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Our ref. RFI 3308

Christian Lister
<mailto:request-33072-6dfff79b@whatdotheyknow.com>
(by email only)

25 October 2010

Dear Mr Lister

RFI 3308 – Correspondence between Defra and CLG regarding the Environmental Information Regulations 2004

Thank you for your email of 21 July 2010 appealing against the response to your request for copies of the correspondence between Defra and the CLG regarding the Environmental Information Regulations 2004, which you subsequently clarified as referring to written communications and emails between Defra and the CLG Housing Team between 1 January 2010 and 19 April (the date of your original request), including those relating to the Charges for Property Search Regulations (CPSR).

In accordance with Defra's internal review procedures, we have considered your appeal in discussion with colleagues in Defra's Environmental Information Unit, which handled your original request, although staff changes in summer mean that the team that responded to your original request is no longer in place.

Summary

In its original response to RFI 3308 Jenny Carpenter explained that the decision had been taken to withhold the requested information and that, to the extent that it was not environmental information, it was being withheld under the Freedom of Information Act 2000 (FOIA). We have concluded that your request was for non-environmental information and was correctly refused under FOIA. However, we are now able to release some of the information previously withheld in view of the passage of time since your original request.

I set out below a fuller explanation of our decision.

Chronology

On 19 April 2010 you sent Defra an email via the website Whatdotheyknow.com requesting correspondence between Defra and the CLG regarding the Environmental Information Regulations 2004.

On 21 April Jenny Carpenter contacted you asking you for clarification to help her identify the particular information that you were interested in.

On 26 April you explained that the request should refer to written communications and emails between Defra and the CLG Housing Team between 1 January 2010 and 19 April (the date of your original request), including those relating to the Charges for Property Search Regulations (CPSR).

On 27 April Jenny Carpenter sent you an acknowledgment of your clarified request for information.

On 25 May Jenny Carpenter sent you a response to your request for information.

On 21 July you sent a request for an internal review to Defra via the Whatdotheyknow.com website.

On 21 July my colleague Valerie Hope sent you an acknowledgement of your request for an internal review.

On 17 August my colleague David Waller sent you an email explaining that more time was needed to complete the internal review and extending the deadline by 20 working days.

On 16 September David Waller sent you an email extending the deadline for a further 20 working days, i.e. to 14 October, and apologising for the delay in concluding your appeal.

On 24 September you emailed David Waller pointing out that no reasons had been given for extending the review beyond the 40 working days.

FOI or EIRs

We initially considered both the EIRs and the FOIA to be applicable. However, we have re-examined the information held and have concluded that the FOIA is the sole applicable information access regime. This is because the information would not meet the definition of environmental information in the EIRs, being information relating to charges made for various property searches, including the Charges for Property Search Regulations (CPSR), and their compatibility with the EIRs. The issue of the lawfulness of charges is not environmental information within the definition in regulation 2(1) of the EIRs.

Timeliness (section 10(1))

We have considered whether Defra complied with the requirement in the FOIA to respond to a requester no later than 20 working days after the date of receipt of the request. Defra's response to RFI 3308 was sent to you on 25 May, 20 working days after the date of receipt, and therefore complied with the FOIA.

The FOIA does not make provision for an internal review and therefore does not set a deadline. However, Defra has put in place a review procedure in line with the recommendation in the Section 45 Code of Practice. We note the ICO position that an internal review should not exceed 40 working days. However, on this occasion the review has proved difficult to complete in a timely manner because of the loss of the two people from Defra's Environmental Information Unit who had been involved in the discussions with



CLG and other government departments during the period in question and who worked on the original response. I can only apologise for the delay.

Exceptions

Section 35(1)(a)

Section 35(1)(a) of the FOIA is engaged where the information relates to the formulation or development of government policy. The information held comprises emails between Defra's Environmental Information Unit and CLG's Home Buying and Selling Team and draft papers exchanged for comment between Defra, the CLG team and other government departments on the extent to which the Environmental Information Regulations 2004 affect the ability of local authorities to charge property search companies (PSCs) and others for information and what action should be taken in order to tackle any issues arising from the discussions. The exemption in section 35(1)(a) is therefore properly engaged.

Section 42

Section 42 of the FOIA is engaged for information in respect of which a claim to legal professional privilege could be maintained. The information held includes texts in which staff in Defra and CLG discuss the legal issues raised by internal and external legal advisors, obtained on a confidential basis from a number of sources. The exemption in section 42 is therefore properly engaged in respect of this information, which is also covered by section 35(1)(a).

Public interest test

Section 35(1)(a)

In the response to your original request, Defra acknowledged the public interest in policy discussions concerning charging for various property searches following publication of guidance by the Information Commissioner's Office, the Information Commissioner's findings in a number of decision notices, and an appeal to the First-Tier Tribunal (Information Rights).

However, at the time of your request there was a countervailing public interest in ensuring that the government could preserve a private space for discussion and consideration of issues which would have an effect on central government, local authorities, property search companies and members of the public. Policy formulation is an ongoing, iterative process that in this case continues to involve negotiations between several government departments. The *Local Authority Property Search Services – Costing and Charging Guidance* had made it clear in January 2009 that the Charging Regulations of the CPSR did not apply to environmental information. Local authorities were additionally advised in summer 2010 to stop charging the £22 fee for a personal search of the Local Land Charges register, and the Ministry of Justice laid a Statutory Instrument in Parliament to revoke the fee. However, other related policy matters are still live and are actively being worked on. Early release of the information would have an adverse impact on the ability of the government to develop policy effectively, as Ministers and officials need to be able to conduct rigorous and candid assessments of their policies. Good government depends on



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good decision-making, and this needs to be based on the best advice and a full consideration of all the options.

Section 42

As explained in our original response, there is a public interest in public authorities being accountable for the quality of their decision-making, and this includes ensuring that decisions have been made on the basis of good quality legal advice and that the authority is acting properly.

Government decisions need to be taken in a fully informed legal context. Legal advice needs to include a full appreciation of the facts, including rights, liabilities, obligations and the likely impact of the various options. This aids Ministers and their officials in the decision-making process, and that process should have the benefit of frank discussions of that legal advice unencumbered by the risk of wider publication.

Discussions of legal advice obtained from internal and external sources and exchanged with a limited number of people on the understanding that they be treated confidentially are covered by the convention of legal professional privilege (LPP), recognized by the Information Tribunal as “a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers, as well as exchanges which contain or refer to legal advice”. Indeed, the High Court recognized in its 2009 judgment in O’Brien, an appeal against an Information Tribunal decision, that “the in-built public interest in withholding information to which legal professional privilege applies is acknowledged to command significant weight”. In this case the public interest in withholding this legal information while the issues are still live and part of active policy development in order to maintain the confidentiality of LPP material takes precedence over disclosure.

Conclusion

In all the circumstances of the case, having reviewed the exemptions that are engaged, we consider that Defra was correct to withhold the information at the time of your request. However, the passage of time means that there is no longer a compelling argument for withholding some of the information. The information that can now be released is attached to this email. Staff names have been redacted as they were not within scope of your request.

I hope that the above answers your letter satisfactorily. However, if you remain dissatisfied, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF



<http://www.ico.gov.uk/complaints.aspx>

Yours sincerely

Brendan Walsh

Head of the Information Rights Team

