



**IN THE FIRST-TIER TRIBUNAL  
(INFORMATION RIGHTS)**

**In the matter of an appeal under section 57 of the  
Freedom of Information Act 2000.**

**Appeal Number: EA/2021/0216**

**BETWEEN:**

**MICHELLE FLEET**

**Appellant**

**and**

**THE INFORMATION COMMISSIONER**

**First Respondent**

**and**

**DEPARTMENT FOR EDUCATION**

**Second Respondent**

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**DECISION**

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**Tribunal: Brian Kennedy QC, Emma Yates and Susan Wolf.**

**Date of Hearing: 2 February 2022 – By agreement on the Papers.**

**Result: The Tribunal refuses the Appeal.**

**REASONS**

## **Introduction:**

1. This decision relates to an appeal brought under section 57 of the Freedom of Information Act 2000 (“FOIA”). The appeal is against the decision of the Information Commissioner (“the Commissioner”) contained in a Decision Notice (“DN”) dated 30 July 2021 (reference IC-72508-Q4B0), which is a matter of public record.

## **Factual Background to this Appeal:**

2. Full details of the background to this appeal, the Appellant’s request for information and the Commissioner’s decision are set out in the DN and not exhaustively repeated here, other than to state that the appeal concerns the question of whether the Department for Education (“DfE”) correctly applied the section 35 (1) (a) of the FOIA.

## **Chronology:**

23 September 2020                      The complainant wrote to the DfE and requested as follows:

*“1. Any risk assessment made on the advice published 26.08.2020 regarding face coverings in schools. By this, I am referring to a risk/benefit assessment of the advice to wear face coverings, which would include some analysis of the potential detrimental outcomes posed by wearing of those within schools from the viewpoints of physical and mental health and social/communication issues for those the guidelines apply to as a collective.*

*2. Given the government guidance published 22nd Oct 2018 on the gov.uk which was updated last on 17th June 2020 (as of today, 2pm, 23rd September 2020), the status of COVID-19 is provided: ‘As of 19th March 2020,*

*COVID-19 is no longer considered to be a high consequence infectious disease. Furthermore, it also states, amongst other information: “The advisory Committee on Dangerous Pathogens (ACDP) is also of the opinion that COVID-19 should no longer be classified as an HCID’ Given this, please provide details of the rationale behind the decisions made, which form current recommendations.”*

- 20 October 2020                      The DfE responded stating that the requested information was withheld under section 35(1)(a) FOIA.
- 23 October 2020                      The complainant requested that the DfE conduct an internal review.
- 19 November 2020                    The DfE upheld its decision under 35(1)(a)

**Legal Framework:**

3. A person requesting information from a public authority has a right to be informed by the public authority in writing whether it holds the information (s.1(1)(a) FOIA) and to have that information communicated to him if the public authority holds it (s.1(1)(b) FOIA).
  
4. However these rights are subject to certain exemptions, set out in Part II of FOIA. For the purposes of this case, the relevant exemption in Part II is s.35 of the FOIA which provides that:

- (1) Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—*
- a. *the formulation or development of government policy,*

5. Section 35 FOIA is a qualified exemption to disclosure, so far as not relating to information held by the House of Commons or the House of Lords, and is therefore subject to the public interest test under section 2(2)(b) of the FOIA. This states that a public authority does not have to provide the information if *“in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.”*

**Commissioner’s Decision Notice;**

6. The Commissioner examined the withheld information subject of the request. The Commissioner acknowledged that the withheld information concerned the development of a government policy which was being advanced at the time of the request. DN [20] is as follows:

*“The DfE summarises its position by stating that its policy on face coverings has been developed in partnership with other government departments, including the DHSC and PHE, upon which they are reliant, to inform the DfE’s policy based on public health advice. The DfE argues this is a “live”, high profile policy area of considerable ministerial and stakeholder interest and the policy will continue to change based on new evidence that becomes available.”*

7. The Commissioner reviewed the arguments in favour of disclosure made by the Appellant alongside the public interest in non-disclosure. The Commissioner took the view that the public interest favoured withholding the information for the following reasons:

1. *The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosure which would undermine this process.*
2. *Whilst there is a general public interest in openness and transparency, there is significant public interest in all matters*

*surrounding the pandemic and how the government arrived at their decisions.*

- 3. The Commissioner was mindful there is no inherent or automatic public interest in withholding information that falls within the section 35 exemption. If the request is made after the policy process is complete, that particular process can no longer be harmed.*
- 4. At the time of the request the pandemic was ongoing and the policy in question remained 'live' due to emerging scientific evidence and understanding of the impacts on pupils.*
- 5. The Commissioner gave weight to the argument that disclosure would harm the effectiveness of the policy itself. The safe space arguments therefore carry significant weight.*
- 6. As the timing of the request was also relevant and the Commissioner held, that it is not in the public interest to disclose information that contains a range of options and evidence, while the issue are still live and under review.*

#### **Grounds of Appeal:**

- 8.** The Appellant put forward essentially four grounds of appeal to argue that the public interest favours disclosure. The Appellant stated that the Commissioner's acceptance of the DfE's response that the policy issue is live, and under review and development, is confusing and contradictory. The Appellant argued that the public interest favours greater transparency given that school staff have been asked to facilitate children covering their face with masks.
- 9.** The Appellant stated that a risk/benefit analysis was not presented before masks were advised in schools, and before any pilot study was conducted. The Appellant averred that it is in the public interest to be made aware if there was an analysis of the potential negative impacts of mask wearing, before it was mandated. The Appellant submitted that as masks set a precedent regarding bodily integrity, there should be concern relating to the absence of informed consent.

## Commissioner's Response:

- 10.** In her Response to the Grounds of Appeal, the Commissioner stated that it is unclear whether the Appellant challenges her findings that the requested information relates to the formulation and development of government policy. If the Appellant challenges this finding, the Commissioner submits that the withheld information clearly relates to the live formulation and development of government policy. (Reference to withheld information in closed submissions to the Commissioner, on 25 August 2020, setting out the DfE's proposed policy position on face covering in education).
- 11.** The question of whether the policy making process is still 'live', according to the Commissioner is an issue that goes to the assessment of the public interest balancing test as held in *Morland v Cabinet Office* [2018] UKUT 67 (AAC) at [31].
- 12.** The Commissioner referred to *R (Evans) v AG* [2015] UKSC 21, to consider that the latest time for an internal review, for the purposes of assessing timing under the public interest test, is 20 working days (or 40 working days for complex requests) after the date of the request for an internal review.
- 13.** The information which was held within the scope of the request concerns a submission dated 25 August 2020. The first guidance on face coverings in schools was issued on 26 August 2020. Subsequently, the request was submitted on 23 September 2020, to which it was responded to on 20 October 2020. An internal review outcome was sent on 19 November 2020. In November 2020, new guidance was published on national restrictions which included revised advice on face coverings. Further, on 27 November 2020 guidance was updated to reflect the local restriction tier system. On 22<sup>nd</sup> February 2021 the DfE published updated guidance to support the return to full attendance, which included updated guidance on face coverings with a further update on 6 April 2021.

14. The Commissioner contended that it was clear that guidance on face coverings was an issue continually under review by government departments, and the DfE. Therefore, based on the timeline of events the issue of face coverings in education was a 'live' issue for the DfE. The Commissioner considered the public interest arguments purported by the Appellant, however, she maintained that the public interest favoured non-disclosure and the DfE was entitled to refuse the request under section 35(1)(a) FOIA.

**Appellant's Response:**

15. The Appellant stated that the safety and effectiveness of masks for children alongside the contention that masks produced are generally for adults are two factors relevant to the appeal. Further, DfE employees are subject to the Civil Service Code of 2015 with an overarching obligation not to harm the general public in the process of formulating live policy.

16. The Appellant further argued that it is in the interest of transparency, democracy and accountability that members of the public should not have this information withheld from them. The Appellant stated that DfE have not satisfied the 'within the public interest' test. Additionally, that the language used by DfE points to experimental measures. The Commissioner agreed with DfE with the broad definition of 'related to' pertaining to the relationship of the measures to the formation of government policy. The Appellant maintained her argument that the Commissioners' decision is both "*confusing and inconsistent*". The Appellant finds it disconcerting. The Appellant contended that the refusal to disclose the information is detrimental to the general public.

**Joinder:**

17. On 12 October 2021 the DfE (the Public Authority herein) was joined as a Second Respondent to this appeal. This application was made at the request of the DfE as they wished to make submissions, particularly on the Public Interest test and felt well qualified and specifically familiar with the issues pertaining. This is acknowledged and welcomed by this Tribunal who would have made such a ruling in any event.

## **Second Respondent's Response:**

**18.** The Second Respondent invited the Tribunal to dismiss the appeal and uphold the Commissioner's decision for the same reasons as are given by the Commissioner in her DN. The Second Respondent accepts, and endorses the Commissioner's position as set out in her DN and Response to the Grounds of appeal.

**19.** In relation to withheld information relating to a live policy issue, the Second Respondent highlighted the timeline provided by the Commissioner and stated that the policy has been updated a further eight times since the Second Respondent's response to the Appellant's request. The dates are as follows:

- (1) 27 November 2020;
- (2) 8 January 2021;
- (3) 1 March 2021;
- (4) 8 March 2021;
- (5) 6 April 2021;
- (6) 10 May 2021;
- (7) 19 July 2021;
- (8) 16 November 2021.

**20.** The Second Respondent referred to the government's published policy on 26 August 2020. The Second Respondent stated that the policy exemplifies the risk that the public could be misled through partial disclosure as the decisions are both complex and inter-linked. This could result, according to the Second Respondent, in an unnecessary withdrawal of children from education or to a reduction in the rate of compliance with policies directed at suppressing COVID-19. The release of the withheld information could impose an unattractive choice on the government which would involve simply accepting the risk of public confusion, and engaging in a public communications exercise to explain and provide surrounding context to the released information. Therefore, they argued, the exemption should be maintained in this case.



**21.** The Second Respondent submitted that the particular risks involved with a loss of public confidence in this policy sphere deem it crucial that the government is able to formulate and develop policy in light of the latest advice and communicate the same to the public. The Second Respondent noted that whilst understandably there is a high level of public interest in the content of this government policy, the disclosure of the withheld information would present a partial and misleading picture of the factors relevant to the government's response.

**22.** The DfE receives and relies on advice from UK Health Security Agency. The Second Respondent argued that this advice frequently involves the communication of material which is not in the public domain. Further, the withheld information represents advice from the civil service to the Secretary of State for education. This is a confidential briefing which was not intended for publication. The DfE and other government departments have published information which discloses the evidential basis for government policy on face coverings. The Second Respondent submitted that this published information is capable of satisfying the Appellant's curiosity. Therefore, the Second Respondent submits that the public interest in maintaining the exemption in relation to the withheld information outweighs the public interest in disclosing the information. We accept this position.

**Witness Statement:**

**23.** Rebecca Hewstone, a civil servant at the DfE, who is a Deputy Director in the Covid-19 Response Measures Directorate, and filed a witness statement, dated 3 December 2021 on behalf of the Second Respondent. The Tribunal are grateful for this valuable input from which empirical evidence of an expert nature (including exhibits) has been made available. The Second Respondent relies upon section 35 (1)(a) FOIA. Ms. Hewstone properly has stated that whether the requested information is disclosable depends on the application of the public interest balance.

- 24.** Ms Hewstone provided context in relation to the specific government policy. This witness stated that at the time the withheld information was requested, the policy remained under development as the DfE was continuing to explore policy options for the use of transparent face coverings in education settings. The DfE held that the information should not be disclosed on the basis that there are considerable risks in providing the information to the Appellant. Additionally, the disclosure would serve a limited public interest in furthering the public's understanding of the policy.
- 25.** Ms Hewstone submitted that there is a risk of the public being confused by the release of a single piece of out-of-date evidence relating to COVID-19, which could lead to the public reaching a misinformation conclusion. Ms. Hewstone noted that the impact of any confusion caused by the disclosure of this withheld information could be detrimental not only to the government and the DfE but also to the education and wellbeing of the children and young people it serves.
- 26.** Ms. Hewstone further averred that the release of the incomplete information would also be detrimental to the government's broader policy on the use of face coverings in society. Moreover, the disclosure of the withheld information could detract from, or dilute the full candid and proper deliberation of policy formulation and development. Ms. Hewstone contended that there remains an ongoing live policy issue as the use of face coverings in education remains a live consideration for the government's plans to respond to variants of concern.
- 27.** Ms. Hewstone stated the DfE and the government are committed to openness. On this basis, the DfE publications relating to the use of protective measures and face coverings in education settings have included guidance but also two papers summarising the evidence relating to the COVID-19 pandemic and children, young people and education settings. Ms. Hewstone noted that there is a public interest in reassurance that ministers are briefed effectively on the key areas of policy. However, the adverse impact and public confusion that disclosure of this withheld information would be likely to cause, must be stressed. The release of this information could have a direct adverse impact on education, society, and future policy and decision-making.

## **Conclusion:**

- 28.** The Tribunal find the DN stands alone as a comprehensive and careful assessment of the issues at the heart of this appeal. In our view it constitutes an excellent assessment of the sensitivities of a complex and important application of the exemption, which exemption has been provided by Parliament in s35 of the FOIA. The issues are fully, and in our view properly considered. The Commissioner, while recognising the important need for transparency and accountability in the exercise of the Public Authority's functions, carefully determines that the exemption is engaged and applies in this case. She then assesses the delicate balance of the Public Interest test before concluding, again quite properly in our view, that the balance favours non-disclosure of the information sought in the impugned request.
- 29.** Without repeating verbatim the script, the Tribunal unanimously accept, endorse and adopt the reasoning of the Commissioner as set out in Paragraphs 8 to 24 of the DN.
- 30.** Similarly, without repeating verbatim the script, we unanimously accept, endorse and adopt the reasoning on the issues pertaining to the application of the Public Interest test and the weight to be given to the public interest test favouring non-disclosure at paragraphs 25 to 52 in the DN. It is our unanimous view that the DN, contains no error of Law, and the exercise of the discretion in the application of the assessment of the weight to be given to the issues properly pertaining to the Public Interest test are not to be faulted. The Commissioner goes further in her Response to the Grounds of Appeal, dated 1 September 2021, which again makes compelling reading and supports the arguments for the application of the s35 exemption and the considerable and significant weight to be given in support of the balance in favour of withholding the information sought in the impugned request. We are well persuaded by these arguments.

**31.** If we are wrong in any the above, we then consider the Second Respondents Response to the Grounds of Appeal, dated 22 November 2021 and can find no fault in the reasoning as set out therein. Much of this repeats the context in which the Public Authority approached the Commissioners' investigation and on which she relied on in coming to her Decision, but again, without repeating the reasoning provided by the Second Respondent verbatim, we unanimously accept, endorse and adopt the reasoning in paragraphs 3 to 17 of this Response.

**32.** That brings us back to the important witness statement of Rebecca Hewstone dated 3 December 2022. We have an Open version and a Closed version, which has been properly redacted to maintain the purpose of the application of the section 35 exemption. The Open statement in itself makes a compelling case for the position and reasoning of the Second Respondent throughout in addressing the detailed issues pertaining to our deliberations herein. We are particularly influenced by Paragraphs 13 to 17 and further the witness's comprehensive analysis of the wide scope of matters to be considered in attaching weight in favour of non-disclosure being in the Public Interest. This includes, but is not exclusive to, the Impact beyond education, the Impact on the Second Respondents "*safe space*" and future policy making, the on-going "live" policy issue, the volume of information already published by the Second Respondent and across Government all in the Public Domain at the time of the request and more since. The closed version is the same statement but where specific examples of a highly sensitive and persuasive nature in support of non-disclosure, being in the public interest, are unredacted. Without such redaction in the Open version, the purpose of the application of the exemption would be undermined. We also find in the redacted material further compelling grounds for upholding the DN.

**33.** We are satisfied that the exemption is engaged. The appellant has not advanced any arguments as to why the exemption is not engaged. The ICO and the second respondent have made lengthy submissions as to why the exemption is engaged. The important witness statement from Ms Hewstone supports these

arguments. The witness is a credible witness and her statement presents detailed accounts of why this was, and remains a live policy area. It further confirms the plethora of relevant information on the relevant subject matter already available within the Public Domain.

**34.**The request concerns information, which relates to the formulation of government policy in relation to the use of face coverings in schools. On the evidence before us, this was (and remains although hopefully, perhaps not for much longer) a live issue. We were presented with clear and cogent evidence that this is an area in which the policy has changed at least 8 times (and continues to change) in response to the scientific evidence and circumstances of the pandemic. The department's submissions to the Commissioner provide detailed background and context that support the conclusion that this is a live and fast changing area of policy development.

**35.**The Second Respondent's submissions (D55) and evidence (in the witness statement) make it clear that the DfE was, at the relevant timespan (referred to above) of the request, and is currently developing policy in partnership with other government departments. This we find is a live high profile policy area, which is reliant on the advice of other government departments.

**36.**The Second Respondent was seeking to develop policy in the extraordinary times of the emerging pandemic. A risk/benefit analysis has not been presented before masks were advised.

**37.**The Second Respondent in their submissions to the Commissioner provides cogent public interest arguments in favour of maintaining the exemptions. The witness statement also provides credible and substantiated evidence relating to the public interest considerations, however we note that arguments relating to the costs associated with contextualising the information (were it to be released) is not a relevant argument. The costs of contextualising cannot be considered in

determining with whether the appropriate limit of £600 has been exceeded (para 22 Open witness statement).

**38.** The Appellant argues that the exemption is not engaged because “the DfE’s response that this is a live policy issue under review and development is confusing and contradictory “. (Commissioner’s Response A 23). We are of the view that the DfE’s response is both clear and coherent.

**39.** The pressing issue for the Tribunal is whether the public interest in maintaining the exemption in s35 (1) was outweighed by the public interest in disclosure. In determining the public interest it is necessary to consider the public interest at the time that the public authority reached its decision (at the request and internal review stage). The Commissioner’s Decision Notice (paras 25-29) and the DfE submissions carefully articulate and acknowledge that there is a significant public interest in disclosure of this information, which would provide greater transparency of the decision to recommend face coverings in schools. We too accept this. This is not a case where either the First or the Second Respondent treats the public interest in disclosure lightly. Both acknowledge the general public interest in favour of disclosure in terms of greater openness and transparency. They also both acknowledge the specific public interest in the government’s response to the pandemic and in the provision of education and safety to children and staff.

**40.** The Second Respondent has provided evidence in relation to its commitment to transparency generally and specifically. There have been numerous releases of information in the public domain identified.

**41.** The Appellant’s arguments in favour of disclosure include that *“it is in the public interest for there to be greater transparency on this issue given that school staff have been asked to facilitate children covering their face with masks”*. The Appellant also argues *“it is in the public interest to know if there was an analysis of the potential negative impacts of mask wearing before it was mandated”*. -

*“Masks set a precedent regarding bodily integrity”*, The Appellant considers there to be a concern regarding the absence of informed consent. The Appellant further argues that it is in the public interest to know if there was an analysis of the potential negative impacts of mask wearing before it was mandated. We take no issue with this and no doubt the Second Respondent would at all material times be aware of any such issues but we consider on a holistic level this was a highly unusual situation with little or no precedent.

**42.** The Appellant further argues, masks set a precedent regarding bodily integrity, and she properly considers there to be concern regarding the absence of informed consent. Again this was a highly unusual situation and with little or no precedent. It is a matter, while clearly one of great interest to the public, it is likely to be within the scope of the request and the s35 exemption, and is therefore encompassed in the general nature of the issues considered by the Public Authority while deliberating what is in the Public Interest by disclosure to the world at large of the withheld information. In any event on such specific issues, it is clearly not within the remit of this Tribunal to opine upon it of its own volition, particularly in light of the comprehensive expert witness evidence including the closed redacted version with which we have been presented herein.

**43.** Having considered and deliberated upon all of the evidence before and for the above reasons we are unanimous in our view that the DN should stand. We too are persuaded that the withheld information concerned the development of a government policy, which was being advanced at and during the time of the request. We find neither error of Law, nor fault in the difficult and sensitive balancing exercise of the discretion when the Commissioner held it to be in the public Interest that the withheld information should not be disclosed because the balance in the Public Interest test favours non-disclosure.

**44.** Accordingly we dismiss this appeal.

Brian Kennedy QC

Date: 3 February 2022

Promulgation Date: 4 February 2022