

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 December 2012

Public Authority: Department of Communities & Local Government (DCLG)

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested information provided to the DCLG by companies and organisations involved in property development and the construction industry in relation to the draft National Planning Policy Framework.
2. The DCLG refused the request because it considered that the information related to the formulation of or development of government policy and was exempt under section 35(1)(a) of the FOIA.
3. During the course of the Commissioner's investigation the DCLG noted that the formulation and development process in question had now been completed, and decided, without prejudice to its original position, to disclose the requested information to the complainant.
4. The Commissioner has decided that the DCLG correctly applied the exemption and that the public interest favoured maintaining the exemption. He does not require the DCLG to take any steps.

Background

5. In December 2010 a review of planning policy, designed to consolidate policy statements, circulars and guidance documents into a single National Planning Policy Framework (NPPF), was announced to Parliament.
6. As part of the development process, organisations and individuals were invited to provide suggestions to the DCLG as to what form the NPPF might take¹.
7. The finalised NPPF was published in March 2012.

Request and response

8. On 26 October 2011, the complainant wrote to the DCLG and requested information in the following terms:

"Please supply a list of the documents (including letters) submitted to the Department by companies and organisations involved in property development and the construction industry (including lobbyists acting on their behalf) before or during the preparation of the draft National Planning Policy Framework that were referred to by members of the NPPF and please make copies of those documents available for inspection."

9. On 7 December 2011 the DCLG replied to the request, stating that the information was being withheld under section 35(1)(a) of the FOIA because it related to the formulation or development of government policy.
10. Following an internal review, the DCLG wrote to the complainant on 12 January 2012 stating that it had upheld its original handling of the request.

¹ Details of this consultation process are published here:
<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1951747.pdf>

Scope of the case

11. The complainant contacted the Commissioner to complain about the way their request for information had been handled.
12. The complainant asked the Commissioner to consider whether the DCLG had correctly withheld the requested information.
13. During the course of the Commissioner's investigation the DCLG confirmed that, with the publication of the NPPF and the completion of the associated formulation and development process, it was willing to disclose the information to the complainant. The DCLG clarified that this step was being taken in acknowledgement of the changed circumstances since the time the request was received and was not intended to prejudice its original decision to refuse the request.
14. In light of this offer to disclose the information on an informal basis and, hence, resolve the complainant's substantive complaint, the complainant was invited to withdraw their complaint to the Commissioner. The complainant declined to do this and asked the Commissioner to consider whether the DCLG was entitled to refuse the request at the time it was originally received.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

15. Section 35(1)(a) of the FOIA provides that information held by government departments is exempt if it relates to the "formulation or development of government policy".
16. Section 35(1)(a) FOIA is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
17. The Commissioner notes that the withheld information comprises information provided to the DCLG by individuals and organisations during the development of the NPPF. DCLG has confirmed that the purpose of inviting suggestions was to inform developing thinking and Ministers' considerations about options. The withheld information relates to the development of the NPPF and the (now published) NPPF constitutes government policy in relation to planning.

18. The Commissioner has, therefore, concluded that the withheld information relates to the formulation or development of government policy and that the exemption is engaged.
19. As section 35(1)(a) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest in favour of disclosure

20. In responding to the request the DCLG acknowledged the general principle of openness enshrined in the FOIA and noted that the disclosure of information can help to increase accountability and transparency. It accepted that such disclosures can contribute to public trust and confidence in the decisions taken by government, particularly where decisions have a direct impact on citizens.
21. In relation to the specific request, the DCLG acknowledged that disclosure of information about suggestions it had received in relation to the NPPF would enable the public to see what issues had been raised and the extent to which suggestions had been taken up by the DCLG. The DCLG argued that it considered that such an interest had been met via the publication of summary information².
22. In their request for internal review, the complainant argued that, where representations are submitted to a Government department, it is generally understood that those representations may be subject to publication or disclosure to third parties.
23. In support of this argument, the complainant referred the DCLG to a discussion paper relating to executive remuneration (the "paper"), published by the Department for Business, Innovation & Skills (BIS) in September 2011³. The paper in question invites views from stakeholders to stimulate debate and help the Government build its evidence base and understanding of the issues around executive remuneration.
24. The complainant highlighted a section of this paper, headed "Confidentiality & Data Protection", which advises that information provided in response to the discussion paper may be subject to

² Published July 2011; see the DCLG website here:

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1951747.pdf>

³ Published here: <http://www.bis.gov.uk/assets/biscore/business-law/docs/e/11-1287-executive-remuneration-discussion-paper>

publication or to disclosure in accordance with the access to information regimes. The paper goes on to state:

*"In view of this it would be helpful if you could explain to us why you regard the information you have provided as confidential. If we receive a request for disclosure of the information we will take full account of your explanation, but we cannot give an assurance that confidentiality can be maintained in all circumstances."*⁴

25. In their submission to the Commissioner, the complainant reaffirmed their belief that there was precedent for information provided to government departments to be disclosed.
26. The complainant has argued that, in the case of their request, the public interest favoured disclosure because it would allow the public to ascertain the extent to which the NPPF has been influenced by representations made by special interest groups and lobbyists. The complainant is concerned that such groups, which may represent unaccountable, moneyed interests, may have an undue influence on public policy. Disclosure of the information during the course of the development of the policy would allow such influences to be checked or challenged.

Public interest in favour of maintaining the exemption

27. In its submissions the DCLG has argued that there is a strong public interest in ensuring that there is sufficient private space within which suggestions and representations may be made and considered.
28. Without such space, DCLG argues, it is less likely that individuals and organisations making suggestions would feel able to do so freely and frankly and any representations are likely to be constrained. An impact of this would be that Ministers would not have the benefit of being able to consider the fullest range of observations and the consultation process and hence the effectiveness of the policy process would be undermined.
29. The DCLG has further argued that, at the time the request was received, the NPPF was still in the process of development and the release of the information at this time would be likely to inhibit the debate and exploration of the full spectrum of available policy options.

⁴ Ibid., page 39.

Balance of the public interest arguments

30. In considering the balance of the public interest arguments, the Commissioner has referred to his own guidance, which sets out his view that there is no inherent public interest in withholding information that falls within the type of information covered by a class based, qualified, exemption⁵. In effect, this means if, after a weighting exercise, the scales are still balanced, the FOIA's inbuilt presumption towards disclosure applies and information should be released.
31. The Commissioner considers that the principal argument presented by the DCLG is essentially about the need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement. Safe space arguments are often made within the context of the application of this exemption. Summarised in *Scotland Office v the Information Commissioner* (EA/2007/0070) as "the importance of preserving confidentiality of policy discussion in the interest of good government" this covers the idea that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.
32. In *Department for Education and Skills v the information Commissioner and The Evening Standard* (EA/2006/0006) the Tribunal recognised the importance of this argument stating "Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy".
33. In *Scotland Office v the information Commissioner* (EA/2007/0128 para 62) the Tribunal again recognised the importance of the safe space concept, but warned that "information created during this process cannot be regarded *per se* as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption". The Commissioner agrees with this view and notes that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration.
34. The Commissioner also acknowledges that the process of policy development and formulation was ongoing at the time the request was

⁵ See the ICO website here:

http://www.ico.gov.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx

received. He considers that there is a strong public interest in maintaining the safe space for DCLG to robustly consider all options without been constrained by the fear of having to constantly respond at each stage in public. DCLG has argued that the early disclosure of an incomplete range of representations would be likely to give a misleading and inaccurate picture of how Government policy is being made and what the public response was.

35. In relation to the complainant's concerns that the development of the NPPF and the final form the policy might take might be unduly influenced by unaccountable interests, the Commissioner accepts this as a valid public interest argument in favour of disclosure – as a means to demonstrating an impartial process.
36. The Commissioner accepts that disclosure of information about the policy formulation could enable the public to engage with the process, for example, by contacting their MP. However, it is also the case that the consultation process itself, by definition, afforded the public an opportunity to participate in the policy debate.
37. In determining the balance of the arguments, the Commissioner considers that there is some weight to the complainant's argument in this regard, however, there is no explicit suggestion or evidence that DCLG would be any more subject to inappropriate influence in respect of submissions made in relation to NPPF than in relation to any other developing policy. It follows, therefore, that the argument is necessarily generic, rehearsing the established principles of accountability and transparency rather than a specific public interest in disclosure as applied to the facts of this case.
38. Whilst the Commissioner acknowledges the value of these general principles, he also recognises that safe space arguments carry particular weight when such activities are live at the time a request is received. In this case, the request was received in October 2011 and the NPPF was finalised and published in March 2012.
39. In addition, the Commissioner notes that the DCLG's initial response to the complainant directed them to a summary of responses to the consultation which it had published on its website⁶. In some instances, the summary identifies submissions made by particular named groups. The Commissioner accepts that the publication of this information contributed towards the serving of the public interest in transparency,

⁶ Published here:

<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1951747.pdf>

accountability, the facilitating of public participation and understanding. He is not convinced that the disclosure of all detailed submissions would, at the time of the request, have added significant value to these principles and, in view of the ongoing nature of the consultation, would have been unwarranted.

40. In view of this, the Commissioner has concluded that, in relation to this particular public interest argument, the balance is weighted in favour of maintaining the exemption.
41. The complainant has argued that the paper published by BIS provides a precedent for the disclosure of information received during government consultations. Having read the relevant sections of the paper, the Commissioner does not agree that it confirms that such information would automatically be published or disclosed in response to requests. The paper advises potential contributors that information they submit might fall within the scope of FOIA requests and, in the event that they consider that information should not be disclosed, invites them to provide any relevant arguments with their submissions. The paper clarifies that there is no obligation on the part of BIS to accept such arguments (the ultimate responsibility for whether to disclose residing with the authority itself) but that submissions in this regard will be taken into consideration.
42. In raising these matters, the paper makes reference to the code of practice issued under section 45 of the FOIA (the "code") which provides recommendations in respect of confidentiality arrangements between authorities and third parties⁷. Part V of the code advises that, whilst authorities should be wary of entering into blanket confidentiality agreements, there may be circumstances in which the preservation of confidentiality of such relationships can be considered to be in the public interest.
43. Having considered the relevant section of the paper, the Commissioner has concluded that the intention behind this can be identified with the relevant recommendations as to good practice set within the code. The Commissioner considers that this section of the code promotes mindfulness of the tension between the benefits of disclosure and the validity of withholding information either provided by or relating to a third party. As there is no explicit recommendation that such information should, in all cases, be disclosed, the Commissioner has concluded that the complainant's argument is invalid and the BIS paper

⁷ The code is published online here: <http://www.justice.gov.uk/downloads/information-access-rights/foi/foi-section45-code-of-practice.pdf>

does not provide a precedent for the withheld information to be disclosed⁸.

44. On the facts of this case the Commissioner has concluded that the balance of the public interest arguments presented favours maintaining the exemption.
45. As he has concluded that the DCLG correctly applied the exemption the Commissioner does not require it to take any steps.

⁸ Similar provision is actually made in part 4 of the DCLG's "Draft National Planning Policy Framework Consultation", published on its website here:
<http://www.communities.gov.uk/documents/planningandbuilding/pdf/1951747.pdf>

Right of appeal

46. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

47. 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.
48. 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

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