

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 February 2022

Public Authority: Department for Levelling Up,
Housing and Communities

Address: Fry Building (4th Floor NE)
2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Levelling Up, Housing and Communities ("DLUHC") about Town Deals and the New Towns Fund.
2. The Commissioner's decision is that the DLUHC was entitled to rely upon section 35(1)(a) (formulation or development of government policy) to withhold the requested information.
3. The Commissioner does not require any steps.

Request and response

4. On 12 November 2020, the complainant wrote to the DLUHC and requested information in the following terms:

"I wish to see all value for money assessments, economic appraisals/assessments and business cases for the "Town Deals" mentioned in this press release below:

[First Town Deals worth almost £180 million announced - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/first-town-deals-worth-almost-180-million-announced)"

5. The complainant made a further request on 25 November 2020, in the following terms:

"I wish to see all value for money assessments, economic appraisals/assessments and business cases for the "New Towns Fund" mentioned in this press release below:

<https://www.gov.uk/government/news/100-places-to-benefit-from-new-towns-fund>"

6. The DLUHC responded on 11 December 2020. It refused to provide the information on the basis that the exemption provided by section 41 (information provided in confidence) of FOIA applied.
7. The complainant requested an internal review on 15 December 2020.
8. The DLUHC wrote to the complainant on 25 February with the outcome of an internal review. It updated its response and refused to provide the requested information on the basis of section 35(1)(a)(formulation of government policy) in addition to section 41.

Scope of the case

9. The complainant contacted the Commissioner on 1 March 2021 to complain about the way the request for information had been handled. Specifically that the DLUHC refused to provide the requested information on the basis of the cited exemptions.
10. The scope of this case is to determine whether the DLUHC is entitled to rely upon section 35(1)(a) and section 41 to withhold the requested information.

Background

11. The DLUHC provided some background information:

- The government's £3.6 billion Towns Fund provides Town Deals to foster economic regeneration.
- A Town Deal is an agreement in principle between government, a lead council and the Town Deal Board. It sets out the agreed projects proposed in a Town Investment Plan ("TIP"). The projects then require further agreement to their business cases.
- The DLUHC carries out assessments of TIPs based on the quality of the proposals including the strategy, the vision for the town and the projects within it.
- The DLUHC provide proposals to Ministers for funding allocations from the Towns Fund which are based on the assessment scores of the TIPs. At the time of the request the DLUHC was in the process of finalising the assessment scores for around 20 TIPs.
- When Town Deal offers are made, the lead council enters into a heads of terms contract to govern the deal. Full business cases then need to be completed for all projects. Payments are made annually once summary documents for the businesses cases are approved by the DLUHC.
- At the time of the request, funding had not been released. The DLUHC had announced the first seven Town Deals following the assessment of their TIPs as a part of phase 1 of the process.

Reasons for decision

Section 35(1)(a) of the FOIA – Formulation of Government Policy

12. Section 35 of FOIA states:

"(1) Information held by a government department or by the National assembly for Wales is exempt information if it relates to-

(a) The formulation or development of government policy"

13. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

14. The Commissioner's guidance explains that there is no standard form of government policy. Policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant ministers. The key point is that policymaking can take place in a variety of ways and there is no uniform process.
15. However, the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - The final decision will be made either by the Cabinet or the relevant ministers;
 - The government intends to achieve a particular outcome or change in the real world; and
 - The consequences of the decision will be wide-ranging.
16. Section 35 of the FOIA is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described, in this case being the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
17. The DLUHC advised that the policy to which the information relates is the support for local areas. It reasoned that this is a government policy because the final approach to the Towns Fund is subject to approval by the department's ministers.
18. The DLUHC stated that it considers the policy to be at the formulation stage because:
 - the department is in a period of discussion and communication with interested local authorities;
 - whilst there has been an announcement about the successful areas it is working with, the process remains competitive as success at this stage is not a guarantee of funding;
 - successful bids are still subject to an assessment process, prior to any decisions on the allocation of the funding and public announcement;

- it is refining analyses of the proposals as the policy process progresses, and
 - final detailed decisions by ministers have yet to be taken on the decided policy in the light of these considerations.
19. The DLUHC argued that whilst it could be debated whether the policy is in the formulation or the development stage, it is clearly not in the implementation stage of a decided policy.
 20. The DLUHC confirmed its position was that the policy formulation/development stage was still ongoing at the time of responding to the Commissioner's investigation into the complaint. It stated that bids for the Towns Fund are subject to the ongoing assessment process and ministers still need to make decisions on the allocation of funding and the final policy direction.
 21. The DLUHC concluded that the information requested relates to the policy in question and will inform the final policy decision to be taken by ministers.
 22. The Commissioner has reviewed a sample of the withheld information, and the arguments provided by the DLUHC. He is satisfied that the information relates to the stated policy, which at the time of the request was in the formulation or development stage.
 23. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
 24. Whilst a number of Town Deals have been announced, the Commissioner accepts that further work is required on the project definitions, business cases and options analyses to enable final decisions on the allocation of the funds to be made.
 25. The Commissioner accepts that the final decisions have not yet been made, and are subject to approval by the relevant minister. The policy will achieve significant levels of funding for areas and therefore have wide-ranging consequences for communities, selected or otherwise, and local economies.
 26. The Commissioner is satisfied that the withheld information relates to the formulation and development of government policy and the exemption at section 35(1)(a) is therefore engaged.

Public Interest Test

27. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner has considered the arguments provided by the complainant and the MHCLG in order to determine whether the public interest in maintaining the exemption outweighs the public interest in favour of disclosure of the information

Public interest in favour of disclosing the information

28. It is the complainant's position that a significant amount of public money is being invested in certain areas. The public should therefore have access to the reasoning behind the money being awarded.
29. The DLUHC acknowledged that "there is a public interest in providing the information as it would enable the public to understand more about the Department's process for selecting which places may receive funding for their regeneration. It would also provide openness and transparency of Government policy."

Public interest in favour of maintaining the exemption

30. The DLUHC stated that at the time of the request there was 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.
31. The DLUHC provided the following arguments in favour of maintaining the exemption:
- Officials require a safe space to gather and assess information and provide advice to ministers;
 - Ministers must feel able to consider the information and advice provided in order to reach objective policy decisions free from distraction that the information will be made public;
 - Disclosure of the requested information including investment plans and business cases when final decisions have not been made, would attract national media coverage and speculation. This would be harmful because it could give a potentially misleading impression about the ultimate policy direction as well as distracting ministers and officials from the task of policy formation;
 - It is possible that officials and ministers, under media and public pressure, may consider attaching less or more weight to certain factors, otherwise necessary to ensuring that objective, reliable analyses could be arrived at.

32. The DLUHC states that the adverse effects on the policy process and the policy itself, were considerations at the time of the request and remain relevant. It states that the timing of the request is at the crux of the matter.
33. The DLUHC considers that the public interest will be served by there being transparency, at the appropriate time, around information that has informed ministers' considerations and decision on the policy. This will enable ministers and the Government to be accountable for the decisions they have taken.

Balance of the public interest

34. The Commissioner considers that in general, there is often likely to be significant public interest in disclosure of policy information, as it can 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.
35. There is a compelling argument for disclosure of the information. The award of such significant amounts of public money will have wide-ranging consequences for communities, selected or otherwise, and therefore should be open to scrutiny.
36. The need for a safe space will be strongest when the issue is still live. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry little weight. The timing of the request is therefore an important factor.
37. The government may also need a safe space for a short time after a decision is made in order to properly promote, explain and defend its key points. However, this safe space will only last for a short time, and once an initial announcement has been made there is also likely to be increasing public interest in scrutinising and debating the details of the decision.
38. The Commissioner has already accepted that, at the time of the request, the policy process was still ongoing. As part of this he accepted that final decisions are yet to be made by ministers and are dependent upon the project definitions, business cases and options analyses.
39. The Commissioner therefore considers that there remains 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 process of its formulation and development. Therefore, on balance the Commissioner considers that the public interest weight favours maintenance of the exemption and withholding the requested information.

40. The Commissioner's decision is that the DLUHC has correctly applied section 35(1)(a) of the FOIA to withhold the information.
41. Having accepted that section 35(1)(a) is engaged, the Commissioner has not needed to consider the application of section 41.

Right of appeal

42. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

43. 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.
44. 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

Janet Wyles
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