

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 16 October 2018

Public Authority: Department for Communities
Address: Lighthouse Building
1 Cromac Place
Belfast
BT7 2JB

Decision (including any steps ordered)

1. The complainant has requested information transferred to the Public Records Office of Northern Ireland (PRONI), part of the Department for Communities. The public authority provided some information and refused the remainder of the request in reliance on the exemption at section 38(1) of the FOIA.
2. The Commissioner's decision is that the FOIA does not provide for a public authority to deal with requests for transferred public records in the absence of the appropriate Northern Ireland Minister. This means that the public authority cannot issue a valid response to the request in this case. Therefore, although the Commissioner finds that the public authority has not responded in compliance with the FOIA, she cannot require the public authority to take any remedial steps.

Request and response

3. The request in this case was made to PRONI, part of the Department for Communities. The Department, rather than PRONI, is the public authority under schedule 1 to the FOIA and on whom this decision notice is served.
4. On 27 March 2013 the complainant submitted a request to PRONI for information relating to the death of a named individual in 1983. PRONI acknowledged receipt of the request on 8 May 2013.
5. PRONI did not issue a substantive response to the request and the complainant contacted the Commissioner on 14 December 2016. The

Commissioner issued a decision notice on 28 February 2017.¹ The Commissioner's decision was that the Department (as the public authority) had failed to respond to the request in accordance with the requirements of the FOIA. Accordingly, the Department was required to issue a substantive response to the complainant.

6. Following the Commissioner's decision notice, PRONI issued a response to the complainant on 3 April 2017. It disclosed some of the requested information but redacted other information. PRONI stated that the redacted information was exempt by virtue of section 38 and section 40 of the FOIA.
7. The complainant requested an internal review on 28 April 2017, and PRONI communicated the outcome of that review on 31 May 2017. At this stage PRONI disclosed some additional information but maintained its refusal to disclose the remainder in reliance on the exemptions cited.

Scope of the case

8. On 3 August 2017 the complainant contacted the Commissioner to complain about PRONI's substantive response to the request. The complainant did not accept that the exemptions claimed had been properly applied, and argued that the withheld information ought to be disclosed to the complainant.
9. The Commissioner understands that the complainant in this case represents family members of the deceased individual. The Commissioner acknowledges that these family members will have strong personal reasons for seeking access to information about their relative. However the Commissioner must stress that she can only make a decision under section 50 of the FOIA. She cannot direct a public authority to disclose information outside the provisions of the FOIA.

Reasons for decision

General duty to comply with a request

10. Section 1(1)(a) of the FOIA requires a public authority to inform the complainant in writing whether or not it holds the requested information, unless an exclusion applies. Section 1(1)(b) requires that

¹ Decision notice FS50660246, issued 28 February 2017

if the requested information is held by the public authority it must be disclosed to the complainant unless an exemption applies.

11. Section 10(1) states that the public authority must comply with section 1 promptly and in any event no later than 20 working days after the date of receipt of the request. The Freedom of Information (Time for Compliance with Request) Regulations 2004 extend the time for compliance, in relation to requests received by PRONI, from 20 working days to 30 working days.

Duty to consult with the responsible authority

12. Section 66 of the FOIA sets out how a public authority should consider requests for records transferred to archives such as PRONI ("transferred public records"). Section 66(2) states that the public authority is required to consult the "responsible authority" before issuing a response.

13. Section 15(5) sets out how the responsible authority is identified in various scenarios:

"(c) in the case of a record transferred to the Public Record Office of Northern Ireland from a government department in the charge of a Minister of the Crown, the Minister of the Crown who appears to the appropriate Northern Ireland Minister to be primarily concerned".

"(d) in the case of a record transferred to the Public Record Office of Northern Ireland from a Northern Ireland department, the Northern Ireland Minister who appears to the appropriate Northern Ireland Minister to be primarily concerned".

"(e) in the case of a record transferred to the Public Record Office of Northern Ireland from any other person, the person who appears to the appropriate Northern Ireland Minister to be primarily concerned".

14. The "appropriate Northern Ireland Minister" is defined at section 84 of the FOIA as the Northern Ireland Minister in charge of the Department for Culture, Arts and Leisure for Northern Ireland (now the Department for Communities).
15. The Commissioner observes that it is explicitly for the appropriate Northern Ireland Minister to identify the responsible authority. PRONI is then required to consult with the responsible authority, and reach a decision about whether an exemption or exclusion applies to the requested information. These steps must be completed within the time for compliance, ie 30 working days.

Handling of the request

16. The Commissioner notes that in this case PRONI had begun the consultation process in 2013, at which point there had been a functioning Executive. The appropriate Northern Ireland Minister identified the Minister for Justice as the responsible authority, and thus consulted the DOJ. NIO was subsequently also consulted. However PRONI did not complete this process and failed to issue a substantive response, which led to the complaint to the Commissioner.
17. In January 2017 the deputy First Minister for Northern Ireland resigned. The party who was entitled to nominate a new deputy First Minister refused to do so. An election was held in March 2017 but this did not result in the formation of a new Executive Committee. Therefore, no Northern Ireland Ministers have been in post since before the election.
18. The Commissioner has carefully considered whether the functions assigned to the appropriate Northern Ireland Minister may be reallocated to any other person. The Commissioner has considered the Departments (Northern Ireland) Order 1999. Article 4 of the Order provides that:

"4.—(1) The functions of a department shall at all times be exercised subject to the direction and control of the Minister."
19. In the context of the FOIA the Commissioner interprets this as meaning that the Department cannot identify and consult with the responsible authority under section 15(5) and section 66(2) of the FOIA in the absence of the appropriate Northern Ireland Minister. Consequently the Department cannot make a decision in respect of a request for a historical record.

Conclusion

20. Accordingly the Commissioner finds that the Department's response dated 3 April 2017 did not comply with the requirements of the FOIA. In the absence of the appropriate Northern Ireland Minister PRONI did not have the authority to complete the consultation process set out at section 66(2). It follows that the Department was not entitled to make a decision as to the application of the exemptions at section 38 and section 40 of the FOIA.
21. The Commissioner has considered whether it would be appropriate to order remedial steps. However, the Commissioner concludes that she cannot require the Department to take any further action at the present time. The FOIA sets out a clear statutory process, which the Department is unable to follow.

22. The Commissioner is mindful that the Department is effectively unable to comply with the requirements of the FOIA in respect of requests for transferred public records. This is deeply unsatisfactory for the complainant, especially in light of the circumstances surrounding the request. However the Commissioner cannot require the Department to consider the request or issue a response in the absence of the appropriate Northern Ireland Minister. The Department cannot respond under the FOIA to requests for transferred public records until the appropriate Northern Ireland Minister takes up post, or legislation is passed to allow a decision to be made by another person.
23. The Commissioner wishes to stress that her decision only relates to the Department's handling of the request under the provisions of the FOIA. The Commissioner cannot direct the Department to consider any other access regime.

Right of appeal

24. 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 123 4504
Fax: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

25. 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.
26. 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

**Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**