

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 copies of draft action plans relating to the draft Irish language strategy and draft Ulster Scots 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 withheld 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:
 - Irish Language strategy – Under s28D of the NI Act there is a duty to adopt an Irish Language Strategy, an Expert Advisory Panel report was published in March 2021, and a co-design group set up to produce an action plan for the strategy. We understand this groups' work finished before the end of 2023. This process is alluded to on the DfC website. Twice, most recently in 2022 the High Court has

found the Executive to have acted unlawfully in not adopting the strategy.

- Ulster Scots strategy – under s28D there is a similar obligation to adopt a strategy in relation to Ulster Scots and DfC followed a similar process to the Irish language strategy.

This is a freedom of information request for:

...

2A: Confirmation the Department holds a copy of the draft Action Plan relating to the Irish language strategy resulting from the work of the co-design group.

2B: A copy of this draft Action Plan relating to the Irish language strategy.

3A: Confirmation the Department holds a copy of the draft Action Plan relating to the Ulster Scots strategy resulting from the work of the co-design group.

3B: A copy of this draft Action Plan relating to the Ulster Scots strategy.”

5. The DfC responded on 18 July 2024. It confirmed that it held a copy of each action plan. It said they were exempt from disclosure under section 35(1)(a) of FOIA, as they were policies still in development and disclosure at the early stage of the development process would be premature and likely to mislead the public about the way in which the strategies were likely to develop. It also said:

“This is a live issue and the government needs enough time and a safe space to allow it to discuss all options, both safe and radical, without fear that premature disclosure would create a distraction from the formulation of the strategies.”

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 the strategies. 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 internal review outcome on 16 August 2024. It maintained that section 35(1)(a) had been correctly applied. It noted:

"...this Department along with other Departments 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."

Scope of the case

8. 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 two action plans.
9. The analysis below considers the citing of section 35(1)(a) to withhold this information.

Reasons for decision

10. 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".
11. 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.
12. 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.
13. '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.
14. 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.

15. 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.
16. The DfC confirmed to the Commissioner that section 28D of the Northern Ireland Act 1998 creates a statutory obligation for the Northern Ireland Executive to adopt strategies in relation to the Irish language and to the Ulster Scots language, heritage and culture. The withheld information relates to the formulation and development of policies which flow from these obligations. The policy development in question, which included the establishment of Expert Advisory Panels and associated Co-Design Groups, began in June 2021 and remains underway.
17. Addressing the complainant's concern that little progress had been made on adopting the action plans, 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. While the DfC leads on the co-ordination of the language strategies, the responsibility for adopting the strategies remains with the Executive as a whole. Their 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 strategies during this period but the extent to which the strategies could be developed was limited.
18. To support its position, the DfC told the Commissioner that in July 2022 it had responded to a request to know what projects, policies and initiatives had been delayed due to the lack of an Executive, by confirming that development of an Irish Language Strategy and Ulster-Scots Language, Heritage and Culture Strategy would require Executive agreement prior to public consultation, final publication and implementation.
19. The DfC explained that:

"The development of both strategies was still at a relatively early stage in terms of formulation and development at the time the original request was received ... and that remains the case. Significant work has been undertaken by Departmental officials, the Expert Advisory Panel and the Co-Design Group. The Expert Advisory Panel has already published its report...The Action Plans developed by the Co-Design

Group are currently being considered by a Cross-Departmental Working Group. The Cross-Departmental Working Group will identify those proposed actions specific to their own Department and in discussion with their own Minister consider which are feasible to take forward. Once the Cross-Departmental Working Group have produced a co-ordinated set of proposals they will be incorporated into Draft Action Plans which will guide the DfC Minister in producing draft strategies for submission to his Executive Colleagues to consider and if content agree to publish for public consultation. Policy development therefore is at a very early stage and a number of additional significant steps are still required before the strategies can be agreed and implemented”.

20. The DfC also said that work on the strategies had also been delayed by the introduction of the Identity and Language (Northern Ireland) Act 2022. This Act will appoint an Irish Language Commissioner and a Commissioner for the Ulster Scots and the Ulster British tradition. Some of the actions contained within the Action Plans proposed by the Co-Design Group are likely to fall within the remit of those roles, which means they may not form part of any recommendations taken forward. It said:

“While some of the Co-Design Groups proposed actions within the Action Plans might be retained within the eventual strategies others might be rejected by the DfC Minister or the Executive due to budgetary constraints or the impact of the Identity and Language (Northern Ireland) Act 2022. The impact of premature disclosure would be likely to mislead the public as they cannot be considered to accurately predict what will be contained within the final version of the strategies which will [sic] submitted for public scrutiny in a public consultation exercise.”

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 policies on the Irish and Ulster Scots languages and that at the time of the request (and currently) those policies were under formulation and development. Therefore, each of the criteria set out in paragraph 15 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:

"- The duties to adopt the strategies are domestic legal obligations that have never been complied with. Twice the High Court has found the Executive to have acted unlawfully in not adopting the Irish language strategy¹

- The strategies also engage the international treaty based obligations of the state party and the release of information relevant to demonstrating compliance with these standards is in the public interest.

...

- The legal obligations have remained unfulfilled since 2006. There was a common two stage process to progress them in the last mandate (from 2020) first with the production of an Expert Advisory Panel followed by a co-design group action plan. Both of these processes were completed before the current minister took up office.

We request an internal review of this decision which we do not consider has properly balanced public interest considerations for a range of reasons not least:

- All of the above reasons for non-disclosure by the Department – which focus on the chilling effect on policy making if the co-design Action Plan is put into the public domain- are fatally undermined by the fact that the Department openly published the Expert Advisory Panel reports which preceded them, clearly considering that none of the above factors now asserted applied. It is simply not viable to argue that publishing the expert advisory reports packed with recommendations for the strategy that may or may not be acted upon by the current minister, had none of the impacts of risking 'misleading the public' regarding subsequent departmental direction, but that publishing the draft Action Plans would have this effect.

- The assertion that the strategies are at 'an early stage of Development' is both questionable and favourable to disclosure of the draft Action Plans. It is firstly questionable that the strategies are at an early stage. Four years work have taken place on an unfulfilled legal obligation which the Hight [sic] Court (in relation to Irish) had held

¹ <https://www.bbc.co.uk/news/uk-northern-ireland-62688552>

there is a limited time to fulfil. This has included significant work by the advisory group and the co-design group...In the alternative this assertion may be indicative that the new Minister has decided to dispense with or departed from the previous work on the strategy, in this case, in particular given the draft Action Plans were complete before he took up office, this also favours disclosure as they would relate to past proposals.

- Not least given the long history of non-compliance with international obligations it is in the public interest for the public to be able to measure the extent to which recommendations from the Departments own co-design group have been watered down (or in the alternative) strengthened by subsequent departmental and ministerial decision making. The rationale advanced for non-disclosure that some of the past recommendations 'may never be considered' further heightens this concern.

- The reasons given by the Department appear generic for s35 rather than based on specific consideration of the material – in particular the [sic] exactly the same considerations are given for the Irish as for the Ulster Scots strategy despite significant differences between the two (not least in international and domestic legal obligations)."

24. The DfC acknowledged:

"In the context of Northern Ireland development of strategies related to either the Irish language or Ulster-Scots Language Heritage and Culture are of wide public interest

Facilitating the public to become more informed which 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 the withheld information relates to a 'live' issue as the strategies which will flow from the Action Plans are at an early stage of development:

"At the time the request was received the draft Action Plans were still under consideration by the Cross-Departmental Working Group which will use them in part to contribute to initial draft strategies for consideration by the DfC Minister once each Department has had an opportunity to consider the proposals specific to them."

26. The Action Plans are a very early stage of the strategies' formulation process. Each strategy needs to go through a number of different stages before it can be finalised, all of which will likely lead to amendments to the content and scope of the final drafts, prior to publication and implementation. Premature release of the Action Plans could therefore mislead the public in regard to the direction the Executive may take.
27. The DfC argued that good government relies on the provision of free and frank advice from a variety of sources. The Department must be able to consult with both internal and external stakeholders and experts. In the case of the draft Action Plans, the Co-Design Group is still engaged with the process and will likely be subjected to pressure from within the language, heritage and culture sectors to take specific positions which would inhibit the provision of free and frank advice. It is essential that this group, and the Cross-Departmental Working Group, are able to work free of distraction to bring forward concrete proposals for the DfC Minister and the Executive to consider, and if content, publish for consultation, without having to concurrently address queries about proposals which may or may not make it into the final strategies.
28. As regards the complainant's suggestion that 'chilling effect' arguments were incompatible with the publication of Expert Advisory Panel reports, the DfC said:
- "This may be the case with the work of the Expert Advisory Panel members which has been completed but the Co-Design Groups are still engaged in this process. The Membership of the Co-Design Groups includes both civil servants and non-civil servants. Disclosure of the draft Action Plan would leave them, particularly the non-civil servants, open to pressure from others in the Irish language or Ulster-Scots language, heritage and culture sectors either in support of the proposals or in opposition to the content of the Action Plans proposed by the Co-Design Group".
29. The DfC argued that the complainant's concerns about lack of transparency are mitigated by the publication of the Expert Advisory Panels' reports² setting out recommendations about the themes and key actions the strategies should include. It will also hold a public consultation on the strategies once proposals have been properly

² <https://www.communities-ni.gov.uk/publications/irish-language-strategy-expert-advisory-panel-recommendation-report> & <https://www.communities-ni.gov.uk/system/files/publications/communities/dfc-ulster-scots-strategy-expert-panel-report-eng.pdf>

developed. This will allow interested parties to influence the final strategies, prior to their eventual implementation. However, it would be inappropriate to disclose the draft action plans to the world at large before each affected Department has had a chance to assess the proposals they contain and identify those that they consider to be achievable, particularly in regard to likely budgetary constraints. Furthermore, 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 drafts, would lead to misplaced concern or confusion among the wider public.

Balance of the public interest

30. 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 language, heritage and culture. The question for the Commissioner to consider is whether the arguments in favour of maintaining the exemption are stronger.
31. 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.
32. In this case, the Commissioner notes that, at the time of the request, the policies to which the withheld information relates were clearly still in development (and remain so at the time of this notice). They were therefore a 'live' matter. As such, the Commissioner considers that there is a clear and strong public interest in protecting this policymaking process.
33. The complainant says that transparency is required because production of the strategies is a long-standing statutory obligation which has not yet been fulfilled. On that point, the DfC has explained that this delay was due to the collapse of the Northern Ireland Executive between 2021 and 2024, which meant that the necessary Ministerial and cross-Departmental consultations and authorisations 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 strategies be allowed to continue efficiently and unhindered by unnecessary external interference.

34. On that point, the DfC has made safe space arguments³ for withholding the requested information. 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 Action Plans are a very early stage of the strategies' formulation process. Each strategy needs to go through a number of different stages before it can be finalised, all of which will likely lead to amendments to the content and scope of the final drafts prior to publication and implementation. It is therefore likely that disclosure of the draft Action Plans 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.
35. The DfC says that all interested parties will be able to scrutinise the strategies when they are opened up to consultation, and they will have the opportunity to comment. This will enable the DfC to execute a managed analysis of the responses and comments on the actual proposals, rather than having to consider and respond in a piecemeal fashion, possibly regarding proposals which are not actually being taken forward.
36. 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 strategies to which the withheld information relate have 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

37. 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

38. 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.
39. 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