

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 December 2022

Public Authority: Department for Levelling Up, Communities and Housing

Address: Fry Building
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information about proposed changes to the Local Government Transparency Code. The above public authority ("the public authority") provided some information, denied holding some information and withheld the remainder – relying on section 35 of FOIA (development of government policy) in order to do so.
2. The Commissioner's decision is that all the information engages section 35, but that the balance of the public interest favours disclosure of some of it. As the public authority failed to respond to the request within 20 working days, it breached both section 10 and section 17 of FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of the document titled "Government response to consultation on changes to the Local Government Transparency Code 2015". The public authority may redact each section titled "Government response."
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 26 June 2022, the complainant wrote to the public authority and requested information in the following terms:

"I would like to make a new information request. This request also relates to DCLG's 2016 consultation 'Strengthening Local Government Transparency: Consultation on changes to the Local Government Transparency Code 2015'.

"Please provide the following information:

1. The number of responses received to the consultation.
2. A list of organisations that submitted responses to the consultation.
3. A copy of any response received from the Cabinet Office.

Please also provide, if held:

4. Any breakdown or analysis of responses to the questions in the consultation.
 5. The most recent unpublished version or draft of any consultation outcome or Government response to the consultation.
 6. Any correspondence, meeting minutes, or other record that relates to the decision not to publish the outcome of the consultation."
6. The public authority responded on 23 August 2022. It provided the information it held within elements 1 and 2 of the request, but denied holding information within the scope of element 4. It confirmed that it held information within the scope of elements 4, 5 and 6, but relied on section 35 of FOIA to withhold this information – a position it upheld following an internal review.

Reasons for decision

7. The withheld information in this case comprises of a ministerial briefing note, a briefing note for a civil servant and a draft copy of the public authority's proposed response to a consultation it carried out in 2016. This latter document was prepared, but apparently never published.
8. The documents being withheld present various ways in which the Transparency Code could be reformed. It is clear that, at the time they were created, they formed part of an ongoing process to update the Transparency Code. For the purposes of determining whether or not section 35 is engaged, it is irrelevant whether the particular policy

process remained ongoing at the point of the request – if the documents relate to a policy process, they are covered. The Commissioner is therefore satisfied that section 35 is engaged in respect of all three documents.

9. On public interest, the Commissioner has consistently recognised that good policymaking is supported by allowing ministers and civil servants to have a safe space in which to develop their thinking and to test and evaluate new policy solutions. That need will be strongest when the policy process is “live” (ie. before a formal policy decision is taken) and will diminish after the Government has had space to announce the policy decision that has been taken.
10. The complainant argued that the policy process in this case was, at best, dormant and possibly complete because the consultation had finished in 2016 and no significant activity appeared to have taken place since.
11. The public authority maintained that proposals for reform were still being discussed. It noted that reforms proposed in the Procurement Reform Bill, currently before Parliament, would overlap with the requirements of the Transparency Code and, as such, it was possible that amendments to secondary legislation, affecting the Transparency Code would be put forward in 2023. The public authority noted that, whilst it had intended to deal with this issue earlier, two unexpected general elections (in 2017 and 2019) plus the pandemic had kept the issue away from the top of the priority list.
12. Whilst the Commissioner would have preferred to have been presented with less ambiguous evidence that this particular policy process remained ongoing, he does accept that there is no definitive evidence that the process has stopped. The withheld information certainly does not indicate that there was any intention (at least as late as 2018) to simply leave the Transparency Code in its current form. Whilst the Commissioner is of course an advocate for transparency both in local government and across the public sector, he accepts that, with Brexit, a global pandemic, a war and economic turmoil, the issue has necessarily struggled to get attention.
13. Having determined that the policy process remained ongoing at the time the request was responded to, the Commissioner is bound to accept that the public interest favours withholding the two briefing notes. These two documents discuss possible options that were, at the time and remain, under consideration. Civil servants should be able to suggest and evaluate policy options without concern that their views will be disclosed whilst the policy process is ongoing.

14. The Commissioner turns next to the Response document. This document gives a summary of the various stakeholder responses to the questions that were asked in the consultation – questions which are already in the public domain – each section also contains overview of how the public authority was (at the time the draft was created) planning to take those responses into consideration.
15. The Commissioner considers that the balance of the public interest favours withholding those sections that set out the Government's intended response – for the same reasons set out in paragraph 13. Whilst these sections will have gone through a certain degree of analysis, they remained draft proposals as the document was never published and thus formal ministerial endorsement had not occurred.
16. However, the remainder of the document contains factual information about how the various stakeholders (mostly local government) had responded to the consultation. Those facts will not change again, however long it takes for the government to either revise the Transparency Code or decide not to. The public authority may decide to carry out a fresh consultation, but that would not strengthen the argument for withholding this information.
17. Disclosing the factual analysis of the data received would not reveal any further information about the options the public authority was considering or any of the internal discussions that had or would take place. The Commissioner is therefore of the view that there is no longer a need for any safe space to protect information which is now six years old, nor is he persuaded that disclosing such information (which doesn't link any response to any particular stakeholder) would dissuade others from participating in such consultations in future.
18. Finally, the Commissioner is satisfied that the factual sections of the report can be considered and comprehended separately, even if they are severed from the more qualitative analysis that forms the "government response" sections.
19. The Commissioner therefore considers that the balance of the public interest favours disclosing these sections of the Report.

Procedural matters

20. The public authority breached section 10 of FOIA as it failed to confirm or deny that it held relevant information and provide any non-exempt information within 20 working days of receiving the request.
21. The public authority breached section 17 of FOIA as it failed to issue a refusal within 20 working days of receiving the request.

Right of appeal

22. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

23. 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.
24. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF