Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2022

Public Authority: Department for Levelling Up, Housing and Communities

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant requested from the Department for Levelling Up, Housing and Communities ("the DLUHC") information relating to the designation of Freeports. The DLUHC withheld the requested information under section 35(1)(a) (formulation or development of government policy) of FOIA.

2. The Commissioner's decision is that the DLUHC was entitled to withhold the requested information under section 35(1)(a).

3. The Commissioner does not require the DLUHC to take any steps.

Request and response

4. On 19 March 2021, the complainant wrote to the DLUHC and requested information in the following terms:

> "FoI Request - Freeports
>
> Please let me have documents showing more detailed evaluation of the freeport bids from a. Teesside and b. North East England, showing how the ratings under each of five categories, as summarised in the government's decision-making note (link below), were arrived at.

> Please also provide minutes of the meeting(s) among Rishi Sunak, Robert Jenrick and senior civil servants as mentioned in that note. Finally, please provide minutes of meetings and correspondence concerning the decision to favour the Teesside bid over the North East England one, as also referred to in the decision-making note."

5. The DLUHC responded on 20 April 2021. It stated that the requested information was withheld under the exemption provided by section 35(1)(a).

6. Following an internal review, the DLUHC wrote to the complainant on 22 June 2021. It maintained its earlier response.

Scope of the case

7. The complainant contacted the Commissioner on 12 July 2021 to complain about the way their request for information had been handled, and specifically that the DLUHC was not entitled to withhold the information under section 35(1)(a).

8. The scope of this case and of the following analysis is whether the DLUHC was entitled to rely upon section 35(1)(a) to withhold the requested information.

Reasons for decision

Section 35(1)(a) – Formulation of Government Policy

9. Section 35 of FOIA states:

> "(1) 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"

10. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

11. The Commissioner's guidance explains 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. Policies can be formulated and developed within a single government department and approved by

the relevant ministers. The key point is that policymaking can take place in a variety of ways and there is no uniform process.

12. However, 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 ministers;
    - The government intends to achieve a particular outcome or change in the real world; and
    - The consequences of the decision will be wide-ranging.

13. Section 35 of the FOIA is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described, in this case being the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.

14. The DLUHC advised that the policy to which the information relates is that of the designation of Freeports, which are areas that operate outside a country's customs borders, and which provide a range of benefits (e.g., tax, business rates, etc.) to businesses operating there. The DLUHC explained that it launched a competition for areas wishing to become Freeports in November 2020, from which appointable bids were presented to ministers for a decision on which to progress.

15. The DLUHC stated that it considers the policy to be at the formulation stage because:

    - Whilst the names of the successful bids had been published, these areas were still to develop business cases which would be subject to scrutiny by ministers before any decision to designate them as Freeports.
    - As such, at the date of the request the policy was subject to ongoing discussion and communication, and no final decisions by ministers had been made. There was no guarantee that the successful bids cited in the request would become operational Freeports, particularly as the tax and customs sites had not been confirmed by government.

16. The DLUHC concluded that the information requested relates to the policy in question and will inform the final policy decision to be taken by ministers.

17. The Commissioner has reviewed the withheld information, and the arguments provided by the DLUHC. He is satisfied that the information relates to the stated policy, and at the time of the request was in the formulation or development stage.

18. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effectively policies. In particular, it ensures a safe space to consider policy options in private.

19. The Commissioner is satisfied that the withheld information relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

Public Interest Test

20. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner has considered the context of the information in order to determine whether the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

Public interest in favour of disclosing the information

21. It is understood by the Commissioner that the designation of Freeports will have significant economic impact on not only the local area, but also nationally. The Commissioner recognises that there is an inherent public interest that such a policy is subject to an appropriate level of transparency and accountability.

22. The DLUHC acknowledges that there is always a public interest in ensuring the information it holds is subject to appropriate transparency and accountability.

Public interest in favour of maintaining the exemption

23. The DLUHC stated that at the time of the request there was 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.

24. The DLUHC provided the following arguments in favour of maintaining the exemption:

- Officials require a safe space to gather and assess information and provide advice to ministers;

- Ministers must feel able to consider the information and advice provided in order to reach objective policy decisions free from distraction that the information will be made public;

- Disclosure of the requested information - including early bid evaluations and discussions held about the policy - when final decisions have not been made, would attract national media coverage and speculation, particularly as it relates to a high-profile area of government policy of economic importance. This would be harmful because it could give a potentially misleading impression about the ultimate policy direction as well as distracting ministers and officials from the task of policy formation;

- It is possible that officials and ministers, under media and public pressure, may consider attaching less or more weight to certain factors, otherwise necessary to ensuring that objective, reliable analyses could be arrived at.

25. The DLUHC states that the adverse effects on the policy process and the policy itself, were considerations at the time of the request and remain relevant. It states that the timing of the request is at the crux of the matter.

26. The DLUHC considers that the public interest will be served by there being transparency, at the appropriate time, around information that has informed ministers' considerations and decision on the policy. This will enable ministers and the government to be accountable for the decisions they have taken.

Balance of the public interest

27. The Commissioner considers that in general, there is often likely to be significant public interest in disclosure of policy information, as it can promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.

28. There is a compelling argument for disclosure of the information. The designation of Freeports will have a national economic impact, and there is a public interest in ensuring that their designation is subject to sufficient scrutiny. The Commissioner also perceives that the designation of Freeports is likely to also impact upon the local area, such as through a change in demand upon its infrastructure and resources.

29. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request is therefore an important factor.

30. The government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.

31. The Commissioner has already accepted that, at the time of the request, the policy process was still ongoing. As part of this he accepted that final decisions are yet to be made by ministers and are dependent upon the discussions had at meetings, and early bid evaluations.

32. The Commissioner therefore considers that there remains 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 process of its formulation and development. Therefore, on balance the Commissioner considers that the public interest weight favours maintenance of the exemption and withholding the requested information.

33. The Commissioner's decision is that the DLUHC has correctly applied section 35(1)(a) of the FOIA to withhold the information.

Right of appeal

34. 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: 0203 936 8963
    Fax: 0870 739 5836
    Email: grc@justice.gov.uk
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.

36. 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 .....

Daniel Perry
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