

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 6 February 2018

Public Authority: Department of Agriculture, Environment and Rural Affairs

Address: Dundonald House
Upper Newtownards Road
Belfast
BT4 3SB

Decision (including any steps ordered)

1. The complainant has requested information relating to a single-language policy. The Department of Agriculture, Environment and Rural Affairs refused to disclose the requested information in reliance on the exemption at section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the exemption at section 35(1)(a) is engaged with regard to the information held. However, she also finds that the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information 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 the FOIA and may be dealt with as a contempt of court.

Background

5. The request in this case followed an Assembly Question submitted by Catherine Seeley MLA on 5 September 2016:

"To ask the Minister of Agriculture, Environment and Rural Affairs to detail (i) the cost of changing the name of the Fisheries Protection

vessel Banrion Uladh to Queen of Ulster; (ii) the rationale for the decision; and (iii) any consultation that took place.”¹

6. The then Minister, Michelle McIlveen MLA, responded on 27 September 2016 as follows:

“The change of lettering was carried out at a scheduled annual maintenance event involving repairs, repainting and antifouling.

DAERA is a new Department with a fresh identity and logo and adopts a single language policy, there have consequently been some necessary adaptations to assets transferring to the new Department.

The name of the patrol vessel was a matter for the former DARD Minister Michelle Gildernew and was not an issue for consultation.”

Request and response

7. The request which led to this complaint was submitted to the Department by the complainant on 30 September 2016. A detailed chronology of the request is set out in Annex 1 at the end of this decision notice. In brief, the Department did not respond to the request until the Commissioner intervened. The Department issued a refusal notice but was subsequently unable to confirm to the Commissioner what information it actually held at the time of the request.
8. The complainant resubmitted the request to the Department on 20 August 2017:

“Dear all, I refer to Assembly Question AOW 2327/16-21 to the Minister tabled on 5/9/2016, this makes reference to the Department having adopted a ‘single language policy’. The context of the response makes clear that this ‘single language policy’ refers to a policy of solely using the English language, as it indicates the application of the policy has prompted the translation of the name of a Fisheries Protection Vessel into English from Irish. The name of the fisheries vessel contained the traditional and correct form of a place name in Irish (Uladh/Ulster).

This is a request under the Freedom of Information Act 2000 for:

1: What information does the department hold in relation to the ‘single language policy’

¹ <http://aims.niassembly.gov.uk/questions/printquestionssummary.aspx?docid=271006>

2: copies of the information captured by request (1)

3: What information the Department holds, that is not already captured by (1) above which sets out how the Department will comply with the following provisions of the European Charter for Regional or Minority Languages (as applied to Irish in the UK):

- *Article 10(1)(a)(iv) [administrative authorities] to ensure that users of Irish may submit oral or written applications in Irish; or (c) to allow the administrative authorities to draft documents in Irish;*
- *Article 10(2) [local and regional authorities] (b) the possibility for users of Irish to submit oral or written applications in Irish; (g) the use or adoption, if necessary in conjunction with the name in the official language(s), of traditional and correct forms of place-names in Irish.*
- *The following provisions of Article 7 (which apply to Irish and Ulster Scots in NI):*
 - *In respect of Irish/Ulster Scots, within the territories in which Irish is used and according to the situation of Irish, the United Kingdom shall base its policies, legislation and practice on the following objectives and principles (inter alia):*
 - a the recognition of Irish/Ulster Scots as an expression of cultural wealth;*
 - c the need for resolute action to promote Irish/Ulster Scots in order to safeguard it;*
 - d the facilitation and/or encouragement of the use of Irish/Ulster Scots, in speech and writing, in public and private life;*
- *Article 7(2) where the state party undertakes to eliminate, if it has not yet done so, any unjustified distinction, exclusion, restriction or preference relating to the use of Irish/Ulster Scots and intended to discourage or endanger the maintenance or development of it.*
- *Article 7(4) In determining its policy with regard to Irish/Ulster Scots, the United Kingdom shall take into consideration the needs and wishes expressed by the groups which use Irish/Ulster Scots. It is encouraged to establish bodies, if necessary, for the purpose of advising the authorities on all matters pertaining to Irish/Ulster Scots.*

4: copies of the information captured by request (3)

The scope of request 1 would include the policy document itself and documents developed in the policy formulation process, including any

document setting out consideration given to compliance with the policy with the terms of binding Council of Europe treaties, including the European Charter for Regional or Minority Languages but also the Framework Convention for National Minorities. This would include the extent that the department took into consideration the needs and wishes of Irish and Ulster Scots speakers, in accordance with Article 7(4) in determining its Single Language Policy."

9. The Department issued a refusal notice on 13 September 2017, stating that the request was being refused under section 35(1)(a) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 14 September 2017 to advise that he remained dissatisfied with the Department's refusal to disclose the requested information.
11. As explained in the annex, the Commissioner is not required to make a decision in respect of a complaint submitted if the complainant has not exhausted any complaints procedure provided by the public authority. However the Commissioner notes that the Department has now had a number of opportunities to reconsider its position, over a period of one year. The Commissioner did not therefore ask the complainant to request a further internal review, but considered it appropriate to proceed to a decision notice in this case.
12. The Commissioner has received another complaint which deals with the same withheld information. That complaint is the subject of a separate decision notice,² although inevitably much of the analysis is repeated in both cases. The Commissioner would stress that she has considered all the circumstances of each case.

Reasons for decision

Section 35: formulation or development of government policy

13. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The Commissioner is of the view that the formulation of government policy relates to the early stages of the policy
-

² Decision notice FS50700448

process. This covers the period during 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.

14. In this case the Department has maintained that the information relates to the formulation and development of a particular policy, namely the Department's single language policy. In its refusal notice dated 13 September 2017, the Department said that its policy was still under development.

15. The Department confirmed that it holds the following information:

- 1) Submission Language Policy;
- 2) Annex A Draft DAERA Language Policy;
- 3) Annex B Parts II & III European Charter; and
- 4) Annex C Draft DAERA Language Policy Screening.

16. The complainant asked the Commissioner to consider whether the policy in question can be said to be under formulation or development, given the wording of the Minister's response to the Assembly Question:

"DAERA is a new Department with a fresh identity and logo and adopts a single language policy..."³

17. The complainant suggested that if the Department had adopted the policy, as indicated by the decision to rename the Fisheries Protection Vessel (FPV), then the policy could not be said to be under development, whether or not the Minister had made a formal decision.

18. The Department clarified to the complainant that a submission had been sent to the Minister on 18 November 2016, but that no decision had been made prior to the dissolution of the Northern Ireland Assembly in January 2017. For this reason the Department maintained that the policy was under development at the time of the resubmitted request.

19. Having reviewed the withheld information, the Commissioner is satisfied that it does in fact relate to the formulation of the policy in question. The Commissioner cannot comment on the Minister's statement, or the decision to rename the FPV in the absence of an agreed policy. However, in the Commissioner's view it does not necessarily follow that

³ <http://aims.niassembly.gov.uk/questions/printquestionssummary.aspx?docid=271006>

the single language policy had completed the formulation stage. Accordingly, the Commissioner accepts that section 35(1)(a) is engaged.

20. Section 35(1)(a) is a qualified exemption and is therefore subject to the public interest test. The Commissioner must therefore consider whether the balance of the public interest in favour of maintaining the exemption outweighs the public interest in favour of disclosure of the information. If the respective public interest arguments are equally balanced, then the information ought to be disclosed.

Public interest in favour of disclosing the withheld information

21. The Department identified the following arguments in favour of disclosing the withheld information:
- The right of the public to have access to information.
 - Disclosure will reveal reasons for decisions.
 - The information may make a valuable contribution to the public debate on the issue.
22. The complainant argued that there was considerable public interest in disclosure of the withheld information since it would clarify the extent to which the policy was actually under formulation or development, as opposed to having been implemented.
23. The Commissioner agrees that there is a general public interest in the disclosure of information held by public authorities, particularly information that would inform the public as to how the authority makes decisions. The Commissioner is of the view that, in this particular case, disclosure of the requested information would more specifically inform the public as to the status of the Department's single language policy.
24. The Commissioner is not however convinced that disclosure of the withheld information would in fact reveal reasons for decisions, as suggested by the Department. One of the key issues in this case is that no Ministerial decision has been taken on the draft single language policy.

Public interest in favour of maintaining the exemption

25. The Department identified the following arguments in favour of maintaining the exemption:
- Premature disclosure of this information may have an adverse effect on the development of the Department's language policy at this stage.

- Release of the records may prematurely prejudice the process of policymaking wherein officials have the space in which to debate live issues.
- The loss of space in which to discuss matters frankly and with candour would damage the quality of advice and lead to poorer decision making in the future.
- The broader community interests must be considered and releasing any information about a single language policy may be detrimental at this stage.

Balance of the public interest

26. The Commissioner has carefully considered the arguments put forward both in favour of disclosure, and in favour of maintaining the exemption. The Commissioner is of the opinion that the Department's arguments are largely generic, and do not reflect the Department's consideration of the actual withheld information.
27. The Department's reference to space in which to debate live issues would appear to correspond to the safe space argument described in the Commissioner's guidance.⁴ The Commissioner accepts that safe space arguments are often relevant, but the Department has not clarified why safe space is required in this case. In the absence of a detailed explanation of the Department's reasoning the Commissioner is unable to attach significant weight to the safe space argument.
28. The Department has also suggested that disclosure of the withheld information could damage the quality of advice and lead to poorer decision making in the future. This appears to correspond to the "chilling effect" argument described in the Commissioner's guidance, although the Department has not explained how it considers that disclosure of the withheld information would result in such harm.
29. The Commissioner is again assisted by her guidance on section 35, which sets out:

"When discussions are purely internal then civil servants are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure. It is also

⁴ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

possible that the threat of future disclosure could actually lead to better quality advice."

30. Having inspected the withheld information the Commissioner does not accept that its disclosure would be likely to have a detrimental impact on the provision of future advice. In the Commissioner's view the submission to the Minister (item 1 as described at paragraph 15) is not especially frank or sensitive, and the draft policy (item 2) is fairly generic. The Commissioner has seen nothing to indicate how civil servants would feel inhibited in future decision making if this information were to be disclosed into the public domain.
31. The Commissioner further notes that some of the withheld information is already in the public domain (ie item 3). In addition the Department's Equality Scheme commits the Department to publishing details of its equality screening documentation as follows:

"As soon as possible following the completion of the screening assessment, the completed form, signed off and approved by the senior manager responsible for the policy, will be made available on our website, under the Equality Scheme heading on the DAERA homepage."⁵
32. The Scheme does not indicate that the publication of screening documentation is subject to approval of the policy.
33. The Commissioner is aware that the Minister's decision to rename the FPV has resulted in substantial media interest and comment. The Commissioner is also mindful that the issue of language is politically sensitive in Northern Ireland. However the Commissioner is required to consider the public interest, or the public good.
34. The timing of the request is also relevant. Between the original request (30 September 2016) and the resubmitted request (20 August 2017) the Northern Ireland Assembly collapsed, and at the time of issuing this decision notice it was unclear when it might be restored. In the absence of a Minister to approve or amend the policy, it remains in draft form.
35. The Commissioner recognises that there is a limited general public interest in protecting information relating to a live policy decision. This is because there is a general public interest in providing a certain amount of protection to the safe space in which policy is discussed and developed. The Commissioner also acknowledges the Department's

⁵ <https://www.daera-ni.gov.uk/sites/default/files/publications/daera/daera-equality-scheme-2016-2020.PDF>

arguments relating to the political situation, ie its concern about disclosing information without Ministerial approval in a time of uncertainty about the future of the Northern Ireland Assembly. The Department is understandably reluctant to disclose information that it considers could make it more difficult for the political parties to reach agreement.

36. However, the Commissioner is of the view that public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. In the absence of evidence to support the Department's concerns about negative consequences of disclosure the Commissioner cannot attach significant weight to these arguments.
37. In light of the above, the Commissioner finds that there is considerable public interest in informing the public as to the development of the Department's single language policy. She is not satisfied that the public interest in maintaining the exemption at section 35(1)(a) is sufficiently strong to outweigh the public interest in disclosure. Therefore the Commissioner finds that the withheld information ought to be disclosed into the public domain.

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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

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

Annex 1: background to the complaint

1. The request which is the subject of this complaint was originally submitted to the Department by the complainant on 30 September 2016.
2. The Department acknowledged the request but failed to issue a substantive response, and the complainant contacted the Commissioner. Following the Commissioner's intervention the Department issued a refusal notice on 20 February 2017. The Department stated that it was refusing the request in reliance on the exemption at section 35(1)(a) of the FOIA.
3. The complainant contacted the Commissioner again on 21 February 2017 since he was dissatisfied with the response. The complainant was of the view that the Department was not entitled to refuse the request.
4. The Commissioner is not required to make a decision in respect of a complaint submitted if the complainant has not exhausted any complaints procedure provided by the public authority. However, in this case the Commissioner was mindful that the Department took nearly five months to issue a substantive response, and only did so following the Commissioner's intervention. The Commissioner therefore considered it appropriate to accept the complaint as valid without requiring the complainant to request an internal review.
5. The Commissioner asked the Department to provide her with a copy of the requested information. On inspection of the information, the Commissioner noted that it was dated after the request was received by the Department. The Commissioner was mindful of section 1(4) of the FOIA, which provides that

"The information –

- a. *in respect of which the applicant is to be informed under subsection (1)(a), or*
- b. *which is to be communicated under subsection (1)(b),*

is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request."

6. The Commissioner drew the Department's attention to the fact that the request was made on 30 September 2016, but the withheld information as provided to the Commissioner was dated November 2016. The Commissioner asked the Department to confirm whether it held a draft version of any of the documents at the date of the request, ie 30 September 2016.
7. The Department confirmed to the Commissioner that the information it provided to her was the only information it held that was relevant to the request. The Department apologised that it was unable to state with certainty when the information was created, but confirmed that it was first saved to its electronic records management system in November 2016.
8. The Commissioner has drawn the Department's attention to the importance of ensuring that a response to a request for information meets the requirements of the FOIA. In this case the Commissioner cannot be certain whether or not the requested information was in fact held at the time of the request of 30 September, as required by section 1(4) of the FOIA. Therefore the Commissioner considered it appropriate to suggest to the complainant that he resubmit his request, on the basis that the Department now clearly holds the information in question.