

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

### **Decision notice**

**Date:** 5 May 2022

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

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

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

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1. The complainant made two requests for copies of information relating to Exercise Cygnus. The Department for Levelling Up, Housing & Communities ("DLUHC") responded to the first request by stating that it did not hold the information. However, when the complainant requested the same information a second time, DLUHC accepted that it did hold some information, but relied on section 35 of FOIA (formulation of government policy) in order to withhold it.
2. The Commissioner's decision is that DLUHC is entitled to rely on section 35 of the FOIA to withhold the requested information. However, as it incorrectly stated, in response to the first request, that it did not hold any relevant information, DLUHC breached section 10 of FOIA. DLUHC also breached section 10 of FOIA in respect of the second request as it failed to respond within 20 working days.
3. The Commissioner does not require further steps.

#### **Nomenclature**

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4. As part of a wider government re-organisation, in September 2021, the then-Ministry of Housing, Communities and Local Government was re-named as the Department for Levelling Up, Housing and Communities. Although the request was responded to under the name of the Ministry for Housing, Communities and Local Government, the Commissioner has

referred to the organisation by its new name (DLUHC) for the purposes of this decision notice.

## **Request and response**

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5. On 22 December 2020, the complainant wrote to DLUHC and requested information in the following terms:

"I request the following information under the Freedom of Information Act:

"Copies of the evaluation sheets, evaluator questionnaire and templates for hot and cold debriefs which were used by the Department of Communities and Local Government for "information capture" from the eight participating Local Resilience Forums (LRFs) during the Command Post Exercise (CPX) for Exercise Cygnus in October 2016. For clarification, I refer to Section 5.1 Information Capture in this gov.uk site:

<https://www.gov.uk/government/publications/uk-pandemic-preparedness/exercise-cygnus-report-accessible-report>

"Copies of any spreadsheet or 'dashboard' document created by the DCLG containing information collected from the LRFs during the CPX for Exercise Cygnus.

"Copies of any reports summarising information captured by the DCLG from the 8 participating LRFs during hot and cold debriefs conducted as part of the CPX for Exercise Cygnus. If this request is too broad in scope, then please provide me with documents summarising information captured from Hertfordshire LRF during hot and cold debriefs conducted as part of the CPX for Exercise Cygnus. For clarification, I refer to Section 5.1 and Appendix 4 in this gov.uk site: <https://www.gov.uk/government/publications/uk-pandemic-preparedness/exercise-cygnus-report-accessible-report>"

6. DLUHC responded on 25 January 2021. It denied holding any information within the scope of the request.
7. On 2 April 2021, the complainant contacted DLUHC again. He had been made aware of evidence showing the role the DLUHC had played during Exercise Cygnus and which would indicate that DLUHC would hold at least some relevant information. Although accepting that the request was late, he requested that DLUHC carry out an internal review of the response of 25 January. Alternatively, if DLUHC did not wish to complete an internal review, he re-submitted the wording of the original request and asked for it to be dealt with as a fresh request.

8. On 7 May 2021, DLUHC responded. It had decided to treat the complainant's correspondence as a fresh request for information – but once again, it denied that any relevant information was held.
9. The complainant sought an internal review of this response. Following an internal review, DLUHC wrote to the complainant on 29 June 2021. It now reversed its position and admitted that it did hold some information within the scope of the request. It apologised for not having previously identified this information. However, it refused to disclose the information and relied on section 35 and section 40(2) of FOIA to withhold the information.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 10 May 2021 to complain about the way his request for information had been handled. At that point, he had not yet sought an internal review. Once DLUHC had provided the complainant with the outcome of its internal review, the complainant asked the Commissioner to investigate the matter further.
11. On 3 March 2022, the Commissioner contacted the complainant to offer his initial view of the complaint. He noted that, based on the wording of the request, there appeared to be a considerable overlap between the type of information DHCLG was likely to hold and the type of information that had been held by the Cabinet Office – about whom the complainant had made a similar complaint and on which the Commissioner had issued a decision.<sup>1</sup> The Commissioner explained that it was his initial view that the information DLUHC held would likely be exempt – for the same reasons as Cabinet Office's information had been found to be exempt – and noted that the complainant had not appealed the Cabinet Office decision.
12. The complainant did not accept the Commissioner's view and exercised his right to ask for a decision notice.
13. The Commissioner considers that the scope of his investigation is to determine whether DLUHC has correctly applied section 35 of FOIA.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notice/2021/2620317/ic-91642-w3p0.pdf>

## Reasons for decision

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14. Section 35(1) 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”

15. The exemption is a class-based exemption meaning that any information of a particular type will automatically be covered. Section 35 is also a qualified exemption, meaning that, even where it is engaged, the information can still only be withheld if the balance of the public interest favours maintaining the exemption.

16. The Commissioner’s guidance states that information will relate to the formulation of government policy if it relates to the generation and evaluation of new ideas. Information will relate to the development of government policy if relates to reviews of the effectiveness of existing policy or considers whether the existing policy is fit for purpose.

17. The First Tier Tribunal has previously held that the term “relates to” in the context of this exemption should be interpreted broadly.<sup>2</sup>

18. However, the guidance also states that section 35 will not cover information relating to the implementation of existing policy. Not every decision will necessarily be a policy decision. Whilst the term “policy” is not defined in the legislation, the Commissioner interprets the term as referring to a framework or set of rules designed to effect a change likely to affect substantial numbers of people.

19. DLUHC explained to the Commissioner that it had located the following information within the scope of the request:

“The Department does not hold copies of evaluation sheets, evaluator questionnaire and templates for hot and cold debriefs from the eight participating LRFs during the Command Post Exercise (CPX)

“This is because during Exercise Cygnus, the department did not collect this type of information from the LRFs. Public Health England (PHE) collected information directly from the LRFs, which was uploaded via an online portal. However, the department had a

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<sup>2</sup> DFES v Information Commissioner & the Evening Standard (EA/2006/0006)

number of staff involved as a Government Liaison Officer (GLO) during the exercise and we hold a number of documents captured by the GLOs at LRF debrief meetings.

"The department does hold the templates for evaluation and debriefing, but these were not used to capture information from LRFs during the exercise. The department also holds the 'Situation Reports' template that was used to capture information from LRFs during the exercise.

"Regarding spreadsheets or 'dashboards' created, whilst the department captured information via the eight LRFs in the Situation Reports mentioned above, the department holds one spreadsheet collating LRF Situation Reports from 18 October 2016 that is within scope of this question. The department did not create any dashboard during, or after, Exercise Cygnus.

"Finally relating to summarising reports. The department did not capture information from LRFs as part of the debriefing process. However, we hold a number of internal documents that contain references to the experience or position of specific LRFs. The references were the views of the specific GLOs attending the LRF meetings."

20. DLUHC explained that this information related to the development of government policy because:

"The department, along with other government departments, continue to develop pandemic and wider UK Civil Contingency policy, including for future COVID-19 Variants of Concern (VoC), emerging infectious diseases and preparedness for other public health emergencies of international concern. The information contained within the documentation located is an important part of this process...

"...At the time of both the original FOI request in December 2020 and the second request in April 2021, the government was continuing to respond to the COVID-19 pandemic, developing a range of policies to mitigate its impact. As the information we hold is about pandemic planning captured during Exercise Cygnus, there is a clear relationship to the continued development of government policy in this area."

21. The Commissioner accepts, as he did in the Cabinet Office case, that exercises such as Cygnus play an important role in enabling the government to plan and prepare for pandemics and other national emergencies. Such exercises enable the government to evaluate how effective the current policies and procedures are in practice and to

identify areas of weakness or areas where the existing policy requires further development.

22. The Commissioner is therefore satisfied that the information in question relates to the development of government policy and thus section 35(1)(a) of FOIA is engaged.

### **Public interest test**

23. As mentioned above, section 35 is subject to a public interest test. This means that, even though the information may relate to the development of government policy, it must still be disclosed unless the balance of the public interest favours maintaining the exemption.
24. The complainant pointed to the strong public interest in understanding the lessons learned (or not learned) from the simulated "flu-like pandemic" in Exercise Cygnus and how those lessons had shaped the government's response to the actual flu-like pandemic of Covid-19.
25. The complainant also pointed out that much of the information would (in his view) have been provided by "emergency professionals" who were used to having their actions scrutinised.
26. DLUHC in response pointed to the need for a safe space in which officials from both central and local government could discuss ideas to reach sound conclusions. It also noted that disclosure would harm its response to the pandemic – which was very much ongoing at the time of the request.

### **The Commissioner's view**

27. The Commissioner considers that, in the circumstances of this case, the balance of the public interest favours maintaining the exemption.
28. Although the arguments DLUHC has presented are highly generic and poorly suited to the particular circumstances of this case, the Commissioner is aware that he has considered similar information before.
29. In decision notice IC-91642-W3P0, the Commissioner drew a distinction between information that represented the product of analysis, carried out over several months and information that had been created "on the spot" during an exercise designed to put participants under pressure. The Commissioner noted in that decision notice that:

"it would be neither practical nor desirable if those who participated in Exercise Cygnus were to present their views with half an eye on how those views would look if they were to be disclosed in future. Exercise

Cygnus was designed to be an extreme scenario. It therefore follows that participants would need to consider extreme solutions that would never normally be considered. Disclosure would risk associating an extreme position, taken in a simulated exercise, with an organisation's general policy...

"...The Commissioner is satisfied that the issues being flagged, both in the COBR minutes and in the reports from the LRFs, have been recorded in the Exercise Cygnus Report. She does not therefore consider that disclosing the raw material as well would make a significant contribution to the public debate – but it would inhibit ministers and officials from fully contributing to exercises such as Cygnus in the future. This would significantly reduce the effectiveness of such exercises and the role that they play in developing government policy."

30. Having reviewed a sample of the withheld information, the Commissioner considers that most of the information DLUHC holds falls into this category. It represents either the raw materials created during the exercise or is an aggregation of those raw materials for internal use. There is little by way of actual analysis held by DLUHC.<sup>3</sup>
31. The one piece of analysis DLUHC does hold is a "cold debrief" report that appears to have involved DLUHC officials and their views on the exercise. Whilst the Commissioner recognises that this document was compiled outside of exercise conditions, he still does not consider that the public interest favours its disclosure.
32. The content of this particular documents contains, in large part, an evaluation of the effectiveness of the exercise itself, rather than an evaluation of the policies it was designed to test – which, in the Commissioner's view, weakens the public interest in disclosure. The public interest in disclosure is strongest in learning lessons for future pandemics, not in learning lessons for future simulations.
33. Where the document does discuss matters relating to the pandemic response, these largely concern issues around administration and the flow of information rather than relating to big decisions around how public authorities respond to a pandemic such as suspending some legal obligations or seeking assistance from the military.

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<sup>3</sup> The Commissioner is aware from other complaints that the analysis of the data was carried out by the Department for Health and Social Care and Public Health England.

34. The complainant noted that he had been provided, under FOIA, with several documents which had been produced for the exercise by Hertfordshire Local Resilience Forum. The Commissioner notes that the forum is free to disclose information if it wishes to do so, however the specific documents that the complainant drew the Commissioner's attention to were not present among the documents DLUHC wished to withhold and therefore this has not affected the Commissioner's conclusion. In any case, the complainant already has this information.
35. In summary, the Commissioner does not consider that the general public would significantly improve understanding of the UK's preparedness for a Covid-19 pandemic from disclosure of these particular documents. There is now (partly, it must be noted, because of the complainant's efforts) a great deal of information about Exercise Cygnus in the public domain – much of which was already available at the point that DLUHC completed its internal review.
36. Disclosure of the information held by DLUHC would add little to what is already publicly available – but it would impede the willingness of officials to participate fully in exercises of this nature in future. That in turn would reduce the effectiveness of such exercises and hence their ability to test government policy. The Commissioner considers that there is a strong public interest in allowing government to test its policies rigorously.
37. The Commissioner therefore considers that, in the circumstances of this case, DLUHC has correctly relied on section 35(1)(a) of FOIA to withhold the requested information.

### **Procedural matters**

38. Section 10 of FOIA requires a public authority to comply with its duty under section 1(1) of the legislation (to confirm or deny holding information and communicate any non-exempt information) within 20 working days.
39. The Commissioner notes that DLUHC incorrectly informed the complainant that it did not hold any information within the scope of his request of December 2020.
40. The Commissioner also notes that, even allowing for the fact that the request was sent on Good Friday and that the Easter Monday and May Day bank holidays fell within the following four weeks, DLUHC failed to respond to the April 2021 request within 20 working days.
41. DLUHC therefore breached section 10 of FOIA in respect of both requests.



## Right of appeal

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

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

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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