

Freedom of Information Act 2000 (FOIA)

Decision Notice

Date: 29 September 2015

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

Address: Castle Buildings
Stormont Estate
Belfast
BT4 3SR

Decision (including any steps ordered)

1. The complainant has requested information held by the Office of the First Minister and deputy First Minister (OFMDFM) relating to its policy on Female Genital Mutilation (FGM). OFMDFM disclosed some of the requested information but withheld the remainder, citing sections 35(1)(a), 35(1)(b) and 40(2) of the FOIA. The Commissioner's decision is that OFMDFM was entitled to rely on the exemptions claimed. No steps are required.

Request and response

2. On 3 December 2014 the complainant requested the following information from OFMDFM:
 - "1. Emails and correspondence between OFMDFM officials and DHSSPS on Female Genital Mutilation since September 2014.*
 - "2. Emails and correspondence between OFMDFM officials and DOJ on Female Genital Mutilation since September 2014.*
 - "3. Emails and correspondence between OFMDFM officials and DFP on Female Genital Mutilation since September 2014."*
3. OFMDFM responded to the complainant on 25 February 2015. It provided some information to him, and withheld other information in reliance on the exemptions at sections 21, 35(1)(a), 35(1)(b) and 40(2) of the FOIA.

4. The complainant requested an internal review on 26 February 2015 and OFMDFM provided him with the outcome on 27 March 2015. OFMDFM upheld its reliance on the exemptions cited in the refusal notice.

Scope of the case

5. The complainant contacted the Commissioner on 30 March 2015 to complain about OFMDFM's response to his request. The complainant asked the Commissioner to investigate whether OFMDFM was entitled to withhold information. The complainant did not raise any issue with OFMDFM's reliance on section 21. Therefore the Commissioner's investigation focused on the information withheld under sections 35(1)(a), 35(1)(b) and 40(2) of the FOIA.
6. The Commissioner has inspected the withheld information, which is contained within 15 documents. Some documents were subject to more than one exemption.

Reasons for decision

Section 35(1)(a): Formulation or development of government policy

7. Section 35(1)(a) of the FOIA provides that information held by a government department (including a Northern Ireland department) is exempt if it relates to the formulation or development of government policy. The exemption is class-based, meaning that if the information in question falls within any of the categories specified, it is exempt.
8. OFMDFM relied on section 35(1)(a) in respect of information contained in nine of the 15 documents identified as relevant to the request. The Commissioner has inspected the information and is satisfied that it relates to the development of government policy relating to FGM. It includes information relating to the development of UK government policy on FGM and how it might affect the development of Northern Ireland government policy on that issue.
9. In light of the above the Commissioner is satisfied that the exemption at section 35(1)(a) is engaged in relation to the nine documents identified by OFMDFM as relevant to this exemption.

Section 35(1)(b): Ministerial communications

10. Section 35(1)(b) states that information is exempt from disclosure if it is held by a government department and relates to Ministerial communications. Section 35(5) defines Ministerial communications to include proceedings of the Executive Committee of the Northern Ireland Assembly.
11. OFMDFM relied on section 35(1)(b) in respect of information contained in two of the 15 documents. The information includes draft Ministerial correspondence relating to the development of Northern Ireland government policy on FGM.
12. The Commissioner is satisfied that this information clearly falls within the scope of Ministerial communications, therefore section 35(1)(b) is engaged.

Public interest test

13. Sections 35(1)(a) and (b) are qualified exemptions and are therefore subject to the public interest test. The Commissioner must therefore consider whether the balance of the public interest lies in favour of maintaining the exemptions or whether it lies in favour of disclosure of the information.

Public interest arguments in favour of disclosing the requested information

14. OFMDFM acknowledged the presumption of a general public interest in disclosure. It also identified the public interest in the public being able to participate in the decision making process, and in the public being able to understand the effect of various factors in shaping those decisions.
15. The complainant argued that there was a strong public interest in disclosure of the withheld information. The complainant advised the Commissioner that FGM was an issue across the UK and argued that there was disparity between Northern Ireland and the rest of the UK in terms of policy initiatives. The complainant suggested that disclosure of the withheld information would better inform the public as to the reasons for this disparity.

Public interest arguments in favour of maintaining the exemptions

16. OFMDFM said that disclosure of the requested information carried the risk of inhibiting discussion, compromising engagement and consultation, and curtailing exploration of policy options. OFMDFM also said that disclosure of the withheld information was likely to prejudice policy development, which would have a corresponding

adverse effect on policy implementation. This could have negative consequences for people affected by FGM, which would not be in the public interest.

17. OFMDFM also referred to the timing of the request, arguing that at this time key policy decisions had not yet been made. OFMDFM was of the view that there was considerable public interest in protecting the "safe space" necessary to take these decisions.

Balance of the public interest arguments

18. The Commissioner acknowledges that there is a significant public interest in informing the public about government policy on FGM. The public has a right to be educated and informed about the government's approach to such important issues. However, having inspected the withheld information in this case the Commissioner considers that its value in informing the public is extremely limited. Much of the withheld information comprises administrative information that would not assist the public's understanding of policy development regarding FGM.
19. The Commissioner would stress that this in itself does not provide conclusive evidence that the information should not be disclosed. Rather, it means that the public interest in disclosure of the information is fairly weak, and the Commissioner may only attach little weight to it when considering the balance of the public interest.
20. The Commissioner also considers the timing of the request to be particularly relevant in this case. At the time the request was made, ie in December 2014, government policy on FGM was under consideration and decisions had not been taken. In support of this, the Commissioner notes that the Department of Justice and the Department of Finance and Personnel issued a news release on 20 July 2015.¹ This announced the introduction of Female Genital Mutilation Protection Orders (FGMPOs) in Northern Ireland. FGMPOs are civil orders that can be used to protect a girl against the commission of FGM, or to protect a girl against whom FGM has been committed. The Commissioner is of the view that there is a stronger public interest in protecting safe space where a policy has not yet been decided. Therefore the Commissioner has attached slightly more weight to the public interest in favour of maintaining the exemptions in this case.

¹ <http://www.northernireland.gov.uk/news-doj-200715-female-genital-mutilation>

21. In conclusion the Commissioner considers that the public interest in protecting safe space in this case is slightly stronger than the public interest in disclosing the withheld information. Therefore the Commissioner concludes that the public interest in maintaining the exemptions at section 35(1)(a) and 35(1)(b) outweighs the public interest in disclosing the information that falls under these exemptions.

Section 40(2)

22. Section 40(2) of the FOIA states that a public authority is not obliged to disclose information if to do so would:
- constitute a disclosure of personal data, and
 - this disclosure would breach any of the data protection principles or section 10 of the Data Protection Act 1998 (the DPA).

Would disclosure of the requested information constitute a disclosure of personal data?

23. OFMDFM advised the complainant that the information withheld under section 40(2) comprised the names, job titles and contact details of a number of officials. This information was redacted from 12 of the 15 documents. In this case, the Commissioner is satisfied that the withheld information is personal data, as the individuals in question can be identified by their names, job titles and contact details, along with other information held by OFMDFM as the data controller.

Would disclosure of the requested information breach any of the data protection principles?

24. OFMDFM argued that disclosure of the requested information would breach the first data protection principle as it would be unfair to the individuals concerned. In considering whether disclosure would be fair or unfair the Commissioner has taken the following factors into account:
- whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned (i.e. the consequences of disclosure);
 - the individuals' reasonable expectations of what would happen to their information; and

- are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the individuals as data subjects?
25. In relation to the first factor, OFMDFM clarified that the individuals in question were all relatively junior members of staff, ie below Principal Officer grade. OFMDFM said that it did not have the consent of the individuals to disclose their personal information, and that the individuals had no expectation that their information would be disclosed into the public domain.
26. The Commissioner has published guidance for public authorities considering whether to disclose personal information relating to their employees.² The Commissioner accepts that the disclosure of personal information relating to junior officials could lead to them being wrongly perceived as personally accountable, when in fact they had no such personal responsibility. The Commissioner also accepts that junior staff may have a reasonable expectation that their information would not be disclosed into the public domain.
27. With regard to the third factor listed above the Commissioner acknowledges that there is a legitimate public interest in accountability and transparency, and the public is entitled to be informed about the operation and decisions of OFMDFM. Nevertheless, the Commissioner recognises that the legitimate interests of the public must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of the data subjects in considering how the factors balance.
28. In light of the above the Commissioner is satisfied that disclosure of junior officials' personal information in this case is not required in order to inform the public as to the decision making process. Consequently the Commissioner finds that it would be unfair on the individuals concerned to disclose this information into the public domain, and OFMDFM was entitled to withhold it under section 40(2) of the FOIA.

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https://ico.org.uk/media/1187/section_40_requests_for_personal_data_about_employees.pdf

Procedural requirements

Section 10: time for compliance

Section 17: refusal notice

29. Section 1(1)(a) of the FOIA requires that a public authority confirm or deny to the complainant that the requested information is held. Section 1(1)(b) requires that if the requested information is held by the public authority it must be disclosed to the complainant. Both duties must be carried out unless a valid refusal notice has been issued. Section 10(1) requires that the public authority comply with section 1 promptly, and in any event no later than twenty working days after the date of receipt of the request.
30. Section 17(1) of the FOIA states that if the authority wishes to rely on any exemption it must issue a refusal notice within the time for compliance. The refusal notice must state which exemption is being relied upon and why it applies. In the case of a qualified exemption the refusal notice must also state the authority's reasons for claiming that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
31. In this case the request was received by OFMDFM on 3 December 2014, but OFMDFM did not provide a substantive response to the request until 25 February 2015. At this stage OFMDFM did provide the complainant with some of the information he had requested, and issued a refusal notice in respect of the withheld information. However, as this was outside the time for compliance the Commissioner finds that OFMDFM failed to comply with section 10(1) and section 17(1) of the FOIA.

Right of appeal

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
LEICESTER
LE1 8DJ

Tel: 0300 123 4504
Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

33. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Tribunal website.
34. 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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