

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 21 August 2014

Public Authority: Office of the First Minister and deputy First Minister

Address: Castle Buildings
Stormont Estate
Belfast
BT4 3SR

Decision (including any steps ordered)

1. The complainant requested information about the tabling of the Sexual Orientation Strategy and Action Plan at meetings of the Northern Ireland Executive. The Office of the First Minister and deputy First Minister (OFMDFM) refused the request in reliance on the exemption at section 36(2)(a)(ii) of the FOIA. The Commissioner's decision is that the requested information falls under the exemption at sections 35(1)(a) and (b) and therefore section 36(2)(a)(ii) is not engaged. The Commissioner finds that the public interest in maintaining the section 35 exemptions does not outweigh the public interest in disclosing the requested information.
2. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation.
 - Disclose which months in the period 1 November 2011 – 31 October 2013 that the Sexual Orientation Strategy and Action Plan has been tabled at meetings of the Northern Ireland Executive by the First and deputy First Minister, or by any other Minister.
3. The public authority must take this step 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 FOIA and may be dealt with as a contempt of court.

Request and response

4. On 13 November 2013 the complainant requested the following information from OFMDFM:

"which months in the last two years that the Sexual Orientation Strategy and Action Plan has been tabled at meetings of the Northern Ireland Executive by the First and deputy First Minister, or by any other Minister".
5. On 23 December 2013 OFMDFM refused the request in reliance on section 36(2)(a)(ii) on the basis that disclosure of the requested information *"would or would be likely to prejudice the work of the Executive Committee of the Northern Ireland Assembly"*.
6. The complainant requested an internal review on 16 January 2014, and OFMDFM communicated the outcome on 2 March 2014, which was to maintain the refusal.

Scope of the case

7. On 10 March 2014 the complainant contacted the Commissioner to complain about the way the request for information had been handled. The complainant was of the view that the requested information ought to have been disclosed in response to the request.
8. On considering the correspondence the Commissioner was of the view that the requested information was likely to fall under the exemption at section 35 rather than section 36. The Commissioner put this to OFMDFM on 4 April 2014, asking that OFMDFM reconsider the request and confirm whether it wished to maintain reliance on section 36(2)(a)(ii) or revise its position in any respect. The Commissioner requested a copy of the withheld information and any final submissions OFMDFM wished to make in support of its position.
9. In his letter of 4 April 2014 the Commissioner drew OFMDFM's attention to a decision notice¹ issued by the Commissioner in respect of a request made to the Cabinet Office for the number of times the Reducing Regulation Committee (the RRC) has met. In that case the

¹ [Decision notice FS50474524](#)

Commissioner accepted that the withheld information fell under sections 35(1)(a) and 35(1)(b) of the FOIA. However the Commissioner found that the public interest in maintaining the exemptions did not outweigh the public interest in disclosing the information. The Commissioner therefore ordered that the Cabinet Office disclose the number of times the RRC has met.

10. The Cabinet Office appealed the decision notice, but the First-Tier Tribunal dismissed that appeal.² The Tribunal accepted that the exemptions were engaged, but found that:

"In light of our analysis of the factors for and against disclosure, we have concluded that the public interest in maintaining the exemption is so weak that it does not equal, let alone outweigh, the, admittedly light, public interest in disclosure".

11. The Commissioner noted that OFMDFM's arguments in this case were similar to those put forward by the Cabinet Office and rejected by the Commissioner and the Tribunal. With that in mind the Commissioner asked OFMDFM to consider the scope for informal resolution. OFMDFM wrote to the complainant on 28 May 2014 to advise that OFMDFM had initiated a consultation process on the development of a sexual orientation strategy. However this correspondence did not provide the requested information, or specifically address the request.
12. The complainant remained of the view that the requested information ought to have been disclosed, and requested that the Commissioner issue a decision notice.
13. Since OFMDFM has failed to respond to the Commissioner's letter of 4 April the Commissioner has not had sight of the requested information. The Commissioner notes that OFMDFM has not explicitly confirmed that it is in fact held, but OFMDFM's refusal notice and internal review correspondence refers to the information not being disclosed, rather than a refusal to confirm or deny that information is held. The Commissioner has therefore only been able to take into account the arguments put forward by OFMDFM in its refusal notice and internal review correspondence.
14. The Commissioner is disappointed that OFMDFM has failed to respond to his letter of 4 April 2014, despite a later reminder. The Commissioner

² [Appeal no EA/2013/0119](#)

considered issuing an information notice under section 51 of the FOIA, but considered that he could make a decision based on the correspondence to date. The Commissioner would stress that public authorities that do not engage with his investigations run a greater risk of adverse findings in individual cases and may face further enforcement action.

Reasons for decision

Section 36(2)(a)(ii): prejudice to the work of the Executive Committee of the Northern Ireland Assembly

15. OFMDFM refused the request in reliance on section 36(2)(a)(ii) on the basis that disclosure of the requested information "would or would be likely to prejudice the work of the Executive Committee of the Northern Ireland Assembly".
16. Section 36(1)(a) states that section 36 applies only to information that is not exempt information by virtue of section 35 of the FOIA. As the Commissioner finds that the requested information is exempt under section 35 it cannot be exempt under section 36.

Section 35(1)(a): formulation or development of government policy

17. Section 35(1)(a) of the FOIA provides that information held by a government department (including a Northern Ireland department) is exempt if it relates to the formulation or development of government policy. The exemption is class-based, meaning that if the information in question falls within any of the categories specified, it is exempt.
18. The government policy in question is the Sexual Orientation Strategy and Action Plan, which falls under the remit of OFMDFM. The Commissioner notes that OFMDFM published a consultation document on the development of a Sexual Orientation Strategy and Action Plan³ in March 2014, which it referred the complainant to in its letter of 28 May 2014.

³ <http://www.ofmdfmi.gov.uk/index/equality-and-strategy/equality-human-rights-social-change/sexual-orientation.htm>

19. In light of the above the Commissioner is satisfied that the months when the Sexual Orientation Strategy and Action Plan was tabled at Executive Committee meetings can be interpreted as relating to the formulation and development of government policy. Therefore the Commissioner finds that the exemption at section 35(1)(a) is engaged.

Section 35(1)(b): Ministerial communications

20. Section 35(1)(b) states that information is exempt from disclosure if it is held by a government department and relates to Ministerial communications. Section 35(5) defines Ministerial communications to include proceedings of the Executive Committee of the Northern Ireland Assembly.
21. The complainant's request referred to meetings of the "Northern Ireland Executive" rather than specifying the Executive Committee. However the complainant has confirmed that the request was intended to refer to the Executive Committee and indeed OFMDFM's responses referred to the Executive Committee.
22. The Executive Committee consists of the First Minister, the deputy First Minister, and the Northern Ireland Ministers. The functions of the Executive Committee are set out in paragraphs 19 and 20 of Strand One of the Belfast Agreement.⁴
23. The Commissioner is satisfied that information about meetings of the Executive Committee will relate to Ministerial communications and that section 35(1)(b) is therefore also engaged.

Public interest test

24. Sections 35(1)(a) and (b) are qualified exemptions and are therefore subject to the public interest test. The Commissioner must therefore consider whether the balance of the public interest lies in favour of maintaining the exemptions or whether it lies in favour of disclosure of the information.
25. OFMDFM's public interest arguments as presented to the complainant relate to section 36 rather than section 35. Despite the Commissioner's letter of 4 April 2014 and subsequent reminder, OFMDFM did not provide

⁴ <http://www.northernireland.gov.uk/index/your-executive/ministerial-code/ministerial-code-2.3-functions-of-the-executive-committee>

any arguments in relation to section 35. However, given the overlapping public interest factors in relation to the exemptions under sections 35 and 36, the Commissioner considers it appropriate to examine OFMDFM's public interest arguments in the context of section 35.

Public interest arguments in favour of disclosing the requested information

26. OFMDFM acknowledged the presumption of a general public interest in disclosure. It also identified that disclosure may provide greater transparency and increased levels of trust in the decision making process, assuring citizens that decisions are taken on the best available information.
27. The Commissioner also understands that an Assembly Question was submitted in June 2012 asking the First Minister and deputy First Minister when they would publish a sexual orientation strategy. OFMDFM responded that it was intended to:

*"...bring forward proposals for a revised sexual orientation strategy, including a full public consultation, by the end of 2012."*⁵
28. Despite this response no proposals were issued, and the public consultation document was not published until March 2014 as set out at paragraph 17 above. The Commissioner therefore considers that there is a legitimate public interest in the public being informed as to the frequency of the issue being tabled for discussion at Executive Committee meetings, as this may help the public to understand more about the delay. However the Commissioner does not consider this to be a weighty public interest argument as disclosure of the requested information would not in itself inform the public as to the nature of any relevant discussions.

Public interest arguments in favour of maintaining the exemptions

29. OFMDFM did not present any arguments referring to the requested information itself, but suggested that disclosure might have various detrimental effects. Firstly OFMDFM argued that it was essential to

⁵ <http://www.niassembly.gov.uk/Assembly-Business/Official-Report/Reports-11-12/18-June-2012/#a6>

protect the convention of collective responsibility. OFMDFM referred in particular to paragraph 1.4(f) of the Ministerial Code, which requires Ministers:

"to support, and to act in accordance with, all decisions of the Executive Committee and Assembly".⁶

30. OFMDFM also argued that:

"The release of information which reveals internal processes through which Executive consideration of relevant matters in order to achieve consensus is facilitated, and which may indicate how engagement between departments at official and Ministerial level facilitates development of policy matters, may lead to less scope for candid or robust discussions in the future".

31. Finally, OFMDFM suggested that:

"To divulge information which relates to Executive processes, could in itself reveal more than simply the information originally requested, particularly given the structure of the Executive and its procedures".

Balance of the public interest arguments

32. The Commissioner notes that the information requested by the complainant is limited to the months in the period 1 November 2011 – 31 October 2013 that the Sexual Orientation Strategy and Act was tabled at meetings of the Executive Committee. The request does not ask about the dates of or attendance at Executive Committee meetings, nor does it ask for agendas or minutes.

33. In this case the Commissioner is disappointed that he has not been provided with the requested information, or any arguments specifically relating to the effects of its disclosure. OFMDFM did not explain how disclosure of the months a particular issue was tabled for discussion would be likely to affect collective responsibility. The Commissioner does not accept that disclosure would reveal the views of or be attributable to any individual Minister. Therefore the Commissioner does not accept OFMDFM's arguments relating to collective responsibility as sustainable in the context of this case.

⁶ <http://www.northernireland.gov.uk/index/your-executive/ministerial-code/ministerial-code-1.4-pledge-of-office>

34. Nor does the Commissioner agree that, in this case, any significant weight should be attached to arguments regarding the internal processes of the power-sharing Executive, as again the requested information barely touches upon these. The Commissioner considers that OFMDFM has failed to demonstrate how disclosure of the requested information would prejudice the "*confidential nature of the workings of the Executive*". The Commissioner does not accept that disclosure would be likely to result in less candid or robust discussions in the future.
35. The Commissioner accepts that the public interest in disclosing the requested information does not carry substantial weight. Nevertheless the requested information may only be withheld if the public interest in maintaining the exemptions outweighs the public interest in disclosing the information in question. The Commissioner considers that OFMDFM has failed to demonstrate to any degree that this is the case in this instance. Therefore the Commissioner concludes that the public interest in maintaining the exemptions at section 35(1)(a) and (b) does not outweigh the public interest in disclosing the information.

Right of appeal

36. 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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

37. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
38. 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

Graham Smith
Deputy Commissioner
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SK9 5AF