

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 7 September 2016

Public Authority: Department for Communities
Address: Lighthouse Building
1 Cromac Place
Belfast
BT7 2JB

Decision (including any steps ordered)

1. The complainant has requested information relating to the Voluntary Exit Scheme in the Northern Ireland Civil Service. The Department refused the request under section 22 since it said it intended to publish the requested information after the scheme closed. During the course of the Commissioner's investigation the Department disclosed the requested information to the complainant, but the complainant asked that the Commissioner issue a decision notice.
2. The Commissioner's decision is that the exemption at section 22 of the FOIA is engaged, but the public interest in maintaining that exemption does not outweigh the public interest in disclosure. However, since the requested information has been disclosed the Commissioner does not require any remedial steps to be taken.

Request and response

3. The Northern Ireland Civil Service (NICS) Voluntary Exit Scheme (VES) was launched on 2 March 2015 with the aim of addressing significant budget pressures facing central government departments. The closing date for applications was 27 March 2015. Applicants were selected on the basis of a "Value for Money" score, and random selection in the

event of a tie. There were five rounds of exits, and by the time of the last round, in May 2016, nearly 3000 individuals had left the NICS.¹

4. The complainant requested the following information from the Department on 11 September 2015:
 - 1) *How many voluntary redundancy scheme offers have been made in CMS [Child Maintenance Service, part of the Department]?*
 - 2) *How many staff are in CMS?*
 - 3) *How many applicants were there in CMS?*
 - 4) *What % of CMS applicants were made offers in tranche 1 and 2 combined?*
5. On 2 October 2015 the Department responded to the request. The Department provided the information requested at part 2, but withheld the information requested at parts 1, 3 and 4 of the request under section 22 of the FOIA. This refusal was upheld following an internal review.

Scope of the case

6. The complainant contacted the Commissioner on 5 January 2016 to complain about the Department's decision to withhold the information at parts 1, 3 and 4 of the request.
7. On 25 May 2016, during the course of the Commissioner's investigation, the Department disclosed the requested information to the complainant. However the complainant remained of the view that the information ought to have been disclosed to him at the time of his original request. The complainant specifically requested that the Commissioner issue a decision notice regarding the Department's application of the exemption at section 22.

¹ <https://www.finance-ni.gov.uk/sites/default/files/publications/dfp/NICS%20Service-Wide%20Exit%20Scheme%20-%20Final%20Scheme%20Information%20Booklet.pdf>

Reasons for decision

Section 22: information intended for future publication

8. Section 22 of the FOIA provides an exemption from disclosure where, at the time a public authority receives a request:

- the public authority holds the requested information with a view to its publication;
- the public authority or another person intends to publish the information at some future date, whether determined or not; and
- in all the circumstances it is reasonable to withhold the information prior to publication.

9. In its refusal notice the Department said that the requested information was at that time:

“...being drafted and it is intended for publication at an appropriate date”.

10. The Department clarified to the Commissioner that the information was held in the context of the VES. The VES was facilitated on behalf of each government department by Corporate HR within the then Department of Finance and Personnel. The Department said that Corporate HR had advised in June 2015 that it intended to publish information about the VES, including analysis of applicant and leaver pools. However the information to be published would be at departmental level and did not include any analysis by business area. Consequently the Department decided that it would also publish more detailed information at the end of the scheme, and this was intended to happen in or around July 2016.

11. The Department was unable to provide the Commissioner with any record of its decision to publish the requested information. Although documentary evidence is not a statutory requirement the Commissioner would strongly recommend that public authorities keep appropriate records of their decision making. Failure to do so can make it more difficult to demonstrate that a decision was made at a certain time, as is required for section 22 to apply.

12. The Commissioner has gone on to consider whether it was reasonable in all the circumstances to delay publication of the requested information. In support of its position the Department said that the analysis would be incomplete until the VES concluded. The Commissioner notes that the complainant made his request after two of the five rounds of exits, but does not consider that this means that the analysis would necessarily be

incomplete. In any event the Commissioner also notes that part of the request was for some information relating specifically to the first two exit rounds. Therefore, although analysis of the VES as a whole might be incomplete, the Commissioner does not consider that this should affect the status of the specific information requested by the complainant.

13. The Department also said it was important to maintain consistency with overall departmental information published by Corporate HR. The Commissioner understands that each department in the NICS is a public authority in its own right, but that the VES was an NICS-wide initiative. For this reason the Commissioner understands why the Department might wish to make information available in a manner consistent with other departments, although a request for information under the FOIA must be considered on its own merits.

14. The complainant had argued to the Department that the cost of providing the information would be "negligible". The Department disagreed, saying that preparing the information for publication would require

"...a high level of staff time to analyse the 2000 (approx) applicant and leaver pools by each grade and business area within [the Department]",

15. Accordingly the Department preferred to wait until all the information could be prepared for analysis. In the Commissioner's view it would be reasonable for the Department to want to delay the process of analysing the information until the VES was finished and all the relevant data available.

16. Finally the Department pointed out that the information was subject to change because staff may have transferred between business areas, and applications and acceptances may be submitted late or withdrawn, as well as cases being put on hold in disciplinary or inefficiency cases. The Commissioner is mindful that under section 1(4) of the FOIA the information to be disclosed is the information held at the time the request is received. Therefore, the Department was obliged to consider providing the complainant with the actual information it held on 11 September 2015. If the Department was concerned that the information may not provide an accurate picture or might be misleading, then the onus would be on the Department to explain this to the complainant.

17. In addition, the Commissioner's published guidance on section 22 sets out her view that

"The information that the public authority intends to publish must be the specific information the applicant has requested."

If, in the course of preparing information for publication, some information is discarded or rejected, the exemption under section 22 will not cover that rejected material."

18. Thus, if the Department considered that the information it intended to publish at the end of the VES was not the same information held at the time of the request, it would not be able to rely on section 22 to refuse the request.
19. Taking into account the arguments put forward by the Department the Commissioner accepts that the Department did intend to publish the requested information after the VES was complete. The Commissioner also accepts that it was reasonable to delay publication of the requested information. Therefore the Commissioner finds that the exemption at section 22 is engaged, and has gone on to consider the public interest.

Public interest in disclosure

20. The Department identified generic arguments in favour of disclosing the requested information, including the general public interest in openness, accountability and transparency. The Department also set out the following argument:

"To show compliance with the FOI Act by disclosing information held by the Department as a Public Authority".

21. The Commissioner considers that compliance with the FOIA is not in itself a public interest argument. Rather, the Department as a public authority is required by the FOIA to comply with its provisions. If the public interest in maintaining the exemption outweighs the public interest in disclosure then there is no obligation to disclose the requested information.
22. The complainant put forward a number of arguments as to why the information ought to have been disclosed at the time of his request. Most of his arguments focused on why CMS staff should be able to access the information. He pointed out that there were approximately 1400 staff in CMS, which made it one of the largest business areas in the NICS and bigger than some departments. The complainant was concerned that the percentage of successful VES applicants in CMS (at the time of his request) appeared to be less than half the comparable figure across the NICS. He said that disclosing the requested information would inform staff whether the VES was being operated fairly, but said that the requested information would be *"of no use to applicants"* once the VES was complete.

23. The Commissioner understands the complainant's reasons for seeking access to the information. However she must stress that the FOIA is applicant- and motive-blind, and a public authority should consider whether the requested information could be disclosed into the public domain. The FOIA does not provide for information to be disclosed solely to a particular applicant or for a particular reason. Consequently the Commissioner cannot attach weight to the complainant's personal interest in the requested information. In any event the Department argued that disclosure of the information would not have assisted any VES applicant since selection and appeals were determined solely on a value for money basis.
24. The Commissioner does however recognise that the public as a whole will have a legitimate interest in accessing information about the operation of the VES. The aim of the scheme was to reduce the paybill across the NICS, and it was stated several times that decisions would be made on the basis of value for money. The VES itself has affected a large number of NICS staff, but the Commissioner also considers that disclosure of information about the VES would better inform the wider public as to its operation and effectiveness.
25. In addition the Commissioner is mindful of the timing of the request, and the planned publication of the requested information. The Commissioner's guidance on section 22 says that the public interest in disclosing the information will often be stronger if the publication date is far in the future. In this case the request was made in September 2015, and the earliest that the information was planned to be published was July 2016. The Commissioner considers the ten month timescale to be an argument in favour of disclosure, albeit that she would not consider it to be particularly weighty.

Public interest in maintaining the exemption

26. In its refusal notice the Department set out public interest arguments "against disclosure". This is not the correct test as set out at section 2(2)(b) of the FOIA. The public authority is required to consider the public interest in maintaining the exemption, which means the authority must focus on the particular interest the exemption is designed to protect. The Commissioner considers that the Department's arguments can be examined in this context, but would expect steps to be taken in future cases to ensure that the correct legal test is set out in correspondence.
27. The Department argued that to disclose the information at the time of the request would have resulted in duplication of effort and would have had an adverse impact on departmental resources. As set out above the complainant did not accept this argument. Having had sight of the

requested information, the Commissioner considers that it would have been relatively straightforward to obtain. The figures for CMS as a business area are relatively small and do not appear to require significant manipulation to produce the requested information. Therefore, whilst the Commissioner would not agree with the complainant that the cost in terms of effort would be negligible, she does not consider it to be a persuasive argument in favour of maintaining the exemption.

28. The Department identified a public interest argument in releasing information to all VES applicants at the same time, to avoid causing any indirect unfairness. The Commissioner understands the logic of this argument, but would point out that disclosing information after the scheme ended would mean that those involved in the earlier exit rounds would have to wait significantly longer to access information than those in the later rounds. In addition the Department said that the requested information would not assist any applicant, so it is not clear how disclosure at the time of the request would have caused unfairness in practical terms.
29. The Department also said that there was a wider public interest in delaying publication of the requested information. This would ensure that the information disclosed was *"consistent and reflects the actual position for the business areas concerned"*. As set out above the Commissioner accepts that this is not unreasonable, but in terms of the public interest she does not consider the argument to carry significant weight. In addition the Commissioner would re-emphasise that the Department may only rely on section 22 in respect of the specific information it intended to publish.

Balance of the public interest

30. Proper consideration of the public interest requires that the public authority balance the competing arguments in favour of disclosure and in favour of maintaining the exemptions. The authority should consider the relative weight attached to the various arguments, which should result in a reasoned conclusion.
31. There will always be public interest arguments in favour of disclosure, but in this case the Commissioner is of the view that they do not carry significant weight. The application of the VES to CMS staff at one point in the scheme's operation could be said to be of limited public interest and value to the wider public.
32. The Department strongly considered that the requested information ought to be withheld until the VES was complete, but the Commissioner does not consider the arguments presented by the Department to be

compelling. The aim of section 22 is to protect information from premature disclosure, but the Commissioner is not persuaded that the public interest favoured maintaining that exemption and delaying publication of the requested information.

33. The Commissioner finds that in this case the public interest is fairly evenly balanced, and the public interest in maintaining the section 22 exemption does not outweigh the public interest in disclosure. Therefore the Commissioner finds that the Department ought to have disclosed the requested information to the complainant at the time of the request. Since the Department has now disclosed the information, she does not require it to take any further action in this case.

Other matters

34. Although it does not form part of the decision notice the Commissioner wishes to comment on the internal review conducted by the Department.

35. The FOIA does not oblige public authorities to offer an internal review, but it is good practice to do so. The Code of Practice issued under section 45 of the FOIA provides guidance and recommendations for public authorities:

"39. The complaints procedure should provide a fair and thorough review of handling issues and of decisions taken pursuant to the Act, including decisions taken about where the public interest lies in respect of exempt information. It should enable a fresh decision to be taken on a reconsideration of all the factors relevant to the issue. Complaints procedures should be as clear and simple as possible. They should encourage a prompt determination of the complaint.

... The public authority should in any event undertake a full re-evaluation of the case, taking into account the matters raised by the investigation of the complaint."

36. The Department's internal review letter dated 27 October 2015 does not address any of the points made by the complainant when he requested the review. The Commissioner would recommend that the Department – and all public authorities – take steps to ensure that internal review correspondence contain sufficient detail to demonstrate that an effective internal review was in fact conducted. In particular authorities should ensure that they address issues raised by complainants where relevant.

Right of appeal

37. 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

38. 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.
39. 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
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