

4 February 2011

By email
Mr Ian Salisbury

Our Ref: FOI 0004265

Dear Mr Salisbury,

FOI Internal Review Request – Architects Registration Board

I am the nominated review officer, in the Department for Communities and Local Government ('the Department'), for the internal review of the Department's response to your request for information, as sought in your e-mail of 10 January 2011.

I have carefully considered the points you raised and the basis for Richard Harral's response to your request, contained in his letter to you of 10 January 2011. I shall set out what I consider to be the relevant background, then turn to the specific grounds of your appeal.

Background

On the 12 November 2010 you sent a clarified request for information about the Architects Registration Board in particular:-

- The original decision to retain ('the decision') showing all head notes and end notes, face sheets and end sheets, and in particular the identify/(ies) and /or office description(s) of the decision taker(s);
- All briefing papers/emails etc informing the decision, showing in particular the authorship of each paper/email etc;
- All internal Government meeting notes and/or minutes relevant to and/or informing the decision identifying those attending;
- All relevant meeting notes and/or minutes between the Government and/or its officers with the Architects registration Board and/or its officers (executive, appointed or elected) identifying those attending;
- Telephone conversation notes between the same identifying the participants;
- Correspondence whether by mail or email between the same identifying the correspondents; and

- All representations relevant to the decision made to the Government its ministers or its officers by individuals, organisations or by or through Members of Parliament (of both houses).

On the 23 November Evonne Hopwood wrote to you advising that you would receive a response from the Department by 13 December 2010.

On 13 December Richard Harral from the Department responded to you advising that the Department was considering specific qualified exemptions in relation to your request and required more time to consider whether the public interest was best served by releasing the information held by the Department and falling within the scope of your request, or by maintaining the exemptions. The exemptions cited were those in section 35(1)(a) (for information relating to the formulation or development of government Policy) and section 42 (for information to which a claim to legal professional privilege could be maintained in legal proceedings) of the Freedom of Information Act 2000 ("FOI 2000") and you were informed you could expect to receive a response by 10 January 2011.

On the same day you responded by e-mail stating your disappointment and 'that the exemptions set out in the Act provided little in the way of subjective assessment as to whether information is or not exempt from disclosure, particularly as the information you requested appertained to a decision that had already been taken'.

On the 10 January 2011 Richard Harral responded confirming that the Department did hold some of the information that you requested on 12 November 2010 in your clarified request. He also made it clear that the following information relevant to the subject of your request was not held by the Department, namely:-

- Any meeting notes or minutes of meetings between ARB and the Department;
- Any records of telephone conversations between ARB and the Department;
- Any e-mails between ARB and the Department.

Richard Harral advised that some of the information that was held by the Department could not be released under section 35(1)(a) (for information relating to the formulation or development of government Policy), section 40(2) (for information that is personal data and where disclosure would breach any of the data protection principles in the Data Protection Act 1998 ["DPA 1998"]) and section 42 (for information to which a claim to legal professional privilege could be maintained in legal proceedings) of the FOI 2000.

On the same day you e-mailed the Department asking for an internal review. You advised that the lack of information provided and the reasons for so doing were insufficient as to ascertain whether they had been properly applied.

Appeals officer's response

Section 35

As Richard Harral highlighted in his response, section 35(1)(a) provides an exemption for information relating to the formulation or development of government policy. I am satisfied that the information in question, as it related to policy decisions in respect of the Architects Registration Board which, at the time of the creation of the information, had not been taken, fell within the section 35(1)(a) exemption which was, therefore, correctly cited.

Section 35(1)(a) is a qualified exemption which means that for information falling within this exemption the Department is required to assess whether the public interest is best served by releasing the information or maintaining the exemption.

There is a general public interest, embodied by the FOI 2000, in information held by public authorities being made publicly available. This helps promote accountability and transparency and helps ensure that the public is informed and therefore able to engage in an informed way in matters of policy development. In turn this helps build public confidence and trust in the way that government considers policy options and takes decisions.

However, as Richard Harral highlights, there is a strong public interest in Ministers and their officials being afforded the appropriate degree of private thinking space in which to consider and advise on a range of policy options and in which to formulate and take decisions. Without the appropriate degree of thinking space it is likely that concern about the release of information about policy development and formulation would be likely to lead to Ministers and officials feeling constrained in their ability to give the necessary degree of thorough consideration to the full range of policy options, particularly where these are less palatable, and this would result in less effective policy making.

In this particular case, in addition, the Department was required to consider how exposing the considerations behind policy formulation might have adversely affected the ongoing implementation of the policy decision, and whether doing so would be in the public interest. While the discussions related to this policy decision have concluded, the Department continues in its sponsorship role of the Architects Registration Board in line with Ministers' expectations which will include in the near future undertaking a review of their Framework agreement and ultimately a triennial review of their function and whether they remain as a body fit for purpose. The advice provided last year therefore remains live and relevant to on-going policy work now and in the future. In view of this I conclude that the thinking space in respect of this information remained important at the time of the response to your request and continues to do so.

I am satisfied that the arguments in both respects were considered fully by the Department and that release of the information would have been likely to have the adverse effect mentioned. I therefore consider and conclude, having taking account of all the circumstances of this particular case and with reference to your comment that with the decision having been already made, that the public interest was best served at the time of the response to your request by maintaining the exemption above and in not releasing some of the information you have requested.

Section 40 Personal Data

My starting point here was whether the information for which the exemption at section 40(2) FOI 2000 was cited did constitute personal data, in that it could or would enable individuals to be identified. As the information consisted of the names of individuals and their views this was clearly so. The first data protection principle in the DPA 1998 states that the processing of personal data, in this case the disclosure of that personal data, must be fair and lawful and in accordance with at least one condition in Schedule 2 of the DPA 1998. In this case, as the individuals concerned were not made aware that this information could be released at the time it was provided, or given the opportunity to make comment on whether disclosure should occur in combination with the views they had expressed, and given that it would have been difficult in my view for the Department to argue that any strong public interest would be served by the disclosure, then I conclude that disclosure of the personal data would have been likely to breach the DPA 1998.

Section 42 Legal Professional Privilege

Section 42(1) provides an exemption for information for which a claim to legal professional privilege could be maintained in legal proceedings. Generally, for information to fall within this exemption, it must consist of or relate to communications between a lawyer and client for the predominant purpose of seeking advice or litigation. I am satisfied that the exemption was correctly applied to the relevant information in this case.

Section 42(1) is a qualified exemption which means that, for information falling within the exemption, the Department is required to assess whether the public interest is best served by releasing the information or maintaining the exemption.

The more general arguments why the public interest is served by releasing information held by public authorities I have already referred to. These also apply to this information of course. There is also a public interest served by ensuring that the public is able to be reassured that the decisions made by government are taken, where appropriate, in the light of relevant, appropriate and effective legal advice.

However, there must therefore also be a strong counter argument that government must be able to seek and receive legal advice within the appropriate degree of private space. The principle of confidentiality in the lawyer and client relationship is well established and understood and there is generally a very substantial public interest in maintaining the confidentiality of legally privileged material. As such there must be at least equally weighty factors in favour of the disclosure of such legally privileged information if the public interest is to favour disclosure.

I consider, on balance and taking account of all the circumstances of this particular case, that there were no significantly strong arguments that would have merited the disclosure of the legally privileged information in this case and that the public interest was best served at the time of the response to your request by maintaining the exemption as described above and in not releasing the information.

If you are not satisfied with this letter, and want to take your case further, you may apply to the Information Commissioner asking him to decide whether the

Department has complied with its obligations under the Act. The information Commissioner can be contacted at:

Office of the Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Telephone 01625 545 700
E-mail: mail@ico.gsi.gov.uk

Yours sincerely,

A handwritten signature in dark ink, appearing to read 'Miranda Abrey', written in a cursive style.

Miranda Abrey
European Programmes Division