

Freedom of Information Act 2000 (FOIA)

Decision notice

Date:

Public Authority: Department for the Economy

**Address: Netherleigh
 Massey Avenue

 Belfast

 BT4 2LP**

Decision (including any steps ordered)

1. The complainant has requested information from the Department regarding security arrangements for a Tribunal matter. The Department stated that it did not hold some of the requested information, and refused to disclose the remainder, citing section 32 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the Department does not hold the requested information which it stated that it does not hold, and that it has correctly applied section 32 of the FOIA to the withheld information. The Commissioner also finds that the Department breached section 1(1) of the FOIA as it failed to specify to the complainant that it did not hold some of the requested information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 4 April 2019, the complainant wrote to the DfE and requested information in the following terms:

"Under the Data disclosure please be advised to let us know when you had received a request from the President of the FT &IT and why there has been failure to make security arrangements and why it took so long to respond. It is irrelevant whether any incident of physical violence took place or not but a Roman Catholic Counsel continued to harass and intimidate the claimant who was a litigant in person.

Please be advised to provide all email, letters and record of telephone calls."

5. The DfE responded to the complainant and refused to disclose the requested information, citing section 32(1)(c) of the FOIA as a basis for non-disclosure. The complainant sought an internal review of that decision on 30 April 2019. The response to the internal review request was issued on 30 May 2019 and the reviewer upheld the original decision.

Scope of the case

6. After the Commissioner had requested the Council's submissions as to its handling of the complainant's request, the DfE wrote to the Commissioner on 9 July 2018 with said submissions. It divided the complainant's request into parts a-c as follows:-
- a) The date on which [name redacted] of the Department received a request from the President of OITFET for him to contact the Council.
 - b) Why there was a failure to make security arrangements for [name redacted]'s case hearing.
 - c) Why it took [name redacted] so long to respond to the Council.
7. The complainant stated to the Commissioner that it did not hold recorded information falling within the scope of parts b and c of the request and that it did hold information falling within part a, to which the exemption as set out in section 32(1)(c) of the FOIA applied.

8. The Commissioner has considered the Department's handling of the complainant's request and in particular its application of section 32 of the FOIA to the requested information.

Reasons for decision

Section 1 - general right of access

9. Section 1 of the FOIA states that:

"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."

10. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of First Tier Tribunal decisions, applies the civil standard of the balance of probabilities.
11. In this case, the Commissioner has sought to determine whether, on the balance of probabilities, the Department held information within the scope of parts b and c of the request, as outlined in paragraph 6 above.
12. In deciding where the balance of probabilities lies, the Commissioner will consider the complainant's evidence and arguments. She will also consider any searches carried out by the public authority together with any other information or explanation offered by the public authority which is relevant to her determination.
13. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
14. In correspondence with the Commissioner, the Department stated that it did not hold recorded information within the scope of parts b and c of the complainant's request. It had never written down any information as to why the requested security arrangements were not made or the

timescale for response as it does not tend to document these issues in its normal course of business. As the FOIA does not oblige a public authority to create information in response to a FOIA request, and the Department clearly did not record any information in relation to either the timescale of its Secretary's response to the complainant or its apparent failure to make security arrangements with regard to a specific Tribunal hearing, the Commissioner is satisfied that the Department does not hold recorded information within the scope of parts b and c of the complainant's request.

15. The Commissioner does, however, find that the Department is in breach of section 1(1) of the FOIA as it did not inform the complainant that it did not hold some of the requested information.

Section 32-court records

16. Section 32(1) of the FOIA states:

"Information held by a public authority is exempt information if it is held only by virtue of being contained in—

(a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter

(b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or

(c) any document created by—

(i) a court, or

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter."

17. Section 32 is a "class-based" exemption, meaning that there is no need for a public authority to demonstrate potential harm for the exemption to apply. Any information of a certain type or category will be covered. Section 32 is also an "absolute" exemption in that it is not subject to a public interest test. The exemption either applies or it does not.
18. There are two main tests in considering whether information falls within this exemption. First, is the requested information contained within a relevant document? Secondly, is this information held by the public authority only by virtue of being held in such a document?
19. In the Commissioner's view, the phrase 'only by virtue of' implies that if the public authority also holds the information elsewhere it may not rely upon the exemption.

Is the information contained in a relevant document created for the purposes of proceedings in a particular cause or matter?

20. What is important in this context is whether the information meets the criteria as set out in section 32(1)(c). As the wording of the exemption implies, it is not only the reason for holding the information which is relevant, but also the type of document in which it is contained.

21. The Commissioner notes that the statutory regulations governing the Industrial Tribunals proceedings set out in the Industrial Tribunals (Constitution and Rules of Procedure) Regulations (Northern Ireland) 2005 (as amended) cover the "General Power to Manage Proceedings" in Schedule 1 of these Regulations.

22. The Department informed the Commissioner that it provides an administrative service to the OITFET judiciary, and if the Secretary to the Tribunals had been available at the time of correspondence they would have replied to the Council as part of their duties. The Tribunal President responded to the Council in their absence. The President's correspondence was part of the tribunal proceedings in the case to which the complainant is referring, which was in progress at the time.

23. The Commissioner therefore considers that security arrangements relating to specific tribunal cases are a judicial matter which fall under the remit of tribunal proceedings, and note that the Department's role can be that of providing an administrative function to the Industrial Tribunals.

24. The information requested by the complainant is the date on which the Secretary received the President's request for him to contact it. This date is the day on which the President's memo was emailed to the Secretary and is held only by virtue of the memo itself, which was created by the President as a member of the judiciary in relation to a current hearing, and of the email in which it was forwarded to the Secretary by the President's personal secretary, who is a member of the administrative staff provided to OITFET by the Department.

25. From the evidence she has seen, the Commissioner is satisfied that the information withheld by virtue of section 32(1)(c) is contained in a document created by a member of the administrative staff of a court, for the purposes of proceedings, and that there is no reason for the

Department to hold it other than for the purposes of those proceedings.

26. As section 32 of the FOIA is an absolute exemption, there is no requirement to consider whether there is a public interest in disclosure.
27. Therefore, the Commissioner's decision is that the requested information in part a of the complainant's request falls within the scope of section 32(1) of the FOIA and the Department was entitled to rely on section 32(1)(c)(ii) of the FOIA to withhold the information.

Right of appeal

28. 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: GRC@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

29. 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.

30. 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

Deirdre Collins
Senior Case Officer
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Wycliffe House
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