

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 July 2018

Public Authority: Ministry for Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant asked the former Department for Communities and Local Government to provide him with the 54 responses made in respect of the government's consultation on changes to Building Regulations 2010. Now called the Ministry of Housing, Communities and Local Government ["the MHCLG"], the Department disclosed to the complainant 14 of the 54 responses it received as part of that consultation.
2. The Commissioner's decision is that, on the balance of probabilities, the MHCLG has disclosed to the complainant all of the responses it holds in respect of the 2010 Building Regulations consultation and in doing so, the Department has complied with section 1 of the FOIA. The Commissioner has also decided that the MHCLG has breached section 10 of the FOIA by exceeding the twenty day compliance period required by the Act
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 2 August 2017, the complainant wrote to the Department for Communities and Local Government and asked to be provided with:

"The 54 responses to the government consultation on changes to Building Regulations 2010 (please see paragraph 2.12 page 7)

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6285/1800841.pdf"

5. The DCLG responded to the complainant's request on 12 October 2017, confirming that the Department held the information he had requested but refusing to supply it in reliance on section 35(1)(a) of the FOIA. The complainant was advised that the information he has asked for relates to the formulation and development of Government policy.
6. On 12 October 2017, the complainant asked the DCLG to conduct an internal review of its handling of his request.
7. On 3 November 2017, the DCLG wrote to the complainant inform him of its internal review decision. The DCLG confirmed that the requested information falls under the section 35(1)(a) exemption as it relates to the formulation and development of Government policy: specifically, building safety policy.
8. The DCLG advised the complainant that the information he seeks is closely related to the independent review of building regulations and fire safety being led by Dame Judith Hackitt. It advised him that the requested information is being considered as part of that process and that it will then continue to form part of policy development if the Hackitt review leads to a full review of Part B of the building regulations.
9. The reviewing officer then advised the complainant that the DCLG's response of 12 October should be upheld and she informed him that there is no further information that can be released at that time.

Scope of the case

10. The complainant contacted the Commissioner 3 November 2017 to complain about the way his request for information had been handled.
11. On 13 April 2018, the Commissioner wrote to the MHCLG to make enquiries about its application of section 35 of the FOIA in respect of the information which it was withholding from the complainant.
12. Having received the Commissioner's enquiry, the MHCLG determined that it was now able to disclose to the complainant 14 of the 54 responses which it received in respect of the Government consultation on changes to Building Regulations in 2010.
13. On 8 May 2018 the MHCLG wrote to the complainant and advised him that:

"After further consideration we are now able to provide you with those responses that the Department still holds from the 2010 consultation (14 of the 54 responses). In line with our records retention policy, we do not keep records indefinitely and in the usual course of events these would have been deleted by now. However the 14 responses attached were identified after an extensive search of our systems."

14. The MHCLG further advised the complainant that some information had been redacted in reliance on section 40(2) of the FOIA on the grounds that it is personal data and the data subjects could not reasonably expect that his or her personal information would be disclosed.
15. At this point, and with the complainant's agreement, the Commissioner closed this complaint case.
16. On 1 June 2018, the complainant contacted the Commissioner and asked her to investigate why such a large number of responses had been deleted from the 2010 consultation, when the documents were deleted, who decided on their destruction, and how they were disposed of.
17. On 4 June the Commissioner submitted a new enquiry to the MHCLG to determine whether the information disclosed to the complainant on 8 May constitutes all of the information it now holds in respect of the request made on 2 August 2017.

Reasons for decision

18. Section 1 of the FOIA states that

"(1) Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

19. The Commissioner has sought to determine whether the MHCLG holds the information which the complainant has asked for. To make this determination the Commissioner applies the civil test which requires her to consider the question in terms of 'the balance of probabilities': This is the test applied by the Information Rights Tribunal when it has considered whether information is held in past cases.

20. The Commissioner has investigated whether the MHCLG holds any further responses to the consultation it carried out in 2010. She has done this by asking the MHCLG questions about the searches it has made to locate the information which the complainant seeks and questions about the possible deletion/destruction of information which might be relevant to the complainant's request.
21. When asked about the searches it had carried out to locate the information requested by the complainant, the MHCLG informed the Commissioner that it had searched "the Department's shared electronic file system, its paper records, and the relevant EEMA email account". The MHCLG identified the information which has now been released to the complainant. The MHCLG explained that the 14 responses it had found were likely to have been duplicates which had been retained in an email folder.
22. In addition to its searches, the MHCLG consulted with its staff within the policy area. Given the age of the information, and changes to staff & the organisational structures, the policy area was not able to identify where the consultation responses might have been filed.
23. The MHCLG also consulted with its Records Team to determine whether it held paper-based files relevant to the complainant's request. Several files were identified using the search terms: "building regulations", "future" and "2010". Additionally, the Department's FOI team searched across all shared drives access by the Building Regulations Division. Those searches used variants of the terms listed above.
24. The MHCLG's FOI Team searched the Building Regulations EEMA account folder for "2010 consultations" and investigated other folders which might have been relevant. Searches were also carried out of the Department's networked resources and emails where the requested information would have been stored if it was still held.
25. When asked about the deletion or destruction of the requested information, the HMCLG advised the Commissioner that, "The fact that the Department's published response to the consultation in 2010 cites 54 responses, suggests that information did exist at one point. Any information would have been deleted in line with our record retention policy and the responses that were released are likely to have been duplicates".
26. The MHCLG advised the Commissioner that it holds no record of when the consultation responses ceased to be retained by the Department. The MHCLG said that it is the Department's usual policy to retain documents of this nature for two years after the consultation's closing date.

27. The Department additionally advised the Commissioner that it was unable to identify any record of the destruction of the consultation responses.
28. The MHCLG's records management policy states that consideration should be given to the Data protection Act 1998 to determine the retention period of consultation responses containing personal data.
29. The policy refers to the Fifth Data Protection Principle which states 'personal data processed for any purpose or purposes shall not be kept for longer than is necessary for that purpose or those purposes'. Where confidential responses which contain personal data, it may be appropriate to retain them only until their analysis is complete.
30. The MHCLG's policy is mindful of the 2 year retention periods set out by other public sector organisations that hold consultation responses containing personal information. Therefore the Department considers that its retention period for consultation responses should be set at 2 years following the closing date of the relevant consultation.
31. Taking into account all of the above, the MHCLG has told the Commissioner that it would have expected the individual 2010 responses to have been deleted by the time the complainant made his request.
32. Given that the coalition government published a summary of the consultation in 2010, there was no business to retain the individual responses beyond the two year retention period.
33. The MHCLG has advised the Commissioner that the consultation responses are not items the Department would expect to be captured for the Public Record or for any statutory purposes.
34. The Commissioner has considered the representations made by the MHCLG in respect of its searches for, and possible destruction of, the 54 consultation responses it received in 2010. She is considers those representation to be credible and persuasive.
35. On the balance of probabilities, the Commissioner has decided that the Ministry of Housing, Communities and Local Government has complied with section 1 of the FOIA by disclosing to the complainant the 14 consultation responses it was able to find. The Commissioner accepts that the 14 responses found by the Department were likely duplicates of those it previously deleted and/or destroyed.
36. The Commissioner has also decided that the MHCLG has breached section 10 of the FOIA because its disclosure of the 14 consultation

responses took place well in excess of the twenty day compliance period required by that section.

Other matters

37. The Commissioner notes that the MHCLG initially applied section 35 to the information described in the complainant's request.
38. It appears to the Commissioner that the Department applied the section 35 exemption before it had searched for the information which it actually holds.
39. The Commissioner is disappointed by MHCLG's approach to dealing with this request. It appears to the Commissioner that the Department applied an exemption to material which had not been searched for or properly examined prior to issuing a refusal of the request, and even before it carried out its internal review.
40. The Commissioner must impress on the MHCLG, the need for it to give proper consideration to the information it actually holds before making any determination that it should be withheld. It is not acceptable for any public authority to make such an apparent 'knee jerk' response to a request without proper consideration of the recorded information it holds.
41. Had the MHCLG restricted its attention to the information it holds, it would not have been necessary for the Department to issue an erroneous refusal notice or to conduct an internal review of a misapplied exemption. These have turned out to be two unnecessary stages prior to the complainant making his referral to the Commissioner.

Right of appeal

42. 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@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

43. 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.
44. 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

Andrew White
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