

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 4 October 2016

**Public Authority:** Department for Communities and Local Government ("DCLG")

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

### Decision (including any steps ordered)

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1. The complainant requested information associated with the Government's 'Pay to Stay' policy at a time when the policy was being formulated and developed in support of the Housing and Planning Bill. In consequence of this, the Department for Communities and Local Government ("the DCLG") determined that the complaint's request should be refused in reliance on section 35(1)(a).
2. The Commissioner's decision is that the DCLG was correct in applying section 35(1)(a) and therefore she does not require the Department to take any further action in this matter.

### Request and response

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3. On 19 January 2016, the complainant wrote to the Department for Communities and Local Government and requested information in the following terms:

*"Please send (pdf versions by email attachments) copies of all documents (regardless of format: reports, emails, meeting notes, internal briefing papers, surveys, impact assessments, studies and analyses undertaken, and any other documents and materials) relating to the Pay to Stay policy in the last two years. I want documents that explain how the 40k threshold was reached and any impact assessments undertaken.*

*I seek copies of anything that explains:*

1. *What impact this policy will have on the tenants*
  2. *What is the expected amount of money it will raise and where that money will go*
  3. *What analysis has been done on this policy and its effect on the social housing market (will some tenants move out; will some buy their property; will some lose their homes for not paying the rent increase; will some retire or quit their employment to reduce their incomes; will some lie about their incomes)*
  4. *How the £40k threshold for London was reached, given that the research thinktank that dreamt of this policy some years ago suggested a much higher threshold of at least £100k*
  5. *What advice the DCLG gave to its minister and the government on this policy..."*
6. On 10 February the DCLG responded to the complainant's request. The DCLG advised the complainant that it was refusing his request in reliance on section 12 of the FOIA, having estimated that the cost of complying with the request would be £2,700. Additionally, the DCLG directed the complainant to the impact assessment available to the public on Parliament's website<sup>1</sup>.
7. The DCLG's response prompted the complainant to submit a refined request for information on 10 February 2016. The terms of this request are:
- "Any documents (internal reports, memos, briefing papers, emails) that discuss, contribute to the setting of, or relate to the decision to set the £40k threshold in London for means-testing of rent in social housing."*
8. The DCLG responded to the complainant's refined request on 9 March. The DCLG confirmed that it holds the information the complainant has requested but refused to provide it in reliance on section 35(1)(a) of the FOIA, on the basis that the information related to the formulation or development of government policy.
9. Having received the DCLG's response, the complainant wrote back to the Department and requested an internal review of its decision to apply section 35(1)(a). The complainant stated:

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<sup>1</sup> <http://services.parliament.uk/bills/2015-16/housingandplanning/documents.html>

"I no longer request, under this FOI, any documents of any kind (keep your documents). I want, in writing, a reply under this FOI request that tells me how and why the London threshold was set at £40k. That's all. The relevant DCLG official, on behalf of the minister (perhaps Brendan Lewis MP), needs to simply explain how the £40k threshold was decided upon and why."

10. The DCLG wrote to the complainant on 8 April 2016 to advise him of its final decision. The Department concluded that its application of section 35(1)(a) was correct and that the public interest supports the withholding of the information.
11. The DCLG's review noted the complainant's statement (above), that he no longer seeks documents. The DCLG advised the complainant that, "...the information you have requested would necessarily be the same as that contained in the documents you initially requested, any such explanation would require the disclosure of information which the Department considers to be exempt under section 35(1)(a)... As such, I am unable to provide the explanation you request at this stage".

### **Scope of the case**

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12. The complainant contacted the Commissioner on 9 April 2016 to complain about the way his request for information had been handled. The complainant advised the Commissioner that the purpose of his request is to find out how the DCLG set the £40,000 means-tested threshold for London in the current Housing and Planning Bill before Parliament.
13. The complainant informed the Commissioner that he seeks an explanation of how the threshold was calculated and that he does not seek documents.
14. The Commissioner determined that the focus of her investigation should be the DCLG's reliance on section 35(1)(a) of the FOIA in respect of the information it holds which is relevant to his refined request of 10 February 2016.

### **Relevant background information**

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15. In 2012, the Coalition Government gave discretion to social housing landlords in England to charge market or near market rents to tenants with an annual income of £60,000 or more a year. It was argued that

high income tenants should not be paying social rents when they could afford to pay more. This scheme became known as 'pay to stay'.

16. In his Summer Budget of 2015, the Chancellor of the Exchequer announced that the discretionary 'pay to stay' scheme would be made compulsory in England and that new, lower, income thresholds would be introduced. The proposed thresholds would be £40,000 in London and £31,000 elsewhere.
17. Measures to introduce a mandatory pay scheme for local authorities were included in the Housing and Planning Act 2016, whereby detailed provisions would be set out in regulations following Royal Assent.
18. The Government conducted a consultation exercise between 9 October and 20 November 2015, the results of which were published on 8 March 2016 as the Pay to stay: fairer rents in social housing – consultation response.
19. The Government confirmed that a taper will be applied above the minimum income thresholds and that households in receipt of Housing Benefit would be exempt from paying higher rents. Affected households will pay an additional 15p in rent per week for every £1 they receive in taxable income above the thresholds.
20. It is the Government's aim to implement the compulsory pay to stay policy from April 2017.

## **Reasons for decision**

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### **Section 35 – formulation or development of government policy, etc**

21. The DCLG has confirmed to the Commissioner that it is relying on section 35(1)(a) to withhold the information which the complainant has requested.
22. Section 35(1)(a) states –  
  
"Information held by a government department or by the National Assembly of Wales is exempt information if relates to  
  
(a) the formulation or development of government policy,"

#### *The DCLG's representations*

23. The DCLG has provided the Commissioner with a copy of the information it is withholding in respect of the complainant's request. The information is marked "official – sensitive".
24. The DCLG impresses on the Commissioner that the withheld information clearly relates to the Government's social rents policy and in particular to "Pay to Stay". At the time the complainant submitted his request for information, the final policy approach and detail of the policy was subject to clearance by the Department's Ministers and the Cabinet via the Home Affairs Cabinet Committee.
25. Although the rationale for the "Pay to Stay" policy had been set out in the Budget of 2015, at the time of this request, the policy had not been concluded. In particular, the income thresholds and how they would work were dependent on the passage of the Act and Ministerial decisions.
26. The DCLG has informed the Commissioner that the detail of the policy and the final policy approach remained subject to clearance by the Department's Ministers and Cabinet by way of the Home Affairs Cabinet Committee.
27. The DCLG understands and accepts the Information Tribunal's view that policy formulation and development is not a "seamless web", and in most cases, the formulation or development of policy is likely to happen as a series of discrete stages, each with a beginning and end, with periods of implementation in between. Here, the 'Pay to Stay' policy required a policy formulation phase prior to it becoming a decided policy. The DCLG points out that additional detail concerning the policy will subsequently be set out in regulations which have yet to be debated in Parliament.
28. Given the facts outlined above, at the time when the complainant made his request, the 'Pay to Stay' policy was in a process of formulation and this had not been concluded.
29. The DCLG accepts that announcements about the policy had been made which were essentially high-level policy aims, with the details still to be worked out. It points out that it is not unusual for this type of announcement to be made, especially in the early days of a new Government.
30. The DCLG accepts the Commissioner's guidance and case law decisions, in respect of the interpretation of the term "*relates to*". It accepts that the term is capable of being interpreted broadly, and it points out that, where there is sufficient link between the information in question and a

specific Government policy – the 'Pay to Stay', the exemption will be engaged.

31. At the time the complainant made his request, the policy formulation/development stage had not been completed. Ministers were still considering options and the Parliamentary process for the Housing and Planning Bill had not been concluded until May 2016.
32. The Commissioner has examined the withheld information and has determined that the exemption provided by section 31(1)(a) is properly engaged. The Commissioner is now required to consider whether, at the time the request was made, the public interest favoured the withholding of the information which the complainant seeks.

*The public interest test*

*Arguments which favour the disclosure of the requested information*

33. The Commissioner considers that some weight must always be given to the general principle of achieving accountability and transparency through the disclosure of publicly held information.
34. Disclosure of the information in this case would enable the public to better understand of how the Government formulates and develops a policy which was laid before Parliament in the form of a Bill and which may be relevant to the development and formulation of later statutory regulations.
35. The DCLG recognises that disclosure of the withheld information would promote transparency concerning the Government's approach to the Pay to Stay' policy. It acknowledges the strong public interest in the withheld information, given that this is a key area of government policy which will impact on a significant number of citizens and where, as the DC LG acknowledges, concerns have been raised over the thresholds set for this policy.
36. The Commissioner recognises the importance of the 'Pay to Stay' policy to the public and must give appropriate weight to it.

*Arguments which favour the continued withholding of the requested information*

37. At the time of this request, the detail of the 'Pay to Stay' policy still needed to be debated in Parliament. It remains the case that further debate will be necessary on the details of the policy before Regulations are laid.
38. It is generally recognised that there is a strong public interest in ensuring that there is an appropriate degree of safe space in which

officials are able to gather and assess information and provide advice to Ministers. This is particularly the case where the advice will be considered by ministers during the formulation and development of a government policy.

39. It is also recognised that Ministers should be able to consider the information and advice before them and be able to reach objective, fully-informed decisions without impediment and distraction. This so-called "safe space" is needed in appropriate circumstances to safeguard the effectiveness of the policy process.
40. Significant weight needs to be given to the requirement for ministerial safe space. This is particularly so where decisions on policy have yet to be taken and where the formulation and development process is still "live". This was certainly the case when the complainant made his request and where further Parliamentary debate is likely to be required.
41. The protection of the policy process merits safe space and the need prevent the policy itself from being adversely affected. The 'Pay to Stay' policy is a high-profile area of the Government policy. It rightly attracts much public and media attention, and its effectiveness and success is of significant importance to the Governments fiscal and social strategies at this time.
42. Disclosure of the requested information would inevitably attract national media coverage and public speculation, giving the public a potentially inaccurate and misleading impression of a yet-to-be fully decided policy.
43. Disclosure of the withheld information at the time of the complainant's request would have required ministers to focus their efforts on explaining the various options which were subsequently debated when the Housing and Planning Bill was introduced to the House of Commons. This would have been unnecessary and avoidable effort and it would not necessarily succeed in correcting any misunderstandings which might arise from disclosure.

*The balance of the public interest and the Commissioner's conclusion*

44. The timing of the complainant's request is relevant to the Commissioner's decision in this case.
45. It is clear to the Commissioner that the formulation or development of the extension of the 'Pay to Stay' policy was yet to be completed when the complainant made his request. At that point in time there was a real risk of prejudicing the policy development process by disclosing the requested information.

46. The detail of the policy is still, to some extent subject to further development due to the requirement for the Government to lay Regulations before Parliament. It is through the Parliamentary process that the fully determined policy will be ultimately be scrutinised, and at that juncture informed transparency of the policy and the accountability of ministers can be gained by the wider public.
47. Having considered the public interest arguments associated with the requested information, the Commissioner has decided that greatest weight should be given to the need to maintain an appropriate degree of safe space. This space will allow ministers to consider what are live policy issues without the distraction and interference which would likely flow from the requested information's premature disclosure.
48. The Commissioner has concluded that the DCLG properly applied section 35(1)(a). The Commissioner's decision is therefore that the DCLG was entitled to withhold the requested information.
49. The Commissioner is mindful of the DCLG's acceptance that once the formulation and development of a policy has been completed, the risk of prejudicing the policy through disclosure of the information is likely to be reduced and therefore public interest in maintaining the exemption will in all likelihood attract less weight. She therefore considers it is likely the DCLG will make a full disclosure of the withheld information once the necessary Regulations are made.



## Right of appeal

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50. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

51. 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.
52. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**