



Department of
Justice
www.dojni.gov.uk

Department of Justice
Freedom of Information Team
Information Services Division
Block 2
Knockview Buildings
Ballymiscaw
Stormont
Belfast
BT4 3SL

Telephone 028 90378617
Email: dojfoi@dojni.x.gsi.gov.uk

Freedom of Information Team

11 July 2017

REFERENCE: FOI1742

Dear Sir,

Thank you for your request for information dated 16 May 2017 and detailed below:

1. *To ask the DoJ to provide all speaking notes, briefing papers or policy advice (or any other policy related documents) provided by officials within the Department of Justice to (a) the last Minister for Justice, Claire Sugden MLA or (b) the Secretary of State for Northern Ireland with regard to the subject of abortion since the 5th of May 2016.*

2. *To ask the DoJ to outline whether the Minister for Justice while she was in post, her special advisor or any official within her Department has met with or communicated with (by phone, letter or email or any other communication method) any of the following groups or individuals with regard to the issue of abortion since the 5th of May 2016. If any communication has been made, can I ask for copies of the contents of the communications whatever form they may have taken.*

(a) The Northern Ireland Human Rights Commission

(b) Amnesty International

(c) Christian Action Research and Education

(d) Marie Stopes International

(e) Family Planning Association

(f) Precious Life

(g) Society for the Protection of the Unborn Child



- (h) The Roman Catholic Church*
- (i) The Church of Ireland*
- (j) The Presbyterian Church in Ireland*
- (k) The Methodist Church in Ireland*
- (l) Alliance for Choice*
- (m) Voice for Choice*
- (n) NUS-USI*
- (o) Evangelical Alliance*
- (p) Equality Commission*

3. To ask the Department of Justice to provide minutes of any meetings held by the Minister for Justice or by any relevant DoJ official with any of the following organisations on the subject of abortion since the 5th of May 2016.

- (a) The Northern Ireland Human Rights Commission*
- (b) Amnesty International*
- (c) Christian Action Research and Education*
- (d) Marie Stopes International*
- (e) Family Planning Association*
- (f) Precious Life*
- (g) Society for the Protection of the Unborn Child*
- (h) The Roman Catholic Church*
- (i) The Church of Ireland*
- (j) The Presbyterian Church in Ireland*
- (k) The Methodist Church in Ireland*
- (l) Alliance for Choice*
- (m) Voice for Choice*
- (n) NUS-USI*
- (o) Evangelical Alliance*



(p) Equality Commission

The Department holds information relevant to your request. However, some of the information is covered by the following sections of the Freedom of Information Act 2000:

- section 22 (information for future publication);
- section 31(1) & (2) (law enforcement);
- section 35 (1)(a) (formulation of Government Policy);
- section 38 (1) (health and safety);
- section 40 (2) (personal information); and
- section 42 (1) (legal professional privilege).

Absolute Exemptions

The names and contact details of DOJ junior officials are exempt from disclosure under **Section 40(2)** of the FOI Act, which is an Absolute Exemption. So too are names of private individuals who have been in correspondence with the Minister. The Data Protection Act 1998 prohibits the release of personal data and information which relates to third parties which could, if released, identify the third party to whom it relates. Disclosure of the names and contact details contained within the attached e-mails and letters would contravene the first and second principles of the Data Protection Act in that the data would be processed unfairly and in a manner incompatible with the original purpose. Further, none of the conditions in Schedule 2 of the Act are met to authorise lawful disclosure.

There is an expectation that names of officials would not be released publicly in connection with their work to protect their personal right to privacy. Furthermore, release of their names and contact details into the public domain could result in them potentially perceiving or receiving pressures, threats or intimidation because they work for the DOJ. Release of this information would be unfair thus breaching the first principle of the Data Protection Act.

Qualified Exemptions

The exemption provisions of sections 22(1), 31, 35(1)(a), 38(1) and 42(1) confer a qualified exemption to our duty under section 1(1)(b) and section 2(1) of the Act – to



release the information requested. Information covered by qualified exemptions can only be withheld where the public interest falls in favour of applying the exemptions.

We have provided details of our Public Interest Test considerations in Annex A to this letter.

If you are unhappy with the result of your request for information you may request an internal review within two calendar months of the date of this letter. If you request an internal review please do so in writing stating the reasons to the address above.

If following an internal review you were to remain dissatisfied you may make a complaint to the Information Commissioner and ask him to investigate whether the DOJ has complied with the terms of the FOIA. You can write to the Information Commissioner at:

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

The Commissioner will not investigate a complaint unless an internal review procedure has been carried out.

Further details on the role of the Information Commissioner and the handling of appeals can be found at: www.informationcommissioner.gov.uk

If you wish to discuss this please contact the Freedom of Information Team using the contact details provided at the top of the first page. Please remember to quote your reference in any correspondence.

Yours sincerely



Freedom of Information Manager



Annex A

PUBLIC INTEREST TEST

Section 22(1) Information intended for future publication

In favour of release:

There is a presumption of general public interest in transparency and openness in how Government works.

In favour of non-disclosure:

The information relates to findings from the Working Group on Fatal Fetal Abnormality, a group of Government officials and health professionals who had been asked by the then Health and Justice Ministers to present their conclusions to them for further consideration by the Executive before publication of its report. The report was presented to Ministers but was not considered by the Executive prior to its collapse. It is expected that, following restoration of the Executive, this path will be followed.

Information which is intended to be published can qualify for exemption whether the date of publication has been determined or not.

To publish now would undermine the legitimate aim of Government to make decisions based on information provided for the sole purpose of policy development in a controversial area.

Conclusion:

Government is permitted to plan and manage activity as part of the effective conduct of public affairs, including where a decision has been made in principle to publish information. Publication of the information requested is expected following due



consideration of proposals once a new Executive is in place. Disclosure of the information in the report at this stage would impede the necessary space for future Government consideration of policy options. We are satisfied that it is in the public interest to withhold the information at this time.

Section 31(1)(a) Law Enforcement

In favour of release:

There is a general public interest in understanding how publicly funded bodies operate and conduct their affairs; and in disclosing information that promotes accountability and transparency.

In favour of non-disclosure:

There is a very strong public interest in protecting the law enforcement capabilities of public authorities. The Section 31 exemption allows public authorities to withhold information if the release would likely cause prejudice to ongoing or future investigations. Some of the information in scope of this request provides details of investigative methodologies adopted by law enforcement agencies and it has been decided that the release of such would pose a clear risk to law enforcement capabilities. By disclosing the information, the detection of crime would be hindered.

Conclusion

We are satisfied that the section 31 exemption applies to the information requested. It is our view that the public interest in protecting law enforcement interests outweighs the public interest in releasing the information.

Section 35(1)(a) (Formulation of government policy)

In favour of release:

- Disclosure prior to a decision being taken will lead to more informed public debate;
- Informs the public how policy decisions are reached, what options are being considered, why some are excluded and others preferred;



- Avoids the public view that their opinion doesn't count and that the decision was a foregone conclusion;
- Increases public confidence and trust in Departmental processes.

In favour of non-disclosure:

- Maintains private thinking space;
- The prospect of release may put policy makers in the position of having to defend everything that has been raised during deliberation;
- Release may inhibit future debate and the exploration of the full range of policy options that ought to be considered;
- Disclosure could compromise future exchange of ideas and deter officials from participating fully and candidly in discussions about policy development;
- Ministers and officials need to be able to engage in free and frank discussion of all the policy options, including the merits and demerits as appropriate;
- Releasing information relating to the development of policies is likely to prejudice such development and subsequent implementation.

Conclusion:

We are satisfied that the section 35 policy formulation exemption applies to the information requested. No clear policy or legislative decision on the issue of the criminal law on abortion in cases of fatal foetal abnormality had been taken by the Executive prior to its fall in January. This continues to be a live policy issue, in a contentious area, which awaits resolution once political structures are reinstated. It would be wrong, in the absence of Executive decision, to publish this information. The space needs to be maintained, away from external distraction, for considered and careful policy making around the termination of pregnancy. The loss of this space to have a free and frank discussion could lead to poorer decision making in a divisive area.

The disclosure of information which is concerned with a controversial issue which has not been settled, and on which clear policy or legislative options on how to proceed have not been developed, may also have an adverse effect on the policy makers in that they would be less likely to provide full and frank advice or opinions on policy proposals.



For that reason, it is our view that the public interest in protecting the policy making activities outweighs the public interest in releasing the information at this stage.

Section 38 – Health and Safety

In favour of release:

There is a general public interest in transparency and openness in how Government works. The public have an expectation that those who work in the public sector should be accountable for decisions made in their name and at the tax payers' expense. The public may also believe they have a right to know who works in which post within a public authority.

In favour of non-disclosure:

Given the sensitive nature of some of the work carried out by the DOJ, some individuals might or might be likely to be exposed to increased risk of targeting or attack should their involvement in certain work be made public. This risk of attack or targeting could be increased depending on where an official lives and in some cases, officials do not let their friends and family know where they work for fear of such attack. There is a public interest in avoiding harm to individuals and their families in relation to this matter.

Conclusion:

We have concluded that the public interest in retaining the officials' names which falls within the criteria described above for s38 outweighs the public interest in release.

Section 42(1) – Legal Professional Privilege

In favour of release

Considerations in favour of release of the information relating to the legal advice offered to DOJ officials include the general desire for openness and transparency in government where possible. The DOJ recognises the fact that openness in government increases public trust and engagement.



There is an additional public interest in knowing that decisions made were done so on the basis of sound legal advice. The release of information which would demonstrate this would increase public confidence for the basis on which such decisions are taken and as such would be clearly beneficial to the wider public interest.

In favour of non-disclosure

On the other hand, there are also strong arguments that it would be against the public interest to disclose the information requested.

Considerations favouring non-disclosure of this information include the need to allow the DOJ to obtain, in the conduct of its functions, full and frank legal advice. The giving and receiving of confidential legal advice is central to the process of good governance, and erosion of this principle is likely to severely prejudice the giving of legal advice in the future.

The Information Commissioner has repeatedly stated that there is a strong public interest in maintaining the convention of Legal Professional Privilege (LPP). Public authorities are entitled to give and receive legal advice without fear of damaging their position that that advice will be routinely and prematurely released into the public domain. The premature release of such advice would serve to prejudice this process in future by discouraging officials from requesting and sharing such advice where necessary. Such an outcome would clearly be detrimental to the interests of Government and as such would not be in the public interest.

It is likely that legal advice given in one context will be helpful or relevant to subsequent issues. This means that in assessing the public interest in maintaining the LPP exemption it is necessary not only to consider the circumstances in which legal interests *relating to the current case* could be prejudiced but also to bear in mind that the public interest in protecting the confidential relationship between lawyer and client is a long term public interest *extending into the future* which could be damaged by individual disclosures.

It is also relevant that (subject to very limited exceptions), legal professional privilege can be maintained in proceedings regardless of the circumstances; in particular, there is



no scope for the court in proceedings to decide that the privilege should be overridden because of a wider public interest in disclosure. This reflects the fact that there is considerable public interest in any party being able to communicate with its lawyers and prepare for litigation in the knowledge that those communications or preparations will not be disclosed.

Conclusion

There is considerable public interest in any party being able to communicate with its lawyers and prepare for litigation in the knowledge that those communications or preparations will not be disclosed. We consider it imperative that we do not undermine the DOJ's ability to obtain full and frank legal advice, particularly in the context of the current court case on the law on abortion, and conclude that maintaining the legal professional privilege outweighs the public interest in disclosure.

