

Under section 42 of FOIA, any person (Applicant) who is unhappy with the way a public authority (PA) has dealt with their request for information and has exhausted the PA's complaints procedure has the right to make a complaint to the Information Commissioner (Commissioner).

It is expected that a decision will be made within six months of receipt unless an appeal is made to the High Court, or the case is otherwise resolved to the satisfaction of the Applicant.

## The duty of the Commissioner

It is the duty of the Commissioner to perform his functions under FOIA to promote good practice which includes (but is not limited to) compliance with the requirements of FOIA and conformity with the code of practice.

When an eligible complaint is received, the Commissioner must make a decision and must issue a Decision Notice to the Applicant and the PA as soon as possible. The limited circumstances in which the Commissioner may not, or must not, make a decision are set out in section 42 of FOIA.

The Decision Notice may be in favour of the Applicant or the PA and must specify:

- the Information Commissioner's reasons for the decision;
- any steps to be taken by the public authority to comply with the requirement or to comply with the request for the information;
- the period of time within which those steps must be taken; and
- the right of appeal to the High Court conferred by section 50.

The Commissioner has no power to vary or cancel a Decision Notice once it has been issued.

The only challenge open to the PA or the Applicant against a Decision Notice is an appeal to the High Court on a point of law.

Section 47 sets out an exception from the obligation to comply with a Decision Notice in circumstances where, on reasonable grounds, the Chief Minister, having consulted with the Council of Ministers and the Attorney General, has formed the view that there was no failure to comply with the right of access provided in section 8 of FOIA as set out in the Decision Notice. Such a certificate could be subject to a Petition of Doleance.

Therefore, to enable the Commissioner to make an informed decision, the PA should provide complete, cogent and comprehensive information about how it complied with the request in accordance with its duties under FOIA and how it formulated its decisions including demonstrating the rationale in applying any exemption.

## Action by the public authority

Once steps have been taken to establish that the Applicant's complaint is eligible, a casework officer will be allocated to the complaint.

A letter will be sent by email to the PA to explain that a complaint has been received and inform the PA of the action required. (If the PA wishes to have that correspondence in hard copy this should be requested from the casework officer.)

The PA will be required to make a submission to the Commissioner by completing the documentation provided and supplying all relevant information, including any additional information the PA wishes the Commissioner to consider.

The Commissioner expects that the information sought will be readily available to the PA as it should already have:

- fully considered the issues in detail when dealing with the initial request and again at review; and
- provided the Applicant with a full explanation, in accordance with Part 2 of FOIA, of its decision to refuse the request, or withhold information.

The submission will be required **within 10 working days**.

The PA is responsible for meeting this deadline and ensuring there are arrangements in place to allow full cooperation with investigations. (Please note: matters such as staff absenteeism or holidays, are not acceptable reasons for failing to meet the deadline.)

If the PA is unable to meet the deadline, the casework officer must be contacted immediately and the matter will be referred to the Commissioner.

If the PA fails to reply to the Commissioner's enquiries then it is likely that an Information Notice will be issued.

## **Completing the submission**

**The onus is on the PA to provide the fullest information possible to the Commissioner – it follows that information not provided to the Commissioner cannot be considered when making a decision.**

The submission may be made in hard copy or electronically.

Answers to specific questions, copies of procedural documentation, or other relevant information, such as an FOI request log-sheet, will be required. If it appears that further information is required, this will be sought promptly from the PA.

Where the PA has applied an exemption to withhold information a copy of the withheld information will be sought.

- **Withheld information**

The PA will be required to complete a spreadsheet identifying where in the submission the information can be found in respect of the considerations and decisions by the PA as to what exemption was applied, why information was withheld and the rationale for doing so, including any prejudice or/or public interest considerations necessary.

If the withheld information is of such sensitivity that the PA considers it should not be sent by post or email to the Commissioner, that concern should be raised with the Commissioner as soon as possible.

Arrangements should be made for hand-delivery or, if the information is highly sensitive, or if it is physically impossible to do otherwise, the Commissioner may decide to view the information in situ.

If deemed necessary, the Commissioner may exercise the power of entry and inspection provided for by section 49 of FOIA.

The PA's submission may include any additional information that the PA wishes the Commissioner to consider in making the decision. For example:

- information about the context of the request, and the role of any staff named within the information provided or withheld;
- background about the information under consideration that will help the Commissioner understand its context and sensitivity;
- the PA's view on whether the case may be open to informal resolution, for example whether the PA would be willing to release some or all of the information to the Applicant or whether there is some other action the PA may be willing to take.

### **If the PA changes its view about the case**

When the PA collates its submission, it is possible that its view may change.

Even after the Commissioner is involved, the PA may continue to discuss the case with the Applicant – particularly if this is likely to lead to the case being resolved informally.

- Releasing the information

If the case can be resolved through full or partial disclosure of information then the PA should do so, and inform the casework officer at the earliest opportunity.

The Commissioner will establish with the Applicant whether the case has been resolved to their satisfaction.

Even if a complaint is withdrawn, the Commissioner may still decide that it is necessary to issue a Decision Notice, and/or Enforcement Notice.

- Changing the exemption that has been applied

In some cases the PA may decide that an exemption previously applied to the information was not correct but decides that another exemption does apply.

The Commissioner will consider any further exemption identified by the PA during the investigation.

However, the PA must inform the casework officer and the Applicant (via the issue of a refusal notice adapted accordingly), that a further exemption has been identified and applied and provide the Commissioner with a submission and full rationale for applying the new exemption.

## The Commissioner's investigation

Depending on the nature of the complaint and the PA's submission, the investigation may be handled by a casework officer, the Deputy Commissioner or the Commissioner.

The Commissioner will be fair, firm and unbiased and an objective assessment of the issues which led to the complaint will be undertaken and a decision made, based, as far as possible, on the submission from the PA.

The following matters will be considered during the investigation:

- The PA's compliance with its duties under FOIA Part 2
- the searches undertaken to determine whether the information was held or not;
- the basis for applying any practical refusal reason;
- whether any exemption was objectively and correctly applied;
- In the case of qualified exemptions:
  - what, if any, prejudice there would be in releasing the information (where this test is required);
  - the factors that were considered in gauging the public interest in the information.

The investigation will also take into account the Applicant's submissions, case law, legislative requirements, developing precedent, along with any other relevant guidance and information available.

An alternative resolution can be suggested by any party at any point in the process. However, it is for the Applicant alone to decide whether any alternative resolution is acceptable.

During investigations the Commissioner will remain mindful of his general functions and, if considered appropriate, may give advice about the operation of the Act and good practice, taking into account the code of practice.

## **The Commissioner's Decision Notice**

After concluding the investigation, and unless the Commissioner is prohibited from making a decision under subsection 42(5)(a), a Decision Notice must be issued setting out the reasons for the decision, any steps to be taken by the PA and the timeframe for doing so.

If the Commissioner has decided that the PA met its obligations under the legislation the complaint will be classed as 'not upheld'; if the PA has failed to comply in full, or in part, it will be classed as 'upheld' or 'partially upheld'.

The Commissioner cannot withdraw or amend a Decision Notice after it is issued.

A copy of the Decision Notice will be sent to both the Applicant and the PA's Chief Executive (or equivalent) by post. Although Decision Notices are sent out at the same time, the Commissioner cannot be held responsible for when they are received.

### **Appeals against the Commissioner's Decision Notice**

If the PA or the Applicant wishes to appeal against the Commissioner's decision, an appeal on a point of law may be made to the High Court in accordance with rules of court.

Details of the right of appeal will be set out in the Decision Notice.

### **Failure to comply with a Decision Notice**

If the PA does not comply with the terms of a Decision Notice, the Commissioner may refer the matter to the High Court which may then deal with the PA as if it had committed a contempt of court.

### **Issue of Enforcement Notice**

Whilst a Decision Notice must be issued in respect of the particular complaint about the handling of the request by the PA, the Commissioner may also issue an Enforcement Notice where there is a suggestion, or evidence that a PA is routinely failing to comply with its obligations under Part 2 of FOIA.

An Enforcement Notice can be appealed on a point of law to the High Court and details of the appeal mechanism will be provided with that Notice.

If the PA does not comply with the terms of an Enforcement Notice, the Commissioner may refer the matter to the High Court which may then deal with the PA as if it had committed a contempt of court.

## **Return of PA's submitted information**

In line with the records management policy, the Commissioner will destroy all withheld information supplied by the PA six months after the end of the investigation or the finalisation of any appeal.

If the PA wishes the information to be returned this must be requested through the casework officer.

Occasionally, the Commissioner may decide to keep some information to help with future cases. If so, the need to continue to keep it will be regularly reviewed.