

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 November 2013

Public Authority: Department for Environment, Food and Rural Affairs (Defra)

Address: Area 4D, Nobel House
17 Smith Square
London SW1P 3JR

Decision (including any steps ordered)

1. The complainant has made a request to Defra for information relating to flood insurance. It refused to disclose the information it held relevant to the scope of this request under section 35(1)(a), section 41 and section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that Defra has correctly applied section 35(1)(a) FOIA in this case and this exemption is applicable to all of the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 8 January 2013 the complainant requested information of the following description:
 1. Please provide all correspondence including e-mails about flood insurance since January 2012 between DEFRA and;
 - a) the Association of British Insurers
 - b) the following 6 insurance companies – a) Aviva b) Axa, c) Lloyds Banking Group, d) Zurich, e) RSA Group and f) Direct Line Group

5. On 20 February 2013 Defra responded. It provided the complainant with some of the information requested but withheld some information under section 35(1)(a), section 40(2), section 41 and section 43(2) FOIA.
6. The complainant requested an internal review on 5 March 2013. Defra sent the outcome of its internal review on 2 April 2013. It upheld its original position. In its review it explained that the information that fell within the scope of his request includes discussions of future policy on flood insurance with stakeholders, including information from stakeholders in support of different policy options. In light of this the review found that the exemption under section 35(1)(a) applies to the information that was withheld.

Scope of the case

7. The complainant contacted the Commissioner 4 April 2013 to complain about the way this request for information had been handled.
8. The Commissioner has considered whether Defra has correctly applied section 35(1)(a), section 40(2), section 41 and section 43(2) FOIA in this case. He has however initially considered whether section 35(1)(a) has been correctly applied to the withheld information.

Reasons for decision

9. In this case the complainant has raised the question as to whether the requested information is environmental information and therefore whether the request should have been dealt with under the Environmental Information Regulations 2004 (EIR).
10. The Commissioner did ask Defra to consider this. Defra explained that it could be argued that the information could fall within regulation 2(c), a measure affecting or likely to affect the elements or factors in 2(a) and (b) or within 2(f) built structures that are or may be affected by the state of the elements referred to in 2(b) and (c). Defra however explained that although flood insurance is related to the built environment, it cannot be said that the provision of home insurance influences whether the houses are affected by the elements of the environment. That is if the houses are to be affected by flooding (the elements of the environment) this will happen whether or not home insurance is in place. Without this link back to being affected by the elements of the environment, it argued that flood insurance cannot be environmental information under regulation 2(1)(f).

11. It went on to explain that for the same reasons, flood insurance also cannot be said to be environmental information under regulation 2(1)(c). It argued that although it could be said that flood insurance is a measure, it could not be said that the measure affects the elements and factors of the environment as listed in the EIRs. It also argued that it could not be said that flood insurance is a measure designed to protect those elements as it is a measure designed to financially protect people living in flood risk areas, rather than to protect the environment.
12. The Commissioner has considered Defra's submissions in the context of the withheld information and considers that it could not be categorised as environmental information for the reasons set out above. He considers that a flood is going to have an affect on the environment regardless of whether flood insurance is in place or not. As the withheld information relates to flood insurance this would not fall under the definition of environmental information as set out in regulation 2 EIR. The Commissioner has therefore considered the case under FOIA.
13. Section 35(1)(a) of FOIA states that, "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".
14. The Commissioner has first considered whether the withheld information relates to the formulation or development of government policy.
15. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
16. Defra has explained that the information withheld under this exemption relates to the development of a policy to enable access to flood insurance for households in areas of high flood risk. It said that Defra is working alongside the insurance industry to develop a policy that would enable people living in high risk areas to have access to affordable flood insurance. It said that the withheld information includes discussions between the Association of British Insurers (ABI), scenario analysis of the different policy options and Minister's letters that talk about specific aspects of policy which are still under discussion and subject to change.
17. Upon viewing the withheld information the Commissioner is satisfied that it does relate to the formulation and development of government policy.

Public Interest Test

18. Section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In *DfES v The Information Commissioner and the Evening Standard (EA/2006/0006)* the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case.

Public interest arguments in favour of disclosing the requested information

19. Defra has argued that there is a strong public interest in ensuring that negotiations between government are open and transparent, and that members of the public are aware of policies that affect them and are able to be part of the decision making process where possible.
20. The Commissioner considers that there is a public interest in the government working in an open and transparent way. There is a public interest in disclosing information which provides the public with a better understanding behind the decision making process and enables the public to contribute where possible. Furthermore there is a public interest in the government being accountable for decisions made.

Public interest arguments in favour of maintaining the exemption

21. Defra has explained that it believes the following public interest arguments favour maintaining the exemption:
- The Policy is still a live issue and is not expected to be completed until after the Water Bill has passed through Parliament in Spring 2015. It said that it did announce a headline agreement with the insurance industry on 27 June 2013 detailing an initial outline of the Policy. However it explained that there are many aspects of the Policy which require significant development and Defra is still working with the ABI to develop these areas. It said that disclosure of the withheld information, before the position is finalised would have a detrimental effect on the Government's ability to develop this Policy.
 - Disclosure of the withheld information would damage the relationship between the ABI and Defra, causing the industry to mistrust Defra and potentially inhibit their willingness to continue discussions in relation to this Policy and in relation to future proposed policies. They may be less willing to enter into

negotiations and could lead to the industry being unwilling to work with the Government to produce a policy to cover properties that are in areas that are at a high-risk of flooding. It said this would not be in the public interest.

Balance of the public interest arguments

22. The Commissioner considers there is a public interest in the government operating in an open and accountable manner. He considers that greater transparency leads to a better public understanding of particular issues and enables the public to assist in the decision making process where possible. DEFRA has explained that a large amount of information on the policy has already been published and is available on its website. This includes consultation documents, an impact assessment report and memorandum of understanding between the Government and the ABI. The Commissioner considers that this goes some way towards meeting public interest in openness and transparency
23. However the Commissioner also considers that there is a strong public interest in Defra being able to consult openly and candidly with the insurance industry in this policy area. There is a strong public interest in not disclosing information which may make the insurance industry reluctant to work with Defra in this area both now and in the future.
24. In this case the Policy is still live and under development which gives greater weight to the public interest arguments in favour of maintaining the exemption. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 35(1)(a) FOIA was therefore correctly applied in this case. The Commissioner has not gone on to consider the application of any of the other exemptions any further as he considers that section 35(1)(a) FOIA applies to all of the withheld information.

Right of appeal

25. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

26. 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.
27. 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

Pamela Clements
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