

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 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 Ministry of Housing, Communities and local Government ("the MHCLG") for a copy of a report about CON29 services. The MCLHG confirmed that it holds the report which the complainant seeks but, on the grounds that the report relates to the formulation and development of government policy, the Department refused to disclose it in reliance on section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the MHCLG has properly applied the provision of section 35(1) and therefore it is entitled to withhold the CON29 Report it holds.
3. No further action is required in this matter.

Request and response

4. On 11 March 2019, the complainant wrote to the MHCLG and made the following request for information:

"We understand that late in 2018, alongside the Secretary of State for BEIS, you were the recipient of a report authored by Mike Westcott Rudd, Board Legal Advisor and Head of Corporate Legal and Assurance Services at Her Majesty's Land Registry on the subject of the CON29.

I am making a request under the Freedom of Information Act 2000 for a copy of that report."

5. The MHCLG sent its response to the complainant on 3 April 2019. The Department confirmed that it holds the information the complainant asked for but advised him that it is exempt from disclosure under section 35(1)(a) of the FOI Act as it relates to the formulation / development of government policy.
6. On 8 April 2019, the complainant wrote to the MHCLG to ask that it undertakes an urgent review of its decision to withhold the Report he had requested.
7. Having completed its review, the MHCLG wrote to the complainant on 20 June 2019 to advise him of its final decision. The MHCLG determined that the exemption provided by section 35(1)(a) had been properly applied.

Scope of the case

8. The complainant contacted the Commissioner on 30 June 2019 to complain about the MHCLG's withholding of the information he had requested.
9. The Commissioner advised the complainant that her investigation would therefore focus on the MHCLG's application of exemption to disclosure which is provided by section 35(1)(a) of the FOIA.

Background information

10. CON29 is a document known as Conveyancing Form 29 which was put together by the Law Society to standardise the questions asked by lawyers and conveyancers to supplement the information contained within a Local Land Charges Search.
11. The information asked for is considered necessary before advising clients on purchases of land and property. The questions raised on the CON29 Form cover matters which might significantly affect the use or value of a property and so the answers to those questions is important to buyers and lenders.
12. The information required to reply to CON29 questions is held within a range of departmental systems within local authorities. That information, together with a search result from the Local Land Charges Register, is an essential part of the conveyancing and borrowing process.

13. Together, the CON29 Form and the search result from the Land Charges Register is known as a "local search" because it is issued by local authorities.
14. The CON29 service levels differ from authority to authority in terms of the speed of service and cost.
15. In January 2017 the MHCLG commissioned Her Majesty's Land Registry ("HMLR") to lead a review of the CON29 service and report to the Secretaries of State for Housing, Communities and Local Government and for Business, Energy and Industrial Strategy ("BEIS").

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 to is 'improvement policy work around the CON29 service'. The report requested by the complainant directly relates to this policy work as it was commissioned specifically for that purpose.
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. The MHCLG has provided the Commissioner with a copy of the report it is withholding. The report is entitled, 'CON29 Review (for MHCLG and BEIS) Final Report October 2018'.
24. Notwithstanding the Report's title, the MHCLG has advised the Commissioner that the report is a draft report which does not include formal HMLR recommendations. The MHCLG has assured the Commissioner that the Report is not a final version of the CON29 Review.
25. At the time of its receipt of the complainant's request, HMLR was still working on the Review. The requested report was part of the information required to inform the developing policy and it had not been submitted to ministers when the request was received.
26. Whilst the CON29 Review was concluded in July 2019 it was an area of policy development at the time the complainant submitted his request.
27. In view of what the MHCLG has told her, the Commissioner is satisfied that the withheld information engages the exemption provided by section 35(1)(a). The Commissioner will now go on to consider the public interest which prevailed at the time the MHCLG made its final decision in this matter.
28. The Commissioner acknowledges the public interest associated with the disclosure of official information which provides transparency and accountability of government and its decision making. Such disclosures increase the ability of the public to participate in decision making.
29. In this case, the Commissioner also acknowledges the more specific public interest favouring the disclosure of the requested report, which is in learning how the subject of Local Authority CON29 enquiries is being discussed within the MHCLG.
30. Weighed against the above is the public interest in favour of withholding the requested report concerns the impact disclosure would have had on the 'safe space' needed by the Department to operate effectively. This 'safe space' is required to allow Ministers and officials to discuss

sensitive topics freely, without premature public scrutiny or announcement.

31. The Commissioner must acknowledge that the requested report was part of the evidence which had been specifically commissioned to inform policy development. At the time when the complainant submitted his request, the report was still at draft stage and had not been submitted to ministers. The Commissioner must accept that the report was still being discussed by officials in various government departments including the MHCLG and final decisions had not, at that time, been made.
32. At the time of the MHCLG's internal review, there remained the need for the report to be disclosed and reviewed by department officials before its submission to the respective Secretary of State for the Ministry of Housing, Communities and Local Government and for Business, Energy and Industrial Strategy.
33. The 'safe space' associated with the withholding of the HMLR Report was necessary to allow officials to consider and deliberate its contents, to provide advice to ministers in full candour and to make their decisions. By prematurely releasing the draft report the MHCLG would likely have prejudiced the policy making process.
34. The benefits of improving transparency through the release of what is a draft report need to be weighed against the benefits of protecting the policy making process at the stage it was at when the request for information was received.
35. Foremost in the Commissioner's mind must be the fact that the draft report had not been submitted to ministers when the complainant's request was received.
36. In view of the above, and in recognition of the need to protect the safe space needed for officials to consider options, to make decisions and to develop government policy, the Commissioner has decided that the public interest favoured the withholding of the HMLR Report and therefore the MHCLG was correct to rely on the exemption provided by section 35(1)(a).

Section 35(2)

37. The Commissioner has considered the provision of section 35(2) of the FOIA. This states that:

"Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy, or

(b) for the purposes of subsection (1)(b), as relating to Ministerial communications.

38. The MGCLH acknowledges that the draft Report contains statistical information in the form of results from interviews carried out by HMLR and results from a survey carried out by the LGA which are reflected in the text, through pie charts, bar charts and in the survey results at Annex D.
39. Some of the statistical information is purely factual, such as answers to questions like 'list the departments and bodies which contribute data to answer CON29', and some of the information is the representation of personal opinions, such as 'identify and comment on any areas of the current process that they regarded as problematic'.
40. The MHCLG agrees that the statistical information contained in the draft report, that it is being used to inform the policy decision requires it to consider section 35(2).
41. In this case, the MHCLG again points to the fact that, at the time the complainant submitted his request in March 2019 policy in question still being developed and the review was not concluded until July 2019.
42. The requested Report was a draft report which had not been seen by Ministers. At the time of the complainant's request, no policy decision had been taken and the final report has still not yet been submitted to MHCLG ministers for a final decision on the respective policy.
43. In view of the MHCLG's representations in this matter, the Commissioner accepts that the statistical information contained in the draft Report is not exempt from s35(1)(a) due to the timing of the complainant's request. Section 35(2) was not engaged at the time of the original request, nor does it appear to be at the date of this notice.

Right of appeal

44. 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

45. 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.
46. 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
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SK9 5AF