

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 March 2020

Public Authority: Electoral Office for Northern Ireland

Address: St Anne's House
15 Church Street
Belfast
BT1 1ER

Decision (including any steps ordered)

1. The complainant has made a three part request for information relating to the Recall Petition 2018 to remove the MP for North Antrim. The Electoral Office for Northern Ireland (EONI) provided information falling within the scope of part three of the request but stated that it did not hold information falling within the scope of parts one and two of the request.
2. The Commissioner's decision is that, on the balance of probabilities, EONI does not hold the information requested in parts one and two of the request. The Commissioner does not require any further steps to be taken as a result of the decision notice.

Request and response

3. On 6 November 2018, the complainant wrote to EONI and requested information in the following terms:

"I am requesting the following details under the Freedom of Information Act 2000 (FOI) following the process (see notes below) as stipulated by the Electoral Office for Northern Ireland website.

- 1) *The breakdown of votes cast (actual number that voted) by each ward for the Recall Petition 2018 to Remove the MP for North Antrim, Ian Paisley.*

- 2) *The breakdown of voters (potential number of voters) by each ward for the Recall Petition 2018 to Remove the MP for North Antrim, Ian Paisley.*
- 3) *Confirmation of the wards provided with publicly available ballot boxes used for the Recall Petition 2018 to Remove the MP for North Antrim, Ian Paisley"*
4. EONI responded on 12 November 2018. It stated that it did not hold the information requested in parts one and two of the request. It provided information within the scope of part three of the request.
5. The complainant responded on 12 November 2018, stating that EONI had not provided them with the requested information under the FOIA and asking it to advise them on when it would provide the information.
6. EONI responded on 15 November 2018, advising the complainant that they could ask for their request to be reviewed if they were dissatisfied with the response to their request.
7. On 15 November 2018, the complainant requested an internal review of EONI's handling of their request, and in particular, that it had not provided the information they had requested in parts one and two of their request. The complainant also stated that since submitting their request, they had discovered that there was information on EONI's website that probably fell within the scope of part two of their request for information. The complainant provided EONI with the link from EONI's website.
8. EONI provided the outcome of an internal review on 23 November 2018. It advised the complainant that they appeared to have accessed the total electorate statistics that are published on the first working day of each month, which it advised was not the number of electors who were eligible to sign the recall petition. It stated that "*the eligible electorate and the number of votes cast are not held by ward, the count of petition papers was by constituency rather than ward so the eligible electorate and number of votes cast are only held by constituency.*"

Scope of the case

9. The complainant contacted the Commissioner on 23 November 2018 to complain about the way their request for information had been handled.
10. The Commissioner considers the scope of this case is to determine whether EONI holds any information in relation to parts one and two of the request.

Reasons for decision

Section 1 and Section 3 – general right of access to information held by a public authority

11. Section 1(1) of FOIA says that an individual who asks for information from a public authority is entitled to:
 - (a) be informed whether the authority holds the information, and
 - (b) if the information is held, to have that information communicated to them.
12. Section 3(2) of the FOIA sets out the criteria for establishing if information is held for the purposes of the FOIA:

"For the purposes of this Act, information is held by a public authority if –

 - (a) it is held by the authority, otherwise than on behalf of another person, or*
 - (b) it is held by another person on behalf of the authority."*
13. The issue for the Commissioner to determine in this case is whether EONI holds the information requested in parts one and two of the request and, if so, whether it is held by EONI on behalf of another person.
14. In its initial submission to the Commissioner, EONI stated that it carried out searches of its records management system "Content Manager" and the "Head of Information Services" computer, as the most likely locations of the information.
15. EONI confirmed that the search terms it used when it carried out a search of its records management system and the Head of Information Services computer was "recall turnout", "recall electorate", "recall eligible" and "recall outcome".
16. EONI confirmed that it did not find the requested information.
17. The complainant in this case believes that the information they had requested *"can be derived in summary format from data that is held by the Electoral Office of Northern Ireland."* The complainant understands *"that each voter is registered at an address and each address is within a ward and each ward is within a constituency."* The complainant has stated that *"It again seems inexplicable that "Ward" and "Constituency"*

are not standard dimensions to provide basic metrics on the number of voters registered v the number of votes cast."

18. The complainant is of the view that EONI is likely to hold information that falls within the scope of their request and referred to the "About the electoral register" page on EONI's website. The complainant *"specifically highlight[ed] the "Marked Register" details that shows that the information [they] requested would normally be available as the source to answer [their] request i.e. a list of all register voters by postcode, ward, constituency, etc" that covers both voters available and votes cast."*
19. The complainant also referred to the Electoral Commission's report of the 2018 recall petition in North Antrim, which they say *"specifically highlights the difficulties of making the "Marked Register" publicly available so strongly confirms that it exists internally."*
20. In response to the complainant's view, EONI explained that *"the marked Register was not available for the Recall Petition as this would have compromised the integrity of the ballot as it was not an indication of someone going to vote but rather an indication that they had potentially signed the petition - thereby revealing their vote."*
21. With regards to breaking the votes down by ward, EONI explained during a telephone conversation with the Commissioner that only three venues were opened for constituents wishing to sign the petition during the six week period. The Commissioner understands that these three venues were made up of a number of wards. It therefore appeared at the time to the Commissioner that the information relating to the ward would not have been available at those three venues, but that the ward information would be available by going back through the information that was held. However, EONI was of the view that this would be creating new information.
22. In cases where a public authority holds the information and it is a simple case of extracting the relevant information from the information that already exists, the Commissioner considers that whilst this *"may be a new task, it is not creating new information; it is simply a re-presentation of existing information..."*.
23. The Commissioner therefore explained to EONI that it appeared likely that the requested information was held by EONI, albeit it would need to undertake some work to re-present that information in the form the applicant had requested. The Commissioner therefore asked EONI to reconsider its position that it did not hold the information requested in parts one and two of the request.

24. EONI advised the Commissioner to write to the Clerk of the Crown as the data was held by him.
25. The Commissioner again asked EONI to confirm whether or not it held the requested information (or held it at the time of the request) within the scope of parts one and two of the request. If so, the Commissioner asked EONI to confirm whether it was held either wholly or partly for EONI's own purposes, or held exclusively on behalf of the Clerk of the Crown. If the information was held exclusively on behalf of the Clerk to the Crown, the Commissioner asked EONI for an explanation of the basis on which EONI had concluded that although it physically held the information, it was not needed for any of EONI's own functions.
26. EONI stated in its submission to the Commissioner that under regulation 44 of the Recall of MPs Act 2015 (Recall Petition) Regulations 2016 (the Regulations), the Petition Officer (in Northern Ireland this is the Chief Electoral Officer) must forward to the Registration Officer (in Northern Ireland this is the Clerk of the Court) the documentation listed in regulation 44. EONI stated that this includes the Marked Register, which it explained would be the document that would indicate the number of people who had voted.
27. EONI explained that regulation 43 of the Regulations states that on completion of the counting of the signing sheets the Petition Officer must not open the sealed packets of:
 - (a) tendered signing sheets,
 - (b) the completed corresponding number lists,
 - (c) certificates as to employment on duty during the petition period,
or
 - (d) marked copies of the register and lists of proxies.
28. EONI stated that the Regulations explain how information can be obtained from the Registration Officer. EONI has referred to regulation 45 which lists the bodies who are entitled to an Order for Production and the circumstances for production. EONI has stated that an FOIA request does not fall within regulation 45.
29. EONI stated that Schedule 3 of the Regulations sets out the rules in relation to Access to the Marked Registers after Petition. EONI explained that this includes a list of the persons or bodies who are entitled to request the Registration Officer (the Clerk of the Court), not the Petition Officer (Chief Electoral Officer), to supply copies. EONI went on to explain that an individual is not included in that list. EONI stated that

Schedule 3 reiterates that the Registration Officer in Northern Ireland is the Clerk of the Court.

30. EONI referred to Schedule 3, paragraph 3(1) which states that *"any person is entitled to request that the Registration Officer makes documents available for inspection"* and goes on to state in paragraph 4 that *"where a request has been made to inspect copies of the marked register or lists under subparagraph (2), the registration officer is only required to make those documents available for inspection if that officer is satisfied that fraud may have taken place in respect of the petition to which the documents relate."*
31. EONI confirmed that it does not hold (and did not hold at the date of the application under section 50) the requested information, and it does not have the right to obtain the information under the Regulations.
32. In this case based on the representations provided by EONI, the Commissioner considers that its assertions that it does not, itself, hold the information requested in parts one and two of the request are reasonable, and is satisfied that the information is not held by EONI for the purposes of the FOIA.

Other matters

Submissions to the Commissioner

33. Whilst the Commissioner has concluded that EONI does not hold the requested information in its own right, she has concerns about the way in which EONI responded to her enquiries. In particular, EONI failed to provide satisfactory responses to the Commissioner's enquiries within any of the deadlines set by the Commissioner.
34. On 5 March 2019, the Commissioner wrote to EONI, asking it to reconsider the way it had handled the request. She set out the scope of her investigation and asked for submissions in support of EONI's position that it did not hold the information requested in parts one and two of the complainant's request for information.
35. On 29 March 2019, EONI provided its submission in support of its position.
36. On 30 May 2019, the Commissioner wrote to EONI to explain the complainant's view as detailed in paragraphs 16 to 18 of this decision notice. The Commissioner asked EONI for its comments on the complainant's view and the evidence they provided that they believed to show that EONI was likely to hold information that falls within the scope

of parts one and two of their request. The Commissioner referred EONI to her guidance note on "determining whether information is held", and specifically the section on "extracting and compiling information to meet a request".

37. On 4 June 2019, EONI wrote to the Commissioner advising that *"the marked Register was not available for the Recall Petition as this would have compromised the integrity of the ballot as it was not an indication of someone going to vote but rather an indication that they had potentially signed the petition - thereby revealing their vote."* EONI also asked the Commissioner to provide suitable dates and times for the Chief Electoral Officer to speak to her further about the matter.
38. The Commissioner responded to EONI on 5 June 2019, providing dates and times that would be suitable for the rest of that week and the following week.
39. As the Commissioner did not receive a call from EONI or a response to her correspondence of 30 May 2019, she wrote to EONI on 19 June 2019 asking it to provide a response by 28 June 2019. The Commissioner also provided EONI with further suitable dates and times for that week and the following week in case the Chief Electoral Officer still wished to speak to her.
40. On 24 June 2019, the Commissioner received a call from EONI. From the information that had been provided, it appeared to the Commissioner that the information requested would be available by going back through the information that was held by EONI. However, EONI was of the view that this would be creating new information.
41. The Commissioner wrote to EONI on 26 June 2019, advising that it appeared EONI did hold the requested information, albeit that it would need to undertake some work to re-present that information in the form the complainant had requested. The Commissioner therefore asked EONI to reconsider its position in respect of this information.
42. On 5 July 2019, EONI wrote to the Commissioner and advised that it held the information for the Clerk of the Crown.
43. On 16 July 2019, the Commissioner wrote to EONI and asked it to explain the basis on which it had concluded that although it physically held the information, the information was not needed for any of EONI's own functions.
44. On 18 July 2019, EONI provided the Commissioner with information on the Recall Petition legislation and advised her to consider that legislation. EONI also advised the Commissioner that it had written to

the judge advising him that the Commissioner was seeking release of the requested information.

45. The Commissioner wrote to EONI on 19 July 2019 and clarified that she had not at this stage advised that she was seeking the release of the information. She advised EONI of her process for handling complaints, in particular that she must first establish whether information is held before deciding whether it should be released. The Commissioner explained her understanding of the communications and evidence, and why therefore she was of the view that EONI did hold information falling within the scope of parts one and two of the request for information. In view of this, the Commissioner asked EONI to confirm whether it held the requested information.
46. On 22 July 2019, EONI left a voicemail regarding the Commissioner's email of 19 July 2019. EONI advised that it was going to re-read the email, but that it didn't think it held the information in the form that was required.
47. As the Commissioner did not receive a response from EONI, she re-sent her email of 19 July 2019 on 9 August 2019. The Commissioner asked EONI to provide a response by 14 August 2019.
48. On 4 September 2019, the Commissioner left a message with EONI's helpline asking for a call back with an update on when it would be responding to the Commissioner's email of 19 July 2019.
49. As the Commissioner did not receive a call back or a response from EONI, she served EONI with an Information Notice.

Information Notice

50. An Information Notice is a formal legal document that the Commissioner can serve on a public authority under section 51 of the FOIA, requiring a public authority to provide her with the information she needs to enforce the requirements of the FOIA. An Information Notice clearly states that failure by the authority to comply with the steps detailed within it may be dealt with as a contempt of court.
51. The Commissioner served an Information Notice on EONI on 9 September 2019, requiring it to provide her with its arguments in support of its position that it did not hold the requested information for its own purposes and therefore for the purpose of the FOIA. The Commissioner gave EONI 30 calendar days to provide its response to that Information Notice.
52. As the Commissioner did not receive a response from EONI within the 30 calendar days, she contacted EONI's helpline on 16 October 2019 for

an update. The operator advised the Commissioner that the Chief Electoral Officer was not in the office. The operator took a message and advised that they would email the Chief Electoral Officer and ask them to call the Commissioner back.

53. As the Commissioner did not receive a call back from EONI, she contacted it again on 18 October 2019 and was advised by the helpline operator that the Chief Electoral Officer was on another call. The operator took a message and said they would pass it to their supervisor who would go and give the request directly to the Chief Electoral Officer.
54. The Chief Electoral Officer at EONI left a voicemail message for the Commissioner on 21 October 2019 apologising for the delay and left their direct contact number. The Commissioner called the Chief Electoral Officer back on the same day, but it went through to their voicemail. The Commissioner left a message requesting a call back.
55. As the Commissioner did not receive a call back from EONI, she wrote to it on 23 October 2019 requiring it to provide a full response to the steps ordered in the Information Notice by 25 October 2019.
56. The Chief Electoral Officer at EONI contacted the Commissioner on 23 October 2019, apologising for the delay and confirmed that it would respond to the questions in the Information Notice the following day.
57. EONI wrote to the Commissioner on 24 October 2019, referring to parts of the Recall of MPs Act 2015 (Recall Petition) Regulations 2016 and advising the Commissioner to consult these Regulations.
58. As its response did not provide answers to any of the questions in the Information Notice, the Commissioner wrote to EONI on 24 October 2019 requiring it to provide the information requested in the Information Notice within 7 days. She stated that if EONI did not comply with the requirements of the Information Notice within this timescale, then the case would be passed to the Commissioner's enforcement solicitors with the view to the commencement of proceedings for contempt of court.
59. As the Commissioner did not receive a response within 7 days, the case was passed to the Commissioner's enforcement solicitors.
60. The Commissioner's solicitors wrote to EONI on 16 December 2019 asking it to respond to the Information Notice by 10 January 2020.
61. The Commissioner's solicitors agreed to give EONI an extension to this deadline and it provided a response on 23 January 2020. Whilst the response provided information about access to the requested information, it did not fully explain EONI's position in relation to whether

it held the information for its own purposes or on behalf of the Clerk to the Crown.

62. The Commissioner's solicitors wrote to EONI on 29 January 2020, again asking it to respond to the questions asked in the Information Notice.
63. EONI provided its submission to the Commissioner on 19 February 2020, 163 days after the Information Notice was issued.
64. The Commissioner reminds EONI that it is the responsibility of a public authority to clearly outline its reasons for refusing to provide information. In this case in particular it was EONI's responsibility to clearly explain the reasons for refusing to comply with parts one and two of the request, both to the complainant at the time of their request and the Commissioner once a complaint had been made.
65. It is not normally necessary to serve an Information Notice on a public authority. The Commissioner would not expect to have to serve another on EONI in the course of any future investigations. However, if such a course of action is necessary and if EONI again does not comply with the Information Notice, the Commissioner will be more readily prepared to deal with the matter as a contempt of court.

Right of appeal

66. 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: 0300 1234504

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

67. 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.
68. 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

Pamela Clements
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