

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 21 September 2006**

**Public Authority:** Department of Education for Northern Ireland  
**Address:** Rathgael House  
43 Balloo Road  
Bangor  
BT19 7PR

#### Summary Decision

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1. The complainant requested information from the Department of Education for Northern Ireland (the Department) relating to the financial situation of the South Eastern Education and Library Board. The Department provided some of the information to the complainant, withholding other information in reliance on the exemption under section 22 of the Act (intended for future publication).
2. The Commissioner's decision is that the withheld information, consisting of a KPMG report dated 28 February 2006, was exempt but should nevertheless have been disclosed in the public interest, and he has therefore ordered the Department to release this information to the complainant.

#### The Commissioner's Role

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3. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

#### The Request

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4. The complainant has advised that on 7 April 2006 she requested the following information from the Department in accordance with section 1 of the Act:

"Could you please send me copies of all departmental letters, minutes of meetings, notes, reports and any other papers from October 28<sup>th</sup> to the present day relating to accounting and overspend by the Belfast Education and Library Board and South Eastern Education and Library Board?"

5. The Department responded on 10 May 2006, providing some of the information requested. The Department advised that a number of documents were being "held" (ie not being provided) because they had not yet been agreed, and that these documents would be provided when agreed by the appropriate parties.
6. The complainant contacted the Department on 12 May 2006 to clarify whether a KPMG report was one of the documents being withheld. The Department advised the Complainant on 12 May that the withheld documents consisted of minutes of two meetings with education and library boards. The complainant reminded the Department that she had requested reports on 7 April 2006, and requested that she be provided with the KPMG report.
7. KPMG consultants were engaged by the South Eastern Education and Library Board (the SEELB) to produce a review of financial systems and costs within the SEELB. This followed a statutory inquiry conducted in 2004, and resulted from financial difficulties experienced when the SEELB overspent its budget by £6.1m in 2003-2004, and further by £6.2m in 2004-2005. The review is currently ongoing, and is scheduled to be completed in September or October 2006.
8. The Department treated the complainant's email of 12 May 2006 as a fresh request for information, and issued a refusal notice on 24 May 2006. The Department advised the complainant that the KPMG report was being withheld under section 22 of the Act (information intended for future publication), as the SEELB had confirmed that this report would be published in September or October 2006. The Department argued that, while it recognised the need to be open, it considered it reasonable to withhold the report until the intended date of publication.
9. The complainant was not satisfied with this response, and requested an internal review on 29 May 2006. The Department conducted a review, and advised the complainant on 19 June 2006 that it upheld the original decision to withhold the information under section 22 of the Act. The Department acknowledged the significant public interest in the information, but felt that releasing the report at this stage would inhibit the SEELB in its efforts to carry out its financial responsibilities effectively.

## Relevant statutory obligations

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10. **Section 1(1)** provides that:
  - (1) Any person making a request for information to a public authority is entitled
    - (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
    - (b) if that is the case, to have that information communicated to him.

11. **Section 22** provides that:
- (1) Information is exempt information if-
    - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
    - (b) the information was already held with a view to such publication at the time when the request for information was made, and
    - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

## The Investigation

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### Scope of the case

12. On 20 June 2006 the complainant contacted the Commissioner to complain about the Department's reliance on the section 22 exemption. The complainant argued that the SEELB had been having severe financial problems for several years, and that this meant there was a real and urgent need for the public to be kept well-informed.
13. Although not formally raised by the complainant the Commissioner also identified a number of areas of concern relating to the way the Department handled the complainant's request.

### Chronology of the case

14. The Commissioner contacted the Department on 3 July 2006 to advise them of the complaint. The Commissioner requested sight of the withheld information, along with details of the Department's reasoning in applying the section 22 exemption.
15. On 25 July 2006 the Department provided the Commissioner with a document titled "Preliminary Report" dated 6 February 2006, produced by KPMG consultants. The Department confirmed that the report belonged to the SEELB but had been provided to the Department as the primary sponsor organisation.
16. The Department confirmed its view that the information contained in the report ought to be published. However, it asserted that the report needed to be published accompanied by the SEELB's response to the report. The planned date for the SEELB to publish its response was some time in October, therefore the Department felt that disclosure of the report should be delayed until this time. The Department asserted that publication of the KPMG report would lead to its publication in the local media, which the Department argued would be highly damaging to the conduct of public affairs and to the delivery of public services.

17. The Commissioner wrote to the Department on 1 August 2006, asking it to clarify a number of issues. Firstly the Commissioner asked whether or not the “held” minutes referred to at paragraph 5 above had now been provided to the complainant. The Commissioner reminded the Department that it was obliged either to provide the minutes, or provide a refusal notice indicating which exemption it intended to rely upon.
18. The Commissioner asked the Department to clarify whether the KPMG report was actually held at the time of the complainant’s request of 7 April 2006, and if so, why it was not referred to in the Department’s response of 10 May 2006. The Commissioner further requested confirmation that the information in question was intended for publication, and that this intention had existed at the time of the complainant’s request.
19. The Commissioner also asked the Department to confirm whether all the information in the report was intended for publication. The Commissioner noted that the report stated that it was the result of 5 days’ work, and did not form a comprehensive analysis of the issues. The Commissioner acknowledged the Department’s assertion that SEELB had committed to publishing KPMG’s findings but required clarification as to whether this equated to an intention to publish all the information in the preliminary report.
20. Finally, the Commissioner noted the media interest in the SEELB’s financial situation, including a number of articles in local newspapers, and asked the Department whether any of the information in the report had been made public in any way.
21. The Department responded to the Commissioner on 10 August 2006. With regard to the withheld minutes, the Department indicated that one document was now agreed and would be provided to the complainant, while the other was awaiting clearance and would be provided after this was agreed. The Department advised the Commissioner that it would ensure the correct exemption was applied in future.
22. At this stage of the investigation the Department advised the Commissioner that it held a further KPMG report at the time of the complainant’s request. The Department provided the Commissioner with a copy of this additional information, a progress report dated 28 February 2006. The Department advised that the SEELB intended to publish the information contained in both reports in October 2006, and reiterated its view that it would be inappropriate to release the information at this stage.
23. With regard to the public interest test, the Department advised the Commissioner that KPMG’s work with the SEELB was still in progress. The Department emphasised that the consultants relied on the co-operation and assistance of Board officers, and argued that staff should have an opportunity to address the consultants’ findings before publication of the report. The Department argued that in the absence of an opportunity for staff to respond, the consultants’ final report could be “biased and flawed”.

24. The Department also advised the Commissioner that the Department had appointed commissioners to take over the SEELB board members' decision making functions in July 2006. The Department advised that these commissioners needed to be able to consider and evaluate KPMG's findings to inform their decision making.
25. In response to the Department's letter of 10 August 2006, the Commissioner asked the Department to explain why it had not provided the 28 February progress report to the Commissioner at the beginning of his investigation, since it was held at the time of the complainant's request. The Commissioner also asked the Department to clarify whether its arguments for withholding the preliminary report also applied to the progress report. The Commissioner also asked the Department to confirm whether all the information in the two reports was intended for publication. Finally, the Commissioner asked the Department to explain how disclosure of the information at the time of the complainant's request would hinder KPMG in completing their work.
26. The Department explained to the Commissioner on 24 August 2006 that its failure to provide the progress report was the result of an administrative error. The Department confirmed that its deliberations regarding the section 22 exemption and the public interest arguments initially related to the preliminary report, but were equally applicable to the progress report.
27. The Commissioner again sought to confirm whether all the information contained in the two reports was intended for publication, as the section 22 exemption applies to information, not documents. The Department quoted the Chief Executive of the SEELB as stating that the content of the reports in question would be included in the published report.

## Analysis

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### Procedural breaches

28. The Commissioner notes that in addition to the information provided to the complainant in response to her request, the Department did in fact hold two sets of minutes, and two KMPG reports at the time of the request. Although the Department withheld all four pieces of information from the complainant it did not explain what information was being withheld, nor did it state its reliance on any exemption under the Act.
29. Sections 1 and 2 of the Act state that when a public authority receives a request for information, it is obliged to provide the information to the requester unless any of the exemptions in the Act apply. If the public authority wishes to withhold information in reliance on an exemption, the authority is required under section 17 to provide a refusal notice to the requester. This notice must state that information is being withheld in

- reliance on an exemption, and explain why the exemption applies to the particular information.
30. The Department's letter of 10 May advised the complainant that a number of documents were being "held" as the relevant parties had not agreed their content. The Department did not refer to the KPMG reports in this letter, nor did it provide any explanation as to why the reports were being withheld. The Department did not state whether any exemption had been applied to any of the withheld information, as required by the Act.
  31. The Commissioner is further satisfied that the Department acted incorrectly in treating the complainant's request for clarification of 12 May as a fresh request for information. The complainant's email related to the Department's response to her request of 7 April, and did not request any new information. The Department wrongly provided a refusal notice on 24 May in response to the request for clarification, rather than providing such clarification. This refusal notice referred to "a report" and did not advise the complainant that the Department was seeking to withhold two reports. The Department did not provide sufficient explanation of its application of the section 22 exemption, nor did it provide details of its public interest deliberations. The Department did not provide the complainant with any further details of its deliberations as a result of its internal review.
  32. For the reasons set out above, the Commissioner finds that the Department breached sections 1 and 17 of the Act in that it did not provide an appropriate response to the complainant's request of 7 April, and it did not provide an adequate refusal notice in respect of the withheld information. The Department wrongly treated the complainant's email of 12 as a fresh request for information, when it ought to have treated the email as clarification and a reminder relating to the original request.

## Exemptions

33. The issue in this case for the Commissioner to determine is whether the Department acted correctly in applying the section 22 exemption to the preliminary report dated 6 February and the progress report dated 28 February.
34. For this exemption to be engaged, the Commissioner first needs to be satisfied that the information is held with the intention of being published, whether by the public authority or by any other person. Secondly, section 22 requires that this intention must have existed at the time of the request, and thirdly, that it is reasonable in all the circumstances that the information should be withheld from disclosure until the intended date of publication. Section 22 is a qualified exemption, so if the exemption itself is engaged, the public authority then needs to apply the public interest test to decide whether the public interest in disclosing the information is outweighed by the public interest in withholding the information until the intended date of publication.



35. The Department advised the complainant, and subsequently confirmed to the Commissioner, that the SEELB intended to publish KPMG's findings in relation to their work in September or October 2006, and that this intention had existed at the time of the complainant's request. The Department was unable to provide evidence of this point, but having enquired further into this issue the Commissioner is satisfied that the intention to publish the information was held by the SEELB at the time of the complainant's request.
36. The Commissioner asked the Department to clarify how it considered that it was reasonable in all the circumstances for the information to be withheld until September or October 2006. The Department did not address this point separately from its public interest considerations, but did advise the Commissioner that in its view premature disclosure of the information in question, namely the two reports, would damage the consultants' ability to complete their work. The Department felt that this in turn could lead to difficult decisions, which would be informed by the consultants' findings, not being made. In reaching this decision the Department drew heavily on the fact that the SEELB's financial situation was a matter of public debate, and the Commissioner notes that this issue was the subject of extensive media comment. In this instance the Commissioner is satisfied that the decision to withhold the information from premature publication was reasonable, and the section 22 exemption is therefore engaged.

### **Public Interest Test**

37. As indicated at paragraph 24 above, the public interest test required the Department to consider whether in all the circumstances of this particular case, the public interest in maintaining the exemption outweighed the public interest in disclosing the information.
38. The Department confirmed to the Commissioner that it was aware of the requirements of the public interest test in relation to the section 22 exemption. The Department considered that there was a strong public interest in disclosing the information at the appropriate juncture, but that the greater public interest lay in waiting until publication of the report could be accompanied by the SEELB's response and action plan.
39. The Department advised the Commissioner that if the information were to be disclosed before this time, it would undoubtedly be published in the local media at a time when the Department was asking SEELB commissioners and senior officers to reach agreement on actions to be taken to address the SEELB's financial problems. The Department felt that disclosure could lead to staff not co-operating with the consultants, which could compromise the quality of the final report. This in turn would have a detrimental effect on the commissioners' ability to reach informed decisions.
40. The Commissioner notes the Department's concerns, but does not accept that publication of the KPMG reports in April 2006 would have prevented the SEELB from making decisions on what is a key issue of financial

management and accountability. Staff are required to co-operate with the consultants as part of their employment with the SEELB, and it is difficult to see how staff would withdraw this co-operation on account of two reports being published ahead of schedule.

41. The Commissioner recognises that section 22 of the Act aims to protect information from premature disclosure when this would not be in the public interest. The Commissioner is mindful that there may be sound reasons why an authority might need to follow its original publication schedule, for example when a public authority is under a duty to present information to Parliament at a certain time. The Commissioner also recognises that public authorities often need to plan and manage the release of information into the public domain which may lead to an increase in enquiries or demand for services.
42. The Commissioner is also mindful of the fact that the financial problems of the SEELB have attracted a considerable amount of media coverage. The Commissioner notes that these issues have been the subject of considerable public speculation and comment during much of the past three years. The Commissioner recognises that there is a public interest in informing the public about issues of financial management and accountability in public authorities. However, the Commissioner is aware that what interests the public is not necessarily the same as that which is in the public interest. The Commissioner is mindful that the SEELB is required to make difficult decisions regarding its finances, and accepts that these decisions may be made more difficult if they are preceded by publication of the reports.
43. However, the Commissioner is of the view that potential impact of media interest in an issue is not in itself a valid reason to withhold information which would inform the public about a matter of such importance as the financial situation of an education and library board. The fact that the SEELB is required to take decisions regarding its finances should not be unduly affected by the disclosure of the KPMG reports. Any information which is placed in the public domain may be published in the media, and it is important not to deny the public access to information simply because it will be reported and commented on in the public domain.
44. The Commissioner notes the Department's argument that commissioners were appointed to replace SEELB members in July 2006, but the complainant's request was made in April 2006, and this does not affect whether the information ought to have been released some three months earlier.
45. The Commissioner notes that there is a substantial body of information relating to the SEELB's financial situation already in the public domain. Previous reports relating to the SEELB have been made publicly available, including the statutory inquiry in 2004. In light of this the Commissioner is mindful of the continuing public interest in the SEELB's financial situation, which has previously been met by disclosure of other information. However, it is arguable that the public needs to be kept up to date with



developments relating to key issues, and the information contained in the reports of 6 and 28 February 2006 provide an indication of the progress made by KPMG at that time.

46. In light of the above, the Commissioner is of the view that there are strong competing public interest arguments both for and against disclosure of the two reports at the time of the complainant's request. The Commissioner is mindful that there is a presumption of openness running through the Act, and if the public interest test is evenly balanced, the public interest favours disclosure. The Commissioner is not satisfied that the public interest in maintaining the exemption outweighed the public interest in disclosing the report at the time of the complainant's request. Therefore the Commissioner is satisfied that the Department breached section 1(1) of the Act in that failed to provide the requested information to the complainant at the time of her request.

## The Decision

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47. The Commissioner's decision is that the Department did not deal with the request for information in accordance with the Act in that it did not comply with section 1(1) of the Act in response to the complainant's request of 7 April.
48. The Commissioner is satisfied that the exemption under section 22 of the Act is engaged, but that the public interest lay in disclosing the information to the complainant.
49. The Commissioner is also satisfied that the Department breached section 17 of the Act in that it did not provide an adequate refusal notice to the complainant in response to her request.

## Steps Required

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50. The Commissioner requires that the Department shall, within 35 days of the date of this notice, provide the KPMG report dated 28 February 2006 to the complainant.

## Right of Appeal

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52. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

**Dated the 21st day of September 2006**

**Signed .....**

**Graham Smith  
Deputy Commissioner**

**Information Commissioner's Office  
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Water Lane  
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Cheshire  
SK9 5AF**