

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

### **Decision notice**

**Date:** 7 October 2024

**Public Authority:** Department for the Economy (Northern Ireland)

**Address:** Netherleigh  
Massey Avenue  
Belfast  
BT4 2JP

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

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1. The complainant has requested information about the expansion of Magee College. The above public authority (“the public authority”) provided some information, but relied on sections 35 (government policy, 43 (commercial interests) and 40 (personal data) of FOIA to withhold the remainder.
2. The Commissioner’s decision is that the public authority has correctly engaged section 35 of FOIA, but that the balance of the public interest only favours maintaining the exemption in respect of some of the withheld information. For the remainder, it favours disclosure. Section 43 is engaged in respect of some of the information to which it has been applied, but not all. Where the exemption is engaged, the balance of the public interest favours maintaining the exemption.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information specified in the confidential annex. The public authority may make appropriate redactions to comply with its data protection obligations.
4. 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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5. On 5 March 2024, the complainant requested information of the following description:

“[1] Can the department share any briefing documents and all communications (telephonic, email or otherwise) between Ulster University and the department about expansion of the Magee campus that has been received in the past six months? If there are specific documents outlining expansion plans and a timeline for construction and completion of different phases can those be provided?”

“[2] Furthermore, can the department share all communications between itself and Irish government departments about possible funding contributions for universities in Northern Ireland over the past six months?”

6. On 6 March 2024, he added to his request as follows:

“Can I add to this, I want all communications between DfE and other departments and communications with DfE and SIB over the last 6 months about university expansion at Ulster University campuses or any of the other Belfast based universities.”

7. On 5 April 2024, the public authority responded. It provided most of the information it held within the scope of element [2] of the request with the exception of a small amount of personal information. In respect of parts [1] and [3], it withheld information and relied on section 35 of FOIA in order to do so. It upheld its original response following an internal review.

## **Scope of the case**

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8. During the course of the Commissioner's investigation, the public authority decided that the passage of time meant that it could now disclose some of the information. However it now relied additionally on section 43 of FOIA to withhold some of the information.

9. The Commissioner considers that the scope of his decision is to determine whether the public authority is entitled to rely on section 35 or section 43 of FOIA to withhold the requested information.

## Reasons for decision

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### Withheld information

10. The withheld information comprises twenty documents. Documents 1-6 and 8-9 comprise of email chains either within the public authority or with Ulster University (or both). Document 7 is a ministerial submission.
11. Documents 4, 5, 6, 8 and 9 have been disclosed subject only to redactions of personal information.
12. Documents 1, 4, 5 and 8 also contain attachments.
  - Document 1 contains a letter from the Ulster University to the public authority.
  - Document 4 has four attachments which comprise of notes of various meetings either within the University or between the University and the public authority.
  - Document 5 also has four attachments which, as far as the Commissioner can see, are identical to those attached to Document 4.
  - Document 8 has two attachments. These are labelled as being draft sections of the business case for Magee's expansion.

### Section 35 – formulation of government policy

13. Section 35 of FOIA allows government departments to withhold information if it relates to the development or formulation of government policy. For the purposes of this exemption, that includes information held by departments of the government of Northern Ireland and which relates to policies of the Northern Ireland Executive.
14. In 2020, the various political parties in Northern Ireland, along with the UK and Irish governments, all signed up to a document titled [New Decade, New Approach](#). This agreement covered a wide range of policy issues and paved the way for the restoration of the Northern Ireland Executive - which had collapsed in 2017.
15. One of the terms of the agreement is that:

"The Executive will expand university provision at Magee in line with commitments made by the previous Executive, including through the establishment of a Graduate Entry Medical School."

16. Whilst the Executive has set out the outcome it wishes to achieve, there are various options and proposals for achieving this outcome. Depending on the option chosen to take forward, different packages of funding (including commitments from both the Executive and UK Government) will be considered. Prior to the public authority issuing its refusal notice, it had announced a taskforce whose goal was to develop an action plan to achieve the Executive's stated goals.
17. The Commissioner is satisfied that this information relates to the formulation of policy. Although the Executive has announced an overall outcome it wants to achieve, it still has to decide on a mechanism for delivering that outcome and to secure funding for it. The information in question clearly relates to those processes. For the purpose of engaging the exemption, it is irrelevant whether those processes were complete or ongoing at the time of the request – though the stage of the process will have a bearing on the public interest test.
18. The Commissioner is therefore satisfied that the exemption is engaged and has gone on to consider the public interest test.

### **Public interest test**

19. The complainant noted that the campaign for a properly-sized university in Derry-Londonderry had been ongoing for 60 years. It was four years since the Executive had announced that it wanted to see an expansion at Magee and the various options and proposals should already have been thoroughly considered and evaluated.
20. In the complainant's view the lack of a properly-sized university was "hampering" the city's development. He argued that having more students in the city would be likely to attract investment into the area, boost local economic growth and create more high quality jobs.
21. He also argued that previous disclosure of information had demonstrated that government officials were (in his view) acting to obstruct ministers by providing "questionable assertions" about the case (or counter-case) for expansion in their briefs to ministers.
22. The complainant argued that, given it was already government policy, the public had a right to know "what is happening and who is being obstructive."
23. In explaining why the public interest should favour maintaining the exemption, the public authority argued that:

- “The information withheld relates to current and ongoing development of policy around the expansion of Magee College. The recent launch by the Department of a taskforce to develop and oversee an action plan to expand the campus reinforces the need for the Department to maintain a safe space for this policy to be developed freely, and without external interference or distraction. The release of the information withheld would be likely to jeopardise this safe space.
- Disclosure of the information withheld would be likely to adversely affect the time and space required not only by this Department but also of delivery partners to develop and debate proposals around expansion, to carefully develop and analyse the policy options available and to make appropriate decisions, away from public interference and possible misunderstanding.
- Releasing this information would run the risk that suggestions which are proposals could be misinterpreted as policy and would be likely to inhibit free and frank discussion in the future. Development of government policy requires the ability to discuss options, alternatives and cost implications fully and freely.
- The release of this information would be likely to curtail the Department’s and delivery partners’ ability to discuss all options and alternatives fully and without interference, and this would be likely to prejudice the decisions made. Information sharing would be likely to become more limited going forward, resulting in less informed policy discussions and potentially leading to sub-optimal outcomes.
- The release of this information is likely to adversely affect the integrity of the policy development process around Magee College.
- The information withheld is intended also to inform future policy decisions in Higher Education. Good government depends on good decision-making and this needs to be based on the best advice available without fear of premature disclosure, and releasing the information would be likely to deter third parties from providing information in the future.”

### **The Commissioner’s view**

24. In the Commissioner's view, the balance of the public interest needs to be struck in different places for different types of information. He has set out the exact information to be disclosed and withheld in the confidential annex.
25. In respect of the meeting notes (the four attachments to documents 4 and 5), he considers that the balance of the public interest favours

maintaining the exemption. In each case, the meeting notes record the candid views of the various attendees on the various options and risks.

26. Given that the process of finalising options is still ongoing, the Commissioner's view is that the public authority still requires a protected space in which to evaluate options and assess risk. That space would be impinged upon by the disclosure of this information and that is not in the public interest.
27. There are two exceptions to this. One is that one of the sets of notes also contains a set of slides that were presented to the meeting. Having viewed these slides, the Commissioner considers that the information they contain is high level, generic or refers to commitments already in the public domain. He is not convinced that disclosure of these slides would impinge upon the safe space. Therefore the balance of the public interest favours disclosure of this information. Although the information is duplicated, only one copy need be disclosed.
28. Attachment 2 contains both a set of notes and a covering email. Whilst the notes appear to replicate those contained in another attachment, the covering email contains nothing sensitive and should be disclosed. Although the information is duplicated, only one copy need be disclosed.
29. The balance of the public interest also favours maintaining the redaction in document 1 – for the same reasons given in paragraphs 25 and 26.
30. In respect of the ministerial submission (document 7), the Commissioner recognises the importance of officials being able to provide advice to ministers (who will ultimately take the decisions) that is both robust and candid.
31. The expansion of the campus was predicted (at the time of the request) to cost around £385 million (more recent estimates suggest the final figure may be twice that – though that includes private sector investment), much of which is likely to come from taxpayers. It is only proper that such proposals are subject to rigorous internal challenge before being announced.
32. The submissions provide background information as well as assessments of the risk involved. Given that the policy process remains ongoing, the Commissioner considers that the public interest favours maintaining a safe space in which ministers and their officials can discuss proposals.
33. Finally, the Commissioner turns to the two attachments to document 8. These are sections from a business case put forward for expansion.
34. Both documents are watermarked as "draft". This is not determinative in itself, but the fact that these documents do not represent final versions

is corroborated by: the author of document 8 (which has been disclosed) describing the two documents as "draft" and inviting comments; the fact that parts of the document contain "XXX" denoting figures that have yet to be agreed; and the author of document 9 (which post-dates document 8) referring to recent changes to the process for compiling outline business cases which would need to be taken into account before the business case was submitted.

35. The Commissioner recognises that there is a strong public interest in the business case for this expansion being subject to rigorous scrutiny. That public interest in scrutiny only applies though once the business case is completed.
36. Revealing a partially completed business case would not inform wider public debate about expansion. It is more likely to mislead public debate by focusing on information that is out of date. It also affects the safe space in which the University and the public authority can consider options and weigh risks
37. The Commissioner therefore considers that the balance of the public interest favours maintaining the exemption in respect of these documents.
38. Finally, the Commissioner would note that he saw nothing within the withheld information that undermines the public statements of ministers.

### **Section 43 – commercial interests**

39. Section 43 allows a public authority to withhold information whose disclosure could harm its own commercial interests or those of another party.
40. The public authority has applied this exemption to parts of documents 2 and 3, which overlap. In broad terms, the withheld information relates to the funding package for expansion.
41. The public authority has argued that releasing this information into the public domain would hinder the University's ability to obtain funding expansion.
42. It also argued that revealing the specific costs or budget for specific projects would hinder the University's ability to achieve value for money when negotiating with suppliers.
43. The Commissioner notes that some of the information that the public authority has relied on this exemption to withhold revolves around the



figure for total students to be accommodated at the campus and the cost of the overall project.

44. These figures were already in the public domain at the time the request was submitted, as a result of a [question answered by the minister](#) in the Northern Ireland Assembly.
45. Given that the figures have been officially placed into the public domain, the Commissioner does not consider that disclosure of this information would be capable of prejudicing anyone's interests. The exemption does not apply to this information and it must be disclosed.
46. However, in relation to the specific sources of funding and budget allocations, the Commissioner does accept that disclosure would be likely to harm the ability of the University to secure private sector funding and to achieve value for money in negotiations with suppliers. The exemption is therefore engaged in relation to this information.

#### **Public interest test**

47. Even where the disclosure of information would cause commercial harm, the information must still be disclosed unless the public interest favours maintaining the exemption.
48. The Commissioner accepts that the sums of money involved are considerable and deserve scrutiny. However he considers that that scrutiny needs to come once proper proposals are in place for expansion.
49. Revealing budgeting information at this stage of the process would add to public debate, but its contribution would be outweighed by the harm caused to the University's commercial interests.
50. The Commissioner is therefore satisfied that, where the exemption is engaged, the balance of the public interest favours maintaining it.



## **Confidential annex**

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51. In order to preserve a meaningful right of appeal for the public authority, the Commissioner has found it necessary to create a confidential annex to this decision notice which will be provided only to the public authority.
52. This is necessary because identifying the information to be disclosed cannot be done without referring to the actual contents of the information being withheld.
53. The confidential annex sets out the information the public authority must disclose in order to comply with the Commissioner's decision.
54. The annex does not contain any further reasoning for the Commissioner's decision.

## Right of appeal

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55. 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)

56. 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.
57. 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

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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