

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 6 August 2013

Public Authority: Office of the First Minister and deputy First Minister

Address: Castle Buildings
Stormont Estate
Belfast
BT4 3SR

Decision (including any steps ordered)

1. The complainant made an information request to the Office of the First Minister and deputy First Minister for Northern Ireland (OFMDFM). OFMDFM took over two years to provide a response. The Commissioner's decision is that OFMDFM failed to comply with sections 1, 10 and 17 of the FOIA. As OFMDFM has now responded to the request the Commissioner requires no steps to be taken.

Request and response

2. On 27 January 2011, the complainant requested the following information from OFMDFM:
"Any documents (including emails) in relation to the appointment of Phil Holder (appointed to examine the handling of the NI Water crisis)"
3. OFMDFM acknowledged receipt of the request on 3 February 2011.
4. On 29 March 2013 OFMDFM wrote to the complainant. OFMDFM advised that it had identified that the request had not been answered, and now provided a substantive response. OFMDFM provided two news releases, but refused to provide two other documents: a Chair's Brief for an Executive Meeting, and the minutes of an Executive Meeting. OFMDFM stated that this information was exempt under section 35(1)(b) of the FOIA. OFMDFM also claimed reliance on the exemption at section 40(2) in relation to some personal data contained within the withheld information.

Scope of the case

5. On 15 May 2013 the complainant contacted the Commissioner to complain about the time taken by OFMDFM to respond to his request. The complainant confirmed that he was content to accept OFMDFM's reliance on the section 35(1)(b) and section 40(2) exemptions in relation to the withheld information. However the complainant pointed out that OFMDFM had taken over two years to provide a response, and asked the Commissioner to issue a decision notice addressing this.
6. Under section 50(2)(a) of the FOIA the Commissioner is not required to make a decision if the complainant has not exhausted the public authority's internal review process. However, the Commissioner is mindful that OFMDFM took more than two years to respond to the request. The Commissioner therefore considered it appropriate to waive the requirement that the complainant should request an internal review.

Reasons for decision

Section 1: general right of access

Section 10: time for compliance

Section 17: refusal notice

7. Under section 1(1)(a) of the FOIA a public authority is obliged to confirm or deny to the complainant that the requested information is held. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant unless a valid refusal notice has been issued. Section 10(1) requires that the public authority comply with section 1 promptly, and in any event no later than twenty working days after the date of receipt of the request.
8. The Commissioner asked OFMDFM to provide a chronology detailing the steps taken in handling the complainant's request. According to the information provided by OFMDFM, a response to the complainant's request was prepared and passed to the Private Office for Ministerial approval on 18 February 2011.
9. The chronology shows that the Local Information Manager (LIM) and officials from the Information Management and Central Advisory Branch (IMCAB) sent frequent reminders to the Private Office, but were advised each time that the request was "still under consideration". The draft response was finally approved by the Private Office on 29 March 2013, and was issued to the complainant later that day.

10. The Commissioner has had sight of all the information which fell within the scope of the request, and notes that it comprises four short documents. The information provided by OFMDFM did not offer any explanation as to why it took more than two years for the Private Office to consider these four documents and the draft response. It appears to the Commissioner that the delay in providing a response was caused by the Private Office rather than the LIM or IMCAB officials.
11. The Commissioner notes that two documents – the news releases - were in the public domain at the time the request received. Therefore the Commissioner is at a loss to understand why it took OFMDFM two years to provide this information to the complainant. If OFMDFM did not wish to provide the information it would have been entitled to issue a refusal notice citing section 21 of the FOIA (where information is already reasonably accessible to the applicant). However in the Commissioner's view there can be no justification for taking so long to provide a response.
12. As OFMDFM greatly exceeded the time for compliance set out in the FOIA, it clearly failed to comply with section 1(1)(b) and section 10(1) in terms of providing the two documents that were not exempt from disclosure. As OFMDFM did not confirm or deny that it held the requested information to the complainant within the time for compliance, the Commissioner also finds that OFMDFM failed to comply with section 1(1)(a) and section 10(1) of the FOIA.
13. Section 17(1) of the FOIA states that if the authority wishes to rely on any exemption it must issue a refusal notice promptly, and in any event no later than twenty working days after the date of receipt of the request. Section 17(2) of the FOIA allows a public authority to extend the time limit where it is still considering the public interest as long as certain measures are taken. Section 17(2) states that the refusal notice:

"must indicate that no decision ... has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached".
14. The effect of this is that a public authority must reach a decision about whether or not a qualified exemption is engaged within twenty working days. If it determines that the exemption is engaged, then a refusal notice that complies with section 17(1) must be issued within twenty working days. The public authority therefore is only permitted to extend the time for compliance in order to consider the public interest test under an exemption which has been applied – and communicated to the applicant – within 20 working days of the request.

15. In this case OFMDFM gave the complainant no indication that it was considering the application of any exemptions. In fact OFMDFM did not communicate with the complainant at all between acknowledging the request on 3 February 2011 and issuing the response on 29 March 2013.
16. The Commissioner is mindful that the exemption at section 35(1)(b) is class-based: if information falls within its scope then the exemption is engaged, there is no requirement to consider the potential effects of disclosure. Consequently the Commissioner is again disappointed that it took so long for OFMDFM to decide that the exemption applied to the withheld information. The exemption is qualified and therefore subject to the public interest test, although there is no statutory time limit for considering the public interest. The Commissioner has commented on this further in Other Matters below, but remains of the view that two years is an unacceptable time for an applicant to wait for a response to an information request.
17. As OFMDFM failed to issue a valid refusal notice within the time for compliance the Commissioner finds that it failed to comply with section 17. In addition the Commissioner is particularly disappointed that OFMDFM failed to keep the complainant informed about the delay, as he considers this to be a matter of basic customer service.

Other matters

18. The Commissioner has issued a number of decision notices involving OFMDFM's failure to comply with the statutory time for response. For example, the Commissioner issued a decision notice in January 2013 relating to a request which took OFMDFM ten months to answer¹. This pattern of non-compliance is clearly unsatisfactory, and led to OFMDFM being selected for formal monitoring by the Commissioner between January-March 2013².
19. In relation to that monitoring the Commissioner has requested further information from OFMDFM and will consider what further action, if any, is necessary.

¹ Decision notice FS50473584

² For more information see www.ico.org.uk/what_we_cover/monitoring_compliance

20. The Commissioner has pointed out at paragraph 16 above that there is no statutory time limit for consideration of the public interest in relation to qualified exemptions. However the Commissioner's published guidance on refusal notices confirms his view that public authorities should take no longer than 20 working days to consider the public interest.³

3

http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/refusing_a_request_writing_a_refusal_notice_foi.ashx

Right of appeal

21. 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: informationtribunal@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

22. 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.
23. 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