

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 9 February 2016

Public Authority: Parades Commission
Address: 2nd Floor, Andras House
60 Great Victoria Street
Belfast
BT2 7BB

Decision (including any steps ordered)

1. The complainant requested the names of individuals and organisations who made representations in respect of certain parades. The Parades Commission refused the request under section 41(1) of the FOIA (information provided in confidence). The Commissioner's decision is that the Parades Commission was entitled to rely on the exemption at section 41(1). The Commissioner also finds that the Parades Commission should also have cited section 40(5) to neither confirm nor deny that any of the requested information comprised personal information relating to the complainant. The Commissioner does not require any steps to be taken.

Request and response

2. The Parades Commission was established in 1998 to regulate public processions (including parades) and related protest meetings in Northern Ireland. The Parades Commission has the power to issue determinations in respect of public processions and related protest meetings, including the power to impose restrictions of various kinds. The Parades Commission receives information from interested parties, as well as its own monitors, which inform its determinations.
3. On 3 July 2015 the complainant requested the following information from the Parades Commission:

"I request under the Freedom of Information Act 2000 that you furnish me with the names of individuals, public representatives and organisations who made representations in respect of the following parade notifications.

PAR/65644 Killowen LOL 930 1 July 2015
PAR/65709 Killowen LOL 930 1 July 2015
PAR/66263 Killowen LOL 930 13 July 2015
PAR/66318 Killowen LOL 930 1 July 2015."

4. On 17 July 2015 the Parades Commission refused the request in reliance on the exemption at section 41 of the FOIA.
5. The complainant requested an internal review on 30 July 2015, and the Parades Commission communicated the outcome of that review to him on 14 August 2015. The Parades Commission maintained reliance on the exemption at section 41.

Scope of the case

6. The complainant contacted the Commissioner on 21 August 2015 to complain about the way his request for information had been handled. The complainant argued to the Commissioner that the Parades Commission ought to have disclosed the requested information to him.
7. The Commissioner has stressed to the complainant that his duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. The Commissioner recognises that the complainant made the request in his capacity as an elected representative, and will therefore have his own reasons for wanting access to the requested information. However the identity and motives of the applicant are not generally relevant to the consideration of a request made under the FOIA. This is because the FOIA concerns disclosure to the public. The Commissioner cannot require a public authority to disclose information to a requester under the FOIA unless it could be disclosed to any member of the public who requested it.
8. In light of the above the scope of the case is to decide whether the requested information ought to have been disclosed to the complainant, and thus into the public domain, in response to the request.

Reasons for decision

Section 1(1)(a): duty to confirm or deny that information is held

9. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise the applicant whether or not it holds the requested information. This is known as the "duty to confirm or deny". However, the duty to confirm or

deny does not always apply and authorities may refuse to confirm or deny in reliance on certain exemptions under the FOIA.

Section 40(5): personal information

10. Section 40(5)(a) provides that the duty to confirm or deny does not arise in relation to information that falls, or would fall if it were held, within the scope of section 40(1) of the FOIA. Section 40(1) provides that information which is the personal data of the applicant is exempt from disclosure under the FOIA. This is because individuals may request their personal data under a separate legislative access regime, namely the right of subject access under section 7 of the Data Protection Act 1998 (the DPA).
11. The Parades Commission did not seek to rely on section 40(5) of the FOIA as it considered that the requested information was entirely exempt under section 41. However, if the complainant has made representations to the Parades Commission in respect of any of the parades in question his name will form part of the requested information. If this were the case then the complainant's name, as his personal data, would fall to be considered under section 40(1) as explained above. In considering such matters, the Commissioner is mindful that whilst an individual may be aware that information does or does not exist because of their involvement in events, it does not follow that the general public is also aware of the existence of that information. Therefore in cases such as this the Commissioner would expect a public authority to refuse to confirm or deny that it holds information relevant to the complainant's request which would, if held, constitute the complainant's personal information.
12. Accordingly the Commissioner is satisfied that the Parades Commission is not required to confirm or deny under the FOIA whether it holds information which, if held, would be the personal data of the complainant, by virtue of section 40(5)(a).

Section 41: information provided in confidence

13. Section 41(1) of the FOIA states that information is exempt if it was obtained by the public authority from any other person (including another public authority), and the disclosure of the information to the public (otherwise than under the FOIA) by the authority holding it would constitute a breach of confidence '*actionable*' by that or any other person.

14. The Commissioner is mindful that he previously considered the application of section 41 in respect of a request for information made to the Parades Commission for information relating to a particular parade.¹ In that case the complainant did not want the names of any person, but wanted details of information provided to the Parades Commission about a particular parade. The Commissioner found that the Parades Commission was in fact entitled to rely on section 41, and his decision was upheld by the then Information Tribunal² and the High Court of Northern Ireland.³ The Commissioner has seen no evidence to persuade him that he should take a different approach from that upheld by the High Court, although he would stress that each case must be considered on its own merits. Therefore the Commissioner has taken into account the findings of the Tribunal and the High Court, while considering the particular circumstances of this case. The Commissioner has also inspected the requested information in this case.

Was the information obtained from another person?

15. In considering whether or not the exemption is engaged, the Commissioner must first determine whether the information was obtained by the public authority from another "person" (a natural person or legal person, ie including individuals, organisations, companies, etc). The request was for the names of individuals, public representatives and organisations that had made representations to the Parades Commission. The Parades Commission would only hold such names as had been provided by those making representations, therefore it is clear that the requested information will have been obtained from other persons.

Would disclosure give rise to an actionable breach of confidence?

16. The test of confidence was established in the High Court case of *Coco v AN Clark (Engineers) Limited [1968] FSR 415 (Coco vs Clarke)*. For the Commissioner to find that provision of confirmation or denial that the requested information is held would, of itself, constitute a breach of confidence, it must be shown that:

- the requested information would have the necessary quality of confidence,
- if it had been imparted, the requested information would have been imparted in circumstances importing an obligation of confidence, and

¹ Decision notice FS50146463, issued 16 August 2007

² Appeal no EA/2007/0103

³ [2011] NIQB 44

- unauthorised use of the information, if held, would be of detriment to the confider.

Does the information have the necessary quality of confidence?

17. Information will generally have the quality of confidence if it is more than trivial and not otherwise accessible. The information does not have to be particularly sensitive, but it must be more than trivial.
18. In this case the information in question is the names of persons who made representations to the Parades Commission in respect of one or more of the specified parades. Disclosure of the names would inform the public as to who made representations, and although it would not necessarily indicate the nature of those representations the Commissioner is satisfied that the information will have the necessary quality of confidence. It cannot reasonably be described as trivial and was not accessible to the public at large at the time of the request.

Was the information imparted in circumstances importing an obligation of confidence?

19. The Parades Commission referred the Commissioner to its Procedural Rules:

"3.3 All evidence provided to the Commission, both oral and written, will be treated as confidential and only for the use of the Commission, those employed by the Commission and Authorised Officers. The Commission, however, reserves the right to express unattributed general views heard in evidence but only as part of an explanation of its decision".⁴

20. The Procedural Rules are produced in compliance with Section 4 of the Public Processions (Northern Ireland) Act 1998 which requires the Parades Commission to issue Procedural Rules explaining how it will exercise these functions.
21. The Procedural Rules indicate that the process of making representations to the Parades Commission is covered by a clear expectation of confidentiality. The Commissioner accepts that, given the context of making representations in respect of a parade, and the Procedural Rules, anyone making such representations would have a reasonable expectation that the information they provided, including

⁴ <https://www.paradescommission.org/getmedia/45e15b11-ffe7-4b11-b603-10a9f2e59ca5/NorthernIrelandParadesCommission.aspx>

their name, would be held in confidence, and that their identity would be protected.

Would unauthorised use of the information be of detriment to the confider?

22. The Commissioner is mindful of the First-Tier Tribunal's decision in the case of *Bluck v ICO & Epsom and St Helier University Hospital NHS Trust*.⁵ At paragraph 15 the Tribunal states that the loss of privacy can be a detriment in its own right. Accordingly there is no need to establish any detriment to the confider in terms of tangible loss in order for information to be protected by the law of confidence.
23. The Commissioner also recognises the difficult history and context of parades and protests in Northern Ireland.⁶ The Commissioner accepts that disclosure of the names of those making representations into the public domain would be likely to cause distress to those affected, whether as individuals or members of an organisation, who may fear harassment or violence as a result.

Inherent public interest test

24. Section 41 provides an absolute exemption, which means that the public interest test set out at section 2(2) of the FOIA is not required. However the Commissioner recognises that the courts have found, in certain circumstances, that the public interest will override a duty of confidence. This may be described as an "inherent" public interest test which must be considered in order to engage the exemption at section 41.
25. In support of his complaint the complainant argued to the Commissioner that:

"It also seems disingenuous of the Parades Commission to repeatedly call for parading bodies (such as Orange Order and others) to engage in dialogue with those who object to parades, while also declining to provide the names of those objecting in order that the very dialogue might take place!"
26. The Parades Commission argued to the Commissioner that there was no overriding public interest in disclosure of the names of persons who had made representations in an expectation of confidence. Rather, the Parades Commission maintained that its Procedural Rules provided an

⁵ Appeal no EA/2006/0090

⁶ <http://cain.ulst.ac.uk/csc/reports/parade.htm#contents>

explicit guarantee that information could be provided without fear of the source of that information being made public.

27. As the Commissioner has emphasised to the complainant, the FOIA only deals with the disclosure of information into the public domain. The Commissioner understands that the functions of the Parades Commission are set out at section 2(1) of the Public Processions (Northern Ireland) Act 1998, which states:

“(1) It shall be the duty of the Commission –

- (a) To promote greater understanding by the general public of issues concerning public processions;*
- (b) To promote and facilitate mediation as a means of resolving disputes concerning public processions;*
- (c) To keep itself generally informed as to the conduct of public processions and protest meetings;*
- (d) To keep under review, and make such recommendations as it thinks fit to the Secretary of State concerning, the operation of this Act.”*

28. Section 2(1)(b) explicitly provides that the Parades Commission has a statutory function to promote and facilitate mediation. Therefore the Commissioner does not accept the complainant’s argument that the Parades Commission is disingenuous in refusing to disclose the requested information. The Commissioner notes that the Parades Commission provides a legal framework for interested parties to engage, and the FOIA does not provide an alternative means for those parties to obtain relevant information. The Commissioner made this point in his previous decision notice involving the Parades Commission, which as noted above was upheld by the High Court.

29. As discussed in the previous decision notice, the Commissioner remains mindful of the significant public interest in ensuring that people are not discouraged from expressing opinions to regulatory bodies by the possibility of the information they provide being made public. When information relating to such concerns is provided to a public authority in confidence, there is a legitimate expectation that this confidence will be protected by that authority. Without this expectation, people may be less willing to express their concerns to such regulatory bodies. In this particular case, the Commissioner is of the view that disclosure of the withheld information would hamper the ability of the Parades Commission to receive representations regarding particular parades. This would undoubtedly prejudice the functions of the Parades Commission, and the Commissioner is of the view that there is a much stronger public interest in protecting its ability to obtain and consider relevant information.

30. For the reasons set out above, the Commissioner is satisfied that there is no overriding public interest in disclosure of the information requested. Therefore the Commissioner finds that the Parades Commission was entitled to rely on the exemption at section 41 of the FOIA to refuse the request.

Right of appeal

31. 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

32. 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.
33. 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