

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2024

Public Authority: Department for Communities (Northern Ireland)

Address: Causeway Exchange
1-7 Bedford Street
Belfast
County Antrim
BT2 7EG

Decision (including any steps ordered)

1. The complainant has requested a copy of a draft Anti-Poverty Strategy for Northern Ireland. The Department for Communities (“the DfC”) confirmed that it held the information but said it was exempt from disclosure under section 35(1)(a) (Formulation of government policy, etc) of FOIA.
2. The Commissioner’s decision is that the DfC was entitled to rely on section 35(1)(a) of FOIA to refuse to disclose the requested information.
3. The Commissioner does not require steps as a result of this decision.

Request and response

4. On 24 June 2024, the complainant wrote to the DfC and requested information in the following terms:

“Under s28E of the Northern Ireland Act 1998 the NI Executive is under a statutory duty to adopt an anti-poverty strategy... In June 2023...DfC confirmed that a draft anti-poverty strategy had been prepared to be taken forward by an incoming Executive. The Executive was restored in February 2024. To date, into late June 2024 there is no consultation on the anti-poverty strategy.

...

This is a freedom of information request for:

1A: Confirmation the Department holds a copy of the draft Anti-Poverty Strategy, referenced above as having been completed by June 2023.

1B: A copy of this draft Anti-Poverty Strategy."

5. The DfC responded on 22 July 2024. It confirmed that it held a copy of the draft Anti-Poverty Strategy. It said it was exempt from disclosure under section 35(1)(a) of FOIA, as it was a policy still in development and its disclosure at this early stage would be likely to mislead the public about the way in which the strategy was likely to develop. It also argued that disclosure would harm the free and frank provision of advice and that it was:

"... clearly vital that the Department is able to preserve confidentiality around the decision-making process during the period the policy is developed. Meetings and discussions around the development of the policy takes place in confidence and if details of these discussions were disclosed it could harm the decision-making process to a significant or substantial degree without any compensating benefit to the public."

6. The complainant submitted an internal review request on 19 July 2024. Among other things, they argued that the DfC's citing of chilling effect arguments was incompatible with it having previously disclosed Expert Advisory Panel reports containing recommendations for its anti poverty strategy. They felt the public interest favoured disclosure of the information, and that the DfC had cited only generic public interest arguments that did not specifically relate to the withheld information.
7. The DfC provided the outcome of the internal review on 13 August 2024. It maintained that section 35(1)(a) had been applied correctly. It noted:

"this Department along with other Department's involved in this process have been without a Minister for significant periods over the past few years. This has had a direct impact on its ability to develop government policy which does require the direct input, direction and eventual approval of a Minister."

8. It said that, as a result, the draft strategy "has never reached a stage where it could be submitted for executive approval therefore any disclosure would be premature as outlined in the Department's original response."

Scope of the case

9. The complainant contacted the Commissioner on 21 August 2024 to complain about the way the request for information had been handled. They disagreed with the application of section 35(1)(a) to withhold the draft Anti-Poverty Strategy.
10. The analysis below considers whether the DfC was entitled to rely on section 35(1)(a) of FOIA to withhold the draft Anti-Poverty Strategy.

Reasons for decision

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

“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”.
12. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes. However, it is then necessary to consider whether disclosure would nevertheless be in the public interest.
13. The Commissioner takes the view that the ‘formulation’ of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations/submissions are put to a minister or decision makers.
14. ‘Development’ may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
15. Ultimately, whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the precise context and timing of the information in question.
16. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - The final decision will be made by the Cabinet or Executive Committee or the relevant Minister;

- the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
17. The DfC confirmed to the Commissioner that section 28E of the Northern Ireland Act 1998 creates a statutory obligation for the Northern Ireland Executive to adopt a strategy setting out how it proposes to tackle poverty, social exclusion and patterns of deprivation. The withheld information relates to the formulation and development of policy which flows from that obligation. This piece of policy development began in the last quarter of 2020 and it remains under development.
 18. Addressing the complainant's concern that little progress had apparently been made on adopting the strategy, the DfC explained that the Northern Ireland Executive collapsed on 3 February 2021, with the resignation of the First Minister, and it was not restored until 30 January 2024. The Anti-Poverty Strategy is an Executive responsibility and its development requires input from other Departments / Ministers, along with agreement on associated funding, neither of which could be fully progressed in the absence of a functioning Executive. DfC staff did continue to work on the strategy during this period but the extent to which it could be developed was limited.
 19. The DfC explained that changes continue to be made:

"The Strategy document at the time it was requested...was a draft prepared by officials for Ministerial consideration. It was prepared by DfC officials to reflect discussions with the former Minister, priorities set out by both the membership of the Expert Panel and Co-design Groups and a range of reviews undertaken across government. Following discussions with the current Minister, the draft Strategy has already changed significantly in the period between [the] request, subsequent internal review and the date of this response to your investigation."
 20. As an example, the DfC explained that the draft strategy cannot be finalised until associated budgetary matters have been agreed, as these will directly impact on the measures which can be included in it.
 21. Having viewed the withheld information (and mindful of the purpose of the exemption) the Commissioner is satisfied that it relates directly to the formulation and development of government policy on tackling poverty and that at the time of the request (and currently) that policy was under formulation and development. Therefore, each of the criteria set out in paragraph 16 is met and the exemption at section 35(1)(a) of FOIA is engaged.

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 withheld information.

Public interest arguments in favour of disclosure

23. The complainant made the following submissions:

- "There is significant public interest in disclosure of any information that has the potential to inform the fulfilment of the Anti-Poverty Strategy, the strategy relates to an unfulfilled statutory duty, on which the Executive had previously acted unlawfully. It also engages international treaty based obligations and the fulfilment of the NDNA deal; there has also been considerable media, committee and broader political attention on the strategy. The disclosure of the draft strategy would assist those seeking fulfilment of the duties and commitments.
- The document in question – the Draft Anti Poverty Strategy of June 2023, was developed before the current Minister took up post in February 2024. The document was developed on the basis of a broad range of evidence-based expert driven work in the previous mandate which is already in the public domain. The Expert Advisory Panel as to the content of a strategy was published by the Department. Members of the Co-design group also published their own key recommendations paper (Members of the DfC Anti-Poverty Strategy Co-Design Group produce Key Recommendations Paper | NICVA¹). There is a public interest in disclosure of the draft strategy developed from work in the previous mandate as to the extent it reflected this prior work (which is in the public domain) and ultimately how this previous draft Strategy measures against the draft Strategy being developed by the current Minister. This is in a context whereby the Minister has indicated he intends to depart from the previous approach. It is not in the public interest for disclosure to be withheld to prevent the public from comparing the strategy proposed by the new Minister with the document flowing from the previous mandate.

¹ <https://www.nicva.org/article/members-of-the-dfc-anti-poverty-strategy-co-design-group-produce-key-recommendations-paper>

- The reasons given for non disclosure appear quite generic rather than being tailored to the specific material in question”.
24. The DfC recognised that the Anti-Poverty Strategy is a long-standing obligation for the Executive:

“Disclosure of information on the development of an Anti-Poverty Strategy will help the public to become more informed. This may encourage stakeholder and public engagement and debate, which may, in turn, contribute to the development and scrutiny of policy formulation and increase public confidence that decisions are properly made.”

Public interest arguments in favour of maintaining the exemption

25. The DfC considered the timing of the request to be the significant factor in this case. It explained that it relates to a live issue and that the Anti-Poverty Strategy is still in active development. The Northern Ireland Executive (rather than the DfC) is the authority responsible for producing the Anti-Poverty Strategy and it would be inappropriate for early proposals to be disclosed to the world at large before that body has been given the opportunity to consider them and make amendments.
26. The withheld version of the Anti-Poverty Strategy is an early version and it is not the same as the current version, which has since been amended. Further changes are likely to be made as a result in ongoing work, until a version is approved by the Minister.
27. The DfC argued that good government relies on the provision of free and frank advice from a variety of sources. The development of the Anti-Poverty Strategy requires the DfC’s Minister to consult with colleagues in the Executive to agree the content of the strategy. It is essential that these considerations are able to take place free from external pressure or distraction. Premature disclosure would be likely to mislead the public on the direction the strategy may take, causing confusion around issues which may not form part of the final version of the strategy. This would be likely to distract both the DfC and partners in the Executive from development of the strategy, requiring them to spend resources addressing queries and concerns about issues which may never arise within the final draft strategy.
28. The DfC argued that the complainant’s concerns about lack of transparency are mitigated by the fact it has already published a significant amount of information on the early development of the

strategy². It will also hold a public consultation on the strategy once proposals have been properly developed. This will allow interested parties to influence the final strategy, prior to its eventual implementation. Disclosure of the various options under discussion at the early stage of the policy formulation process, which may never be considered for inclusion in the final draft, would lead to misplaced concern or confusion among the wider public.

Balance of the public interest

29. The Commissioner accepts that there is a public interest in the disclosure of information which can inform public understanding of how the Northern Ireland Executive is formulating and developing policy on an important area of public welfare. The question for the Commissioner to consider is whether the arguments in favour of maintaining the exemption are stronger.
30. The relevance and weight of 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. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed. As such, the exact timing of a request will be very important.
31. In this case, the Commissioner notes that at the time of the request the Anti-Poverty Strategy was clearly still in development (and it remains so at the time of this notice). It was therefore a 'live' matter. As such, the Commissioner considers that there is a clear and strong public interest in protecting this policymaking process.
32. The complainant says that transparency is required because the production of an Anti-Poverty Strategy is a long-standing statutory obligation which has not yet been fulfilled. On that point, the DfC has explained that this delay has been due to the collapse of the Northern

² <https://www.communities-ni.gov.uk/publications/report-anti-poverty-strategy-expert-advisory-panel> & https://www.nicva.org/sites/default/files/d7content/attachments-articles/recommendations_for_an_ni_anti-poverty_strategy_-_a_paper_from_members_of_the_aps_co_design_group_september_2022.pdf

Ireland Executive between 2021 and 2024, which meant that the necessary Ministerial and cross-Departmental consultations and authorisations underpinning the strategy could not be carried out. In view of this delay, the Commissioner considers it is in the public interest that further work on shaping the strategy be allowed to continue efficiently and unhindered by unnecessary external interference.

33. On that point, the DfC has made safe space arguments³ for withholding the draft version of the strategy. These concern the need to protect a private space in which all policy options may be properly considered, without the distraction of having to concurrently deal with outside interference and background 'noise' regarding those considerations. The DfC has said that the Executive is exploring moving in a different direction with the strategy, to that which had previously been considered. It is therefore likely that disclosure at this stage would generate some public discussion among interested parties which the DfC would have to address. This would be a diversion of its time and resources from the task at hand, and it may lead to further delays in the production of the policy.
34. The DfC says that all interested parties will be able to scrutinise the final draft against previous recommendations when the strategy is opened up to consultation, and they will have the opportunity to comment. Providing the same version of the strategy to all interested parties at the same time will enable the DfC to execute a managed analysis of the responses and comments, rather than having to consider and respond to them in a piecemeal fashion.
35. Bearing in mind that the purpose of the exemption is to facilitate an efficient and effective policy making process, and in view of the delays that the production of the Anti-Poverty Strategy has already been subject to, the Commissioner considers that, in this case, the public interest in maintaining the exemption is stronger than that in disclosing the information. His decision is therefore that the DfC was entitled to rely on section 35(1)(a) to refuse to disclose the withheld information.

³ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/section-35-government-policy/#safespace>

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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.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 Information 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.

Samantha Bracegirdle
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF