

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 March 2013

Public Authority: Invest Northern Ireland
Address: Bedford Square
Bedford Street
Belfast
BT2 7ES

Decision (including any steps ordered)

The complainant has requested information in relation to the information that Invest NI provided to the Economic Advisory group and which was used as background to a financial report. The Commissioner's decision is that Invest NI has correctly applied the exemption as set out in section 36(2)(c) of FOIA to the requested information and that the public interest in all the circumstances of the case favours maintaining that exemption. The Commissioner requires no steps to be taken.

Request and response

1. On 12 August 2012, the complainant wrote to Invest NI and requested information in the following terms:

"Can you please provide me with the same information that Invest NI provided to the Economic Advisory group, in particular, that which was used as input/background to the report "The Impact of Reducing Corporate Tax on the Northern Ireland Economy."
2. Invest NI provided a response to the complainant on 10 September 2012 in which it refused to disclose the requested information on the basis of the exemption contained in section 36(2)(c) of FOIA.
3. The complainant requested an internal review of Invest NI's decision on 10 September 2012. Invest NI responded to the complainant on 10 October 2012 with the details of the result of the internal review it had carried out. That review upheld the original decision by the Department

not to disclose the requested information ("the withheld information") under the specified exemption.

Scope of the case

4. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
5. The Commissioner has considered whether Invest NI was correctly to apply the exemption under section 36(2)(c) in this case.

Reasons for decision

Section 36 - prejudice to the effective conduct of public affairs

6. Section 36(2)(c) provides that information is exempt if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. The phrase 'otherwise prejudice' means that this section refers to prejudice not covered by section 36(2)(b).
7. In order to engage any limb of section 36, the 'qualified person' must give an opinion that the prejudice would or would be likely to occur, but that in itself is not sufficient; the opinion must be reasonable.
8. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
9. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd, and in accordance with reason. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.

10. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC1*¹ (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus,
'does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant'.
11. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.

The engagement of section 36(2)(c)

12. Section 36(5)(I) states that in relation to information held by a Northern Ireland public authority other than the Northern Ireland Audit Office, the qualified person includes the public authority, or
'(ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly'.

In this case the Commissioner has established that the opinion was given by Alastair Hamilton, the current Chief Executive of Invest NI. As Chief Executive, he is an officer of the Council authorised by the First Minister and deputy First Minister as per the provisions of the above section. The Commissioner is therefore satisfied that Mr Hamilton was a qualified person for the purposes of section 36(5)(I) of the FOIA.

13. Invest NI explained that the qualified person's opinion was sought before a substantive letter was sent to the complainant regarding the withheld information. The qualified person was shown the information and subsequently approved the use of section 36(2)(c) in relation to the withheld information. Invest NI has provided the Commissioner with a copy of the submission provided to Mr Hamilton in order to seek his opinion as to whether this exemption was engaged.

¹ EA/2006/0011 and EA/2006/0013

Section 36(2)(c)

14. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose.
15. In *Ian Edward McIntyre v Information Commissioner and the Ministry of Defence*², 4 February 2008, the Information Tribunal said at paragraph 25:

"We take a similar view to the Commissioner that this category of exemption is intended to apply to those cases where it would be necessary in the interests of good government to withhold information, but which are not covered by another specific exemption, and where the disclosure would prejudice the public authority's ability to offer an effective public service or to meet its wider objectives or purposes due to the disruption caused by the disclosure or the diversion of resources in managing the impact of disclosure"
16. Invest NI argued that disclosure of the information would be likely to prejudice its ability to successfully meet its objectives in relation to its duty to inform discussions and debates in developing advice to a Minister. Invest NI said that disclosure of such discussions would be disruptive to the process and necessitate a diversion of resources in managing the impact of disclosure.
17. The withheld information is comment from the Chief Executive on a draft report. The report itself places into the public domain the issues around the debate on lowering the corporation tax within Northern Ireland which is a policy being developed by the NI Assembly with input from the Minister of the Department of Enterprise, Trade and Investment (DETI). The withheld information is the opinion of a public official within Invest NI on the opinions expressed by the authors of a report drafted for the Economic Advisory Group (EAG) of which Invest NI is a member.
18. The purpose of the EAG is to gather expert opinion and disseminate this into advice for the DETI Minister to feed into economic policy for the NI Executive. To fulfil its purpose it must engage with relevant stakeholders including public bodies such as Invest NI. The EAG Secretariat (based in DETI) was consulted in respect of disclosure of the information and they advised that they would seek to apply s35 to

² EA/2007/0068

this type of information (correspondence between members of the EAG).

19. Invest NI considers that the prejudice likely to be caused by disclosure of this information is threefold. Firstly it would be likely to cause prejudice to the debate itself between public officials. This needs to be held in a 'safe space' without the interference of external scrutiny. The debate on corporation tax is still ongoing and the release into the public domain of feedback and deliberations between members may have the potential to deter the process.
20. Invest NI argues that, without the guarantee of a safe space to debate issues, the integrity of the decision making process itself would likely be prejudiced. Any detraction from issues, say to focus on a debate regarding the internal opinions of officials as opposed to the agreed views put forward by the EAG after a consultation has been fully engaged, would have the potential to impact negatively on the debate so that the real issues are not given their due attention. The request for this information has been made whilst the need for the 'safe space' in relation to the Corporation Tax policy making process is still required.
21. The need for a 'safe space' for debate on important policy issues are intertwined and overlap with that of the need for candour and free and frank discussion for the purpose of deliberation. Invest NI has not sought to apply the exemption relevant to this area (s36(2)(b)(ii)) as it considers that the reasoning for this is tied up in and feeds into the reasoning for its arguments that to release this information would likely prejudice the effective conduct of public affairs beyond simply reducing the frankness of conversations. Invest NI believes that it will likely prevent the ability of Invest NI to engage in the policy formulation process if deliberations, regardless of where in the decision-making process they occur, are released into the public domain and it must be prepared to justify and defend unformulated ideas and also divert resources to do so, thus preventing it from continuing discussion to its natural uninhibited conclusion.
22. As noted in *Kikugawa v the information Commissioner & Ministry of Justice*³ in respect of ministerial briefings, which, like the output of the EAG, intend to advise and inform the Minister: "It would be odd if information to ministers. . flowed less freely than to important decision

³ EA/2011/0267

makers in the commercial world. That, however, is, in the context, a foreseeable consequence of the routine exposure of such information to public scrutiny”.

23. As noted in ICC guidance, such arguments are about the need for a 'safe space' to formulate policy, debate 'live' issues and reach decisions without being hindered by external comment and/or media involvement. Whilst part of the reason for needing a safe space is to allow free and frank debate, the need for a safe space exists regardless of any impact upon the candour of debate of involved parties, which might result from a disclosure of information.
24. Support for this can be found in Department for Education and Skills v the Information Commissioner & The Evening Standard⁴ where the Tribunal recognised the importance of this argument stating “Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy” (ICC Guidance).
25. Whereas this referred to section 35(1)(a) of the FOIA the same principles behind the reasoning apply, in Invest NI's view, to this case. Invest NI believes it is necessary to withhold the information in the interests of good government. The goal of the EAG is to provide advice and guidance to the Minister a 'line to take' on economic issues. This will involve debate and deliberation between members to come to a consensus viewpoint to provide to the Minister. To release correspondence showing the individual and differing opinion within the group will potentially undermine the value of the agreed approach and likely emasculate the authority of the advice offered to the Minister on issues such as Corporation Tax.
26. As noted in Kikugawa Invest NI believes that briefing/providing advice to Ministers is an area of government where the need for confidentiality is paramount as the points that need to be raised to conduct a full and intensive discourse may be based on evidence of varying strength and may involve criticism of authors of a report or another participants view or another member or third party. The official offering advice may be understandably reluctant to make them public, whilst properly

⁴ EA/2006/0006 & EA/2007/0070

concerned that the points should be raised for the attention of the EAG and Minister.

27. It is for the EAG and the Minister to decide what should be used, what rejected and what is too tenuous to be relied upon. This reluctance is linked to the second prejudice that would likely occur as a result of disclosure in respect of maintaining good working relationships between members of the EAG. Release of documents showing internal wrangling, negotiations and disagreement may lead to 'lurid' headlines that will detract from the work of the EAG and prevent it from conducting their function due to any potential strain caused by the disclosure of one member's disagreement or critique of the other. Whereas this is part of any decision making process, to have these internal discussions published would add an extra burden on the group.
28. The third prejudice that would be likely to occur by release of this document would be that of diverted resources to respond to the impact of release which would in itself impact upon the function of both the EAG in the development of policy advice to the Minister and Invest NI in contributing to the debate. Evidence of this would be the resources already spent by Invest NI in dealing with requests of this nature, relating to internal deliberations on policy issues. Thus disclosure of such discussions contained within the withheld information would be disruptive to the process and require the diversion of resources in managing the effects of disclosure. This would be likely to prevent Invest NI from meeting its objectives in contributing to this debate as those staff who are involved in the debate would be diverted to justifying their opinions and discussions regardless of whether such opinions and discussions were complete and fully researched. It is a different matter between defending decided government policy or fully formed proposals and defending ideas and comments made whilst deciding upon policy or said proposals. Prospect of release would place public servants in the position of having to defend everything that has been raised and possibly later discounted during deliberation on policy.
29. The Commissioner has considered all of these arguments and has perused the withheld information. He accepts that the qualified person's opinion that disclosure would be likely to otherwise prejudice the effective conduct of public affairs is a reasonable one and that therefore the exemption under section 36(2)(c) of FOIA is engaged in relation to the withheld information. He has now gone on to consider the public interest arguments in this case.

The public interest test

30. Section 2 of FOIA sets out the circumstances under which a public authority may refuse a request for information. According to this section, where a public authority has identified a qualified exemption, it must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information. This is often referred to as the "*public interest test*". When considering the public interest in relation to section 36, the Commissioner can consider the severity, extent and frequency of the prejudice or inhibition to the effective conduct of public affairs.

Public interest arguments in favour of disclosing the withheld information

31. Invest NI recognises that the public interest may be served by greater transparency in the way the EAG communicates with Invest NI and other members. Disclosure could also further public confidence that issues of importance are discussed at the appropriate level, with the appropriate experts and in appropriate detail. The Commissioner agrees that this is a strong public interest argument in favour of disclosure.
32. Disclosure of such information may also serve to inform public debate regarding significant issues such as corporation tax. The Commissioner has afforded some weight to this public interest argument as he considers that public authorities should be open, transparent and accountable with regard to their decision-making processes.
33. However these arguments need to be weighed against the public interest in Invest NI and the EAG Secretariat and EAG members being able to discuss complex points in detail and share ideas prior to finalising these issues and the public interest in the EAG being able to trust that they are able to consult and communicate with Invest NI in a manner appropriate to the issues in the knowledge that information provided to the EAG or discussed with the EAG will not be disseminated prematurely or at all where appropriate. The Commissioner has also considered the public interest arguments in favour of maintaining the exemption

Public interest arguments in favour of maintaining the exemption

34. The withheld information still represents input into the policy discussion which is still a live issue, at the time of the request and still at present. The facts and views offered in the withheld information will be subject to review as the policy develops, therefore disclosure would have limited public interest benefit.

35. Invest NI argues that no meaningful public benefit is to be obtained from further and more detailed disclosure of this document. The relevant issues around changes to corporation tax policy that have been placed into the public domain by the report and subsequent information published by the EAG on the issue. There is a clear need for a safe space in which issues such as this can be debated in a free and frank fashion and ideas exchanged with candour, without fear of premature disclosure. The Commissioner agrees that this is a strong public interest argument in favour of maintaining the exemption.
36. Invest NI also argues that there is a public interest in it being able to maintain a position where it is able to engage with and be consulted by key external bodies in relation to matters which are of importance to its key regulatory function and also the public interest in allowing Invest NI to consult with the EAG without interference and inhibition to ensure the quality and effectiveness of policy will not suffer. The Commissioner accepts that there is a strong public interest in such discussions being able to take place without inhibition.

Balance of public interest arguments

37. Invest NI accepts there is a general public interest in greater transparency as well as in shedding light on the way in which it interacts with stakeholders such as the EAG in the formulation of government policy. However the withheld information is more concerned with issues contained within the report impacting upon Invest NI, by suggested changes to corporation tax, rather than any recommendations on the Corporation Tax policy itself. Therefore any arguments in favour of aiding public understanding of policy formation in relation to the report carry limited weight. Invest NI argues that the withheld information itself gives no rise to issues that, in their view, add weight to the general public interest in transparency in this area. Having perused the withheld information, the Commissioner accepts this argument.
38. Invest NI argues that, whereas it aids and informs public debate to see the views represented in the report, it is Invest NI's opinion that it would not further the debate to release specific details of discussions that lead to an agreed approach for a group such as the EAG including details of differences of opinions between different members of the EAG. Indeed this would likely be detrimental to the public interest as it may detract the debate away from the relevant issues to focus on disagreements between members/bodies who contribute to the policy advice.

39. In respect of arguments relating to public participation in government decisions, Invest NI argues that the report itself is to encourage participation from relevant bodies prior to any decisions being taken, it represents the consensus views of the EAG, not individual responses, Whereas there are obvious benefits to public participation in the debate on issues raised within the report, the debate in respect of the drafting of the report itself holds less of a public interest.

40. The Commissioner, having perused the withheld information and considered carefully all arguments in favour of both disclosure and of maintaining the exemption, has concluded that, in all the circumstances of the case, the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. Therefore the Commissioner is satisfied that the disputed information was correctly withheld by the public authority and upholds the application of section 36(2)(c).

Right of appeal

40. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

41. 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.
42. 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

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