

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 December 2023

Public Authority: Executive Office Northern Ireland
Address: Castle Buildings
Stormont Estate
Belfast
BT4 3SR

Decision (including any steps ordered)

1. The complainant has requested a copy of a document which was produced following discussions between the civil service and the main political parties in Northern Ireland. The Executive Office of Northern Ireland (TEO) refused the request citing section 35(1)(a) of FOIA (formulation or development of government policy). The Commissioner's decision is that TEO was not entitled to rely on section 35(1)(a) to withhold the requested information.
2. The Commissioner requires TEO to take the following steps to ensure compliance with the legislation:
 - Disclose the withheld information.
3. The public authority must take these steps 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 FOIA and may be dealt with as a contempt of court.

Request and response

4. On 8 December 2022, the complainant wrote to TEO and requested information in the following terms:

“Under the Freedom of Information Act, I would like to request a copy of a document produced because of talks with the main Stormont parties.

I understand a printed document has been produced following discussions led by Head of the Civil Service [name redacted] with the main Stormont parties in the months following May's Assembly election.

I understand it relates to discussions around policy priorities ahead of any new Executive eventually being formed. As this document has been printed, and thus finalised, I would contend that it cannot be withheld under any sort of exemption citing ongoing policy formation.

- Please disclose a scanned or PDF copy of the printed document. Please let me know if you receive this.”

5. TEO responded on 9 January 2023. It stated that it could not disclose the requested information and cited section 35(1)(a) as its basis for doing so.
6. Following an internal review, TEO wrote to the complainant on 7 February 2023 and stated that it was maintaining its original decision to withhold the requested information under section 35(1)(a) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 13 February 2023 to complain about the way their request for information had been handled.
8. The Commissioner considers that the scope of his investigation is to determine whether TEO were correct to rely on section 35(1)(a) of FOIA to withhold the requested information.

Reasons for decision

Section 35: formulation of government policy

9. Section 35(1)(a) FOIA provides an exemption from the duty to disclose information relating to the formulation or development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
10. The purpose of subsection 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosures which would undermine this process and result in less robust, well considered policy options in private.
11. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
12. TEO confirmed that the withheld information relates to the development of policy and priorities that may be considered by an incoming Northern Ireland Executive. It says that the document was provided to elected representatives to assist with their deliberation around priorities they may wish to have endorsed during a round of talks in the Autumn of 2022 to seek the return of the Executive.
13. Based on the representations submitted by TEO, and having inspected the information in question, the Commissioner accepts that the exemption at section 35(1)(a) is engaged in this case. The Commissioner considers that the withheld information is high level rather than detailed, but it clearly relates to policy matters in a number of areas. Given that the scope of section 35(1)(a) is intended to be broad, the Commissioner accepts that the withheld information does relate to the formulation of government policy. The Commissioner is therefore satisfied that the exemption at section 35(1)(a) is engaged.

Public interest test

14. TEO recognises a public interest in favour of transparency and accountability and a public interest in the development of policy and priorities that may be considered by an incoming Executive. It also accepts that there may be a public interest in disclosure on the

ground that it might assist the public's understanding and promote transparency and accountability.

15. Turning to its public interest arguments in favour of withholding the information, TEO argues that a frank and honest debate is required for a high-quality policy formulation and there is a public interest in maintaining a private space for discussion away from public scrutiny to effectively formulate and develop policy. It states that officials need to be able to discuss difficult policy issues with candour and the release of details of those discussions would inhibit that. It says that if officials were to feel inhibited from being frank and candid with one another because of the possibility of the disclosure of such exchanges, the quality of the debate lying behind the collective discussion and decision-making process would be diminished.
16. TEO argues that government requires a private space in which to carry out candid risk assessments and scenario planning. It contends that premature disclosure of advice and assessments may close off discussion and development of better policy options and undermine frank reporting on progress and identification of risks. It says that all parties contributing to the formulation and development of policy must be confident that any view expressed will be fully scrutinized in the light of all relevant factors and only considered for disclosure when a complete analysis has been undertaken and decisions reached. TEO contends that the document was prepared for the purpose of providing advice to an incoming Executive and as the Executive is not in place, draft policies and or priorities contained within the document have yet to be finalised and agreed.
17. In its submission to the Commissioner, TEO asserts that the document will be made available to any newly formed Executive and as such until such time as an Executive can be formed, it maintains that section 35(1)(a) applies. It states that it will protect good government by reflecting and protecting longstanding conventions of government and to protect the integrity of the policy making process. TEO argues that it would prevent disclosures that would undermine the process of formulating or developing policies which would likely lead to less robust, well considered, or effective policies.
18. TEO argues that the release into the public domain of the withheld information, has the potential to undermine and inhibit the ability of any new Executive to develop and implement policy going forward. It contends that disclosure may also impact the ability of civil servants to focus on the agreed priorities of any new Executive by diverting limited resources away from the agreed priorities of that

administration by shifting focus to policy positions that may never be agreed but were contained in the paper.

19. In addressing the concerns raised by the complainant in their internal review request, TEO argued that whilst the document was finalised, printed, and discussed at meetings with people external to TEO, it has no bearing on the fact that it was developed to assist with what the priorities might be, in the terms of policy that, a new Executive may wish to endorse. TEO maintains that the proposals contained in the document were not agreed or finalised and aspects of it may form the basis of any new programme for government, a newly formed executive might adopt. TEO acknowledges that talks with the main Stormont parties did not result in the formation of an Executive and therefore the policy proposals contained in the document are not agreed and finalised. It considers that when an Executive is formed, a number of the proposals contained in the document will again form the basis of discussion and possible agreement and therefore disclosure into the public domain of such information has the potential to undermine development of new policy proposals that have arisen during the intervening period.

Balance of the public interest

20. The Commissioner accepts that a safe space is needed for discussion and decision making by officials, particularly in handling matters relating to policy that may be considered by a new Executive. He considers that the timing of a request is often important. If the information reveals details of policy options and the policy process remains ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight.
21. The Commissioner has had sight of the withheld information which is a document containing policy priorities for potential consideration by a newly formed Executive. Having considered the document, he takes the view that it discusses broad, high-level objectives. The withheld information does not explain how these objectives could be translated into action, or indeed how those objectives would be achieved. He also considers that the document is not related to a specific government policy but discusses a number of policy areas in general terms. TEO has not explained how in practice the formulation of any government policy would be undermined if the withheld information were to be disclosed.
22. The Commissioner's decision must be based on the circumstances at the time of the original decision to refuse the request, i.e., January 2022. At this point in time Northern Ireland parties were in

discussions surrounding the possibility of restoring the NI Executive.¹ It is arguable that the political situation in Northern Ireland required a level of confidentiality to facilitate these discussions. In its internal review, TEO acknowledged that the withheld information could be out of date by the time a new Executive is formed. However, in the Commissioner's view this indicates that the withheld information itself would have been of limited value in terms of informing the detailed policymaking process at the time of the request. Accordingly, the need for confidentiality surrounding policy discussion would have been limited.

23. Although TEO maintains that there are a number of proposals and issues within the document that any newly formed Executive might consider relevant, it did not provide the Commissioner with detailed or specific arguments as to how disclosure of the withheld information could actually have the effect of undermining policy discussions.
24. The Commissioner acknowledges that TEO has provided general arguments about how disclosure could affect the development and formulation of government policy. However, he has not seen any public interest arguments relating to the importance of the withheld information to the public, who had been without a functioning government since February 2022 (and remain so at the time of issuing this decision notice). Having considered the political situation in Northern Ireland at the time of the request, it is the Commissioner's view that the disclosure of the withheld information would in fact provide the public with confidence and assurance that relevant matters of public interest and importance had been brought to the attention of elected representatives. This is a strong argument in favour of disclosure.
25. Whilst the Commissioner accepts that there is weight to the public interest arguments regarding safe space to develop policy away from external interference, the Commissioner is not persuaded that safe space is actually required in this case. His conclusion is informed by the general level of detail and the fact that there was no guarantee that an Executive would be formed to consider the document as part of a programme for government.
26. The Commissioner does not consider that TEO has provided compelling arguments about how the priorities outlined in the withheld information would be undermined by its disclosure into the

¹ <https://www.bbc.co.uk/news/uk-northern-ireland-64166307>

public domain. While the Commissioner accepts that section 35(1)(a) is intended to protect the policymaking process, the Commissioner is not persuaded that disclosure of the specific withheld information would have a harmful effect on such a process. Rather, he believes that disclosure would be more likely to provide reassurance to the public and may also assist public debate on what the priorities should be for any new Executive.

27. In light of the above the Commissioner finds that the balance of the public interest favours disclosure. The public interest in maintaining the exemption is not sufficient to outweigh the public interest in disclosure. Therefore, the Commissioner finds that the withheld information ought to have been disclosed to the complainant.

Right of appeal

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

28. 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.
29. 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

**Esi Mensah
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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