

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 17 December 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 requested a report on the role of the Attorney General for Northern Ireland. The Office of the First Minister and deputy First Minister (OFMDFM) refused the request in reliance on the exemption at section 35(1)(a) of the FOIA. During the Commissioner's investigation OFMDFM disclosed part of the report to the complainant, and two of the three annexes to that report. The Commissioner's decision is that the exemption is engaged in relation to the outstanding withheld information, and the public interest in maintaining the exemption outweighs the public interest in disclosing this information. The Commissioner does not require any steps to be taken.

Background

2. The Justice (Northern Ireland) Act 2002 provided for the appointment of an individual to the post of Attorney General for Northern Ireland (AGNI)¹ by the First Minister and deputy First Minister acting jointly. Since 1972 the Attorney General for England and Wales had also acted as AGNI.

¹ www.attorneygeneralni.gov.uk/index.htm

3. In 2008 the First Minister and deputy First Minister announced that they had identified Mr John Larkin QC as the person they intended to appoint as AGNI. The First Minister and deputy First Minister asked Mr Larkin to produce a report on the establishment of the office of the AGNI. This report was completed in September 2009 and is publicly available on the Northern Ireland Assembly website, along with OFMDFM's response to the report².
4. Following the devolution of policing and justice powers to the Northern Ireland Assembly in April 2010, Mr Larkin was appointed as AGNI for a term of four years. In addition to the AGNI's statutory role as an independent Law Officer, it was agreed that the AGNI should also act as Chief Legal Adviser to the Northern Ireland Executive, a non-statutory role.
5. In 2012 OFMDFM commissioned Dame Elish Angiolini, former Lord Advocate of Scotland, to carry out a review of the AGNI's role. Dame Elish delivered her report in October 2012.

Request and response

6. On 27 November 2012, the complainant requested the following information from OFMDFM:

"A full copy of the report into the role of the Attorney General of Northern Ireland carried out by the Rt Hon Dame Elish Angiolini".
7. OFMDFM did not provide a substantive response until 15 April 2013, when it issued a refusal notice citing the exemption at section 41(1) of the FOIA. The complainant requested an internal review the same day.
8. OFMDFM communicated the outcome of the internal review to the complainant on 15 May 2013. At this stage OFMDFM withdrew reliance on the exemption at section 41(1), and sought instead to rely on section 35(1)(a) of the FOIA.

² http://archive.niassembly.gov.uk/researchandlibrary/deposited_papers/2010/dp628.pdf

Scope of the case

9. On 15 May 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant asked the Commissioner whether it was appropriate for a public authority to change its position at the internal review stage and rely on an exemption not previously claimed. In any event the complainant was of the view that the requested information should be disclosed to him. The complainant also asked the Commissioner to consider the five months taken by OFMDFM to respond to his request.
10. The Commissioner has explained to the complainant his view that it is reasonable for authorities to rely on new exemptions following an internal review. The internal review provides an opportunity for the authority to review its handling of the case and correct any errors. This includes withdrawing reliance on an exemption and choosing instead to rely on a more appropriate exemption.
11. In light of the above the Commissioner's investigation focused on the time taken to respond to the request, and OFMDFM's reliance on the exemption at section 35(1)(a) of the FOIA.
12. During the course of the Commissioner's investigation OFMDFM disclosed some information to the complainant. This comprised parts of the report itself and two of the three annexes. Therefore the Commissioner's decision in this case relates to the remaining withheld information (contained in the report and the withheld annex), and OFMDFM's handling of the case.

Reasons for decision

Section 35(1)(a): formulation or development of government policy

13. Section 35(1)(a) of the FOIA provides that information held by a government department is exempt if it relates to the formulation or development of a government policy.
14. OFMDFM argued that section 35(1)(a) is engaged because the withheld information, ie the report, "*seeks to inform the formulation of government policy and thinking around the role of the post of Attorney General*".

15. The Commissioner takes the view that the 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.
16. The internal review letter goes on to explain that the "*policy-making process is still in the early development stage in this case*", and that "*the information in question will form the basis of any future policy discussions concerning the role of the Attorney General*".
17. Having considered OFMDFM's arguments the Commissioner is of the view that the withheld information in this case falls more squarely under "development" of government policy, than "formulation" of government policy. This is because the withheld information, ie Dame Elish's report, was commissioned to review the AGNI's role, and thus to inform policy discussions surrounding the future development of the role. As the withheld information relates to the development of government policy, the Commissioner is satisfied that section 35(1)(a) is engaged.
18. Section 35(1)(a) provides a qualified exemption. The Commissioner must therefore consider whether the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosing the information.

Public interest in favour of disclosing the withheld information

19. OFMDFM acknowledged the public desire for information about the role of the AGNI, given the important position the Office occupies within the Northern Ireland administration. OFMDFM accepted that disclosure of the withheld information would provide greater transparency and accountability, which may increase trust.
20. OFMDFM added that the decision to re-establish a local AGNI followed the devolution of policing and justice powers in 2010. This followed a period of almost 40 years during which the functions of the AGNI were exercised by the Attorney General for England and Wales. OFMDFM accepted that disclosure of the withheld information would enhance public understanding of the functions of the AGNI and the operation of the Executive in the context of devolved justice powers.

21. The Commissioner notes that, unlike the Attorney General for England and Wales, and the Lord Advocate of Scotland, the AGNI is not a government minister. This means that the AGNI is not bound by the convention of collective responsibility, nor is he subject to the Ministerial Code of Conduct.³ This is particularly important as the political independence of the AGNI was seen as essential, given the history and circumstances in Northern Ireland. Section 22(5) of the Justice (Northern Ireland) Act 2002 explicitly states that:

"The functions of the Attorney General for Northern Ireland shall be exercised by him independently of any other person."⁴

22. The AGNI has described this as meaning that he has

"...sufficient material and institutional autonomy to permit conscientious discharge of the duties of the Office."⁵

23. The Commissioner also notes that information relating to consideration of the AGNI's role has previously been published. As noted at paragraph 5 above Mr Larkin's 2009 report on the establishment of the office of the AGNI is in the public domain, along with the response from the First Minister and deputy First Minister.

24. In addition Mr Larkin appeared before the Northern Ireland Assembly Committee on Procedures on 28 May 2013, to provide oral evidence in relation to the extent to which Standing Orders should permit the AGNI to participate in proceedings of the Assembly. The AGNI's evidence is publicly available, although the Commissioner notes that the complainant made his request in November 2012, some six months before this. Dame Elish also acknowledged that some aspects of the AGNI's role had been considered elsewhere, including the Committee on Procedures, but confirmed that this fell outside the scope of her report.

25. The complainant argued that the AGNI has also been the subject of public scrutiny following a number of high profile cases which have been widely reported in local media. These include the AGNI's decision to bring proceedings against a former UK government minister for "scandalising the court", and to intervene in a European case relating to same-sex adoptions in Austria. The AGNI also wrote to the Justice Committee inviting it to investigate the activities of a

³ www.northernireland.gov.uk/index/your-executive/ministerial-code.htm

⁴ www.legislation.gov.uk/ukpga/2002/26/section/22

⁵ www.attorneygeneralni.gov.uk/annual_report_2011-12_final_.pdf

Marie Stopes clinic in Belfast. Therefore it is arguable that there is a legitimate interest in the public being informed as to consideration of the AGNI's role and how it may be developed – whether extended or limited.

Public interest in favour of maintaining the exemption

26. OFMDFM argued that ministers and officials should have the necessary space to consider policy options derived from the review in a free and frank manner, requiring the confidentiality of the report to be preserved. OFMDFM stressed that the report deals with sensitive and complex areas and argued that it is fundamentally important that ministers have the space and opportunity to consider all the options without fear of premature disclosure.
27. The Commissioner considers this to be a “safe space” argument, based on the premise that it is in the public interest for ministers and officials to be able to have a full and open debate away from external scrutiny so as to enable them to reach a reasoned position. Once government has successfully determined an issue and agreed a collective position, the Commissioner’s view is that “safe space” arguments will no longer apply.
28. In this case the request was made one month after the report was delivered to OFMDFM. The Commissioner accepts that at this time the First Minister and deputy First Minister were unlikely to have had an opportunity to consider the report in detail, and certainly not to the extent that they were ready to make a decision regarding the recommendations in the report.
29. The Commissioner accepts that the withheld information contained within the report would have been extremely sensitive at the time the request was made. At the time of issuing this decision notice the report and its recommendations were still being considered by OFMDFM and no policy decisions had been taken. Accordingly, the Commissioner is inclined to attach significant weight to this argument in favour of maintaining the exemption.

Balance of the public interest arguments

30. In balancing the public interest, the Commissioner has taken into account the arguments outlined above and additional information provided by OFMDFM. This additional information is contained within a confidential annex to this decision notice, since it is sensitive and was provided to the Commissioner in confidence.
31. The Commissioner believes that there is a significant public interest in government being seen to be transparent and open in its decision

making. The Commissioner appreciates that the role of the AGNI is a matter of general public interest, not least because between 1972 and 2010 Northern Ireland did not have its own Attorney General. During this period the post was held by the Attorney General for England and Wales, so the establishment of a local AGNI was considered an indication of the political progress made in Northern Ireland. Therefore the AGNI's role, and how it may develop, is of interest to the public and the Commissioner considers it reasonable that the public should expect to be informed so as to increase public understanding of, as well as public confidence in, the role of the AGNI.

32. The Commissioner also recognises the strength of public interest in informing the public about a key constitutional role and the way it is envisaged that the AGNI should function. The AGNI's statutory independence, along with his role as chief legal adviser to government departments, is a unique situation and it is reasonable to expect that the public be informed as to the success or otherwise of these arrangements.
33. However the Commissioner is also mindful of the sensitivities involved in the review of the AGNI's functions. Any decision taken on the development of the role will need to be agreed by the First Minister and deputy First Minister, and as such this will require detailed consideration and discussion away from public scrutiny. The Commissioner acknowledges that greater public scrutiny can enhance the process of developing government policy in some circumstances. However in this particular case he considers that the need for "safe space" creates a compelling public interest argument in favour of maintaining the exemption.
34. With respect to the timing of the request and the impact it may have on the "chilling effect", the Commissioner notes that the complainant's request was submitted just one month after the report was delivered to OFMDFM. The Commissioner is of the view that the weight that should be attached to frankness and openness would be greater where a decision has been not yet taken in relation to the formulation or development of a particular policy. The Commissioner is required to consider the circumstances at the time the request is made and refused, although in this case he also notes that at the time of drafting the decision notice no timetable for making a decision had been agreed. The role of the AGNI is clearly a complex policy issue which will require further dialogue and examination before a decision is taken, and the Commissioner accepts that disclosure at this stage of the withheld information contained within the report would have an adverse impact on the ability of the relevant parties to do so.

35. The Commissioner notes that during the course of his investigation OFMDFM agreed to release parts of the report and two of the annexes. The Commissioner considered that the disclosure of this information, which was largely factual, would both inform and reassure the public about the review of the AGNI's role, without any detrimental effect on the need for safe space to consider policy options. However the remaining withheld information contains frank and detailed analysis and recommendations. On this basis the Commissioner is satisfied that the public interest in maintaining the exemption in relation to the remainder of the withheld information outweighs that in disclosure.

Procedural requirements

Section 17: refusal notice

36. Section 17(1) of the FOIA states that if an authority wishes to rely on an exemption in order to refuse a request, it must issue a refusal notice no later than 20 working days after the date the request is received. The complainant made his request on 27 November 2012, but OFMDFM did not issue a refusal notice until 15 April 2013. This is more than 100 working days after the request was received, and is clearly unacceptable. Consequently the Commissioner finds that OFMDFM failed to comply with section 17(1) of the FOIA.
37. The Commissioner also considers that the arguments provided by OFMDFM in the internal review letter of 15 May 2013 were generic and therefore not particularly helpful in informing the complainant as to OFMDFM's consideration of the information he actually requested. Although OFMDFM did provide the Commissioner with more detailed arguments, the Commissioner remains of the view that OFMDFM ought to have set out its position in more detail to the complainant. Therefore the Commissioner finds that OFMDFM failed to comply with section 17(1)(c) of the FOIA in this regard.

Right of appeal

38. 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

39. 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.
40. 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

Graham Smith
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