulation or development of government policy...*

The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

17. The Commissioner's guidance states that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant minister.
18. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
- the final decision will be made either by the Cabinet or the relevant minister;
  - the government intends to achieve a particular outcome or change in the real world; and
  - the consequences of the decision will be wide-ranging.
19. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
20. The Commissioner is satisfied that the information that has been withheld falls into the class of information covered by section 35(1)(a). Defra has confirmed that the government policy this information relates to is that on the regulation of waterways, specifically that around unlicensed moorings. The specific information consists of emails, a briefing note, the agenda and minutes of a meeting concerning the initial discussion of a multi-agency group on houseboats in order to further public understanding of the issue.

### Public interest test

21. Even though the Commissioner considers the exemption to be engaged, the public interest test must be considered because the exemption is qualified. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure. There is no automatic public interest in non-disclosure just because it falls within this exemption.<sup>1</sup>
22. Section 35(1)(a) covers any information relating to the formulation and development of government policy. The Commissioner's guidance says that public interest arguments should focus on potential damage to policymaking from the content of the specific information and the timing of the request. Arguments will be strongest when there is a live policy process to protect.

### Public interest in disclosing the information

23. Defra recognises the argument that there is public interest in disclosing information concerning the initial discussion of a multi-agency group on houseboats in order to further public understanding of this issue and facilitate accountability and transparency.
24. The complainant's view is that Dr Coffey MP wrote to Marcus Jones MP on 19 July 2018, stating that it was agreed at the meeting on 4 December 2017 that user groups would be invited to attend any future meetings. The letter also said that "*there is every intention to ensure that the views of those who represent boat dwellers are taken into account*". The complainant argues that representatives of boat dwellers need to understand the background to an invitation to attend future meetings and to make publicly available what was discussed at the December 2017 meeting.
25. The complainant goes on to say that the meeting in December 2017 was held in secret at the instigation of the then Secretary of State Michael Gove, in response to letters from MPs raising concerns about "illegally [sic] moored houseboats". She points out that the UK's estimated 50,000 plus boat dwellers have had no opportunity to put their case regarding the lawfulness of their moorings. As the group's activities

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf>

could result in very serious consequences for boat dwellers, namely the loss of their homes, the public interest in accountability and transparency outweighs the public interest in withholding this information.

26. The complainant continues by expressing the view that new Government policy will not be balanced, equitable or objective if information is withheld at a formative stage from those who will be most affected by that policy. The complainant's view is that only those whose agenda is to remove boat dwellers is being considered.

#### Public interest in maintaining the exemption

27. Conversely, Defra explained to the Commissioner that in applying the exemption at section 35(1)(a) of the FOIA, it balanced the public interest in withholding the information against the public interest in disclosure. Defra recognised the argument that there was some public interest in disclosure of information concerning the initial discussion of a multi-agency group on houseboats in order to further public understanding of the issue and facilitate accountability and transparency.
28. Defra balanced against the arguments in favour of release, that it considered information in relation to this meeting was and is subject to ongoing consideration and that disclosure would prejudice any policy intentions and implementations. Defra provided context by explaining that the issue of unlicensed moorings on waterways is a policy area that is keenly felt by those it affects. It describes how there has been a consistent lobbying campaign on both sides of the debate. As a result Defra believes that the preservation of a safe space where stakeholders feel they can contribute freely is paramount to achieving a balanced and objective view of the issues. Defra considers that the application of section 35 was correct at the time and that the exemption still applies to the remaining withheld parts of the information requested.
29. Defra believes that the information it withheld relating to communications from Defra to the group members inviting them to join the group, with any explanatory memoranda or reports that were sent with the invitations falls under section 35(1)(a) for the reasons set out below.
30. The withheld information forms part of a live policy discussion. Releasing it would be misleading to the public as to the government's intentions because it contains an incorrect policy position which cannot, for obvious reasons, be reproduced here.

31. Defra states that when the meeting was convened, policy officials were in the early stages of policy development in this area. Policy development it would appear, has not moved on since then. Defra stresses that, if the government decides to proceed with developing this policy area, then it would want to hear openly from all perspectives. Defra argues that release of the information could affect the department's ability to consult stakeholders in the development of the policy as there may be an implication that a particular view has been established as the Government's position which would be incorrect.
32. Regarding the withheld minutes, Defra has not reached a point in the policymaking process to say for certain that the issues under consideration are a 'problem' that requires policy development. It believes that releasing the information could antagonise stakeholders and impede an open conversation in this policy area. Defra has not adopted the language included in the minutes and perceives it as likely to have a negative impact on the ability of stakeholders to contribute to future policy development process should the text be released. The text reflects the opinion of a government agency advisor as fact. Releasing it therefore could hinder the development of a future policy position.
33. Similarly, release of the withheld background brief gives an overview of the issues that were discussed within this meeting with a view to identifying where new Government policy may or may not be required. Defra asserts that disclosure would prejudice the outcome of discussions.
34. Defra argues for the preservation of a safe space where stakeholders feel they can contribute freely as this is paramount to achieving a balanced and objective view of the issues. It acknowledges that this is an emotive subject which, if the requested information were to be disclosed, could inhibit free and frank discussions. The loss of candour would damage the quality of the advice and lead to poorer decision-making which could prejudice any policy outcome.
35. Defra further explains that this policy position has recently moved to the Floods and Water Directorate and that the new team is taking stock of previous policy development work done. Release of this information would impede this process.

### **The balance of the public interest**

36. The Commissioner acknowledges the public interest arguments which the complainant has put forward in favour of disclosing the requested information and the strength of feeling amongst boat dwellers on both sides.



37. However, in line with the judgment in *APPGER v ICO and Foreign and Commonwealth Office (UKUT 0377 (ACC), 2 July 2015)*.<sup>2</sup> The Commissioner has only considered the public interest factors existing at the time the request was first considered by Defra.
38. The Commissioner's decision is based primarily on the fact that the two main criteria against the public interest in favour of releasing the information as set out in her section 35 guidance have been met. Policy development at the time of the request was at an early stage and was also 'live'. Defra assures the Commissioner that the issue is still 'live', and that no final decision has been made regarding government policy in this area. Defra stresses that all parties will be given the chance to put their views across to ensure that there is a balanced and equitable discussion of the issues. It intends to make information available as to how that will be managed in due course. The Commissioner accepts that Defra requires a 'safe space' to develop its policy and agrees, on balance, that disclosing potentially misleading information before Defra has consulted with all parties would damage policy-making and that this would not be in the public interest.

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<sup>2</sup> <https://www.extraordinaryrendition.org/documents/all-other-documents/send/2-all-other-documents/14-ut-final-decision.html>

## Right of appeal

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39. 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)

40. 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.
41. 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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