

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2019

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has asked the MHCLG for a submission for funding and the development plans made by the Old Oak and Royal Park Development Corporation to the Housing Infrastructure Fund.
2. The Commissioner's decision is that the MHCLG has correctly applied the provision of section 35(1)(a) of the FOIA to the information which the complainant has asked for.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. The complainant wrote to the MHCLG on 21 September 2018, asking to be given information concerning the request for funding made to the Housing Infrastructure Fund ("the HIF") by the Old Oak and Royal Park Development Corporation ("the OPDC"). Contained within the complainant's letter was the following request for recorded information:

"That the OPDCs HIF submission and development plans be fully shared with Cargiant so we are able to properly assess the impact on our business (this should be treated as a request under FOIA/EIR)."
5. The MHCLG responded to the complainant's request on 22 October 2018, referring to his request as: "Disclosure of the HIF submission made by or on behalf of the OPDC".

6. The MHCLG advised the complainant that it holds this information and that it was refusing its disclosure in reliance on section 35(1)(a) of the FOIA. The MHCLG said that the information relates to the formulation and development of government policy and that, on balance, it is not in the public interest to disclose the information at this time.
7. On 21 November 2018, the complainant's solicitors wrote to the MHCLG and asked it to review its decision to refuse their client's request. The solicitors informed the MHCLG that their client would ask it to consider release of "that part of the HIF submission made by or on behalf of the OPDC only in so far as it relates to a part of the submission that:
 - a) Describes compulsory acquisition of our client/Car Giant's site;
 - b) The impact of OPDC's proposals upon our client/Car Giant's business; and
 - c) Includes any assumptions in relation to land valuation or compensation attributable to compulsory acquisition of our client/Car Giant's site."
8. The complainant's solicitors advised the MHCLG that its client is happy for MHCLG to redact or withhold entirely all other information comprised in the HIF submission. The solicitors said, "We do not consider that the disclosure of a description of a proposal to compulsorily acquire our client's site or impact upon his business can sustainably be argued to infect the government's ability freely to consider whether or not to do so".
9. The solicitors added, "Our client does however have significant concerns that information that OPDC has provided to MHCLG on the above points could either be misleading or inaccurate. Reliance upon it during MHCLG's decision making process could infect the validity of your decision, or render it susceptible to judicial review. Whilst there is merit in the government having a safe space to develop ideas and reach decisions it is of paramount importance and in the public interest that it proceeds to do so from a factually correct basis".
10. On 20 December 2018, the MHCLG wrote to the complainant to advise him of its internal review decision. The MHCLG said, "Having reviewed this case, I have decided that the public interest is best served by applying the exemptions at section 35(1)(a) to the requested information. I have concluded that the Department responded to your original request correctly".

Scope of the case

11. The complainant contacted the Commissioner on 19 March 2019 to complain about the way his request for information had been handled.

12. The Commissioner advised the complainant that the focus of her investigation would be to determine whether the MHCLG is entitled to withhold information from him in reliance on section 35(1)(a) of the FOIA.

Background information

13. The MHCLG has provided the Commissioner with information about the Housing Infrastructure Fund which it considers is relevant to her consideration of the complainant's request. That information is reproduced below:
14. The £5.5 billion Housing Infrastructure Fund is available to local authorities for infrastructure to unlock housing development. Government believes it will help to unlock up to 650,000 new homes by supporting infrastructure funding in areas of greatest housing need. The funding, allocated to local authorities on a competitive basis, is being provided to fund physical infrastructure such as roads, community facilities and utilities.
15. The Fund is divided into 2 streams:
 - Marginal Viability Funding: available to all single and lower tier local authorities in England – to provide the final or missing piece of infrastructure funding to get additional sites allocated or existing sites unblocked quickly.
 - Forward Funding: available to the uppermost tier of local authorities in England – for a small number of strategic and high-impact infrastructure projects.

Reasons for decision

Section 35 – Formulation of government policy, etc.

16. The MHCLG has confirmed to the Commissioner its reliance on section 35(1)(a) of the FOIA.
17. Section 35(1)(a) provides an exemption to the duty to disclose information held by a government department if it relates to the formulation or development of government policy.
18. The MHCLG has informed the Commissioner that the policy to which the information relates is support for housing infrastructure (housing supply). It says, "The policy is one of "government policy" as the final

policy approach to the Housing Infrastructure Fund is subject to clearance by the Department's Ministers".

19. 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. Policy can be formulated and developed within a single government department and approved by the relevant minister.
20. 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.
21. Section 35 is class-based exemption which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. Section 35 is not a prejudice-based exemption and therefore the public authority does not have to demonstrate evidence of the likelihood of prejudice.
22. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of a government policy.
23. In this case, the MHCLG has advised the Commissioner that its support for housing infrastructure policy is a process which happens as a series of discrete stages, each with a beginning and end, with periods of implementation in between.
24. The MHCLG says, "...the fact that the Department has been undertaking a period of discussion with interested local authorities, refining analyses as the policy process progresses, and final detailed decisions by Ministers have yet to be taken on the decided policy in the light of such considerations, means the "formulation" stage has not yet been concluded".
25. The Department asserts that, although there has been an announcement about the successful areas it is working with through forward funding or development, the process remains a competitive one and success at this stage is not a guarantee of funding. The MHCLG adds, "Successful bids are still subject to an assessment process, prior

to any decisions on the allocation of funding and public announcement” and therefore the requested information relates to the formulation or development of its policy rather than to the implementation of a decided policy.

26. The Commissioner is satisfied that the withheld information falls into the class of information covered by section 35(1)(a). It relates to the formulation or development of government policy in relation to the provision of funding for infrastructure to unlock housing development. The Commissioner accepts that this is a developing policy area which, at the time the complainant made his request, was not complete and has not been completed since that time.
27. The Commissioner acknowledges that successful bids for the Housing Infrastructure Fund are still undergoing an assessment process and Ministers still need to make decisions on the allocation of funding and the final policy direction. Likewise, the Commissioner recognises that the withheld information relates to the policy in question and will inform the final policy decision to be taken by Ministers.
28. Having accepted that the withheld information engages the exemption provided by section 35(1)(a), the Commissioner must now consider whether the public interest favours its disclosure or its continued withholding.

The public interest test

29. The MHCLG recognises the general public interest in the disclosure of information for the purpose of promoting transparency and accountability, and particularly recognises the public interest in disclosing information in relation to the business of government. The Department accepts that such disclosure of information allows the Government to be accountable and open to the electorate and increases public trust and confidence in the workings of government.
30. Weighed against the above is the generally recognised and relatively strong public interest associated with ensuring there is an appropriate degree of safe space to allow officials are able to gather and assess information and provide advice to Ministers which will inform their eventual policy decisions.
31. Likewise, Ministers must be able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from the distraction that would likely flow if the withheld information was made public.

32. The need for a 'safe space' is widely accepted in order to maximise the effectiveness of the formulation and development of the relevant government policy.
33. In the Commissioner's opinion, these considerations carry most weight where the decision on policy has yet to be taken and the formulation or development process is still "live".
34. In its submission to the Commissioner, the MHCLG advised her of its belief that the need for safe space around the advice and final decisions on policy detail still prevail at this time.
35. In addition to protecting the 'safe space' needed for developing government policy, there is also a need to not adversely affect the policy itself. This is particularly so in the case of this high-profile area of the Government's policy which has attracted much public and media attention. The MHCLG argues that the effectiveness and success of its policy is of real importance to fiscal efficiency and crucial social issues that face our society. It says that nothing "...should detract from Ministers' ability reasonably to take policy decisions that will help to tackle those issues".
36. In this case, it is the Department's opinion that disclosure of the requested information would inevitably attract national media coverage. This in turn raises the possibility that the public would engage in harmful speculation based on a potentially inaccurate and misleading impression about the ultimate policy direction.
37. In order to avoid potentially significant adverse repercussions following the disclosure of the requested information, Ministers and officials would need to focus effort on explaining the various bid outcomes and assessment process. This, in the view of the MHCLG, would be unnecessary and avoidable effort, and should the Department be required to do this, it might not be successful in correcting any misunderstandings and their consequences.
38. If such an unhelpful state of affairs was to occur, officials and Ministers, under media and public pressure, might consider attaching less or more weight to certain factors rather than to ensuring that objective, reliable analyses could be arrived at.
39. The MHCLG alludes to, but does not elaborate on, the public interest in transparency which will be served when, "...information that has informed Ministers considerations and decision on the policy, and by Ministers and the Government then being accountable, at the appropriate time, for the decisions they have taken".

40. The timing of the complainant's request at a time when the government policy is still being developed has to be considered. Clearly 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 significantly reduced and so the public interest in maintaining the exemption deserves less weight. This is not the situation in this case as the policy to which the withheld information relates is still being formulated.
41. The Commissioner has examined the information which the MHCLG is withholding from the complainant. She has also considered the Department's representations in support of its position. On balance, the Commissioner considers that the public interest favours the continued withholding of the requested information. In the Commissioner's opinion there remains a need for an appropriate degree of safe space within which to consider live policy issues away from external interference and distraction and to protect the policy and the formulation/development process.
42. The Commissioner's decision is that the MHCLG has correctly applied the provisions of section 35(1)(a) to the information it is withholding from the complainant.
43. The Commissioner is mindful of the provision of section 35(4) of the FOIA. This requires her to have particular regard to the public interest which would be served by disclosing factual information which is used, or which is to be used, to provide an informed background to decision-taking.
44. The Commissioner notes that the withheld information is comprised of a business case submitted to the MHCLG for consideration with regard to the Housing Infrastructure Fund.
45. The Commissioner disagrees with the MHCLG's position that the withheld information "...is not reasonably capable of being characterised as factual information intended to provide an informed background". On the contrary it appears to be just that.
46. Notwithstanding her position that the withheld information contains factual information, the Commissioner considers that the greater public interest weight still favours maintaining the MHCLG's application of section 35(1)(a). The Commissioner also notes that, irrespective of her decision in respect of section 35(1)(a), the MHCLG would likely be able to successfully rely on at least one of the other exemptions to disclosure provided by the FOIA.

Right of appeal

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

48. 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.

49. 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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