

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 December 2011

**Public Authority:** Office of the First Minister and Deputy First Minister

**Address:** Castle Buildings  
Stormont Estate  
Belfast  
BT4 3SR

### Decision (including any steps ordered)

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1. The complainant requested information relating to funding by the Office of the First Minister and Deputy First Minister (OFMDFM) to Lesbian, Gay, Bisexual and Transgender (LGBT) groups since devolution.
2. The Information Commissioner's decision is that OFMDFM improperly applied section 12 and breached section 16 of the FOIA in handling the request, as well as committing a number of procedural breaches.
3. The Information Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - OFMDFM must provide the complainant with the information which falls within the scope of the request or issue a valid refusal notice under section 17 of the FOIA.
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 Information Commissioner making written certification of this fact to the high court (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 10 January 2011, the complainant wrote to OFMDFM and requested information in the following terms:

*"I request all information held by OFMDFM relating to the payment of monies by the department to lesbian gay and bisexual groups since the restoration of devolution.*

*Also, please provide me with the dates on which monies were paid by the Department and the amount paid on those dates (in tabular format if possible) since the restoration of devolution".*

6. OFMDFM wrote to the complainant on 27 January 2011 as it believed that the request could be interpreted in several ways and therefore required further clarification.

7. On 27 January 2011 the complainant wrote to OFMDFM:

*"I thought I had been clear in my request but for the avoidance of doubt I request all documentation held by OFMDFM relating to the payment of monies to lesbian, gay and bi-sexual groups including correspondence with LGBT groups relating to the payment, internal departmental emails and memos relating to the payments, copies of and [sic] to HM Government at Westminster relating to the payments, copies of correspondence to any EU body relating to payments, copies of requests for funding for any LGBT groups and the Departments response.*

*Also, please provide me with the dates on which monies were paid by the Department and the amount paid on those dates (in tabular format if possible) since the restoration of devolution".*

8. On 22 March 2011 OFMDFM wrote to the complainant confirming that information was held in relation to the request but that it was refusing to disclose it citing section 12 (cost limit) of the FOIA. It also cited section 16 (advice and assistance). It told the complainant that if he narrowed the scope of his request it would help to keep it below the cost limit. In respect of offering advice and assistance it also told the complainant:

*"For example, in this particular case, the financial details of the funding to the LGBT sector in tabular format can be provided, including information about the recipients, amounts and dates of payments made by OFMDFM to LGBT Groups. I can also at this time confirm that*

*OFMDFM has had no correspondence with HM Government at Westminster relating to such payments, nor has there been correspondence with any EU body relating to such payments, so that in re-framing your request you need not include these elements”.*

9. On 22 March 2011 the complainant wrote to OFMDFM and noted that it had agreed to provide him with the financial details of the funding to the LGBT sector in tabular format, including information about the recipients, amounts and dates of payments made by OFMDFM to the LGBT sector. He confirmed that he expected the information to be sent to him immediately.
10. On 28 March 2011 the Information Commissioner reminded OFMDFM that it had assured him that the financial details of funding to the LGBT sector in tabular format would be provided to the complainant but that to date the information had not been disclosed.
11. The complainant, being dissatisfied with handling of his request, asked OFMDFM to conduct an internal review of its decision.
12. As OFMDFM had failed to comply with its obligations to conduct an internal review, on 12 May 2011 the Information Commissioner issued a decision notice under reference FS50374300 noting a number of procedural breaches and directing OFMDFM to provide a response to the complainant's request for an internal review.
13. On 15 June 2011, OFMDFM wrote to the complainant with the outcome of its internal review. It told him that it accepted that it had failed to adhere to the statutory timeframe for responding to the request but that it was satisfied that it had correctly handled the request under section 12 and section 16 of the FOIA. It also provided the financial information in tabular form that it had agreed to disclose in its letter of 22 March 2011.

### **Scope of the case**

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14. The complainant contacted the Information Commissioner to complain about the way his request for information had been handled and that he remained dissatisfied that he had not received the information within the scope of his request or an adequate explanation of why. He also told the Information Commissioner that he remained unhappy with the delays in handling his request.

15. The Information Commissioner asked OFMDFM to provide full details of its handling of the request and this was received during the course of his investigation.
16. The Information Commissioner, having already issued a decision notice previously (under reference FS50374300) on the failure of OFMDFM to conduct an internal review, has only included within the scope of this investigation whether OFMDFM correctly applied section 12 in relation to costs limits and section 16 regarding advice and assistance to the complainant in making his request.
17. The Information Commissioner notes that the complainant's request is in two parts, the first for all information relating to funding and the second for the financial figures relating to the funding.
18. The Information Commissioner has noted that the complainant has now received the financial information in tabular format of the recipients of the funding and the dates and amounts of monies relating to the funding. Therefore, the scope of his investigation is focussed on the remaining information which OFMDFM argues would be outside the cost limit to locate and retrieve.
19. The scope of the Information Commissioner investigation focussed on the following:
  - the advice and assistance offered to the complainant by OFMDFM in interpreting the request;
  - the advice and assistance offered to the complainant by OFMDFM in communicating with him that complying with the request exceeded costs; and
  - whether OFMDFM correctly calculated the costs for complying with the request.

## **Reasons for decision**

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### *Section 16 - Advice and assistance*

20. OFMDFM twice offered advice and assistance during the handling of the request. First, when acknowledging receipt of the request, in determining that it could be interpreted in several ways; and secondly, in responding to the request, when it determined that complying with the request would exceed the cost limit.

*Interpreting the request*

21. Section 16(1) of FOIA deals with the duty of a public authority to provide advice and assistance to a person making a request, where it is reasonable to expect to do so.
22. Under section 1(3) of FOIA a public authority that reasonably requires further information in order to identify and locate the information requested, having informed the applicant of the requirement, is not obliged to comply with section 1(1) of the FOIA. However, if it is relying on section 1(3) then section 16 is automatically triggered.
23. The section 45 code of practice<sup>1</sup> also covers clarification of requests and is clear that a request must adequately specify and describe the information sought. Authorities, as far as is practicable, are required to provide assistance to the requestor to enable them to more clearly describe the information sought. Authorities should be prepared to explain why this is the case. The code of practice outlines that an authority might provide assistance in a number of ways, including providing an outline of the type of information available, access to indexes or catalogues of information, or providing a general response followed by an indication of other information that may be available.
24. In respect of its initial clarification OFMDFM asked the complainant to clarify his request as it believed that the scope and range of the information requested was unclear. Accordingly, it informed the complainant that its time for compliance did not start until the clarification had been received.
25. OFMDFM told the Information Commissioner that it had correctly offered advice and assistance to the complainant to clarify his request as it believed that the request for 'all information' was so broad that it raised doubt about what he wanted. It also argued that it had considered what the complainant might want based on what might already be in the public domain. The Information Commissioner notes that the original request was:

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<sup>1</sup> Secretary of State for Constitutional Affairs' Code of Practice on the discharge of public authorities' functions under Part I of the Freedom of Information Act 2000, issued under section 45 of the Act.

*"I request all information held by OFMDFM relating to the payment of monies by the department to lesbian gay and bisexual groups since the restoration of devolution.*

*Also, please provide me with the dates on which monies were paid by the Department and the amount paid on those dates (in tabular format if possible) since the restoration of devolution".*

26. The Information Commissioner has considered the wording of the request and does not agree, on an objective reading of the request, that it was unclear or ambiguous. He does not agree that further information was required before OFMDFM could identify and locate the information requested. The complainant asked for "all" information relating to the "payment of monies" by the department to "lesbian, gay and bisexual groups since the restoration of devolution"; followed by a second part for dates and amounts of monies paid and to whom. When asked to clarify the request he confirmed that by "all" information he meant information such as emails and memos and correspondence relating to the "payment of monies".
27. The Information Commissioner also notes that at this stage of handling the request OFMDFM did not offer specific help or assistance to the complainant to help clarify his request, it simply asked him to contact it to discuss the request.
28. Having made an objective reading of the request the Information Commissioner considers that OFMDFM was incorrect to rely on section 1(3) to claim that further information was needed to identify the information requested. He does not agree that the request was particularly unclear and considers that it was evident that the complainant wanted all information relating to a specific topic of funding. Accordingly, he considers that OFMDFM incorrectly applied section 1(3).

*Advice and assistance - costs*

29. Section 12 of FOIA/EIR states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit, which in this case is £600 as laid out in section 3(2) of the fees regulations.
30. The Information Commissioner has published guidance on the subject of applying the fees regulations. The regulations are clear that a public authority can only take into account the costs it reasonably expects to incur in determining whether it holds the information, and in locating,

retrieving and extracting that information. The calculation is £25 per person per hour.

31. However, when applying the fees regulations under section 12 the Information Commissioner also expects that a public authority should have regard to its duties under section 16 of the FOIA to provide advice and assistance to the requestor.
32. The Information Commissioner is clear that where an authority refuses a request because the appropriate limit has been exceeded, it should, bearing in mind the duty under section 16 of FOIA to advise and assist an applicant, provide information on how the estimate has been arrived at and provide advice to the applicant as to how the request could be refined or limited to come within the cost limit.
33. In its letter of 22 March 2011 OFMDFM told the complainant that the cost of complying with the request as it was currently framed would exceed the cost limit of £600. It told him that it would help him reframe his request as narrowing the request would help to keep it below the cost limit for compliance. As an example it told the complainant that it could provide the financial information in a tabular format and that it did not hold any information in relation to correspondence with the EU (European Union) or HM Government at Westminster relating to the payments described in his request.
34. OFMDFM did not further assist the complainant in that letter and did not make clear whether the information that was now being disclosed was as a result of it falling within the cost limit. It also did not make clear whether a search had been made to establish that no EU or HM Government correspondence was held, again within the cost limit. It did not provide the complainant with an explanation of whether any further information was held within the scope of the request and if so if it was outside the cost limit to locate and retrieve it.
35. It was not until its internal review on 15 June 2011 that OFMDFM disclosed the financial information it had agreed to disclose in its letter of 22 March 2011, some three months later. In that letter it told the complainant that it had made genuine efforts to offer advice and assistance and had provided him with a specific example of what could be provided within the cost limit.
36. OFMDFM argued that it had provided advice on the specific information that could be made available to the complainant. The Information Commissioner does not accept this argument as based on the evidence he has seen he does not accept that a sufficient effort to offer advice



and assistance to the complainant under the code of practice and published guidance was made. For example, it is clear that there was no attempt to distinguish whether the information that could be disclosed or the information that was not held was as a result of a search-and-locate exercise up to the limit.

37. The Information Commissioner has also been provided with a breakdown of the files by OFMDFM. This includes the file type (paper file, electronic format and email) of where it had determined that the information within the scope of the request was most likely to be located. The Information Commissioner believes that OFMDFM could have done more to assist the complainant, for example by providing an index or names of the files and asking the complainant to identify from that list those he was most interested in.
38. The section 45 code of practice is clear that, where a public authority cites section 12, it should consider providing an indication of what, if any, information could be provided within the cost limits. This is to ensure that the requestor can understand the limits of what information can be provided and may prevent further futile attempts to refine the request to bring it under the cost limit. The Information Commissioner takes the view that when a requestor has a full understanding of the way in which the decision had been reached it would allow them to better make any challenge or appeal of that decision.
39. Accordingly, in light of the evidence available, the Information Commissioner considers that OFMDFM breached section 16 and therefore did not comply with the section 45 code of practice, as it did not clarify what was being provided within the cost limits or offer sufficient advice and assistance in order to narrow or refine the request.

### *Section 12*

40. As already stated section 12 of FOIA states that a public authority is not obliged to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate cost limit which in this case is £600 as laid out in section 3(2) of the fees regulations.
41. Regulation 4(3) of the Fees Regulations states that an authority, when estimating whether complying with a request would exceed the appropriate limit, can only take into account the costs it reasonably expects to incur in:
  - determining whether it holds the information;



- locating the information, or documents containing it;
  - retrieving the information, or documents containing it; and
  - extracting the information from any documents containing it.
42. The four activities are sequential and any estimate must be a reasonable one.
43. Where the estimate exceeds the limit there is no obligation for the authority to communicate the information, however there is still an obligation to confirm or deny whether the information is held unless to do this would in itself exceed the appropriate limit.
44. In its internal review response OFMDFM told the complainant that it had examined the estimated costs schedule of complying with the clarified request and that it was content that doing so would well exceed the cost limit. It did not provide any further details of how it had reached this decision or whether this was because to confirm or deny that the information was held would exceed the cost limit.
45. OFMDFM told the Information Commissioner that it had identified a number of records in which information within the scope of the request was likely to be held. It told the Information Commissioner that it had identified one email account containing 20 emails, 18 hard copy files containing 600 documents and three electronic folders containing 200 documents. It has not provided the names or titles or index of those documents to the Information Commissioner nor how it identified the documents or what type of searches it conducted to establish those records where the information was most likely to be held.
46. OFMDFM provided the Information Commissioner with a breakdown of the estimate of costs associated with the entirety of the request. He notes that OFMDFM subsequently disclosed financial information to the complainant and that this was done as part of the exercise to locate, retrieve and extract the information within the cost limit. OFMDFM also stated that it did not hold any information regarding information on any EU or HM Government correspondence in conducting this exercise.
47. A public authority does not have to estimate costs in advance and can search up to the cost limit and then refuse to conduct further searches. However, the Information Commissioner must be satisfied that the public authority's decision that the cost estimate is reasonable must be presented with sensible, realistic and cogent evidence.

48. OFMDFM argued that it would have taken 24 hours at £25 per hour to locate, retrieve and extract the information within the scope of the request. However, it did disclose some information (a financial table) to the complainant and confirm that other information was not held (EU and HM Government information). The Information Commissioner is not satisfied that the estimate is reasonable as OFMDFM have stated that some of the information is not held and it has disclosed some financial information but it also states that it has not searched the files as to do so would exceed the cost limit.
49. Based on the arguments put forward by OFMDFM the Information Commissioner is therefore unable to reasonably conclude that section 12 and the cost regulations have been correctly applied in this case.
50. Accordingly the Information Commissioner has determined that OFMDFM incorrectly applied section 12.

### **Other matters**

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51. The Information Commissioner has noted that OFMDFM has accepted that it failed to adhere to the statutory timelines in responding to the request and that this is unsatisfactory. He also notes that despite agreeing to disclose the financial information OFMDFM did not do so until three months later. The Information Commissioner reminds OFMDFM of its obligations in relation to the statutory time limits in the FOIA.

## Right of appeal

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52. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

53. 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.
54. 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** .....

**Jon Manners**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**