



HOLLESLEY PARISH COUNCIL

Mrs Judi Hallett, Clerk to the Council

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Thursday, 23 May 2019

Disclosure Team
Ministry of Justice
102 Petty France
London
SW1H 9AJ

Dear Sir/Madam,

Re: Freedom of Information Act (FOIA) Request – 190415037

I am writing in connection with a Freedom of Information (FOI) request made by Hollesley Parish Council (HPC) and given the reference number 190415037. A response to this request was received in a letter from Mr Lee Bateman dated 2nd May 2019. Having considered his letter HPC is not satisfied with the response and has instructed to me request that you review your decision to withhold the information requested.

Mr Bateman's response reproduces some, but not all, of what was written in HPC's FOI request dated 15 April 2019. HPC's request reproduced a number of sections from the Information Commissioners Office (ICO) Guidance on Section 35 of the FOI Act. I will not duplicate these again but would point out that they deal with the ICO's position on whether information relates to 'Formulation or Development' of a policy versus the implementation of that policy. The Ministry of Justice's (MoJ) position – as stated by Ms Stacey Tasker OBE – appears to be, that a decision to accommodate men convicted of sexual offences at Hollesley Bay has actually been made and plans are being made to implement that decision (a copy of this letter was sent with the FOI request).

The ICO's guidance on Section 35 states (in paragraph 23) that:

“The purpose of section 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 or effective policies. In particular, it ensures a safe space to consider policy options in private.”

Based upon the information HPC has been given by the MoJ its councillors concluded that the 'policymaking process' has come to an end and the relevant decision makers were allowed the 'safe space' to consider the options.

Mr Bateman's letter states that the information HPC requested is exempt from disclosure, "*because it relates to the development of government policy.*" I have underlined the word development to highlight that only this word has been used on this occasion – as opposed to the "*formulation or development*" stated when HPC first requested the information (your ref. 181004033). In the absence of any explanation of this HPC can only conclude that there is an acceptance by Mr Bateman that the policy is no longer being formulated but is still, apparently, being developed. Clearly, this appears to contradict what Ms Tasker has written.

Having reached this conclusion I should point out that Mr Bateman appears to contradict his own statement when he goes on the deal with public interest test. One of the reasons stated for withholding the information refers to documents and correspondence, "*relating to the formulation of this policy*". I have underlined the word formulation as, in this instance, only this word has been used.

The councillors at HPC fully support the principles that underpin the Section 35 exemption. They accept that those making government decisions should be allowed the time and space to make an informed decision (i.e. one that hopefully results in a "*well considered or effective*" policy) free from interference, as set out in the above quote from the ICO's guidance. It is for this reason that HPC decided not to challenge the previous refusal to provide the information by the MoJ in connection with request 181004033. HPC accepted what we had been told by the MoJ in that instance.

Subsequent communication with the MoJ – including two of our councillors travelling to Westminster, from Suffolk, to speak to The Rt Hon Rory Stewart OBE MP – led HPC to the conclusion that the policy had been decided. This was confirmed by Ms Tasker's letter to HPC, which did not lead councillors to believe that the 'policy' was still at the development (or formulation) stage back in January 2019 – and yet this is apparently being suggested now, by Mr Bateman, to avoid disclosing the information requested.

HPC's councillors are somewhat concerned at how difficult it is proving to obtain a 'straight answer' from the MoJ to the question of whether, or not, any decision has actually been made in this case and where exactly we find ourselves in the policy making process. The ICO's guidance on the Section 35 exemption (paragraph 43) states that 'formulation' would refer to "*the early stages of the policy process*". Having considered the ICO's guidance, specifically paragraphs 33 to 36, councillors accept that, on occasions, there may be 'grey areas' and it may not always be possible to say exactly where development or formulation stops and implementation begins.

In Ms Tasker's letter she responded to HPC's appeal for clarity over this issue by saying, "*I am sorry that there appears to be confusion*". Nothing in her letter could be considered as suggesting that the MoJ were only at the "*early stages*" of making a decision. This continued failure to provide a clear and consistent message has been a factor in HPC's decision to request a review of Mr Bateman's conclusions.

I shall now move on to Mr Bateman's application of the public interest test in this matter. He lists a number of reasons that would 'favour' disclosure. These largely mirror the reasons suggested in the ICO's guidance on the subject and the MoJ's own published guidance. The ICO's guidance lists a number of key topics – 'General public interest in transparency', 'Public interest in the issue', 'Public interest in the information' and 'Presenting a full picture'. We consider all of these matters relevant in this case.

We note that the ICO also states that:

"The main principle behind freedom of information legislation is that people have a right to know about the activities of public authorities, unless there is a good reason for them not to. This is sometimes described as a presumption or assumption in favour of disclosure."

Mr Bateman has written four paragraphs under the heading of "*Public interest considerations favouring withholding the information*". I will deal with each paragraph in turn, but suffice it to say that HPC do not accept that "*on balance*" these amount to "*a good reason*" to withhold the information we have asked for.

Paragraph 1

This paragraph opens with the phrase, "*Although this position has been publicly stated...*" It is not clear to us what "*this position*" actually refers to. In the absence of any further explanation it would appear to be acceptance of the fact that the 'policy' or 'decision' to house sex offenders at Hollesley Bay has, long since, been made public. Mr Bateman goes on to suggest that, "*it nonetheless does not alter the exemption in terms of releasing any documents and correspondence relating to the formulation of this policy*". His assertion appears, to us, to be completely at odds with the ICO's guidance on this exemption, which states in paragraph 46:

"In other cases where legislation is not required, a public announcement of the decision is likely to mark the end of the policy formulation process."

Mr Bateman then goes on to say that, "*Such documentation will relate to current prison service operations, as well as future plans, that can still not be disclosed at this stage.*" HPC's FOI request relates specifically to the decision to house sex offenders at Hollesley Bay. This is, we believe, a policy decision that has been made, and publicly announced, and we have asked for copies of documents that might help us understand that decision. We have not requested details of "*future plans*" or "*current prison service operations*".

Whilst it is possible that some of your relevant documents may additionally contain details of such things as "*future plans*" this is not something that we requested. We can see no reason, therefore, why any irrelevant information could not be redacted in the copies of the documents supplied to us.

As I have already pointed out, in this paragraph Mr Bateman mentions documents and correspondence that relate to "*formulation*" when his earlier stated grounds for relying on the Section 35 exemption refers to "*development*" only. The ICO's Section 35 guidance (notably paragraphs 43 and 54) makes it clear that these terms do not mean the same thing.

Paragraph 2

Mr Bateman states that, "*There is a public interest in maintaining a neutral forum while such deliberations take place, and once they have been taken, in order to protect the ability for officials to have free and frank discussions to enable them to make well-informed decisions.*"

There is no dispute that government officials should be allowed the freedom to make decisions without interference (we take it that is what is meant by a “*neutral forum*”). This is, in essence, what the Section 35 exemption was written for. Our reading of the ICO’s guidance on the subject does not lead us to believe, however, that this exemption means that once a decision has been made any document that relates to that decision can be kept secret indefinitely - as Mr Bateman seems to suggest in the section I have underlined.

As the ICO’s guidance (reproduced above) suggests, “*The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process...*” The aim of this exemption appears to us to be that the decision making ‘process’ is protected. It does mean that once a decision has been made it can never be made subject to public scrutiny.

How can the public ever be confident that government officials have made “*well-informed decisions*” if there is no means of obtaining the documentation upon which that decision has been based? If this were the case then no details regarding government decisions would ever be disclosed and this strikes us as the complete opposite of the aim of the legislation.

Paragraph 3

This paragraph appears to us to be largely repetition of paragraph 2. The phrase in that paragraph, “*the ability for officials to have free and frank discussions*” strikes us as very similar to the “*sharing views internally between departmental officials*”. This paragraph again uses the phrase “*neutral forum*” in the sentence, “*This is a process that requires a neutral forum for options to be considered, pursued or rejected without prejudicing any final decision to be taken.*”

Again, there is no dispute on our part that this is what the exemption allows government officials to do. Once that decision has been made, however, this argument no longer applies and as we have already stated there is every reason to believe that the MoJ has already made its “final decision”.

Paragraph 4

This paragraph opens with the statement, “*Disclosure may cause unhelpful debate based on an incomplete picture of the policy*”. This might be the case if the MoJ has not actually made the decision to house sex offenders at Hollesley Bay, but again we do not believe this to be the situation.

Mr Bateman goes on to say that, “*Release of information out of context from the proposals may also lead to misunderstanding of the nature of these and any future changes*”. The ICO’s guidance on the application of the Public Interest Test (see paragraphs 40, 44 and 45) includes a section entitled “*Irrelevant factors*” – one of which is the suggestion that “*Information might be misunderstood*”. The ICO states that:

“*This is not usually in itself an argument for maintaining the exemption. The obvious solution is for the authority to publish an explanation of the information, rather than withhold it.*”

Mr Bateman closes with the suggestion that, “*There is a danger disclosure of the data may lead to expectations based on isolated comments*”.

We are not entirely sure what to make of such a statement. It appears to highlight the fact that there are likely to be “*isolated comments*” contained within the withheld documents that either do not support the decision that has been made (or not made - depending on who one talks to at the MoJ) or those who made them would rather they did not become public. Mr Bateman’s use of the emotive word “danger” only serves to heighten our concern. Why is there a danger? Who is in danger?

This appears to us to be an argument that actually supports disclosure rather than withholding the information.

In conclusion, HPC is not convinced that the Section 35 exemption still applies to this case. We believe that there is good reason to believe that the MoJ has made a decision to house sex offenders at Hollesley Bay and is not, as is apparently being suggested now, ‘*formulating or developing*’ a policy that might lead to that decision being made at some future date.

Even if the MoJ are able demonstrate that this exemption is still valid in this case we do not consider Mr Bateman’s application of the public interest test supports his assertion that, “*the public interest favours withholding the information at this time*”. I would point out that this statement itself (i.e. the words, “*at this time*”) appears to be an acknowledgement of the fact that the MoJ cannot withhold the information indefinitely.

I will not duplicate the arguments already made above in connection with the public interest test, but HPC is of the view that the matters Mr Bateman put forward, and gave weight to, in support of his decision to withhold the information do not stand up to scrutiny. Some points are clearly irrelevant, some are simply duplication – leading us to the conclusion that Mr Bateman believes that writing a greater number of words equates to a greater weight that should be applied.

For these reasons we would ask that you review your decision to withhold the information we have requested.

Kind regards,

Judi Hallett

Judi Hallett (Clerk to Hollesley Parish Council)

cc. Dr Therese Coffey MP
Mr Robert Buckland QC MP
Cllr. Andrew Reid – Suffolk County Council
Cllr. James Mallinder – East Suffolk Council