

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 May 2015

Public Authority: Land Registry
Address: Trafalgar House
1 Bedford Park
Croydon
CR0 2AQ

Decision (including any steps ordered)

1. The complainant has requested information held by Land Registry concerning the impact of TUPE regulations in respect of Land Registry developing the provision of a centralised Local Land Charges service. Land Registry confirmed that it held information relevant to the request but that the information was exempt under Section 35(1)(a)(formulation and development of government policy) and Section 42 (legal professional privilege), and that the public interest balance favoured maintaining the exemptions.
2. The Commissioner's decision is that Section 35(1)(a) applies to all the withheld information and that the public interest favours maintaining the exemption.

Request and response

3. On 3 April 2014, the complainant wrote to Land Registry and requested information in the following terms:

'From 1 February 2014 to date, please supply an electronic copy of all information (including sent and received internal and external emails, agendas, minutes, reports, briefing notes, memos, letters, discussion papers, legal opinions, submissions to Ministers and the Land Registry

Boards etc) that mention/consider the impact of TUPE regulations¹ in respect of the Land Registry developing the provision of a centralised Local Land Charges service and supply of Con29 information²

4. Land Registry responded on 29 May 2014. It stated that information within scope of the request was held but that no information was held concerning Con29. Land Registry stated that the information was exempt from disclosure under Section 35(1)(a) and Section 42 of FOIA and that the public interest favoured maintaining both exemptions.
5. Although Land Registry initially offered the complainant an internal review, when this was requested the complainant was advised that because the same lawyers were involved with both the Local Land Charges project and conducting reviews of FOI requests, there was a potential conflict of interest and the complainant was advised to instead contact the Commissioner directly with his complaint.

Scope of the case

6. The complainant contacted the Commissioner on 3 June 2014 to complain about the way his request for information had been handled.
7. The Commissioner notes that Local Land Charges were created by the Land Charges Act of 1925 with Local Land Charges (LLC) Registers being maintained by every Local Authority in England and Wales (with the exception of County Councils). The complainant's request is specifically focused on information held by Land Registry which relates to the impact of TUPE in the event of a transfer of statutory responsibility for the LLC register and delivery of LLC searches from the Local Authorities to Land Registry.
8. The Commissioner has had sight of the withheld information and this comprises a number of email chains amounting to nine pages. The scope of the Commissioner's investigation has been to determine whether the exemptions have been correctly applied to the information concerned.

¹ The Transfer of Undertakings (Protection of Employment) Regulations 2006

² An enquiry form which serves to provide prospective purchasers with information that relates to the property being searched and in some cases the area where the property is situated.

Reasons for decision

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

9. Section 35(1)(a) of FOIA states that information held by a government department (Land Registry is a non-ministerial department), or by the National Assembly for Wales, is exempt information if it relates to the formulation or development of government policy.
10. Section 35 is a class-based exemption and Section 35(1)(a) will therefore automatically be engaged if the information relates to either the *formulation* or the *development* of government policy. As a qualified exemption, Section 35 is subject to the public interest test.
11. The purpose of Section 35(1)(a) is to protect the integrity of the policy making 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. The Information Tribunal has found that the term '*relates to*' can be interpreted broadly and can encompass the immediate background to policy discussions.
12. 'Government policy' is not defined in FOIA but it is well established that it may be made in a number of different ways and take a variety of different forms. The withheld information in this case relates to a proposal for Land Registry to take over responsibility as sole registering authority for Local Land Charges in England and Wales. In the Queen's Speech on 4 June 2014 it was announced that the Infrastructure Bill:

'would transfer statutory responsibility for the local land charges register and delivery of local land charges searches to the Land Registry supporting the delivery of digital services and extend Land Registry's powers to enable it to provide information and register services relating to land and other property'.
13. A public consultation took place on the proposal to centralise the Local Land Charges Register between January and March 2014 and the Commissioner notes that over 95% of those who expressed an opinion during the consultation were opposed to Land Registry becoming the sole registering authority³. It was announced on 12 August 2014 that the proposal was proceeding and the Infrastructure Act was given Royal

³ As reported in the Law Society Gazette

Assent (and thus came into force) on 12 February 2015. However, at the time of the complainant's request (April 2014) the Commissioner notes that the Infrastructure Bill had not yet had its 1st Reading (this taking place in the House of Lords on 5 June 2014).

14. The Commissioner would note that the policy with which the complainant's request is concerned is not the proposed transfer of statutory responsibility for the Local Land Charges register from local authorities to Land Registry (although this obviously forms the background and context), but the possible impact on existing service employees by any TUPE (which governs the situation where a business changes ownership). That is to say, the policy relevant to this request is that of potential TUPE application to Local Authority employees affected by the legislative changes.
15. In determining whether the withheld information relates to the formulation of government policy or the implementation of policy (Section 35 not applying to the latter) the Commissioner has considered the withheld information itself and the submissions provided by the parties. It is important to note that these submissions were received prior to the passing of the Infrastructure Bill into legislation.
16. In submissions to the Commissioner the complainant asserted that, *'the Land Registry policy to create a centralised Local Land Charges register has been finalised and approved by the Land Registry Board several years ago; it is only the implementation timetable that is uncertain, starting with Royal Assent in May 2015'*.
17. Land Registry disputed the complainant's assertion and informed the Commissioner that:

'The decision was not made years ago. The Consultation concluded on 9 March 2014 and the legislative programme is at a critical stage. No decision has been taken for Land Registry to deliver LLC results. Even if Royal Assent is given for the clauses in the Infrastructure Bill to enable Land Registry to deliver this service, it is not possible to conclude whether TUPE will apply until individual conversations can take place with each of the Local Authorities'.
18. Land Registry advised the Commissioner that it had not started discussions with each of the Local Authorities to scope its requirements (in the event of taking over the LLC service) in terms of digitising the local authority records and arranging for transfer of the data. It explained that once the primary legislation had been passed, then statutory instruments would contain the rules and procedures governing the delivery of the search results. *'Therefore, unless and until the Infrastructure Bill is passed to include the granting of this power (to*

provide LLC results) to Land Registry, Land Registry cannot begin to implement or further formulate the policy, in terms of discussing the digitalisation of the local authority records and procuring a system'.

19. The Commissioner considers that the Infrastructure Bill, as the legislative vehicle used by Government to introduce the necessary provisions for Land Registry to deliver the LLC searches, is a classic example of the policy formulation process, in which policy formulation can continue all the way up to the point at which the bill finally receives royal assent and becomes legislation. The Commissioner would agree with Land Registry that prior to the Bill passing into legislation, the policy of centralising the LLC register could not be correctly regarded as having been implemented. The Commissioner notes that in his submissions the complainant accepted that the *'implementation timetable'* would begin with royal assent.
20. The Commissioner notes that the email chains comprising the withheld information date from between February and April 2014, almost a year before the Infrastructure Bill became law. In submissions to the Commissioner, Land Registry explained that the email discussions refer to and follow on from legal advice which it obtained from the Treasury Solicitor's Department (TSol) (the non-ministerial government department which provided legal advice services to central government departments⁴) in autumn 2013. The Commissioner notes that as this legal advice was obtained prior to 1 February 2014 it is outside the scope of the complainant's request.
21. It follows that as the enabling legislation (Infrastructure Bill) remained at the formulation stage between February and April 2014, any TUPE policy which might need to be developed to accommodate the changes in the event of them becoming law remained in the very early stages of formulation at this time. Land Registry advised the Commissioner that the number of staff providing LLC search results in the Local Authorities is between 700 and 800. However, Land Registry was unable to confirm how many individuals would be affected by TUPE, if any, as this number could not be quantified until direct talks were had with each individual Local Authority. Land Registry explained that, *'until details of the process have been determined, in terms of how Land Registry will assimilate the data of the local authorities and what system Land Registry will purchase, it is not possible to conclude the extent to which TUPE will apply'*.

⁴ As of 1 April 2015 TSol became the Government Legal Department (GLD)

22. For the reasons explained above the Commissioner is satisfied that the information relates to government policy (potential TUPE arrangements) and relates to the early formulation of this policy. It therefore follows that Section 35(1)(a) is engaged in relation to all the emails concerned and the Commissioner has gone on to consider the public interest test.

Public interest test

Public interest arguments in favour of disclosure

23. In its response to the complainant's request Land Registry accepted that there is *'usually public interest in disclosing information to show transparency and accountability'*. However, Land Registry considered that the public interest in maintaining the exemption outweighed the public interest in disclosure. Land Registry stated that TUPE implications would be a consequence of Land Registry taking on the role of providing search results from Local Authorities but as that decision had not yet (then) been made, disclosure of the information would not inform the decision making process. Land Registry also stated that:

'TUPE affects a relatively small class of people and not a significant number of individuals. Although the decision making process could affect the privacy of these individuals, the number of people affected is small compared with decisions taken by public bodies which attract a significant number of individuals and the public as a whole'.

24. In short submissions to the Commissioner the complainant submitted that, *'as the policy has been formulated and approved by the Land Registry Board, and a Bill introduced to Parliament, it is in the public interest to know if TUPE will apply to the local authority staff threatened with redundancy'*.

Public interest arguments in favour of maintaining the exemption

25. In submissions to the Commissioner Land Registry maintained that as the LLC policy (and any TUPE policy which might be needed in consequence) was dependent on the passing of primary and secondary legislation, there was, *'no public interest element in disclosing the information at this time'*.
26. Land Registry stated that, *'the most important reason for not disclosing the information that the complainant has requested is the distress that would be caused to the Local Authority employees if they had sight of emails and information relating to TUPE'*. Land Registry noted that the withheld information directly affects the lives and privacy of the individuals working in the Local Authorities. It contended that:

'If this request were made, for example, in a few years when delivery had already been handed over and any restructuring at the Local Authorities had taken place, then the response might be different as there may be public interest arguments in disclosing how the decision was arrived at as to whether TUPE applied or not'.

27. As it was, Land Registry stated that to disclose the information prematurely (ie before any decision had taken place), would have adverse consequences and would be insensitive to individuals currently working in the Local Authorities delivering LLC results. Land Registry expressed the view in submissions that it had been more open than strictly necessary, in confirming to the complainant that it held the information requested.

Balance of the public interest

28. As the Commissioner has noted, the proposal (now decision) to centralise the Local Land Charges register to Land Registry has not been without opposition from interested parties, as evidenced by the vast majority of responses to the public consultation. Given the effect upon the Local Authorities in England and Wales of the policy and possible impact upon the property market, the Commissioner considers that any information which would help inform or explain the rationale for the LCC changes would carry significant and widespread public interest.
29. However, the withheld information in this case does not concern that decision-making process but specifically deals with possible TUPE implications arising from the same. That is to say, the public interest in transparency and accountability which the information carries concerns, as the complainant indicates in his submissions, the Local Authority staff who might be affected by any TUPE scenarios. As noted, according to information provided to the Commissioner by Land Registry, the number of such staff is between 700 and 800.
30. The Commissioner would observe that because the withheld information contains information relating to TUPE which might have a direct impact and effect upon the relevant Local Authority employees, the suggestion by Land Registry that disclosure would cause them distress could be countered by the distress (or at the very least, concern) which would be caused to such employees by their being left in a state of uncertainty about their job security and future role. In any case, as the public interest arguments under Section 35 must focus on the specific good government interests protected by the subsection being claimed, the argument advanced by Land Registry is not a relevant public interest to Section 35(1)(a) and the Commissioner is unable to consider the same.

31. Without wishing to downplay or ignore the interest which the relevant employees would have in any information relating to TUPE, the Commissioner considers that the public interest in the (potential) circumstances of a relatively small group of individuals is limited, to the extent that it can more accurately be described as the private interests of a specific group of individuals – those Local Authority staff currently undertaking LLC searches.
32. The Commissioner considers that the most important factor relevant to his determination of the public interest balance attached to the withheld information in this case is the fact that at the time of the complainant's request, government policy concerning the proposal to centralise the Local Land Charges register remained at the formulation stage, with the Infrastructure Bill not then having been subject to debate and amendment in Parliament. As the central policy had not yet been implemented at the time of the request, any subsidiary TUPE policy which might be required remained even more formulable in nature.
33. Indeed, whilst it could be argued that with the subsequent passing of the Infrastructure Act, the central LLC policy has passed into the implementation stage, any consequential TUPE policy (the focus of the complainant's request) will remain 'live' and at the formulation or development stage until Land Registry has completed the appropriate discussions and engagement with the affected Local Authorities.
34. As the Information Tribunal confirmed in *DBERR v Information Commissioner and Friends of the Earth (EA/2007/0072)*, the need for government to have a safe space to debate policy issues and reach policy decisions will be strongest when the issue is still live. The weight of the safe space public interest will diminish over time as policy becomes more certain. Although traditionally safe space arguments relate to internal discussions the operation of modern government means that they can include external organisations or individuals (such as Local Authorities in this case).
35. Land Registry has acknowledged in its submissions that should any TUPE related restructuring of the relevant Local Authority staff roles need to take place, then once this had occurred the need for the safe space would have diminished, to the extent that the public interest might warrant disclosure to provide transparency and accountability to the decision-making process. The Commissioner would note that it is highly likely that in the event of any TUPE situations occurring as a result of the LLC changes, the Local Authority staff concerned would then be provided with, or have the opportunity to obtain through trade union or legal representation, relevant information affecting their employment status.

36. The Commissioner does not consider that the withheld information in this case contains any sufficiently strong public interest arguments (eg a reasonable suspicion of wrongdoing or the proposal having a significant impact on the public) to outweigh the public interest in protecting the live and very specific policy process of TUPE as it affects, or may affect relevant Local Authority employees following the decision to transfer the statutory responsibility for the Local Land Charges register and delivery of Local Land Charges searches to Land Registry. As the policy was at the formulation stage at the time of the request, the Commissioner is satisfied that the public interest balance favours maintaining the Section 35(1)(a) exemption to the withheld information.
37. Under the broad interpretation given to '*relates to*' in Section 35(1)(a) the Commissioner is satisfied that *all* the withheld information (emails) are exempt from disclosure under this exemption. He has therefore not gone on to consider the applicability of Section 42 (legal professional privilege) to some of the emails concerned.

Other matters

38. The Commissioner appreciates that the specific circumstances of this request presented a potential conflict of interest which rendered the provision of an internal review by Land Registry unsuitable from an independent and impartiality viewpoint. He would commend Land Registry for having recognised this, but would note it would have been more helpful if the complainant had not been originally offered an internal review in the request response of 29 May 2014.

Right of appeal

39. 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

40. 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.
41. 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

Gerrard Tracey
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