

## **Freedom of Information Act 2000 (FOIA)**

### **Decision Notice**

**Date:** 27 March 2014

**Public Authority:** Office of the First Minister and deputy First Minister

**Address:** Castle Buildings  
Stormont  
Belfast  
BT4 3SR

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of risk registers held by the Office of the First Minister and deputy First Minister (OFMDFM). OFMDFM refused the request under section 36(2)(b)(ii) and section 36(2)(c) of the FOIA. The Commissioner's decision is that the exemptions are engaged, but that the public interest in maintaining the exemptions does not outweigh the public interest in disclosing the requested information.
2. The Commissioner requires OFMDFM to take the following step to ensure compliance with the legislation.
  - Disclose each version of the OFMDFM risk register since January 1, 2011.
3. The public authority must take this step 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.

#### **Request and response**

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4. On 17 April 2013 the complainant requested the following information from OFMDFM:

*"Under the Freedom of Information Act, please provide me with copies of each version of the OFMDFM risk register since January 1, 2011."*

5. OFMDFM responded on 15 May 2013, citing the exemptions at section 36(2)(b) and section 36(2)(c) as a basis for refusing the request.
6. The complainant requested an internal review on 15 May 2013, and on 11 July 2013 OFMDFM advised that the internal review had upheld its decision to refuse the request.

### **Scope of the case**

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7. On 30 July 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant pointed out that other public authorities had published their risk registers, including at least one other Northern Ireland government department.
8. The Commissioner considers the scope of this case to be whether OFMDFM was entitled to refuse the request under sections 36(2)(b) and 36(2)(c) of the FOIA. The Commissioner has been provided with copies of the requested information, which comprises nine documents.

### **Reasons for decision**

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#### **Section 36: prejudice to the effective conduct of public affairs**

9. The relevant parts of section 36(2) state that:

*"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-*

*(b) would, or would be likely to, inhibit-*

*...*

*(ii) the free and frank exchange of views for the purposes of deliberation, or*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."*

10. Section 36 may only be applied to information held by a government department (or by the National Assembly for Wales) to the extent that the information in question is not exempt under section 35 of the FOIA. Section 35 applies to information held by a government department (or by the National Assembly for Wales), relating to the formulation or development of government policy. In this case the information in question comprises risk registers relating to OFMDFM as a department,

rather than a specific policy or project. Therefore the Commissioner accepts that section 36, rather than section 35, is the appropriate exemption.

11. Section 36(5)(b) of the FOIA provides that the qualified person (the QP) for a Northern Ireland department is the Northern Ireland Minister in charge of that department. Article 3(2) of the Departments (Northern Ireland) Order 1999 provides that:

*"3(2) The Office of the First Minister and deputy First Minister shall be in the charge of the First Minister and the deputy First Minister acting jointly."*

12. In this case the opinion was given by the First Minister and deputy First Minister acting jointly, and the Commissioner is thus satisfied that they were authorised to act as the QP under section 36(5)(b).
13. The Commissioner has published guidance which sets out his approach to section 36:<sup>1</sup> if the opinion is in accordance with reason and not irrational or absurd, then it is reasonable. It is only not reasonable if it is an opinion that no reasonable person in the qualified person's position could hold.
14. In order to determine whether the QP's opinion was reasonable the Commissioner has considered:
  - Whether the prejudice claimed relates to the specific subsections of section 36(2) that OFMDFM is relying upon;
  - The nature of the requested information and the timing of the request; and
  - The QP's knowledge of or involvement in the issue.
15. OFMDFM has provided the Commissioner with a copy of a submission to the QP dated 3 May 2013 in which the opinion of the QP was sought. The QP responded, approving the application of the exemptions recommended, by email dated 15 May 2013. Following the request for internal review a further submission was sent to the QP on 11 June 2013. The QP approved the submission on 10 July 2013.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/section\\_36\\_prejudice\\_to\\_effective\\_conduct\\_of\\_public\\_affairs.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf)

16. Neither submission contains a detailed explanation as to how the exemptions claimed are engaged, but both include draft responses to the complainant. In relation to the 3 May submission the draft response was approved by the QP and issued to the complainant as a refusal notice. In relation to the 11 June submission the draft response was approved by the QP and issued as the outcome of the internal review. Therefore OFMDFM's reasoning is largely contained within its correspondence with the complainant, although OFMDFM did provide the Commissioner with some further explanation.
17. Neither the refusal notice nor the internal review letter specified which subsection of section 36(2)(b) was being recommended. However both letters stated that disclosing the requested information would inhibit the free and frank exchange of views, and OFMDFM confirmed to the Commissioner that section 36(2)(b)(ii) is the relevant subsection. The Commissioner also notes that OFMDFM did not provide separate arguments for the engagement of the exemption and the public interest considerations. Nor did OFMDFM distinguish between section 36(2)(b) and 36(2)(c). Instead OFMDFM presented all its arguments as relating to the public interest.
18. The Commissioner does not consider this in itself to be a fatal flaw in obtaining the QP's opinion since some of the arguments clearly relate to the engagement of the exemption. However the Commissioner would remind public authorities that they should explain how any exemption claimed is engaged before providing details of the public interest test. The Commissioner would expect OFMDFM to ensure that any future consideration of section 36 is specific about the subsection claimed and the arguments supporting any such claim. The Commissioner has also commented on the quality of the refusal notice in "Procedural requirements" below.

Section 36(2)(b)(ii)

19. OFMDFM's submissions to the QP stated that ministers and officials needed to be able to discuss and offer their views on risks with candour and the disclosure of details of those discussions would inhibit that candour. OFMDFM stated that:  
  
*"In areas as important as risk, government must be able to talk candidly about all of the potential risks for the department without fear that those discussions would be made public. This requires a private space in which to carry out a candid assessment."*
20. The Commissioner recognises this as a "safe space" argument, based on the premise that it is in the public interest for ministers and officials to

be able to have a full and open debate away from external scrutiny so as to enable them to reach a reasoned position.

21. The Commissioner accepts that, as the Ministers in charge of OFMDFM, the QP would obviously have had detailed knowledge of issues relevant to the requested information, ie the risk registers. With this in mind, and having inspected the withheld information, the Commissioner considers it reasonable for the QP to form the opinion that disclosure of risk registers would reveal key risks to the delivery of high level strategic priorities.
22. Therefore the Commissioner is satisfied that the QP's opinion was reasonable, although he considers that OFMDFM has not provided sufficient evidence in order to engage the higher level of "would". Accordingly the Commissioner concludes that the lower level of inhibition, ie "would be likely to", should apply.

#### Section 36(2)(c)

23. As indicated above OFMDFM did not provide specific arguments referring to section 36(2)(c) in either submission to the QP. However OFMDFM made a number of arguments which do not fall within the scope of section 36(2)(b)(ii), therefore the Commissioner has considered them under section 36(2)(c).
24. OFMDFM argued that the inhibition identified in relation to section 36(2)(b)(ii) would result in weaker risk registers being produced. It stated that:

*"...there is a significant risk that disclosure would result in the content of future risk registers being changed. They would turn into anodyne documents and be worded quite differently and would no longer be the effective internal management tools they are intended to be."*

25. Again, having regard to the withheld information and the qualified person's knowledge of the issues, the Commissioner accepts as reasonable the QP's opinion that section 36(2)(c) is also engaged. Similarly the Commissioner is of the view that the lower level of prejudice should be applied as OFMDFM has provided insufficient evidence that the higher level is appropriate.

#### Public interest test

26. As indicated above OFMDFM presented one set of public interest arguments in relation to all the subsections of section 36 claimed. By way of good practice the Commissioner would remind OFMDFM that public authorities are required to consider the public interest fully in respect of each exemption (including subsections) claimed. However,

given that the arguments in this case are closely linked the Commissioner has considered the public interest arguments together.

#### Public interest arguments in favour of disclosure

27. OFMDFM identified generic public interest arguments in favour of disclosure, and in particular recognised the presumption of a general public interest in disclosure. It accepted that disclosure of the requested information would demonstrate openness, transparency and accountability.
28. OFMDFM acknowledged the public interest in the public being able to assess, understand and participate in the decision making process. It also argued that disclosure would demonstrate the free and frank exchange of views between Ministers and officials on issues related to the formulation of the risk registers.
29. The Commissioner considers that there is a legitimate public interest in informing the public as to how OFMDFM has identified and addressed risk. However, having inspected the requested information the Commissioner does not believe it would demonstrate to any detailed extent the exchange of views as argued by OFMDFM.
30. The Commissioner also notes the complainant's arguments that other public authorities, including at least one Northern Ireland government department, have published their departmental risk registers. The Commissioner considers that this is indicative of the general public interest in disclosure, but is mindful that his decision in any particular case must be informed by the facts of that case. The content of risk registers is likely to vary across public authorities, therefore the Commissioner is reluctant to treat one public authority's decision to disclose information of a particular type as a precedent to be followed in other cases.

#### Public interest arguments in favour of maintaining the exemptions

31. OFMDFM said that some of the information was "highly sensitive and emotive" but did not specify which information it considered to fall within this description. OFMDFM pointed out that some of the information contained in the risk registers is live and ongoing, although it accepted that other information was up to two years old at the time of the request. Nevertheless OFMDFM was of the view that none of the requested information ought to be disclosed.
32. The Commissioner accepts that information which is demonstrably live is often more worthy of protection, whereas the passage of time can reduce sensitivities around disclosure. However in this case OFMDFM has failed to distinguish between the information which it claims is "highly

sensitive” and that which is more anodyne. The Commissioner has stressed to OFMDFM that he can only make his decision based on the information provided to him by that public authority. It is not for the Commissioner to construct arguments as to why information ought not to be disclosed, nor should the Commissioner make assumptions as to arguments that are not put forward by the authority. In the absence of detailed arguments which are specific to the withheld information the Commissioner cannot attribute significant weight to the currency of the information as a factor in favour of non-disclosure.

33. OFMDFM expressed concern that disclosure would expose vulnerabilities which could be used “against the department for the gain of others”. OFMDFM suggested that disclosure would result in a more cautious approach to compiling future risk registers, which would undermine their effectiveness. OFMDFM maintained that disclosure of the risk registers would result in the content of future risk registers becoming “anodyne documents”, worded differently and less effective as internal management tools. In its internal review letter OFMDFM advised that it had attributed considerable weight to the argument that disclosure would lead to the “watering down” of risk registers.
34. The Commissioner is of the view that the compilation and maintenance of effective risk registers is an integral part of the management of a government department. Accordingly he does not accept that the fear of disclosure would result in civil servants being less willing to fulfil such an important responsibility. The Commissioner acknowledges that disclosure of a risk register would necessarily disclose information about the risks identified. However as indicated above the Commissioner is of the opinion that OFMDFM has provided insufficient detail as to any anticipated adverse effect of disclosure.
35. OFMDFM also argued specifically that disclosure of the requested information  
  
*“...could prejudice Ministers’ electoral prospects and would most certainly have a ‘chilling effect’ on the future development of corporate risk registers”.*
36. The Commissioner accepts OFMDFM’s assertion that Ministers who are in charge of a department are judged on their performance, and that their management of risk is “an important element in judging their performance”. However this in itself does not mean that the public interest lies in withholding such information from public scrutiny. While the electoral prospects of individuals are not strictly a relevant factor when weighing the public interest in the disclosure of information, the Commissioner is of the view that access rights afforded by the FOI constitute an accountability tool which can help the public make up its



mind for the purpose of participation in democratic elections. Contrary to OFMDFM's assertion, this is therefore a public interest argument in favour of disclosure in respect of supporting accountability and transparency.

### Balance of the public interest

37. When assessing the public interest the Commissioner has given due consideration to protecting what is inherent in these exemptions. In accepting that the exemptions are engaged the Commissioner has accepted as reasonable the opinion that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views.
38. The Commissioner notes that the withheld information in this case relates to corporate risk and its management by OFMDFM, and the Commissioner accepts that this may be a sensitive topic for any public authority. The Commissioner notes however that disclosure of the risk registers in this case would not reveal details of discussions about the risks identified. Nor has OFMDFM provided detailed arguments in relation to the content of the withheld information itself.
39. The Commissioner acknowledges that the public interest arguments in favour of disclosure are not particularly compelling. However the Commissioner considers the arguments in favour of maintaining the section 36(2)(b)(ii) exemption are generic and, as such, do not outweigh the public interest in disclosing the requested information.
40. The Commissioner has also accepted as reasonable the opinion that disclosure of the requested information would be likely to prejudice the effective conduct of public affairs more generally. He has also accorded weight to maintaining section 36(2)(c), whilst noting the lack of specific arguments advanced by OFMDFM relating to this exemption.
41. However, the Commissioner does not accept that disclosure of the requested information would necessarily result in less detailed risk registers being produced. The Commissioner is mindful that OFMDFM, like any other public authority, has clear duties to discharge and these include the maintenance of an effective risk register. The Commissioner again finds that OFMDFM has failed to put forward compelling arguments to support its position in respect of the requested information. Further, the Commissioner considers OFMDFM's argument about the potential impact of disclosure on future electoral prospects to support indirectly the public interest in disclosure, rather than that in maintaining the exemption. Therefore the Commissioner also finds that the public interest in maintaining the exemption at section 36(2)(c) does not outweigh the public interest in disclosing the withheld information.



## **Procedural requirements**

### **Section 17: refusal notice**

42. Section 17(1) of the FOIA states that:

*"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which –*

- (a) states that fact,*
- (b) specifies the exemption in question, and*
- (c) states (if that would not otherwise be apparent) why the exemption applies".*

43. The Commissioner considers that the explanation provided by OFMDFM in its refusal notice and internal review letter was insufficiently clear. OFMDFM failed to state which subsection of section 36(2)(b) it sought to rely on, and it failed to explain why section 36(2)(b)(ii) and section 36(2)(c) applied to the requested information. Therefore the Commissioner finds that OFMDFM failed to comply with section 17(1)(c) of the FOIA in this regard.

44. Section 17(3) states that public authorities must also provide details of its public interest considerations in the case of qualified exemptions. OFMDFM did not distinguish between section 36(2)(b)(ii) and section 36(2)(c) in its explanation of the public interest test conducted. Therefore the Commissioner also finds that OFMDFM failed to comply with section 17(3)(b) of the FOIA. The Commissioner would remind OFMDFM to ensure that future refusal notices set out clearly the reasons for applying an exemption, separately from the consideration of the public interest.

## Right of appeal

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45. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

46. 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.
47. 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 .....**

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