

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 June 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 information held by the Department for Levelling Up, Housing and Communities (the DLUHC) about a particular meeting attended by the Secretary of State.
2. The DLUHC confirmed that it held some information relevant to the request; however, it advised that this was to be withheld under section 35(1)(a) - formulation and development of government policy, section 40(2) - personal information, section 41(1) - duty of confidence, and section 43(2) - commercial interests, of the FOIA.
3. During the course of the Commissioner's investigation the DLUHC confirmed that it did not hold any information relevant to parts 1, 2 and 4 of the request. The DLUHC also stated that it was now only relying on section 41(1), and section 43(2), of the FOIA as its basis for withholding the information relevant to part 3 of the request.
4. The Commissioner's decision is that the DLUHC is entitled to rely on section 41(1) of the FOIA when withholding the information relevant to part 3 of the request.
5. The Commissioner also accepts that, on the balance of probabilities, the DLUHC does not hold any information relevant to parts 1, 2 and 4 of the request. However, as the DLUHC failed to inform the complainant that it does not hold some of the information they have requested, the Commissioner has found a breach of section 1(1)(a) of the FOIA.
6. The Commissioner does not require the DLUHC to take any steps as a result of this decision notice.

Request and response

7. On 21 September 2020, the complainant wrote to the DLUHC and requested information in the following terms:

'This is a Freedom of Information request for the department to publish the names of the individuals who attended the meeting on 16th March 2020 between Robert Jenrick and Residential Land, M&G, Redrow and Berkeley Homes.

-Please also provide minutes for the meeting.

-Please also release any correspondence between [Person A] and Mr Jenrick in the period 24/07/2019 and the present day.

-Please also release any correspondence between [Person B] and Mr Jenrick in the period 24/07/2019 and the present day.'

8. The DLUHC provided its response to the complainant on 19 October 2020, confirming that whilst it held some information that fell within the scope of the request, this was to be withheld under section 35(1)(a), section 40(2), section 41(1), and section 43(2) of the FOIA.
9. The DLUHC went on to confirm that, where relevant, it had considered the public interest test, and had concluded that this lay in favour of withholding the information in this instance.
10. The DLUHC then went on to say that 'to be helpful', the usual details of the meeting had been disclosed as part of the Ministerial Transparency return, and it provided a link to its website.
11. The DLUHC also advised the complainant that they may be interested in recent Parliamentary questions 'on this topic' and it provided further links to this information on its website.
12. On 19 October 2020, the complainant requested an internal review, and on 21 December 2020, the DLUHC provided its internal review response, upholding its original decision.

Scope of the case

13. The complainant contacted the Commissioner on 11 January 2021, to complain about the way their request for information had been handled by the DLUHC.

14. In particular, the complainant raised concerns that all the information relevant to all parts of their request had been withheld by DLUHC. They also believed that the DLUHC had not given full and proper consideration to the public interest test.
15. The Commissioner considers the complainant's request to be in four parts, which are as follows:
 - Part 1: The names of the individuals who attended the relevant meeting on 16 March 2020.
 - Part 2: The minutes for that meeting.
 - Part 3: Correspondence between Person A and Mr Jenrick in the period 24 July 2019 to the date of the request.
 - Part 4: Correspondence between Person B and Mr Jenrick in the period 24 July 2019 to the date of the request.
16. During the course of the Commissioner's investigation, the DLUHC advised that it does not hold any information relevant to parts 1, 2 and 4 of the complainant's request.
17. Furthermore, the DLUHC advised that it no longer wished to rely on section 35 and section 40 of the FOIA when withholding the information relevant to part 3 of the request. However, the DLUHC maintains that section 41(1) and section 43(2) of the FOIA are engaged, and that the public interest lies in favour of maintaining these exemptions.
18. The Commissioner will decide whether, on the balance of probabilities, the DLUHC is correct to say that it does not hold any information that is relevant to parts 1, 2 and 4 of the complainant's request, and that it has identified all the information relevant to part 3 of the request.
19. The Commissioner will also decide whether the DLUHC is entitled to rely on section 41(1), or section 43(2), of the FOIA, when withholding any information that is relevant to the request.

Reasons for decision

Section 1: Information held/not held

20. Section 1(1)(a) of the FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information and, if so, to have that information communicated to him. This applies to the information held at the time that the request is received.

21. The DLUHC has confirmed to the Commissioner that it has been unable to locate any information that is relevant to parts 1, 2 and 4 of the complainant's request; it has also provided an explanation as to why it does not hold minutes of the meeting of 16 March 2020.
22. The DLUHC has stated that, in keeping private office records, the department follows the 'Model 2 of the National Archives guidance on the management of private office papers'.¹
23. The DLUHC goes on to say that this guidance sets out the circumstances where events do, and do not, need to be recorded (sections 12-13 of the guidance), and it makes reference to the fact that meetings which are purely informal, or of a social nature, fall into the 'do not' need to be recorded category.
24. The DLUHC states that it believes that the following criteria set out within section 12(iii) of the guidance applies to the meeting of 16 March 2020:

'.....meetings that do not constitute a formal discussion on matters of departmental or government policy but which allow Ministers or officials a confidential space within which to develop ideas or respond to fast moving situations.'
25. It is not for the Commissioner to determine whether the DLUHC has complied with the National Archives guidance in relation to the conduct, and recording, of its meetings. However, he is satisfied that the arguments presented by the DLUHC are sufficient to explain why the information that has been requested by the complainant about the meeting of 16 March 2020, is not held.
26. Having taken all factors into account, the Commissioner is satisfied that, on the balance of probabilities, the DLUHC does not hold any information relevant to parts 1, 2 and 4 of the complainant's request.
27. However, the Commissioner finds it necessary to record his concerns that at no point did the DLUHC communicate to the complainant that it does not hold part of the requested information. This led the complainant to believe that all the information they had asked for was held, when this was clearly not the case.

¹ [Guidance on the management of Private Office Papers \(2009\) \(nationalarchives.gov.uk\)](https://nationalarchives.gov.uk)

28. The Commissioner finds that the DLUHC failed to comply with section 1(1)(a) of the FOIA, as it failed to state that it did not hold information relevant to parts 1, 2 and 4 of the request until his intervention.
29. The Commissioner will now go on to consider whether the DLUHC can rely on section 41(1) of the FOIA, when withholding the information relevant to part 3 of the request.

Section 41 – information provided in confidence

30. Section 41 of the FOIA states that information is exempt from disclosure if –
 - (a) It was obtained by the public authority from any person (including another public authority), and
 - (b) The disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

Was the information obtained from another person?

31. The withheld information relevant to part 3 of the request consists of one email which was sent to the Secretary of State. The Commissioner is satisfied that this is information which was obtained by the DLUHC from a third party, and that this element of the exemption is met.

Would disclosure constitute an actionable claim for breach of confidence?

32. In considering whether the disclosure of information constitutes an actionable breach of confidence the Commissioner will take account of the following:
 - Whether the information has the necessary quality of confidence
 - Whether the information was imparted in circumstances importing an obligation of confidence
 - Whether disclosure would be an unauthorised use of the information to the detriment of the confider.

Necessary quality of confidence

33. The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.

34. The Commissioner is satisfied that the matter to which the content of the withheld email relates, that being the personal views of the third party in relation to the meeting that took place with the Secretary of State, is not trivial.
35. With regard to accessibility, as far as the Commissioner is aware, the information contained within the email is not already in the public domain.
36. The Commissioner is satisfied that the withheld information is not trivial or otherwise accessible, and therefore has the necessary quality of confidence.

Circumstances importing an obligation of confidence

37. The DLUHC has argued that the withheld information consists of an unsolicited email which sets out the third party's personal views. It goes on to say that the email carried the header 'Private and Confidential', and that it is reasonable to assume that at the time it was sent, the third party was expecting the information contained therein to be treated in confidence.
38. The DLUHC has also provided correspondence from the third party following receipt of the request, which clearly stipulates that they had expected this information to be treated as confidential, and not disclosed to a wider audience at any point in time. The third party has not provided consent for the disclosure of the withheld information.
39. The Commissioner is satisfied that the information was imparted in circumstances giving rise to an obligation of confidence. Given the contents of the withheld information, the fact that it records discussions relating to personal opinion, it is, in the Commissioner's view, reasonable to say that the third party will have expected the information they shared to be treated as confidential, and certainly not for public disclosure.

Would disclosure be detrimental to the confider?

40. The DLUHC argues that it is possible that the release of the withheld information could be construed as an invasion of the third party's privacy, which would be to their detriment. The DLUHC goes on to say that the views expressed within the email are personal, and were intended to be the third party's personal reflections on the meeting which they wished only to be shared with the Secretary of State.
41. As previously stated, the Commissioner is satisfied that the withheld information documents the personal opinion of the third party, and references the private discussion that took place. In the Commissioner's

opinion, disclosure of this information would constitute an invasion of the third party's privacy, and could cause personal detriment.

42. Although section 41 is an absolute exemption and is not subject to the consideration of the public interest test under the FOIA, there exists a recognised defence to an actionable breach of confidence, if there is an overriding public interest in the information being disclosed. The Commissioner has therefore gone on to consider this below.

Is there a public interest defence for disclosure?

43. The DLUHC states that it recognises that there is some weight to be afforded to the public interest in ensuring that public authorities remain transparent, accountable, and open to scrutiny. It goes on to say that this is especially the case in circumstances where disclosure would further public understanding of, and participation in, the debate of issues of the day. This would enable individuals to understand decisions made by public authorities affecting their lives whilst, in some cases, assisting individuals in challenging decisions or facilitating accountability and transparency in the spending of public money.
44. However, the DLUHC argues that the public interest arguments set out above, which are often considered to weigh in favour of the disclosure of information, are not applicable to the circumstances of this particular case.
45. The DLUHC states that the meeting was held to facilitate a discussion about how business was faring during the pandemic in relation to building and allied matters, and that whilst the fact that the Government had a meeting is of interest, the DLUHC does not believe that it is in the public interest to release the information.
46. The DLUHC goes on to argue that interesting matters are not necessarily in the public interest, and that the meeting had not discussed the spending of public money or matters which might affect the lives of citizens. Instead, this was a meeting which was essentially the Government 'taking the temperature' of the developer industry.
47. The complainant has advised that, on 25 February 2020, and just weeks before the meeting with representatives from Residential Land, M&G, Redrow and Berkeley Homes, the Secretary of State had attended a Conservative fundraising dinner. He advised that the Secretary of State was on the same table as Person A, the owner of Residential Land and a significant Conservative donor.
48. It would appear that the complainant has concerns about the content of the discussion that took place at the meeting, and subsequently. He states that given that the Secretary of State has considered it in the

public interest himself to disclose communications with Conservative donors about business matters in the past, he argues that surely the same standards apply in this case.

49. The complainant has provided a number of additional arguments in support of the disclosure of the requested information. However, as they relate to parts 1, 2 and/or 4 of the request (where it has already been established the information is not held), they are not relevant to the Commissioner's consideration of the withheld information.
50. The Commissioner considers that some weight must be afforded to the public interest in ensuring that public authorities remain transparent, accountable, and open to scrutiny.
51. However, it is the Commissioner's view that there would have to be significant public interest defence that would override the duty of confidence in a case such as this. For example, evidence of misconduct, illegality, maladministration, or negligence; in this instance, the Commissioner has found no such evidence. Furthermore, he is of the opinion that the withheld information is unlikely to have had a direct impact on any subsequent decisions that may have been reached by the Secretary of State.
52. The Commissioner considers that the public interest in preserving the principle of confidentiality, and the impact disclosure would have on the confider, carries significant weight in favour of the public interest in maintaining the exemption at section 41(1) in this instance.
53. The Commissioner is therefore satisfied that the DLUHC is entitled to rely on section 41(1) of the FOIA when withholding the information relevant to part 3 of the complainant's request.
54. Given the above, the Commissioner has not found it necessary to consider the DLUHC's application of section 43(2) of the FOIA.

Right of appeal

55. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

56. 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.
57. 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

Suzanne McKay
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