

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

**Decision notice**

**Date:** 16 October 2023

**Public Authority:** Executive Office  
**Address:** Castle Buildings  
Stormont Estate  
Belfast  
BT4 3SR

**Decision (including any steps ordered)**

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1. The complainant has requested the agendas and minutes of Northern Ireland Executive Committee meetings. The Executive Office refused the request in reliance on the exemptions at sections 35(1)(a) (government policy) and 35(1)(b) (ministerial communications) of FOIA, and the exception at regulation 12(4)(e) of the EIR.
2. The Commissioner's decision is that the exemptions and exception are engaged in respect of all of the requested information. With regard to the minutes, the public interest in maintaining the exemptions and exception outweighs the public interest in disclosure. However, with regard to the agendas, the public interest in maintaining the exemptions and exception does not outweigh the public interest in disclosure.
3. The Commissioner requires the Executive Office to take the following steps to ensure compliance with the legislation.
  - Disclose the agendas 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 FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 7 May 2021 the complainant wrote to the Executive Office and requested information in the following terms:

Pursuant to the Freedom of Information Act, please provide copies of:

- the agenda for each meeting called; and
- the minutes of the proceedings and decisions of

The Executive Committee (set out in the Northern Ireland Act 1998) from the restoration of the Stormont Institutions (January 2020) to the 30 April 2021.

6. The Executive Office responded on 25 May 2021, refusing the request in reliance on the exemption at section 35(1)(a) of FOIA (government policy).
7. The complainant requested an internal review on 27 May 2021. He contacted the Commissioner on 28 September 2021 to complain that he had not received the outcome of that internal review.
8. The Commissioner accepted the complaint as valid without an internal review and requested that the Executive Office provide him with the requested information. The Executive Office provided the Commissioner with a full copy of the requested information.
9. The Commissioner observed that the requested information was voluminous. He therefore considered it proportionate to inspect a sample of the information. The Commissioner observed that some of the information falling within the scope of the request was environmental information within the meaning of the EIR.
10. The Commissioner was mindful that the Executive Office had not identified the environmental information, nor had it considered the request under the EIR. He considered directing the Executive Office to conduct an internal review which would in theory rectify these procedural issues. However the Commissioner considered that this would not assist the complainant because, given the substantial volume of the information falling within the scope of the request, the Executive Office would be likely to claim reliance on section 14 of FOIA on the basis of burden. It would also be likely to rely on regulation 12(4)(b) of the EIR in respect of any environmental information caught by the request, on the basis that the request was manifestly unreasonable.

11. The Commissioner suggested to the complainant that he refine or limit his request. The complainant agreed to do so, and the following refined request was submitted to the Executive Office on 27 March 2023:

Agenda and minutes for each Executive Committee meeting called between 1 November 2020 and 31 December 2020.

12. The Executive Office wrote to the complainant on 25 April 2023 in respect of his refined request, confirming that it had considered the refined request under FOIA and the EIR. The Executive Office refused to disclose any of the requested information, relying on the exemptions at sections 35(1)(a) (government policy) and 35(1)(b) (ministerial communications) of FOIA, and the exception at regulation 12(4)(e) (internal communications) of the EIR.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 25 April 2023 to complain about the Executive Office's response to his revised request. The complainant remained of the view that the requested information ought to have been disclosed to him. The Commissioner considered it appropriate to accept the complaint as eligible for investigation without an internal review because in his opinion the Executive Office had had three opportunities to consider the requested information.
14. The Commissioner is mindful that his decision must take account of the circumstances at the time the request was made. This is slightly more complex in this case since the request was originally made in May 2021 and resubmitted, albeit in a refined manner, in March 2023. For the avoidance of doubt the Commissioner's decision in this case is made on the basis of the circumstances at the time of the refined request, ie March 2023.
15. The Commissioner further notes that some of the requested information falls under the EIR rather than FOIA. This has not been disputed by either party. Accordingly the Commissioner's decision in this case relates to each access regime as applicable to the specific information in question, which has been set out below.
16. The withheld information in this case comprises the agendas and minutes of 13 meetings of the Northern Ireland Executive Committee.<sup>1</sup>

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<sup>1</sup> <https://www.nidirect.gov.uk/articles/northern-ireland-executive>

The Executive Committee comprises the First Minister, deputy First Minister, two junior ministers and eight other government ministers.

## **Reasons for decision**

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### **Section 35(1)(a): formulation and development of government policy**

17. Section 35(1)(a) of FOIA provides that information held by a government department is exempt if it relates to the formulation or development of government policy. Section 35(1)(a) is a class-based exemption and there is no requirement to consider the consequences of disclosure in order to engage the exemption. The information in question must merely meet the description set out in the exemption.
18. The Commissioner is of the opinion 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.
19. The Executive Office set out that the requested information relates to the formulation and development of Executive policy in a number of areas, for example draft budgets and Covid-19 provisions. On this basis the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in this case.

### **Public interest in disclosing the withheld information**

20. The Executive Office recognised that disclosure would provide greater transparency, accountability and openness surrounding the operation of the Executive, with the publication of minutes and agendas possibly serving to increase the understanding and trust the public may have in the operation of the Executive Committee.
21. It recognised the public interest in being able to assess the quality of decisions taken and to understand the extent to which various factors influenced those decisions.

## **Public interest in maintaining the exemption**

22. The Executive Office maintained that frank and honest debate is a key component of high quality policy formulation and there is a public interest, in appropriate situations, in maintaining a private space for discussion away from public scrutiny to effectively formulate and develop policy.
23. It further argued that ministers need to be able to discuss difficult policy issues with candour and the release of information showing what discussions took place and when, along with the details of those discussions, would inhibit that. If ministers were to feel inhibited from being frank and candid with one another because of the possibility of the disclosure of such exchanges, the quality of debate lying behind the collective discussion and decision-making process would be diminished, ultimately resulting in weaker policy formulation.
24. Finally, the Executive Office set out that ministers must be able to undertake a full consideration of all of the options. This requires a "safe space" in which to carry out a candid assessment and scenario planning. In this context, premature disclosure of advice and assessments may close off discussion and the development of better policy options and undermine frank reporting on progress and the identification of risks. This would not be in the public interest.

## **Balance of the public interest**

25. The Commissioner has considered how the various UK administrations deal with minutes of government meetings. The UK Government does not proactively publish records of Cabinet meetings. Instead they are transferred to The National Archives (TNA) after 20 years, at which they will be considered for publication as open files.<sup>2</sup>
26. The Scottish Government publishes Cabinet minutes after 15 years.<sup>3</sup> However, it has published some information dating from 2020 in response to a request made under the Freedom of Information (Scotland) Act 2002.<sup>4</sup>

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<sup>2</sup> <https://www.nationalarchives.gov.uk/cabinetpapers/cabinet-gov/meetings-papers.htm>

<sup>3</sup> <https://www.gov.scot/publications/foi-202100232471/>

<sup>4</sup> <https://www.gov.scot/publications/foi-202000090391/>

27. The Welsh Government proactively publishes minutes and papers from Cabinet meetings. It publishes this information as soon as possible following clearance at the next meeting, albeit that some redactions are made.<sup>5</sup>
28. The Commissioner has considered the different approaches across UK administrations as set out above. However he is mindful that the situation in Northern Ireland is unique, given that its power-sharing Executive requires unionist and nationalist political parties to participate in government.<sup>6</sup>
29. Having reviewed the Executive Office's response in the context of the withheld information, the Commissioner considers that there is clearly a significant public interest in disclosure of information that provides insight into and scrutiny of the operation of the Executive.
30. The requested information includes consideration and decision making of restrictions on everyday life to counter the threat posed by Covid 19, which impacted on everyone in Northern Ireland and further afield. There is accordingly a significant public interest in the public being able to understand how and why these decisions were taken.
31. That said, the Commissioner notes that not all of the requested information relates to Covid 19. The Executive Committee continued to discuss other policy issues as required during the time period specified. These are also of legitimate interest to the public.
32. In this case, the Commissioner considers the safe space arguments put forward by the Executive Office to attract particular weight due to the context of the policy making and the content of the withheld information itself. The Commissioner accepts that there is a strong public interest in allowing the Executive the space and time to formulate its position in respect of policy matters without having to divert resources to answer questions or respond to lobbying, particularly about policy positions that had not yet been finalised.
33. For these reasons, the Commissioner considers that the public interest in maintaining the exemption at section 35(1)(a) outweighs that in disclosure with regard to the minutes of the Executive Committee meetings.

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<sup>5</sup> <https://www.gov.wales/cabinet-meetings>

<sup>6</sup> <https://www.bbc.co.uk/news/uk-northern-ireland-57583168>

34. However, the Commissioner considers that the public interest favours disclosure of the agendas as this will allow the public insight and scrutiny of the areas covered by the Executive Committee without revealing ministers' positions and specific considerations regarding these areas.

### **Section 35(1)(b): Ministerial communications**

35. Section 35(1)(b) provides that information held by a government department is exempt information if it relates to ministerial communications. Section 35(5) defines 'ministerial communications' as any communication between a Minister of the Crown and;

"includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet, proceedings of the Executive Committee of the Northern Ireland Assembly, and proceedings of the executive committee of the National Assembly for Wales."

36. Section 35(1)(b) is a class-based exemption and there is no requirement to consider the consequences of disclosure in order to engage the exemption. The information in question must merely meet the description set out in the exemption.
37. Accordingly the Commissioner finds that the exemption at section 35(1)(b) applies to the requested information, ie the agendas and minutes of Executive meetings.
38. Section 35(1)(b) is a qualified exemption and therefore subject to the public interest test. The Commissioner has therefore considered whether the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure of the information.
39. Since the Commissioner has already found that the minutes of Executive Committee meetings may be withheld under section 35(1)(a), he has restricted his analysis of section 35(1)(b) to the agendas of those meetings, which he has found may not be withheld under section 35(1)(a).

### **Public interest in disclosing the withheld information**

40. The Executive Office recognised the strong public interest in openness, transparency, and accountability with regard to the operation of the Executive Committee, and in ensuring that decision making can be assessed and understood.
41. It set out that the disclosure of the agendas of meetings might be considered to assist and inform more widespread discussion in regard to the work of the Executive Committee.

## **Public interest in maintaining the exemption**

42. The Executive Office maintained that the release of ministerial communications has the potential to damage the concept of collective responsibility. It clarified that collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Executive Committee and carry joint responsibility for all government policy and decisions. The Pledge of Office<sup>7</sup> affirmed by Northern Ireland Ministers upon taking office requires them "to support, and to act in accordance with, all decisions of the Executive Committee and Assembly".
43. The Executive Office set out that, prior to such decisions being taken by the Executive Committee, it is important that Ministers are able to express their own views freely, frankly and with candour within the Executive Committee. This would be less likely if the requested information were to be disclosed into the public domain.

## **Balance of the public interest**

44. The Commissioner considers that the public interest in disclosure is the same as that set out above for the consideration of section 35(1)(a).
45. The Commissioner has considered the arguments set out by the Executive Office in its response to the complainant. He is of the opinion that these arguments are unhelpfully generic and do not refer to the content of the requested information. The Commissioner's decision in this case is therefore informed by his detailed consideration of the requested information.
46. The Commissioner accepts the Executive Office's explanation of the importance of collective responsibility. The Commissioner finds that that there is a strong public interest in allowing Executive ministers to discuss and debate matters in private.
47. However, he is not persuaded by the Executive Office's assertion that disclosure of the agendas has the "potential" to damage this convention, or indeed the concept of safe space. The Executive Office has provided no evidence of the causal link between disclosure and such damage or harm, therefore, although the Commissioner will not dismiss these arguments entirely, he is unable to attach significant weight to them.

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<sup>7</sup> <https://www.northernireland.gov.uk/topics/your-executive/ministerial-code>



48. For these reasons, the Commissioner finds that the public interest in maintaining the exemption at section 35(1)(b) does not outweigh the public interest in disclosure of the agendas.

**Regulation 12(4)(e): internal communications**

49. Regulation 12(4)(e) provides an exception for information that comprises internal communications. It is a class-based exception, therefore there is no requirement to consider the consequences of disclosure at this stage. The exception is qualified, therefore the consequences of disclosure are likely to be relevant considerations for the public interest test. Regulation 12(8) further clarifies that communications between government departments will be classed as internal communications.
50. The Commissioner is satisfied that a very small portion of the requested information, contained within the agendas and minutes, is environmental information within the meaning of regulation 2 of the EIR. As set out at paragraph 15 above this is not contested by either party, therefore the Commissioner does not consider it necessary to set out further details in this regard.
51. The Commissioner is satisfied that the environmental information contained within the agenda and minutes of Executive Committee meetings are internal communications, and as such engage the exception at regulation 12(4)(e).

**Public interest in disclosing the withheld information**

52. The Executive Office noted that regulation 12(2) sets out a presumption in favour of disclosing the information. Disclosure would provide greater transparency, accountability and openness surrounding the operation of Government, and would possibly serve to increase the understanding and trust the public may have in the operation of the Executive Committee.

**Public interest in maintaining the exception**

53. The Executive Office maintained that frank and honest debate is a key component of high quality policy formulation and there is a public interest, in appropriate situations, in maintaining a private space for discussion away from public scrutiny to effectively formulate and develop policy.
54. It further argued that ministers need to be able to discuss difficult policy issues with candour and the release of information showing what discussions took place and when, along with the details of those discussions, would inhibit that. If ministers were to feel inhibited from

being frank and candid with one another because of the possibility of the disclosure of such exchanges, the quality of debate lying behind the collective discussion and decision-making process would be diminished, ultimately resulting in weaker policy formulation.

55. The Executive Office also set out that ministers must be able to undertake a full consideration of all of the options – this requires a private space in which to carry out a candid assessment and scenario planning. In this context, premature disclosure of advice and assessments may close off discussion and the development of better policy options and undermine frank reporting on progress and the identification of risks. This is not in the public interest.

### **Balance of the public interest**

56. Again, the Commissioner is disappointed at the generic nature of the Executive Office's arguments. It is difficult for the Commissioner to attach significant weight to generic arguments, but it is even more difficult for the requester to understand why the information they requested cannot be disclosed.
57. As set out at paragraphs 32 and 33 above, the Commissioner has already found that the information contained in the minutes which is not environmental information may be withheld under section 35(1)(a). The Commissioner has reached a similar conclusion with regard to the environmental information and finds that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the minutes.
58. However, the Commissioner cannot be satisfied that the public interest in maintaining the exception at regulation 12(4)(e) outweighs the public interest in disclosure of the agendas.

## Right of appeal

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59. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

60. 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.

61. 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 .....**

**Sarah O’Cathain  
Senior Case Officer  
Information Commissioner’s Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**