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Ref: **DFC/IR/2020-0003**
DFC/2020-0053

6 May 2020

Mr Trevor McKee
ProbitaacNI

Via email: request-653844-6c6b1228@whatdotheyknow.com

Dear Mr McKee,

Freedom of Information Act 2000: Internal Review

On 6 April 2020 you requested an Internal Review of the Department's response, dated 6 April 2020, to your request for information originally received on 10 March 2020. You specifically stated:

"I refer to a previous request at the link below:

https://www.whatdotheyknow.com/request/scott_review_of_the_charity_comm#incoming-1119510

As the reason for non publication has effectively fallen away, I would be obliged for a copy (or publication) of the review as requested."

The purpose of an Internal Review is solely, to assess how your Freedom of Information (FOI) request was handled in the first instance and to determine whether the original decision given to you was correct. I have undertaken this independent review because I was not previously involved in the original response to your request.

Request Handling and Time Limits

Your initial FOI request for information (DfC/2019-0053) was received on 10 March 2020, therefore the 20 working day deadline for the Department's response to this request for information was 8 April 2020.

Section 10(1) of the Act states that *"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", where Section 1(1) states that "Any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request, and if that is the case, to have that information communicated to him."*

The Department's Response

The Department's response to your request was issued to you on 6 April 2020. Therefore the Department met the requirements of Section 10(1) of the Act by issuing a response within 20 working days of receipt of your request for information.

In its response the Department provided the information requested but withheld some information under Section 35(1)(a) 'the formulation or development of government policy', Section 42 'Legal Professional Privilege (LPP)' and Section 40(2) 'Personal information'.

Internal Review

In your email to the Department dated 6 April 2020 you requested an internal review. In carrying out my review I have considered your original request anew.

You state in your complaint that *"I am writing to request an internal review of Department for Communities (Northern Ireland)'s handling of my FOI request. You have sent me a draft review, the AQW reproduced by the Minister responsible says "now complete". Please provide the completed unredacted report."*

I have reviewed the Department's response to your original request, including how the exemptions were engaged and the arguments within the Public Interest Tests. The Department has explained in its response and previous responses to you that the report requested is held as a draft document. The review itself was never finalised, nor presented to the former DfC Minister. This was due to a legal challenge which arose regarding the validity of Orders made by the Commission's staff and the subsequent collapse of the Assembly and Executive in early 2017.

The Information Commissioner also confirmed that the report is in draft form in its Decision Notice (FS50716547) of 30 May 2019 in which it stated "The Commissioner, having perused the withheld information, accepts the DfC's argument that the information relates to the development of government policy as the draft report contains a series of options, none of which has yet been decided on."

In the Assembly Questions for Written Answer (AQW 345/17-22) you refer to in your complaint, the current Minister confirmed in her answer on 12 February 2020 that "The review was never finalised, or presented to the former Minister".

I am therefore content that the document provided to you on 6 April 2020 is the latest version of the draft report available.

Section 35(1)(a) - the formulation or development of government policy

The purpose of Section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well considered or effective policies. In particular, it ensures a safe space to consider policy

options in private, to develop ideas, debate live issues and reach decisions away from external interference and distraction. Traditionally safe space arguments relate to internal discussions and at this early stage in the development of options have not been opened up for general external comment.

The need for a safe space will be strongest when the policy issue is still live. This is particularly relevant in this case as while the draft Report is incomplete options for change in respect of the Commission will need to be fully explored in light of the recent Court of Appeal Judgment. The fact that three years have already passed since the review was commissioned makes the need for a safe space to fully consider all the options and reach a balanced decision an ongoing live issue.

In considering your request, the Department considered the public interest in disclosure. Release of this information at this time would be premature and could mislead the public as the policy considerations could see a number of changes before a final draft policy and options are developed and agreed. Officials need to be able to conduct rigorous and candid assessments of policies without there being premature disclosure which might close off better options and inhibit the free and frank discussion of all options.

I am therefore satisfied that disclosure of the information falling within the terms of your request would risk undermining future decision making and discussion of a live policy issue. Therefore for the reasons outlined above, I consider that the public interest in maintaining this exemption, outweighs the public interest in disclosure of the information.

Section 42 - Legal Professional Privilege (LPP)

Section 42 provides an exemption under FOIA for information which is subject to LPP. The concept of LPP protects the ability to obtain appropriate legal advice and the confidentiality of communications between a lawyer and client. In this instance the Department considered the redacted information to constitute legal advice provided to the Department by the Departmental Solicitors Office (its legal advisers) and was withheld under the exemption in Section 42 - advice privilege.

In a freedom of information context, LPP will only have been lost if there has been a previous disclosure to the world at large and the information can therefore no longer be considered to be confidential. As this is not the case then I am satisfied that the public interest in maintaining this exemption, outweighs the public interest in disclosure of the information.

Section 40(2) - Personal information

Section 40 (2) refers to information that constitutes the personal data of a third party. In the Department's opinion release of this information would breach the first principle of the Data Protection legislation¹ which requires personal data to be processed both lawfully and fairly. It is for this reason that the personal data of third parties has been redacted from the draft report. A public interest test is not required for this exemption.

The Department must first consider whether the requested information is personal data. If the department is satisfied that it is personal data, it then needs to consider whether disclosure of this information would be unfair and unlawful. For the purposes of the FOI Act, a disclosure is to the world at large.

Personal data is defined by Article 4 of the General Data Protection Regulations (GDPR) as “any information relating to an identified or identifiable natural person (‘data subject’); an identifiable natural person is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of that natural person”.

Furthermore, ICO guidance states that personal data includes information relating to persons who:

- can be identified or who are identifiable, directly from the information in question; or
- who can be indirectly identified from that information in combination with other information.

The information redacted includes the name of an expert advisor and details of nine statutory inquiries. I am satisfied that the redacted information constitutes personal data and therefore it is appropriate to engage the exemption in section 40(2).

The second consideration to section 40(2), relates to whether disclosure of the personal data would contravene one of the principles of Data Protection legislation¹. It is the first Data Protection Principle which is relevant. In accordance with this principle, personal data can only be disclosed if it would be fair and lawful to do so.

It is important to highlight again that disclosure under the FOI Act means disclosure is to the world at large for anyone to see and with very limited, if any, restrictions on the use of that information. The relevant consideration is not whether the information can be disclosed to you as the requester but whether the information can be released into the public domain.

With that regard the expert advisor had given his consent to the release of his name as part of the ICO Decision Notice mentioned earlier and thus into the public domain. Therefore Paragraph 2.3.2 should include ‘Sam Younger, former CEO of the Charity Commission for England and Wales’.

In relation to the details of statutory inquiries, CCNI routinely publish details of inquiries on their website therefore it is correct that any names published and in the public domain can be disclosed. Paragraph 6.4.4 should therefore include the following: ‘Victoria Housing

¹ Data Protection Legislation: (i) the applied GDPR, the Law Enforcement Directive (LED) and any applicable national implementing Laws as amended from time to time (ii) the Data Protection Act 2018 (DPA 2018) to the extent that it relates to processing of personal data and privacy; (iii) all applicable Law about the processing of personal data and privacy.

Estates; Lough Neagh Rescue; Ulster Society for the Prevention of Cruelty to Animals (USPCA); Emergency Medical Services and Disabled Police Officers Association Northern Ireland (DPOANI)'. Consequently Paragraph 6.6.7 should include 'Victoria Housing Estates; DPOANI and USPCA'.

I am however content that the charities subject to inquiry who's details have not been published, would not have an expectation that the requested information could be disclosed into the public domain. I am therefore satisfied that disclosure under the FOI Act would be unfair in these instances and would breach the first data protection principle.

Conclusion

The determination of this internal review is to partially uphold the Department's decision of 6 April 2020 to withhold information contained within the draft report under Section 35(1)(a) 'the formulation or development of government policy', Section 42 'Legal Professional Privilege' and Section 40(2) 'Personal information'.

If you are not content with the outcome of the internal review of the Department's decision, you have the right to apply directly to the Information Commissioner for a decision. The Information Commissioner can be contacted at:

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

Yours sincerely,

Adrian Boyce
Information Management Branch