

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

### **Decision notice**

**Date:** 19 June 2023

**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 requested information about the provision allocations to local authorities in relation to the Local Authority Housing Fund (LAHF). The Department for Levelling Up, Housing and Communities (the DLUHC) refused the request citing section 35(1)(a) of the FOIA (formulation or development of government policy). The Commissioner's decision is that the DLUHC was not entitled to rely upon section 35(1)(a) to withhold the requested information.
2. The Commissioner requires the DLUHC to take the following steps to ensure compliance with the legislation:
  - Disclose the withheld information – the indicative allocation to local authorities under the LAHF.
3. The DLUHC 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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4. On 19 January 2023 the complainant wrote to DLUHC regarding the Local Authority Housing Fund and requested information in the following terms:  
  
"Is there a list of provisional allocations to councils that you can share?"
5. DLUHC initially responded as normal course of business on 10 February 2023 advising that the information had not yet been published and more information would be "shared in due course".
6. On 13 February 2023 following further correspondence from the complainant DLUHC confirmed that it would now treat the request formally under the FOIA.
7. DLUHC responded on 6 March 2023 and confirmed it held the information requested but it was exempt under section 22 (information intended for future publication) of the FOIA.
8. On 6 March 2023 the complainant requested an internal review into the handling of their request.
9. DLUHC provided the outcome of its internal review on 14 April 2023. It withdrew reliance on section 22 and stated that the information was now considered exempt under section 35 of the FOIA.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 17 April 2023 to complain about the way their request for information had been handled.
11. The scope of the Commissioner's investigation is to determine whether DLUHC is entitled to rely on section 35(1)(a) to withhold the disputed information.

## **Reasons for decision**

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### **Section 35 – formulation of government policy**

12. Section 35(1)(a) FOIA provides an exemption from the duty to disclose for information relating to the formulation or development of government policy. The Commissioner understands 'formulation' to

broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.

13. The purpose of subsection 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered policy options in private.
14. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
15. The DLUHC confirmed that the withheld information relates to the development of the policy for allocating funding to local authorities in respect of the first and second rounds of the LAHF. The withheld information is being used as part of discussions and deliberations for developing the allocations with ministers. It will form part of candid consultation with local authorities to assess "the deliverability of the formula-generated indicative allocations in their local area and inform final policy on how the funding should be allocated".
16. The DLUHC stated that the withheld information and the approach where it made direct offers to local authorities formed part of a consultation process to determine feasibility and willingness to participate in the LAHF. The provisional allocations was shared confidentially with local authorities on 21 December 2022. The information has not been published by the DLUHC and local authorities were only provided with information about their own provisional allocation. DLUHC advised that it was made clear to local authorities that the provisional allocation was intended for discussion and review within the authority and it did not represent a firm commitment that it would provide the funding.
17. The DLUHC advised the Commissioner that the provisional allocations and the approach where it made direct offers to local authorities was part of a consultation process to establish the willingness and feasibility to participate in the LAHF. It confirmed that the information was shared confidentially with authorities on 21 December 2022.
18. The DLUHC explained that the policy on how funding is allocated to local authorities is still in development. At the time of this notice, the DLUHC is using the indicative allocations from the first round (the withheld information) to make decisions in relation to how the second round of funding is allocated and to "inform metrics on funding already offered and received by local authorities".

19. On 28 March 2023 the Minister for Veteran Affairs announced that the LAHF would be expanded by a further £250 million. As such, the DLUHC argues that policy decisions relating to the allocation of that funding were still in development. It stated that:

“The announcement of the total amount was made on the basis of an assessment of departmental budgets and funding available from HM Treasury, on the basis of estimated demand for the housing. This is a routine way Departments develop policy for funds, where the funding envelope available to Departments to deliver a specific outcome is agreed with HM Treasury and announced in advance, then policy options to best spend the funding are subsequently developed”

20. The DLUHC confirmed that at the time of this notice it is using the indicative allocations from the first round of policy development to make decisions on how to allocate the second round of funding. It will then discuss indicative allocations from the first and second rounds with local authorities to determine whether the policy is deliverable in local areas. In order for this process to be effective the DLUHC requires a safe space to discuss both sets of indicative allocations frankly with authorities. The DLUHC argues that disclosure of the indicative allocations from the first round of funding would be likely to “create external distraction during these development discussions, particularly where a local authority’s allocation increased or decreased in the first round from what was in their indicative allocation”.
21. Based on the representations submitted by the DLUHC the Commissioner is satisfied that it comprises information relating to the formulation or development of government policy in relation to the allocation of the LAHF. The Commissioner is therefore satisfied that the exemption at section 35(1)(a) is engaged.
22. He has therefore gone on to consider the public interest and whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **Public interest test**

23. The DLUHC accepts that there is a general public interest in favour of disclosure relating to transparency and accountability. It also acknowledges that there is a public interest in disclosure of information relating to the business of government as this increases public trust and confidence in the workings of government.
24. In favour of maintaining the exemption, the DLUHC argues that disclosure would be likely to prejudice the safe space needed for policy officials and Ministers to reach policy decisions away from external

interference and distraction. This ensures that the DLUHC is able to operate effectively. It argues that disclosure would be likely to weaken the ability of officials to discuss sensitive issues free from premature public scrutiny.

25. The DLUHC also contends that disclosure would be likely to have a chilling effect on general policy making. It states that the chilling effect “relates to the notion where under the impediment of distraction, policy officials and Ministers may feel less able to participate in free, frank and objective discussions regarding any information and advice put before them”.
26. In its internal review response dated 14 April 2023, the DLUHC confirmed that the final allocations had been published and provided the complainant with the relevant link<sup>1</sup>. The DLUHC accepts that there is a public interest in individuals being able to compare the indicative allocations with the final (published) allocations. This would allow the public to assess whether local authorities received less or more than their indicative allocation. However, it considers that there is a stronger public interest in it being able to have frank discussions with local government about the deliverability of policy options free from any undue influence or distraction which would be caused through disclosure of the withheld information. It considers that disclosure would be likely to result in local government being less willing to engage in the policy development stage for the second round of funding allocation and any future funding. This would result in the DLUHC being unable to conduct a thorough deliverability assessment for the policy, which is key to its success
27. The DLUHC advised that, at the time the request it was still in discussions with the Treasury on the budget for the second round of funding. In addition, officials were in discussion with colleagues at the Home Office and internal analysts to determine the policy for allocating funding to local authorities to deliver housing for those in bridging accommodation. The withheld information was being used as part of this policy development to inform discussions. Since then the DLUHC has agreed funding with the Treasury but it is still developing policy for the allocations for the second round. It therefore argues that disclosure would have a chilling effect on the discussions identified and adversely impact the ability to effectively develop the programme.

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<sup>1</sup> <https://www.gov.uk/government/publications/local-authority-housing-fund>

## **Balance of the public interest**

28. The Commissioner accepts that a safe space is needed for discussion and decision making by officials and ministers, particularly in handling matters relating to the expenditure of significant public funds.
29. The Commissioner considers that the public interest in maintaining the exemption will be at its strongest where the policy process is live.
30. The request was made on 19 January 2023 and responded to on 6 March 2023.
31. The provisional allocations were sent to local authorities on 21 December 2022 and the validation period where DLUHC consulted with local authorities ended on 25 January 2023. However, on 28 March 2023 an announcement was made that a further £250 million would be available under a second round of funding under the LAHF. In light of this the Commissioner accepts that the policy was still being developed at the time of the request.
32. The Commissioner acknowledges that there is a public interest in allowing DLUHC the time and space to implement the LAHF. However, the Commissioner considers that DLUHC has failed to consider the strong public interest in timely understanding, and scrutiny of the administration of the LAHF and the difference between provisional and final allocations. Whilst the Commissioner notes that DLUHC has now published information relating to final allocations, he considers that this does not provide the ability to understand and scrutinise any changes between provisional and final allocations.
33. Although DLUHC states that the indicative allocations were provided to local authorities in confidence, the Commissioner has undertaken some sampling research and notes that a number of authorities have published information relating to both their indicative, and final allocations. A number of these were published either prior to the request being submitted, or prior to the initial response to the request dated 6 March 2023. The Commissioner has not been provided with any evidence to suggest that these disclosures have had any impact on the development of the policy in question. The Commissioner also notes that some authorities have actually published the letter from DLUHC notifying it of its indicative allocation.
34. The Commissioner would like to point out that he has not checked whether every authority has published its indicative allocation – only a small sample. He pointed this out to DLUHC and it maintained that, even if a small number of authorities had published their indicative allocation,

it considered that section 35 was still applicable to publishing all 183 indicative allocations.

35. The Commissioner considers that, in considering the second round of funding, it is likely that DLUHC will consider both the provisional **and** final allocations from the first round. The final allocations have already been published and again the Commissioner has not been provided with any evidence that this has had any adverse effect on the policy in relation to the second round of funding.
36. DLUHC has argued that disclosure would be likely to result in local government being less willing to engage in the policy development stage for the second round of funding allocation, and any future funding if indicative allocations were published. Local authorities are already aware of the difference between their provisional and final allocations. The Commissioner does not consider that DLUHC has provided sufficient evidence to suggest that disclosure of the indicative allocations under FOIA would result in local authorities being more reluctant to apply for any funding under the second round, particularly in light of the fact that some authorities have already published their indicative allocation
37. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding allowing DLUHC the space to develop policy away from external interference, the Commissioner is not persuaded that this is sufficient to outweigh the strong public interest in disclosure of the withheld information.
38. DLUHC has not provided compelling arguments regarding how the specific policy named would be undermined by disclosure of the indicative allocations. Having reviewed the information, it is not apparent to the Commissioner how the specific policy would be undermined other than the general safe space arguments presented. While the Commissioner accepts that section 35(1)(a) is intended to protect the policy process as a whole, in addition to specific policies, the Commissioner is not persuaded that the public interest arguments presented are sufficient to outweigh the public interest in scrutiny of the LAHF.
39. The Commissioner therefore considers that the balance of the public interest favours disclosure.

## Right of appeal

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40. 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)

41. 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.
42. 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 .....**

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