Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 3 March 2015

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 has requested details of the salaries paid to special advisers working in the Office of the First Minister and Deputy First Minister (OFMDFM). OFMDFM refused the request under section 40(2) of the FOIA. The Commissioner's decision is that OFMDFM was entitled to withhold some of the requested information under section 40(2) but that some information ought to be disclosed.

2. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose the current salary, as at the date of the request, paid to each special adviser working in OFMDFM and the point on the salary scale that each person was on when they were appointed to their role.

3. 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.

Request and response

4. On 11 March 2014 the complainant requested the following information from OFMDFM:

"I request the current salary paid to each Special Adviser working in the Office of the First Minister and Deputy First Minister (Northern Ireland). I am aware of that the salary scale for these individuals is published, but I am specifically requesting details of the actual salary.

I also request the point on the salary scale that each person was on when they were appointed to their role and if not appointed to the bottom point of the scale, the justifications provided for that."

5. OFMDFM responded on 4 April 2014, stating that the request was being refused under section 40(2) (personal information of third parties).

6. The complainant requested an internal review on 5 April 2014.

Scope of the case

7. The complainant contacted the Commissioner on 21 July 2014 to complain that he had not yet received the outcome of the internal review. The complainant was of the opinion that OFMDFM ought to have provided him with all of the requested information.

8. Under section 50(2)(c) of the FOIA the Commissioner is not obliged to make a decision in a particular case if the complainant has not exhausted any complaints process provided by the public authority. Therefore the Commissioner will normally expect complainants to have exhausted the public authority's internal review procedure before making a complaint. In this case the complainant did request an internal review, but complained to the Commissioner as OFMDFM had failed to complete the review. The Commissioner considered that OFMDFM had had ample time to complete the review, and therefore accepted the complaint as eligible.

Meta request submitted by the complainant

9. In addition to the request that is the subject of this decision notice, on 23 June 2014 the complainant submitted a request for information about how his request of 11 March had been handled by OFMDFM. The Commissioner refers to this type of request as a "meta request", although it should be noted that meta requests have no special status under the FOIA. The Commissioner has included further details of the meta request and OFMDFM's response at Other Matters at the end of this notice.

10. Since information disclosed under the FOIA is disclosed into the public domain the Commissioner was able to inspect this correspondence as part of his investigation. The correspondence did not refer to OFMDFM's

consideration of the withheld information, therefore it did not specifically assist the Commissioner's deliberations in this regard. However it did provide an indication as to why OFMDFM failed to communicate the outcome of the internal review to the complainant. As internal reviews are not a requirement of Part I of the FOIA the Commissioner has commented further at Other Matters below.

Reasons for decision

Co-operation with the Commissioner's investigation

11. The Commissioner wrote to OFMDFM on 18 August 2014 to confirm receipt of the complaint. The Commissioner advised OFMDFM that, in his view, its refusal notice of 4 April 2014 did not adequately explain OFMDFM's reliance on the section 40(2) exemption. The Commissioner also pointed out that the internal review had not been completed.

12. In this letter the Commissioner drew OFMDFM's attention to his "Definition document for Northern Ireland government departments".[1] This document provides examples of the kinds of information the Commissioner would expect departments to publish proactively in order to meet their commitments under section 19 of the FOIA[2], and includes the following:

"Special advisers

The names of special advisers, the appointing Minister, and the salaries of those earning £58,200 and above. For those earning less than £58,200 levels of pay should be identified by salary range."

13. Given the recommendations in the definition document the Commissioner asked OFMDFM to reconsider the request. The Commissioner reiterated his view that he would expect public authorities to publish the salaries of special advisers earning above £58,200. The Commissioner warned that if OFMDFM maintained its position that this information ought not to be disclosed, it would need to provide strong

[1] http://ico.org.uk/for_organisations/freedom_of_information/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/definition-document-northern-ireland-government-departments.pdf

[2] Section 19 of the FOIA requires each public authority to maintain a publication scheme and publish relevant information proactively in accordance with the scheme. The Commissioner has developed a model publication scheme and definition documents on a sectoral basis.

and clear arguments as to why the Commissioner should depart from his established approach.

14. Regrettably OFMDFM did not provide a response, and the Commissioner wrote to OFMDFM again on 18 September 2014. The Commissioner reminded OFMDFM that he could issue a decision notice without further correspondence. The Commissioner wishes to ensure that public authorities are given adequate opportunity to finalise their position, but must also ensure that his investigations are not unduly delayed. In a previous case involving OFMDFM the Commissioner had not received a response to his enquiries and ultimately ordered disclosure of the requested information.[3]

15. However in this case the Commissioner recognised that the requested information was likely to comprise personal information relating to a number of individuals (the special advisers). Given his role as the data protection regulator the Commissioner did not wish to proceed to a decision notice that may order disclosure of personal information without having had sight of that information.

16. Consequently on 6 October 2014 the Commissioner issued an information notice under section 51 of the FOIA. The information notice required that OFMDFM provide the Commissioner with the requested information (insofar as it was held), and any arguments OFMDFM wished to provide to support its position. OFMDFM complied with the information notice on 6 November 2014. OFMDFM provided the Commissioner with the requested information but did not provide the Commissioner with any further submissions as to why it was exempt.

17. The Commissioner is disappointed that OFMDFM failed to engage with his investigation in this case. The Commissioner will not issue an information notice unless he considers that it is necessary, and most public authorities co-operate with his investigations without requiring such formal action. However in this case the Commissioner concluded that an information notice was required to ensure that he received the information he required for the purposes of investigating the complaint and making a decision.

18. Further, the Commissioner is disappointed that OFMDFM failed to expand on its arguments in support of its position. It is well established that it is the public authority's responsibility to demonstrate that it has complied with the FOIA. The Commissioner's decision is made on the basis of the information provided to him, and the Commissioner will not

[3] Decision notice FS50534298, issued 21 August 2014

generally construct arguments or make assumptions on behalf of the public authority. Where a public authority fails to provide arguments in support of its position the Commissioner is more likely to order disclosure of the requested information, as OFMDFM will be aware from previous decision notices.[4]

19. There are however exceptions to this general rule, for example where the requested information comprises personal data. As indicated above the Commissioner is mindful of his role as the data protection regulator. As such he will, when necessary, proactively consider arguments not identified by the public authority, in order to ensure that any disclosure of personal information does not contravene the data protection principles as set out in the Data Protection Act 1998 (the DPA). Nevertheless the Commissioner would remind OFMDFM that it ought to have provided him with full and detailed arguments in respect of the exemption claimed.

Section 40(2): personal data of third parties

20. Section 40(2) of the FOIA states that a public authority is not obliged to disclose information if to do so would:

- constitute a disclosure of personal data, and
- this disclosure would breach any of the data protection principles or section 10 of the DPA.

Would disclosure of the requested information constitute a disclosure of personal data?

21. The DPA defines personal information as:

> *"…data which relate to a living individual who can be identified*
>
> *a) from those data, or*
>
> *b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,*
>
> *and includes any expression of opinion about the individual and any indication of the of the data controller or any person in respect of the individual."*

[4] Decision notice FS50494921, issued on 27 March 2014, in which the Commissioner ordered the disclosure of the requested information in the absence of detailed arguments from OFMDFM.

22. The requested information can be categorised as follows:

    (i) "Salary information": the salary paid to each special adviser at the time of the request and the salary paid to each special adviser on their appointment; and

    (ii) "Justification information": the justifications provided for placing any special adviser above the starting point of the appropriate salary scale on their appointment.

23. OFMDFM has not explicitly confirmed or denied that it holds the requested information, but cited section 40(2) in its refusal notice, which stated that:

    "…the requested information cannot be released without disclosing the personal data of individuals, or it would allow those individuals to be identified."

24. The Commissioner is thus satisfied that OFMDFM has in effect confirmed that it holds information relevant to the request. Having inspected the withheld information the Commissioner is further satisfied that all of it is personal data. This is because the individuals can be identified by their names in combination with the withheld information (ie the salary information and the justification information).

Would disclosure of the requested information breach any of the data protection principles?

25. The first data protection principle has two main components. They are:

    - the requirement to process all personal data fairly and lawfully; and
    - the requirement to satisfy at least one DPA Schedule 2 condition for the processing of all personal data.

26. The refusal notice said that disclosure of the requested information would breach the first data protection principle on the grounds that OFMDFM was unable to satisfy any of the required conditions for processing. However, the Commissioner's general approach to the first data protection principle is to consider the fairness element first. If the Commissioner finds that disclosure would be fair he will then move on to consider the other elements of the first data protection principle.

Would disclosure of the information be fair?

27. In assessing fairness, the Commissioner has considered the reasonable expectations of the individuals concerned (ie the special advisers), the

nature of those expectations and the consequences of disclosure to the individuals. He has then balanced these against the general principles of accountability, transparency and legitimate public interest in disclosure.

Expectations of the individuals concerned

28. OFMDFM has provided no evidence of having consulted the special advisers in respect of this request. Therefore it is difficult for the Commissioner to assess fully their expectations. The Commissioner has considered his own published guidance on handling requests for information relating to public authority employees.[5] He is of the view that public authority employees should expect to have some personal information disclosed (for example, salary information) as they are paid from the public purse. This is reflected in the definition documents published by the Commissioner in connection with the section 19 duty on public authorities to publish certain information proactively.

29. In this particular case the Commissioner has distinguished between the salary information, which he considers individuals should expect to be made publicly available, and the justification information, which would carry a stronger expectation of privacy. The justification information is specific to each individual's circumstances, and is more intrinsically private. On this basis the Commissioner accepts that the special advisers would have a reasonable expectation that the justification information would not be disclosed. The Commissioner would point out that the reasonable expectation of any individual is not an overriding argument that information should not be disclosed. It is merely one of a number of factors that should be considered when discussing fairness.

Consequences of disclosure to the individuals

30. Again the Commissioner has no evidence of OFMDFM having sought consent from any of the special advisers. Therefore the Commissioner has thus identified relevant arguments proactively, and has again distinguished between the salary information and the justification information. The Commissioner does not believe that the publication of the salary information would have adverse consequences on any of the special advisers. In reaching this conclusion the Commissioner has taken into account that the special advisers were appointed between 2011 and

[5] https://ico.org.uk/media/for-organisations/documents/1187/section_40_requests_for_personal_data_about_employees.pdf

2013. Therefore the information relating to their appointments will have been up to three years old at the time of the request. The Commissioner's view is that the passage of time will reduce any adverse consequences of disclosure with regard to this portion of the withheld information.

31. The Commissioner's guidance suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. The Commissioner is of the clear view that information relating to an individual's private life (ie their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (ie their public life).

32. In this case the salary information will obviously relate purely to the special advisers' public lives in terms of their employment as special advisers. The justification information is more likely to focus on each individual as it relates to them personally, and may discuss the work or other experience of the individual that led to them being placed on a particular starting salary. Although the justification information is linked to individuals' salaries, the nature and content of the information leads the Commissioner to conclude that disclosure would be at best, intrusive, and at worst, an unwarranted interference in those individuals' private lives. The Commissioner cannot provide further detail in relation to any of the individuals in question without disclosing the withheld information, which would of course defeat the purpose of the exemption.

General principles of accountability, transparency and legitimate public interest in disclosure

33. The Commissioner is assisted by his decision in a previous case, where he ordered the disclosure of information relating to an increase in the maximum salaries for special advisers:

"The Commissioner considers that there is a legitimate public interest in the public being informed as to the remuneration of special advisers in Northern Ireland... The Commissioner notes that special advisers are political appointments and not subject to the merit principle and are able to earn up to £90,000 per year, which is well above the average salary in Northern Ireland. In addition special advisers (unlike permanent civil

servants) operate from a party political viewpoint, rather than the position of political neutrality held by the traditional civil service." [6]

34. The Commissioner also considers that there is a strong public interest in the public being informed where individuals were appointed to salaries above the starting point of the pay scale, especially in the context of ongoing "austerity" measures, redundancies and budget cuts across departments. As other areas of public spending are heavily scrutinised the public will expect significant transparency about salaries paid to political appointees from the public purse.

35. The Commissioner considers it more difficult to identify a legitimate public interest in the disclosure of the justification information. As indicated above the Commissioner notes that this information is more inherently personal and in some respects private as it relates to the individual outside their employment as a special adviser. Having inspected the withheld information the Commissioner would stress that he has seen no evidence of wrongdoing which might have strengthened the arguments in favour of disclosure. The Commissioner fully understands why the public would be interested in information relating to special advisers' salaries, particularly if they were appointed above the starting rate. However the legitimate public interest in disclosure could not justify this level of interference with the privacy rights of the individuals in question.

36. In light of the above the Commissioner finds that disclosure of the salary information would be fair, but that disclosure of the justification information would be unfair and would thus contravene the first data protection principle.

37. As the Commissioner has found that disclosure of the salary information would be fair he must go on to consider whether a condition for processing can be satisfied by OFMDFM.

Conditions for processing

38. In order to satisfy the first data protection principle, the disclosure of personal data must not only be fair but must also meet one of the conditions in Schedule 2 to the DPA. The Commissioner's guidance on

[6] Decision notice FS50445861, issued 21 January 2013

requests for personal data about public sector employees,[7] in particular paragraphs 24-31, clearly explains how public authorities should consider conditions for processing. The conditions that are most likely to be relevant in such cases are conditions 1 or 6.

39. Condition 1 will be met where the data subject has given their consent to the processing. As OFMDFM has failed to state whether it sought consent from the special advisers, the Commissioner is not satisfied that OFMDFM could rely on this condition.

40. Condition 6 will be met where the processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject. This condition effectively creates a three-part test:

    1) there must be a legitimate public interest in disclosing the information;
    2) the disclosure must be necessary to meet that public interest; and
    3) the disclosure must not cause unwarranted interference with the rights, freedoms and legitimate interests of the employee.

41. The Commissioner's view is that a public authority ought already to have considered the issues of legitimate interests in disclosure and unwarranted interference in the rights and freedoms of the employees as part of the general determination of fairness. In the absence of any evidence of such consideration by OFMDFM the Commissioner's analysis is set out above.

42. Therefore, the question in relation to Schedule 2 condition 6 is whether the disclosure is indeed necessary to meet the legitimate interests. For example, could the legitimate interests be met by other means that interfere less with the employee's rights and freedoms? Is it necessary to provide all of the information requested? If not, full disclosure is not necessary, and the information is thereby exempt.

43. The Commissioner notes that the UK Government published the names of its special advisers in post at 17 July 2012, including each special

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7 http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Environmental_info_reg/Practical_application/section_40_requests_for_personal_data_about_employees.ashx

adviser's pay band, and actual salary where this was £58,200 or higher, together with details of the special advisers' pay ranges for 2012-13.[8] The Commissioner sees no reason why OFMDFM should take a different approach in this case, and finds that disclosure of the special advisers' salaries at the time of the request is indeed required to meet the legitimate interest in this case. The Commissioner further finds that disclosure of the special advisers' starting salaries is necessary to inform the public as to the amount of public money paid to these individuals since their appointment. Therefore the Commissioner finds that OFMDFM can rely on Schedule 2 condition 6 of the DPA with regard to the disclosure of this information. Since the Commissioner finds that disclosure of the justification information would be unfair he is not required to consider conditions for processing that information.

Other matters

Meta request submitted by the complainant

44. The complainant made the following meta request to OFMDFM on 23 June 2014:

"I request copies of all records (including but not confined to internal and external correspondence, diary records, internal memos, handwritten notes, submissions) relating to the refused Freedom of Information request 2014/0024 to the OFMDFM".

45. OFMDFM responded to the meta request on 24 July 2014, providing some of the requested information and claiming reliance on sections 35(1)(d) and 40(2) in respect of the remainder.

46. The Commissioner would point out that OFMDFM ought to have considered the extent to which the requested information comprised the complainant's personal data within section 1 of the DPA, as this would need to be handled as a subject access request under section 7 of the DPA.

47. The Commissioner has inspected the information disclosed in response to the meta request. This included a flow chart outlining OFMDFM's procedures for handling and responding to information requests. The flow chart indicates that all draft responses are put to the Private Offices

8 https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/62365/WMS-07-12.pdf

of the First Minister and deputy First Minister for "clearance". It is not clear why such clearance is required in every case, and the Commissioner would suggest that it may lead to unnecessary and undesirable delays in responding to the more straightforward requests.

Internal review of the request of 11 March 2014

48. As recorded at paragraph 6 above the complainant requested an internal review on 5 April 2014. The internal correspondence disclosed in response to the meta request shows that the request for internal review was copied to the Private Offices on 7 April 2014. A draft response was drafted by OFMDFM's Departmental Information Manager for the then Director of HR and Corporate Services. The draft response was then sent to the Private Offices for approval on 29 April 2014. The draft response itself was not disclosed in response to the meta request, but the Commissioner notes that the covering email advised that:

"The original decision to withhold the information has been upheld".

49. OFMDFM's Information Management and Central Advisory Branch (IMCAB) sent reminders to the Private Offices on 8 May and 22 May 2014. On 22 May 2014 the Private Offices advised IMCAB that, although the First Minister was content with the response, the deputy First Minister was not:

"DFM not content with this response which is under discussion with FM adviser".

50. The correspondence does not say why the deputy First Minister was not content with the draft response. For example, it could be that the deputy First Minister disagreed with the internal review decision to uphold the refusal of the request, or he may have disagreed with the wording of the internal review letter. Whatever the reason, the result was that the outcome of the internal review was never communicated to the complainant.

51. Although it is not a statutory requirement, the Code of Practice issued under section 45 of the FOIA provides guidance on how to conduct an internal review. The FOIA does not prescribe a time limit for internal reviews, but the Commissioner's established view is that internal reviews should usually take no longer than 20 working days, and in

exceptional cases no longer than 40 working days.[9] The Commissioner also notes paragraph 42 of the Code which recommends that:

"42. Authorities should set their own target times for dealing with complaints; these should be reasonable, and subject to regular review. Each public authority should publish its target times for determining complaints and information as to how successful it is with meeting those targets."

52. It is not clear whether OFMDFM technically completed the internal review, given that the First Minister and deputy First Minister were apparently unable to agree a response. If a public authority is unable to complete an internal review within the 40 working days recommended by the Commissioner then it may be more practical to advise the complainant that an internal review is not possible. In this scenario the complainant would then have the option to complain to the Commissioner at that stage, rather than experience further delay in the handling of his request.

53. The Commissioner would however stress that he expects public authorities to be able to complete internal reviews promptly in the majority of cases. The Commissioner therefore expects that in the future, where OFMDFM offers an internal review, it will be conducted in such a manner to demonstrate compliance with the Code, and in line with the Commissioner's guidance.

[9] http://ico.org.uk/for-organisations/guide-to-freedom-of-information/refusing-a-request/

Right of appeal

54. 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

55. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.

56. 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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