

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 10 December 2024

**Public Authority:** Ministry of Housing, Communities and Local Government

**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to the allocation of funds to the Isle of Wight Council. The Department for Levelling Up, Housing and Communities (DLUHC) refused to disclose the information under section 35(1) of FOIA (government policy).
2. DLUHC has recently changed name to the Ministry of Housing, Communities and Local Government (MHCLG). Although the request was submitted before the change of name, the Commissioner's decision notice refers to MHCLG throughout.
3. The Commissioner's decision is that MHCLG is entitled to rely on section 35 of FOIA to withhold the information.
4. The Commissioner does not require further steps.

#### **Request and response**

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5. On 25 March 2024, the complainant wrote to MHCLG and requested information in the following terms:

"Please provide copies of all background documents and copies of notes of discussions relating to the allocation of £3 million to the Isle of Wight Council announced in the final local government funding settlement."

6. MHCLG responded on 10 May 2024 and confirmed that it held the information. However, it withheld the information under section 36 of FOIA. On 21 May 2024 the complainant requested an internal review into the handling of the request.
7. Following the internal review, MHCLG wrote to the complainant on 18 June 2024 and upheld its original position to withhold the information requested under section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).

## **Scope of the case**

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8. The complainant contacted the Commissioner on 18 June 2024 to complain about the way their request for information had been handled.
9. During the Commissioner's investigations, MHCLG informed him that it was withdrawing its reliance on section 36 to engage section 35(1)(a) of FOIA to withhold the information. It stated that due to the passage of time it has re-assessed the harm disclosure would cause, and it believes that the information is directly and significantly influential to the preparatory work for the Local Government Finance Settlement (LGFS) 2025/26.
10. MHCLG added that it was also engaging section 40(2) of FOIA to withhold the name of junior officials within the withheld information. It also confirmed that it had sent a new response to the complainant to inform them of its decision.
11. The Commissioner considers that the scope of his investigation is to determine whether MHCLG were correct to withhold the information under section 35(1)(a) of FOIA.

## **Reasons for decision**

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### **Section 35- formulation and development of government policy**

12. Section 35(1)(a) 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”
13. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

14. The Commissioner's guidance<sup>1</sup> 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.
15. 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.
16. Section 35 of 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.
17. In this case, the withheld information consists of two ministerial submissions, two briefings, an evidence-gathering exercise report and an internal DLUHC analysis. The MHCLG considered that the information related directly and significantly to the preparatory work for LGFS 2025/26.
18. It said that the preparatory work for the LGFS 2025/26 began following the conclusion of the 2024/25 LGFS. However, it maintained that the withheld information is linked to the ongoing policy work, which was already underway at the time it received the complainant's original request.
19. MHCLG confirmed that all of the withheld information related to the development of the current policy around LGFS. It said that the information is related to the additional grant of funding provided for the

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

Isle of Wight last year and the Minister will need to take a decision on repeating this arrangement for the current year.

20. The Commissioner has reviewed the withheld information, and there is no dispute over the withheld information relating to policy making about LGFS. The Commissioner agrees that the information clearly relates to the formulation or development of policy making of 2024/25 LGFS. On this basis alone the Commissioner is satisfied that the withheld information falls within the scope of the exemption contained at section 35(1)(a) of FOIA.
21. However, the Commissioner appreciates that there is a fundamental disagreement as to whether the information also relates to the formulation or development of policy in relation to future LGFS decisions namely policy making concerning LGFS 2025/26.
22. The Commissioner has considered both parties' submissions carefully, alongside the content of the withheld information. He has taken into consideration that the withheld information contains extensive evidence gathered for MHCLG analysis for 2023/24 and the preceding years as well as 2024/25 towards the Local Government Finance Settlement negotiations. The Commissioner accepts that the information in question still relates to the formulation and development of LGFS 2025/26, which at the time of the request, was in its formulation stage.
23. 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**

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24. 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**

25. Following receipt of MHCLG's recent decision, the complainant provided their submission in support of their argument in favour of disclosure of the withheld information. They stated:

"Firstly, this is a new argument - if it is upheld then it can clearly be used to never disclose any information at all about the original decision - there are always ongoing discussions about local government finance! The government made a decision which

affected millions of pounds of public money - it is not unreasonable for the public to be told the grounds on which it was made and for it to be made clear whether their former MP was telling the truth or not. In view of [name redacted]'s claims which are in the public domain - it is clearly in the public interest for Isle of Wight residents to be given grounds to have faith that the government makes decisions which affect the allocation of public money fairly and on objective evidence. In fact this latest 'excuse' not to provide information is likely to further undermine the faith of the public in the instruments of government - particularly in the way it has arrived out of the blue. What has prompted this 're-consideration' of my request? Certainly no input from me. It appears to be simply an attempt to give a new reason for non-disclosure. There was no reference to the information relating to 'ongoing development' of policy in the original refusal notice or the outcome of the internal review. This aspect adds to the arguments already made about this failure to disclose decreasing public trust in government.

Secondly, the reason now being used to justify non-disclosure was clearly not valid at the time my original request was made (March 2024) or within the time limits that it should have been dealt with (even if through an internal review) or it would have been used in the Ministry's response..." Secondly, the reason now being used to justify non-disclosure was clearly not valid at the time my original request was made (March 2024) or within the time limits that it should have been dealt with (even if through an internal review) or it would have been used in the Ministry's response. [Name redacted] has recently made a public statement that council officers are now putting together an evidential bundle for next year's local government funding round. This is a large burden on a small council - and being able to target the evidence on matters which the government deem relevant to their decision would no doubt be enormously helpful. It would reduce the burden on the public purse and also free up officers to work on other important and pressing council matters - of which there are many!"

### **Public interest arguments in favour of disclosure**

26. MHCLG recognised that there is benefit in making information held by public authorities available as it increases public participation in decision-making and aids the transparency and accountability of government. It also acknowledged that the public interest allows for the scrutiny of Government policy and decision-making processes, in particular, increasing public understanding of how central government allocates funding to local government.
27. MHCLG added that it understands that this public interest is higher at this time because of increased media coverage of the financial

difficulties experienced by some local authorities and the declining wider economic conditions. In recognition of this public interest, MHCLG regularly publishes information on LGFS into the public domain.

### **Public interest arguments in favour of maintaining the exemption**

28. MHCLG argued that there is a public interest in maintaining a safe space in which policy officials and Ministers are able to develop policy ideas and reach decisions away from external interference and distraction. MHCLG has considered that there is a public interest in avoiding the erosion of this safe space and the consequences of disclosing the information. It strongly believes that the chilling effect that would follow would not be in the public interest.
29. MHCLG argued that there is a public interest in officials and ministers feeling able to consider the information and advice before them and be able to reach objective, fully informed decision without impediment and free from distraction that such information will prematurely be made public.
30. Pertaining to the issue of local government finance and funding distribution, MHCLG considered the public interest in ensuring that local authorities are not hesitant in approaching central government for assistance when they are in difficulty. It stated that the department welcomes locally held information to provide a more complete understanding of local issues. It believes that the fear of disclosure may have a chilling effect, suppress the openness of future discussions and discourage local authorities from approaching it on important issues. It argued that this may degrade the trust between central and local government.
31. MHCLG has considered the effect of the disclosure of the information on the government's impending distributional reform. It explained that the government has publicly committed to consulting on this reform which will reassess the relative needs and resources of all local authorities in England. It argued that disclosing the information it holds will have a prejudicial effect on the reform process, specifically, disclosure would likely result in its position on Islands funding, as of January 2024 being taken as indicative of its position. It maintains that sharing this position would not be in the public interest.
32. When balancing the public interest, MHCLG said it considered the likelihood and severity of the prejudice caused by disclosure as well as the age of the information and the context of the request. It also considered information that is already in the public domain and the extent to which disclosure would further public understanding of the matter.

33. MHCLG argued that there has been heavy coverage in the media and commentary in the press surrounding the issue of local government funding for public services as evidenced by the coverage of the recent Budget. This increased scrutiny means the "safe space" which officials and ministers require to discuss and work on these issues needs to be protected more than usual. It maintains that disclosing the information it holds would cause significant prejudice.
34. MHCLG argued that the prejudice would not only be related to policy work on local government funding but also impact the consultation on distributional reform that the government has committed to. It said that the prejudice caused, would impact all local authorities across England and not only the Isle of Wight. MHCLG stated that it has attached great weight to the public interest arguments in maintaining a safe space for officials and ministers, and contends that without this the prejudice caused would be severe.
35. When considering the age of the information, MHCLG stated that the information is from earlier this year and is currently being considered in the context of the next funding settlement. It said that because this information is very recent it places a significant weight on its relevance to current policy making and on the public interest in maintaining a safe space.
36. MHCLG noted the increased interest in local funding in recent years and stated that although public participation is important, it does not consider it in the public interest to compromise the consultation into distributional reform by disclosing its views on the Island's funding. It maintained that the disclosure of its position would lead to many presuming its views going into the consultation process that may affect the contributions it receives.
37. MHCLG also noted the information that is already available in the public domain. It published information about extra funding for local authorities including the uplift to the Isle of Wight in February 2024. It also published a summary of the consultation that preceded the uplift amongst other information to inform the public debate. Based on the information that is already in the public domain about LGFS, it considered that the disclosure of the information would not significantly add to the debate or increase public understanding.

### **Balance of the public interest**

38. The complainant has presented their arguments as to why they believe the information should be disclosed. The Commissioner has noted the complainant's remarks regarding MHCLG's decision to rely on a new exemption. While he understands why they have questioned this, it must be explained that when the Commissioner requests submissions



from a public authority (in support of their decision to withhold information), he also gives them the opportunity to revisit the request and consider whether it could be disclosed or that a new exemption may apply. It is a public authority's responsibility to tell the complainant why the new exemption applies and to provide the Commissioner with its full submission. Having revisited the request, MHCLG concluded that a new exemption would apply and informed the complainant accordingly.

39. The Commissioner considers that in general, there is often likely to be a significant public interest in disclosure of policy information, as it can promote government accountability, increase public understanding and enable public debate and scrutiny of both the policy itself and how it was arrived at. Whilst the Commissioner has considered this, he also believes that significant weight should be given to safe space arguments i.e. the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making.
40. In its submission to the Commissioner, MHCLG stated that the preparatory work for LGFS 2025/26 began in March 2024 before the complainant's original request was received. The Commissioner has noted that MHCLG has not provided any detail about the nature of the preparatory work that had commenced at the time the request was submitted.
41. During the Commissioner's investigations, he asked MHCLG to confirm if all of the withheld information will be considered for the current policy. MHCLG stated that the information is related to the additional grant funding provided for the Isle of Wight last year and the Minister will need to take a decision on repeating this arrangement this year.
42. The Commissioner is mindful that the policy for which the withheld information was originally collated, is the 2024/25 LGFS, which was published on 5 February 2024. The Commissioner accepts that the preparatory work for 2025/26 LGFS had commenced at the time of the complainant's request. Furthermore, having considered the content and context of the withheld information, he accepts that it has the potential to encroach on the safe space of this policy making. The Commissioner accepts that it contains evidence that goes to inform the local government spending review.
43. The Commissioner appreciates that LGFS is a matter of considerable interest to significant range of stakeholders and one that involves balancing a range of competing demands. The Commissioner therefore accepts that disclosure of the information at the time of the request could have led to the government having to defend or justify particular policy decisions regarding LGFS for both 2024/25 and 2025/26. In turn



the Commissioner accepts that this would encroach upon the safe space that officials need for such ongoing policy making and as a result the safe space arguments deserve considerable weight.

44. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy discussions are likely to carry significant weight. Arguments about the effect on closely related live policies, such as the consultation on distribution reform may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions. The Commissioner considers that the impact on both the safe space and risk of a chilling effect is arguably lessened where disclosure at the point of the request would not have interfered with the policy making process for which the information was originally submitted.
45. In the circumstances of this case, the Commissioner accepts that disclosure of the withheld information potentially risks the candour of local government funding negotiations if officials involved are aware they may be disclosed in the future. He agrees that the erosion of a safe space could result in a chilling effect that could impact local and central government relationship. Although officials are expected to be robust and impartial, the Commissioner accepts that disclosure could nevertheless affect the tone or manner in which some information is presented. For the reasons noted above, the Commissioner accepts that the withheld information relates to a live policy which is still ongoing and usually this would add further weight to the chilling effect arguments.
46. The Commissioner agrees with MHCLG regarding the information that is in the public domain about LGFS. Having reviewed the information that is in the public domain about LGFS, the Commissioner is of the opinion that there is adequate information available, and that the disclosure of the withheld information is not likely to add significantly to the transparency and accountability surrounding LGFS.
47. In the Commissioner's view, the balance of the public interest therefore lies in maintaining the exemption. The Commissioner's decision is that the MHCLG has correctly applied section 35(1)(a) of FOIA to withhold the information.

48. Since the Commissioner has decided that the MHCLG is entitled to withhold the requested information under section 35(1)(a), he does not need to go onto consider MHCLG's application of section 40(2) to some of the information.

## **Right of appeal**

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49. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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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**Wycliffe House**  
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