

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 29 March 2023

**Public Authority:** Department for the Economy  
**Address:** Netherleigh  
Massey Avenue  
Belfast  
BT4 2JP

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to a Ministerial Direction sought in respect of the High Street Stimulus Scheme in Northern Ireland. The Department for the Economy withheld the requested information in reliance on the exemptions at section 35(1)(a) (formulation or development of government policy) and section 35(1)(b) (Ministerial communications) of FOIA.
2. The Commissioner's decision is that section 35(1)(a) and section 35(1)(b) are engaged with respect to the requested information. However he finds that the public interest in maintaining the exemptions claimed does not outweigh the public interest in disclosure.
3. The Commissioner requires the Department to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information to the complainant.
4. The public authority must take these steps 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 FOIA and may be dealt with as a contempt of court.

## Background

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5. The request in this case relates to the "High Street Stimulus Scheme",<sup>1</sup> an initiative whereby adults living in Northern Ireland could apply for a £100 pre-paid card to spend in local businesses. The Scheme aimed to encourage the public to support local businesses and stimulate economic recovery during the Covid-19 pandemic.
6. On 21 April 2021 the Permanent Secretary and Accounting Officer for the Department, Mike Brennan, advised the Minister for the Economy that he could not provide a Value for Money assurance.<sup>2</sup> The Northern Ireland Executive consequently agreed that the Scheme be taken forward under a Ministerial Direction, which was provided by the Minister for the Economy on 29 April 2021.<sup>3</sup>
7. Applications for the Scheme ran from 27 September 2021 until 25 October 2021.

## Request and response

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8. On 16 November 2021 the complainant requested the following information from the Department (numbers added for reference):

I have seen a copy of the following Ministerial Direction:

"Ministerial Direction

HIGH STREET SUPPORT SCHEME

I received a submission from Mike Brennan on 2 April 2021 entitled HIGH STREET STIMULUS SCHEME which sought a Ministerial Direction to approve the High Street Stimulus Scheme.

This request for a Ministerial Direction was sought because the Accounting Officer's view was that he "cannot give you the necessary assurances that the preferred delivery solution represents value for money as required by MPMNI".

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<sup>1</sup> <https://www.economy-ni.gov.uk/articles/high-street-scheme>

<sup>2</sup> <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/DfE%20-%20High%20Street%20Stimulus%20Scheme%20-%20Background.pdf>

<sup>3</sup> <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/DfE%20-%20High%20Street%20Stimulus%20Scheme.pdf>

This scheme was presented as part of Paper E(21)092(C) to the Executive and was agreed by the Executive on 29<sup>th</sup> April 2021.

I am content to issue a Ministerial Direction for the progressions of the High Street Stimulus Scheme as outlined in the Executive Paper.”

1. I would like to request a copy of the Paper E(21)092(C) that is referred to in the [Ministerial] Direction.
  2. I would also like to request a copy of the Accounting Officer's submission of 2 April.
9. The Department issued a refusal notice on 15 December 2021, citing the exemption at section 35(1)(a) of FOIA (formulation or development of government policy).
  10. Following an internal review the Department wrote to the complainant on 20 January 2022, maintaining its decision to refuse the request.

### **Scope of the case**

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11. The complainant contacted the Commissioner on 25 January 2022 to complain about the way their request for information had been handled.
12. The complainant argued that there was a “strong public interest in transparency as to the decision making process”.
13. During the course of the Commissioner's investigation the Department sought to rely on the exemption at section 35(1)(b) (Ministerial communications) in addition to section 35(1)(a).
14. The Commissioner acknowledges that public authorities may at any stage seek to rely on an exemption or exclusion not previously claimed. This was confirmed by the Upper Tribunal in the case of *McInerney v IC and Department for Education* [2015] UKUT 0047 (AAC).<sup>4</sup>
15. In light of this the Commissioner has considered the Department's reliance on section 35(1)(b) and section 35(1)(a) in respect of the requested information.

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<sup>4</sup> <https://administrativeappeals.decisions.tribunals.gov.uk/Aspx/view.aspx?id=4420>

## Reasons for decision

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

16. Section 35(1)(a) of FOIA states:

“(1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to –

(a) the formulation or development of government policy.”

17. The Commissioner’s view is that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a minister. Development of government policy, however, goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.

18. The Commissioner considers that the purpose of section 35(1)(a) is to protect the integrity of the policy-making process. It prevents disclosures which would undermine this process and which would result in less robust, well-considered and effective policies. In particular, it ensures a safe space to consider policy options in private.

19. This exemption is class based which means that there is no requirement to show harm in order for it to be engaged. The relevant information simply has to fall within the description set out in the exemption.

20. The Commissioner’s published guidance on section 35<sup>5</sup> sets out his view that:

“The term ‘formulation’ of policy refers to the early stages of the policy process where options are generated and analysed, risks are identified, consultation occurs, and recommendations or submissions are put to a Minister who then decides which options to translate into political action.”

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<sup>5</sup> <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#whatconstitutesformulation>

21. The Commissioner is satisfied that the requested information in this case relates to the formulation of government policy; the policy in question being the Scheme.

### **Section 35(1)(b): Ministerial communications**

22. 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.
23. The requested information in this case comprises two documents: Paper E(21)092(C) (the Paper) and the Accounting Officer's submission (the Submission). The Commissioner is satisfied that both documents relate to Ministerial communications; therefore, the exemption at section 35(1)(b) is engaged.
24. Both section 35(1)(a) and section 35(1)(b) provide qualified exemptions, which means that information caught by the exemption must still be disclosed unless the public interest in maintaining the exemption outweighs the public interest in disclosure.
25. The Department provided public interest arguments which related to section 35(1)(a) and section 35(1)(b). Owing to the crossover between the two limbs of section 35, and to avoid duplication, the Commissioner does not consider it necessary to examine the public interest arguments in respect of each limb separately.

### **Public interest in favour of disclosure**

26. The Department acknowledged that releasing information around the formulation and development of the Scheme would increase public understanding of, and confidence in, the decisions made. It would promote accountability, transparency, and robust defensible decision making.
27. The Department also acknowledged as relevant to the public interest the costs of the Scheme and the large number of Northern Ireland residents eligible for payment.
28. The complainant pointed out that critics of the Scheme had questioned its necessity and its effectiveness – especially given the potential for deadweight and displacement effects.
29. He argued that the circumstances of the case, and especially the size of the expenditure and the concerns raised by the Accounting Officer,

created a strong public interest in transparency as to the decision making process.

### **Public interest in favour of maintaining the exemption**

30. The Department argued that it needed to protect the safe space in which its Minister can liaise with Executive colleagues without constraint. It set out that disclosure of the requested information would reveal an individual minister's view/decision, as well as their approach in arriving at a decision on a 'live' policy and engaging with the Northern Ireland Executive in securing that decision. The Department maintained that the policy process was ongoing at the time of the complainant's request, ie November 2021. The Scheme remained live at that time, as evidenced by a policy decision to extend the "spend deadline" for people who received their cards late.
31. Due to the sensitivity of such documents, the Department believed that disclosure of these documents would be likely to have a 'chilling effect' on free and frank ministerial debate/communications in the future, causing significant harm to the policy making process. The harm likely to be caused by releasing the requested information would be severe and likely to occur.
32. The Department was of the opinion that Ministers must be able to operate within a safe and private policy space in order to share their views and concerns freely with their Ministerial colleagues prior to a final decision being made. Loss of this necessary frankness and openness would be likely to damage the quality of advice given and decisions made, both in relation to this Scheme and to future policies.
33. The Department emphasised that the NI Executive (at the time of the request) was a mandatory coalition of five political parties. The Department set out that the approach of Ministers to securing cross party support and then ensuring Ministers present a united front in justifying and promoting agreed positions was a sensitive issue and fundamental to the decision making process. Disclosure of information which revealed the approach of Ministers could negatively impact the process for Executive decision making. Undermining collective responsibility and ministerial unity would result in less robust and effective ministerial decisions.

34. The Department referred the Commissioner to a decision notice issued concerning the Department for Education IC-134878-Q7J6,<sup>6</sup> which it suggested had parallels with the need to protect the process of Ministerial decision making.
35. The Department also argued that the Minister whose views are disclosed within the requested information is still active in politics and disclosure of such sensitive documents could harm their political career.
36. The Department argued that disclosure of the requested information could cause harm to the wider policymaking process and would be likely to produce a chilling effect in relation to future engagement from internal and external bodies on policies. Loss of this necessary frankness and openness would be likely to damage the quality of advice given and decisions made, both in relation to this Scheme and to future policies.
37. Finally, the Department maintained that disclosure of the information at this time would distract public debate from the key issues of economic recovery.

### **Balance of the public interest**

38. The Commissioner has carefully considered the arguments put forward by the Department and by the complainant. He has also examined the requested information in detail.
39. The Department has described the requested information as sensitive, and has referred to sensitivities around the functioning of the Executive. However it has not elaborated on these sensitivities and the Commissioner cannot make assumptions. The Commissioner observes that the Accounting Officer's advice that a Ministerial Direction would be required is a matter of public record, albeit that his submission to the Minister was not in the public domain at the time of issuing this decision notice.
40. The Commissioner's published guidance on section 35 sets out his view that the need for safe space will be strongest when an issue is still live. Once a public authority has made a decision, a safe space for deliberation will no longer be required and the argument will carry little weight.
41. The requested information in this case dates from April 2021, some seven months before the request was made. It relates solely to the

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<sup>6</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2022/4022123/ic-134878-q7j6.pdf>

process of obtaining a Ministerial Direction which was considered necessary to progress the Scheme. It does not ask the Executive to agree whether or not the Scheme should go ahead, or details of funding allocated, since these decisions had already been announced by the Minister of Finance on 1 April 2021.<sup>7</sup> Nor does it record any detail of discussion or exchange of views. For this reason the Commissioner considers that the safe space argument carries limited weight in this case.

42. For similar reasons, the Commissioner is not persuaded that disclosure of the requested information would have any impact on collective responsibility as claimed. The Commissioner understands that the convention of collective responsibility exists to allow government ministers to express their views frankly in the expectation that they can argue freely in private while maintaining a united front when decisions have been reached. However, even where collective responsibility does apply, it does not create an absolute exception, and in the Commissioner's view the public interest in maintaining the exception on this basis is relatively weak.
43. The Department has not provided any evidence to support its claim that disclosure would result in less robust and effective ministerial decisions. Therefore the Commissioner does not consider that the Department has demonstrated the causal link between the requested information and the consequences of its disclosure into the public domain.
44. For similar reasons the Commissioner is not persuaded that disclosure of the requested information would have a chilling effect in relation to future engagement. The content of the requested information relates solely to the advice from the Accounting Officer, which is in the public domain. The Commissioner has seen no evidence to suggest that Ministers would feel inhibited in future decision making if this information were to be disclosed into the public domain.
45. Rather, the Commissioner is of the opinion that Ministers should not easily be inhibited in making decisions on matters of substantial public interest. As elected representatives they are expected to understand that the public will have a legitimate interest in being informed as to how decisions are made and communicated. This is particularly relevant given the extensive impact of Covid-19 on people's lives across Northern Ireland and further afield.

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<sup>7</sup> <https://www.finance-ni.gov.uk/news/murphy-announces-budget-rebuild-economy-and-support-children-and-young-people>



46. The Commissioner does not accept as relevant the Department's argument about the Minister's political career. As set out in the Commissioner's guidance, the exemption at section 35(1)(b) is not designed to protect individuals from scrutiny, or from being held accountable for their decisions.
47. The Commissioner has considered the decision notice referred to at paragraph 34 above. He observes that the requested information in that case comprised an email setting out the Secretary of State's opinions on Ofqual's policy regarding Autumn 2021 exams, as well as his agreement with the views of another minister. The Commissioner is satisfied that the requested information in this case is sufficiently different and does not therefore lend itself to direct comparison.
48. The Commissioner is also sceptical of the Department's argument that disclosure of the requested information would distract public debate away from key issues. The Commissioner believes that access rights under FOIA exist to allow requesters, as a conduit for the public, to be informed about matters of public interest. This right of access should not be limited to those issues which public authorities deem to be relevant or important.
49. As with any case, the Commissioner can only make his decision on the basis of the information provided to him. It is therefore essential that a public authority provide robust arguments that explain the circumstances of the case in the context of the content of the specific requested information. Otherwise the Commissioner is more likely to order the disclosure of information.
50. Consequently the Commissioner is not satisfied that in this particular case the public interest in maintaining the exemption at section 35(1)(a) or section 35(1)(b) outweighs the public interest in disclosing the requested information.

## Right of appeal

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52. 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: 0203 936 8963  
Fax: 0870 739 5836  
Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

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

54. 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 .....**

**Sarah O’Cathain  
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