

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 31 May 2022

Public Authority: Executive Office
Address: Castle Buildings
Stormont Estate
Belfast
BT4 3SR

Decision (including any steps ordered)

1. The complainant has requested a review into the role of the Attorney General for Northern Ireland which was produced in 2012. The Executive Office provided some information but withheld the remainder under the exemptions at sections 35(1)(a) and 42 of FOIA.
2. The Commissioner's decision is that the Executive Office was entitled to refuse the request in reliance on section 35(1)(a) of FOIA. No steps are required.

Background

2. The Justice (Northern Ireland) Act 2002 provided for the appointment of an individual to the post of Attorney General for Northern Ireland (AGNI)¹ by the First Minister and deputy First Minister acting jointly. Since 1972 the Attorney General for England and Wales had also acted as AGNI.
3. In 2008 the First Minister and deputy First Minister announced that they had identified John Larkin QC as the person they intended to appoint as AGNI. The First Minister and deputy First Minister asked Mr Larkin to produce a report on the establishment of the office of the AGNI. This report was completed in September 2009 and is publicly

¹ www.attorneygeneralni.gov.uk/index.htm

available on the Northern Ireland Assembly website, along with OFMDFM's response to the report.²

4. Following the devolution of policing and justice powers to the Northern Ireland Assembly in April 2010, Mr Larkin was appointed as AGNI for a term of four years. In addition to the AGNI's statutory role as an independent Law Officer, it was agreed that the AGNI should also act as Chief Legal Adviser to the Northern Ireland Executive, a non-statutory role.
5. In 2012 OFMDFM commissioned Dame Elish Angiolini, former Lord Advocate of Scotland, to carry out a review of the AGNI's role. Dame Elish delivered her report in October 2012.
6. In 2014 Mr Larkin's term was extended for two years, and in December 2015 it was extended for a further three years.³ In May 2019, in the absence of a Northern Ireland Executive, the Northern Ireland Secretary of State reappointed Mr Larkin until 30 June 2020.⁴
7. In January 2020 Mr Larkin, whilst still Attorney General for Northern Ireland, was appointed a temporary High Court judge.⁵
8. On 1 July 2020 Brenda King (who was subsequently awarded a damehood) took up post as the new Attorney General for Northern Ireland. The appointment was initially for one year, with the option of an extension.
9. On 1 July 2021 the Executive Office announced that Dame Brenda's appointment had been extended for one year. The Executive Office also announced that the former Lord Chief Justice Sir John Gillen had been asked to undertake an independent review of the office of AGNI.⁶

² http://archive.niassembly.gov.uk/researchandlibrary/deposited_papers/2010/dp628.pdf

³ <https://www.bbc.co.uk/news/uk-northern-ireland-35096685>

⁴ <https://www.gov.uk/government/news/re-appointment-of-attorney-general-for-northern-ireland?msclkid=6c4d2803cf8b11ecb6cf2ec6236fdfa8>

⁵ <https://www.nijac.gov.uk/news-centre/temporary-high-court-judge-appointment>

⁶ <https://www.executiveoffice-ni.gov.uk/news/extension-term-appointment-attorney-general?msclkid=fd6f73e9cf7f11ecbc78f4ed4384e389>

Request and response

3. On 4 February 2020 the complainant requested the following information from the Executive Office:

"I am writing... to request a full copy of the report into the role of the Attorney General of Northern Ireland carried out by the Rt Hon Dame Elish Angiolini, in or around 2012."

4. The Executive Office responded on 4 March 2020. It disclosed a redacted version of the requested information, citing the exemptions at sections 31(1)(c) (administration of justice), 35(1)(a) (government policy) and 42 (legal professional privilege) of FOIA.
5. The complainant requested an internal review on 23 April 2020. The Executive Office wrote to them on 22 May 2020 advising that it had decided to disclose a small portion of the previously withheld information. However it upheld its refusal to disclose the remainder of the requested information in reliance on the exemptions cited.

Scope of the case

6. The complainant contacted the Commissioner on 18 June 2020 to complain about the way their request for information had been handled. The complainant argued that the Executive Office had failed to demonstrate that the exemptions claimed were justified. The complainant further argued that the public interest lay in favour of disclosure of the withheld information.
7. The Commissioner notes that he issued a decision notice relating to a similar request in 2013.⁷ The Commissioner considers some of the arguments to be relevant in this case. However he wishes to emphasise that he has considered all the circumstances of this case when making a decision.
8. During the course of the Commissioner's investigation the Executive Office disclosed some more of the withheld information to the complainant. At this stage the Executive Office withdrew reliance on the exemption at section 31(1)(c). Therefore the Commissioner's

⁷ https://ico.org.uk/media/action-weve-taken/decision-notice/2013/931250/fs_50497952.pdf issued 17 December 2013.

decision in this case relates solely to the remaining withheld information.

9. The Executive Officer relied on section 35(1)(a) in respect of all of the withheld information. It additionally relied on the exemption at section 42 of FOIA in respect of one piece of information.

Reasons for decision

Section 35(1)(a): formulation or development of government policy

10. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner is of the opinion that the formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy however goes beyond this stage to improving or altering existing policy. This may include monitoring, reviewing or analysing the effects of the policy.
11. The Executive Office set out that at the time the request was submitted (February 2020), it was preparing for the process of appointing a new Attorney General for Northern Ireland. Discussions were being held with the then First Minister and deputy First Minister on their preferred approach. The Executive Office confirmed that the withheld information, in particular opinions and recommendations provided by Dame Elish, was under consideration as part of these discussions.
12. The complainant disputed that the exemption could be engaged for the following reason:

"I do not accept that the concept 'relates to' means that the information is exempt for all time, even when the Executive does not in fact use it for development of public policy for over 10 years, and then commissions a further review to inform public policy."
13. The complainant also argued that the commissioning of a second review of the role meant that the withheld information no longer related to public policy in any meaningful sense.

14. In the previous decision notice referred to at paragraph 9 above, the Commissioner accepted that the exemption at section 35(1)(a) applied to the withheld information, which is also the subject of this request:

“17. Having considered OFMDFM’s arguments the Commissioner is of the view that the withheld information in this case falls more squarely under “development” of government policy, than “formulation” of government policy. This is because the withheld information, ie Dame Elish’s report, was commissioned to review the AGNI’s role, and thus to inform policy discussions surrounding the future development of the role. As the withheld information relates to the development of government policy, the Commissioner is satisfied that section 35(1)(a) is engaged.”

15. Having re-examined the information the Commissioner remains of the opinion that it relates to the development of government policy. The Executive Office confirmed that no decisions had been taken at the time of the complainant’s request (ie February 2020) and the matter was under active consideration. Therefore the Commissioner considers it reasonable to accept that the withheld information formed part of the consideration process at this time.
16. The Commissioner acknowledges the arguments put forward by the complainant. He is mindful of the fact that the withheld information dates from 2012. However he respectfully disagrees with the complainant’s perception that “relates to” means that information will never be disclosed. In the Commissioner’s opinion “relates to” should be interpreted broadly, but it is relevant only to the question of whether the exemption is engaged.
17. The Commissioner is also of the opinion that the second review, which had not been completed at the time the request was made, does not substantially alter the status of the withheld information. The Commissioner’s published guidance⁸ sets out his view that there may be several distinct stages of active policy consideration, with periods in between where policy is more settled.
18. The Commissioner considers this case to be an example of such a scenario, albeit that there was no period where policy was more settled. The withheld information clearly related to the development of government policy when it was produced, and in the

⁸ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

Commissioner's opinion it equally related to the development of government policy at the time of the complainant's request. It is not for the Commissioner to comment on the time taken to develop government policy at this point, since it does not affect the engagement of the exemption.

19. Accordingly the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in respect of the withheld information. Accordingly he has gone on to consider the public interest. Information that is exempt by virtue of section 35(1)(a) may therefore only be withheld if the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest in maintaining the exemption

20. The Executive Office set out that the timing of the request was a crucial argument in favour of maintaining the exemption. At the time of the request, discussions were ongoing as to the appointment or reappointment of the Attorney General, and the review of the role of the Office.
21. In addition there was substantial discussion of a potential conflict of interest, given that Mr Larkin had recently been appointed a temporary High Court judge. The Executive Office maintained that ministers required safe space to consider their approach away from the intense public debate surrounding these issues.
22. The Executive Office's position was therefore that government policy on the future role of the AGNI and the appointment process to be applied when Mr Larkin's term ended in June 2020 was still under consideration. The Executive Office pointed out that Mr Larkin's term had been extended on two occasions (2015 and 2019). No policy changes had been made in 2015, and in 2019 the Secretary of State did not have any powers to change policy.
23. The Executive Office set out that it was "fundamentally important that Ministers have the necessary safe space in which to consider policy options derived from the report, which deals with sensitive and complex areas, in a free and frank manner which requires the confidentiality of the report to be preserved without fear of premature disclosure."
24. In addition, Mr Larkin's term of office was due to end just four months after the complainant submitted their request. The Executive Office argued that ministers were at that time considering options on how best to take this forward. It emphasised that the role of the

AGNI was a complex policy issue, which would require further dialogue and examination before a decision could be taken.

25. The Commissioner considers this to be a "safe space" argument, based on the premise that it is in the public interest for ministers and officials to be able to have a full and open debate away from external scrutiny so as to enable them to reach a reasoned position. Once government has successfully determined an issue and agreed a collective position, the Commissioner's view is that "safe space" arguments will no longer apply.

Public interest in favour of disclosing the withheld information

26. The Executive Office acknowledged the general public interest in information about the role of the AGNI, given the important position the office occupies within the Northern Ireland administration. It recognised that Dame Elish's report had been delivered in 2012, but despite the passage of time there was still significant interest from the public in the matter.
27. It further accepted that disclosure of the withheld information would provide greater transparency and accountability of matters potentially influencing the future development of the office of the AGNI. This may in turn increase public trust and confidence.
28. The complainant provided detailed arguments in favour of disclosure. They argued that the time that had elapsed since Dame Elish's review was sufficient to tip the balance of the public interest firmly in favour of disclosure. The complainant pointed out that in that time, Mr Larkin had been reappointed a number of times, and since the outcome of the internal review, the Executive Office had decided how to move forward, ie by appointing an interim AGNI.
29. The complainant advised the Commissioner that the then First Minister had made public statements to the effect that a reconsideration of the role and remit of the AGNI was contemplated before a permanent appointment could be made. In this context the complainant argued that the public was entitled to know the basis on which the Executive would base its review and judgment. If the role was now to be reviewed, it was of paramount importance to the administration of justice that the public could participate in consultations on the role. Therefore it was necessary for the public to be in possession of all the facts, including understanding why the Executive might not have acted earlier on the review.

30. The complainant also argued that the public had "a right to understand factual matters which led to very public malfunctions of the office, which impacted on the rights of individuals and led to huge taxpayer expense, but were not addressed by new policy overhauling the role during the 10 year period."
31. The complainant suggested that disclosure of the withheld information may inform the public as to the legal basis for actions taken by Mr Larkin during his tenure as AGNI. They submitted that "personal embarrassment of the last AGNI or of the Executive is not a good reason to withhold information from the public".
32. The complainant further maintained that it was important for the public to understand Dame Elish's findings, and whether her recommendations "focused on the need for revised legislation or on the conduct of subsequent AGNIs or both".
33. Finally the complainant set out that the passage of time inevitably meant that government policy-making would no longer be based on Dame Elish's report alone, but on additional, more recent factors.

Balance of the public interest

34. The Commissioner is of the established view that the public interest relating to section 35(1)(a) should focus on protecting the policymaking process. There is no inherent public interest in withholding the information; the public authority must consider the content and sensitivity of the particular information in question. It must also consider the effect its disclosure would have in all the circumstances of the case.
35. In the previous decision notice the Commissioner was of the view that the withheld information contained candid comments and assessment, and was sensitive in the context of the review of the AGNI. Having re-examined the withheld information the Commissioner is satisfied that this remains the case.
36. The Commissioner further considers that the analysis in his previous decision notice remains relevant to the circumstances of this case. In the decision notice the Commissioner appreciated that the role of the AGNI is a matter of particular public importance, since its establishment in 2010 was considered an indication of the political progress made in Northern Ireland. He considered it reasonable that the public should expect to be informed of relevant issues so as to increase public understanding of, as well as public confidence in, the role of the AGNI.

37. The Commissioner also recognises the strength of public interest in informing the public about a key constitutional role and the way it is envisaged that the AGNI should function. The AGNI's statutory independence, along with his role as chief legal adviser to government departments, was and remains a unique situation and it is reasonable to expect that the public should be informed as to the success or otherwise of these arrangements.
38. The Commissioner is mindful that he is required to consider the circumstances at the time the public authority makes a decision regarding the request, as opposed to the time this decision notice is issued. The Executive has relied on "safe space" arguments, and the Commissioner recognises that the importance of a safe space can wax and wane, depending on how fixed the policy is at the time in question.
39. Furthermore the Commissioner is of the opinion that the timing of the complainant's request is a weighty consideration in this case. In some cases the sensitivity of information will decrease with the passage of time, and this is more likely to be the case once policy decisions have been taken.
40. The Commissioner has considered the complainant's arguments regarding the passage of time and the need for the public to be informed as to why a decision had not been taken.
41. The Commissioner agrees that it is crucial for the public to be able to participate in consultations on the role of the AGNI. He notes that the Executive Office has disclosed further information during the course of his investigation. However he is not persuaded that disclosure of the remaining withheld information would have enabled public participation at the time of the request. Nor does he consider that disclosure would inform the public as to why a decision had not been taken after so long.
42. In the Commissioner's opinion the specific circumstances at the time of the request were such that safe space was still justified. Mr Larkin was still in post as AGNI at the time of the request but his term was due to expire in June 2020, four months later, and no plans for his successor had been announced. The last few months of Mr Larkin's term were especially important in that a decision needed to be made as to how he would be replaced, even temporarily (as was the case). The Commissioner accepts that such plans were under active discussion at this time, and safe space was required to protect those discussions.

43. Taking into account the arguments set out above, and bearing in mind the content of the withheld information, the Commissioner accepts that disclosure of the withheld information at the time of the request would have defeated the purpose of safe space and would have made it more difficult for ministers to discuss and agree how to move forward when the incumbent AGNI's term came to an end.
44. Given the constitutional importance of the role of AGNI the Commissioner finds that interfering with this safe space would not serve the public interest, despite the lack of progress in development of the policy in question. Therefore he finds that the public interest in maintaining the exemption at section 35(1)(a) clearly outweighed the legitimate public interest in disclosure at the time of the request.
45. Since the Commissioner's decision is that the Executive Office was entitled to rely on the exemption at section 35(1)(a) in respect of all of the withheld information, he has not gone on to consider section 42 separately.

Right of appeal

46. 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

47. 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.
48. 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

Sarah O'Cathain
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