# 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 Estate
Belfast
BT4 3SR

## Decision (including any steps ordered)

1. The complainant requested market research relating to the proposed Peace-building and Conflict Resolution Centre (PbCRC) at the Maze Prison/Long Kesh (MLK) site. The Office of the First Minister and deputy First Minister (OFMDFM) refused the request in reliance on the exemption at section 35(1)(a) of the FOIA. OFMDFM subsequently disclosed some information but withheld the remainder of the requested information.

2. The Commissioner's decision is that the exemption at section 35(1)(a) is engaged, but the public interest in maintaining the exemption does not outweigh the public interest in disclosing the withheld information. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - Disclose the Visitor Assessment, the Visitor Assessment Addendum, and the Marketing Strategy in full.
   - Disclose the information contained in the following sections of the Economic Appraisal:
     - Section 6.1.1
     - Section 6.4.6
     - Section 9.2
     - Section 9.3
     - Section 10.3
     - Section 11.2.1

3. The public authority must take these steps 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.

## Background

4. In 2002, the UK Government agreed to transfer a number of former security sites to the Northern Ireland Executive. These included a former prison and security base at the Maze Prison/Long Kesh (MLK) site, near Lisburn. In 2005 plans were announced to build a multi-sports stadium and international centre for conflict resolution on the MLK site. However in 2009 this project was cancelled.

5. In 2010 the First Minister and deputy First Minister for Northern Ireland announced an agreement to develop the MLK site, including a Peace-building and Conflict Resolution Centre (PbCRC).

6. In January 2011 an application was made to the Special European Union Programmes Body (SEUPB) for £18million funding. This application was approved in January 2012. An application for planning permission for the PbCRC was submitted in November 2012 and granted in 2013.[1]

7. In August 2013 the First Minister issued a letter to his party colleagues stating that, while he remained supportive of the PbCRC project, he considered there was a *"need to gain widespread agreement and broad consensus"* before the project could proceed.[2] In October 2013 the SEUPB confirmed that it had rescinded its letter of offer as it considered the PbCRC project was *"no longer viable at this time"*.[3]

## Request and response

8. On 24 January 2013 the complainant requested the following information from OFMDFM:

[1] http://www.planningni.gov.uk/index/news/news_releases/conflict_resolution_centre.htm April 2013
[2] http://www.newsletter.co.uk/news/regional/full-letter-by-peter-robinson-on-the-maze-1-5388583#comments-area
[3] http://www.bbc.co.uk/news/uk-northern-ireland-24399418

*"The full publication of the market research conducted by Colliers International into the Peace Building and Conflict Resolution Centre at the Maze/Long Kesh site including all results stemming from the research."*

9. OFMDFM responded to the request on 12 February 2013. It stated that it had decided to withhold the requested information under the exemption at section 35(1)(a) of the FOIA.

10. The complainant requested an internal review on 13 February 2013.

11. OFMDFM wrote to the complainant on 1 March 2013 to advise that it had now completed the internal review as requested. OFMDFM upheld its decision to withhold the requested information under section 35(1)(a).

## Scope of the case

12. On 23 April 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant did not accept OFMDFM's decision and was of the view that there was a strong public interest in disclosing the information he had requested.

13. During the course of the Commissioner's investigation both parties agreed to explore informal resolution. Consequently OFMDFM disclosed some of the requested information to the complainant. However the complainant subsequently declined to withdraw the complaint and asked that the Commissioner proceed to issue a decision notice.

14. Therefore the Commissioner considered the scope of the case to be whether OFMDFM was entitled to withhold the requested information to the extent that it had not already been disclosed to the complainant.

## Reasons for decision

### Information falling within the scope of the request

15. The Commissioner has been provided with a copy of the withheld information. This comprises:

    i) The market research report specified by the complainant, entitled "Visitor Assessment", dated August/September 2011;
    ii) Addendum to the Visitor Assessment, dated September 2011;
    iii) Economic Appraisal, dated October 2011; and
    iv) Marketing Strategy, dated May 2012.

16. Having initially identified the above four documents as containing relevant information, OFMDFM advised the Commissioner during the course of his investigation that it considered the Economic Appraisal to fall outside the scope of the request.

17. OFMDFM pointed out that the request had specified *"all results stemming from the research"*. OFMDFM was of the opinion that the Economic Appraisal did not 'stem' from the research (the Visitor Assessment), therefore it did not fall under the scope of the request and should not be released.

18. The Commissioner examined the Economic Appraisal and noted that it contains a number of references to, and discussion of, the Visitor Assessment. The Commissioner concluded that, whilst the Economic Appraisal as a whole did not stem from the research, the following parts of it do fall within the scope of the request:

    - Section 6.1.1;
    - Section 6.4.6;
    - Section 9.2;
    - Section 9.3;
    - Section 10.3; and
    - Section 11.2.1 .

19. Consequently OFMDFM agreed that the information relevant to the request comprised the Visitor Assessment; the Addendum to the Visitor Assessment; the Marketing Strategy and those parts of the Economic Appraisal specified at paragraph 18 above.

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

20. 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.

21. The Commissioner has published guidance setting out his view on the exemption at section 35.[4] The Commissioner considers that the formulation of government policy focuses on the early stages of the

[4] http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx

policy process. Options are generated and sorted, risks are identified, consultation occurs, and recommendations or submissions are put to a minister who will then decide which options should be translated into political action. Development of policy will include the process of reviewing, improving or adjusting existing policy.

22. OFMDFM argued that section 35(1)(a) is engaged because the withheld information relates to the formulation and development of government policy on the PbCRC at the MLK site. In its refusal notice OFMDFM explained that a final decision had yet to be taken and discussion of policy options was *"very much ongoing"*.

23. The Commissioner notes that a development board and members were appointed in September 2012, and an application for planning permission for the PbCRC was submitted in late November 2012.[5] This suggests that a number of key decisions had been made by the time of the complainant's request on 24 January 2013.

24. The Commissioner acknowledges that the future development of the most significant prison site in Northern Ireland is recognised as an extremely sensitive issue, and one which had not been fully resolved at the time of issuing this decision notice. The Commissioner must consider the circumstances at the time of the request, and despite the planning application having been submitted by January 2013 there remained policy decisions to be taken at various levels. Therefore the Commissioner accepts that the requested information relates to the formulation, as well as the development, of government policy, and the exemption at section 35(1)(a) is engaged.

**Public interest in favour of disclosing the withheld information**

25. Section 35(1)(a) provides a qualified exemption. Therefore the Commissioner is required to consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the requested information.

26. OFMDFM acknowledged the regional significance of the MLK site, and accepted that there was a public interest in public participation in the decision making process. OFMDFM accepted that there was a general public interest in the public being sufficiently informed to assess the

5 http://epicpublic.planningni.gov.uk/PublicAccess/zd/zdApplication/application_detailview.aspx?caseno=MDSE3OSV30000

quality of decisions taken and to understand the extent to which various factors influenced those decisions.

27. OFMDFM further considered that disclosure of the requested information may facilitate a more effective public debate and public contribution to the policy making process. Finally, OFMDFM noted that the public interest was magnified by the potential expenditure of a significant amount of public money.

28. The complainant also identified a number of arguments in favour of disclosing the requested information. The complainant referred to a statement given by the First Minister and deputy First Minister in response to an Assembly Question (AQ):

*"The market research conducted by Colliers International confirmed that the overall concept of the PbCRC is clearly very strong and has significant international, political and cross-community support across a broad cross-section of residents here".*[6]

29. The complainant argued that if this were indeed the case then releasing the full research should not have a detrimental impact on ministers' ability to reach informed decisions. The Commissioner considers this argument to be unduly simplistic. If the ministers' response had misrepresented the results of the research, this would be a strong factor in favour of disclosure. The Commissioner does not consider this to be the case, and notes that the response itself appears to have been taken almost verbatim from the executive summary of the Visitor Assessment, the relevant extract of which has been disclosed to the complainant. The Commissioner expects that the formulation and development of such a complex and sensitive policy as the PbCRC would be taken on the basis of information which may include, but could not be expected to be limited to, the Visitor Assessment. Therefore a favourable comment in one document would not in itself affect the complexity or sensitivity of the policymaking process.

**Public interest in favour of maintaining the exemption**

[6] AQW 3781/11-15: see http://www.niassembly.gov.uk/Documents/Answer-Book/2012/120921.pdf, p6

30. OFMDFM argued that, as consideration of the PbCRC policy was still live at the time of the request, the public interest in maintaining the section 35(1)(a) exemption clearly outweighed the public interest in disclosure. OFMDFM referred to a decision notice issued by the Commissioner with regard to a request made to the Foreign and Commonwealth Office[7] which stated:

    *"…there is considerable merit in arguments about needing a safe space for policy development where the policy process is live and the requested information relates to that policy making. He [the Commissioner] also considers that it is unlikely that in such cases the public interest will favour disclosure unless, for example, disclosure would expose any wrongdoing".*

31. OFMDFM maintained that the requested information was *"playing a pivotal role in formulating the eventual finalised policy",* therefore the public interest lay in withholding the information and protecting the private space in which ministers could discuss and consider relevant issues. It argued that OFMDFM needed "safe space" in which to undertake extensive consideration of all the options, which would require a candid risk assessment and scenario planning.

32. OFMDFM further argued that premature disclosure may close off discussion and the development of better policy options, and undermine frank reporting on progress and the identification of risks. However OFMDFM did not provide the Commissioner with any supporting information to explain how this might happen.

33. The complainant disputed OFMDFM's argument that safe space was still required. Rather, the complainant was of the view that policy consideration was at an advanced stage, given that a planning application for the proposed PbCRC had been submitted in November 2012. In addition the complainant pointed out that at the time of the request the SEUPB had issued a letter approving funding for the project.

34. The Commissioner appreciates the complainant's argument in this regard. At paragraphs 23 and 24 above the Commissioner has pointed out that some key decisions had already been taken by the time of the request. However the Commissioner has accepted that there remained several further areas of policy to formulate and develop. Therefore the Commissioner is satisfied that the safe space argument put forward by OFMDFM is relevant.

[7] Decision notice FS50433943

35. During the course of the investigation the Commissioner asked OFMDFM to provide more detail as to the live status of the project at the time of the complainant's request. The Commissioner also asked OFMDFM to explain how the requested information played a "pivotal role", and how disclosing the requested information would have an adverse impact on the safe space needed for consideration of policy options.

36. OFMDFM provided additional public interest arguments in respect of the withheld information contained in the Economic Appraisal. In particular OFMDFM advised the Commissioner that the withheld information had a direct link to a number of aspects of policy that underpin the project. As the policy had not yet fully evolved, OFMDFM argued that disclosure of the withheld information would risk excessive criticism. OFMDFM further argued that disclosure would polarise views, undermine those aspects agreed to date, and make compromise more difficult to achieve.

37. OFMDFM also suggested that disclosure would confuse what was already a very sensitive debate. OFMDFM maintained that disclosure of the withheld information

    *"…could be highly detrimental to both the project, wider good relations issues and may result in a high level of misunderstanding and concern by the public."*

38. The Commissioner does not accept OFMDFM's argument that the public may misunderstand the withheld information. The Commissioner's view, as set out in his published guidance,[8] is that this concern may generally be addressed by the public authority disclosing explanatory or contextual information. It is not reasonable to withhold information simply because of fears that the public may not understand it. This approach has been supported by the Tribunal in a number of cases.

**Balance of the public interest**

39. The Commissioner is aware that a great deal of information relating to various plans and options for the MLK site has been published, including the planning application for the PbCRC itself. The Commissioner is mindful of the historical and political significance of the MLK site, and is of the view that there is a strong public interest in informing the public about plans for its redevelopment. In particular, disclosure of the requested information would assist the public's understanding of the

8 http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/the_public_interest_test.ashx

research undertaken and what it aimed to achieve. Disclosure would also reassure the public as to the "full picture" of the research, and would address any concern that the outcome had been misrepresented.

40. OFMDFM has argued that the public interest in maintaining the exemption outweighs the public interest in disclosure because the PbCRC policy is still live. The Commissioner recognises that there is a limited general public interest in protecting information relating to a live policy decision. This is because there is a general public interest in providing a certain amount of protection to the safe space in which policy is discussed and developed. The Commissioner also accepts that OFMDFM's arguments relating to the political situation, ie the need for agreement from the First Minister and deputy First Minister. The Commissioner is cognisant of the obvious sensitivities surrounding power-sharing, particularly within OFMDFM, and therefore this argument carries considerable weight.

41. However the Commissioner is of the view that OFMDFM has failed to provide specific and robust arguments to support its assertion that safe space was required at the time of the request. Nor has OFMDFM provided any information to explain how disclosure of the requested information would have an adverse impact on the safe space needed for policy development in this particular case. Therefore, although he does not dismiss the safe space argument entirely, the Commissioner cannot attach significant weight to it in this case.

42. The Commissioner is mindful that it is for the public authority to satisfy him that the public interest in maintaining the exemption outweighs the public interest in disclosing requested information. The Commissioner can only make his decision based on the information provided to him by the public authority. The Commissioner would stress that consideration of the public interest requires public authorities to be specific and detailed in relation to the arguments claimed.

43. The Commissioner notes that OFMDFM disclosed some of the requested information during the course of the investigation. However the Commissioner is unable to discern how OFMDFM has drawn a distinction between what information should be disclosed and what information needs to be withheld. The Commissioner concludes that this disclosure, although welcome, is insufficient to address the public interest in disclosure of the requested information.

44. The Commissioner also notes that OFMDFM has not referred to the content or sensitivity of the requested information itself in its arguments. Having inspected the requested information the Commissioner notes that it contains a large proportion of explanation and analysis of general issues relating to tourism and visitors. The

Commissioner considers this to be innocuous and sees no reason why it should be withheld. Further, if OFMDFM is of the view that any of the requested information is particularly sensitive then it ought to have identified this to the Commissioner and explained why this was considered to be the case. As it stands it appears to the Commissioner that OFMDFM has sought to refuse the request by applying section 35(1)(a) as a blanket exemption, without consideration of the requested information in sufficient detail.

45. In light of the above, the Commissioner is not satisfied that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner considers this case to be finely balanced in that the public interest in maintaining the exemption is not insignificant. However the Commissioner finds that the public interest in maintaining the exemption does not outweigh the substantial public interest in disclosing the withheld information. Therefore the Commissioner finds that the withheld information ought to be disclosed into the public domain.

## Right of appeal

46. 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
    Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

48. 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**