

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 February 2018

Public Authority: Department for Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information regarding the lobbying and communication around the decision to use the Devolution Act and suspend the existing involvement of the Boundary Commission in relation to the merger of Taunton Deane Borough Council and West Somerset Council. The Commissioner's decision is that the Department for Communities and Local Government has incorrectly applied the exemption for information that relates to the formulation or development of government policy at section 35(1)(a) of the FOIA.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose the information withheld under section 35(1)(a) of the FOIA.
3. The public authority must take this step 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.

Request and response

4. On 10 January 2017, the complainant wrote to the Department for Communities and Local Government ('DCLG') and requested information in the following terms:

"Taunton Deane Borough Council (TDBC) voted to "merge" with a financially non-viable neighbouring authority West Somerset Council (WSC).

At TDBC a Full Council vote was taken in July 2016 to proceed with the merger without any prior public consultation.

TDBC are now belatedly seeking to gauge public opinion by consulting after the formal merger decision by the Council had been taken.

The consultation has no authentication of the responders (to ensure that the consultation applies only to TDBC citizens and taxpayers), does not require a name and address to be recorded and is open to anyone (anywhere in the world) who can access the internet.

Q1. From 1/1/2016 to current date, please disclose all correspondence (including letters, emails, meeting minutes or notes, phone notes, legal opinions etc) between TDBC and DCLG that relate to the merger proposal (between TDBC and WSC).

Q2. Please disclose all relevant TDBC/WSC merger correspondence from other parties e.g. MPs, Sedgemoor District Council, Boundary Commission, Somerset County Council etc.

Q3a. Please disclose any guidance (or provide internet links) as to how the DCLG would expect a public consultation to be undertaken (under the Devolution Act).

Q3b. Would the DCLG expect public consultation (under the Devolution Act) to be undertaken prior to a formal decision to proceed by Council(s)?"

5. DCLG replied on 3 April 2017. It said that the information requested is exempt from disclosure under section 35(1)(a) (information relating to the formulation and development of government policy) and that the public interest does not favour disclosure.

6. The complainant requested an internal review on 4 April 2017. He challenged DCLG's decision to withhold the information and said the following:

"I would like to narrow my FOI request to focus on the lobbying and communication around the decision to use the Devolution Act and suspend the existing involvement of the Boundary Commission to impartially review boundaries".

7. DCLG completed its internal review on 29 April 2017. It said that it wished to maintain its position that the information sought was exempt.

Scope of the case

8. The complainant contacted the Commissioner on 9 May 2017 to complain about the way his request for information had been handled.
9. The Commissioner has considered whether DCLG has correctly applied the exemption at section 35(1)(a) of the FOIA to the narrowed down request for communications that surround the use of the Devolution Act over the established principle of using the impartial Boundary Commission.

Background

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

“With the enactment of the Cities and Local Government Devolution Act 2016 there are now two wholly separate processes for changing boundaries and merging councils. The “Commission process” involves the Boundary Commission undertaking a review of the boundaries and making recommendations to the Secretary of State and now an alternative and more streamlined process whereby councils themselves may submit proposals for boundary changes, including mergers, to the Secretary of State. The Commission itself advises the use of the newer streamlined process.

In 2016 Taunton Deane and West Somerset councils voted to merge.

In March 2017 West Somerset District Council and Taunton Deane Borough Council submitted a joint proposal to merge to form a single, new council covering both of their present geographies. At this time no policy on district council mergers had been formulated. The Department had not previously carried out this type of local government reorganisation, therefore policy relating to the acceptability of the mergers as a whole and this specific proposal to merge needed to be generated, advice thereon submitted to the Secretary of State for Local Government and a decision taken. Advice on the proposal from West Somerset and Taunton Deane was submitted to the Secretary of State for his consideration. We have not yet had a final decision as to the implementation of the merger proposal or the policy on which our advice was based.”

Reasons for decision

Section 35 – formulation or development of government policy, etc

11. Section 35(1)(a) states –

“Information held by a government department or by the National Assembly of Wales is exempt information if it relates to -

(a) the formulation or development of government policy,”.

12. DCLG said that the request is concerned with the merging of Taunton Dean and West Somerset councils to form a new local authority. It said that the precise form of governmental reorganisation required to merge two local authorities to form a new authority and abolish the extant authorities has not been carried out before, though it believes powers exist to do so under the Cities and Local Government Devolution Act 2016. It explained that there is currently no active policy with regard to how these mergers should proceed and therefore formulation of new policy is very much necessary to achieve this outcome and, at this point, is still very much in development. DCLG confirmed that the proposal submitted by West Somerset and Taunton Deane to merge to form a single district council is still under consideration by the Secretary of State for Communities and Local Government and therefore the policy is still subject to ministerial decision and open to development.

13. Taking into consideration that the key indicators of the formulation or development of government policy, as stated in the Commissioner's guidance on this exemption¹, are as follows:

- the final decision will be made either by the Cabinet or the relevant minister;
- the government intends to achieve a particular outcome or change in the real world; and
- the consequences of the decision will be wide-ranging,

the Commissioner considers that, in this case, the merger of council's under the Cities and Local Government Devolution Act 2016 amounts to the formulation or development of government policy.

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

14. The term 'relates to' can be interpreted broadly. If there is sufficient enough link between the information in question, in this case a letter, and its enclosure, to the Secretary of State from the leader of a district council, and the formulation or development of government policy, which here is how council mergers should proceed, then the exemption will be engaged.
15. The Commissioner has considered the withheld information. She has taken into account the case of *DfES v The Information Commissioner & Evening Standard*² 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

16. 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

17. DCLG said it recognises 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. It said that this, in turn, may serve to increase public trust and confidence in the policy decisions made by ministers and in good governance. It also said that there is a specific public interest in a greater understanding of the operation of the arrangements described in the request and that residents of the councils concerned may be able to confirm the basis on which any merger would take place and gain a greater insight into the advantages and/or disadvantages involved.
18. The complainant made the following points:

² Appeal number EA/2006/0006

- Custom and practice is that all council mergers and boundary reviews are conducted impartially by the Boundaries Commission which is an impartial body and avoids political parties redrawing boundaries for their own electoral benefit. He said that he does not believe that the Devolution Act with Ministerial approval should be used in place of the Boundary Commission when examining Local Government reorganisation which he believes should not favour any political party.
- Taunton Deane and West Somerset Councils took a decision to merge without prior consultation with the public, which is wrong in principle. In his view, the misuse of the Devolution Bill has allowed a post-decision consultation to take place, thus supporting the maladministration that had already occurred.
- The majority of the 500+ respondents to the consultation were against the merger.
- At a modest cost of £80K, the consultation could have been conducted on a formal postal basis to every household via the Electoral Roll ensuring authentication for postal, on-line or phone responses. That was eschewed in favour of an informal web-based response that required no name or address or any authentication whatsoever, allowing anyone, anywhere in the world to respond and without effective detection of duplicate entries.
- If the Minister comes to a decision utilising the Devolution Act over impartial Boundary Commission involvement then the public interest in seeing the communications under the FOIA have been suppressed until it is too late and the policy decision around, in his view, a misuse of the Devolution Act has taken place and established legal precedent. It could also open up the DCLG to Judicial Review.
- The issue with the use of the Devolution Bill by a Conservative Minister in support of a merger of two Conservative Councils and lobbied for by the local Conservative MP is that it clearly favours Conservative party interests.
- The newly merged council would give the Conservative party a 27 seat majority, which means that the Conservative Minister could be seen as redrawing the Map of Somerset to potentially suit Conservative (or ruling) party interests. This is wrong in principle.
- Clearly, the number of Councillors would be reduced to approximately 65 by the Boundary Commission. However, it will

still see a council that would be likely to remain Conservative for many years to come.

- The merger also implicitly requires existing Taunton Deane taxpayers to subsidise West Somerset which has a structural deficit and is heading towards insolvency. This brings in another party political dimension to the public interest test.
- The Minister could be seen as utilising the Devolution Bill to prevent the insolvency of a Conservative-run West Somerset Council by getting the Taunton Deane taxpayers to provide a hidden subsidy, as the newly merged Council will absorb West Somerset deficits, thus enabling the Government to avoid the political embarrassment of a Conservative-run Council becoming insolvent and, also, avoiding central Government paying for the shortfalls.
- DCLG confirmed this potential bias in Local Government policy formulation and the excessive power to over-rule local consultation by Ministerial decision:

"Advice would be submitted to the Secretary of State based on the robustness of the proposals and requesting a decision regarding whether he is minded to proceed. Once this advice is submitted it is entirely at the discretion of the Secretary of State as to whether he is minded to proceed with the merger, or not. The progress of the merger is therefore entirely down to ministerial decision".

Public interest in maintaining the exemption

19. DCLG has said 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. 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 it is widely accepted that such safe space is needed where it is appropriate in order to safeguard the effectiveness of the policy process.
20. DCLG acknowledged that the considerations described in the preceding paragraph carry most weight where the decision on policy has yet to be taken and the formulation or development process is still "live". It said that this was the case at the time of the request, and at the date of responding to the Commissioner's enquiries, and expressed its opinion

that the need for safe space around the advice, pending consultation, debate and final decisions is clear.

21. It was further submitted by DCLG that nothing should detract from the Minister's ability to reasonably take policy decisions that will in future affect the evolution and structure of local government. It said that disclosure of the requested information would inevitably have attracted media coverage and public speculation which would be harmful as it would have given the public a potentially inaccurate and misleading impression about the development of the merger process and the Department's work with the local government sector.
22. DCLG then explained that whilst it can be argued that the fact that information may be misinterpreted is not itself reason not to disclose it, there are powerful arguments to the contrary in this case. It said 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. DCLG submitted that such unnecessary effort is avoidable and, even if deployed, might not be successful in correcting misunderstanding and its consequences. It said 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.
23. DCLG summarised that the above are all factors that would serve to undermine the policy aims and delivery and that release of information providing insight into the development of this policy would hinder and distort the merger of two discrete authorities into a single body and any future mergers of a similar nature. It said that 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.

Balance of the public interest

24. 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, its content and sensitivity, and its context are key influences on the outcome of the public interest test, as is the timing of the complainant's request.

25. Given DCLG's explanation, as referred to in paragraph 12, that there is currently no active policy with regard to how mergers under the Cities and Local Government Devolution Act 2016 should proceed, the Commissioner is satisfied that the request was made when the policy in this area is in a process of formulation and development.
26. 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.
27. DCLG's arguments in this case relate to the concept of a safe space. The Commissioner accepts that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. However, 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.
28. Although it is clear to the Commissioner that the issue in this case is still live, she also needs to focus on the particular information that is being withheld. Having viewed such information, she notes that it does not constitute internal discussions or advice to Ministers. Nor does she consider that the withheld information would provide an insight into the development of policy regarding the merger of council's. Although the information does touch on the advantage of using one of the two processes for changing boundaries and merging councils over the alternative, it does not amount to detailed consideration of options. Rather the withheld information amounts to the views of a third party council.
29. As stated on the aforementioned guidance on this exemption, traditionally safe space arguments relate to internal discussions but modern government sometimes invites external organisations/individuals to participate in their decision making process (eg consultants, lobbyists, interest groups, academics etc). The guidance explains that safe space arguments can still apply where external contributors have been involved, as long as those discussions have not been opened up for general external comment. However, it comments that this argument will generally carry less weight than if the

process only involved internal contributors. In this specific case, it is not apparent that the third party council was invited to participate in their decision making process.

30. The argument presented in paragraph 21 encompasses the view that the information may be misinterpreted. The Commissioner's guidance on the public interest test³ 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 Hogan⁴ 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 misunderstood, or is considered too technical or complex."

31. 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 said that unnecessary effort would need to be focused on explaining various options considered, which might not be successful in correcting misunderstandings, and that much debate could be expected. Having examined the withheld information, the Commissioner does not necessarily consider that disclosure would lead to the effect claimed by DCLG or that an explanation of the information could not reasonably be provided. As stated above, the withheld information does not amount to detailed consideration of options, but amounts to the views of a third party council. The Commissioner notes that the overall view of the third party council is available online and has been so since before the request was made in this case.
32. DCLG said that the public interest served by disclosure of the requested information would need to be equal to or greater than that in maintaining the exemption. It said that any release of information must serve a greater purpose than the potential disadvantages of prematurely

³ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

⁴ Christopher Martin Hogan and Oxford City Council v Information Commissioner EA/2005/0026 and 0030

revealing the inner workings, inputs and arguments that evolve into final policy and that in using this test, the release of the information in full is not in the public interest.

33. The Commissioner's guidance on the public interest test⁵ states the following:

"The effect of section 2(2)(b) is that when the authority has carried out the public interest test, it can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosing it. If the public interest is equal on both sides, then the information must be released. If the public interest in disclosure is greater than the public interest in maintaining the exemption, then the information must also be released. In this sense we can say that there is an assumption in favour of disclosure in FOIA."

34. Therefore the Commissioner considers DCLG's explanation, at paragraph 32, of how the public interest test works to be inaccurate. In effect, DCLG has described an assumption in favour of maintaining the exemption. For the avoidance of doubt, the assumption is in favour of disclosure.
35. The aforementioned guidance on this exemption recognises that, in general, there is often likely to be significant public interest in disclosure of policy information, as it is likely to 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.
36. As mentioned above, having viewed the withheld information, the Commissioner does not consider that it constitutes internal discussions or advice to Ministers or that it would necessarily provide an insight into the development of policy. Therefore the public interest in disclosure as described in the preceding paragraph is limited. However, there is always some public interest in transparency and in providing the full picture.
37. When assigning weight to the public interest arguments, regard must be had to the actual content of the withheld information. The Commissioner notes that although some of the information isn't entirely anodyne, she couldn't identify significant content that would reduce DCLG's ability to

⁵ https://ico.org.uk/media/for-organisations/documents/1183/the_public_interest_test.pdf

develop ideas, debate live issues, and reach decisions on an issue that has wide reaching consequences, away from external interference and distraction. She has therefore only placed very limited weight on the safe space arguments presented by DCLG in this case.

38. As DCLG has itself stated, there is a legitimate public interest in the subject of this information. The Commissioner considers that the public, particularly residents of the councils concerned, should be expected to have a real and justified interest in the reorganisation of their local authorities. It is possible that disclosure could highlight any flaws in the recommendation to merge the councils in the manner proposed which could then lead to a better recommendation and ultimately a better decision.
39. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemption is not outweighed by the public interest in disclosure of the requested information and therefore the exemption at section 35 of the FOIA has been incorrectly applied.

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

Andrew White
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