

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 June 2019

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

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested reports prepared for and presented to the Rough Sleeping and Homelessness Reduction Taskforce.
2. The Ministry of Housing, Communities and Local Government ('MHCLG') withheld the information its entirety citing section 35(1)(a) – formulation of government policy.
3. The Commissioner's decision is that the MHCLG has appropriately relied on section 35(1)(a) to withhold the requested information and that the public interest favours maintaining the exemption.
4. The Commissioner does not require any steps.

Request and response

5. On 15 October 2018, the complainant wrote to the Ministry of Housing, Communities and Local Government ('MHCLG') and requested information in the following terms:

"Reports prepared for and presented to the Rough Sleeping and Homelessness Reduction Taskforce. Please may I see the information."

6. The MHCLG responded on 14 November 2019 and confirmed that the information is held, however it withheld it in its entirety citing section 35(1)(a) – formulation of government policy.
7. Following an internal review the MHCLG wrote to the complainant on 12 December 2018. It upheld the decision to withhold the information.

Scope of the case

8. The complainant contacted the Commissioner on 12 December 2018 to complain about the way his request for information had been handled. That being, specifically, whether the MHCLG were correct to withhold the information, on the basis it has cited.
9. The Commissioner considers that the scope of the case is to establish whether the MHCLG has correctly engaged the exemption at section 35(1)(a). If it has, then she will consider where the balance of public interest lies.

Background

10. The MHCLG provided the following background to the request *"The government aims to halve rough sleeping over the course of the Parliament and eliminate it altogether. The Minister for Housing and Homelessness, Heather Wheeler, chairs the Rough Sleeping Advisory Panel which will support government to produce a national rough sleeping strategy. The strategy will take action to reduce rough sleeping now, and ensure the structures are in place to eliminate rough sleeping for good. The panel is made up of experts, charities and local government."*

Reasons for decision

11. Section 35 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,"

12. This exemption is a class-based one which means that, unlike a prejudice-based exemption, there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the class described, in this case, the formulation of government policy.

13. The Commissioner considers that 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. Her guidance advises that a public announcement of the decision is likely to mark the end of the policy formulation process.

14. The Commissioner considers that the term 'relates to' in section 35 can be interpreted broadly within the meaning of the class based exemption. This means that the information itself does not have to be created as part of the activity. Any significant link between the information and the activity is sufficient.

15. The MHCLG confirmed that the information relates to the government policy for homelessness reduction and the elimination of rough sleeping. It confirms that it is 'government policy' whereby the final policy approach and detail will be subject to clearance by the MHCLG's Ministers.

16. The MHCLG advised it considered that, at the time of the request, the related policy process was in the formulation stage (as opposed to the development stage): *"We consider the fact that Ministers had yet to take decisions on the decided rough sleeping policy, means the "formulation" stage had not yet been concluded. Even though there have been announcements about rough sleeping and homelessness reduction, one can characterise this as a high-level announcement of policy aims, with the details still be worked out. This is not an unusual scenario for many policy announcements; in any case this is certainly*

"formulation or development" as opposed to "implementation" of a decided policy."

17. Furthermore the MHCLG confirmed that *"the policy formulation / development stage had not been completed at the time of the request and has still not. Ministers are still considering options in terms of policy formulation which may lead to engagement with the Parliamentary process and to the laying of legislation. The information requested therefore relates to the policy in question and will inform final policy decisions to be taken by Ministers."*
18. Regarding the volume of information being withheld, the MHCLG confirmed that *"The Advisory panel has met on a number of occasions so there may be 20-30 plus reports all of which relate to the development of government policy in this area."*
19. Having reviewed a sample of the reports, 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.

The public interest

20. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

Public interest in disclosure

21. The complainant outlined the following public interest arguments:

"1. To uphold public confidence that the Government has adequate information on which to base decisions about tackling rough sleeping and homelessness;

2. To provide assurance that the Government responds appropriately to information about rough sleeping and homelessness;

3. To ensure that money is correctly spent on tackling rough sleeping and homelessness."

22. In its response to the complainant the MHCLG stated that it recognised *"There is always a degree of 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. This in turn may serve to increase public trust and confidence in the policy decisions made by Ministers and in good governance."

Public interest in favour of maintaining the exemption

23. The MHCLG states that there is a strong public interest in ensuring that officials have an appropriate degree of safe space to gather and assess information and provide advice to Ministers that will inform policy decisions. Likewise it states *"Ministers must feel able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and free from distraction that such information will be made public. Such safe space, it is widely accepted, is needed where it is appropriate in order to safeguard the effectiveness of the policy process."*
24. The MHCLG explains that as the formulation and development process is still live then significant weight should be given to the requirement for safe space around the advice pending possible parliamentary debate and final decisions on policy detail.
25. The MHCLG argued that the possibility of adverse effects on the policy itself is another important consideration. It stated that tackling homelessness and rough sleeping is a high profile area of the Government's policy. That disclosure would attract media coverage and public speculation which would be *"harmful as it would have given the public a potentially inaccurate and misleading impression about the ultimate, decided design of rough sleeping policy."*
26. The MHCLG contends that whilst the risk that the information may be misinterpreted is not a reason for non-disclosure, the impact in dealing with potential adverse repercussions is. For example ministers and officials' effort may be diverted to explaining options and correcting misunderstandings. Or officials, under public and media pressure may be led to *"consider attaching less or more weight to certain factors, otherwise necessary to ensuring that objective, reliable analyses could be arrived at."*
27. The MHCLG concludes *"All these adverse effects, both on the policy process and the policy itself, were highly relevant considerations at the time of [complainant's] request. They are the crux of the matter in determining the appropriate response. It is also a factor to consider, therefore, that the public interest will be served by there being transparency, at the appropriate time, around information that has informed Ministers' considerations and decision on the policy, and by*

Ministers and the government then being accountable, at the appropriate time, for the decisions they have taken.

The Commissioner's view

28. The Commissioner appreciates that there will be significant public interest in the development of government policy to address rough sleeping and homelessness. It follows, therefore, that there will be public interest in the information created, and its consideration, for the formulation of those policies and associated actions.
29. The Commissioner considers that public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption. Furthermore that the relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. As such the key public interest argument for this exemption will usually relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction.
30. The Commissioner recognises that the disclosure of the withheld information is likely to result in significant public and media attention. Bearing must be given also to the timing of the request and the status of the policy making process. She therefore considers that significant weight should be given to the safe space arguments to develop ideas, debate issues and reach decisions away from external interference.
31. The Commissioner agrees that there is a clear public interest in the disclosure of the information regarding such a sensitive issue. However she believes this is outweighed by a well-established strong and legitimate public interest in Government being afforded the safe space in which to develop and finalise policy prior to its implementation. The need for safe space is very much dependant on the stage the policy had reached at the time of the request which, in this case, the Commissioner has accepted is in the formation phase. The Commissioner therefore finds there is a greater public interest in ensuring that the policymaking process is protected.
32. Having carefully considered the withheld information and the submissions from both parties, the Commissioner has concluded, for the reasons given above, that in all the circumstances of the case, the public interest balance favours maintaining section 35(1)(a) to the withheld information.

Right of appeal

33. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

34. 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.
35. 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

**Pam Clements
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