

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

### **Decision notice**

**Date:** 28 February 2023

**Public Authority:** Department for Communities (NI)  
**Address:** Causeway Exchange  
1-7 Bedford St  
Belfast  
BY1 7FB

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

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1. The complainant has requested biographical information of panel members and any conflicts of interest these members have.
2. The Commissioner's decision is that Department for Communities (the DfC) has correctly relied on section 40(2) of FOIA when refusing to disclose the requested information.
3. The Commissioner does not require the public authority to take any further action.

#### **Request and response**

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4. On 27 April 2022, the complainant wrote to the public authority and requested information in the following terms:

"Request 1 relates to the five named expert [Ulster] Scots Strategy panel members:

1A: What biographical information does DfC hold on the panel members, including any information on any prior declared conflicts of interest.

1B: Copies of the information captured by 1A (redacting as necessary any personal information details)

Request 2 relates to background submissions documents to the Expert Panel report

2A The Expert Panel Report at page 4, makes reference to written submissions received by the Panel, what information does DfC hold in relation to these submissions?

2B Copies of the information captured by 1A (i.e. the written submissions - redacting as necessary any personal information.)

Request 3 NDNA Ulster Scots funding bid.

In the run up to NDNA the media reported a funding bid from the head of the Ulster Scots Agency that had been sent to [Languages] Branch in DfC – the details are here.

<https://inews.co.uk/news/uk/leak-shows-dup-proposal-140m-ulster-scots-funding-86475> some material from this bid is in the public domain but not the detail and there is a public interest in being aware the extent to which it is reflected or not in the current Expert panel report.

3A Can the DfC confirm it holds a copy of the funding bid [referred] to in the media article.

3B A copy of the funding bid [referred] to in the media article.”

5. The public authority responded on 12 May 2022. It provided some information within the scope of the request, but refused to provide the remaining information under Section 40(2). This withheld information related to one panel member and whether they had any conflicts of interests.
6. Following an internal review the public authority wrote to the complainant on 9 August 2022. It stated that it was upholding its original decision.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 25 August 2022 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of his investigation to be to establish whether the public authority is entitled to withhold the requested information under section 40(2) of FOIA

### **Reasons for decision**

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## **Section 40 personal information**

9. Section 40(2) of FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
10. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
11. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
12. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

## **Is the information personal data?**

13. Section 3(2) of the DPA defines personal data as:  

"any information relating to an identified or identifiable living individual".
14. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
15. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
16. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA

17. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the data subject. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
18. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
19. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

20. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

21. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
22. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

23. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.

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<sup>2</sup> Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of

24. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
25. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interests**

26. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
27. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
28. The complainant advised the Commissioner that the panel member whose name had been withheld is a "senior public figure" meaning there would be a strong public interest in knowing whether this panel member had declared any conflicts of interest.
29. The complainant explained that, the panel report recommended numerous funding streams, which could be linked to the panel members own interests, in which they would benefit from the funding recommendations.
30. The DFC recognised that the complainant had a legitimate interest in how funding was allocated, however it advised the Commissioner that the expert panel in question worked collectively to produce a set of
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the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

agreed recommendations, not to make funding decisions in respect of particular organisations. The DFC acknowledged that there is always a strong public interest surrounding the expenditure of public money.

31. The Commissioner has concluded that there is a clear legitimate interest in the requested information, he will therefore consider whether disclosure of the requested information is necessary.

**Is disclosure necessary?**

32. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
33. In the circumstances of this case, the complainant has requested the information to see if the panel member had made any funding recommendations to organisations they had a conflict of interest with.
34. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

**Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

35. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
36. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern to the disclosure; and
  - the reasonable expectations of the individual.

37. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
38. The Commissioner agrees that there would likely be a strong public interest regarding any conflicts of interest an expert panel member may have.
39. The Commissioner recognises that there is also a public interest in understanding how the public authority makes decisions and spends public funding.
40. The DFC informed the Commissioner that the panel member had objected to their information being released. The Commissioner accepts that disclosure would be contrary to the data subject's expectations. He is also satisfied that those expectations are reasonable.
41. The DFC explained that all members of the expert panel were informed that they had to declare any conflicts of interest, before they were accepted to be apart of the panel including that of the panel member in question. DFC advised each panel member that any information declared would only be used in relation to the work of the Expert panel and not shared outside this process. The Commissioner is therefore satisfied that if the DFC was to disclose information against their reasonable expectations, it would likely cause distress and harm to these people.
42. The Commissioner is satisfied that the DfC would be aware of any conflicts of interests and would have taken these into account before forming the Expert panel.
43. The DFC also confirmed that the panel doesn't dispense funds and any final decision on fund distributions would be made by the DfC. The member of the panel who's information was withheld, was only one member of the expert panel meaning the interest in transparency would be lower. All other panel members consented to their information being disclosed and therefore the public can determine any conflicts of interests based on these members.
44. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.

45. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.



## Right of appeal

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46. 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](mailto:grc@justice.gov.uk)

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

47. 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.
48. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**