

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

Date: 05 May 2011

**Public Authority:** Office of the First Minister and deputy First Minister  
**Address:** Stormont Castle  
Belfast  
BT4 3ST

### Summary

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The complainant requested information relating to an opinion poll entitled 'Public Perceptions of the Executive'. OFMDFM disclosed some of the information requested but withheld other information citing section 43(2) of the Act.

The Commissioner's decision in this case is that the exemption under section 43(2) is not engaged and that the information should be disclosed. The Commissioner has also recorded a number of procedural breaches in relation to OFMDFM's handling of this request.

### The Commissioner's Role

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1. The Commissioner's 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 Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

### Background

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2. On 4 March 2010, the Office of the First Minister and deputy First Minister (OFMDFM) published an opinion poll entitled 'Public Perceptions of the Northern Irish Executive'. The objectives of the poll were to determine the views of the general public in Northern Ireland on the Executive in Stormont and to assess the level of support or opposition for the transfer of policing and justice powers.

3. The poll was procured by way of a single tender action with the contract awarded to Red Circle Communications on 18 February 2010.

## The Request

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4. On 10 March 2010, the complainant made the following information request to OFMDFM:

*"Could you please provide me with the following information:*

- 1. The press release by OFMDFM Public Perceptions of the Northern Irish Executive dated 8/3/10.*
  - 2. How much did it cost taxpayers to have this Poll Commissioned?*
  - 3. A full break down of the costs for this Poll?*
  - 4. How much was Red Circle Communications paid in relation to these Poll?*
  - 5. Was the Poll put out to Tender – if so was there any quotes from any other companies – please provide copies of quotes?"*
5. On 7 April 2010, OFMDFM responded to the complainant. OFMDFM provided information in respect of each part of the request, it did not advise that any information was being withheld.
  6. On 9 April 2010, the complainant requested an internal review of OFMDFM's response. The complainant clarified that in question three of his request he had asked for a *"full breakdown of the costs for this poll"*, but he did not consider that this information had been provided to him.
  7. OFMDFM provided the complainant with the outcome of its internal review on 14 May 2010. OFMDFM accepted that the complainant had requested a breakdown of the costs associated with the poll but had only been provided with the total cost. OFMDFM therefore reconsidered this part of the request, but concluded that this information was exempt from disclosure under section 43(2) of the Act (prejudice to commercial interests).

## The Investigation

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### Scope of the case

8. On 17 May 2010, the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the

failure by OFMDFM to reveal the full details of the breakdown of the costs of the poll as he had requested.

## Chronology

9. On 5 July 2010, the Commissioner wrote to OFMDFM to advise it of the complaint and to ask for its representations regarding withholding the requested information. OFMDFM responded to the Commissioner on 2 August 2010 clarifying its arguments for non disclosure and enclosing the withheld information.
10. On 3 September 2010, the Commissioner wrote to OFMDFM requesting some additional information to assist in the investigation. OFMDFM responded to the Commissioner on 15 September 2010.

## Analysis

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### Exemptions

#### Section 43(2) Prejudice to Commercial Interests

11. Section 43(2) provides an exemption from disclosure for information which would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). The full text of the exemption can be found in the Legal Annex at the end of this Notice.
12. In order for the Commissioner to agree that section 43 of the Act is engaged, OFMDFM would need to demonstrate that prejudice would or would be likely to occur to OFMDFM/or the business concerned if the information were disclosed, and that the prejudice claimed is real and of substance. This view is taken from the Information Tribunal in the case of *John Connor Press Associates Ltd v Information Commissioner (EA/2005/005)* and its decision, which outlined the Tribunal's interpretation of "*likely to prejudice*". The Tribunal confirmed that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk*". Once the prejudice test is satisfied, OFMDFM would then need to apply the public interest test weighing up the arguments for and against disclosure.
13. The information being withheld by OFMDFM under this exemption consists of pricing and methodology information relating to an opinion poll commissioned by OFMDFM to determine the views of the general public in Northern Ireland on the Executive in Stormont and to assess the level of support or opposition for the transfer of policing and justice powers.

14. OFMDFM argued that disclosure of a detailed breakdown of information relating to a competitive bid may have a detrimental effect on the company concerned in this case, Red Circle Communications (Red Circle), and may leave it in a vulnerable trading position. OFMDFM advised that it would not be in its interests to release information which may force a company out of business. OFMDFM also considered disclosure may reduce the number of companies willing to tender for future contracts and impact negatively on OFMDFM'S ability to secure better value for money. OFMDFM further argued that disclosure would jeopardise the running of fair procurement competition.
15. When considering the application of a prejudice-based exemption, the Commissioner adopts the three step process laid out in the Information Tribunal case of *Hogan v the ICO and Oxford City Council* (Appeal no EA/2005/0026 and EA/2005/0030). In that case the Tribunal stated that:

*" The application of the 'prejudice' test should be considered as involving a numbers of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption.....Second, the nature of 'prejudice' being claimed must be considered .....A third step for the decision-maker concerns the likelihood of occurrence of prejudice. "(para 28 to 34).*

16. The Commissioner has followed the test set out above when considering the representations put forward by OFMDFM and Red Circle.

### **Relevant applicable interest**

17. The Commissioner has considered the wording of the exemption under section 43(2) which refers to "commercial interests". OFMDFM informed the Commissioner that it believes disclosure of the relevant information would or would be likely to cause prejudice to the commercial interests of both OFMDFM and Red Circle. Having considered the activity carried out by OFMDFM in this case as explained in paragraphs 13 and 14, the Commissioner is satisfied that OFMDFM is engaged in a commercial activity and the potential prejudicial effects being claimed would relate to the commercial interests of both OFMDFM and Red Circle. Therefore the Commissioner is satisfied that the information in question falls within the scope of the exemption.

## Nature of the prejudice

18. When considering the nature of the prejudice, the Commissioner has noted the Tribunal's comments in *Hogan v the ICO and Oxford City Council* (paragraph 30):

*"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoroton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected. There is therefore effectively a de minimis threshold which must be met."*

19. Therefore, the Commissioner takes the view that, for the exemption to be engaged, the disclosure of the information must have a causal effect on the applicable interest, this effect must be detrimental or damaging in some way, and the detriment must be more than insignificant or trivial.
20. OFMDFM argued that disclosure of a detailed breakdown of information relating to a competitive bid may have a detrimental effect on Red Circle and leave it in a vulnerable trading position. It further argued that disclosure may reduce the pool of competitors being able to tender for future OFMDFM contracts and jeopardise the running of fair procurement competition.
21. The Commissioner's approach when considering prejudice to a third party's commercial interests is that it will not be sufficient for the public authority to speculate regarding any prejudice that may be caused, rather arguments originating from the third party itself will need to be considered.
22. OFMDFM consulted with Red Circle to seek its views on disclosure of the information in question. Red Circle responded by email advising that whilst it was content for OFMDFM to disclose the overall cost of the project it did not want a detailed breakdown of costs disclosed. OFMDFM subsequently sought clarification and asked Red Circle to elaborate on its arguments against disclosure as it required convincing arguments to demonstrate why the company did not want the information to be disclosed.
23. Red Circle advised that as a new company it had to vigorously guard its pricing strategies. Disclosure would reveal its pricing structure and provide an insight into his company's strategies, methodology and

intellectual property and might have a detrimental effect on its viability.

24. The Commissioner has examined the withheld information in this case, which comprises a one page summary of costs, and has been advised by OFMDFM that this is the only breakdown of costs in the contract documentation. The Commissioner does not consider this one page document to be a particularly detailed breakdown of costs as claimed by OFMDFM, nor does he consider that disclosure would amount to disclosure of Red Circle's pricing strategies. The information contains basic details on the survey methodology. It also contains an outline of the costs involved for each part of the survey, the total of which has already been disclosed. As Red Circle was given this particular contract on a single tender, OFMDFM's arguments in relation to fair procurement competition are of limited application.
25. In light of the above, the Commissioner is not satisfied that there is a causal link between the disclosure of any of the requested information and the prejudicial outcome described in the exemption at section 43(2). As such, he does not accept that the requested information can properly be withheld under section 43(2) as the exemption is not engaged.

## **Procedural Requirements**

### **Section 1(1)(b): duty to provide information**

26. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that the withheld information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act.

### **Section 10(1): time for compliance**

27. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than twenty working days after the request has been received. As the Commissioner finds that the public authority wrongly withheld the requested information from the complainant, it follows that the public authority failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the public authority failed to comply with section 10(1) of the Act.

## The Decision

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28. The Commissioner's decision is that OFMDFM failed to deal with the following elements of the request in accordance with the Act:
- Section 43(2) of the Act in that OFMDFM incorrectly applied the exemption to the withheld information.
  - Section 1(1)(b) of the Act in that OFMDFM failed to provide information in response to a request.
  - Section 10(1) of the Act in that OFMDFM failed to communicate requested information to the complainant within the statutory time limit.

## Steps Required

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29. The Commissioner requires OFMDFM to take the following steps to ensure compliance with the Act:
- To disclose the previously withheld information comprising part 3 of the complainant's request - as identified in this Notice.
30. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

## Failure to comply

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31. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Right of Appeal

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32. 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,  
Arnhem House,  
31, Waterloo Way,  
LEICESTER,  
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: [informationtribunal@tribunals.gsi.gov.uk](mailto:informationtribunal@tribunals.gsi.gov.uk).

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Dated the 5<sup>th</sup> day of May 2011**

**Signed .....**

**Graham Smith  
Deputy Commissioner  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

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### **Section 1(1) provides that -**

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

### **Section 10(1) provides that –**

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

### **Section 43(2) provides that –**

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."