

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 25 July 2023

**Public Authority:** Department for Levelling Up,  
Housing & Communities

**Address:** 2 Marsham Street  
London  
SW1P 4DF

#### **Decision (including any steps ordered)**

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1. The complainant submitted a request to the Department for Levelling Up, Housing & Communities (DLHUC) seeking copies of equalities information it provided to HM Treasury in relation to the 2020 spending review, along with information about any guidance which accompanied this process. DLHUC confirmed that it held information falling within the scope of the request but explained that it considered this to be exempt from disclosure on the basis of section 35(1)(a) (formulation or development of government policy) of FOIA and that the public interest favoured maintaining the exemption.
2. The Commissioner's decision is that the withheld information is exempt from disclosure on the basis of section 35(1)(a). However, the Commissioner has decided that the public interest in disclosing the information outweighs the public interest in maintaining the exemption.
3. The Commissioner requires DLHUC to take the following steps to ensure compliance with the legislation:
  - Provide the complainant with a copy of the information which the Commissioner considers to fall within the scope of the request. This is the information described at paragraph 14 of this decision notice.

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.

## **Request and response**

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5. The complainant submitted the following request to the Department for Levelling Up, Housing and Communities (DLUHC) on 26 September 2022:

"Our request relates to the discharge of responsibilities under section 149 of the Equality Act 2010 relating to the determination of central government funding available to social services authorities to use in fulfilling their responsibilities under the Care Act 2014.

In our requests we refer to the information gathered, provided and/or considered for the purpose of the discharge of the s149 duty in connection with this determination in the relevant spending review as 'Equalities Information'. Please could you provide the following information.

(a) Details of the process or processes followed to provide Equalities Information to HM Treasury for the purpose of discharging its obligations under section 149 of the Equality Act 2010 in the 2020 Spending Review.

(b) Details of whether the Department for Levelling Up, Housing and Communities was provided with a standard template to complete in relation to the 2020 Spending Review for the purpose of providing the Equalities Information? If so, please could you provide a copy.

(c) Please provide copies of the Equalities Information provided by the Department for Levelling Up, Housing and Communities to HM Treasury in relation to the 2020 Spending Review."

6. DLUHC responded on 27 October 2022 and confirmed that it held information falling within the scope of the request but explained that it considered this to be exempt from disclosure on the basis of section 35(1)(a) of FOIA.
7. The complainant contacted DLUHC on 22 December 2022 and challenged the decision to withhold information on the basis of section 35(1)(a) of FOIA.

8. DLUHC contacted the complainant on 17 February 2023 with the outcome of an internal review. Although this review quoted a later request the complainant had submitted to DLUHC on 28 November 2022 regarding the 2021 spending review, the content of the internal review response expressly dealt with the 2020 spending review. The complainant therefore treated this internal review as DLUHC's response to its request for a review of the decision to withhold the information relating to the 2020 spending review. The Commissioner considers this to be a reasonable position to adopt. The internal review concluded that the information was exempt from disclosure on the basis of section 35(1)(a).

### **Scope of the case**

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9. The complainant contacted the Commissioner on 15 May 2023 in order to complain about DLUHC's decision to withhold information falling within the scope of their request on basis of section 35(1)(a) of FOIA. They argued that the withheld information did not fall within the scope of the exemption, and even if the exemption was engaged, then in their opinion the public interest favoured disclosure of the information. The complainant's submissions to support this position are set out below.
10. It should be noted the Commissioner's role is limited to considering the application of any exemptions (including the balance of the public interest test) to the point at which the request was submitted (or at the latest, the time for compliance with the request, ie 20 working days after it was submitted). Therefore, the scope of the Commissioner's investigation is to determine the circumstances as they existed at the time of the request.

### **Reasons for decision**

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#### **Nature of information falling within the scope of the request**

11. In its submissions to the Commissioner, DLUHC provided him with the following information:
  - For part (a) of the request, the Spending Review Guidance and accompanying technical annexes provided to the department by HM Treasury (HMT) at the launch of the spending review.
  - For part (b) of the request, the 'CSR20' unified template provided by HMT for departments to complete and submit their bid on.

- For part (c) of the request, the version of the 'CSR20' template completed for the local government bid and submitted by DLUHC to HMT during the spending review process.
12. However, the Commissioner's understanding of the request is that it only seeks information relating to 'equalities information'. The request itself explains that this should be taken to mean 'the discharge of responsibilities under section 149 of the Equality Act 2010 relating to the determination of central government funding available to social services authorities to use in fulfilling their responsibilities under the Care Act 2014'.
  13. Having reviewed the information provided to him by DLUHC, the Commissioner is of the view that parts of the information do not concern 'equalities information' but instead concern other unrelated aspects of the spending review.
  14. Therefore, in the Commissioner's view the only information which falls within the scope of the request consists of the following:
    - For part (a) of the request, the parts of the Spending Review Guidance and accompanying technical annexes which concern the provision of equalities information to HMT.<sup>1</sup>
    - For part (b) of the request, sheet 8 (ie the blank 'Equalities impact') from the unified template.
    - For part (c) of the request, the completed version of sheet 8 of the unified template.
  15. For parts (b) and (c), the Commissioner finds support for this approach based on how HMT interpreted another request which the complainant submitted to it seeking similarly defined 'equalities information' returned to it by the Department for Health and Social Care (DHSC) as part of the spending review 2020. That is to say, HMT considered this to only be seeking sheet 8 of DHSC's return rather than other parts of its return.

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<sup>1</sup> These consist of part P of the guidance (ie paragraphs 3.131 to 3.139) and annex K of the technical annexes (ie paragraphs 1.191 to 1.200).

**Section 35(1)(a) – formulation or development of government policy**

16. Section 35(1)(a) of FOIA states that:

“Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-

(a) the formulation or development of government policy”

17. Section 35(2) specifically deals with statistical information and states that:

“(2) Once a decision as to government policy has been taken, any statistical information used to provide an informed background to the taking of the decision is not to be regarded—

(a) for the purposes of subsection (1)(a), as relating to the formulation or development of government policy’

18. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

19. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a minister or decision makers.

20. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.

21. Ultimately whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.

22. 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 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.

DLUHC's position

23. DLUHC argued that the withheld information related to ongoing policy formulation relating to the current financial year, as well as policy development relating to the subsequent 2021 spending review outcome and policy development in anticipation of a future spending review. As further background, DLUHC explained that although the spending review 2020 was ultimately only a one-year spending review for 2021-22, it was initially intended to be a three-year spending review covering the financial years 2021-22, 2022-23, and 2023-24. As a result DLUHC explained that the documents covered by the request were all developed when the spending review was still intended to be for three-years, and as a result there is information in the documents about the current financial year for which policy development is still ongoing.
24. Since its initial response to the request, DLUHC explained that the local government finance settlement for 2023-24 has been passed, however policy work relating to ongoing inflationary and other pressures is still ongoing. It argued that the information in these documents relates to ongoing policy development in relation to the three-year 2021 spending review period, and ongoing policy development in anticipation of the next spending review. DLUHC argued that spending review guidance and templates do not differ substantially between spending reviews, and as such releasing them would give a strong indication of how the government would handle a future spending review.

The complainant's position

25. The complainant argued that they did not accept that the exemption was engaged because in their view the policy making to which the information related was not live at the point that the request was submitted.
26. For clarity, in order for section 35(1)(a) to be engaged, the information in question does not need to relate to live policy making. Information will be exempt if relates to the formulation or development of government policy making, even if by the point of the request that formulation or development is complete. It is however the case that whether the policy making is live will have an impact on the balance of the public interest test.
27. Nevertheless, in the circumstances of this particular case the complainant's submissions to support their view that the policy was not live at the point of the request are still relevant to the Commissioner's decision on the engagement of the exemption. Firstly, because of the provision of section 35(2). Secondly, because the complainant's view is essentially that the withheld information relates to a smaller, narrower

area of policy making in comparison to the areas of policy to which DLHUC maintain the information relates to.

28. In the complainant's view the policy making which the withheld information relates only concerns decisions about the 2020 spending review. (In their view such decisions were no longer live by the point that the request was submitted). In contrast, for the reasons set out above, DLUHC take the view that the withheld information relates not only to the formulation and development of policy making for the 2020 spending review. But also in its view the information relates to the formulation and development of policy making in relation to 2023/24 budgets (policy making which in DLUHC's view was ongoing at the time of the request).
29. The complainant argued that it would be concerning if it was being suggested that department returns provided at the end of 2020 for the year 2021/22 justified being withheld over concerns of the impact over a longer term up to 2023/24. The complainant argued that there will always be future impacts of past policy decisions and ongoing live future policy discussions in all departmental areas of work. The complainant argued that the approach being taken by DLUHC risked a fundamental undermining of transparency and accountability. The complainant argued that the decision of the First-tier Tribunal had rejected a similarly broad approach adopted by another public authority.<sup>2</sup> The complainant argued that the fact that a decision will have long-lasting effects does not change the fact that the decision has been made and is no longer being deliberated.
30. In relation to section 35(2) the complainant argued that the request would clearly capture information that would fall within the definition of statistical information. Furthermore, as set in the preceding paragraphs, in the complainant's view the government policy decision to which the requested equalities information relates had already been taken by the time of the request.

#### The Commissioner's position

31. The Commissioner understands that it is commonly agreed between the two parties that the withheld information relates to policy making about the 2020 spending review. The Commissioner agrees that the information clearly relates to the formulation or development of policy making in terms of that spending review. On this basis alone the Commissioner is therefore satisfied that the withheld information falls

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<sup>2</sup> Committee on Climate Change v Information Commissioner and Montford EA/2020/0231

within the scope of the exemption contained at section 35(1)(a) on that basis.

32. However, the Commissioner appreciates that there is a fundamental disagreement between the parties as to whether the information also relates to the formulation and/or development of policy in relation to future spending decisions, including up to policy making concerning spending for the financial year 2023/24.
33. In relation to this point the Commissioner has considered both parties' submissions carefully, alongside the content of the withheld information. Having done so the Commissioner is more persuaded by DLUHC's view that the sought by part (c) of the request does not relate simply to policy making in respect of the 2020 spending review. In reaching this finding the Commissioner appreciates that as his guidance and previous Tribunal decisions have made clear, policy making should not be considered to be a seamless web. The Commissioner also acknowledges the complainant's point that there will always be future impacts of past policy decisions on future policy making.
34. However, in the specific circumstances of this case the Commissioner has taken into account that the withheld information contains predicted spending data for four financial years from 2020/21 to 2023/24 along with narrative analysis not restricted simply to matters concerning the 2020 spending review. The Commissioner has also taken into account DLUHC's position that the withheld information relating to part (c) of the request relates to policy making decisions concerning the financial year 2023/2024, and that such decisions were ongoing at the point of the request. Therefore, whilst the Commissioner accepts that future data for spending reviews beyond 2020 have been submitted to HMT by DLUHC, he nevertheless accepts that the information in question still relates to the formulation and development of policy relating to financial planning for the financial year 2023/24. That is to say, the Commissioner accepts DLUHC's position that the information falling in the scope of part (c) of the request scope, along with the more recent evidence form one body of evidence that is used to support policy development in respect of 2023/24 budgets. On this basis that the Commissioner accepts that it is plausible to argue that the withheld information falling within the scope of part (c) of the request relates to the formulation and development of policy making regarding the 2023/24 financial year. In relation to this conclusion the Commissioner has considered the Tribunal cited by the complainant but not is not persuaded that this supports their position.
35. With regard to the applicability of section 35(2), there is limited numerical data contained within the DLUHC's completed return. In terms of the information that is expressed numerically, having considered such information and its context, the Commissioner is of the view that this



amounts to views or opinions expressed numerically rather being statistical information.

36. With regard to the information sought by parts (a) and (b) of the request, the Commissioner accepts that such information relates to the formulation and development of policy making information the 2020 spending review. On this basis alone such information falls within the scope of the exemption contained at section 35(1)(a).
37. However, taking into account the more limited information which he considers to fall within the scope of these parts of the request than DLUHC, the Commissioner does not accept that such information can be said to relate to future spending reviews or subsequent policy making around future financial years. Rather the Commissioner's view is that the equalities guidance contained in the 2020 spending review documentation, and the equalities template, only concern policy making in respect of that review. To accept that such information relates to policy making for later years would, the Commissioner considers, be accepting that policy making is some sort of seamless web and would stretch the boundaries of the exemption contained at section 35(1)(a) too far.
38. In summary, the Commissioner has therefore concluded that the withheld information falling within the scope of part (c) of the request is exempt on the basis of section 35(1)(a) because i) it relates to policy making in relation to the 2020 spending review and ii) it relates to policy making in relation to the budget setting for later years, including 2023/24. He has also concluded that the information sought by parts (a) and (b) of the request are exempt from disclosure on the basis of section 35(1)(a) because it relates to policy making concerning the 2020 spending review. However, the Commissioner does not accept that such information relates to policy making for any subsequent financial years.

### **Public interest test**

39. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

### Public interest in favour of maintaining the exemption

40. In its internal review response, DLUHC argued that releasing the requested information has the potential to jeopardise the provision of full and impartial equalities information at future spending reviews. Furthermore, DLUHC argued that releasing this information relating as it does to just one department's initial bid that was much changed by the

time of the spending round announcement, could give a misleading impression as to the equalities impacts of the eventual spending round settlement and local government spending decisions.

41. DLUHC explained that the equalities information is provided to HMT in the context of an initial bid which is then the subject of intense negotiation between departments at both official and ministerial level. DLUHC argued that it is essential that ministers and officials can freely and frankly discuss the ways in which agreement or otherwise on different elements of the bid will prevent discrimination, promote equality of opportunity, and foster good relations between those sharing protected characteristics and those who do not.
42. DLUHC explained that inevitably, during the spending review process some elements of a bid will stand, some will be reduced, and others will fall during the negotiation process. DLUHC explained that the convention of collective responsibility means that both DLUHC and HMT ministers must stand behind those decisions made at spending reviews, however in practice ultimate decision making lies in the hands of the Chancellor.
43. DLUHC argued that disclosure of the equalities information associated with the initial bid could result in a reluctance to provide full, honest and impartial advice in future spending reviews, particularly where elements of the bid falling would result in a negative impact on those with a protected characteristic or loss of potential positive equalities impacts. There could also be a temptation to exaggerate the positive impacts of funding and negative impacts of underfunding in an effort to increase the probability of a bid being successful. Furthermore it could lead to a reluctance to make riskier bids for funding that would have positive equalities impacts if successful, because of the likelihood of negative press were those bids to be unsuccessful.
44. DLUHC argued that disclosure of the information also risked giving a partial and therefore distorted impression to the public. This was because in deciding upon the eventual spending review settlement, HMT must consider the equalities impact of the spending review in its entirety, not just how it relates to the outcomes of individual bids. Reaching a settlement that fits within the overall funding envelope inevitably means trade-offs between different departmental bids. Release of the equalities information associated with the local government bid could, for example, result in the impression of a negative equalities impact on a particular group where in fact that group had benefited from funding via another departmental settlement or vice-versa. DLUHC noted that for this reason, HMT publishes information about the equalities impacts of the eventual settlement rather than in relation to individual departmental bids.

45. DLUHC also noted the information provided to HMT in the context of spending review negotiations represents the department's best understanding of how funding is liable to be allocated to service spend at the national level, but final spending decisions are ultimately for local authorities to make.
46. In submissions to the Commissioner DLUHC provided more specific arguments in relation to the different parts of the withheld information which it considered to fall within the scope of the request. In respect of the guidance and technical annexes, DLUHC explained that they include information on assumptions HMT asked departments to make about bids in the financial years up to 2023-24. Disclosure of this information could mislead the public about the assumptions that actually underpinned the later spending review settlements for 2022-23. DLUHC also explained that the releasing the guidance could prejudice future spending reviews by indicating the parameters for debate, especially as future spending review guidance is likely to mimic previous guidance.
47. With regard to the template, DLUHC explained that it contains detailed information about the way in which HMT structures the spending review process, including information on regional impacts and on the division into policy pressures, bids, and savings. DLUHC argued that detailed knowledge of how spending review bids are structured could lead the local government sector – and other stakeholders – to 'game' their engagement with the department in the run-up to the next spending review in an attempt to achieve a better outcome for their particular interests. This could therefore create perverse incentives and 'winners' and 'losers' in the system depending on how stakeholders read and interpret the template.
48. With regard to the completed template, DLUHC argued that this contained sensitive data regarding the sums that were requested for local government at the start of the spending review 2020 process and the assumptions that underpinned this. It also contains information on bids for specific policy pressures that were not successful. DLUHC noted that it also does not reflect the full evidence provided by it to HMT nor does it contain the detail of other departments' bids for funding to the benefit of local government, and as such provides a potentially misleading partial picture. DLUHC argued that the ability of departmental ministers to provide their full and frank understanding of the funding need for local government to their colleagues at HMT at the start of the spending review negotiation process could be jeopardised if they feared unsuccessful or reduced bids being made public.

Public interest in favour of disclosing the information

49. As explained above, in the complainant's view the policy making process was not live at the time of the request.
50. In support of this position the complainant noted that the 2020 spending review was published in full on 25 November 2020 and as result the underlying policy decisions had been finalised by that date and what followed was an implementation of that policy. The complainant argued that the formulation and development of the new policy which encapsulated the 2021 spending review was undertaken as part of the process leading to the publication of that review in October 2021 and information relating to the equalities information impacts on that review would have been considered during that policy making process. In summary, the complainant's position is that the spending review 2020 policy process was complete at the point of the request.
51. The complainant highlighted the Commissioner's section 35(1)(a) guidance which noted that once the policy making is complete the sensitivity of information relating to the decision making process will wane and the arguments for maintaining the exemption become weaker.
52. The complainant also emphasised that section 35(4) of FOIA states that:

'(4) In making any determination required by section 2(1)(b) or (2)(b) in relation to information which is exempt information by virtue of subsection (1)(a), regard shall be had to the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.'
53. The complainant also noted that DLUHC's internal review failed to address the relevance of section 35(4) and they argued that it was inconceivable that no part of the relevant information is purely factual and would require a different approach to decision making.
54. The complainant raised concerns that disclosure of the information would have the prejudicial impacts envisaged by DLUHC.
55. Firstly, they disputed DLUHC's position that disclosure of the withheld information had the potential to jeopardise the provision of full and impartial equalities information at future spending reviews. The complainant noted that the Commissioner's guidance and Tribunal decisions are generally sceptical of chilling effect arguments. The complainant also argued that DLUHC's position that a chilling effect would occur was purely speculative and not supported by any evidence.

56. Secondly, the complainant disputed DLUHC's position that disclosure would risk giving a misleading impression as to the equalities impacts of the eventual spending round settlement and local government spending decisions. The complainant acknowledged that initial bids are subject to negotiation, and much can change in the final spending round announcement. However, given the nature of the section 149 duty, equalities information relating to the final decision would be required and so disclosure of the full equalities' information (both that relating to the initial bid and to any changes) would avoid the risk of a misleading impression. Even where there is no equalities information relating to the impacts of the final decisions it would be clear from the disclosure that the equalities information provided related to the initial bid.
57. Thirdly, the complainant noted that DLUHC had suggested that reliance is better placed on the equalities impacts published by HMT on the final settlement. However, the complainant argued that as each government department is subject to the section 149 duty in the discharge of its own functions and there should be transparency and accountability of each.
58. The complainant also explained that they were aware that HMT published a statement of equalities impacts accompanying the spending review 2020. However, the complainant argued that this only focussed on areas in which the decisions were said to have a positive impact on people with protected characteristics.<sup>3</sup> But the complainant noted that this is despite the fact that HMT's Equality and Diversity Statement<sup>4</sup> indicated that negative impacts are considered. It says that:
- "When working on policy, our officials look at the impact a policy option might have on those from protected groups, including positive opportunities for promoting greater fairness for them. They also consider if there are options for avoiding or otherwise mitigating against any negative impact on that group. Ministers are advised of the impact a decision has on protected groups, and this is taken into account when a policy decision is made."
59. The complainant argued that this suggested that negative impacts were considered, but, if so, that information was withheld from HMT's equalities impact statement. They argued that the provision of information about process alone in a context where the impact statement refers only to examples of positive impacts does not foster

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/938052/SR20\\_Web\\_Accessible.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/938052/SR20_Web_Accessible.pdf) Page 93. A.3

<sup>4</sup> <https://www.gov.uk/government/organisations/hm-treasury/about/equality-and-diversity>

transparency. Moreover, the complainant argued that the decision to withhold the information in effect rendered HMT, as the department in receipt of the equalities information the ultimate decision maker in respect of departmental budgets, unaccountable in the performance of its equalities duties unaccountable in the performance of its equalities duties.

60. Furthermore the complainant argued that it was not possible for the public to ascertain whether, and to what extent, effects on groups with protected characteristics have been considered without disclosure of this information in full. In their view given the absence of any information at all on what information was taken into account, what specific advice ministers received on both positive and adverse impacts on particular groups with protected characteristics, what information was given particular weight and for what reason, it is impossible to determine whether HMT has in fact had due regard to the impact of its decisions on the statutory equalities objectives as required by section 149 Equalities Act 2010.
61. Fourthly, the complainant argued that they were concerned the disclosure could lead to a temptation to exaggerate the positive impacts of funding and the negative impacts of underfunding in an effort to increase the probability of a bid being successful, along with a reluctance to make riskier bids due to the risk of negative press. Again, the complainant pointed to the Commissioner's position in his guidance in respect of the chilling effect.
62. With regard to the benefits of the withheld information being disclosed, the complainant argued that it is much more likely that the possibility of future disclosure would enhance the overall quality of decision-making, which, in the context of its information requests, concerns the discharge of the very important Public Sector Equality Duty equalities considerations. In the complainant's view disclosure would promote accuracy and careful consideration of relevant detail.
63. The complainant argued that DLUHC had failed to take sufficient account of the public interest in transparency and accountability in budgetary decision making. The complainant noted that the Commissioner's guidance highlighted that accountability for spending a large amount of money is a factor in weighing favour of disclosure. They also emphasised that the vital nature of transparency in central government budgetary decision making was recognised by the OECD, of which the UK is a member. The complainant noted that in 2015 the full Council of

the OECD adopted the "Recommendation of the Council on Budgetary Governance"<sup>5</sup> and introduces its recommendation as follows:

"The budget is a central policy document of government, showing how annual and multi-annual objectives will be prioritised and achieved. Alongside other instruments of government policy – such as laws, regulation, and joint action with other actors in society – the budget aims to turn plans and aspirations into reality. More than this, the budget is a contract between citizens and state, showing how resources are raised and allocated for the delivery of public services.

**The experience of recent years has underlined how good budgeting is supported by, and in turn supports, the various pillars of modern public governance: transparency, integrity, openness, participation, accountability, and a strategic approach to planning and achieving national objectives. Budgeting is thus an essential keystone in the architecture of trust between states and their citizens."** [Complainant's emphasis]

64. Furthermore, the complainant argued that accountability is particularly important where the decision concerns allocation of significant sums of money with the potential for significant impacts on those affected and that central government's collection of equalities information informed decisions of this nature. The complainant emphasised that the allocation of such funding was at a time when there was a serious concern about the funding of social care and its implications for fulfilling statutory obligations. The complainant noted that there had been serious and growing concerns about the adequacy of funding for adult social care for sometime with surveys conducted by the Association of Directors of Adult Social Services showing that its members increasingly lacked confidence that budgets would allow them to meet eligible needs. Consequently, the complainant argued that public interest in disclosure of the information was particularly strong.
65. The complainant also argued that disclosure of the withheld information would ultimately contribute to better fiscal outcomes and more responsive impactful and equitable policies. This is on the basis that disclosure would enable the social care sector, and those with care and support needs, to meaningfully respond to the robustness and suitability of current equalities information and make representations for its improvement.

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<sup>5</sup> [oecd.org/gov/budgeting/Recommendation-of-the-Council-on-Budgetary-Governance.pdf](https://www.oecd.org/gov/budgeting/Recommendation-of-the-Council-on-Budgetary-Governance.pdf)

Balance of the public interest arguments

66. In terms of considering the public interest arguments above, the Commissioner considers it important to note that in his view considerably less information falls within the scope of the request than that identified by DLUHC. As result, in the Commissioner's view some of the arguments advanced by DLUHC are not directly relevant the information which the Commissioner considers to fall within the scope of this request.
67. Turning to the arguments themselves, the Commissioner accepts that significant weight should be given to safe space arguments - ie the concept that the government needs a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction - where the policy making process is live and the requested information relates to that policy making. In the circumstances of this case, and for the reasons discussed above, the Commissioner accepts that policy making in relation in the DLUHC budget for 2023/24 was ongoing at the time of the request. This is on the basis that although the budget had been set, policy work relating to ongoing inflationary and other pressures was still ongoing.
68. Furthermore, having the considered the content and context of the withheld information contained in the completed spreadsheet, the Commissioner accepts that it has the potential to encroach on the safe space of this policy making. The Commissioner accepts that it contains a direct assessment of the impact of budget decisions on those with protected characteristics. The Commissioner appreciates that decisions around how DLUHC budgets are allocated, including the scope of any reprioritisation of them, is matter of considerable interest to a significant range of stakeholders and one that involves balancing a range of competing demands. The Commissioner therefore accepts that disclosure of the information at the time of the request could have led the government having to defend or to justify particular policy decisions regarding the budget 2023/24. In turn, the Commissioner accepts that this would encroach upon the safe space that ministers and officials need for such ongoing policy making and as a result the safe space arguments deserve considerable weight.
69. With regard to attributing weight to the chilling effect arguments, as a general approach the Commissioner recognises that civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. Nonetheless, chilling effect arguments cannot be dismissed out of hand and are likely to carry some weight in most section 35 cases. If the policy in question is still live, the Commissioner accepts that arguments about a chilling effect on those ongoing policy



discussions are likely to carry significant weight. Arguments about the effect on closely related live policies may also carry weight. However, once the policy in question is finalised, the arguments become more and more speculative as time passes. It will be difficult to make convincing arguments about a generalised chilling effect on all future discussions.

70. In the circumstances of this case the Commissioner accepts that disclosure of the information on the completed spreadsheet potentially risks the candour of such equalities assessments if officials drafting them were aware they may be disclosed in the future. Although officials are expected to be robust and impartial when giving advice, the Commissioner accepts that disclosure could nevertheless affect the tone or manner in which some information is presented. For the reasons noted above, the Commissioner accepts the policy making is still live and ongoing and usually this would add further weight to the chilling effect arguments.
71. However, the Commissioner considers the impact on both the safe space and risk of a chilling effect is arguably lessened by the fact that the live policy making at the time of the request only concerned the policy work relating to ongoing inflationary and other pressures relating to the 2023/24 budgets rather than live policy making in relation to the 2020 spending review itself. That is to say, disclosure at the point of the request would not have interfered with the policy making process for which the information was initially submitted.
72. Furthermore, the Commissioner does not accept that disclosure simply of sheet 8 of the blank template would have any of the prejudicial or harmful effects of the nature identified by DLHUC. The Commissioner is also of the view that given the content of the information, disclosure of the parts of the guidance documents which he accepts fall within the scope of the request would be likely to have limited harmful effect.
73. Turning to the public interest arguments in favour of disclosure, the Commissioner appreciates that the allocation of local government spending and adult social care spending is an area of significant public interest. This includes the basis upon which equalities impacts have been factored into such decision making. In the Commissioner's view disclosure of the withheld information would provide a direct insight into how DLUHC took into account the impact of its spending on protected groups as part of the 2020 spending review. Furthermore, given its ongoing use in the policy making process it would also provide some insight into the information being considered by ministers and officials in relation to the decisions about work relating to ongoing inflationary and other pressures is still ongoing. Given the significant public interest in such issues, the Commissioner considers that this factor, namely providing insight into DLUHC assessment of equality impacts, attracts

particular and significant weight. In attributing such weight the Commissioner has also taken into account the evidence put forward by the complainant regarding the concerns around adult social care funding.

74. The Commissioner acknowledges DLUHC point that after the settlement of a spending review HMT publishes information about the equalities impacts of the eventual settlement rather than in relation to individual departmental bids. However, the Commissioner broadly shares the complainant's views about the information in the public domain. As a result the Commissioner is not persuaded by the argument that there is information already available in the public domain that fully meets the public interest in transparency and accountability in relation to this information. Whilst there is some information in the public domain about the impact on equalities of the spending reviews 2020 and 2021, in the Commissioner's view it does not provide anywhere near the level of insight that disclosure of the withheld information would. As a result in the Commissioner's opinion disclosure of the withheld information would add significantly to transparency and accountability around this issue, beyond that already achieved by the information in the public domain.
75. The Commissioner also considers that the complainant's point that disclosure of the withheld information could allow the social care sector, and those with care and support needs, to meaningfully respond to current equalities information and suggest representations for its improvement has merit. In the Commissioner's view such a process could potentially improve the quality of decision making.
76. In conclusion, the Commissioner considers the public interest arguments to be evenly balanced. However, given the presumption in favour of disclosure, the Commissioner has found that the public interest in disclosing the information outweighs the public interest in maintaining the exemption. In reaching this conclusion the Commissioner has also taken into account the fact that although he accepts that the policy making was still live at the point of the request, this was only in relation to the policy work relating to ongoing inflationary and other pressures concerning the 2023/24 budget, rather than the policy making in relation to the full 2020 spending review.

## Right of appeal

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77. 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](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

78. 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.
79. 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 .....**

**Jonathan Slee**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**