

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 May 2023

Public Authority: Department of Justice

Address: Dundonald House
Belfast
BT4 3SU

Decision (including any steps ordered)

1. The complainant made a request to the Northern Ireland Prison Service (NIPS) which is an agency within the Department of Justice (DoJ) in Northern Ireland. The Commissioner considers the DoJ to be the appropriate public authority in this case. The DoJ refused to provide the information citing section 35(1)(a) (formulation and development of government policy) of FOIA.
2. The Commissioner's decision is that the DoJ has correctly relied on section 35(1)(a) of FOIA.
3. The Commissioner does not require any steps to be taken.

Request and response

4. On 23 March 2022, the complainant wrote to the DoJ and requested the following information:

"Staff have always been told the meetings between the POA and NIPS management were unminuted yet the DG quotes directly from minutes of a meeting. I request publication on the DoF register of FOI requests and an email copy of any and all minutes between the POA and NIPS. If my request is refused then I further request an explanation from the

department as to why staff were told minutes were never recorded yet they were from the DG and/or Minister.”

5. The complainant clarified on 4 April 2022 that they were requesting all minutes from POA and NIPS meetings from the last year.
6. NIPS responded to the complainant on 7 April 2022, stating that it was normal practice for notes to be taken during pay meetings and that the relevant information, i.e. that an agreement had been reached, had already been released. NIPS stated that the remaining notes were being withheld under section 35(1) of FOIA (formulation and development of government policy).
7. In its internal review response to the complainant on 22 June 2022 NIPS upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner on to complain about the way their request for information had been handled.
9. The Commissioner has considered the DoJ's application of section 35(1)(a) of FOIA.

Reasons for decision

Section 35(1)(a) – formulation of government policy

10. Section 35(1)(a) FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
11. The purpose of subsection 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 policy options in private.
12. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to the public interest test.
13. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February

2007) the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

14. The DoJ has informed the Commissioner that pay negotiations in NIPS cover a wide range of issues, from a pay policy perspective to the terms of an individual pay award. The agreement in place between both sides is that a separate note will be taken by each side to record the broad areas of discussion. These are not formal minutes, nor are they published. However, a Notice to Staff is issued once Ministerial approval has been received, which sets out all aspects of the discussions which are being implemented. This less formal approach ensures the meetings can take place in a safe space where views and arguments are shared and discussed openly.
15. The meeting in question between NIPS management and the Prison Officers Association Area Committee took place on 24 February 2022. The DoJ informed the Commissioner that, as is usual, no formal minute of the meeting was recorded though both sides of the discussions took notes.

What Government policy or policies does the requested information relate to?

16. The Commissioner's guidance for the Section 35 exemption is as follows¹:-

"The important point is that government policy is ultimately signed off by the Cabinet or Executive Committee or the relevant Minister. This is because only Ministers have the mandate to make policy. If the final decision is taken by someone other than a Minister, that decision does not itself constitute government policy".

17. The information requested by the complainant forms part of a pay process that is ultimately approved by the Minister for Finance. The Department of Finance issues Pay Remit Approval Process and Guidance documentation each year. The 2014 guidance states:-

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>.

“Enforcement of pay growth limits is devolved to the Northern Ireland Executive. With the Executive’s endorsement, the Minister for Finance and Personnel is responsible for the approval of pay remits for most of the staff groups in bodies within the wider public sector in Northern Ireland within the broad parameters of public sector pay policy”.

18. The process within NIPS is that Senior Management holds pay negotiations with Trade Union Side. The Prison Service Pay Review Body gathers written and oral evidence from the Justice Minister, NIPS officials, and the recognised trade unions before submitting a report and recommendations to the Justice Minister. The Justice Minister then seeks approval from the Finance Minister for the pay remit. As a result of this process and the final Ministerial approval, the DoJ considers that the requested information is covered by the Section 35 exemption.

Does the information relate to the development or formulation of government policy and not the implementation?

19. The Commissioner’s guidance confirms that:-

“to be exempt, the information must relate to the formulation or development of government policy.”

20. The Commissioner understands these terms to refer to the design of new policy and the process of reviewing or improving existing policy. It does not cover information relating purely to the application or implementation of established policy.
21. The view of the DoJ is that these meetings are a vital part of the pay policy development within NIPS which is ultimately approved by Ministers. The meetings are an integral part of this process leading directly to the formulation of the annual pay deal and not about the implementation of a previously agreed deal.

The importance of a safe space

22. The purpose of the exemption of Section 35 (1) (a) is to provide a safe space to protect the integrity of the policy-making process and to prevent disclosures that would undermine the process.

23. The DoJ considers that the very nature of pay negotiations between government bodies and trade unions require this safe space to be protected. The meetings are entered into by both sides on the basis

that no formal minutes are to be taken and the disclosure of the NIPS note of the meeting would hugely undermine this safe space and the trust which all involved have for the process. This would result in a less robust discussions and result in a less well considered outcome.

24. It could be argued that, because the pay deal has now been agreed, the notes of the meeting could now be released. The meeting was held in February 2022 and the pay notice was issued in April 2022. While one might put forward an argument that this specific pay round has concluded, the Notice to Staff sets out all the relevant information pertaining to the outcome of negotiations. The note contains other issues discussed which continue to be debated and the disclosure of the note could raise false expectations thereby damaging the process, possibly irretrievably. The discussions from individual meeting to individual meeting will vary. Some proposals may be tabled which will take years to work through, or result in incremental change, or will be debated without agreement being reached.
25. The requested information involves sensitive negotiations as both sides try to reach agreement with a free and frank discussion regarding the options available given the financial backdrop. If both management and union officials believed the meeting would be minuted and made freely available, the "safe space" for the negotiations would be undermined and the policy-making process weakened. The policy-making process could be subject to a chilling effect with discussions and arguments inhibited by how they would be received by those reading the notes of the meetings. As a direct result, the notes of the meetings could become a platform for grandstanding rather than a confidential meeting working towards an agreed settlement.
26. The Commissioner has viewed the requested information and he considers that it relates to the formulation and development of policy in relation to the annual pay deal and not the implementation of a previously agreed pay deal. Therefore the Commissioner is satisfied that the DoJ has correctly applied section 35(1)(a) to the requested information. As this is a qualified exemption, the Commissioner has to now consider the public interest test.

Public interest arguments in favour of disclosing the requested information

27. The DoJ accepts that there is a public interest in placing as much information as possible in the public domain which allows for increased debate, improves transparency and accountability. Pay costs make up a significant proportion of civil service spending in Northern Ireland and the public will have an interest in how pay deals are agreed and the impact of the deal on the public finances. Union members will also be interested in how the negotiations were undertaken by their officials during the negotiations. The Commissioner accords significant weight to the public interest in such openness, transparency and accountability, particularly where public finances are concerned.

Public interest arguments in favour of maintaining the exemption

28. The DoJ considers that disclosure of pay negotiation details in this way would have a profound effect on the pay policy-making negotiations themselves and therefore not be in the public interest. The Commissioner's guidance confirms that weight must be given dependent on the content and sensitivity of the information in question and the effect of its release.
29. The requested information involves sensitive negotiations as both sides try to reach agreement with a free and frank discussion regarding the options available given the financial backdrop. If both management and union officials believed the meeting would be minuted and made freely available, the "safe space" for the negotiations would be undermined and the policy-making process weakened. The policy-making process could be subject to a chilling effect with discussions and arguments inhibited by how they would be received by those reading the notes of the meetings. As a direct result, the notes of the meetings could become, in the words of the DoJ, a "platform for grandstanding" rather than a confidential meeting working towards an agreed settlement.

The balance of the public interest arguments

30. The DoJ considers the balance of public interest to be in favour of applying the exemption due to the detrimental impact disclosure of the document would have on current and future pay negotiations.
31. The Commissioner is always cognisant of the general public interest in openness, transparency and accountability in relation to information generated by public authorities. He also accepts that the information would be of interest to the public as it would show how pay deals are agreed in the public sector and any impact upon public finances.
32. However, the Commissioner accepts that a safe space is needed to develop ideas, debate live issues, and reach decisions away from external interference and that the need for a safe space will be strongest when the issue is still live. As this information will shape the formulation

and development of the NIPS pay policy, the Commissioner is of the view that disclosure of the requested information could impact those policy decisions and undermine the safe space needed for policy formulation and development.

33. The Commissioner therefore finds that the public interest in maintaining the exemption at section 35(1)(a) outweighs the public interest in disclosure at the time of the request.

Right of appeal

34. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

35. 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.
36. 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

Deirdre Collins
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