

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 August 2023

Public Authority: Northern Ireland Assembly
Address: Parliament Buildings
Stormont
Belfast
BT4 3XX

Decision (including any steps ordered)

1. The complainant has requested information redacted from the Official Record of the Northern Ireland Assembly. The Assembly refused to provide this information, relying on the exemption at section 40(2) of FOIA (third party personal data).
2. The Commissioner's decision is that the Assembly is entitled to rely on section 40(2) in respect of some of the withheld information, but not in respect of the remainder.
3. The Commissioner requires the Assembly to take the following steps to ensure compliance with the legislation.
 - Disclose to the complainant the portion of the withheld information described in the confidential annex.
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.

Request and response

5. The complainant requested the following information from the Assembly on 23 February 2022:

“Under the Freedom of Information Act, please provide me with all material held by the Assembly in relation to the removal from the Hansard record of words spoken by Martin McGuinness (the background to this request is explained here -

<https://www.belfasttelegraph.co.uk/news/politics/state-papers-assembly-debate-report-altered-after-dups-peter-robinson-threatened-to-sue-41206817.html>

To this day, the Hansard record of the first Assembly debate does not include the ‘offending’ words which Mr McGuinness used in the chamber that day. As part of your response, please provide me with a copy of the words which were removed from the first column of page 12 of the Official Report for that day [1 July 1998]:

<http://www.niassembly.gov.uk/globalassets/documents/official-reports/bound-volumes/1998-1999/bv-001.pdf>”

6. The Assembly responded on 24 May 2022, advising that it did not hold information falling within the scope of the first part of the request. It advised the complainant it held audio visual information relating to the second part, and that the complainant could view this information, but that some information would be redacted under section 40(2) of FOIA.
7. The complainant requested an internal review on 15 June 2022. He did not dispute the Assembly’s position with regard to the first part of the request but argued that the Assembly ought to disclose the withheld information. He contended that given that one of the two senior politicians referenced in the withheld information had faced a number of serious allegations in his long career, it would not be unfair or unjustifiable for the information to be disclosed.
8. The Assembly communicated the outcome of that review on 8 July 2022. It maintained its position that the withheld information was exempt from disclosure by virtue of section 40(2) of FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 3 August 2022 to complain about the way the Assembly handled the second part of his request. Specifically he wished to challenge the Assembly’s reliance on the exemption at section 40(2) in respect of the withheld information.

10. As is the Commissioner's usual practice for cases of this nature, he requested a full copy of the withheld information.
11. The Assembly requested that the Commissioner issue an information notice under section 51 of FOIA. The Commissioner issued an information notice, and the Assembly provided him with a full copy of the withheld information.

Reasons for decision

Section 40: third party personal information

12. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
13. In this case the relevant condition is contained in section 40(3A)(a).¹ This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (the DP principles), as set out in Article 5 of the UK General Data Protection Regulation (the UK GDPR).
14. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (the DPA). If it is not personal data, then section 40 of FOIA cannot apply.
15. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

16. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

¹ As amended by Schedule 19 Paragraph 58(3) of the DPA.

17. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
18. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural, or social identity of the individual.
19. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
20. In this case, the Assembly has relied on section 40(2) in respect of information comprising words spoken by Martin McGuinness in 1998. Mr McGuinness is now deceased; therefore the information cannot be his personal data within the meaning of the DPA. Mr McGuinness was referring to two individuals, one of whom is also now deceased, and the other of whom is still alive.
21. The Assembly has not explicitly confirmed to the complainant that the living individual who was the subject of Mr McGuinness's comments is Peter Robinson, the then deputy leader of the Democratic Unionist Party. However the newspaper article referred to in the request for information quotes from information contained in declassified government files. This includes a memo dated 2 September 1998, in which a senior civil servant advised the then Secretary of State for Northern Ireland of Mr Robinson's threat of legal action in connection with Mr McGuinness's comments.
22. In light of the above, and having examined the withheld information, the Commissioner is satisfied that it relates to an identifiable third party, namely Mr Robinson. The withheld information therefore falls within the definition of "personal data" in section 3(2) of the DPA.

Would disclosure contravene any of the DP principles?

23. The fact that information constitutes third party personal data does not automatically exclude it from disclosure under FOIA. The public authority is required to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a). Article 5(1)(a) of the UK GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

25. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair, and transparent.
26. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing, ie disclosure of the personal data into the public domain. It must also be generally lawful.
27. The Assembly set out to the Commissioner that disclosure of the withheld information would be unlawful since it had received legal advice that the information was defamatory. Disclosure of the withheld information would be incompatible with the lawfulness element of principle (a).
28. The Commissioner has carefully considered the Assembly's arguments. He also observes that section 50 of the Northern Ireland Act 1998² provides the following:

"50. (1) For the purposes of the law of defamation, absolute privilege shall attach to –

 - (a) The making of a statement in proceedings of the Assembly; and
 - (b) The publication of a statement under the Assembly's authority."
29. The Assembly has advised the Commissioner that since December 1999, there has been a statutory requirement for the Assembly to publish an official report of its proceedings. There was no equivalent legal duty at the time the withheld information was created, ie July 1998, because at that time the Assembly operated on a "shadow" basis as the New Northern Ireland Assembly.³ The Assembly explained that, therefore, the withheld information does not attract privilege under section 50 of the Northern Ireland Act 1998.
30. However the Commissioner is mindful of section 79 of FOIA, which provides that:

"79. Where any information communicated by a public authority to a person ("the applicant") under section 1 was supplied to the public authority by a third person, the publication to the applicant

² <https://www.legislation.gov.uk/ukpga/1998/47/section/50>

³ https://archive.niassembly.gov.uk/io/summary/new_summary.htm#6

of any defamatory matter contained in the information shall be privileged unless the publication is shown to have been made with malice.”

31. In effect, a public authority is protected from an action for defamation if it is required to disclose information under FOIA that would otherwise constitute publication of defamatory information. The Commissioner does not consider that the question of malice would arise from a disclosure under FOIA, where the public authority is disclosing information in order to meet a legal obligation.
32. In light of the above the Commissioner is satisfied that disclosure of the withheld information in response to a request made under FOIA would be privileged within the meaning of section 79. The Commissioner is of the opinion that the Assembly may not rely on section 40(2) of FOIA solely on the basis that disclosure is unlawful because the requested information may be defamatory.
33. Consequently the Commissioner has gone on to consider whether the Assembly may rely on one of the lawful bases listed in Article 6(1) of the UK GDPR in order to disclose the requested information.

Lawful processing: Article 6(1)(f) of the UK GDPR

34. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
35. The Commissioner considers that the lawful basis most applicable is Article 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”.⁴

⁴ Article 6(1) goes on to state that:

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

36. Accordingly, in considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, the public authority should consider the following three-part test:
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
37. The Commissioner further considers that these tests should be considered in sequential order, ie if the legitimate interest is not met then there is no need to go on to consider the necessity test, and so on.

Legitimate interests

38. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They may include the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, although trivial interests may be more easily overridden in the balancing test.
39. The Assembly accepted that there is a legitimate interest in reporting the public proceedings of the Assembly, and that the request pursues this legitimate interest. The Assembly also acknowledged that since November 1999, there has been a statutory requirement for the Assembly to publish an official report of its proceedings, as set out at paragraph 29 above. Therefore, had the comments been made after

However, section 40(8) of FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UKGDPR would be contravened by the disclosure of information, Article 6(1) of the UKGDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

November 1999, they would have been published in full, in line with the statutory requirement to do so.

40. The Commissioner is satisfied that there is a clear legitimate interest in the publication of accurate reports of public Assembly proceedings, including those of the shadow Assembly. He notes that the shadow Assembly was established following the Belfast (Good Friday) Agreement in order to support power sharing in Northern Ireland. Consequently the Commissioner considers that the legitimate interest in disclosure applies generally to information regarding Assembly proceedings, and in the particular circumstances of this case.

Is disclosure necessary?

41. Having identified a legitimate interest, the next step is to consider whether disclosure of the personal data in question is actually necessary to meet that legitimate interest. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
42. The Assembly accepted that disclosure of the requested information in this case "could" be necessary, in the interests of the publication of accurate reports of public proceedings of the Assembly, should the public interest in the withheld information outweigh the rights and freedoms of the data subject.
43. The Commissioner is further satisfied that disclosure of the withheld information is necessary in order to meet the legitimate interest set out at paragraph 40 above.

Do the above interests override the legitimate interests or fundamental rights and freedoms of the data subject?

44. If the first two tests are satisfied, the public authority must balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, the authority should consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
45. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;

- whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual has expressed concern about the disclosure; and
 - the reasonable expectations of the individual.
46. The Commissioner considers a key issue to be the extent to which the data subject has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as:
- the individual's general expectation of privacy;
 - whether the information relates to an employee in their professional role or to them as a private individual; and
 - the purpose for which they provided their personal data.
47. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual. Disclosure under FOIA equates to publication to the world at large. The Commissioner must therefore balance the legitimate interests against the data subject's interests when determining whether the information can be disclosed into the public domain, and not just to the complainant.
48. The Assembly recognised that:
- "The different backgrounds of those who were elected to the New Northern Ireland Assembly, and the tension apparent in early sittings of that Assembly, is a matter of obvious historical interest."
49. However it set out that it had published a large amount of information, including Official Reports of other debates, which would inform the public as to matters of public interest.
50. The Assembly also acknowledged that elected representatives must expect more in the way of criticism than individuals who have not actively sought political office. However it balanced this against the content of the withheld information.
51. Finally, the Assembly considered that it would not be unreasonable for Mr Robinson to expect that the withheld information, having not been published for 25 years old, would not now be published. It confirmed that it had decided not to seek consent from Mr Robinson, since it had assumed that he would not consent to any request that the withheld information be published.
52. The Commissioner observes that public authorities are not obliged to consult data subjects regarding requests for information that contains their personal data. Consultation may be necessary, or good practice, for example where the data subject's views are not already known and

may influence the decision. It is important to remember that the final decision rests with the public authority, and it may be right to disclose personal data against the data subject's wishes.

53. The Commissioner has carefully considered the content and context of the withheld information. He must be careful not to disclose the withheld information in this decision notice, since to do so would defeat the purpose of the Assembly's reliance on an exemption. For this reason, the Commissioner has set out more detailed analysis in a confidential annex which will be provided to the Assembly but not to the complainant.
54. For the reasons set out in the confidential annex the Commissioner finds that the Assembly would be able to rely on Article 6(1)(f) as a lawful basis for disclosure of some of the withheld information. He is satisfied that disclosure of the specified portion of the withheld information is necessary in order to meet a legitimate interest. He is further satisfied that the legitimate interest in disclosure of that specified portion overrides the legitimate interests or fundamental rights and freedoms of the data subject.
55. Accordingly the Commissioner finds that disclosure of the information specified in the confidential annex would not contravene DP principle (a). He finds that the Assembly was not entitled to rely on section 40(2) of FOIA in respect of this specified information.
56. However, the Commissioner also finds that the Assembly could not rely on Article 6(1)(f) as a lawful basis for disclosing the remainder of the withheld information. Disclosure of this information would not be lawful and would therefore contravene DP principle (a). The Commissioner finds that the Assembly was entitled to rely on section 40(2) of FOIA in respect of this information.

Procedural matters

Section 1: duty to respond to requests

Section 10: time for compliance

Section 17: refusal notice

57. Section 1(1) of FOIA states that:

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

58. Section 10(1) of FOIA states that a public authority must respond to a request promptly and “not later than the twentieth working day following the date of receipt”.
59. Section 17(1) of FOIA states that if a public authority wishes to refuse any part of a request it must issue an appropriate refusal notice within the time for compliance.
60. In this case the complainant submitted his request to the Assembly on 23 February 2022. The Assembly issued a substantive response on 24 May 2022, at which point it confirmed that it held some of the requested information and did not hold the remainder. Since this response was issued more than 20 working days after the request was received, the Assembly failed to comply with section 1(1)(a) and section 10(1) of FOIA.
61. The response dated 24 May 2022 comprised a refusal notice because it explained that some of the requested information was being withheld in reliance on section 40(2) of FOIA. Consequently the Commissioner also finds that the Assembly failed to comply with section 17(1) of FOIA in relation to the time taken to issue it.
62. As set out above the Commissioner has found that the Assembly ought to have disclosed some of the requested information to the complainant. The Commissioner finds that the Assembly failed to comply with section 1(1)(b) and section 10(1) of FOIA in respect of the information that ought to have been disclosed at the time of the request.

Right of appeal

63. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

64. 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.

65. 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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Information Commissioner’s Office
Wycliffe House
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SK9 5AF**