

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: Fry Building
2 Marsham Street
London
SW10 4DF

Decision (including any steps ordered)

1. The complainant requested from Department for Levelling Up, Housing and Communities ("DLUHC") information relating to a smoking room constructed in the Ministry. DLUHC stated it neither confirms nor denies whether it holds the information requested, and cited section 31(3) by virtue of section 31(1)(a) (prejudice to law enforcement) of FOIA.
2. The Commissioner's decision is DLUHC is entitled to neither confirm nor deny whether it holds the information requested, and to rely on section 31(3) by virtue of section 31(1)(a) of FOIA. To do so would be likely to prejudice the prevention or detection of crime. The public interest favours maintaining this exemption. Therefore, the Commissioner does not require DLUHC to take any steps as a result of this decision.

Request and response

3. On 7 March 2022 the complainant wrote to DLUHC and requested information in the following terms:

"This is an information request relating to a smoking room that has been constructed in the Ministry since the appointment of the current secretary of state on 15 September 2021.

My understanding is that it is a small room that has been placed onto the balcony/roof of the Marsham Street building and that it is principally used by the secretary of state. Please provide the following information:

- What was the cost of constructing this smoking room?
 - Who has access to this smoking room?
 - Did the secretary of state request the construction of this smoking room? If it was not the secretary of state, who requested the construction?
 - Which members of the Ministry's SCS4, SCS3 and the secretary of state's private office staff were involved in approving the construction of this smoking room?"
4. On 4 April 2022 DLUHC responded and cited section 31(3) by virtue of section 31(1)(a) (prejudice to law enforcement). It stated that it neither confirms nor denies whether it holds information in scope of the request.
 5. On the same day the complainant asked DLUHC for an internal review, and asked DLUHC to clarify what it means by citing section 31(1)(a) of FOIA.
 6. On 26 April 2022 DLUHC provided its internal review response. It upheld its original decision to neither confirm nor deny whether it holds the information requested and explained its reasons.

Reasons for decision

Section 31 – law enforcement

7. Section 31(1)(a) of FOIA states:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice -

- (a) the prevention or detection of crime,"

Neither confirm nor deny

8. Section 31(3) states:

“the duty to confirm or deny does not arise if, or to the extent that compliance with section 1(1)(a) would or would be likely to, prejudice any of the matters mentioned in subsection (1).”

9. DLUHC cited section 31(3) by virtue of section 31(1)(a) and issued a neither confirm nor deny response to the complainant. It stated that to confirm or deny whether DLUHC holds the information requested, would likely prejudice the prevention or detection of crime.

10. DLUHC considered that disclosing whether or not the information is held, would present a real and significant risk to the security of the Department's buildings and specific whereabouts of senior individuals. DLUHC said it could potentially put into the public domain information that would make the Department and its Ministers and staff more vulnerable to crime, i.e. targeted by those wishing to engage in terrorist activities. It also said that it could possibly reveal information about the Department's security measures. DLUHC stated that it has a responsibility for ensuring the safety and security of its staff, Ministers and others, whilst they are on its premises or going about official business.

11. The Commissioner accepts that confirming or denying whether the requested information is held, would be likely to prejudice the prevention or detection of crime. He considers that in the responses from DLUHC, it has satisfied all three stages of the prejudice test set out on Hogan, and therefore accepts that section 31(1)(a) is engaged. He finds that the chance of prejudice being suffered from disclosure of the requested information is more than a hypothetical possibility; it is a real and significant risk.

Public interest test

12. Section 31(1) is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosure

13. DLUHC recognises that disclosure of information held by public authorities would increase transparency and accountability.

Public interest arguments in favour of maintaining the exemption

14. DLUHC stated that disclosing whether or not the information is held, it would be putting into the public domain information that can assist those with ill intent. To confirm or deny whether information is held, would potentially reveal information about the Department's security measures, which could be targeted by potential criminals. This would place its staff at an unacceptable risk, therefore, DLUHC concluded its argument that the public interest lies in favour of neither confirming nor denying that the information requested is held.

Balance of the public interest arguments

15. The Commissioner acknowledges that there is always public interest in the disclosure of information. This promotes the aims of transparency and accountability, which in turn promotes greater public engagement and understanding of the decisions taken by public authorities.
16. The Commissioner accepts that the security of DLUHC's ministers is paramount and outweighs all other considerations on confirming or denying whether the information is held. He considers that there is a stronger public interest in neither confirming nor denying whether the information in this case is held. This is because to do so would potentially reveal information about the DLUHC's security measures, which could be targeted by potential criminals. The Commissioner also accepts that it would present a significant risk to the security of DLUHC's buildings and the specific location of senior individuals. He considers the information requested would be likely to have a prejudicial effect on the prevention of a crime.
17. Having considered the arguments on the balance of the public interest test, the Commissioner concludes that the public interest in maintaining the exemption outweighs the arguments for disclosure in this case.

The Commissioner's position

18. The Commissioner is satisfied that to confirm or deny whether or not DLUHC hold the information requested, would be likely to prejudice the prevention or detection of crime. Therefore, section 31(3) by virtue of section 31(1)(a) of FOIA is engaged and DLUHC was entitled to rely upon this exemption.

Right of appeal

19. 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

20. 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.
21. 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

Phillip Angell
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