

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 July 2014

**Public Authority:** Department for Communities and Local Government

**Address:** Eland House  
Bressenden Place  
London  
SW1E 5DU

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to high risk families. The Department for Communities and Local Government provided some of the requested information and withheld other information under the exemption for formulation of government policy (section 35 of the FOIA).
2. The Commissioner's decision is that the Department for Communities and Local Government has correctly applied section 35(1)(a) of the FOIA to withhold the information requested in parts 1 and 3 of the request and that the public interest favours maintaining the exemption.
3. The Commissioner does not require the public authority to take any steps.

## **Request and response**

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4. On 3 September 2013, the complainant wrote to the Department for Communities and Local Government (DCLG) and requested information in the following terms:
  1. *Information relating to how the figure of 400,000 high risk families was calculated.*
  2. *Whether the 400,000 high risk families will be divided between local authority areas.*
  3. *What the criteria for being identified as a 'high risk family' is.*
  4. *How many families the £200 million is expected to be spent on.*
  5. *Clarify if the £200 million is 'for' 2015-2016 or is 'available from' 2015-2016.*
  6. *Details of the Payment By Results framework for high risk families.*
  7. *Information on the new incentives for services to work more closely together.*
5. DCLG responded on 27 September 2013. It provided the information in part 5 of the request. The remaining information was withheld under the exemption for the formulation of government policy (section 35 of the FOIA).
6. Following an internal review DCLG wrote to the complainant on 14 November 2013. It stated that, in relation to parts 1 and 3 of the request, it was maintaining its reliance on section 35 of the FOIA to refuse the request. The complainant stated in their request for internal review that they did not wish to pursue parts 2, 4, 6 and 7 of the original request.

## **Scope of the case**

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7. On 8 January 2014 the complainant contacted the Commissioner to complain about the way their request for information had been handled.
8. The Commissioner confirmed with the complainant that his investigation would consider whether DCLG had correctly applied exemptions to withhold the information specified in parts 1 and 3 of their request.

## Reasons for decision

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

9. During the Commissioner's investigation DCLG confirmed that it was relying on section 35(1)(a) to withhold all the information requested in parts 1 and 3 of the request. In doing so, it withdrew its reliance on section 35(1)(b).
10. Section 35(1)(a) of the FOIA provides that information held by government departments is exempt if it relates to the "formulation or development of government policy".
11. Section 35(1)(a) FOIA is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.
12. The withheld information relates to the extension of the Troubled Families Programme. DCLG has confirmed that this is a government policy as clearance of the Programme's final criteria and public announcement is subject to clearance by DCLG Ministers and via the Home Affairs Cabinet Committee.
13. Having viewed the information and considered the DCLG's response, the Commissioner has concluded that the withheld information relates to the formulation or development of government policy and that the exemption is engaged.
14. As section 35(1)(a) is a qualified exemption, the Commissioner has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

#### *Public interest in disclosing the information*

15. DCLG has acknowledged that the engagement of the exemption is not enough, in itself, to warrant the withholding of information and that the weighting of the public interest in withholding or disclosing the information must also be considered.
16. DCLG's internal review response recognised the general public interest in disclosure of information and the specific public interest in releasing information about the provisional criteria referred to in the request. DCLG considers that disclosure of this information would demonstrate that impartial, relevant and comprehensive advice is available to Ministers to inform their consideration and eventual decisions on

the policy for extending the Troubled Families Programme (the "Programme").

17. The complainant has noted that the figure of 400,000 high risk families has been put in the public domain by DCLG, suggesting that the number of high risk families and (by extension) the methodology used to calculate the figure is not in doubt. The complainant has argued that (at least) this element of the policy in question is no longer subject to development or formulation and it would be in the public interest to facilitate understanding of how the figure was calculated.

*Public interest in maintaining the exemption*

18. DCLG has argued 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 which will inform their eventual policy decisions. DCLG has further argued that Ministers must, in turn, 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. Such safe space, DCLG has argued, is needed where it is appropriate in order to safeguard the effectiveness of the policy process.
19. The Commissioner has acknowledged in many previous decisions that the timing of a request can often be a relevant factor in determining where the balance of the public interest lies. In this case, DCLG has acknowledged that in relation to section 35(1)(a), it is generally accepted that, 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.
20. In relation to the above, DCLG has explicitly stated that these conditions do not apply as the detail of the Programme has not been cleared or finalised by Ministers at the Home Affairs Cabinet Committee. DCLG has stated that, subject to ministerial clearance, it hopes (possibly during Summer 2014) to publish the finalised analysis and criteria information.
21. DCLG has submitted that "safe space" considerations carry more weight where the decision on policy has yet to be taken and the formulation or development process is still "live". In light of the above, DCLG has stated that at the time of the request and the time of the Commissioner's investigation, the need for safe space in relation to the provisional analyses and eligibility criteria, pending Ministerial sign-off, endures.

22. DCLG has argued that, in addition to the general need for safe space, as applicable in this situation, there is a specific need to prevent adverse affect to the policy in question. DCLG has stated that the Programme is self-evidently an important, high-profile and, the Commissioner would further suggest, sensitive area of Government policy. DCLG has stated the issues in question attract a high degree of public and media attention and its effectiveness and success are important for broad economic and social reasons.
23. In light of the above, DCLG has argued that the disclosure of information relating to provisional analysis and eligibility criteria for "risk families" and, effectively, the scope of the policy, would inevitable attract media coverage and public speculation. DCLG maintains that this would be harmful as it would give the public and local authorities charged with implementing any final policy, a potentially inaccurate and misleading impression about the ultimate, finalised design of the Programme.
24. DCLG has argued that disclosure of the information at this stage could damage buy-in to the policy and delivery objectives to the Programme as it could give an erroneous impression that the Government's commitment to consult and work with local authorities on the final design of the Programme was empty. It has also argued that disclosure of the information could result in local authorities and their partners preparing and investing in an expected Programme design on the basis of provisional information. DCLG considers that this could also result in the wasting of public funds.

*Balance of the public interest*

25. In considering the balance of the public interest arguments, the Commissioner has referred to his own guidance, which sets out his view that there is no inherent public interest in withholding information that falls within the type of information covered by a class based, qualified, exemption<sup>1</sup>. In effect, this means if, after a weighting exercise, the scales are still balanced, the FOIA's inbuilt presumption towards disclosure applies and information should be released.

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<sup>1</sup> See the ICO website here:

[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom of Information/Detailed specialist guides/the\\_public\\_interest\\_test.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of Information/Detailed_specialist_guides/the_public_interest_test.ashx)

26. The Commissioner considers that the principal argument presented by the DCLG is essentially about the need for a "safe space" to formulate policy, debate "live" issues", and reach decisions without being hindered by external comment and/or media involvement. Safe space arguments are often made within the context of the application of this exemption. Summarised in *Scotland Office v the Information Commissioner* (EA/2007/0070) as "the importance of preserving confidentiality of policy discussion in the interest of good government" this covers the idea that the policy making process should be protected whilst it is ongoing so as to prevent it being hindered by lobbying and media involvement.
27. In *Department for Education and Skills v the information Commissioner and The Evening Standard* (EA/2006/0006) the Tribunal recognised the importance of this argument stating "Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy".
28. In *Scotland Office v the information Commissioner* (EA/2007/0128 para 62) the Tribunal again recognised the importance of the safe space concept, but warned that "information created during this process cannot be regarded per se as exempt from disclosure otherwise such information would have been protected in FOIA under an absolute exemption". The Commissioner agrees with this view and notes that there may be cases where the public interest in disclosure is sufficient to outweigh this important consideration.
29. The Commissioner acknowledges that, in this case, the process of policy development and formulation was ongoing at the time the request was received. He considers that there is a strong public interest in maintaining the safe space for DCLG to robustly consider all options without been constrained by the fear of having to constantly respond at each stage in public. DCLG has argued that the early disclosure of an incomplete range of representations would be likely to give a misleading and inaccurate picture of how the Programme will eventually look.
30. The Commissioner notes that, in relation to high risk families, whilst the figure of 400,000 has been placed in the public domain, DCLG has confirmed that this is a provisional sum based on provisional criteria.
31. The Commissioner considers that, when making decisions which have far-reaching significance and implications, public authorities should expect these to attract public scrutiny. The Programme clearly falls into this category and the Commissioner considers that the fact that information might be misinterpreted is not reason alone for information to be withheld. However, in this case, the Commissioner considers that

the potential effects of disclosure whilst the Programme remains in a nascent form, transcend mere misunderstanding and, rather than resulting just in further queries to DCLG, could lead to damage to the policy formulation or development process.

32. The Commissioner considers that the severity of the potential effects which disclosure could cause in this case heightens the need for integrity of the safe space identified by DCLG being maintained.
33. In reaching a decision to the balance of the public interest the Commissioner has also considered DCLG's submissions that, beyond the formal announcement of the details of the Programme, the need for safe space will have receded and the public interest will favour disclosing the information. The Commissioner considers that DCLG's decision to withhold the information at this time and intention to make the information available once the policy formulation and development process is complete characterises a correct balancing of the public interest in this case.
34. Having considered the relevant arguments the Commissioner has concluded that, in this case, the public interest favours maintaining the exemption.

## Right of appeal

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35. 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: [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)

36. 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.
37. 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**  
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**Information Commissioner's Office**  
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