

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 23 June 2021

Public Authority: Department of Finance Northern Ireland

Address: Clare House
303 Airport Road
Belfast
BT3 9ED

Decision (including any steps ordered)

1. The complainant has requested information from the Department relating to a maintenance review. The Department of Finance (“the Department”) refused to disclose the information, citing section 33 of the FOIA as a basis for non-disclosure.
2. The Commissioner’s decision is that section 33 of the FOIA is not engaged in relation to the requested information.
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 Act and may be dealt with as a contempt of court.

Request and response

5. On 18 September 2019, the complainant wrote to the Department and requested information in the following terms:

"I am requesting a copy of the Gateway 5 review carried out recently on the Northern Ireland Housing Executive ("NIHE") maintenance services."
6. The Department refused to disclose the requested information to the complainant, stating that it was applying section 33 of the FOIA to the information.
7. The complainant asked for an internal review on 2 October 2019, the result of which was provided to him on 16 October 2019. The reviewer upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on 18 December 2019 to complain about the way his request for information had been handled.
9. The Commissioner has considered the Department's handling of the complainant's request, in particular its application of the above exemption.

Reasons for decision

10. Section 33(1)(b) of the FOIA states that the exemption applies to any public authority which has functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
11. Section 33(1) should be read in conjunction with section 33(2) of the FOIA. This provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).
12. The first step is to establish whether the Department has the audit functions described in section 33(1)(b) of the FOIA. The Commissioner's guidance on section 33 acknowledges that the expression "economy, efficiency and effectiveness" is not clearly defined. Nevertheless, the Commissioner considers it would encompass information about inspections of the use of resources such as staff and premises, as well

as the standard of services provided by the authority being audited. Her guidance can be accessed via this link¹.

13. The Department has stated that Gateway reviews are managed in Northern Ireland by the Centre of Expertise for Programme and Project Management within the Construction and Procurement Delivery division of the Department, the local authorised hub of the Efficiency and Reform Group within the Cabinet Office. Therefore the exemption can be claimed by the Department.
14. The Department assessed whether a Gateway Review can be considered an audit function and in doing so made reference to a previous decision notice of the Commissioner's² in which the requester asked for information on the traffic light status of Gateway Reviews carried out by the Office for Government Commerce (OGC) in relation to plans to introduce ID cards; the requests were refused under section 33. The Information Commissioner considered whether section 33 applied to the information and stated the following:

"Gateway reviews take place at key decision points in major acquisition programmes and procurement projects in civil central government. The OGC has explained that one of its functions is to examine and review the ID card programme, at critical stages in its lifecycle, to assess whether it can progress successfully and to make the necessary recommendations in order for it to do so. The Commissioner is therefore satisfied the OGC does examine the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions. Therefore the Commissioner is satisfied that OGC is a public authority to which the exemption at s.33 of the Act applies".

15. The Commissioner's view was that all stages of Gateway Reviews, if carried out by a public authority, are audit functions for the purposes of section 33 (1)(b).
16. The exemption at Section 33 is prejudice-based and only applies if disclosure of the requested information would, or would be likely to, prejudice the exercise of any of the authority's functions, as stated in paragraph 11 above.
17. The term "would" prejudice means that it is more likely than not to occur (i.e. a more than 50 percent chance that prejudice would occur. "Would

¹ <https://ico.org.uk/media/for-organisations/documents/1210/public-audit-functions-s33-foi-guidance.pdf>

² FS50070196

be likely to" prejudice is a lower threshold – although there may be below a 50 percent chance, there must be a real and significant likelihood of prejudice occurring.

18. The Commissioner considers that prejudice in the context of section 33 of the FOIA may take different forms. One scenario is that premature disclosure could affect the behaviour of the organisation being audited. Another is a more general prejudice to audit functions where, for example, disclosure was about specific audit techniques that were not already known to the public. A further scenario is where disclosure would or would be likely to discourage cooperation with the auditor in the future thereby prejudicing the audit function.
19. It is the Department's view that disclosure of the requested information "would prejudice" the Department's functions as outlined in Section 33 of the FOIA. It considers that disclosure of the requested information by the Department would be setting a precedent whereby the body that administers the independent Gateway Review process (i.e. the Department) undermines the integrity and trust inherent in the process by releasing report information 'behind the backs' of client Senior Responsible Owners (SROs) in other Departments. The Department considers that "the seriousness of this action cannot be overstated in terms of the future value of this highly regarded and painstakingly embedded independent review process."
20. The Department states that it considers that it should be a matter for the project SRO (who is the commissioner of the Gateway Review and owner of the review report, which he received in confidence from the review team) as to whether or not to disclose the report.
21. The Department also states that it considers that it would be inappropriate for it to disclose information which could pertain to aspects of a contractor's relationship or performance in delivering services to the sponsored body of another Department, i.e. the NIHE which is sponsored by the Department for Communities ("DfC"). The Department considers that this "would prejudice" its ability to provide independent Gateway Reviews to the NIHE in the future.
22. In the Department's view also, disclosure of the requested information "would be likely to prejudice" and undermine the trusted relationships built up over many years between the Department and the NIHE, DfC and the other Departments, that are necessary to effectively deliver an independent and 'in confidence' Gateway™ Review process.
23. The Department also states that it has no view on whether or not a Department within the Northern Ireland Civil Service ("NICS") decides to disclose its own Gateway Review information. It states that it does not

object to the disclosure of the requested information itself, rather it objects to the disclosure of the requested information by the Department, which is the Gateway Review administrator only and is granted access to a copy of each report "for the sole purpose of deriving and publishing lessons learned."

24. The Department also stated to the complainant in its original response that "disclosure would make it less likely that in future assurance reviews, the audited body and third parties will volunteer useful information to the auditor."
25. The Commissioner understands the necessity to maintain the integrity and trust inherent in the audit process, however the Department has not provided any evidence as to how disclosure of the requested information would meet the high threshold of "would prejudice", or even the lower threshold of "would be likely to prejudice" in this respect. It has alluded to disclosing the information "behind the back" of the SRO, however it has not indicated whether or not it sought the views of the SRO regarding disclosure in accordance with the guidance set out in section 3 of the ICO's Section 45 Code of Practice, which states as follows:-

"Public authorities may want to directly consult third parties in these circumstances particularly if, for example, there are contractual obligations which require consultation before information is released. In other circumstances it may be good practice to consult third parties, for example, where a public authority proposes to disclose information relating to third parties, or information which is likely to affect their business or private interests.

Consultation will often be necessary because third parties who have created or provided the information may have a better understanding of its sensitivity than the public authority. On this basis it is important the public authority understands the views provided by the third party and gives them appropriate weight. The expert view of a third party may, as long as it is reasonable, be helpful if the applicant appeals against any refusal. The views of third parties will be especially relevant in cases where it is necessary to consider the prejudice and public interest tests."

26. In relation to disclosure potentially making it less likely in the future that the audited body and third parties would volunteer useful information to the auditor, the Commissioner is not persuaded that the information contained in the Gateway Report is of such a nature that its disclosure would discourage future co-operation by those providing the information to the Department. In addition, the Commissioner does not accept that those contributing information as part of the Gateway Review process do so on a genuinely voluntary basis, or that they are at liberty to refuse to co-operate with future Gateway Reviews. Those contributing information

do so in a professional capacity which is part of their official responsibilities.

27. The Department has stated that it has no objection to a NICS Department disclosing its own Gateway Review report. Therefore it does not link the prejudice which it believes "would" be caused directly to the disclosure of the requested information, but rather to the disclosure of that information by this particular Department, which delivers the Gateway Review processes. It does not state whether it has consulted with the DfC or the NIHE in relation to the disclosure of the report, it merely states that disclosure "behind the back" of the SRO would prejudice the integrity and trust of the process.
28. The Department has not demonstrated that disclosure of the requested information would, or would be likely to, prejudice the exercise of any of its audit functions. The Commissioner's decision therefore is that the exemption at s.33 of the Act is not engaged in respect of the requested information.

Right of appeal

29. 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

30. 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.
31. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF