

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 2024

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SWAP 4DF

Decision (including any steps ordered)

1. The complainant requested correspondence exchanged between the Department for Levelling Up, Housing and Communities, now the Ministry of Housing, Communities and Local Government (MHCLG), and the Duchy of Cornwall in relation to the Leasehold and Freehold Reform Bill. The MHCLG provided some information and withheld the remainder under sections 35(1)(a) (formulation or development of government policy) and 40(2) (personal data) of the FOIA.
2. The Commissioner's decision is that the MHCLG correctly applied section 35 to the request and the public interest favours maintaining the exemption. The Commissioner also finds that the MHCLG breached section 10(1) of the FOIA as it failed to respond to the request within the statutory timescale. The Commissioner does not require any steps to be taken.

Request and response

3. On 12 December 2023, the complainant wrote to MHCLG and requested information in the following terms:

"In connection with the above [the Leasehold and Freehold Reform Bill] please provide copies of any correspondence between the Department for Levelling Up and the Duchy of Cornwall".

4. MHCLG responded on 6 March 2024 and provided some information and stated other information held relevant to the request was exempt under sections 35 and 40(2) of the FOIA.
5. On 10 March 2024 the complainant requested an internal review, specifically in relation to MHCLG's application of section 35 to the request. They also reiterated that they were only interested in correspondence with the Duchy of Cornwall.
6. MHCLG provided the outcome of its internal review on 3 April 2024 and upheld its decision that section 35 of the FOIA applied to the request.

Scope of the case

7. The complainant contacted the Commissioner on 7 April 2024 to complain about the way their request for information had been handled.
8. The scope of the Commissioner's investigation into this complaint is to determine whether MHCLG correctly applied section 35 of the FOIA to the request.

Reasons for decision

Section 35 – formulation and development of government policy

9. Section 35(1)(a) FOIA provides an exemption from the duty to disclose for information relating to the formulation or development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
10. The purpose of subsection 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 policy options in private.
11. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.

12. The MHCLG advised that the withheld information relates to the formulation of the Leasehold and Freehold Reform Bill (the Bill), which is now an Act. It stated that:

"The Bill was introduced to Parliament on 27 November 2023 and received Royal Assent on 24 May 2024. Live policy development was ongoing throughout this period".

13. The MHCLG provided the Commissioner with more detailed representations to support the engagement of section 35 with regard to each piece of withheld information. The MHCLG pointed out that the content of the withheld information relates to live policy issues associated with the Bill and how proposed reforms would apply to the Crown. The issues referred to within the withheld information were subject to Parliamentary scrutiny at the time of the request and therefore subject to change.

14. The Commissioner's guidance on section 35¹ states that:

"The term 'formulation' of policy refers to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister who then decides which options to translate into political action.... The classic and most formal policy process involves turning a White Paper into legislation. The government produces a White Paper setting out its proposals. After a period of consultation, it presents draft legislation in the form of a bill, which is then debated and amended in Parliament. In such cases, policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation."

15. Based on the representations submitted by the MHCLG and having viewed the withheld information the Commissioner is satisfied that it comprises information relating to the formulation or development of government policy in relation to the Bill. The Commissioner is therefore satisfied that the exemption at section 35(1)(a) is engaged.
16. The Commissioner has gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

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

Public interest arguments in favour of disclosing the information

17. The MHCLG accepts that there is a benefit in disclosure of information which increases public participation in decision making, and increases transparency and accountability of government. The MHCLG recognises that:

“this public interest allows for the scrutiny of government policy and decision-making processes, and could, in this instance, increase public understanding of the relationship between central government and Crown bodies”.

18. The complainant argues that there is a public interest in disclosure of the information requested as it relates to “an unelected unaccountable ‘private estate’”, particularly when it has been engaged in meetings concerning the formulation and development of public policy. In addition the complainant pointed out that the Duchy of Cornwall enjoys “Crown Immunity.

Public arguments in favour of maintaining the exemption

19. As well as quoting from the Commissioner’s section 35 guidance that the purpose of section 35 is to “protect good government”, in this case the MHCLG contends that there is a public interest in preserving the safe space needed for policy officials to discuss and debate the merits and possible implications of proposed reforms on the Crown, free from any external distraction or influence. The MHCLG considers that it is important that policy officials, Ministers and other stakeholders are able to discuss and reach decisions freely, and away from external interference.
20. The MHCLG advised the Commissioner that it:

“considered this public interest to be particularly strong at the time of [this request] as discussions with the Crown bodies were still live, and the Bill was subject to active consideration and possible amendment by Parliament. For example, policy in relation to ground rents and deferment rates could impact the market which would not be in the public interest while policy development continued. Additionally, policies across many of these areas are still being developed under the new

government's commitment to reform as set out in the King's Speech on 17 July 2024²"

21. As well as the entire contents of the Bill being subject to amendment by the Government and both Houses of Parliament, the MHCLG stated that, at the time of the request, engagement with the Duchy of Cornwall was ongoing, along with similar policy discussions with a large number of stakeholders. In addition, the MHCLG advised the Commissioner that it "also intended to bring forward amendments to the Bill in relation to some of the content which was still being developed (e.g. the leasehold house ban)".
22. Although the Bill received Royal Assent on 24 May 2024, the MHCLG advised that the majority of provisions are not yet enforced and will need to be commenced through secondary legislation by the Secretary of State for Housing, Communities and Local Government. As part of this process Ministers need to consider a number of policy options, including the timing to commence various provisions within the Leasehold and Freehold Reform Act 2024, and other decisions across some of the policies referred to in the withheld information. As such, MHCLH argues that policy considerations associated with the subject matter of the request remain live.

Balance of the public interest

23. The Commissioner is always cognisant of the general public interest in openness and transparency of information generated by public authorities. The Commissioner appreciates that, in this case, the policy and how it will impact homeowners, particularly residential long leaseholders, is a matter of considerable interest to those affected. He also accepts that there is a public interest in knowing how stakeholders and third parties, including the Duchy of Cornwall, have contributed to discussions around this policy area.
24. As mentioned earlier in this notice, the withheld information relates to issues which were under active consideration at the time of the request, and subject to Parliamentary scrutiny. The Commissioner has seen no evidence to suggest that the Duchy of Cornwall exercised undue influence on the formulation and development of the policy matters in question.

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https://assets.publishing.service.gov.uk/media/6697f5c10808eaf43b50d18e/The_King_s_Speech_2024_background_briefing_notes.pdf - pages 74 to 76

25. Having reviewed the withheld information, and in view of the MHCLG's explanations and representations, the Commissioner is satisfied that the policy in this area was, at the time of the request, in a process of formulation and development. The Commissioner accepts that the exemption is designed to protect the policy making process and that, where disclosure might result in this process being impaired, there is an arguable public interest in decision-making undertaken on behalf of the public being effective.
26. The Commissioner notes that 'safe space' arguments will be at their strongest when the matter is still 'live' and in this case the development of this policy area was, at the time of the request a live matter. The Bill was still making its way through Parliament and therefore can be considered to be still in the formulation and development stage. In view of this, the Commissioner is of the opinion that the MHCLG's safe space arguments attract considerable weight in this case.
27. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants (particularly senior ones) are expected to be impartial and robust when giving advice, and that, in general, they should not easily be deterred from expressing their views by the possibility of future disclosure. However, where the formulation or development of the policy to which the withheld information relates is still live and ongoing, the Commissioner does accept that disclosure would be likely to have a chilling effect on those specific, ongoing policy discussions.
28. As discussed above, the Commissioner is satisfied that the policy making in question here was live and ongoing at the time of the request. The Commissioner therefore accepts that disclosure of the withheld information would have a chilling effect on ongoing discussions regarding this specific policy.
29. Having considered all of the public interest arguments, both in favour of maintaining the exemption and of disclosure, the Commissioner considers that, in this case, the public interest is in favour of maintaining the exemption at section 35(1)(a) of the FOIA.

Procedural matters

Section 10 – time for compliance

30. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.

31. In this case the request was submitted on 12 December 2023 and the MHCLG did not respond until 6 March 2024. The Commissioner therefore finds that the MHCLG breached section 10(1) of the FOIA in failing to respond to this request within the statutory timescale.

Right of appeal

32. 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

33. 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.
34. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Joanne Edwards
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