

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

### **Decision notice**

**Date:** 23 May 2024

**Public Authority:** Department of Finance  
**Address:** 2nd Floor  
Craigantlet Buildings  
Stoney Road  
Belfast  
BT4 3SX

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

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1. The complainant has requested information relating to the expansion of places at Magee University. The Department of Finance (DoF) refused to provide the information citing section 35(1) FOIA.
2. The Commissioner's decision is that section 35(1) is engaged but the public interest lies in disclosing part of the withheld information.
3. The Commissioner requires DoF to take the following steps to ensure compliance with the legislation.
  - Disclose the information listed in the confidential annex ensuring personal data is redacted where necessary.
4. Details of the information to be disclosed is contained in a confidential annex made available to DoF only.
5. The public authority must take these steps within 30 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 Act and may be dealt with as a contempt of court.

## Request and response

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6. On 4 October 2023, the complainant wrote to DoF and requested information in the following terms:

“May I have correspondence from Minister Conor Murphy to both the Economy Department and Health Departments and vice versa, in relation to the medical school, allied health, or general expansion on university places at Magee.

Can you also provide any communications to Mr Murphy from any other MLAs or civil servants about Magee expansion?

I like them to cover the period from January 2019 to February 2022 and am aware of a letter from the Economy Department on March 10 2022. I would like that also.”

7. DoF responded on 25 October 2023 and refused to provide the requested information citing section 35(1)(a) and (b) as its basis for doing so.
8. Following an internal review on 13 November 2023 DoF maintained its position.

## Scope of the case

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9. The complainant contacted the Commissioner on 15 November 2023 to complain about the way their request for information had been handled.
10. The Commissioner considers that the scope of his investigation is to determine whether DoF is entitled to rely on section 35(1)(a) and (b) to withhold the requested information.

## Reasons for decision

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### Section 35 - Formulation of government policy, etc

11. The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.
12. Section 35(1) of FOIA states that: “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
  - b) Ministerial communications.
13. The purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures that 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.
  14. Section 35 is class-based, meaning that a public authority does not need to consider the sensitivity of the information in order to engage the exemption. It must simply fall within the class of information described. The classes are interpreted broadly and catch a wide range of information.
  15. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.
  16. DoF considers that section 35(1)(a) of FOIA applies to the requested information in its entirety, and 35(1)(b) to some parts of the withheld information.
  17. In its submission to the Commissioner, in support of its view that section 35(1)(a) applies in this case DoF stated that the policy development is still ongoing, such that its view is that releasing information may prejudice the formation of the policy going forward.
  18. DoF explained that the government policy in question is the Executive's policy on the departmental responsibilities for the medical school at Magee, including allied health and general expansion of the university places at Magee, and the corresponding funding of this.
  19. DoF considers the formulation/development of this particular policy (or policies) to have been ongoing at the time of the request and remains one considered by Executive ministers. This has been confirmed by the Department for the Economy on behalf of the Economy Minister, therefore this policy remains at the formulation development stage as of 29 April 2024.
  20. With regard to the Ministers involved in the communications DoF provided the Commissioner with the relevant documents and stated they were as follows:
    - First Minister and Deputy First Minister

- Minister of Health
- Minister of Finance
- Minister for the Economy
- Minister of Justice

21. Having considered the withheld information, the Commissioner is satisfied that the exemptions at section 35(1)(a) and (b) are engaged. This is because all of the withheld information relates to the ongoing development of policy and communications are clearly between Ministers.

### **Public interest test**

22. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

23. The Commissioner considers that the public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the purpose of the exemption.

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

24. DoF acknowledged the general public interest in accountability, openness and transparency of government to promote public understanding.

25. The establishment of a medical school at Magee Campus, Ulster University was an Executive commitment under 'New Decade New Approach' (an agreement restoring the government of the Northern Ireland Executive after a three-year hiatus on 9 January 2020<sup>1</sup>).

26. The complainant has argued this subject is of huge significance to the economy, it related to a 60 year campaign for a university in Derry. The ramifications have been significant, with economic bodies pinpointing this as the central reason why the city hasn't grown.

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<sup>1</sup> [https://assets.publishing.service.gov.uk/media/5e178b56ed915d3b06f2b795/2020-01-08\\_a\\_new\\_decade\\_\\_a\\_new\\_approach.pdf](https://assets.publishing.service.gov.uk/media/5e178b56ed915d3b06f2b795/2020-01-08_a_new_decade__a_new_approach.pdf)

27. That has led to thousands of young people leaving the city, the highest unemployment rates on the island of Ireland and the least disposable income for its inhabitants.
28. Therefore the public interest in this case is profound. It should outweigh any claim of the need to protect Ministerial communications.

### **Arguments in favour of maintaining the exemption**

29. DoF explained that the Executive's policy on the medical school at Maggee, its future expansion, and the wider expansion of the Magee Campus including allied health professions, is a policy which is still being formulated and developed. It is continuing to be considered by Ministers and maybe subsequently brought to the executive for further decisions. To prematurely disclose information relating to the ongoing development of the policy will be detrimental to enabling Ministers and Executive to conclude and agree policy decisions.
30. Departmental officials need to be able to provide full and frank information and advice to Ministers to enable Ministers to form their own views in respect of budget/funding prioritisation, and policy responsibility and accountability while such decisions/responsibilities may be open to different interpretations and challenged by individual Ministers. There is a need to be able to discuss difficult policy issues with candour and the release of information showing what discussions took place and when, along with details of those discussions, would inhibit that. If departmental officials were to feel inhibited from being frank and candid with their Minister or vice versa, because of the possibility of the disclosure of such exchanges, the quality of debate line behind officials' advice would be diminished, ultimately resulting in weaker policy formulation which would not be in the public interest.
31. Departmental officials must be able to provide ministers with the full range of advice to enable them to undertake a full consideration of all options - this requires a private space in which to carry out a candid assessment and scenario planning eg in this instance with respect to budget/funding prioritisation and responsibility/accountability of departments and departmental accounting officers. In this context premature disclosure of advice and assessments may close off discussion and the development of better policy options and undermine frank reporting on progress and the identification of risks. This is not in the public interest.
32. The release of departmental officials' advice to Ministers has the potential to damage the concept of collective responsibility. Collective responsibility is the longstanding convention that all Ministers are bound by the decisions of the Executive Committee and carry joint

responsibility for all government policy and decisions. The Pledge of Office affirmed by Northern Ireland Ministers upon taking office requires them "to support, and to act in accordance with, all decisions of the Executive Committee and Assembly". Prior to such decisions being taken by the Executive Committee, it is however important that Ministers are able to express their own views freely, frankly and with candour with their departmental officials.

33. DoF concluded that the key issue in favour of maintaining the exemption is that the Executive's policy is a policy which is still being formulated and developed. To disclose the information could negatively impact on the policy formulation process, discussion between Ministers and with their officials, and damage the concept of collective responsibility.
34. Disclosure could also negatively impact future policies being considered by Ministers and departments by reducing and inhibiting debate between Ministers and between Ministers and officials during the policy the development and formulation process.

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

35. The Commissioner has considered the withheld information and the arguments put forward by both parties. He has also carried out a limited amount of research himself.
36. He acknowledges that the relevance and weight of the public interest arguments 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.
37. The weight of these interests varies from case to case, depending on the profile and importance of the issue and the extent to which the content of the information actually adds to public debate.
38. The Commissioner recognises the general public interest in transparency, openness and accountability. In this case, he recognises that disclosure of the withheld information would enable the public to understand the complex processes involved in agreeing policies of this nature.
39. He also recognises that policy development needs some degree of freedom to enable the process to work effectively. He accords significant weight to the public interest in not prematurely disclosing information which was, at the time of the request, and still remains, under consideration regarding ongoing policymaking in this area.

40. This is so that policy consideration can be uninhibited and to ensure delivery of the best outcomes in relation to further development of Magee.
41. However, he has also considered the counter argument that disclosing such information may well improve decision making as those concerned will be conscious of the potential for it to be made public.
42. With regard to the negative impact on future policies by reducing and inhibiting debate between Ministers and officials, the Commissioner acknowledges this but does not afford it significant weight in this particular case.
43. Given the time it has taken to reach this stage in the formulation of the policy, and the nature of that policy, the Commissioner considers it to be a unique and protracted process.
44. As pointed out by the complainant, this is of huge economic importance to Magee, involving a significant amount of public money.
45. The Commissioner further notes that DoF has applied section 35 as a 'blanket' exemption without considering if any of the individual documents can be disclosed without detriment to the policy making process.
46. Having reviewed the withheld information and taking account of the public interest arguments, it is the Commissioner's decision that part of the withheld information can be disclosed without negatively affecting the formulation of government policy.

## **Right of appeal**

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47. 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)

48. 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.
49. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Susan Duffy**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**