

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 April 2014

Public Authority: Northern Ireland Tourist Board

Address: St Anne's Court
59 North Street
Belfast

BT1 1NB

Decision (including any steps ordered)

The complainant has requested information from the Northern Ireland Tourist Board (NITB) regarding funding policy in relation to bi-lingual tourist signs in Northern Ireland. The NITB disclosed most of the requested information, however it withheld some information, citing the exemptions under sections 36 and 42(1) of FOIA. The Commissioner considers that the exemptions have been correctly applied, and therefore requires no steps to be taken.

Request and response

1. On 17 December 2012, the complainant wrote to the NITB and requested information in the following terms:

"...we are writing formally requesting further information as follows:
 1. **Funding policy documentation:** you have clarified that the matters at hand relate to NITB funding schemes. CAJ requests
 - a) the titles of documents which set out the funding policy for signage, interpretation panels including documents relating to criteria for funding;
 - b) Copies of the above documents;

2. **Policy approach for signage and interpretation panels:** as per our previous correspondence NITB has indicated it established an approach that all signage and interpretation panels involving NITB must be "in English except where an attraction is known in Irish." CAJ requests:
 - a) The titles of documents, including minutes of meetings etc, which set out this approach and the scope of its application;
 - b) Copies of the above documents;

3. **Ministerial direction.** Your correspondence makes reference to the NITB approach being based on clear ministerial direction. You have clarified DETI is the sponsor department of NITB and that the matter also engages DRD policy.
 - a) The titles of documents, including correspondence, which set out this ministerial direction;
 - b) Copies of the above documents;

4. **Departmental Signage Policy:** you have indicated that the NITB is bound by Departmental policy, including the DRD signage policy, in relation to its policy approach. CAJ requests:
 - a) The titles of documents, (including any legislation) to which the NITB refers as setting out such a policy framework;
 - b) Copies of the relevant provisions within the above documents which the NITB relies on as setting Departmental policy for the NITB in relation to the above matter;
 - c) Copies of the above documents (if not otherwise readily available)."

2. The NITB responded on 14 January 2013. It stated that it held information relevant to the complainant's request and that it was potentially going to withhold some of that information under the exemption as set out in section 36 of FOIA – prejudice to the effective conduct of public affairs. It was seeking an extension of time under section 10(3) of FOIA in order to consider the public interest test, as section 36 is a qualified exemption.

3. On 11 February 2013 the NITB again wrote to the complainant to state that it was further extending the 20 day time limit in order to consider the balance of the public interest.

4. On 11 March 2013 the NITB provided a response to the complainant's request. It disclosed some information which the complainant had requested, stating that it had redacted some information under sections

40(2) (third party personal information) and 42 (legal professional privilege). It had withheld some further information under section 36 of FOIA.

5. Following an internal review the NITB wrote to the complainant on 23 July 2013. It disclosed some further information, stating that it was applying fewer redactions, however sections 40(2), 36 and 42 still applied to the information it was continuing to withhold or redact.

Scope of the case

6. The complainant contacted the Commissioner on 2 August 2013 to complain about the way his request for information had been handled.
7. The Commissioner has considered the way in which the NITB has handled the complainant's request for information, in particular its application of sections 36 and 42 to the withheld information.

Reasons for decision

Section 36 of FOIA

8. Section 36 of FOIA provides that: "Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act—
 - (b) would, or would be likely to, inhibit—
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
9. The NITB has sought to apply several limbs of section 36(2) to different parts of the withheld information. The Commissioner has firstly considered the application of section 36(2)(b)(ii) as the NITB has sought to apply this to all parts of the withheld information to which it has not applied section 42. In determining whether section 36(2)(b)(ii) was correctly engaged the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been correctly applied the Commissioner must:

- Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
10. The NITB has explained that Mr Alan Clarke, Chief Executive, is the qualified person in this case and his opinion was obtained on 30 January 2013. The NITB has provided the Commissioner with an explanation of the submissions put to the qualified person in relation to the application of section 36(2):
11. The qualified person had access to a copy of the withheld information, the request, the exemption that may be applicable and public interest factors in favour of, and against, disclosure. The qualified person was provided with evidence supporting engagement of the exemption.
12. The qualified person's opinion was that sections 36(2)(a)(ii), (b)(ii) and (c) applied to certain items of the withheld information and that sections 36(2) (b) (i) (ii) and (c) applied to the remaining information being withheld under section 36(2) of FOIA.

Was the opinion reasonable?

13. The Commissioner must determine whether the qualified person's opinion was a reasonable one. In doing so the Commissioner has considered all of the relevant factors including:
- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
14. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be

held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.

15. The information being withheld under the various limbs of section 36 of FOIA consists of information relating to discussions and submissions by various relevant bodies involving the policy approach of various government departments to the funding of tourism signage of certain areas and attractions in Northern Ireland, and whether these should be bilingual.
16. The Commissioner accepts that this is a highly topical issue, both at the time of the request and now, which still remains under discussion and review, and that disclosure of the withheld information would be likely to cause prejudice to the ability of departments and officials to engage in a free and frank exchange of views regarding this issue. He is also satisfied that the qualified person has extensive knowledge of, and involvement in, the issue. He therefore accepts that the qualified person's opinion is reasonable, and has been reasonably arrived at.
17. The Commissioner notes, and adopts in particular, the Tribunal's conclusions in the case of *Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC*¹ that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest.
18. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure

¹ EA/2006/0011; EA/2006/0013

would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the information withheld under section 36(2)(b)(ii)

19. The NITB recognised the inherent public interest in operating in an open and transparent way and being held to account for decisions made. It further recognised the public interest in releasing information that will help the public understand the reasoning as to why decisions are made.

Public interest arguments in favour of maintaining the section 36(2)(b)(ii) exemption

20. The NITB argues that there is a very strong public interest in the NITB being able to engage in frank and honest reporting of issues to the Minister. There is a public interest in maintaining a private space away from public scrutiny to effectively discuss progress and for NITB and government officials to discuss and offer their views with candour.
21. The NITB also argues that disclosure of the information withheld under section 36(2)(b)(ii) would impact upon NITB's ability to attract further consultation and engagement with partners and stakeholders, which would be likely to have a detrimental effect on NITB's objective of improving the tourism experience, which would not be in the public interest.

Balance of the public interest arguments

22. The Commissioner considers that there is a very strong public interest in public authorities such as the NITB being transparent and accountable regarding their decisions, particularly those involving the expenditure or proposed expenditure of public funds. The Commissioner also considers that there is a strong public interest in disclosure of information regarding the specific issue in question, i.e. bi-lingual tourist signage, as it is important to inform public debate on such a contentious issue.
23. However, the Commissioner acknowledges that a lot of information has been disclosed to the complainant, and therefore to the public, as a result of the complainant's request. The Commissioner also accepts that the NITB's position regarding bilingual tourist signage has been well documented in Northern Ireland Assembly questions and through correspondence and communication with the public. The Commissioner accepts that this addresses the need for transparency and informing public debate.

24. The Commissioner accepts that there is a very strong public interest in public authorities such as the NITB being able to engage in frank and candid discussions and reporting in a safe and private space, away from public scrutiny. He also accepts that it would not be in the public interest to cause prejudice to the NITB's ability to effectively carry out its objective of improving tourism in Northern Ireland, which may happen if its ability to effectively engage with stakeholders is impacted upon due to premature disclosure of the information withheld under section 36.
25. Having weighed the competing public interest arguments against each other, the Commissioner has concluded that, in all the circumstances of the case, the public interest in maintaining the exemption under section 36(2)(b)(ii) outweighs that in disclosure of the information withheld under that section. He is particularly persuaded by the fact that a lot of information regarding the issue has already been disclosed to the public through Northern Ireland Assembly questions and publication of minutes of NITB meetings, among other communications. As he is satisfied that section 36(2)(b)(ii) applies to the entirety of the information withheld under section 36, he has not considered the NITB's application of the other limbs of section 36. He has now gone on to consider the information which the NITB has withheld under section 42(1) of FOIA.

Section 42(1) of FOIA

26. Section 42(1) of FOIA provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
27. Section 42 is a class based exemption. That is, the requested information only has to fall within the class of information described by the exemption for it to be exempt from disclosure. This means that the information simply has to be capable of attracting legal professional privilege. No potential prejudice caused by disclosure need be demonstrated.
28. The purpose of legal professional privilege is to ensure the confidentiality of communications between a legal adviser and their client. This allows the client to set out in full all the issues relevant to the legal problem that they need advice on and allows the lawyer to provide as full advice as possible.
29. There are two types of privilege – litigation privilege and advice privilege. In this instance the NITB has argued that the information withheld under section 42 attracts advice privilege. This is available where the information consists of confidential communications between

a client and legal adviser made for the sole or dominant purpose of obtaining legal advice.

30. The Commissioner has examined the information withheld under s42. It consists of correspondence containing legal advice and discussion by officials of that advice. He is satisfied therefore that the exemption is engaged.
31. The s42 exemption is qualified and therefore subject to the public interest test.

Public interest arguments in favour of disclosing the information withheld under section 42(1)

32. The NITB acknowledged the presumption of openness running throughout FOIA. It also recognised that it is in the public interest to be transparent and accountable in relation to its decisions. If it were to demonstrate that its decisions have been made on the basis of high quality legal advice, this would increase public confidence in the legality of decisions concerning contentious issues such as bi-lingual tourist signage.

Public interest arguments in favour of maintaining the exemption as set out in section 42(1)

33. The NITB has advised the Commissioner that it considers the principle of legal privilege, which safeguards the openness between client and legal adviser, to be a strong factor against disclosure. This helps to ensure complete fairness in legal proceedings.
34. The importance of legal advice privilege has already been expressed by the Commissioner and the Information Tribunal in a number of previous decisions. These decisions have confirmed that the disclosure of information that is subject to legal advice privilege would have an adverse effect on the course of justice through a weakening of the general principle behind legal professional privilege. In the case of *Bellamy v Information Commissioner and Secretary of State for Trade and Industry*², the Information Tribunal described legal professional privilege as "*a fundamental condition on which the administration of justice as a whole rests*".

² EA/2009/0070

35. The NITB has also argued that it is very important that it should be able to consult with its legal advisers in confidence to obtain legal advice. Any fear of doing so resulting from a disclosure could affect the free and frank nature of future legal exchanges or it may deter the NITB from seeking legal advice. The Commissioner's published guidance on section 42 states the following:
"The client's ability to speak freely and frankly with his or her legal adviser in order to obtain appropriate legal advice is a fundamental requirement of the English legal system. The concept of LPP protects the confidentiality of communications between a lawyer and client. This helps to ensure complete fairness in legal proceedings."
36. In light of the above, there will always be a strong argument in favour of maintaining legal professional privilege because of its very nature and the importance attached to it as a long-standing common law concept.

Balance of the public interest arguments

37. The Commissioner acknowledges the public interest in disclosing information which will lead to greater openness and accountability.
38. However, he recognises that the general public interest inherent in the s42 exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in communications between client and lawyer to ensure access to full and frank legal advice which in turn is fundamental to the administration of justice.
39. The Commissioner has concluded that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption. Therefore the information exempted under s42 should be withheld.

Other matters

40. The complainant requested an internal review of the NITB's decision on 14 March 2013. After several e-mails in order to chase up the internal review, the NITB provided the complainant with the outcome of its internal review on 23 July 2013, over four months later. The Commissioner would remind the NITB of his guidance on internal reviews and the recommended time limit of 40 working days.

Right of appeal

41. 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: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber
42. 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.
43. 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

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