



Ministry of Housing, Communities & Local Government

Ministry of Housing, Communities and
Local Government
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Sean Brawley

Date: **30 October 2019**

Dear Mr Brawley

Internal review under the Freedom of Information Act 2000 (ref: 4336268)

Thank you for your request for an internal review which we received on 13 August 2019. I am sorry that you are dissatisfied with our attempts to handle your request under the Freedom of Information Act 2000.

I am the review officer appointed to undertake the internal review and I am writing to provide a response.

Background

On 12 July 2019 you requested the following information:

Please provide and policy research or papers produced by the Department reviewing the feasibility of pension release for use in housing deposits.

On 18 July 2019, the Department wrote to you acknowledging that it held information within scope of your request but would not release it. The information falls within the exemption at section 35(1)(a) FOIA as it relates to the formulation/development of government policy.

On 13 August 2019 you requested an internal review of the Department's decision to withhold the information giving the following reasons:

Firstly, it is specifically the case that the department must consider the specific impact of releasing the specific information requested. The use of a template rejection to on the basis of a generalised safe space is not an appropriate use of the defence given; the public interest test

must be properly applied to the specific documents requested. Releasing this information does not generate an obligation for future disclosures, for example. ICO and the Information Tribunal have clearly stated, for example, "To the extent that the Appellant is suggesting that ... there is some form of presumption against the disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under section 35(1)(b) is inherently weighty, we must disagree.'

If it was the case that a "safe space" was considered of sufficient importance to refuse release in all cases, then the exemption would have been made absolute. It is not, a public interest test is required, which means release is the correct decision in some cases. You must give appropriate attention as to if that is the case here, which you plainly have not done.

On the specific case, this is now plainly a closed policy process. The policy means required would have to pass through the DWP, which has publicly rejected the policy. The cabinet has not supported the policy, and the sitting minister at the time has declared it to be a personal idea. Meanwhile, the change in Ministers means that it is clearly the case this policy work is over. What may have been correct at time of writing is not likely to be a working defense at the time the review is finalised; this is not a live policy option in development. If you wish to dispute this, I hope you will confirm in your internal review response that work on this policy option is ongoing under the new Housing Minister.

Furthermore, it does not appear this policy development process was ever formally endorsed by the most relevant department (DWP), by the cabinet, or by anyone other than the previous housing minister. As such it is questionable if it counts as policy development by the sitting government at all, rather than just a ministerial research project. A key factor as to if something is policy development is that the final decision would be taken by the relevant minister, but this policy paper for the Housing Minister would not be within his power to take a decision on.

This is admittedly a small distinction, but the general unlikelihood of adoption of this in terms of likely immediate government policy choices at this moment does very much limit the impact on the government and on policy processes going forwards of release. This is not a particular sensitive policy document because it does not reflect the likely direction of actual policy of the present government as a whole. This means there is not a need to preserve a safe space for the government to present its case. The fact that this is not a live policy process means that it is not possible to contaminate this policy development process through this release. Even ignoring this, the release of the policy development paper on this subject is not particularly likely to impact other policy debates and therefore is not likely to impact the safe space for other policy development.

If the Department continues to assert the policy is live, then it must be noted this is a policy development across two fields of vital public interest taking place in a single department without wider public consultation. This is not how early stages of such major policy formulation should take place and as such the widening of debate and extending the opportunity to influence public policy to a larger cohort would in this case be much more important than preserving the safe space in any case. Disclosure if the policy process was active would actually be likely to serve to enhance rather than stymie the process.

There is a public interest in release not only in the general interests of transparency, but to understand the circumstances which led to the commissioning by the Housing Department of a policy of using pensions money without DWP or treasury sign off. The contents of the paper are likely to be illuminating both in terms of being available to inform public debate on if this is a viable of positive policy choice going forward, but also in terms of informing the general view on pensions and housing policy.

The shape of both these policy fields is likely to have a large impact on the public, with both a housing crisis and aging population ongoing. As such there is a very strong public interest in supplying as much information into the public domain as possible in order to inform policy

development, discussion and debate throughout the public realm.

In general, there is a strong public interest in detailed policy analysis being released whenever possible to inform the public scrutiny of risks and alternative policy options which may be available or advocated for in the future. It is likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at. Furthermore, the policy document is likely to contain a variety of background factual information, which as per Section 35(4) there is a particular and special public interest in disclosing to inform debate and development of policy by other groups moving forwards.

As such, because:

- you have not properly conducted a public interest test*
- There is little possible harm to releasing the paper*
- There is much larger public interest in release*

Appeals Officer's Response

I have reviewed the response sent you and make the following observations in response to your points above:

- 1. Policy making:** Section 35(1)(a) FOIA covers any information **relating to** the formulation and development of government policy. As is widely accepted now in the light of the Commissioner's own guidance and case law decisions, the term "*relates to*" is capable legitimately of being interpreted broadly. If there is sufficient enough link between the information in question and a Government policy or policies then the exemption will be engaged. I have examined information the Department holds within scope of your request and believe it meets the criteria set out above.
- 2. Public interest:** The relevance and weight of the public interest arguments you mention will depend on the content and sensitivity of the particular information in question, and the effect its release would have in all the circumstances of the case. As mentioned in the original response to you, the key public interest argument for this exemption will relate to preserving a 'safe space' to debate live policy issues away from external interference and distraction. In this case there are also related arguments about preventing a 'chilling effect' on free and frank debate in future if the information were to be released.

Similarly, the Commissioner's guidance suggests that public interest arguments should focus on potential damage to policymaking from the content of the specific information and the timing of the request. Once the government has made a decision, a safe space for deliberation will no longer be required and this argument will carry less weight.

No decisions have yet been made by Ministers about this particular policy area and so I find that the "safe space" argument is sound.

Conclusion

Having reviewed this case I have concluded that the Department responded correctly to you and I uphold the use section 35(1)(a) FOIA to withhold this information. I also find it is not in the public interest to release this information at this time.

If you are unhappy with the outcome of this internal review, you can ask the independent Information Commissioner to investigate. The Information Commissioner can be contacted at email address casework@ico.org.uk or use their online form at ico.org.uk/concerns or call them on 0303 123 1113.

Yours sincerely

MHCLG FOI Team