

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 6 February 2018

Public Authority: Department of Agriculture, Environment and Rural Affairs

Address: Dundonald House
Upper Newtownards Road
Belfast
BT4 3SB

Decision (including any steps ordered)

1. The complainant has requested information relating to a single-language policy. The Department of Agriculture, Environment and Rural Affairs refused to disclose the requested information, relying on the exemption at section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the exemption at section 35(1)(a) is engaged with regard to the information held. However she also finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information to the complainant.
4. 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 the FOIA and may be dealt with as a contempt of court.

Background

5. The request in this case followed an Assembly Question submitted by Catherine Seeley MLA on 5 September 2016:

"To ask the Minister of Agriculture, Environment and Rural Affairs to detail (i) the cost of changing the name of the Fisheries Protection

vessel Banrion Uladh to Queen of Ulster; (ii) the rationale for the decision; and (iii) any consultation that took place.”¹

6. The then Minister, Michelle McIlveen, responded on 27 September 2016 as follows:

“The change of lettering was carried out at a scheduled annual maintenance event involving repairs, repainting and antifouling.

DAERA is a new Department with a fresh identity and logo and adopts a single language policy, there have consequently been some necessary adaptations to assets transferring to the new Department.

The name of the patrol vessel was a matter for the former DARD Minister Michelle Gildernew and was not an issue for consultation.”

Request and response

7. The request which led to this complaint was submitted to the Department by the complainant on 30 September 2016. A detailed chronology of the request is set out in Annex 1 at the end of this decision notice. In brief, the Department issued a refusal notice citing section 35 of the FOIA, but was subsequently unable to confirm to the Commissioner what information it actually held at the time of the request.
8. The complainant resubmitted the request to the Department on 7 September 2017:

- “ 1. DAERA policy documentation. [name of complainant] requests*
- a) The titles of documents which set out the Department's language policy*
 - b) A copy of the policy*
- 2. DAERA policy approach*
- a) The titles of documents, including minutes of meetings, briefing papers, legal opinion and any other documentation, including by email, which set out the Department's approach on the policy and the scope of its application*
 - b) Copies of all the documentation listed at 2a)*

¹ <http://aims.niassembly.gov.uk/questions/printquestionssummary.aspx?docid=271006>

- c) *The titles of any documents, including legislation, which the Department considers sets out its language policy framework*
 - d) *Copies of the relevant provisions within the documents listed at 2c) which the Department relied on to set out its language policy*
3. *Ministerial direction*
- a) *The titles of minutes, documents, including e-correspondence which sets out any Ministerial direction on Departmental language policy*
 - b) *The titles of minutes, documents, including e-correspondence which sets out any Ministerial direction on policy for naming of assets, both those transferring from previous department(s) and those being acquired at present or in future, signage, interpretation and information panels*
 - c) *Copies of the documentation listed at 3b)*
4. *Section 75 Equality Duty NI Act 1998*
- a) *The titles of documents, including minutes of meetings, briefing papers, legal opinion and any other documentation, including by email, which set out the Department's approach on equality screening of the language policy*
 - b) *Copies of all the documentation listed at 4a)*
 - c) *The titles of documents, including minutes of meetings, briefing papers, legal opinion, advice from the Equality Commission or any other body charged with compliance with Equality provisions, and draft and finalised consultation documentation with regards to an EQIA on the proposed policy*
 - d) *Dates of any public consultation on the policy*
 - e) *Copies of the documentation listed at 4c)*
5. *European Charter for Regional or Minority Languages*
- a) *The titles of documents, including minutes of meetings, briefing papers, legal opinion and any other documentation, including by email, which set out the Department's approach on compliance with the provisions of Part II and Part III of the European Charter for Regional or Minority Languages*
 - b) *Copies of the documentation listed at 5a)*

- c) *The titles of documents, including minutes of meetings, briefing papers, advice from the Department for Communities, the Equality Commission, the Inter Departmental Charter Implementation Group or any other body with the application of Charter provisions in respect of the Department's language policy*
 - d) *Copies of the documentation listed at 5c)"*
9. The Department issued a fresh refusal notice on 21 September 2017, again citing the exemption at section 35(1)(a) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 5 October 2017 to request that she make a decision as to whether the Department was entitled to refuse the request of 7 September 2017 in reliance on the exemption at section 35(1)(a) of the FOIA.
11. As explained in the annex, the Commissioner is not required to make a decision in respect of a complaint submitted if the complainant has not exhausted any complaints procedure provided by the public authority. However the Commissioner notes that the Department has now had a number of opportunities to reconsider its position, over a period of one year. The Commissioner did not therefore ask the complainant to request a further internal review, but considered it appropriate to proceed to a decision notice in this case.
12. The Commissioner has received another complaint which deals with the same withheld information. That complaint is the subject of a separate decision notice,² although inevitably much of the analysis is repeated in both cases. The Commissioner would stress that she has considered all the circumstances of each case.

Reasons for decision

Section 35: formulation or development of government policy

13. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner is of the view that the
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² Decision notice FS506694285

formulation of government policy relates to the early stages of the policy process. This covers the period of time in which options are collated, risks are identified, and consultation occurs whereby recommendations and submissions are presented to a Minister. Development of government policy however goes beyond this stage to improving or altering existing policy such as monitoring, reviewing or analysing the effects of the policy.

14. In this case the Department has maintained that the information relates to the formulation and development of a particular policy, namely the Department's single language policy. In its original refusal notice dated 2 March 2017, and the subsequent refusal notice dated 21 September 2017, the Department said that it was developing a departmental language policy.
15. The Department has confirmed that it holds the following information relevant to the request:
 - 1) Submission Language Policy;
 - 2) Annex A Draft DAERA Language Policy;
 - 3) Annex B Parts II & III European Charter; and
 - 4) Annex C Draft DAERA Language Policy Screening.
16. The complainant disputed the Department's claim that the information in question related to the formulation of government policy, given that the Department did not appear to hold any recorded information at the time the original request was submitted.
17. Having reviewed the withheld information, the Commissioner accepts that it relates to the formulation of the Department's single language policy. As such, the Commissioner accepts that section 35(1)(a) is engaged. The Commissioner considers the extent of information held at the time of the request to be more relevant to the consideration of the public interest test.
18. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider whether the balance of the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure of the information. If the respective public interest arguments are equally balanced, then the information ought to be disclosed.

Public interest in favour of disclosing the withheld information

19. The Department identified the following arguments in favour of disclosing the withheld information:

- The right of the public to have access to information.
 - Disclosure will reveal reasons for decisions.
 - The information may make a valuable contribution to the public debate on the issue.
20. The complainant argued that there was considerable public interest around the treatment of the Irish language by Northern Ireland government departments, especially in the absence of an agreed strategy for the Irish language. The complainant referred to the European Charter for Regional or Minority Languages, signed by the UK Government in 2000. The Charter is the European convention for the protection and promotion of languages used by traditional minorities.³ The complainant was of the view that Charter obligations relating to the Irish language were not being met, therefore they argued that the public ought to be informed as to how departments were treating these obligations.
21. The complainant also pointed out that the Department's response indicated that no formulation of government policy had taken place prior to the decision to rename the Fisheries Protection Vessel (FPV). The complainant argued that disclosure of the withheld information would make a valuable contribution to the public debate in that it would inform the public whether the government policy had been formulated
- "...in support of a decision already made rather than on an evidence and policy basis".*
22. The Commissioner agrees that there is a general public interest in the disclosure of information held by public authorities, particularly information that would inform the public as to how the authority makes decisions. The Commissioner acknowledges that, in this particular case, disclosure of the requested information would more specifically inform the public as to the status of the Department's single language policy.
23. The Commissioner is not however convinced that disclosure of the withheld information would in fact reveal reasons for decisions, as suggested by the Department. One of the key issues in this case is that no Ministerial decision has been taken on the draft single language policy.

³ <https://www.coe.int/en/web/european-charter-regional-or-minority-languages/home>

Public interest in favour of maintaining the exemption

24. The Department identified the following arguments in favour of maintaining the exemption:
- Premature disclosure of this information may have an adverse effect on the development of the Department's language policy at this stage.
 - Release of the records may prematurely prejudice the process of policymaking wherein officials have the space in which to debate live issues.
 - The loss of space in which to discuss matters frankly and with candour would damage the quality of advice and lead to poorer decision making in the future.
 - The broader community interests must be considered and releasing any information about a single language policy may be detrimental at this stage.

Balance of the public interest

25. The Commissioner has carefully considered the arguments put forward both in favour of disclosure, and in favour of maintaining the exemption. The Commissioner is of the opinion that the Department's arguments are largely generic, and do not reflect the Department's consideration of the actual withheld information.
26. The Department's reference to space in which to debate live issues would appear to correspond to the safe space argument described in the Commissioner's guidance.⁴ The Commissioner accepts that safe space arguments are often relevant, but the Department has not clarified why safe space is required in this case. In the absence of a detailed explanation of the Department's reasoning the Commissioner is unable to attach significant weight to the safe space argument.
27. The Department has also suggested that disclosure of the withheld information could damage the quality of advice and lead to poorer decision making in the future. This appears to correspond to the "chilling effect" argument described in the Commissioner's guidance, although

⁴ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

the Department has not explained how it considers that disclosure of the withheld information would result in such harm.

28. The Commissioner is again assisted by her guidance on section 35, which sets out:

“When discussions are purely internal then civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also possible that the threat of future disclosure could actually lead to better quality advice.”

29. Having inspected the withheld information the Commissioner does not accept that its disclosure would be likely to have a detrimental impact on the provision of future advice. In the Commissioner's view the submission to the Minister (item 1 as described at paragraph 15) is not especially frank or sensitive, and the draft policy (item 2) is fairly generic. The Commissioner has seen nothing to indicate how civil servants would feel inhibited in future decision making if this information were to be disclosed into the public domain.

30. The Commissioner further notes that some of the withheld information is already in the public domain (ie item 3). In addition the Department's Equality Scheme commits the Department to publishing details of its equality screening documentation as follows:

“As soon as possible following the completion of the screening assessment, the completed form, signed off and approved by the senior manager responsible for the policy, will be made available on our website, under the Equality Scheme heading on the DAERA homepage.”⁵

31. The Scheme does not indicate that the publication of screening documentation is subject to approval of the policy.
32. The Commissioner is aware that the Minister's decision to rename the FPV has resulted in substantial media interest and comment. The Commissioner is also mindful that the issue of language is politically sensitive in Northern Ireland. However the Commissioner is required to consider the public interest, or the public good.
33. The timing of the request is also relevant. Between the original request (30 September 2016) and the resubmitted request (20 August 2017)

⁵ <https://www.daera-ni.gov.uk/sites/default/files/publications/daera/daera-equality-scheme-2016-2020.PDF>

the Northern Ireland Assembly collapsed, and at the time of issuing this decision notice it was unclear when it might be restored. In the absence of a Minister to approve or amend the policy, it remains in draft form.

34. The Commissioner recognises that there is a limited general public interest in protecting information relating to a live policy decision. This is because there is a general public interest in providing a certain amount of protection to the safe space in which policy is discussed and developed. The Commissioner also acknowledges the Department's arguments relating to the political situation, ie its concern about disclosing information without Ministerial approval in a time of uncertainty about the future of the Northern Ireland Assembly. The Department is understandably reluctant to disclose information that it considers could make it more difficult for the political parties to reach agreement.
35. However, the Commissioner is of the view that public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. In the absence of evidence to support the Department's concerns about negative consequences of disclosure the Commissioner cannot attach significant weight to these arguments. The Commissioner has attached some weight to the complainant's argument that disclosure of the withheld information would help inform the public as to the basis for the policy as drafted.
36. In light of the above, the Commissioner finds that there is considerable public interest in informing the public as to the development of the Department's single language policy. She is not satisfied that the public interest in maintaining the exemption at section 35(1)(a) is sufficiently strong to outweigh the public interest in disclosure. Therefore the Commissioner finds that the withheld information ought to be disclosed into the public domain.

Right of appeal

37. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

38. 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.
39. 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

Sarah O’Cathain
Senior Case Officer
Information Commissioner’s Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Annex 1: background to the complaint

1. The request which is the subject of this complaint was originally submitted to the Department by the complainant on 30 September 2016.
2. The Department issued a number of holding responses, and provided a substantive response on 2 March 2017. It confirmed that it held the requested information but refused to disclose it, citing the exemption at section 35(1)(a) of the FOIA.
3. The complainant requested an internal review on 14 March 2017.
4. The complainant contacted the Commissioner on 19 May 2017 since they had not received the outcome of the internal review.
5. The Commissioner is not required to make a decision in respect of a complaint submitted if the complainant has not exhausted any complaints procedure provided by the public authority. Therefore the Commissioner wrote to the Department on 2 June 2017 to remind it of its obligations under the FOIA.
6. Since the Department was unable to confirm when it would be in a position to complete the internal review, the Commissioner used her discretion to proceed to an investigation.
7. The Commissioner asked the Department to provide her with a copy of the requested information. On inspection of the information, the Commissioner noted that it was dated after the request was received by the Department. The Commissioner was mindful of section 1(4) of the FOIA, which provides that

“The information –

- a. *in respect of which the applicant is to be informed under subsection (1)(a), or*
- b. *which is to be communicated under subsection (1)(b),*

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.”

8. The Commissioner drew the Department's attention to the fact that the request was made on 30 September 2016, but the withheld information as provided to the Commissioner was dated November 2016. The Commissioner asked the Department to confirm whether it held a draft version of any of the documents at the date of the request, ie 30 September 2016.
9. The Department confirmed to the Commissioner that the information it provided to her was the only information it held that was relevant to the request. The Department apologised that it was unable to state with certainty when the information was created, but confirmed that it was first saved to its electronic records management system in November 2016.
10. The Commissioner has drawn the Department's attention to the importance of ensuring that a response to a request for information meets the requirements of the FOIA. In this case the Commissioner cannot be certain whether or not the requested information was in fact held at the time of the request of 30 September, as required by section 1(4) of the FOIA. Therefore the Commissioner considered it appropriate to suggest to the complainant that they resubmit the request.
11. The complainant resubmitted their request to the Department on 7 September 2017 so as to allow the Department to issue a response relating to the information that it now held.
12. The Department issued a refusal notice on 21 September 2017, maintaining its reliance on the exemption at section 35(1)(a) of the FOIA.