

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

### **Decision notice**

**Date:** 22 July 2015

**Public Authority:** Department of Culture, Arts & Leisure

**Address:** Causeway Exchange

1-7 Bedford Street

Belfast

Northern Ireland

BT1 7FB

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

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1. The complainant has made a number of requests to the Department of Culture, Arts and Leisure (DCAL) broadly relating to the Libraries NI Board Member appointment competition or other public appointments. DCAL disposed of a number of the requests to the complainant's satisfaction but the complainant remained concerned about DCAL's decision to withhold parts of the requested information. The concerns have been separately considered by the Commissioner under three complaint headings; FS50550293, FS50556269 and FS50554634. The Commissioner's findings are as follows.
  - FS50550293 - the Commissioner has found that DCAL was correct to withhold some but not all of the requested box marking information under section 40(2) ('third party personal data') of FOIA.
  - FS50556269 – for information relating to an appointment process, the Commissioner has decided that DCAL correctly applied sections 36(2)(b)(i) and (ii) ('prejudice to the effective conduct of public affairs') and section 40(2) and, with regard to the application of the 36(2)(b) exemptions, found the public interest favoured maintaining the exemption.
  - FS50554634 - the Commissioner has determined that advice given to a Minister about the filling of vacant roles engaged section

42(1) ('legal professional privilege') and considers the public interest favoured withholding the information.

2. The effect of these findings is that the Commissioner requires DCAL to disclose the requested information considered under case FS50550293, with the exception of the information captured by requests 9(e) and 10(e) which is exempt under section 40(2). For cases FS50556269 and FS50554634, DCAL is not obliged to take any further action as a result of this notice.
3. The public authority must take the step specified above 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 Act and may be dealt with as a contempt of court.

## **Request and response**

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4. The Commissioner sets out below the requests that form the basis of each of the three complaints and a summary of the position adopted by DCAL in respect of these requests.

### **FS50550293**

5. The complaint concerns DCAL's handling of a selection of requests made on 16 April 2014 and 3 June 2014.

#### Requests of 16 April 2014

*9. For the year 2011/12, in which the Chair carried out appraisals of the performance and contribution of each Board member, with scopes of Box 1, Box 2 or Box 3 given for each of 9 criteria, please state:*

*c. How many Councillor members received six or more Box 1 markings?*

*d. How many non – Councillor members received six or more Box 1 markings?*

*e. What was the gender balance of the above groupings?*

*10. Please give the corresponding data as in para 9 above for 2012/13.*

#### Requests of 3 June 2014

*2. What was the average number of Box 1 markings for the Councillor members as a whole?*

*3. What was the average number of Box 1 markings for the non Councillor members as a whole who were not re-appointed?*

*4. What was the average number of Box 1 markings for the non Councillor members as a whole who were not re-appointed?*

6. DCAL has refused to disclose the information specified in each of the requests under the 'third party personal data' exemption (section 40(2)) in FOIA. This is on the basis that the information constitutes personal data, the release of which would breach the first data protection principle of the Data Protection Act 1998 (DPA).

### **FS50554634**

7. The complaint refers to the requests made to DCAL on 8 June 2014. These asked for information regarding Ministerial decisions in public appointments, since May 2011, where member or chair appointments have been made by means of Ministerial choice from an unranked list of eligible candidates following a publicly advertised process. The complainant confirmed that he did not require information for the Libraries NI member competition.

8. The complainant has only asked the Commissioner to consider DCAL's handling of two of the original eight requests made on the above date.

*2. A copy of any comments made by or attributed to the Minister or the Minister's Special Adviser on any submission relating to the arrangement for such competitions or to the field of choice or to the selection of appointees both at the initial and interim stages and at the stage of the final selection.*

*3. A copy of any reasons recorded by the Minister for the decision to appoint or not to appoint each of the recommended candidates.*

9. DCAL has refused to comply with requests 2 and 3 under respectively the 'prejudice to the effective conduct of public affairs' (sections 36(2)(b)(i) and (ii)) and 'third party personal data' (section 40(2)) exemptions. With regard to the application of section 36(2)(b), which unlike section 40 is qualified by the public interest test, DCAL found that the strength of the public interest in withholding the information outweighed the public interest in disclosure.

### **FS50556269**

10. Following earlier correspondence with DCAL on a related issue, the complainant wrote to DCAL on 3 June 2014 with further queries regarding the Libraries NI Board Member Competition 2014. Three

freedom of information requests were identified within the correspondence, only one of which concerns us here:

A. [...] *Could I have a copy of the full text of the submission of 14 March [2013][provided to a Minister in connection with vacancies on the Board of Libraries NI].*

11. DCAL considers that the requested submission is exempt information under the 'legal professional privilege' exemption (section 42(1)) in FOIA and that on balance the public interest favours maintaining the exemption.

### **Scope of the case**

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12. The complainant has complained about DCAL's decision to refuse the disclosure of information captured by each of the requests quoted in the 'Request and response' section above.
13. The Commissioner's findings on whether DCAL correctly relied on an exemption to withhold information are set out in the remainder of this notice.

### **Reasons for decision**

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#### **FS50550293**

14. DCAL has explained that the requested box marking information relates to an appraisal exercise. When appointed, the terms and conditions of appointment of the NI Libraries Board Members state that an annual appraisal on their performance will be conducted by the Chair. An appraisal is conducted at the end of each financial year to record performance within that period. Performance would be marked as Very Satisfactory (Box 1), Satisfactory (Box 2) and Unsatisfactory (Box 3) for a section relating to the role, which could result in between 8 – 10 separate box markings being awarded to a Member.
15. DCAL considers that the withheld box marking information engages section 40(2) of FOIA. This provides an exemption to the public right to access recorded information where it is the personal data of a third party. The application of the exemption has two parts. Firstly, the information must constitute the personal data of a third party. Secondly, disclosure of that personal data would contravene a data protection principle in the DPA. For the purposes of a disclosure under FOIA, it is

the first data protection principle that is likely to be relevant. This requires the fair and lawful processing of personal data.

16. Personal data is defined by section 1 of the DPA. This describes it as data which relate to a living individual, who can be identified from that data, or from that data and other information. In short, information will only be personal data where it 'relates to' an 'identifiable individual'.
17. In this case the complainant has disputed whether the requested information, in the form that it is held, would constitute personal data. In many cases it will not be a straightforward task to determine whether someone can in reality be traced back to the information. Even if the information itself does not contain identifiers such as names, it may still be possible to match a person with the information by pulling together other pieces of data that are known about the individual.
18. At page 26 of his Anonymisation Code of Practice<sup>1</sup>, the Commissioner states that data protection law is concerned with information which identifies an individual. This implies a degree of certainty that the information in question is about one person and not another. Consequently, identification involves more than making an educated guess that information is about someone. The possibility of making an educated guess in relation to the linking of information with an individual may present a privacy risk but not a data protection one because no personal data has been disclosed to the guesser.
19. This point is reinforced in the Commissioner's step-by-step guide 'Determining what is personal data'<sup>2</sup>. At page eight, the guide explains that the fact there is a very slight hypothetical possibility someone might be able to reconstruct data in such a way that the data subject is identified is not sufficient for the information to be personal data; rather identification must be reasonably likely.
20. As stated, it may be possible to link an individual to information, thus making it personal data, even if the information does not contain any obvious identifiers. This may occur where the information is pieced together with other bits of information in order to facilitate data linkage. Therefore, when considering whether requested information is personal data, a public authority must factor in what surrounding contextual

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<sup>1</sup> <https://ico.org.uk/media/1061/anonymisation-code.pdf>

<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

information could reasonably be obtained by someone motivated to identify an individual. In certain circumstances it may also be advisable for a public authority to bear in mind the prior knowledge an individual may have of the data subject to whom the information relates.

21. DCAL has provided the complainant with the number of board members who received six or more Box 1 markings in 2011/12 (7) and 2012/13 (8). However, it has not been prepared to disclose a more detailed breakdown of the results of the box marking exercise. DCAL has acknowledged that, in relation to box markings and appraisal details, the requested information is of a statistical nature and when tabulated in aggregated form does not relate to identifiable individuals. However, it is also of the view that under certain circumstances it would be possible to identify personal data applying to individuals from the tabulation when combined with other information from other sources.
22. The complainant, on the other hand, rejects the possibility that an individual could be linked to the requested information. He accepts there can be circumstances under which individual information might be derived from group information, most obviously where the group is entirely homogenous and all members have the same score. However, he argues that these are unlikely circumstances and considers there is no reason to believe that they prevail here.
23. In this case the performance appraisal for the years specified only applies to a relatively few number of individuals, with even fewer Members obtaining six or more Box 1 markings even fewer. As a rule of thumb, the smaller the statistical pool the greater the chance that identification could take place. However, the Commissioner is also obliged to consider the specific circumstances in which a request is made.
24. To support its position that the requested information is personal data, DCAL has provided the Commissioner with a specific example of how the information at 10(e) – which asks for a gender breakdown of member numbers – could be linked with other parts of the requested information to tell us something about an individual. The Commissioner accepts that this provides a concrete example of data linkage leading to the identification of an individual within the information. Flowing from this, the Commissioner considers that disclosure of the gender information at request 10(e), and for the same reasons request 9(e), means it is reasonably likely an individual could be identified.
25. However, the Commissioner considers that these instances apart there is no evidence to support a finding that the other categories of requested information constitute personal data. With respect to the requests made for the actual numbers of councillors and non-councillors

that had received six or more Box 1 markings, the Commissioner considers that a total figure, whether by itself or in conjunction with other pieces of reasonably accessible information, would not permit a motivated individual to make with any certainty a data link to an individual. With regard to the requests for average score markings, it has not been demonstrated that the information could be reverse engineered in such a way that the specific score of a member could be ascertained. The Commissioner has therefore determined that this information does not comprise personal data and therefore section 40(2) of FOIA is not engaged.

26. The Commissioner has therefore gone on to consider whether the information he has found to be personal data, namely the numbers captured by requests 9(e) and 10(e), should be placed in the public domain. This requires a decision on whether disclosure would be in accordance with the first data protection principle. This requires the fair and lawful processing of personal data.
27. The starting point when assessing whether the first principle is satisfied is the consideration of whether it would be fair to a data subject to disclose their personal data. To test whether it would be fair in the circumstances, the Commissioner will take into account the following competing interests –
  - A data subject's reasonable expectations of what would happen to their personal data.
  - The consequences of disclosure.
  - The balance between the rights and freedoms of the data subject and the legitimate interest of the public in disclosure.
28. For the release of person data to be permitted, the Commissioner must also have regard to the sixth condition of schedule 2 of the DPA, as well as to the question of whether disclosure would be lawful.
29. With regard to the expectations of the members in question, DCAL recognises that they should reasonably expect to be accountable for their performance as the members are paid from public finances. However, DCAL considers that this reasonable expectation would not extend to the specific details of a member's appraisal; information which DCAL argues is confidential and personal in nature between the Member, Chair and the department.

30. When considering the reasonable expectations of an individual, the Commissioner will frequently consider the seniority of an individual. As stated in his guidance 'requests for personal data about employees'<sup>3</sup>, the Commissioner considers it is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones. This is because senior employees are likely to be responsible for major policy decisions and the expenditure of public funds, and thus should expect their posts to carry a greater level of accountability.
31. It is clear in this case that members of the NI Libraries board hold significant and influential roles. In the Commissioner's view, this would strengthen the expectation that information relating to the active part of their roles may be disclosed. However, the Commissioner also considers that appraisal information does not fall into this bracket; relating, as it does, to a measure of performance and not to specific information about an individual's decision-making.
32. The Commissioner considers that, regardless of seniority, appraisal information will be regarded as personal to an individual because it represents a judgement on that individual's performance, which would strengthen an expectation of confidentiality. Consequently, a disclosure is likely to be more intrusive than a disclosure of information that records the actions of an official in his or her role. For this reason, the Commissioner accepts that placing appraisal information in the public domain is likely to be distressing to those concerned.
33. The nature of the information, and the likely consequences of disclosure, has ultimately led the Commissioner to decide that the strength of the arguments for upholding the rights of a Member to privacy outweigh those that promote the legitimate interests of the public in disclosure. For this reason, the Commissioner has concluded that disclosure of the request 9(e) and request 10(e) information would be unfair and therefore section 40(2) of FOIA is engaged.

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<sup>3</sup> [https://ico.org.uk/media/for-organisations/documents/1187/section\\_40\\_requests\\_for\\_personal\\_data\\_about\\_employees.pdf](https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf)



**FS50554634**

34. The Commissioners considers in turn each of the requests that make up the complaint.

- *Request 2 – copies of comments made by or attributed to the Minister or Minister's Special Adviser*

35. DCAL argues that the requested information engages the exemptions to disclosure in section 36(2)(b) of FOIA. Section 36(2)(b) states that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:

(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.

36. Unlike other exemptions in FOIA, the application of an exemption in section 36(2) requires a public authority to consult with a relevant qualified person and it must be the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise. Furthermore, the exemption will only be engaged where the opinion given by the qualified person is reasonable in the circumstances. In other words, it was reasonable for the qualified person to conclude that there was a link between disclosure and a real and significant risk of the prejudice that the exemption is designed to protect against.

37. With regard to sections 36(2)(b)(i) and (ii), it is understood that the exemptions are about the inhibition of the processes of providing advice or exchanging views rather than what is necessarily in the information itself. The essential question is whether disclosure could inhibit either of the processes in the future.

38. To evidence the fact that a qualified person's opinion had been obtained, DCAL has confirmed that it sought the opinion of the Minister of Culture, Arts and Leisure on 4 July 2014. The Minister's agreement to the application of the exemptions was communicated on 2 September 2014.

39. Section 36(5) of FOIA describes who is meant by a 'qualified person' for the purposes of the exemption; with section 36(5)(b) stating that in relation to information held by a Northern Ireland department, the qualified person means the Northern Ireland Minister in charge of the department. The Minister of Culture, Arts and Leisure fulfils this definition for the purposes of the request. DCAL has also provided a copy of an email that in effect evidenced the qualified person's

agreement with the application of the exemptions. The next step for the Commissioner is therefore to consider whether the opinion given by the qualified person was reasonable.

40. In preparation for the requesting of the Minister's opinion, DCAL produced submissions that briefly summarised the background to the requested information, set out how the Department planned to respond to each of the requests made by the complainant on 8 June 2014 and attached a copy of a draft response letter for the complainant. With regard to request 2, DCAL explained the operation of the section 36 exemption, recommended that the requested information should be withheld under section 36(2)(b) and provided a brief analysis of the arguments supporting this recommendation.
41. By agreeing to the application of the exemptions in section 36(2)(b), the Commissioner considers that the qualified person effectively subscribed to the arguments included in the submissions – accepting that it *would be likely* the prejudice described in sections 36(2)(b)(i) and (ii) would occur through disclosure. While the level of prejudice designated by '*would be likely*' is lower than the alternative threshold of '*would*' prejudice, it nevertheless still requires that there is a real and significant risk of the prejudice occurring.
42. The Commissioner has observed that the submissions do not go into great detail about the link between the prejudice and disclosure. Rather they explain the process by which a Minister will make decisions on filling Board vacancies before contending that the release of any documents containing comments by or attributed to the Minister or the Special Adviser (SPAD) would be likely to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation.
43. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. The critical issue is whether the arguments being advanced by the qualified person not only correspond with the factors described in the exemption but also correspond with the withheld information itself. Even from the brief arguments presented, the Commissioner is satisfied that they do.
44. In making this finding, the Commissioner has considered important the context in which the requested information was produced. This contains numerous entries recording the Minister's or SPAD's comments on submissions relating to the appointment process. Broadly speaking, these comments either confirm the Minister's or SPAD's endorsements of the approach adopted in the submissions or include recommended

modifications. The Commissioner accepts that this system of review is a critical part of the evolution of a process to a finished state and considers it is appropriate to allow that the advice and views would have been put forward under an implicit expectation of confidence.

Accordingly, for the reason that disclosure would be likely to deter individuals from being as forthright with their views and advice in the future, the Commissioner considers reasonable the qualified person's opinion which says that disclosure would have an inhibitory effect on the factors described at sections 36(2)(b)(i) and (ii).

45. On the basis that each of the exemptions in section 36(2)(b) are engaged, the Commissioner has gone on to consider the public interest test. As befitting their status, the Commissioner considers that the opinion of the qualified person will always carry some weight in this test. However, the Commissioner's guidance on section 36<sup>4</sup> also makes clear that the Commissioner will form his own view on the severity, extent and frequency of any prejudice or inhibition when deciding where the balance of the public interest lies (paragraph 71).

*Public interest arguments in favour of disclosure*

46. Throughout his submissions to the Commissioner the complainant has stressed the importance of transparency and accountability. In his view, this would ensure that any decisions made on appointments had legitimacy in the eyes of the public.
47. Extending this argument, DCAL acknowledged that disclosure would help increase trust in the government by demonstrating that decisions had been taken lawfully, objectively, and on the basis of the best available information. This is clearly in the public interest.

*Public interest arguments in favour of maintaining the exemption*

48. DCAL has advanced the following principal arguments in support of its view that the public interest favours withholding the requested information.
- Ministers and officials need space in which to develop their thinking and explore options and public exposure of this thinking may be inhibit the use of imaginative options.

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<sup>4</sup> [https://ico.org.uk/media/for-organisations/documents/1175/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

- Ministers and officials need to have a rigorous and candid debate about the implications of various options.
- If the nature of deliberations between Ministers and officials were revealed, it may deter a free and frank exchange of views about all potential options and decisions.

*Balance of the public interest*

49. When considering the weight of the competing public interest arguments, the Commissioner has had regard to the withheld information itself. It is noticeable that many of the withheld comments do not contain anything particularly sensitive or tendentious. However, as previously stated, the purpose behind the inclusion of the exemptions in section 36(2)(b) is not necessarily about the requested information itself but about the inhibitory effect of disclosure. In the Commissioner's view, this means looking at the wider picture in which the information was produced.
50. In this case the Commissioner considers that there would be some benefit to the public in understanding more about the behind-the-scenes decision-making and particularly how the input of the Minister and SPAD manifested itself. He also considers that the lack of detail in DCAL's arguments means that the severity of the prejudice that could arise through disclosure has been harder to gauge and weakens to a degree the persuasiveness of the arguments.
51. However, the Commissioner is also of the view that the overall value of this information to any debate about the arrangements for appointment competitions is reasonably minor and relatively narrow in scope. Furthermore, by accepting the exemption is engaged the Commissioner has found that disclosure would be likely to cause inhibition to the way in which officials contribute to DCAL's policy work. When the competing arguments are put together, the Commissioner has ultimately concluded that the strength of the public interest in disclosure based on the value of the information suffers in comparison with the public interest in favour of withholding the information.
52. In summary, the Commissioner has determined that sections 36(2)(b)(i) and (ii) are engaged and that in all the circumstances the public interest favours maintaining the exemptions.
- *Request 3 - a copy of any reasons recorded by the Minister for the decision to appoint or not to appoint each of the recommended candidates*

53. DCAL has refused to disclose the requested information under the 'third party personal data' (section 40(2)) exemption in FOIA. The tests to be applied with respect to the exemption are set out above in relation to complaint FS50550293.
54. The withheld information consists of comments made about named candidates for various public appointments. The Commissioner's guidance 'Determining what is personal data' states that a name is the most common means of identifying someone. However, it also clarifies that in itself a name may not always be personal data where there is not further contextual information that will permit an individual to be matched with the name. In this case, the Commissioner is satisfied that bearing in mind that the information relates to an important public appointment process, the inclusion of a name in this context would be sufficient for a person to be identified. As the withheld information is therefore the personal data of the individuals named, the Commissioner must go on to consider whether disclosure would breach the first data protection principle.
55. As stated, the starting point when assessing whether the first principle is satisfied is to consider whether it would be fair to a data subject to disclose his or her personal data.
56. With regard to a data subject's reasonable expectations, the Commissioner considers that a candidate would anticipate that information relating the appointment process would be kept confidential. As previous decisions of differently constituted Information Tribunals have found, an individual carrying out a public function should expect a significant level of scrutiny. However, this is not the situation here, where the information does not refer to an official's performance in a role but rather to an individual's suitability for that role.
57. To a greater extent the comments themselves are not particularly contentious. Nevertheless, they do provide an indication of why an individual was deemed suitable, or not, for a particular appointment. In effect, the comments represent a judgement on an individual's eligibility for a role. The Commissioner considers that disclosure of information in this framework could cause distress to the individuals concerned, even if that distress was not particularly severe.
58. To guide him on whether disclosure would be fair, the Commissioner has found helpful the working assumptions produced by the Ministry of

Justice (MoJ) on what information may be disclosed in relation to public appointments<sup>5</sup>. The working assumptions point out that:

*Details of vacant senior civil service posts or public appointments are normally publicly available. It is also likely that the methods used to identify and recruit people to such posts will be either publicly available, or will not attract any exemption from disclosure. Even if not routinely made public, it is unlikely that harm would arise from disclosure of such information. An exemption might only apply in cases where disclosure of the recruitment procedure might prejudice the procedure itself, and hence the future supply of suitable candidates.*

59. The MoJ contrasts the expectation of disclosure relating to details of public appointments with information relating to the candidates themselves. In this regard, the working assumptions state:

*It is unlikely that the disclosure of personal data held on any candidate would be justified by one of the [conditions set out in Schedule 2 to the DPA]. If so, information should be withheld which could lead to identification of any candidate.*

60. The Commissioner is not bound by the MoJ's guidelines but must consider the specific circumstances as they are presented. Nevertheless, he does consider that the distinction made between the types of information that would, and equally would not, normally be expected to be disclosed does represent a logical approach to balancing the competing interests that, on the one hand, promote the importance of transparency and accountability and, on the other, affirm a person's right to privacy.
61. The Commissioner has decided disclosure of the information would represent an unwarranted intrusion into an individual's legitimate right to privacy. In coming to this view, the Commissioner acknowledges the argument which says that a successful candidate should have a greater expectation of scrutiny of their appointment than those candidates that were not appointed. On this reasoning, the comments relating to the successful candidates could potentially be disclosed. However, even if the general principle of separating the successful from the non-successful candidates was accepted, the Commissioner still considers

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<sup>5</sup> <https://www.justice.gov.uk/information-access-rights/foi-guidance-for-practitioners/working-assumptions/foi-assumptions-appointments>

that the nature of the withheld information means that disclosure would not be appropriate.

62. For the reasons explained, the Commissioner has found that disclosure of the personal data would be unfair for the purposes of the first data protection principle. The 'third party personal data' exemption therefore applies.

## **FS50556269**

### **Section 42 – legal professional privilege**

63. Section 42(1) of FOIA provides that information is exempt from disclosure if it is protected by legal professional privilege. The exemption is qualified by the public interest test.
64. In his guidance on the exemption<sup>6</sup>, the Commissioner emphasises (paragraph 5) that a client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The Commissioner continues by clarifying that the concept of legal professional privilege protects the confidentiality of communications between a lawyer and client.
65. There are two types of privilege within the concept of legal professional privilege; litigation privilege and advice privilege. DCAL has claimed that the category of privilege that applies in this case is advice privilege. This covers communications between a client and lawyer, made for the dominant purpose of seeking or giving legal advice, where litigation is not in progress or being contemplated. Advice privilege will also extend to any part of a document that evidences the substance of such a communication.
66. The withheld information is contained in a submission that provided a Minister with options for filling vacancies on the Board of Libraries NI. The withheld information includes both the summary of advice obtained from counsel and a copy of the advice which was appended to the submission. The Commissioner has had sight of both parts of the withheld information, namely, the summary and the letter containing the counsel's advice.

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<sup>6</sup> [https://ico.org.uk/media/for-organisations/documents/1208/legal\\_professional\\_privilege\\_exemption\\_s42.pdf](https://ico.org.uk/media/for-organisations/documents/1208/legal_professional_privilege_exemption_s42.pdf)

67. Returning to the definition of advice privilege, the Commissioner is satisfied that the counsel's letter of advice clearly represents a communication between a lawyer and his client, made for the dominant purpose of giving legal advice. He therefore agrees with DCAL that the information was subject to legal professional privilege. The next step for the Commissioner was therefore to determine whether privilege similarly extended to the summary of the advice. In his view, it did. This is because it reproduces the substance of the information that, as stated, was otherwise privileged.
68. However, the fact that information once attracted privilege does not mean the confidentiality associated with privilege cannot be lost. This will occur where the information is shared with a third party on an unrestricted basis – that is, a disclosure made to the world at large or without any restriction on its future use - thereby stripping it of its confidential nature. DCAL has confirmed, however, that the information has not been made available to the public or a third party and the Commissioner has not seen any evidence that privilege may inadvertently have been lost because of an unrestricted disclosure.
69. The Commissioner has therefore decided the withheld information did attract legal professional privilege and that this privilege was still intact at the time of the request. Accepting that section 42(1) of FOIA is therefore engaged, the Commissioner has gone on to consider the balance of the public interest test.

### **Public interest test**

#### *Public interest arguments in favour of disclosure*

70. Some weight must always be attached to the benefit of transparency for its own sake. However, the complainant considers that three principal arguments further strengthen the case for disclosure in this case.
71. Firstly, the complainant argues that the legal advice is now of historical value only. He therefore disputes DCAL's contention that disclosure could have a harmful effect on future exchanges or discussions. Secondly, the complainant considers that DCAL's decision to apply the exemption was not guided by a proper analysis of the sensitivity of the information itself. Thirdly, the complainant has argued there is a strong public interest in information that demonstrates what advice had informed the Minister in relation to her decision-making on the procedural mechanism connected to the Libraries NI Board Member Competition.
72. DCAL similarly acknowledged that there is a general public interest in authorities being accountable for the quality of their decision-making



and ensuring that decisions have been made on the basis of good quality legal advice.

*Public interest arguments in favour of maintaining the exemption*

73. DCAL has argued that there is a wider public interest in it receiving high quality, comprehensive and frank legal advice for the effective conduct of its operations. In the view of DCAL, advice provided under fear of disclosure might contain unnecessary caveats and qualification and might lack professional expressions of opinion; an outcome that DCAL asserts would not be in the public interest.
74. Furthermore, DCAL has stated that disclosure could prejudice its ability to defend its legal interests – both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice being full and presented without fear or favour.
75. Where a risk of disclosure exists, DCAL believes an additional side-effect is that advisers and officials are more likely to avoid a permanent record of any advice given. DCAL has also raised the possibility that disclosure could act as a deterrent, with officials more reluctant to seek legal advice if they thought the advice could be made public.

*Balance of the public interest*

76. As was outlined in the introduction to the exemption, the concept of legal professional privilege is of fundamental importance. Accordingly, where information engages section 42(1), any decision on the balance of the public interest must take account of the strong public interest inherent in the exemption. However, it is also apparent that the authors of the legislation envisaged circumstances in which it would be appropriate for legally privileged information to be disclosed. This is evidenced by the fact that section 42 was incorporated into FOIA as a qualified exemption, which is subject to the public interest, rather than as an absolute exemption, which is not.
77. In *Calland v Information Commissioner & the Financial Services Authority (EA/2007/0136, 8 August 2008)*<sup>7</sup> the Information Tribunal reviewed previous decisions made on the public interest weighting exercise in the context of section 42 and found that what emerged was there must be some “clear, compelling and specific justification for disclosure to be shown” (paragraph 37). Factors affecting where the

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<sup>7</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i31/Calland.pdf>

balance of the public interest lies may include whether the legal advice is recent and, or live, and the number of people affected by, and the amount of money involved in, the issue to which the advice relates.

78. The complainant has claimed that at the time of the request the legal advice was purely of historical interest, presumably both because of its age and due to the developments that had occurred since the advice was obtained. Insofar as the advice was therefore no longer 'live', and was unlikely to be relied on in future-decision making, the complainant rejects the possibility that any significant harm could arise from disclosure – in essence, DCAL would not be disadvantaged from a legal standpoint in having the information placed in the public domain. As the Information Tribunal endorsed in *Department for Education & Skills v Information Commissioner & the Evening Standard (EA/2006/0006, 19 February 2007)*<sup>8</sup>, albeit in relation to the reliance on another exemption, a public authority should 'adopt a commonsense approach to the disclosure of information, which will cause no or no significant damage to the public interest' (paragraph 53).
79. The Commissioner accepts that the advice is not recent, with a number of years elapsing between its creation and the date the request was made. However, he does not share with the complainant the opinion that the 'historical' aspect of the advice meant it no longer did, or potentially could have, any importance in the framework of the legal questions arising from the implementation of new legislation.
80. In terms of the other factors supporting disclosure, the Commissioner considers that there is clearly a public interest in knowing about how a Minister was guided about the construction and implementation of a statutory provision. This also feeds in to the wider public interest in being able to hold authorities accountable for the quality of their decision making. The Commissioner has also placed little weight on DCAL's arguments that disclosure could discourage officials from either seeking advice in the first instance or, where advice is sought, requiring a permanent and complete record of that advice. Firstly, the Commissioner has not been provided with any evidence of either of these effects. Secondly, the Commissioner is mindful that in many cases an official will need legal advice in order to proceed and that this advice will frequently be technical and highly detailed. He is generally sceptical of any argument that indicates an official would not want or require a

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<sup>8</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i70/DFES.pdf>

permanent record of the advice he or she in all probability will later need to refer to and rely on.

81. However, the Commissioner has ultimately found that the strength of the public interest in disclosure suffers in comparison with the weight inherent in legal professional privilege, which is predicated on the faith that a client and legal adviser have that their communications will be kept confidential. In short, the Commissioner considers there is not clear, compelling and specific justification for disclosure that would tip the balance of the public interest in favour of disclosure.
82. In making this finding, the Commissioner has no doubt that the complainant has entirely legitimate reasons for seeking access to the withheld information. However, the Commissioner considers this is not a significant enough reason by itself to conclude that the public interest in disclosure outweighs the strong public interest in maintaining the exemption.

## Right of appeal

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83. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

84. 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.
85. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
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**Wilmslow**  
**Cheshire**  
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