

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2014

Public Authority: Department for Communities and Local Government

Address: Eland House
Bressenden Place
London
SW1E 5DU

Decision (including any steps ordered)

1. The complainant has requested information about meetings held and planned by the Ministerial Working Group on Gypsies and Travellers. The Department for Communities and Local Government refused the request, citing the exemptions for information relating to the formulation or development of Government policy and information relating to ministerial communications (sections 35(1)(a) and 35(1)(b) of the FOIA).
2. The Commissioner's decision is that the requested information engages the exemptions in section 35(1)(a) and section 35(1)(b) of the FOIA but that the public interest favours disclosing the information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Background

5. The Ministerial Working Group on tackling inequalities experienced by Gypsies and Travellers (the "Working Group") was set up in late 2010 as a working group led by the DCLG and chaired by its Secretary of State. The Working Group met three times in December 2010, March 2011 and July 2011. In April 2012 the Working Group published a progress report (the "Report")¹ which included 28 commitments to help reduce inequalities experienced by Gypsies and Travellers which was endorsed by the Home Affairs Cabinet Committee.
6. The forward to the Report states that the Government intends to produce another report once it has had chance to assess progress in delivery against the 28 commitments.
7. The complainant is a national charity working on behalf of all Gypsies and Travellers. As one of a number of Gypsy/Traveller organisation 'stakeholders' the complainant works closely with colleagues in the Traveller Movement, the National Federation of Gypsy Liaison Groups, the London Gypsy and Traveller Unit and others.
8. The complainant confirmed that it and other stakeholders have met with civil servants and occasionally the Minister to discuss issues relating to the Working Group. The complainant has stated that it had concerns that the Working Group was not properly engaging with stakeholders and that, in the absence of any updates since the publication of the Report, it might be that the Working Group was not progressing matters. It is within this context that the request was made.

Request and response

9. On 18 November 2013, the complainant wrote to the Department for Communities and Local Government (DCLG) and requested information in the following terms:
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¹ The Report is published here:

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6287/2124046.pdf

1. *"How many times has the Ministerial Working Group on Gypsies and Travellers met since the publication of its progress report in April 2012?"*
 2. *How many meetings of the Ministerial Working Group on Gypsies and Travellers are currently scheduled to take place over the next six months? "*
10. DCLG responded on 16 December 2013 and confirmed that the requested information was held. It withheld the information under the exemptions for information relating to the formulation or development of Government policy and information relating to ministerial communications (sections 35(1)(a) and 35(1)(b)) of the FOIA).
11. Following an internal review DCLG wrote to the complainant on 15 January 2014. It stated that it was maintaining its original position.

Scope of the case

12. On 20 January 2014 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. The Commissioner confirmed with the complainant that his investigation would consider whether DCLG had correctly applied exemptions to withhold the requested information.

Reasons for decision

Section 35 – Formulation of government policy, etc.

14. DCLG has withheld the information specified in both parts of the request under section 35(1)(a) and section 35(1)(b) of the FOIA.
 15. Under section 35(1) of the FOIA, information held by a government is exempt if it relates to-
 - (a) The formulation or development of government policy,
 - (b) Ministerial communications.
- (a) *The formulation or development of government policy*
16. Turning firstly to whether the requested information relates to the formulation or development of government policy, the DCLG has confirmed that the information in question and the activities of the

Working Group relate to a range of policy areas. These are linked together by the consideration of how the Government should tackle inequalities experienced by Gypsies and Travellers.

17. The approach of the Commissioner is that the term 'relates to' as it is used in this exemption can safely be interpreted broadly and so he is satisfied that the information, which consists of the number of times the Working Group has met, relates to government policy. Furthermore, as the activities of the Working Group are ongoing and no decision in respect of the various associated policies had been made at the time of the request the Commissioner is satisfied that the information relates to the formulation or development of government policy and that section 35(1)(a) is, therefore, engaged.

(b) Ministerial Communications

18. Section 35(1)(b) states that information is exempt from disclosure if it is held by a government department and relates to Ministerial communications. As stated above, the Commissioner interprets the phrase 'relates to' broadly. Information which refers to a specified Ministerial communication, whether written or verbal, would also engage this exemption because it would 'relate to' such communications.
19. As the information identifies the number of times the Working Group have met or are scheduled to meet and the Working Group is a Ministerial initiative, the Commissioner is satisfied that that information about its meetings relates to Ministerial communications and that section 35(1)(b) is therefore engaged.

Public interest test

20. Section 35 is a qualified exemption and 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.
21. The DCLG has submitted a single set of public interest arguments in respect of its application of section 35(1)(a) and section 35(1)(b). The Commissioner has considered these and submissions made by the complainant before setting out his conclusions below.

Public interest in disclosure

22. DCLG has stated that, in addition to general considerations about transparency, accountability and public engagement and trust in the policy process, a degree of public interest would be served by knowing

whether the Working Group had met since the publication of the Report and whether it was scheduled to meet. DCLG considers that, beyond being of interest to the complainant and the Gypsy and Traveller community, a broader public interest would be served by demonstrating that Ministers are undertaking work in pursuit of stated policy aims.

23. The complainant is a national charity that works on behalf of all Gypsies and Travellers.² The complainant has stated that it is one of just three national bodies working on behalf of Gypsies and Travellers (others being the Traveller Movement and the National Federation of Gypsy Liaison Groups (of which the complainant is also a member). The complainant has stated that, despite being a small organisation with just 16 staff it is probably the largest organisation working in this field.
24. The complainant has clarified that it is one of a number of Gypsy/Traveller organisation 'stakeholders' who work closely with colleagues in the Traveller Movement, the National Federation of Gypsy Liaison Groups, the London Gypsy and Traveller Unit and others. They explained to the Commissioner that, collectively, these bodies approached the then Minister with responsibility for Race Equality, Andrew Stunell MP, to offer collective participation and assistance in the work of the inter-Ministerial Working Group.
25. The complainant confirmed that the Minister agreed that his civil servants (and occasionally the Minister himself) would meet with a stakeholder group of Gypsy/Traveller organisations to discuss issues on a regular basis (3 or 4 times per annum). The complainant confirmed that these meetings have been taking place and FFT along with others has been a regular attendee.
26. The complainant has stated that there is a high degree of disenchantment in that the meetings appear to be simply a means of stonewalling by civil servants without any genuine attempt at involving the stakeholders in the work or progress of the so-called 'Working Group'. The complainant confirmed that the feeling has been so strong that it prompted it to find out whether the 'Working Group' was actually doing any work at all, or even meeting. This, the complainant explained is what prompted the request.
27. The complainant has submitted that, in its opinion, the Report, published by DCLG in April 2012, was produced with little or no involvement from third sector organisations working on behalf of

² <http://www.gypsy-traveller.org/>

Gypsies and Travellers. The complainant has stated that this is an issue that it and other representative organisations have complained about.

28. In addition to finding failings with the progress report, the complainant has raised concerns that the Working Group which produced the report has not done anything by way of follow-up work. The complainant has stated that this scepticism and lack of available information to confound this view led it to submit the request.
29. The Commissioner notes that Commitment 12 of the Report directs the DCLG to "...help Gypsy and Traveller representative groups showcase small private sites...". Paragraph 4.8 states "Gypsy and traveller representative groups have been invited to lead on this....".³

Public interest in maintaining each exemption

30. DCLG has argued that there is a strong public interest served by ensuring that the process by which Ministers are able to consider and then take those decisions on policy, within an appropriate degree of private space, is safeguarded.
31. DCLG has argued that the public interest in maintaining the exemption is stronger where work towards policy decisions is still ongoing (as in this case) as disclosure would be more likely to have an adverse effect.
32. DCLG has argued that disclosure of the number of occasions the Working Group has or is scheduled to meet would result in public and media speculation as to the extent of progress made in relation to its stated goals.
33. DCLG has argued that an outcome of this might be that Ministers and their officials would be forced to focus whether they met, how many times they met, etc., and on generating explanations for this at the expense of other activities which would further the development of policy.
34. DCLG has argued that there is potential for the adverse affects described above to be more broadly felt than solely in this specific case. It considers that the pressure to focus on meeting arrangements and to consider the public perception of the extent to which this reflects work being done result in a 'chilling effect'. This pressure to focus on

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https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/6287/2124046.pdf

justifying administrative arrangements and explaining processes could result in potential policy options not being as fully considered. DCLG has argued that the knock-on effects of disclosure would be inhibition to the activities the exemption is designed to protect.

35. DCLG has further argued that disclosure of the information is not necessary to demonstrate that Ministers have been progressing the aims of the Working Group. It also considers that the stated commitment to publish the outcomes against the commitments set out in the Report serves the public interest in accountability and transparency.
36. DCLG provided the Commissioner with information about actions undertaken by the Working Group since the publication of its Report. DCLG argued that this information demonstrated that the aims of the Working Group were being progressed and that there was no need for the requested information to be disclosed in order to meet the public interest in being reassured that progress was being made.

Balance of the public interest

37. 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.
38. In relation to the specific wording of the exemption, which has Ministerial Communications and the development or formulation of policy as its focus, the Commissioner considers that certain types of information will be more closely linked to and, therefore, have a greater influence on these factors.
39. So, for example, minutes of meetings or the content of discussions around policy options will have a direct relationship with the formulation or development of Government policy. Similarly, the degree of detail or the nature of Ministerial Communications will influence the effects of disclosure.
40. DCLG has argued that disclosure of the information would represent an invasion of the "safe space" necessary for Ministers to consider policy options and would result in adverse effects to this process. In this case, DCLG considers that it would represent an interference with Ministerial decisions and options as to how best to progress the policy process.

41. The Commissioner is familiar with such "safe space" and "chilling effect" arguments in the context of section 35(1)(a) and (b). He is satisfied that they represent a cogent and legitimate response to the general issue of preserving private thinking space during policy development and good working relationships, both for ministers and for civil servants.
42. DCLG has argued that one of the outcomes of Ministerial safe space being breached in cases such as this would be that disclosure would create a false impression of the work being done. In response to this the Commissioner would say that this, in itself is not a reason for withholding information as DCLG is at liberty to clarify what progress has been made and the relevance or otherwise of the number of meetings.
43. In relation to DCLG's argument that the focus on the number of meetings would result in Ministerial efforts being focussed on providing explanations and would lead to possible policy options being overlooked, the Commissioner is sceptical that disclosure would have this effect. In maintaining the focus on the content and context of the information, the Commissioner considers number of meetings is of the same category of information as the timing or the venue of the meeting – it relates to the administrative arrangements via which policy-making might take place. Had the request sought the content of papers submitted to Working Group meetings or the minutes of meetings the Commissioner considers that DCLG might have had a stronger case for arguing that the public interest favours maintaining the exemption.
44. 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. However, the Commissioner considers that the number of meetings undertaken by the Working Group is sufficiently removed from the content of any decision-making that disclosure would be unlikely to produce the damaging effects described by the DCLG. The Commissioner considers that the requested information reveals little if not nothing of the content of decision making and does not have a significant impact on Ministerial safe space.
45. The Commissioner also does not consider that disclosure of the information would result in the chilling effects ascribed by the DCLG. The Commissioner considers that officials should be confident enough in their decision-making to be able to demonstrate that progress in relation to stated actions is being made or, where it is not, to be held accountable. The Commissioner considers that DCLG has not adequately explained how disclosure of the information would result in Ministers being inhibited from considering policy options or how it might

force them to change established processes or meeting procedures. Furthermore, whilst not an argument explicitly made by the DCLG, the Commissioner does not accept that Ministers would (or should) alter the processes by which decisions are made in order to avert scrutiny via the FOIA.

46. The Commissioner has considered the detrimental effect of releasing the number of times the Working Group has met and simply does not agree that the DCLG has shown that it would lead to Ministers becoming more circumspect and less effective in the way they approach their work. It is very hard to believe that Ministers would consider themselves inhibited as a result of the disclosure of this piece of information.
47. Conversely, the Commissioner notes that the complainant is a key stakeholder in the area of policy development which the Working Group is facilitating. The Report suggests that there is a shortfall in data and evidence in relation to the experience of Gypsies and Travellers and that, to address this and to identify how improvements can be made, the Working Group will work with Gypsy and Traveller communities.
48. However, as a key stakeholder working on behalf of Gypsy and Traveller communities, the complainant has argued that it does not consider that there is evidence of liaison leading up to the production of the Report and that subsequent contact and involvement has been limited, despite its best efforts to engage with the process. The complainant has stated that the request was submitted to ascertain whether any progress was being made, in the absence of any updates from the Working Group.
49. The Commissioner considers that disclosure would, therefore, provide public reassurance that the Working Group is making progress in relation to its stated aims and commitments.
50. The Commissioner considers that knowledge of the number of meetings would show whether the issues had been taken forward and the extent to which there has been engagement with the relevant stakeholders. Should DCLG consider that the number of meetings does not reflect the work done to progress the policy, it is at liberty to clarify this with contextual information with its response.
51. Regardless of how the information is received or interpreted by the public the Commissioner does not consider that its disclosure should inhibit the scope of policy making decisions available or pressurize DCLG to revise the procedures for making such decisions.
52. In relation to DCLG's argument that evidence has been shared with the complainant that the Working Group has been progressing matters the Commissioner does not consider that this contributes significant weight

to the balance in favour of maintaining the exemptions. Whilst some information about the activities of the Working Group might well have been shared the Commissioner considers that DCLG has not explained how releasing the requested information would result in the damaging effects it has described and how, therefore, the public interest favours maintaining each of the exemptions.

53. In conclusion the Commissioner has concluded that, in this case, there is a strong public interest in the information being disclosed. He does not consider that DCLG has coherently demonstrated that the effects of disclosure on the activities defined by the exemptions counterbalance or are even equal to the public interest factors in favour of disclosure in this case.
54. For both the section 35(1)(a) and (b) exemptions the Commissioner has concluded that the public interest in maintaining each of the exemptions does not outweigh the public interest in disclosure.

Other matters

55. Although they do not form part of this decision notice the Commissioner wishes to note the following matters of concern.

Engagement with the Commissioner's Investigation

56. In investigating complaints the Commissioner is heavily reliant on the timely cooperation of public authorities. Where authorities fail to meet the deadlines set in the Commissioner's correspondence an outcome can be that complainants are denied access to information to which they are entitled.
57. The Commissioner usually expects public authorities to provide final submissions within 20 working days in order that he can reach a decision in relation to any specific complaint. Where there are extenuating circumstances, the Commissioner will allow authorities more time to respond, however, he expects that authorities will make every effort to provide submissions as promptly as possible.
58. In this case DCLG took over 90 working days to respond to the Commissioner's enquiries. The Commissioner expects that, in future, DCLG will respond to his correspondence in a timely manner.

Right of appeal

59. 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

60. 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.
61. 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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