

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 October 2024

Public Authority: The Crown Estate
Address: 1 St James's Market
London
SW1Y 4AH

Decision (including any steps ordered)

1. The complainant has requested information relating to correspondence between the Crown Estate and the Duchy of Cornwall. The Crown Estate refused to disclose the information citing section 35(1)(a) (formulation or development of government policy) of FOIA as the basis for withholding the information.
2. The Commissioner's decision is that the Crown Estate was entitled to withhold the requested information under section 35(1)(a) of FOIA.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 12 December 2023, the complainant wrote to the Crown Estate under the title 'Leasehold Freehold Reform Bill' and requested information in the following terms:

"In connection with the above please provide copies of any correspondence between the Crown Estate and the Duchy of Cornwall".
5. On 20 December 2023, the Crown Estate sought clarification about the specific period which the request related to. The complainant responded on 17 January 2024 and clarified that their request was for information created from the year 2020 to the current time.

6. On 13 February 2024, the Crown Estate provided its response. It disclosed email correspondence between the duchy of Cornwall, the Crown Estate and the Department for Levelling Up, Housing and Communities (DLUHC) now the Ministry of Housing Communities and Local Government (MHCLG). It withheld personal information in the emails citing section 40(2) of FOIA. It also withheld other information citing section 35(1)(a) of FOIA.
7. Following an internal review on 10 April 2024, the Crow Estate maintained its original position to withhold the information under sections 40(2) and 35(1)(a) of FOIA.
8. The Commissioner has noted that the complainant is not challenging the redaction of personal information contained in those emails disclosed to him. In their most recent correspondence to the Commissioner dated 16 September 2024, they stated "It is precisely the application of section 35 about which I am appealing." Having seen the withheld information, the Commissioner is of the view that he will not consider the Crown Estates' application of section 40(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 13 April 2024 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether the Crown Estate was correct to rely on regulations 35(1)(a) of FOIA.

Reasons for decision

Section 35(1)(a)-formulation and development of government policy

11. Section 35(1)(a) of FOIA states that:

"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy."
12. Section 35 is a class-based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

13. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.
14. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing, or recording the effects of existing policy.
15. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case-by-case basis, focussing on the precise context and timing of the information in question.
16. 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.
17. The Crown Estate advised that it considered direct correspondence as well as correspondence where the Crown Estate and the Duchy of Cornwall had been copied into.
18. The Crown Estate has stated that the withheld information relates to the formulation or development of government policy. In this case, the policy was being formulated by the DLUHC (as it was called at the time) in consultation with other stakeholders such as the Crown Estate and the Duchy of Cornwall in order to understand the impact of legislative proposals on Crown bodies.
19. It states that the policy referred to at the time was the Leasehold Freehold Reform Bill. It argues that consultation with stakeholders is part of policy formulation, and that the information withheld comprises two meeting notes, one of which is in draft form. It says that both meeting notes detail discussions relating to the Leasehold Freehold Reform Bill but does not set out any views specifically put forward by the Duchy of Cornwall. It argues that on the basis that the substance of those meetings relates to matters that are part of live policy formulation, section 35 is engaged.
20. The Crown Estate argued that the subject of the meeting notes means that the exemption at section 35 (1)(a) is engaged. In so doing it cited the case of APPGER which was considered by the Upper Tribunal in the

case of *UCAS v Information Commissioner and Lord Lucas* [2015] AACR 25 at [46] where it said, “relates to” means that there must be “some connection” with the information or that the information “touches or stands in relation to” the object of the statutory provision.” (paragraph 18).¹

21. The Crown Estate has given particular attention to the period which it responded to the complainant’s request, that is in February 2024. It argues that the policy formulation was unquestionably live at the time of providing its response as the legislation was eventually passed in late May 2024.
22. The Commissioner has reviewed the withheld information, and the arguments provided by the Crown Estate. He is satisfied that the information relates to the said policy and at the time of the request, the policy was still in the formulation stage.
23. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
24. The Commissioner is satisfied that the withheld information relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

Public interest test

25. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner has considered the context of the information in order to determine whether the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

The complainant’s arguments

26. In their complaint to the Commissioner and their internal review request, the complainant argued that:

“It is a matter of public interest that in our democracy an unelected unaccountable “private estate” is engaged in meetings concerned

¹ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#interpretrelatesto>

with the “formulation of public policy” particularly since that same unaccountable unelected “private estate”, by virtue of it enjoying “Crown Immunity”, will not be bound by the provisions of any resulting legislation. The details of the meeting(s) in which representatives of this unaccountable unelected “private estate” are obviously a matter of public interest. The public interest would also be served by knowing if, as a result of the involvement of this unaccountable unelected “private estate”, Government policy was changed. In summary it is obviously in the public interest to have some understanding why in a modern democracy there is the bizarre situation in which an unaccountable unelected “private estate” attends meetings concerned with the formulation of Government policy when they are exempt from the legislation resulting from that policy. Equally it is in the public interest to be aware of what consequences, if any, followed from that bodies [sic] involvement in such meetings”

Public interest argument in favour of disclosure

27. The Crown Estate recognises that there is an inherent public interest in transparency and accountability particularly in relation to policy which will affect people’s daily lives. It also says that there is likely to be significant public interest in disclosure of policy information as it is likely to promote government accountability, increase public understanding of the relevant policy and enable public debate and scrutiny of the policy and the way it is developed.

Public interest arguments in favour of maintaining the exemption

28. The Crown Estate argued that the timing in this this case is an important factor especially where there is ongoing live policy making process which warrants protection.
29. It states that the purpose of section 35 is to protect and promote good government and is reflective of a longstanding constitutional convention of government and can be used to preserve a safe space in which policy options may be considered in private. It argued that the ongoing discussions warrant the protection of a safe space on the basis that a final position was not agreed with the Crown bodies.
30. It says that at the time it responded to the request, the Leasehold and Freehold Bill was in Parliament and engagement was ongoing. It says that the expectation of the parties involved was that the conversations with DLUHC would be conducted in confidence and that the principal purpose of the meetings recorded in the withheld notes were to respond to requests from the DLUHC to assist them in understanding the impact of legislative proposals on Crown bodies so that it can develop its policy for the Bill in an informed manner.

31. The Crown Estate argued that such conversations would have been less candid and less effective had there been an expectation that they would be released during the policy making process. It says that it is possible that the release of the withheld information would have a consequence chilling effect upon future discussions.
32. The Crown Estate maintain that the balance of public interest lies in the non-disclosure of the requested information. It argued that the disclosure of the withheld information would be counterproductive to the public interest in resolving any outstanding issues in an efficient manner without the deliberative process being inhibited or trust between the parties involved harmed.
33. The Crown Estate has argued that there is public interest in limiting any harmful effects caused by outside influence in maintaining the integrity of the policymaking process so that all policy options can be fully explored. It maintains that to disclose the information would undermine the process and result in a less robust, well considered and effective policies.
34. It is the Crown Estate's view that the release of such information would have a negative impact on the development of policy and could result in external interference and distraction on the safe space for policy debate within the department. It says that as the policy in question is still being considered and developed it believed there will be prejudicial effects if the information was disclosed.

Balance of the public interest

35. The Commissioner considers that in general, there is often likely to be significant public interest in disclosure of policy information, as it can promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.
36. The complainant has presented their arguments as to why they believe the information should be disclosed. Whilst the Commissioner has considered this, he also believes that the need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request is therefore an important factor.
37. The government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.

38. The Commissioner has already accepted that, at the time of the request, the policy process was at the formulation stage, and that the involvement of the Crown Estate was in direct response to requests from the DLUHC to assist them in understanding the impact of legislative proposals on Crown bodies so that it can develop its policy for the Bill in an informed manner.
39. The Commissioner therefore considers that 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 process of its formulation and development. Therefore, on balance the Commissioner considers that the public interest weight favours maintenance of the exemption and withholding the requested information.
40. The Commissioner's decision is that the Crown Estate has correctly applied section 35(1)(a) of FOIA to withhold the information.

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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