

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 31 March 2014

Public Authority: Office of the First Minister and deputy First Minister

Address: Castle Buildings
Stormont
Belfast
BT4 3SR

Decision (including any steps ordered)

1. The complainant requested information from the Office of the First Minister and deputy First Minister (OFMDFM). OFMDFM refused the request in reliance on the exemption at section 36(2)(c) of the FOIA. The Commissioner's decision is that section 36(2)(c) is not engaged. The Commissioner therefore requires OFMDFM to disclose the requested information to the complainant.
2. The public authority must take this step within 35 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 FOIA and may be dealt with as a contempt of court.

Request and response

Background

3. The complainant in this case has made three requests for information to OFMDFM. The requests were made on the following dates:
 - 21 May 2012
 - 23 May 2012
 - 10 July 2012
4. This decision notice deals solely with the 23 May request. The complainant has clarified to the Commissioner that he has not complained about the 21 May request because he submitted the 10 July

request to OFMDFM as a revised version of the 21 May request. The complainant subsequently complained to the Commissioner about OFMDFM's handling of the 10 July request and it is dealt with in a second, separate decision notice.¹

The 23 May request

5. On 23 May 2012 the complainant requested the following information from OFMDFM:

"1. How much has OFMDFM spent on Special Advisers since May 2007, broken down by (i) salary; (ii) pension contributions; (iii) expenses; (iv) office costs; and (v) other costs?

2. Since May 2011 how many FOI requests have OFMDFM received?

3. How many are answered within 20 working days?

4. How many are answered after the 20 working days?

5. What is the reason for each late reply?

6. Do the Ministers Special Advisers read each reply before it is read and if so why?

7. Since May 2011 how many written questions has the department received?

8. In relation to Standing Order 20 (B) which states that a written answer 'shall' be answered by the end of ten working days after it is published how many have missed this target?

9. What is the reason for each?

10. Have the Ministers taken any action to abide by the Assembly's target?

11. If a question is answered late do the Ministers send their apologies to each along with an explanation?"

6. On 2 July 2012 OFMDFM responded to the complainant. OFMDFM's response referred to the 23 May request and also to the 21 May request. OFMDFM refused both requests in reliance on the exemption at section 36(2)(c) of the FOIA.
7. The complainant requested an internal review of both requests on 10 July 2012.

¹ Case reference FS50473808

8. The complainant contacted the Commissioner on 15 November 2012 as at that stage he had not received the outcome of the internal review.
9. Following the Commissioner's intervention OFMDFM communicated the outcome of the internal review to the complainant on 3 December 2012. The outcome was that OFMDFM upheld its decision to refuse both requests in reliance on the exemption at section 36(2)(c).

Scope of the case

10. The complainant remained dissatisfied and on 4 December 2012 he asked the Commissioner to make a decision as to whether OFMDFM was entitled to refuse the 23 May request. The complainant also asked the Commissioner to consider the time taken to respond to that request, specifically the internal review.
11. As explained at paragraph 4 above the complainant clarified to the Commissioner that his complaint related only to the 23 May 2012 and not to the 21 May request. Therefore the scope of the case was limited to the 23 May request.

Reasons for decision

Exemption claimed: section 36(2)(c)

12. Section 36(2) provides that –

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act–

- (a) would, or would be likely to, prejudice–*
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) the work of the executive committee of the National Assembly for Wales,*
- (b) would, or would be likely to, inhibit–*
 - (i) the free and frank provision of advice, or*
 - (ii) the free and frank exchange of views for the purposes of deliberation, or*

(c) *would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

13. OFMDFM has refused the 23 May request on the basis of section 36(2)(c). Section 36 can only be engaged by the expression of the reasonable opinion of a qualified person (QP) as described at section 36(5) of the FOIA. Section 36(5)(b) of the FOIA provides that the QP for a Northern Ireland department is the Northern Ireland Minister in charge of that department. Article 3(2) of the Departments (Northern Ireland) Order 1999 provides that:

"3(2) The Office of the First Minister and deputy First Minister shall be in the charge of the First Minister and the deputy First Minister acting jointly."

14. In this case the opinion was given by the First Minister and deputy First Minister, and the Commissioner is satisfied that they were authorised to act jointly as the QP under section 36(5)(b). OFMDFM advised that its departmental information manager provided a submission to the QP on 19 June 2012. The QP responded to the submission on 2 July 2012 and agreed that the proposed response be issued.

15. The Commissioner must next decide whether the QP's opinion was reasonable. The Commissioner has published guidance which sets out his approach:² if the opinion is in accordance with reason and not irrational or absurd, then it is reasonable. It is not reasonable only if it is an opinion that no reasonable person in the QP's position could hold.

16. In considering whether the QP's opinion was reasonable the Commissioner has taken into account the submission to the QP, and the wording of the request itself. The 19 June submission provides some background information on the section 36 exemption, and states that:

"The reasoning for the application of the exemption (including the public interest considerations) is contained within the proposed response to the applicant."

17. Having examined the information provided by OFMDFM the Commissioner's view is that the proposed response referred to in the 19 June submission does not explain how or why the exemption at section 36(2)(c) is engaged in relation to the requested information. The proposed response merely states that the request is being refused under

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[http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom of Information/Detailed specialist guides/section 36 prejudice to effective conduct of public affairs.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx)

section 36(2)(c) and goes on to discuss the public interest considerations. The Commissioner also notes that the requested information was not provided to the QP.

18. A further submission was provided to the QP on 7 August 2012 in order to complete the internal review. Again, the submission provided a summary of the request and invited the QP to approve a pre-prepared draft response. (The submission also explained the requirements of the section 45 Code of Practice in relation to internal reviews. The Commissioner has commented further about the internal review at Other Matters below, as it is not a requirement of Part I of the FOIA.)

19. The Commissioner's guidance on section 36 explains that:

"While it is the qualified person who must give the required opinion, someone else in the authority, eg the authority's freedom of information officer, may carry out the preparatory work leading up to the decision, for example assembling the evidence and summarising the arguments."

20. In this case an OFMDFM official prepared the submission and draft response, which is acceptable, but there is no evidence of any arguments in relation to the engagement of the exemption itself. The Commissioner notes that the refusal notice states that:

"Release of this information under the FOI Act, particularly in its current draft form, would seriously undermine Assembly business, both in relation to the processing of questions raised by Members of the Legislative Assembly, and to the proceedings of the Assembly as a whole."

21. The draft responses contained in the two submissions appear to reflect the conclusions of the public authority, but neither the submissions nor the draft responses provide any explanation as to *how* disclosure of the requested information would undermine Assembly business.

22. OFMDFM expanded on this argument in its letter to the Commissioner dated 5 March 2013. OFMDFM advised the Commissioner that the requests were, in the main, taken from a list of unanswered Assembly Questions (AQs) published on the Northern Ireland Assembly website. The wording of the complainant's request dated 21 May 2012 was identical to a number of AQs. OFMDFM stressed that ministerial agreement had not been reached on the AQs in question at the time of the request, and that:

"...publishing material as information in an FOI response based on draft material for the consideration of Ministers before they report it to the Assembly, directly serves to undermine the Assembly. This cannot be acceptable."

23. In relation to the level of prejudice claimed, OFMDFM argued that:

"[the complainant] was effectively challenging the Assembly's privileged access to information process, by attempting to elicit a FOI response before an AQ response was issued, this explains why the more exacting statement that prejudice 'would occur' was used".

24. Again the Commissioner notes that there is no discussion of the level of prejudice in either submission to the QP, or any of OFMDFM's correspondence with the complainant. OFMDFM argued to the Commissioner that the key factor in determining that prejudice *would* occur was the fact that the complainant had used unanswered AQs as the basis of his requests.
25. OFMDFM accepted that it may not have been the complainant's intention to circumvent the Assembly's processes and procedures, but maintained that this was the effect of the request. OFMDFM was of the strong view that it would be disrespectful to Ministers if officials attempted to answer questions submitted as formal AQs before MLAs had received a reply.
26. The 19 June submission stated that the questions in the request of 23 May 2012 and those in the request of 21 May 2012 were *"on a broadly similar theme"* which it clarified in the refusal notice to mean that all the questions were based on AQs. The Commissioner accepts that the complainant's request of 21 May 2012 did copy the wording of a number of unanswered AQs. However this request was not the subject of a complaint to the Commissioner. The only request to be considered by the Commissioner in this decision notice is that dated 23 May 2012.
27. The Commissioner has carefully considered the wording of the 23 May request and finds that the information requested is entirely separate from that requested in the 21 May request. The 21 May request comprised 20 questions on a range of themes including ministerial drivers, the Diamond Jubilee and child poverty. The 23 May request comprised 11 questions, of which one was on a similar topic: special advisers. The other 10 questions related to FOIA requests and AQs. Therefore the Commissioner does not agree that the 23 May request is on a similar theme to that of the 21 May request.
28. It appears to the Commissioner that OFMDFM's approach to the 23 May request was influenced by the fact that it was made shortly after another request from the same individual. OFMDFM ought to have considered the 23 May request on its own merits, but failed to do so.
29. OFMDFM advised the Commissioner that the first question from the 23 May request was an AQ, and directed the Commissioner to the Assembly's website. However the AQ referred to by OFMDFM was tabled

on 16 June 2011 and answered on 25 July 2011, almost a year before the complainant's request was made. Therefore the answered AQ provided some, but not all, of the requested information. The refusal notice of 2 July 2012 referred to "draft responses still to be cleared by Ministers", but the Commissioner notes that very little of the requested information was the subject of an AQ, unanswered or otherwise. The Commissioner also notes that OFMDFM did not refer the complainant to the published answer to the AQ in question.

30. Similarly, OFMDFM advised the Commissioner that the information requested in parts 2-4 of the request was available on OFMDFM's departmental website. However the complainant's request was for information up to the time of the request (ie 23 May 2012), whereas the most recent published information at the time of the request related to 2011. The Commissioner notes that information relating to 2012 was published on OFMDFM's website in July 2012, but the complainant was not advised of this.
31. In light of the above, the Commissioner does not consider OFMDFM's arguments in relation to AQs to be relevant to this case. Given that all the arguments put forward by OFMDFM, both in its submissions to the QP, and to the Commissioner, concern the relationship between the AQs and the requests made under the FOIA, the Commissioner is not satisfied that the opinion given by the QP was a reasonable opinion. The substance of the requests made under the FOIA, and the relevant information held, was not addressed. This means that the exemption at section 36(2)(c) cannot be engaged. There is no requirement in these circumstances for the Commissioner to consider the public interest.

Procedural requirements

Section 17: refusal notice

32. Section 17(1) of the FOIA states that if a public authority wishes to rely on any exemption it must issue a refusal notice promptly, and in any event no later than twenty working days after the date of receipt of the request. The decision notice must state which exemption applies, and why, and contain details of the public interest test in relation to qualified exemptions.
33. In this case the refusal notice was issued just outside the time for compliance, and stated that OFMDFM was refusing the request under section 36(2)(c) of the FOIA. However the refusal notice did not explain how this exemption was engaged, and made no mention of the QP's opinion. The Commissioner therefore finds that the refusal notice did not meet the requirements of section 17 of the FOIA. The Commissioner has found above that OFMDFM was not entitled to rely on section 36(2)(c),

but the section 17 breach relates to the timing and quality of the refusal notice rather than the validity of the refusal.

Other matters

Internal review

34. The Code of Practice issued under section 45 of the FOIA provides guidance on how to conduct an internal review. Paragraphs 39-40 say that:

"39. The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.

40. Where the complaint concerns a request for information under the general rights of access, the review should be undertaken by someone senior to the person who took the original decision, where this is reasonably practicable. The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

35. The Commissioner appreciates that in some cases, particularly where section 36 is relied on, it will not be possible or practical for a senior person to conduct the internal review. However the QP should still be able to reconsider their opinion, taking into account any arguments put forward by the complainant, and it should always be possible to reconsider the public interest.
36. In this case the internal review submission to the QP did not provide any information as to how the handling of this request had been or should be reconsidered. The Commissioner has seen insufficient evidence to satisfy him that OFMDFM did in fact undertake a "full re-evaluation of the case".
37. The Commissioner is of the view that the internal review provides a valuable opportunity for a public authority to check that it has handled a request properly, and to correct any procedural errors. If OFMDFM had conducted a thorough internal review it may have identified the deficiencies noted by the Commissioner in his analysis above, particularly with regard to engaging the exemption claimed.

38. The complainant argued to the Commissioner that the time taken to complete the internal review was excessive. The FOIA does not prescribe a time limit for internal reviews, but the Commissioner's established view is that internal reviews should usually take no longer than 20 working days, and in exceptional cases no longer than 40 working days. The Commissioner also notes paragraph 42 of the Code which recommends that:

"42. Authorities should set their own target times for dealing with complaints; these should be reasonable, and subject to regular review. Each public authority should publish its target times for determining complaints and information as to how successful it is with meeting those targets."

39. In this case the complainant requested an internal review on 10 July 2012. A further submission was provided to the QP on 7 August 2012 in order to complete the internal review. However the outcome of the internal review was not communicated to the complainant until 3 December 2012, some five months after the review was requested, and only after the Commissioner's intervention.
40. The Commissioner is disappointed that it took so long for OFMDFM to complete the internal review, particularly as in the Commissioner's view the review itself fell short of the recommendations set out in the Code. Section 48 of the FOIA provides that the Commissioner may issue a "practice recommendation" to a public authority if he considers that the authority is failing to conform to the recommendations set out in the Code. The Commissioner therefore expects that in the future, where OFMDFM offers an internal review, it will be conducted – and recorded – in such a manner to demonstrate compliance with the Code.

Right of appeal

41. 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: 0116 249 4253
Email: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.
43. 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

**Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Annex 1

Request to OFMDFM dated 21 May 2012

1. To detail the travel and subsistence costs incurred by the Department for the First Minister and deputy First Minister on trips outside Northern Ireland in each year of the 2007-11 mandate, broken down by the costs incurred by (i) the First Minister; (ii) the deputy First Minister; (iii) special advisers; and (iv) support staff?
2. In relation to the First Minister and deputy First Minister (i) to detail the arrangements relating to the recruitment, status and payment of their ministerial drivers; (ii) whether the arrangements differ from those that were in place prior to 1 April 2011; and (iii) if so, how the arrangements differ?
3. In relation to the First Minister and deputy First Minister to detail (i) how many traffic accidents the deputy First Minister's driver has been involved in since May 2007; (ii) how many of these were his responsibility; (iii) how many resulted in prosecution; and (iv) how much has been paid in compensation to third parties?
4. In relation to the First Minister and deputy First Minister (i) whether they were consulted on, and consented to, the decision taken by the Department of Finance and Personnel on 18 July 2011 to increase the upper limit of the Band B salary scale for Special Advisers to £90,000; (ii) when they became aware of the planned increase; and (iii) what input they had to the decision?
5. In relation to the First Minister and deputy First Minister to detail (i) the total cost of their visit to the USA in September/October 2011 and (ii) who accompanied them on their visit?
6. How does OFMDFM determine which nomination form for an honour to submit to the Cabinet Office when a person who resides outside Northern Ireland submits a form to their office?
7. In relation to the First Minister and deputy First Minister to detail the results of the market research that was carried out by Colliers International on the proposed Peace Building and Conflict Resolution Centre at the Maze/Long Kesh site?
8. In relation to the First Minister and deputy First Minister whether the Executive is currently making any plans to mark the occasion of Her Majesty's Diamond Jubilee, in consultation with the Department for Culture, Media and Sports?

9. What funding is available for community groups to celebrate the Queen's Diamond Jubilee?

10. In relation to the First Minister and deputy First Minister what plans they have to mark Her Majesty's Diamond Jubilee by way of a gift on behalf of her subjects in this part of the UK?

11. Please detail the number of children in the (i) Upper Bann; (ii) Banbridge; (iii) Lurgan; and (iv) Portadown areas who were deemed to be living in (a) relative poverty; (b) mixed poverty; and (c) absolute poverty in each of the last five years?

12. Has the First Minister and/or deputy First Minister have had any discussions with the Secretary of State to ensure that the Irish Government is invited to play a central role in any discussions to find a comprehensive mechanism for dealing with the past?

13. In relation to the First Minister and deputy First Minister (i) how many children have been living in poverty in the last three years; and (ii) for their assessment of the potential impact of the Welfare Reform Bill on the target of eradicating child poverty by 2020?

14. Will the First Minister and deputy First Minister give an assurance that their Department has given all possible help to [family name] in their humanitarian quest to identify the murderer of [named individual]?

15. To ask the First Minister and deputy First Minister whether they will assist the relatives of victims by calling on all persons in elected office who have information on terrorist-related crimes to report this information?

16. In relation to the First Minister and deputy First Minister (i) whether the serving Commissioners of the Commission for Victims and Survivors will be offered a four year extension, which is an option within their current contracts; and (ii) if not, what is the future of the Commission?

17. Will the First Minister and deputy First Minister clarify (i) whether officials were asked to investigate and report urgently on the issue of the Crossmaglen republican monument; (ii) by what date; and (iii) whether a report has been received and if it will be published.

18. Will OFMDFM detail the process, including Ministerial involvement, in the drafting of the Civil Service's submission to the review of the operation of the Freedom of Information Act by the Westminster Justice Committee?

19. In relation to the First Minister and deputy First Minister how much has

been paid to photographers, or other service providers, for the provision of photographic services to the Executive for work outside Northern Ireland since May 2007?

20. In light of the Peter Hain controversy, whether the Attorney General still enjoys the confidence of both the First and Deputy First Ministers?