

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 July 2023

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested from the Department for Levelling Up, Housing and Communities ("the DLUHC") information relating to unsuccessful bids for the 'Levelling Up Fund'. The DLUHC withheld the requested information under section 35(1)(a) (formulation or development of government policy) of FOIA.
2. The Commissioner's decision is that the DLUHC was entitled to withhold the requested information under section 35(1)(a).
3. The Commissioner does not require the DLUHC to take any steps.

Request and response

4. On 20 January 2023, the complainant wrote to the DLUHC and requested information in the following terms:

“Please provide me with:

1. A list of all the unsuccessful bids for the second round of the Levelling Up Fund. For each unsuccessful bid please provide:

a. Legal name of lead applicant organisation

b. Bid Name

c. ITL1 Region

d. Country

e. Bid Value

f. A summary of the bid. I would like this to be the text provided as part of section 3.3 of the application form. If this is not possible, please provide an alternative summary.

g. The score it was given by officials* *According to the department’s explanatory note on the assessment and decision-making process: “The remaining 512 bids were assessed and scored by officials against the published criteria set out in the Prospectus and the technical note (Sections 3 and 4). These criteria covered strategic fit; deliverability; economic case; and, in Great Britain, the characteristics of place was also reviewed and scored. The assessment scoring against these criteria in Great Britain combined for a score out of 100, and 75 for Northern Ireland (where characteristics of place was not scored).”

2. According to the department’s explanatory note, six bids “were considered a Financial Due Diligence high-risk” by the programme’s senior responsible officers. Please provide me with the above information for each of these bids and copies of the senior responsible officers’ risk assessments.”

5. The DLUHC responded on 20 February 2023. In respect of parts 1 a. to g. it withheld the information under section 35(1)(a). In respect of part 2 it withheld the information under section 43(2).

6. On 22 February 2023, the complainant sought an internal review in respect of the DLUHC's application of section 35(1)(a) to parts 1 a. to g. of the request.
7. Following an internal review, the DLUCH wrote to the complainant on 21 March 2023. It maintained the application of section 35(1)(a)

Reasons for decision

Section 35(1)(a) – Formulation of Government Policy

8. Section 35 of FOIA states:

“(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to—

(a) The formulation or development of government policy”

9. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.
10. The Commissioner's guidance explains 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. Policies can be formulated and developed within a single government department and approved by the relevant ministers. The key point is that policymaking can take place in a variety of ways and there is no uniform process.
11. However, 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 ministers;
 - The government intends to achieve a particular outcome or change in the real world; and
 - The consequences of the decision will be wide-ranging.
12. Section 35 of the FOIA is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described, in this case being the formulation or development

of government policy. Classes can be interpreted broadly and will catch a wide range of information.

13. The DLUHC advised that the policy to which the information relates is round 3 of the 'Levelling Up Fund' ("the LUF"), as well as the potential funding of some unsuccessful shortlisted bids from round 2 of the LUF.
14. The DLUHC stated that it considers the policy to be at the formulation stage because:
 - Whilst the requested information relates to unsuccessful bids made in round 2 of the LUF, this information is being used to inform the ongoing policy development for round 3, for which the timing or format has not been finalised to allow for the possibility of changes following round 2. This was specified in the prospectus for round 2¹.
 - At the time of the request, development of the policy for round 3 of the LUF, had begun, with a submission on the future of the LUF having been submitted to the Secretary of State on 3 November 2022.
 - At the time of the request, development of a policy to fund certain unsuccessful shortlisted bids from round 2 had also begun (subsequently termed 'Capital Levelling Up Bids'), with discussions started on 19 January 2023.
15. The Commissioner has reviewed the withheld information, and the arguments provided by the DLUHC. He is satisfied that the information relates to the stated policy, and at the time of the request was in the formulation or development stage.
16. 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 effectively policies. In particular, it ensures a safe space to consider policy options in private.

¹ <https://www.gov.uk/government/publications/levelling-up-fund-round-2-prospectus/levelling-up-fund-round-2-prospectus>

17. 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

18. 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.

Public interest in favour of disclosing the information

19. It is understood by the Commissioner that the allocation of funding from the LUF will have significant economic impact. The Commissioner recognises that there is an inherent public interest that such a policy is subject to an appropriate level of transparency and accountability.
20. The DLUHC acknowledges that there is always a public interest in ensuring the information it holds is subject to appropriate transparency and accountability.

Public interest in favour of maintaining the exemption

21. The DLUHC stated that at the time of the request there was 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.
22. The DLUHC argues that, at the time of the request, the requested information directly related to the development of round 3 of the LUF, and the Capital Levelling Up Bids. Revealing this information would very likely lead to significant public interest, including that by MPs, local authorities, media outlets and the general public. This would erode the 'safe space' in which officials and Ministers are able to consider these policies without external pressures and cause a chilling effect on their discussions. This would damage their ability to participate in free, frank and objective discussions regarding the information and advice put before them.
23. The DLUHC further argues that there is significant public transparency about the allocation of funding to successful bids², and that this

² <https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attach>

transparency addresses the public interest in which local areas have received government funding.

Balance of the public interest

24. 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.
25. There is a compelling argument for disclosure of the information. The allocation, or non-allocation, of funding for bids under the LUF will have national economic impact, and there is a public interest in ensuring that this is subject to sufficient scrutiny.
26. 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.
27. 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.
28. The Commissioner has already accepted that, at the time of the request, the policy process was still ongoing, and that the non-successful bids for round 2 of the LUF were directly informing the development of round 3, as well as the associated 'Capital Levelling Up bids'.
29. 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.
30. The Commissioner's decision is that the DLUHC has correctly applied section 35(1)(a) of the FOIA to withhold the information.

Right of appeal

31. 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

32. 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.
33. 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

Daniel Perry
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
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SK9 5AF