

## **Freedom of Information Act 2000 (FOIA)**

### **Decision Notice**

**Date:** 21 January 2013

**Public Authority:** Department of Finance and Personnel for Northern Ireland

**Address:** Rosepark House  
Upper Newtownards Road  
Belfast  
BT4 3NR

#### **Decision (including any steps ordered)**

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1. The complainant requested information relating to an increase in the maximum salary for some special advisers within Northern Ireland government departments. The Department of Finance and Personnel claimed that it did not hold some information, and the information it did hold was exempt under sections 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOIA. The Commissioner's decision is that the Department was correct to say that it did not hold some of the requested information. In addition, although the exemptions are engaged, the public interest in maintaining the exemptions does not outweigh the public interest in disclosure. Therefore the Commissioner requires the Department to disclose the information that it holds.
2. The Department 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.

#### **Background to request**

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3. Special advisers are employed as civil servants except that the merit principle of appointment is waived and they may act in a political capacity within defined limits.
4. In July 2011 the Department amended the salary band for "Band B" special advisers within Northern Ireland government departments. The

minimum salary was unchanged at £57,300 but the maximum salary was increased from £82,531 to £90,000.

## Request and response

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5. On 22 August 2011, the complainant requested the following information from the Department (numbers added by the Commissioner for reference):

*"1. Did any person engaged in the reviewing of the salary bands for Special Advisers declare a personal interest/connection with any of those who might benefit from the increase in the Pay Band B scale?"*

*2. Did any person within the DFP declare a personal interest/connection with any person who might benefit from the increase in the Pay Band B scale?"*

*3. Has DFP instituted any probe to establish if any official in the Department should have declared a personal interest/connection with any of those who might benefit from the increase in the Pay Band B scale?"*

*4. Who initiated the review of the Pay Band B and Pay Band A scales?"*

*5. On what basis did this official(s) reason that it was necessary to review the scales of salary paid to Special Advisers?"*

*6. State reasons given/documentated, as justification for specifically reviewing salaries paid to Special Advisers?"*

*7. How many officials were involved in the exercise to review the salary scales of Special Advisers?"*

*8. Who approved/signed off on the decision/recommendation to the Minister to increase the Pay Band B scale?"*

6. The Department acknowledged receipt of the request on 23 August 2011. The complainant contacted the Department on 27 September 2011 to ask when he would receive a response to the request, and if the Department was refusing his request. The Department replied on 30 September:

*"I am afraid that at this stage I can only advise that I am unable to say when the response will be forthcoming."*

7. The complainant contacted the Commissioner to complain that the Department had failed to respond to his request. Following the Commissioner's intervention the Department issued a response to the complainant on 21 February 2012.
8. The Department advised the complainant that it did not hold information relevant to parts 1-3 and 7-8 of the request. The Department advised that relevant information was held in relation to parts 4-6 of the request but that this was exempt under sections 36(2)(b)(i) and (ii), 36(2)(c) and section 42 of the FOIA.
9. The complainant requested an internal review on 12 March 2012, and the Department responded on 13 April 2012. Following the internal review the Department upheld its decision.

### **Scope of the case**

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10. The complainant wrote to the Commissioner on 19 April 2012. The complainant disagreed with the Department's decision to refuse his request and asked the Commissioner to investigate.
11. During the course of the Commissioner's investigation the Department withdrew its reliance on section 42. The Department maintained that all of the withheld information was exempt under sections 36(2)(b)(i) and (ii), and section 36(2)(c) of the FOIA.
12. The Department has confirmed to the complainant that the withheld information comprises two file notes compiled by senior officials. The files notes contain details of conversations involving the Minister for Finance and Personnel, or private office officials, and subsequent actions. One document is dated 26 May 2011 and the other 14 July 2011.

### **Reasons for decision**

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#### **Information not held**

13. The complainant did not accept the Department's explanation that it did not hold information relevant to parts 1-3 and 7-8 of the request. The Commissioner must be careful not to disclose any of the withheld information via this decision notice, but he considers that the nature and content of the withheld information explain why the Department does not hold information relevant to parts 1-3 and 7-8 of the request.

## **Section 36: prejudice to the effective conduct of public affairs**

14. The relevant parts of section 36(2) state 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-*

*[...]*

*(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."*

15. Section 36(5) sets out who may act as the qualified person in relation to a public authority. Section 36(5)(b) provides that the qualified person for a Northern Ireland government department is the Northern Ireland Minister in charge of that department.

16. In this case the relevant opinion was given by Sammy Wilson MP MLA, Minister of Finance and Personnel. The Department has provided the Commissioner with a copy of a submission to the Minister dated 26 September 2011 in which the opinion of the qualified person was sought. The Minister provided his opinion on 27 September 2011. The Commissioner is satisfied that the Minister was the authorised qualified person in this case.

17. In determining whether these exemptions are engaged the Commissioner must next decide whether the qualified person's opinion was reasonable. The Commissioner has published guidance which sets out his approach<sup>1</sup>: if the opinion is in accordance with reason and not irrational or absurd, then it is reasonable. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold.

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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)

18. The Department told the Commissioner that "*the principle of section 36(2)(b)(i) and (ii) can be applied as an overarching consideration*". The Commissioner has considered sections 36(2)(b)(i) and (ii) together, and has then gone on to consider section 36(2)(c).

*Sections 36(2)(b)(i) and (ii)*

19. The Department's submission to the qualified person set out the argument that disclosure of the withheld information may lead to less candid and robust discussions, particularly in relation to pay of senior civil servants and special advisers. The Department was of the view that the knowledge that future engagement between officials and Ministers noted for the record may be released would inhibit both parties' ability to deliberate, offer advice freely and frankly and express themselves open, honestly and completely.
20. The Commissioner notes that the withheld information comprises records of conversations between senior officials and the Minister (and his private office). Without disclosing the substance of the withheld information the Commissioner can say that the information comprises individuals' opinions and advice in relation to the issue of increasing special advisers' pay.
21. The Commissioner also notes that the Minister who acted as the qualified person was also the Minister who made the decision to increase the maximum salary for special advisers. Therefore the Commissioner accepts that the qualified person would obviously have had detailed knowledge of relevant issues. With this in mind, and having inspected the withheld information, the Commissioner considers it reasonable for the qualified person to form the opinion that disclosure of the withheld information would engage the exemption at sections 36(2)(b)(i) and (ii). However the Commissioner considers that the lower level of inhibition, ie "*would be likely to*", should apply as he does not consider that sufficient evidence has been provided in order to engage the higher level of "*would*".

*Section 36(2)(c)*

22. The submission to the qualified person argued that the ability to freely and frankly engage with Ministers and other officials, and to record that engagement completely for the record, would be undermined by the prospect of disclosure. This would consequently inhibit the openness and quality of engagement and in turn affecting the quality of decision-making, prejudicing the Department's ability to meet its wider, departmental objectives.

23. The Department also argued to the complainant that disclosure of the withheld information could prejudice the Department's ability to defend current and potential legal action arising from the current pay system or relating to any future pay and grading structure. Disclosure could also damage the Department's ability effectively to negotiate with trades unions on the outcome of the pay and grading review, thereby prejudicing the effective conduct of public affairs.
24. Again, having regard to the withheld information and the qualified person's knowledge of the issues, the Commissioner accepts as reasonable the qualified person's opinion that section 36(2)(c) is also engaged. Similarly the Commissioner is of the view that the lower level of prejudice should be applied.

*Public interest test*

25. The Department provided the complainant with very little explanation of its public interest considerations, but did provide the Commissioner with some further detail. The Department combined its arguments in relation to all the subsections of section 36 claimed. By way of good practice the Commissioner would remind the Department that public authorities are required to consider the public interest fully in respect of each exemption (including subsections) claimed. In this case the Commissioner has agreed to consider the public interest arguments considered as a whole as the arguments are closely linked.
26. The Commissioner has stressed to the Department that he can only make his decision based on the information provided to him by that public authority. It is not for the Commissioner to construct arguments as to why information ought not to be disclosed, nor should the Commissioner make assumptions as to arguments that are not put forward by the authority.

*Public interest arguments in favour of disclosure*

27. The Department identified the following arguments in favour of disclosing the withheld information:
  - the general right of access to information;
  - the public interest in how Departmental risks are managed;
  - the public interest in the accountability and transparency of public spending; and
  - showing compliance with the spirit of the FOIA by disclosing information held by the Department.
28. The Commissioner considers that there is a legitimate public interest in the public being informed as to the remuneration of special advisers in

Northern Ireland. The employment of special advisers has been the subject of significant public debate, particularly focused on the background of the advisers. The Commissioner notes that special advisers are political appointments and not subject to the merit principle and are able to earn up to £90,000 per year, which is well above the average salary in Northern Ireland. In addition special advisers (unlike permanent civil servants) operate from a party political viewpoint, rather than the position of political neutrality held by the traditional civil service.

29. The Commissioner also considers that there is a strong public interest in the public being informed as to why this specific decision was taken in the current financial climate, ie increasing the maximum salary for one particular group of special advisers by more than 10% in the context of a pay freeze among the wider civil service. At the time of the request the state of the public finances and issues about where savings should be made was the subject of significant public debate and there is a particularly strong public interest in transparency about the type of spending linked to the request. As other areas of public spending reduce the public will expect significant transparency about large increases in salary bands of this type.

*Public interest arguments in favour of maintaining the exemptions*

30. When assessing the public interest the Commissioner has given due consideration to protecting what is inherent in these exemptions. With regard to section 36(2)(b)(i) and (ii) this includes the avoidance of unwarranted inhibition to the free and frank provision of advice, or to the free and frank exchange of views for the purposes of deliberation.

31. In addition to the public interest arguments inherent in section 36(2)(b)(i) and (ii) the Department also argued that:

*"...release of the information may be detrimental to the ultimate quality of either policy making or other decision-making and that this will lead to less candid and robust discussions, insufficient records being created, hard choices being avoided and ultimately the quality of policy development being undermined".*

32. The Department did not specifically refer to section 36(2)(c) in its public interest arguments. However the Department made a number of arguments which do not fall within the scope of section 36(2)(b)(i) or (ii), therefore the Commissioner has considered them under section 36(2)(c).
33. Firstly, the Department was of the view that the inhibition caused by disclosure could affect the quality of decision making and policy

development. However, the correct exemption in relation to the formulation or development of government policy is section 35 of the FOIA. If the withheld information in this case fell under section 35 then it could not be exempt under section 36 as the exemptions are mutually exclusive. Although the Department did make arguments in relation to the quality of decision making it has not at any stage sought to rely on section 35 in respect of any of the withheld information, and the Commissioner therefore has not considered its arguments in relation to policy development.

34. Secondly, the Department considered that disclosure of the withheld information would lead to less candid and therefore less robust discussions, as well as insufficient record keeping. However, the Department did not explain to the Commissioner why this would be the case. The Commissioner notes that he has already found the qualified person's opinion to be reasonable in this respect, but is of the view that consideration of the public interest requires public authorities to be more specific and detailed in relation to the arguments claimed. In this case the Commissioner is satisfied that the exemptions are engaged, but more detailed arguments are required in order to persuade him that the public interest in maintaining those exemptions actually outweighs the public interest in disclosure.
35. The Commissioner notes that the Tribunal has considered "record keeping" arguments in previous cases, but has not been inclined to attach significant weight to them. The Tribunal made the following comment in the case of *PCSU v IC & MOJ*<sup>2</sup> where the National Offender Management Service argued that record keeping would deteriorate as a result of fears about disclosure:
- "We do not attach great weight to that factor. The introduction of a freedom of information regime should not lead to discussions or advice being inadequately recorded, because this would ultimately undermine the decision-making process itself. We do not believe that civil servants should or would resort to such behaviour to undermine a law that Parliament has created in a form that includes adequate protection for information that justifies continuing confidentiality."* (para 38)
36. The Commissioner sees no reason to disagree with the Tribunal, and in the absence of any detailed supporting information from the Department the Commissioner is unable to accept this as an argument in favour of maintaining the exemptions.

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<sup>2</sup> Appeal no EA/2009/0123



37. The Department referred the Commissioner to his decision in a case involving the Ministry of Justice (the MOJ), where the request was for information relating to a pay increase for a previous Information Commissioner in 2008<sup>3</sup>. The Department considered this case to be comparable, as the MOJ had successfully argued that it needed a "safe space" to conduct pay negotiations. The Department maintained that the continued interest in the pay levels for senior officials strengthened the public interest in protecting the safe space around which the most detailed discussions can be held.
38. The Commissioner notes that the MOJ case involved the "safe space" argument in relation to a different exemption, that at section 35 of the FOIA. The Commissioner accepts that in some cases "safe space" arguments will be relevant to section 36. In this case however the Commissioner finds that safe space arguments are not relevant given the timing of the request – by the time the request was made (August 2011) the decision about the salary band had been made (July 2011). The Commissioner is of the view that the MOJ case can be also distinguished on the grounds that it involved direct negotiations with one individual in relation to that individual's employment. In the Department's case, the withheld information relates to a decision to increase the maximum salary for a post which was held by a number of individuals rather than a record of negotiations with an individual.
39. The Department drew the Commissioner's attention to the case of *Scotland Office v IC*<sup>4</sup> in which it was accepted that "inappropriate" disclosure of the advice of civil servants to Ministers, and communication between officials containing the views of Ministers, has the capacity to undermine the relationship of trust and confidence that exists between Ministers and civil servants and risks compromising both the convention of ministerial accountability and civil service neutrality. The Department also sought to draw support from previous decision notices issued by the Commissioner which had involved requests for details of discussions between Ministers and officials<sup>5</sup>. However again the Department failed to provide a detailed explanation as to how the principles set out in other cases applied to the specific information in this case. The Commissioner is not completely dismissive of this point and acknowledges that the

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<sup>3</sup> FS50410999, issued 25 June 2012

<sup>4</sup> Appeal no EA /2007/0128

<sup>5</sup> Including FS50423025, relating to allegations of misconduct by Whitehall special advisers, and FS50341963, relating to remuneration of Whitehall special advisers.

timing of the request has some relevance - the request was made very shortly after the decision, when Ministers may still have been defending it - but the Department has not developed these arguments to the Commissioner.

40. The Department also argued that disclosure of the withheld information was not in the public interest because disclosure could have a detrimental impact on the Department's ability to administer pay and grading across the Northern Ireland Civil Service (NICS). Specifically the Department was of the view that disclosure could damage its ability to negotiate with trades unions, or to defend current and potential legal action relating to pay and grading. However the Department did not expand on why this was considered to be the case.

#### *Balance of the public interest*

41. In accepting that the exemptions are engaged the Commissioner has accepted as reasonable the view that disclosure of the withheld information would be likely to have an inhibiting effect on the exchange of views and provision of advice. The Commissioner notes that the withheld information in this case contains candid observations provided by officials to the Minister who made the decision to increase the maximum salary band for special advisers. The Commissioner accepts the sensitivity of discussions about pay, especially in the context of financial restraint. He also acknowledges the fact that the decision had been made and the need for space had fallen away but there was close proximity between the request and the decision. The Commissioner has therefore accorded some weight to maintaining section 36(2)(b)(i) and (ii).
42. However the Commissioner agrees with the Tribunal that senior officials whose duties include giving advice are expected to be impartial and robust in discharging their responsibilities and not to be deterred from expressing their views by the possibility of future disclosure.
43. The Commissioner has also accepted that it was a reasonable opinion that disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs more generally, as it would have an adverse impact on the quality of decision making and the Department's ability to manage the wider issue of pay and grading. He has also accorded weight to maintaining section 36(2)(c), whilst noting the lack of specific arguments advanced by the Department relating to this exemption.
44. However in this case the Commissioner is of the view that there is a very strong argument in allowing the public to be able to see the arguments that were made by senior officials in relation to the decision

to increase the maximum salary for Band B special advisers. This will give the public a clearer understanding as to the workings of government and will help to instil confidence in the public that officials were carrying out their duties impartially and robustly. There is a strong public interest in the public understanding the decision, from the perspective of the correspondence, at a time of tough austerity in the public sector.

## **Procedural requirements**

### **Section 1: General right of access**

#### **Section 10(1): Time for compliance**

45. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether or not recorded information is held that is relevant to the request. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued.
46. Section 10(1) requires the public authority to comply with section 1 promptly and in any event no later than twenty working days after the date of receipt of the request.
47. The Commissioner notes that the complainant made his information request on 22 August 2011. Although the Department obtained the qualified person's opinion on 27 September 2011, the Department did not respond to the complainant's request until 21 February 2012.
48. The Commissioner sought and received from the Department a detailed explanation of the steps taken to deal with the request before the complaint was made. The Department explained to the Commissioner that the draft response was submitted to the Minister in September 2011. However the response could not be issued until Ministerial approval had been given, and this was not obtained until February 2012.
49. The Department failed to provide any reason for this delay, and the Commissioner considers it a matter of concern that the Department is apparently unable to explain why the Minister, having given his opinion as the qualified person, took five months to approve the draft response to the complainant. The Commissioner expects that the Department will review its procedures to ensure that this inordinate delay is not repeated in relation to future requests.
50. In failing to respond within the time for compliance, the Department failed to confirm to the complainant that it did not hold the information requested at parts 1-3 and 7-8 of the request. Therefore the

Commissioner finds that the Department failed to comply with section 1(1)(a) and 10(1) of the FOIA.

51. The Commissioner also finds that the Department failed to comply with sections 1(1)(b) and 10(1) of the FOIA.

**Section 17: refusal notice**

52. Where a public authority refuses a request for information it is required under section 17 of the FOIA to provide the applicant with a 'refusal notice' explaining the exemption or exemptions relied upon. The Commissioner has produced guidance to assist public authorities in complying with this requirement<sup>6</sup>.
53. Section 17(1) states that the public authority must issue the refusal notice within the time for complying with section 1(1), ie twenty working days. The Department's letter of 21 February 2012 constitutes a refusal notice as it advised that part of the request was being refused. As the refusal notice was issued well outside of the time for compliance, the Department failed to comply with section 17(1).

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[http://www.ico.gov.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/FES016\\_REFUSING\\_A\\_REQUEST.ashx](http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/FES016_REFUSING_A_REQUEST.ashx)

## Right of appeal

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54. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

55. 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.
56. 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 .....**

**Steve Wood**  
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**Information Commissioner's Office**  
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