

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 March 2022

Public Authority: Department for the Economy
Address: Netherleigh
Massey Avenue
Belfast
BT4 2JP

Decision (including any steps ordered)

1. The complainant has requested correspondence about an industrial relations framework. The Department for the Economy ('DfE') is withholding the majority of information relevant to the request under section 35(1)(a) of FOIA (formulation of government policy). DfE has also applied section 40(2) of FOIA to the personal data within the disputed information.
2. The Commissioner's decision is as follows:
 - The information to which DfE has applied section 35(1)(a) of FOIA engages that exemption, and the balance of the public interest favours withholding the information.
3. The Commissioner does not require DfE to take any corrective steps.

Background

4. In its submission to the Commissioner, DfE has provided the following background and context.

Further education linkage to DfE

5. Further Education (FE) colleges are the main provider of vocational and technical training in Northern Ireland. They are central to delivering DfE's contribution to the outcomes set out in the draft Programme for Government, and to DfE's core policy initiatives. These include the '10x Economic Vision' and the draft 'Skills Strategy for a 10x Economy'.
6. Under the Further Education (Northern Ireland) Order 1997 (Schedule 3), the FE colleges' Governing Bodies set the pay and conditions for college staff after consultation with employee representatives through a committee structure. Since 2010 FE colleges have been classified as Non Departmental Public Bodies (NDPBs) of DfE. As such, DfE is responsible for the policy, strategic development and financing of the statutory further education sector, and sponsorship is delegated to its FE Division.
7. The relationship between DfE and each of the colleges is set out in the Management Statement and Financial Memorandum. This details the respective responsibilities of the Minister, Permanent Secretary (Accounting Officer), FE Division and Colleges/Governing Bodies in relation to budget management and control of resources as below:
 - The Minister's responsibilities (section 3.1) include approval of the amount of grant in aid/grant/other funds to be paid to the college and securing Assembly approval.
 - Pay and Conditions of Service (section 45) states that the staff of the college, shall be subject to the levels of remuneration as approved by DfE and Department of Finance (DoF).

Further education sector transformation

8. Transformation of the FE sector has been ongoing for a considerable time; in 2007 the 17 original colleges were merged into the current six colleges; in 2010 the colleges were reclassified as DfE Non-Departmental Public Bodies.
9. The six colleges currently have 30 campuses located in major towns and cities across Northern Ireland with an estate that has seen significant capital investment in recent years, including £135m of capital build projects currently in delivery. Approximately 88% of the colleges' £220m annual resource budget is paid in salaries to a total of 3,500 staff (lecturing and non-lecturing).
10. DfE's 'Further Education Means Success Strategy' was launched in January 2016 - shortly before the Department for Employment and Learning and the Department for Enterprise, Trade and Investment merged to become the Department for the Economy. The vision was for

an FE sector that delivered for business and the economy rather than just for learners. In the introduction to the Strategy, the Minister wrote,

“my top priority as Minister for Employment and Learning has been to transform the professional and technical education and training system, in order to provide the most effective support to the growth of our economy, and to provide learning pathways that enable the people of Northern Ireland to reach their full potential.”

11. The strategy document is structured around nine themes which contain a total of 21 policy commitments and the FE lecturers are key to delivering on these. Some elements of the strategy have been completed and closed. Others are ongoing and will be subsumed into work which will reframe the FE sector by developing a new delivery model for the FE colleges. This work includes the lecturers' pay and conditions. It is at an extremely sensitive stage, and a contractor is to be appointed imminently to undertake research work.
12. The FE sector is currently operating within a rapidly evolving strategic and economic environment. It needs to be able to adapt quickly to meet the changing skills needs of the economy and of learners. In addition, there are increasing concerns around the sustainability of the sector in the face of declining enrolments and increasing budgetary pressures.
13. The scale of change which has been taking place in some of these factors in recent years has been significant and the current operating model severely constrains colleges' ability to adapt and to flex their provision to address the challenges those changes present.

Request and response

14. On 6 July 2020 the complainant wrote to DfE on behalf of University College Union and requested information in the following terms:

“All written correspondence including emails, letters, notes of telephone conversations exchanged between Department of Employment and Learning staff, Minister and the Principals of the six Further Education Colleges (SERC, NRC, SWC, NWRC, BMC, SRC) and members of the College Employers Forum concerning an industrial relations framework following the collapse of the Salisbury taskforce in 2015 until the present.

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15. DfE responded to the request on 2 September 2020. It released some relevant information and refused to release the remainder that it holds, citing section 35(1)(a) of FOIA.
16. The complainant requested an internal review on 15 September 2020. They presented a number of arguments to support the view that the requested information did not engage section 35(1)(a), which included the following:
 - The ambition of the so called Transform To Deliver (TTD) policy was not pledged in any political party's manifesto. It did not feature in the draft 2016-2021 Programme for Government, nor its associated Outcomes Delivery Plan and it was not a departmental 'Indicator' for the ODP's implementation.
 - TTD appears to be an initiative devised by civil servants with the FE employers, independently of any democratic mandate or Ministerial direction required of government policy.
 - Ministerial approval to develop policy in a specific area is required prior to its formulation. The implication here is the civil service decides the policy as well as writes it and only thereafter is the Minister's opinion sought.
 - Further evidence that TTD is not a government policy is located in a briefing to the Permanent Secretary dated 16 November 2018. There was no government nor Minister in Northern Ireland in 2018. Stormont collapsed in January 2017.
 - DfE's refusal refers to the "ongoing negotiations" between Colleges and the Trade Union Side (TUS). There are no ongoing negotiations between the employers and Trade Unions representing lecturing staff in Further Education. Those negotiations collapsed on 29 January 2020 and a conciliation effort following same at the Labour Relations Agency was also unsuccessful. The trade unions have rejected the employers' proposals on two occasions and have been absolutely clear those proposals will not be given any further consideration by TUS.
 - Refusing to release information around respective costs and affordability on the basis of it endangering public finances has no bearing to the specifics of the FOI request submitted. No financial information was sought, and, in any case, redactions can be applied.

17. DfE provided an internal review on 11 November 2020. It upheld its reliance on section 35(1)(a) and noted that personal data contained in the information is also exempt from disclosure under section 40(2) of FOIA.
18. In its submission to the Commissioner, DfE advised that it intended to disclose a small amount of the information it had withheld, as that information is now in the public domain. The Commissioner understands that DfE disclosed that information on 25 February 2022. DfE confirmed that it continues to withhold the remainder of the information under section 35(1)(a) of FOIA [and section 40(2)].

Scope of the case

19. The complainant contacted the Commissioner on 11 December 2020 to complain about the way their request for information had been handled.
20. The Commissioner's investigation will focus on whether DfE is entitled to rely on section 35(1)(a) of FOIA to withhold information the complainant has requested, and the balance of the public interest. If necessary, he will consider DfE's reliance on section 40(2) to withhold some of the information.

Reasons for decision

21. Section 35(1)(a) of FOIA says that information held by a government department is exempt information if it relates to the formulation or development of government policy.
22. DfE has provided the Commissioner with a copy of the information it is continuing to withhold. It is a substantial amount of material that includes email correspondence and attachments. The attachments include draft business cases, submissions, meeting minutes and financial information (which the Commissioner notes the complainant says they have not requested).
23. In their complaint to the Commissioner, the complainant argued that although DfE asserted that the requested information is the subject of government policy, it has been unable to identify the specific policy upon which it relies. The complainant says that there is no Northern Ireland Executive policy mandating the civil service to collaborate with employers to redesign employment contracts and the industrial relations framework. The Minister agrees such work belongs to the Lecturer Negotiating Committee.

24. The complainant believes that officials have erroneously applied an exemption to prevent release of documentation that will show they have acted partially with college employers to diminish the collective bargaining rights of Trade Unions and worsen conditions of service (not pay) for further education lecturers. They say that one of the reasons DfE provided for not releasing the information – that “It could damage the Department’s reputation” - is not a qualifying reason for applying the section 35 exemption.
25. For its part, in its submission to the Commissioner DfE states that the request relates to the development of the options for transforming the FE sector and, as such, can be considered to be policy under development. DfE has provided the following further background on the associated negotiations about pay and conditions, which is the subject of the request.
26. While FE colleges are employers in their own right, public bodies that choose to follow Northern Ireland Civil Service terms and conditions but whose staff are not civil servants, as in the case of FE lecturers, must obtain Departmental approval for pay remits before making any pay commitments. When considering the potential out-workings of negotiations and developing policy, DfE’s FE Division, in its sponsorship role, must ensure that the NDPBs are as effective and efficient as possible and that the use of public funds is value for money. This necessitates Departmental approval with reference to the Minister as appropriate. In particular, FE college pay remits should comply with the Public Pay Policy.
27. Negotiations on FE lecturers’ pay and conditions between the College Employer Forum (CEF) representing the FE colleges and TUS take place through an agreed mechanism – the Lecturers Negotiating Committee. The University and College Union is one of three unions representing lecturers in FE colleges and it has declared an industrial dispute with both DfE and the FE Colleges since March 2021. Information relating to these negotiations on pay and conditions in the FE sector is at the core of the request for information in this case.
28. Pay negotiations have been taking place intermittently over several years to resolve the long-running issue around FE lecturers’ pay and conditions. At present, salaries account for 88% of net FE College’s Resource Budget and are rapidly increasing.
29. TUS withdrew from the negotiations in July 2020. Negotiations re-started in October 2020 but broke down again in February 2021 before TUS declared an industrial dispute in March 2021 (following a membership ballot on industrial action). TUS subsequently suspended their engagement in negotiations in July 2021. DfE has a vested interest in restoring good industrial relations to enhance the colleges’ ability as

NDPBs to deliver effective economic outcomes and also as its Ministerial remit includes the area of employment rights. In late 2021 the Minister met with both the employers and the TUS to actively encourage both parties to re-engage in the negotiating process on revised proposals.

30. The approach taken to the subject of the negotiations prior to late 2021 was that lecturers' pay negotiations formed part of a wider transformation of the FE sector, of which lecturers are a key part. However the recent revised proposals sought to separate out retrospective pay issues from current/ future pay issues and also from anything of a transformational nature. This new approach was intended to break the stalemate and it proved successful.
31. Negotiations resumed and resulted in some progress being made. On 13 December 2021 an agreement was reached on the way forward on one specific element of the negotiations, retrospective pay for 2019/20 and 2020/21. As this agreement fell well short of the original TUS demand of 7% and was within the 2% range specified in the above pay remit circular it did not require a full five point Business Case. Rather, a pay remit has been submitted to the DfE for consideration and approval. However the pay remit for this agreement is currently progressing through the financial approvals process and has not yet been approved.
32. Despite this progress with the negotiations, current (2021/22) and future pay issues remain outstanding along with wider transformational issues which will be the subject of further/ongoing negotiations which are due to resume in early 2022. Therefore the policy relating to the pay and conditions of FE lecturers' is still very much at the development stage and DfE is not in a position to release any information that would jeopardise its current position.
33. The outcome of these negotiations cannot be pre-empted. Any business case developed as a result of the negotiations will have to be referred to DfE for appraisal prior to seeking Ministerial approval and before approval is sought from the DoF. DfE's appraisal of the business case will consider the issue of affordability and will identify the extent of any additional financial resources which would be required to deliver the preferred option. The Minister will then explore how any additional requirements can be met including whether a bid for additional resources is required to meet the current and future years' pay bill (2021/22 onwards) and any budget required for transformation.
34. In its submission, DfE has confirmed that the policy about which the request is concerned relates to FE lecturers' pay and conditions and transformation within the FE sector. As this involves DfE financing the out-workings of any agreements, DfE consideration and approval is required to ensure:

- alignment with government policy
- that employers and learners' needs are met
- that the agreement is affordable and represents value for money; and
- is in line with the transformation of the FE sector.

As such, DfE says, the pay and conditions negotiations and outcomes reflect policy in development and the following policies: Further Education (Northern Ireland) Order 1997; Management Statement and Financial Memorandum and Public Pay Policy and Further Education Means Success.

35. These policies relate to the effective and efficient running of the FE colleges as NDPBs of DfE and DfE's role in ensuring value for money in relation to the use of public finances.
36. DfE considers that, therefore, the information which it continues to withhold is exempt under section 35(1)(a) on the basis of the roles of DfE and the Minister in this process, including the oversight of public funds and value for money.
37. DfE notes that one of the key indicators in the Commissioner's published guidance¹ on section 35, as to whether something relates to formulation or development of government policy, is that the "final decision will be made by the Cabinet or relevant Minister". DfE has confirmed that if the CEF and TUS reach agreement, DfE will be responsible for appraising the subsequent business case and the Minister will consider this and, if appropriate, approve it.
38. DfE goes on to note that the Commissioner's guidance states other indicators of government policy are "the government intends to achieve a particular outcome or change in real world" and "the consequences of the decision will be wide-ranging". DfE says that it is content that this is the case in this instance as the impact of the decision to approve any subsequent business case will be very significant, including for the following reasons:
 - It will determine whether this long running dispute is brought to an agreed conclusion.
 - It will set the pay policy for approximately 1,650 lecturers in the FE sector. Given that negotiations are retrospective, the outcome

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

of pay negotiations is likely to have a cumulative impact on public finances from past, present and future pay commitments. It will therefore have major and ongoing ramifications for public finances.

39. DfE concludes its submission by advising that the issues are complex, and the policy does not simply require an established formula to be applied to a set of figures to arrive at a pay calculation, i.e. this is not an administrative task, but rather the negotiations relate to far reaching transformational issues.
40. Developing the policy is an ongoing process and, despite its duration, the negotiations and process are live. The issues remain unresolved and there is currently no indication of when the negotiations will be concluded, and the policy finalised.

The Commissioner's conclusion

41. DfE is correct that the Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant Minister
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
42. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. It is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
43. The Commissioner has considered the complainant's reasoning as to why policy formulation or development is not relevant here. However, it is his view that DfE's submission satisfactorily addresses the above factors. First, regardless of what the process was that led to the business case associated with any final decision, the Commissioner accepts that the final decision on FE lecturers' pay and conditions will be made by the relevant Minister.
44. The Commissioner also accepts that, at the time of the request and currently, through the pay and conditions business case and associated decision the government intends to achieve a particular outcome or real

world change; namely a conclusion to a long running dispute; transformative change across the FE sector and a pay policy for FE lecturers. In addition, the Commissioner considers that the FE lecturers' pay and conditions business case and decision can be categorised as the development of a policy in its own right and DfE has identified other specific policies with which the decision is associated: Further Education (Northern Ireland) Order 1997; Management Statement and Financial Memorandum and Public Pay Policy and Further Education Means Success.

45. Finally the Commissioner accepts that the decision will have the wide-ranging consequences that DfE has identified at paragraph 34.
46. The Commissioner is therefore satisfied that the information being withheld relates to the formulation or development of government policy – specifically, government policy on public sector pay and conditions. He finds that the section 35(1)(a) exemption was therefore engaged at the time of the request and internal review in July and November 2020. The Commissioner has gone on to consider the public interest test.

Public interest test

47. Section 35 is a qualified exemption and so the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1) outweighed the public interest in disclosing the information.
48. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed. As such, the exact timing of a request will be very important.
49. There is often likely to be significant public interest in disclosure of policy information, as it is likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.

Public interest arguments in favour of disclosing the information

50. In its submission to the Commissioner, DfE has provided the following arguments:

- Releasing the information would increase transparency and demonstrate accountability of the workings of DfE around this matter. It would also improve public understanding of and trust in the decision making process relating to it.
 - Releasing this information would increase public confidence that changes to policies regarding public sector pay are well considered, debated and properly made.
 - Releasing this information may increase public awareness of the matter and encourage public debate of the details surrounding DfE's position.
51. The complainant has not provided any discrete public interest arguments for releasing the information, in their correspondence with DfE or with the Commissioner.

Public interest arguments in favour of maintaining the exemption

52. DfE has provided the following arguments. First, the information being withheld relates to a live policy issue which is highly sensitive due to its potential impact on FE College lecturers and the current position regarding TUS negotiations. Access to this information is strictly controlled both within DfE and the Colleges.
53. It is crucial to the integrity of DfE's decision making processes and negotiation with TUS that it maintains a safe space in which to exchange views and conduct free and frank discussion around this matter. This was the case both at the time of the request and subsequent internal review, and at the date of its submission to the Commissioner.
54. The aim of the negotiations is to resolve the lecturers' pay dispute and to agree the wider transformation of the FE sector. The approach to these negotiations has been significantly modified over time to separate out the major issues and deal with each of these one step at a time. This was in an attempt to break the stalemate in negotiations and encourage TUS to re-engage.
55. Proposals are still under discussion and may change over time, and releasing the information requested may therefore create misunderstanding.
56. While the financial circumstances have changed somewhat since the formulation of this policy began, the issues addressed in the information being withheld are still pertinent to the continuing negotiations. Releasing confidential information relating to previous proposals on the respective costs and affordability options that have been considered would be likely to skew and potentially undermine the negotiations. This

would make it much more difficult to obtain an agreed outcome which can deliver Value For Money for public finances. DfE considers that, "disclosure would prejudice the ongoing negotiations, mislead the wider public and the media about the government's position and negotiating strategy to the detriment of the taxpayer" (a Department of Health argument in a separate section 35 case: FS50600541).

57. Releasing information on the respective costs and affordability of options being considered could potentially endanger public finances. It could possibly impact on the ability of DfE and FE Colleges to meet the needs of both individual learners and of the economy as a whole.
58. The information addresses policy proposals and considerations requiring Ministerial approval. Releasing this information into the public domain at this stage would be likely to have major repercussions for the success of DfE's current industrial relations and ongoing negotiations. It would jeopardise DfE's ability to develop and consider further policy proposals objectively, free from public scrutiny and debate, and make it more difficult for an effective and affordable resolution to be reached.
59. The negotiations are ongoing and have yet to be resolved, with further complex discussions with TUS required before any resolution can be reached. Therefore it is very important to the integrity of the DfE's decision making processes that it maintains a 'safe space' in which to exchange views and conduct free and frank discussion. Releasing the information requested would jeopardise this safe space. DfE considers the Commissioner to have supported this argument in decision notices FS50477229 and FS50512828 in which the Commissioner favoured exemption as "the public interest in giving Ministers and officials space to consider policy options and continue to discuss issues in a full and frank matter outweighed disclosure".
60. Disclosing the information requested could lead to the 'chilling effect' as described in the Commissioner's guidance on the section 35 exemption. A loss of frankness and candour would damage the quality of advice exchanged within DfE and with the CEF, and lead to poorer decision making. This would prejudice DfE's negotiating position and discussions. The Commissioner recognised in decision notice FS50600448 that "there is public interest in maintaining MoJ's [Ministry of Justice] ability to deliver and formulate policy around public sector pay and conditions in relation to past and future policy formulation". The Commissioner also stated, "there is public interest in preserving the working relationship between the MoJ and its stakeholders such as trade unions and not doing anything which would hamper the ability of DfE to hold free and frank discussions in the future". DfE considers the circumstances of this case to be similar to that of the earlier MoJ case.

61. DfE notes that this chilling effect would be likely to carry forward into future policy making.
62. While of interest to the union that the complainant represents, DfE considers that the details contained in the disputed information are unlikely to be of benefit to members of the general public.
63. Finally, DfE considers the likelihood of the harm identified above occurring to be high and the impact to be severe, both at the time of the request and now. It says it therefore continues to be content that the public interest in withholding this information outweighs that in disclosure.

Balance of the public interest

64. The Commissioner acknowledges that there is clearly a public interest in transparency, openness and accountability in relation to decisions taken by government about public sector pay and conditions policy. Such decisions affect further education lecturers, and the further education sector and public finances more widely.
65. However, the timing of the request is a crucial factor. The Commissioner is satisfied that the policy process was live at the time of the request, and it remains live at the date of this notice. As the requested information relates to that policy making, he considers that the need for a 'safe space' to debate policy and reach decisions without external comment is a valid argument. It has been generally accepted by both the Commissioner and Tribunal (detailed in the section 35 guidance referenced above) that significant weight should be given to maintaining the exemption, where a valid need for safe space is identified. A compelling public interest in favour of disclosure is required when a significant need for safe space is demonstrated. The complainant has not presented any compelling public interest argument for disclosure.
66. Disclosing the information at the time of the request would have been likely to have had a significant impact; frustrating the safe space needed to deliberate the issues. The public interest in the government being able to develop its pay and conditions policy, without significant disruption is the overwhelming factor in the circumstances of this case.
67. However, the Commissioner has also considered the content of the withheld information. Whilst disclosing it would clearly inform the public and those wishing to influence the debate, the content does not create a compelling case for disclosure.
68. Having weighed the public interest factors for and against disclosure, the Commissioner has determined that the public interest in protecting the safe space at the time of the request was of sufficient significance for

him to conclude that maintaining the exemption outweighed the public interest in disclosure.

69. As the Commissioner has concluded that the DfE was entitled to withhold the requested information under section 35(1)(a), he has not gone on to consider the application of section 40(2).

Right of appeal

70. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

71. 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.
72. 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

Cressida Woodall
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Wycliffe House
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