

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 December 2016

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

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information relating to how the funds contained within the £300m transitional relief fund for local councils have been allocated. The Commissioner's decision is that the Department for Communities and Local Government has correctly applied the exemption at section 35(1)(a) of the FOIA. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

2. On 12 February 2016, the complainant wrote to the Department for Communities and Local Government ("DCLG") and requested information in the following terms:

"Please provide details about how the funds contained within the £300m transitional relief fund for local councils have been allocated, including correspondence regarding how the allocation formula was arrived at.

Please provide detailed information and not a summary, in electronic format."

3. DCLG responded on 28 April 2016. It provided the following narrative information along with links to the 'Explanatory Note on Method of Calculation of the Transition Grant'¹, which sets out the methodology used to calculate the 2016-17 transition grant, and the distribution of the transition grant²:

"This long term funding settlement for councils is fair, and ensures that those facing the highest demand for services continue to receive more funding and have higher spending power than less deprived authorities. We are making available £300 million to ease the transition from a system based on a central Government grant, to a system which looks at local income in the round. All authorities in all areas of the country have been treated equally in the allocation of transitional grant."

It said that the remainder of the information requested, that being more detailed information about the allocation of funding and the correspondence regarding how the allocation formula was arrived at, is held but is exempt from disclosure under section 35(1)(a) of the FOIA as it relates to the development of government policy.

4. DCLG provided an internal review on 19 May 2016 in which it maintained its original position regarding the application of section 35(1)(a) of the FOIA.

Scope of the case

5. The complainant contacted the Commissioner on 9 June 2016 to complain about the way his request for information had been handled.
 6. The Commissioner has considered whether DCLG has correctly applied the exemption at section 35(1)(a) of the FOIA.
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¹ https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/510870/Explanatory_note_on_the_allocation_of_the_Transition_Grant.pdf

² https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/498700/core_spending_power_supporting_info.xlsx

Background

7. DCLG provided the Commissioner with the following information as policy background to this request:

“DCLG distributes funding to local authorities on an annual basis in order to support their statutory functions; the Department does this in negotiation with HMT and other government departments and through the annual settlement process. Preferred options for the distribution of resources, alongside provisional funding allocations, are proposed to the sector through consultation. DCLG Ministers then decide on a final approach taking in to account all consultation responses, which is subject to collective agreement. Final funding allocations are then published and the final settlement is put forward for formal resolution in the House of Commons.

The 2016-17 LGFS³ introduced a new funding distribution methodology, which allocated Revenue Support Grant (the primary unringfenced grant for local authority service delivery) by looking at the main resources available to councils, including income from council tax and business rates, and then ensuring that councils delivering the same set of services receive the same percentage change in funding for those sets of services. As a result of this change, authorities with relatively more income from council tax and business rates received less Revenue Support Grant than they would have under the previous methodology.

In response to representations received through consultation on the provisional 2016-17 LGFS, ministers chose to distribute a Transition Grant worth £150m in 2016-17 in order to “smooth” the transition between funding changes for some councils. The Transition Grant is paid to those councils who did not benefit from the new approach, compensating them in direct proportion to the difference between the old methodology and new methodology.

As part of the consideration of the current 2017-18 LGFS a Transition Grant is expected to be used again. Options put to Ministers for 2017-18 will be based on the approach used in 2016-17 (and it is moreover possible that transition grant in the same or similar form will be an option in later years). It can be seen that Transition Grant policy and

³ Local Government Finance Settlement ('LGFS')

its formulation are an integral part of the LGFS for both 2016-17 and for the proposals relating to the forthcoming financial year (2017-18)."

Reasons for decision

Section 35 – formulation or development of government policy, etc

8. 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,".

9. DCLG informed the Commissioner that the policy to which the information relates is the annual Local Government Finance Settlement ('LGFS') process. It said that the policy is one of "government policy" as the final policy approach and detail is subject to clearance by the department's ministers and collective agreement.

10. As stated in the Commissioner's guidance on this exemption⁴, the term 'relates to' can be interpreted broadly. If there is sufficient enough link between the information in question, in this case how the transition grant is formulated, and the formulation or development of government policy, which here is the shape of each year's LGFS, then the exemption will be engaged.

11. DCLG said that it is clear that the information requested relates to formulation or development of the policy in question as it informs the final policy decisions on the settlement to be taken by ministers. It explained that the decision for the period the complainant had asked about had been taken at the time of the request (the LGFS for 2016-17 was agreed in February 2016) but, nevertheless, the same information relates to the formulation or development of the policy as decisions around the transition grant will remain part of the consideration for future settlements (the LGFS for 2017-18 is currently out for consultation and is not expected to be finalised until early in 2017).

⁴ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

12. The Commissioner asked DCLG to confirm, in line with the requirements of s35(2), that if a decision in relation to the relevant policy has been taken, any statistical information has not been withheld on the basis of section 35(1)(a).
13. DCLG said that it takes into account the Commissioner's guidance when considering whether information is statistical for the purposes of section 35(2). It confirmed that no statistical information has been withheld on the basis of section 35(1)(a) in this case. It explained that it takes the view that the decision relevant to the policy (i.e. that needed for the 2017-18) had not and has not yet been taken so section 35(2) does not apply in this instance.
14. The Commissioner has considered the withheld information. She has taken into account the case of *DfES v The Information Commissioner & Evening Standard*⁵ in which the Tribunal suggested that whether an item of information can be accurately characterised as relating to government policy should be considered on the basis of the overall purpose and nature of the information rather than on a line by line dissection. The Commissioner has therefore looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy, rather than on a minute dissection of the content of the information. She has determined that the exemption provided by section 35(1)(a) is correctly engaged.

The public interest test

15. As section 35 is a qualified exemption it is subject to the public test at section 2 of the FOIA. Therefore, the Commissioner must consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest in disclosure

16. In its initial response to the complainant, DCLG said that 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. It explained that release of the requested information would help to demonstrate that impartial,

⁵ Appeal number EA/2006/0006

relevant and comprehensive advice is available to ministers to inform their considerations and eventual decision on the policy. It also said that is in the public interest to know if ministers have or have not been fully briefed, and to know if ministers are at risk of making decisions without being completely informed and that in this case, release of the detailed methodology used for the allocation of funding and the related correspondence would demonstrate that ministers have made a fully-informed decision about the allocation of transition grant and this would certainly be in the public interest.

17. In its response to the Commissioner, DCLG also acknowledged that there is an understandable interest in the local authority sector.
18. The complainant has said that there is a strong public interest in revealing the rationale for the policy decision. He said that there have been multiple press reports that the transitional relief fund was set up to favour Conservative-led councils, at the expense of much poorer Labour councils. He said that the Guardian has reported⁶ that 83% of the fund will go to Conservative councils and only 5 per cent will go to Labour councils.
19. The complainant has submitted that the rationale for this allocation is of great public interest and trumps any use of the exemption because the use of funds in this way may render the structure susceptible to judicial review and the rationale for favouring certain boroughs over others should be publicised and supported or criticised following receipt of the information.
20. 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. Disclosure of the information in this case would enable the public to better understand how the government formulates and develops a policy relating to local government funding. The Commissioner recognises the importance of the LGSF policy to the public and must give appropriate weight to it.

⁶ <http://www.theguardian.com/society/2016/feb/10/labour-furious-fund-ease-council-cuts-conservative-authorities>

Public interest in maintaining the exemption

21. DCLG has submitted that, as is generally recognised, 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 which will inform their eventual policy decisions. In turn, 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. It said that such safe space, it is widely accepted, is needed where it is appropriate in order to safeguard the effectiveness of the policy process and that without this it is likely that officials would feel constrained in their ability to advise freely, frankly and fully when providing briefing to aid ministers' policy considerations which would result in ministers being provided with less informative and candid advice, which clearly would not be in the public interest.
22. In its internal review response, DCLG further explained that the government is still awaiting confirmation from local authorities that they will agree to four-year settlements and said that disclosure of detailed information concerning how this allocation was arrived at and the correspondence surrounding this would be likely to cause disruption to this process, since it would invite focus on minutiae and on alternatives which the government had chosen not to implement. It said that since, by definition, any such alternatives have been ruled out as part of this policy, there is little public interest in disclosing this information and disrupting this process whilst the policy is still being developed.
23. DCLG said that these considerations carry most weight where the decision on policy has yet to be taken and the formulation or development process is still "live". It believes that was the case at the time of the request and indeed at the time of the response to the Commissioner's enquiries, and it said that the need for safe space around the advice, pending Parliamentary debate and final decisions on the 2017-18 settlement, are apparent.
24. In addition, DCLG submitted that whilst protection of the policy process merits safe space, the need not to adversely affect policy on each year's settlement itself is another important consideration. It said that it will be obvious that this is a high-profile area of the government's policy, attracting much public and media attention, and that its effectiveness and success is of real importance to all local authorities and the people they serve. It explained that nothing should detract from minister's ability to reasonably take policy decisions that will help balance fiscal prudence and effective financial support for local authorities and that disclosure of the requested information would inevitably have attracted national media coverage and public speculation which would be harmful

as it would have given the public a potentially inaccurate and misleading impression about the settlement process and DCLG's work with the local government sector.

25. DCLG recognised that the fact information may be misinterpreted is not itself reason not to disclose it but said that there are powerful arguments to the contrary in this case. It explained that to try to avoid significant potential adverse repercussions, ministers and officials would need to focus effort on explaining the various options considered; any range of options is likely to either advantage or disadvantage some or all particular councils, so much debate could be expected as to why any specific local authority was subject to an option which was not – for that authority – as advantageous as possible. It said that such unnecessary effort is avoidable and, even if deployed, might not be successful in correcting misunderstanding and its consequences. It submitted that it is possible that such an unhelpful state of affairs may even lead officials and ministers, under media and public pressure, to consider attaching less or more weight to certain factors, otherwise necessary to ensuring that objective, reliable analysis of options could be arrived at.
26. DCLG summarised that the above are all factors that would serve to undermine the policy aims and delivery. It said that all these adverse effects, both on the policy process and the policy itself, were highly relevant considerations at the time of the request and that they are the crux of the matter in determining the appropriate response.

Balance of the public interest

27. In determining where the balance of the public interest lies the Commissioner first notes that the exemption is a class-based exemption, meaning that it is not necessary for it to be demonstrated that any prejudice, inhibition or harm would result from disclosure in order for the exemption to be engaged. There is, therefore, no inbuilt weight in favour of maintaining the exemption which automatically transfers across to the public interest weighting. In view of this, the Commissioner considers that the specific nature of the information and its context are key influences on the outcome of the public interest test.
28. The timing of the complainant's request is relevant to the Commissioner's decision in this case.
29. In her enquiries to DCLG, the Commissioner pointed out that the Tribunal has made it clear that in cases where section 35(1)(a) applies central to the consideration of the public interest test is the timing of any request because once the formulation or development of a policy has been completed, the risk of prejudicing the policy process by disclosing information is likely to be reduced and so the public interest in

maintaining the exemption deserves less weight. She also informed DCLG that the Tribunal has made it clear that policy formulation and development is not one which is a 'seamless web', i.e. a policy cycle in which a policy is formulated following which any information on its implementation is fed into the further development of that policy or the formulation of a new policy. It is therefore necessary for the Commissioner to be able to identify when the policy formulation/development stage to which the withheld information relates ended and the implementation of the policy began. She therefore asked DCLG to explain when the formulation/development of the policy to which the information relates was completed, or to confirm why DCLG considers the formulation/development of this particular policy to have been ongoing at the time the complainant submitted his request. She also noted that DCLG considers that the policy is under development until such time as the allocations have been agreed by Parliament and asked it to confirm whether the policy has been signed off by the relevant minister or Cabinet, or when this will take place, and whether and when the transition grants for 2016/2017 been paid out.

30. DCLG said that it understands and accepts the 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. It explained that different pressures and priorities may apply in any particular year and ministers require the freedom to consider and tailor the LGFS as required, and the information requested directly relates to the formulation of government policy, which in this case is still in progress in relation to the LGFS for 2017-18 at least. It said that although the broad outline of coming years has been set out, decisions on each year's approach in detail are still required and whether to include some form of transition grant and the basis on which any grant should be paid is a good example of such required decisions. It concluded that, at the time of the request and at the time of responding to the Commissioner's enquiries, there was and is still a need for an appropriate degree of safe space within which to consider live policy issues away from external interference and distraction and to protect the policy and the formulation/development process. It also clarified that the LGFS for 2016-17 was agreed in February 2016 and announced and paid but that for 2017-18 it is currently out for consultation and is not expected to be finalised until early in 2017.
31. Given the above explanation, the Commissioner is satisfied that the request was made when the policy in relation 2017-18 (and subsequent years) is in a process of formulation and development. She has taken into consideration the fact that the policy formulation and development stage in relation to 2016-2017 was concluded but accepts that the same

information will be used for formulation and development in relation to the 2017-18 policy (and subsequent years) as DCLG will not necessarily want or need to reinvent the wheel in relation to the LGFS and the transition grant.

32. The Commissioner accepts that the exemption is designed to protect the policy making process and that, where disclosure might result in this process being impaired, there is an arguable public interest in decision-making undertaken on behalf of the public being effective.
33. The Commissioner does not consider that safe space arguments automatically carry much weight in principle. The weight accorded to such arguments depends on the circumstances of the specific case, including the timing of the request, whether the issue is still live, and the content and sensitivity of the information in question.
34. In the specific circumstances of this case, the Commissioner considers that disclosure of the withheld information could reduce DCLG's ability to develop ideas, debate live issues, and reach decisions on an issue that has wide reaching consequences, away from external interference and distraction. This could detrimentally affect the policy process and the policy itself. She has therefore given the safe space argument significant weight.
35. The argument presented in paragraph 25 encompasses the view that the information may be misinterpreted. The Commissioner's guidance on the public interest test⁷ makes it clear that arguments that the information may be misunderstood are not usually valid arguments for maintaining the exemption. As stated in the guidance this is supported by the comments of the Information Tribunal in Hogan⁸ at paragraph 61:

"While FOIA requires that all the circumstances of the case be considered, it is also implicitly recognised that certain factors are not relevant for weighing in the balance.

First, and most importantly, the identity and, or, the motive of the applicant is irrelevant ...

Second, the 'public interest' test is concerned only with public interests, not private interests.

Third, information may not be withheld on the basis that it could be

⁷ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

⁸ Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030

misunderstood, or is considered too technical or complex.”

36. The Commissioner considers that public authorities should normally be able to publish some context or explanation with the information it releases. In this case, DCLG has provided reasons why providing an explanation would not necessarily limit any damage caused which the Commissioner has taken into consideration when reaching a conclusion in this case.
37. The Commissioner has also taken into consideration the complainant's arguments at paragraphs 18 and 19 that the transitional grant was set up to favour certain local authorities over others. However, she does not consider it appropriate to focus on the way certain sections of the press have chosen to present the issue and notes that DCLG has published an explanation as to how the transition grant has been allocated and why.
38. 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 relating to local authority funding without the distraction and interference which would likely flow from the requested information's premature disclosure.
39. The Commissioner has concluded that the DCLG properly applied section 35(1)(a) and that the balance of the public interest lies in maintaining the exemption. Therefore her decision is that DCLG was entitled to withhold the requested information.

Right of appeal

40. 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

41. 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.
42. 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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