

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 April 2020

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested from the Ministry of Housing, Communities and Local Government (MHCLG) information relating to the outcome of a consultation process conducted by the MHCLG on plans for local government re-organisation in Northamptonshire. The MHCLG refused to provide the information held initially citing section 22(1) of the FOIA (information intended for future publication) and subsequently section 35(1)(a) of the FOIA (formulation or development of government policy).
2. The Commissioner's decision is that the MHCLG was entitled to rely on section 35(1)(a) as its basis for withholding the remainder of the requested information. As the initially withheld information under section 22(1) of the FOIA was published during the course of the Commissioner's investigation, this decision notice does not cover whether the exemption provided in section 22(1) was applicable.
3. The Commissioner does not require the MHCLG to take any further action in this matter.

Background information

4. On 9 January 2018, the Secretary of State for Housing, Communities and Local Government appointed Max Caller CBE as the person to undertake an Inspection of the compliance of Northamptonshire County Council (NCC) with the requirements of Part 1 of the Local Government Act 1999 in relation to NCC's governance functions, particularly those functions under section 151 of the Local Government Act 1972.
5. This inspection was conducted between January and March 2018 and it concluded, amongst other findings, that NCC had failed to comply with its duty under the Local Government Act 1999 (as amended) to provide best value in the delivery of its services.
6. Following this inspection report seven of the eight Northamptonshire councils submitted a unitary proposal to the Secretary of State for the replacement of the existing eight councils across Northamptonshire with two new unitary councils.
7. In accordance with the relevant legislative requirements, on 29 November 2018, the Secretary of State launched a statutory consultation, inviting views from all principal councils in and neighbouring Northamptonshire, Northamptonshire Chamber of Commerce, South East Midlands Local Enterprise Partnership, Northamptonshire Police and Crime Commissioner, local health bodies, the University of Northampton, and representatives of the voluntary sector.
8. The consultation closed on 25 January 2019, having received a total of 386 responses.

Request and response

9. On 15 April 2019, the complainant wrote to the MHCLG and requested information in the following terms:

"Any report on the outcome of the recent consultation conducted by your Ministry (which closed on 25 January 2019) on plans for local government reorganisation in Northamptonshire."
10. The MHCLG responded on 13 May 2019. It confirmed holding information within the scope of the request but refused to disclose it. It stated that the information requested *"is exempt from disclosure under section 22(1) of the FOI Act as it is going to be published and it is reasonable not to make it available until then."*

11. Remaining dissatisfied with the response received, on the same day the complainant requested the MHCLG to conduct an internal review.
12. The MHCLG provided the complainant with the outcome of its internal review on 26 June 2019. It did not change its original position in relation to section 22(1) of the FOIA and introduced an additional exemption. The MHCLG stated that the information withheld was also exempt from disclosure under section 35(1)(a) of the FOIA (formulation or development of government policy).

Scope of the case

13. The complainant contacted the Commissioner 17 May 2019 to complain about the way his request for information had been handled. At that stage the Commissioner advised the complainant to wait for the outcome of the MHCLG's internal review. Upon receiving the outcome of the internal review, on 1 July 2019 the complainant requested that the Commissioner conduct an investigation of his complaint in relation to the refusal of his information request.
14. The MHCLG provided the Commissioner with a copy of the withheld information. It consists of a document with the title "Consultation analysis" and the vast majority of its content is replicated in the subsequently published explanatory memorandum¹. The remaining parts of this document were withheld under section 35(1)(a).
15. During the course of the investigation, the MHCLG informed the Commissioner that the information withheld under section 22(1) of the FOIA had in the meantime been published. The complainant confirmed that he still wished the Commissioner to complete her investigation and to serve a decision notice. However, bearing in mind that the initially withheld information under section 22(1) of the FOIA has subsequently been published in the Written Ministerial Statement (WMS)²,

¹

http://www.legislation.gov.uk/ukdsi/2019/9780111190968/pdfs/ukdsiem_9780111190968_en.pdf

² <https://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2019-05-14/HCWS1556/>

Explanatory Memorandum and a Consultation Summary³, this decision notice does not address the application of this exemption.

16. Therefore, the following analysis is to determine whether the Council was correct, at the time of the request, to withhold the undisclosed information under the exemption provided in section 35(1)(a).

Reasons for decision

Section 35 – Formulation of government policy, etc.

17. The MHCLG has confirmed to the Commissioner its reliance on section 35(1)(a) of the FOIA.
18. Section 35(1)(a) provides an exemption to the duty to disclose information held by a government department if it relates to the formulation or development of government policy.
19. The MHCLG has informed the Commissioner that the policy to which the information relates to is the local government reorganisation in Northamptonshire, a process which requires the laying of secondary legislation. The information requested by the complainant directly relates to this policy work as it was produced specifically for that purpose.
20. The Commissioner's guidance states that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policy can be formulated and developed within a single government department and approved by the relevant minister.
21. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant minister;

³ <https://www.gov.uk/government/consultations/the-proposed-reorganisation-of-local-government-in-northamptonshire>

- the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
22. Section 35 is a class-based exemption which means that the withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy.
23. The MHCLG has provided the Commissioner with a copy of the consultation analysis, clearly marking the parts which it considered to be exempt under section 35(1)(a)
24. The MHCLG asserted that, at the time of its receipt of the complainant's request, the policy was very much live and in development because the final decision had not yet been taken.
25. Having reviewed the withheld information and considered the MHCLG's submissions, the Commissioner is satisfied that it falls within the category of "formulation or development of government policy". She accepts that the information relates to the policy on local government reorganisation in Northamptonshire. Accordingly she finds that section 35(1)(a) is engaged in respect of the withheld information.
26. The Commissioner has reached this conclusion upon a thorough analysis of the withheld information. She considers that any decision on the reorganisation of local government in Northamptonshire would have been government policy, as evidenced by the fact that it would have required a ministerial decision to bring in secondary legislation. In addition, the Commissioner accepts that the government intended to achieve a particular outcome being the re-organisation of local government in Northamptonshire and by doing so, the consequences of such a decision would have been wide-ranging.

Public interest

27. Section 35(1)(a) is a qualified exemption and therefore the Commissioner must consider the public interest test at section 2 of the FOIA. In line with this, if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information must be disclosed.
28. With respect to the public interest test the Commissioner's guidance on section 35(1)(a) states:

"Section 35(1)(a) covers any information relating to the formulation and development of government policy. There is no automatic public interest in withholding all such information. Public interest arguments

should focus on potential damage to policymaking from the content of the specific information and the timing of the request. Arguments will be strongest when there is a live policy process to protect”.

29. The complainant argued that there was public interest in disclosure of the withheld information under section 35(1)(a), because *“councils in Northamptonshire are spending considerable amounts of money in preparing for a re-organisation without knowledge of how their electors viewed the changes being proposed by the Minister’s decision.”*
30. The MHCLG acknowledged that there was *“general public interest in disclosing information in relation to the business of Government, as this would allow the Government to be accountable and open to the electorate and increase public trust and confidence in the workings of the government.”* It added that there is also a *“a great deal of interest regarding the reorganisation of local councils, particularly from the people resident in those councils and from the councils themselves.”*
31. However, the MHCLG maintained that *“disclosure at this time would be likely to have prejudicial effect of impacting on the safe space needed for the Department to operate effectively.”* In the outcome of its internal review, the MHCLG argued that this would be likely to weaken the ability of Ministers and officials to discuss sensitive topics free from premature public scrutiny and announcement.
32. The MHCLG asserted that, at the time of the request, the final decision was under consideration but not taken yet. It explained that *“the Cabinet is the supreme decision-making body in government, and Cabinet Committees are groups of Ministers who make collective decisions that are binding across the Government. There is a great deal of public interest in ensuring that due process is followed and that Ministers are able to consider information and make decisions and consult with others.”*
33. The MHCLG stated that whether or not to adopt the councils’ proposal was a sensitive decision and a safe space was necessary in which all options could be considered.
34. The MHCLG concluded that, therefore, *“releasing a summary or an analysis of the responses at this stage would have impacted on the ability of the Secretary of State to fully consider the information and discuss it with the officials and set out his decision in a safe space.”* The MHCLG explained that the Secretary of State requested the Committee’s views by 30 April 2019, which demonstrates that the policy decision-making process was ongoing and very much live.

The Commissioner’s view

35. The Commissioner has considered the public interest arguments from both parties. She recognises the importance of transparency in policymaking and in this case, the particular public interest in understanding the development of a policy which would potentially result with a change to the local government institutional structure.
36. The Commissioner notes the complainant's argument on the importance of the public's need to be familiar with the outcome of a consultation process, which would have an impact on the areas they live.
37. The Commissioner also notes that the MHCLG's arguments were focused on the necessary safe space for officials involved in decision-making processes.
38. With regard to the safe space arguments, the Commissioner accepts that significant weight should be given to safe space arguments – the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case, the Commissioner accepts that at the time of the complainant's request the information was the subject of active policy formulation and development.
39. The Commissioner also recognises that the subject of potential reorganisation of local government structure in a county like Northamptonshire is an issue which has gained considerable public interest. Consequently, in the Commissioner's opinion disclosure of the information about the outcome of a consultation process, would be likely to result in public and media attention and thus interfere with the safe space for government policy formulation or development. Therefore, in the circumstances of this case the Commissioner believes that notable weight should be attributed to the safe space arguments.
40. In view of the above, and in recognition of the need to protect the necessary safe space for officials to consider options, to make decisions and to develop government policy, the Commissioner has found that the public interest favoured withholding the remainder of the information held and, therefore, the MHCLG has correctly applied the exemption provided by section 35(1)(a) of the FOIA.

Right of appeal

41. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

42. 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.
43. 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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