

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested information relating to a complaint made in 2012 by Jack Dromey MP to Andrew Dilnot, Chair of the UK Statistics Authority.
2. The Department for Communities and Local Government (DCLG) refused the request under the exemption for information accessible via other means, the exemption for ministerial communications, the exemption for information regarding the formulation and development of government policy and a number of subsections of the exemption for prejudice to the effective conduct of public affairs. During the course of the Commissioner's investigation DCLG withdrew its reliance all the exemptions except for that relating to the formulation and development of government policy. It also confirmed that some of the information was being withheld under the exemption for personal information.
3. The Commissioner's decision is that DCLG has not demonstrated that the exemption for information relating to the formulation and development of government policy is engaged. In relation to the personal data of junior officers contained within the requested information, the Commissioner finds that DCLG has correctly applied section 40(2) to withhold the information.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all the requested information, except for the personal data of junior officers.

5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 4 July 2012, the complainant wrote to DCLG and requested information in the following terms:

"Would you please send me all meeting minutes, e-mails, letters or minutes of phone calls held by your department relating to a complaint made by Jack Dromey in 2012 to Andrew Dilnot.

Meetings or phone calls may include those between (but not limited to) UK Statistics Authority; the office of the Prime Minister; the Cabinet Office; DCLG departmental statisticians; DCLG ministers; private office staff and special advisors.

I note that Mr Dromey released his letter into the public domain and Mr Dilnot printed his response on the UKSA website."

7. DCLG responded on 29 August 2012 and refused to provide the requested information citing the exemptions in section 21, section 35(1)(a) and 35(1)(b), section 36(2)(b)(i)/(ii) and section 36(2)(c) of the FOIA.
8. Following an internal review DCLG wrote to the complainant on 27 September 2012 and confirmed that it was maintaining its position.

Scope of the case

9. On 27 September 2012 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner confirmed with the complainant that his investigation would determine whether DCLG handled his request in accordance with the FOIA. Specifically, the Commissioner explained that he would determine whether DCLG is entitled to rely on exemptions as a basis for refusing to provide the information which the complainant had requested.
11. During the course of the investigation, DCLG confirmed that it was withdrawing its reliance on section 21 and section 35(1)(b) in refusing

the request. DCLG confirmed that it wished to withhold all the requested information under section 35(1)(a) of the FOIA – the exemption relating to the formulation and development of government policy. In the event that the Commissioner did not uphold its use of this exemption, DCLG initially confirmed that it considered that, in the alternative, section 36(2)(b)(i)/(ii) and section 36(2)(c) was applicable. DCLG also confirmed that, in relation to some personal information contained within the requested information, this was being withheld under section 40(2) of the FOIA.

12. Following receipt of its submissions the Commissioner provided DCLG with an initial view that it was unlikely that he would find that the various section 36 exemptions applied in this case were engaged. DCLG accepted this view and withdrew its reliance on section 36. The Commissioner has considered, at DCLG's request, whether any of the arguments submitted in relation to section 36 can be transposed to the exemption in section 35(1)(a) of the FOIA.

Reasons for decision

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

13. Section 35(1)(a) of the FOIA states that:

"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"

14. This section of the FOIA is a class-based exemption. This means that if, as a matter of fact, information falls within the category defined by the exemption, it is exempt. However, it is also a qualified exemption, meaning that, even if information is exempt, a public authority must consider whether there is an equal or greater public interest in disclosure. The Commissioner has first considered whether the withheld information falls within the category of the exemption.

What is 'policy'?

15. The Commissioner's guidance acknowledges that 'policy' is not a precise term and what can be regarded as policy is dependent on context. However, the Commissioner considers that there is a general consensus

that policy is about the development of options and priorities for ministers, who determine which options should be translated into political action and when¹.

16. Even if information relates to policy matters, in order for the exemption to be engaged, it must be shown that the policy or policies in question are government policy.
17. The Commissioner's guidance draws a distinction between government policy and 'departmental' or other types of policy. The Commissioner considers that government policy may be policy which requires Cabinet input, represents the collective view of ministers or applies across government. Information regarding departmental policy, which applies only to the internal workings of an individual department would not, in the Commissioner's view, fall within the category of the exemption².
18. The final qualifying factor which must be shown to apply in order for the exemption to be engaged is that the information must relate to the formulation or development of government policy or policies. The Commissioner acknowledges that the terms "formulation" and "development" are not precisely defined by the FOIA. However, he considers that they are both suggestive of a dynamic process. "Formulation" and "development" imply that something is happening to the policy concerned, not that it merely exists.
19. The Commissioner's guidance clarifies that 'formulation' in this context suggests the output from the early stages of the policy process, where options are generated and discussed and recommendations are made. 'Development', the Commissioner's guidance explains, whilst in some instances being synonymous with formulation, might also refer to processes involved in improving upon or reviewing the effects of an existing policy. The Commissioner is clear that the exemption cannot apply to information purely about the application or implementation of agreed policy."³.

¹ The Commissioner's guidance is published on the ICO website here:
http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/FORMULATIONOFGOVERNMENTPOLICY.ashx

² Ibid.

³ Ibid.

The DCLG's view

20. In establishing the relevant context, DCLG provided the Commissioner with an explanation of the background to the matters referred to in the request.
21. DCLG explained that, on 11 June 2012 the Shadow Housing Minister, Jack Dromey MP, wrote to the Chair of the UK Statistics Authority (UKSA) and set out concerns about Grant Shapps MP's (the (then) Minister for Housing and Local Government) alleged misrepresentation and misuse of statistics relating to housing and homelessness.
22. UKSA replied on 29 June 2012, setting out its perspective on the matter. Both letters had, at the time of the request, been published on UKSA's website.
23. DCLG considers that, at the time the request was made, the need to formulate and determine an agreed policy on the appropriate interpretation and usage of official statistics relating to housing was being considered as a live issue.
24. DCLG clarified that the withheld information "does not directly relate to the formulation or development of a specific Government policy on housing or homelessness for Ministers had yet to reach a decision." Rather, the policy to which the information relates is "the question of the flexibility Ministers have when making statements about any of the Department's official statistics and the decisions needing to be made about that", in relation to housing statistics at the time of the request.
25. In support of its position, DCLG has argued that the definition of 'government policy' and, therefore, the scope of the exemption can be interpreted widely. The question of whether information relates to policy formulation or development, DCLG has argued, need not relate to a specific novel or identifiable policy of the Government. It is possible, in DCLG's view that, where political judgement and decision, based on advice from and exchanges with officials, is needed to translate Ministers' preferences otherwise into actions and decisions, that the decision to be made is still one of policy.
26. DCLG has further argued that the political sensitivity and the general sensitivity of any potential direction, decision or statements by Ministers may be heightened where the matters at hand relate to specific government policies such as, in this case, housing and homelessness. DCLG considers that the presence of these factors in the current case is a strong indication that such matters, and recorded information reflecting them, will relate to the formulation or development of

government policy. It says the requested information was "part of live policy consideration by Ministers."

The Commissioner's view

27. The Commissioner has first considered whether the withheld information relates to the formulation or development of government policy. The Commissioner notes that DCLG has argued that the term "Government policy" can be interpreted widely. However, the Commissioner's established approach in the context of this exemption is that it is the term "relates to" that can be interpreted widely. The Commissioner also notes that DCLG's arguments make repeated reference to decisions to be made in relation to a policy for the *department* in relation to its presentation of housing statistics. Based on DCLG's submissions, the Commissioner is not persuaded that the process of reaching a decision regarding the presentation of statistics by DCLG represents anything other than a departmental issue.
28. The Commissioner has, nevertheless, considered whether the withheld information might conceivably relate to government policy regarding the use and presentation of statistics.
29. The Commissioner accepts that Ministers can face questions or receive correspondence from MPs seeking their views on topics. Some questions may be routine but others will relate to existing government policy and still others may raise new issues or demonstrate a groundswell of opinion on an issue which triggers policy development.
30. In this instance, the letter from Jack Dromey MP to UKSA, which gave rise to the correspondence which constitutes the withheld information, asks a range of questions about DCLG's use of statistics, in particular, whether it conforms with the Code of Practice for Official Statistics (January 2009)⁴.
31. Having viewed the withheld information, the Commissioner notes that the focus of this is on discussions around the proposed content of a response to Mr Dromey's letter. The Commissioner considers that the

⁴ Jack Dromey MP's letter is published here <http://www.insidehousing.co.uk/Journals/2012/06/11/m/e/n/2012-06-11-Letter-to-UKSA.pdf>; the Code of Practice for Official Statistics (January 2009) is here: <http://www.statisticsauthority.gov.uk/assessment/code-of-practice/code-of-practice-for-official-statistics.pdf>

information could be characterised as being part of a process of justification or explanation for a decision already taken. The decision in this case being to present statistics in a certain way.

32. The Commissioner does not consider that DCLG has demonstrated that the presentation of statistics in this context is part of a government policy on the use of statistics. In any event, information about how to respond to Mr Dromey's letter cannot be said to be part of or to relate to a process of developing or formulating policy.
33. Simply because the withheld information reflects decision making within government departments, this does not mean that it must relate to government policy making. Not all discussions or consideration of options taking place within government departments amount to activity relating to policy development or formulation.
34. As the Commissioner considers that DCLG has not demonstrated that the withheld information relates to the formulation or development of government policy he has concluded that the exemption is not engaged. He has not, therefore, gone on to consider the public interest arguments.

Section 40 – personal information

35. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
36. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

37. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the data protection principles under the

DPA. In this instance, DCLG has suggested that disclosure of the information would breach the first data protection principle.

38. The first consideration is whether the information is personal data. The withheld information contains the names and contact details of junior officials. The Commissioner considers that individuals' names and contact details are clearly personal data as such information relates directly to identifiable individuals.
39. As the Commissioner is satisfied that the withheld information is personal data, he now needs to consider whether disclosure would breach the first data protection principle, as the council has claimed, i.e. would disclosure be unfair and/or unlawful.
40. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

41. In his guidance "Requests for personal data about public authority employees"⁵ the Commissioner notes that a factor to be taken into account when considering whether to release information identifying an employee is whether the information relates to the employee's public or private life. The threshold for releasing professional information will generally be lower than that for releasing truly personal, sensitive information.
42. In this case, the withheld information relates to individuals' participation in DCLG's consideration of Jack Dromey's letter. The Commissioner considers that this information relates purely to the individuals' public function and not to their private life.
43. In his guidance, the Commissioner states that it would be good practice for public authorities should (in, for example, their publication scheme) list the sort of information which they routinely make available about employees. The guidance explains:

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

"In assessing whether employees can have a reasonable expectation that their names will not be disclosed, key factors will include their level of seniority and responsibility and whether they have a public facing role where they represent the authority to the outside world. A junior employee whose name appears on an email simply because they are organising a meeting or distributing a document in an administrative capacity would have a reasonable expectation that their name would not be disclosed⁶."

44. The Commissioner's guidance also recommends that public authorities should consider producing a general policy which clarifies its position in this matter and assists employees in forming a reasonable expectation of what will be done with their personal data.
45. DCLG confirmed to the Commissioner that its usual practice is to redact the names of staff below the Senior Civil Service (SCS). In its view, the names of those in the SCS will already be in the public domain, in various directories, and so on, and that therefore no breach of the Data Protection principles will occur. DCLG acknowledged that there will be the occasional exceptions to this rule, and its application will depend on the context of the particular information request.
46. DCLG stated that, in this case, whilst senior officials named in the withheld information should reasonably expect to be identifiable and accountable in their official capacity, the same expectation should not apply to more junior officials.
47. In this instance, the Commissioner accepts that, given DCLG's general approach to the disclosure of personal data junior officers would have a reasonable expectation that their data would not be disclosed.

Consent

48. DCLG did not confirm whether it sought the consent of the individual employees affected by the request. However, it did state that it considered that no such direct consent would be given in this case.
49. The issue of consent is dealt with in the Commissioner's specialist guidance "Consent". The guidance states that the Commissioner will take data subjects' comments into account insofar as they represent an expression of the views of the data subject at the time of the request. The Commissioner considers that such views will help to inform the

⁶ Ibid.

analysis of fairness because of the unique perspective of the data subject on the impact of disclosure on them.

50. The Commissioner notes that an individual's objection to the disclosure of information does not necessarily mean that it cannot be released. It is important to consider whether it is reasonable for the data subject to object to the disclosure. However, as DCLG has not provided any submissions in this regard, the Commissioner has not considered the question of consent further.

Consequences of disclosure

51. In order to assess the impact of the consequence of disclosure on whether release of the requested information would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the individuals in question.
52. DCLG has not provided the Commissioner with submissions in this regard, however, having considered DCLG's general stance in relation to the disclosure of officers' personal information, he considers that the disclosure of junior officers' data would come as a surprise to the individuals concerned and would not be in keeping with what they had been led to expect in carrying out their functions.
53. Taking the above into account, the Commissioner's view is that disclosure of the withheld information would cause distress to the individuals concerned.

Legitimate interest in disclosure

54. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake. It can also include specific interest which, in this case, is the legitimate interest in knowing individuals' roles in the discussion and decision making process identified by the request. The Commissioner accepts that employees of public authorities should be open to scrutiny and accountability because their jobs are funded by the public purse.
55. In view of the above, the Commissioner is, therefore, satisfied that there is a legitimate public interest in disclosure in this case.
56. As previously noted, the Commissioner's guidance qualifies that the more senior an employee is and the more responsibility they have for

decision making and expenditure of public money, the greater their expectation should be that their name will be disclosed⁷. It follows that more junior employees with less influence over decision making and less direct responsibility for expenditure would have a lower expectation that their personal data would be disclosed.

57. The Commissioner has also considered arguments submitted by DCLG which set out that the disclosure of the names and other personal data of junior officers would not, in this case, be necessary to meet the legitimate public interest as the information is not material to the content of the communications and is not required to understand the views contained in the communications.
58. The Commissioner has determined that the legitimate public interest in disclosure does not outweigh the legitimate interests of the junior officers concerned. Whilst the public interest in knowing which officers were involved in the processes is relatively strong, this is outweighed by the unwarranted interference or prejudice to the rights of the officers concerned.
59. The Commissioner has concluded that, in relation to the personal information of junior officers contained within the requested information, DCLG has correctly applied section 40(2) of the FOIA.

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http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

Right of appeal

60. 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

61. 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.
62. 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

Graham Smith
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