

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 October 2018

Public Authority: Ministry of Housing, Communities and Local Government

Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has asked the Ministry of Housing, Communities and Local Government ("the MHCLG") to provide him with recorded information concerning the voter identification pilot scheme for the elections of May 2018, and specifically for information which concerns the exclusion of Tower Hamlets from the Government's pilot. Having first refused the complainant's request in reliance on section 31(1) of the FOIA, and following the Commissioner's initial enquiry in this matter, the MHCLG disclosed to the complainant much of the information it holds which is relevant to his request. One document, a briefing note for an intended telephone conversation between Ministers, was identified which the MHCLG determined should continue to be withheld in reliance on section 35(1)(b).
2. The Commissioner has decided that the MHCLG has correctly applied the exemption provided by section 35(1)(b) and it is therefore entitled to withhold the briefing note.
3. The Commissioner requires the public authority to take no further action in this matter.

Request and response

4. On 22 September 2017, the complainant wrote to the Ministry of Housing, Communities and Local Government ("the MHCLG") and requested information in the following terms:

"Can you tell me who decided that Tower Hamlets should be excluded from the voter ID pilot in 2018?"

Can you publish all correspondence between:

- a) DCLG Ministers and Officials in this regard since 2015?
- b) Commissioners and DCLG since 2015?
- c) Council officers including [name redacted] since 2015?
- d) Elected members of Tower Hamlets or members of the Commons and Lords since 2015 in this regard?

5. On 18 October 2017, the MHCLG wrote to the complainant to advise him that it holds information relevant to his request. The Department informed the complainant that it was considering the application of sections 35(1)(a) and 36 in respect of that information and that it would require an additional 20 working days to consider where the balance of the public interest lies.
6. On 15 November 2017, the MHCLG wrote to the complainant and informed him that it required further time to consider the public interest arguments relating to the applicable exemptions.
7. The MHCLG found it necessary to extend the compliance period for this request again on 13 December 2017 and on 12 January 2018 in order to consider the public interest.
8. On 13 February 2018, the complainant wrote to the MHCLG to ask for an update on the Department's progress on his request.
9. On 5 March 2018, the MHCLG made its formal response to the complainant's request. The Department informed the complainant that it held information within the scope of his request but was withholding it in reliance on section 31(1)(a) of the FOIA by virtue that disclosing the information would harm the prevention or detection of crime. The MHCLG's response provided the complainant with its public interest considerations.
10. On receipt of the MHCLG's response the complainant asked the Department to conduct an internal review of its decision to withhold the information he had requested. The complainant said, "I disagree with the notice as I feel that some of the information could be released and that not all of it will have negative impact on the general public in Tower Hamlets. It may have a positive effect to see how officers are dealing with elections".
11. On 29 March 2018, the MHCLG wrote to the complainant to advise him of its final decision. The reviewer decided to uphold the Department's decision to withhold the requested information for the reasons outlined in its response of 5 March.

Scope of the case

12. The complainant contacted the Commissioner 29 March 2018 to complain about the way his request for information had been handled.
13. Having considered the documents supplied to her by the complainant, the Commissioner initially decided the focus of her investigation would be whether the MHCLG is entitled to refuse the complainant's request in reliance on section 31(1) of the FOIA.
14. Following the Commissioner's initial correspondence with the MHCLG, the Department advised the Commissioner that it wished to change its position with regard to the complainant's request.
15. The MHCLG issued a revised response to the complainant on 7 September 2018 and the majority of the information he had requested was released to him. The MHCLG provided the Commissioner with a copy of the revised response and the information it released to the complainant.
16. The MHCLG identified one document which fell within the scope of the complainant's request which it considered should continue to be withheld. The complainant he was advised that the withheld document engaged the exemption provided by section 35(1)(b) of the FOIA on the grounds that it is information which relates to ministerial communications.
17. Additionally, and in the alternative, the MHCLG advised the complainant that it considered section 36(2)(c) to also be engaged.

Background information

18. The complainant's request relates to the voter ID pilots which were conducted at the Local Elections on 3 May 2018. The pilots formed part of the government's commitment to improve the security of the election process.
19. This pilot scheme was led by the Cabinet Office and included five pilot areas where voters were required to show identification when voting at a polling station.
20. This requirement was announced by the Minister for the Constitution in 16 September 2017 in a move to tackle voter fraud through voter impersonation.

21. For the purposes of the Government's pilot scheme, Woking, Gosport, Bromley, Watford and Slough volunteered to take part in a trial which will required voters in their areas to produce identification before being issued with a ballot paper.
22. In addition to the scheme outlined above, Tower Hamlets ran a separate postal voting pilot for the purpose of looking at the security of postal votes and for providing additional guidance in postal vote packs.
23. The form of identification used was set by the councils listed above, but involved trialling both photo ID and non-photo ID.
24. The Electoral Commission has called for the introduction of voter identification and the international election watchdog the Organisation for Security and Co-operation has said it should be "seriously considered".
25. Tower Hamlets originally expressed an interest in being involved in these pilots, but later withdrew their expression of interest and did not participate.
26. There has been a commitment to facilitate further pilots at the next round of Local Elections in 2019¹.

Reasons for decision

Section 35 – formulation of government policy, etc.

27. Under section 35(1)(b) of the FOIA information is exempt from disclosure if it relates to Ministerial communications.
 28. The MHCLG has provided the Commissioner with a copy of the document it has withheld from the complainant. This document consists of a briefing note prepared for the then Secretary of State, Sajid Javid, prior to a telephone conversation with Chris Skidmore, the then Minister for the Constitution in the Cabinet Office.
 29. Ministerial communications are defined by section 35(5) of the FOIA as being:
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¹ <https://www.gov.uk/government/news/governmentcommits-to-new-round-of-voter-id-pilots-at-next-local-elections>

"... any communications –

- (a) Between Ministers and the Crown
- (b) Between Northern Ireland Ministers, including Northern Ireland junior Ministers, or
- (c) Between Assembly Secretaries, including the Assembly First Secretary,

and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales"

- 30. Where the MHCLG has applied the section 35(1)(b) exemption, it has done so in reliance on the phrase 'relates to'. To support its position, the MHCLG has referred the Commissioner to her own guidance which states that the term relates to is capable of being interpreted widely.
- 31. In this case, the Commissioner acknowledges that the primary purpose of the briefing note was to brief the then Secretary of State prior to a telephone conversation with the Elections Minister.
- 32. In the Commissioner's opinion the briefing note is not a Ministerial communication in itself. It does however directly relate to an intended communication between ministers and as such, the briefing note is most certainly more than incidental to the intended communication. For this reason, the Commissioner has no hesitation in finding that the note engages the exemption provided by section 35(1)(b).
- 33. As section 35 is a qualified exemption it is subject to consideration of the public interest test. This requires the Commissioner to determine whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
- 34. The MHCLG acknowledges the general public interest inherent in the disclosure of official information. This is particularly so where disclosure of information promotes both transparency and accountability in respect of decisions taken by Ministers across all Departments.
- 35. In this case, disclosure of the briefing note would assist the public in understanding more fully the relationship which exists between the Tower Hamlets council and central government, particularly following the police investigation into election fraud in Tower Hamlets.
- 36. The Commissioner notes that disclosure could allow the public to scrutinise any decisions made by government following the pilot scheme

and thereby increase its understanding of government processes. This in turn might influence public trust in those decisions and the resulting openness would also make government more accountable.

37. The Commissioner acknowledges the clear public interest Ministers across government Departments being able to discuss issues candidly. This is equally important where officials within Departments are tasked with providing advice to Ministers in preparation for their discussions.
38. The Commissioner recognises the importance of officials being able to provide candid advice to Ministers where that advice is not subject to public disclosure. She is mindful that where such conversations are documented, their disclosure could potentially undermine the collective decision making process of government Ministers.
39. In the Commissioner's opinion, it is key to the operation of Government that Ministers are able to debate and discuss issues in a free and frank way before reaching a collective decision.
40. In this case, the withheld briefing note was prepared by officials to support a conversations between two Ministers of the Crown to ensure they are appraised of all the salient facts and to provide the high quality advice needed to be able to discuss issues effectively.
41. The Commissioner notes the date when the complainant submitted his information request. This was 22 September 2017 which was before the voter ID pilot scheme and the local elections of 3 May 2018. Effectively, at that time, the information in question concerned 'live' and on-going discussions, and although those elections have now passed, there is an intention for further pilot schemes to be launched in 2019.
42. It is clear to the Commissioner that the information contained in the briefing note was intended to inform a conversation between Ministers and not set out a final policy decision about Tower Hamlets participation in the voter ID pilot. Nor is the note a record of the actual conversation that took place.
43. The decision not to participate was ultimately made by Tower Hamlets Council. This is evidenced in the documents released to the complainant. Additionally, the MHCLG has assured the Commissioner that Tower Hamlets Council has itself released information about its decision not to participate in the pilot scheme.
44. The Commissioner has considered the representations made by the MHCLG in support of its withholding of the briefing note.

45. The Commissioner will always support the disclosure of information where it will genuinely provide greater openness, transparency and accountability in respect of government and the decisions it makes.
46. In the Commissioner's opinion, the information already released by the MHCLG and the Council goes a long way in satisfying the public interest associated with Tower Hamlets decision not to participate in the voter ID pilot scheme. She agrees with the MHCLG that the release of the briefing note would not significantly add to the public's understanding of Tower Hamlets' decision.
47. Here, the Commissioner must recognise the need for Ministers to be able to communicate with one another in a 'safe space' and for officials to provide advice to ministers to facilitate those communications. For this reason the Commissioner gives greater weight to the public interest which supports maintaining the exemption cited by the MHCLG.
48. The Commissioner's decision is that the MHCLG has correctly applied to section 35(1)(b) to the briefing note it has withheld from the complainant.
49. In view of the above decision, it is not necessary for the Commissioner to consider the MHCLG's additional and alternative reliance on section 36(2)(c).

Right of appeal

50. 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

51. 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.
52. 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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