

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 1 March 2010

Public Authority: Department for Children Schools and Families
Address: Sanctuary Buildings
Great Smith Street
Westminster
London
SW1P 3BT

Summary

The complainant requested original drafts of evaluation reports prepared by PwC in relation to the public authority's policy on Academies. This request was refused under section 35(1)(a) (formulation and development of government policy). The Commissioner is satisfied that the exemption is engaged. However the Commissioner finds that, in all the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the Act). This Notice sets out his decision.

Background to the request

2. The Academies programme was introduced by the then Secretary of State for Education and Skills in his March 2000 speech on transforming secondary education. The first Academy projects were announced in September 2000.
3. The public authority states that:

"Academies are publicly funded independent local schools... They are all ability schools established by sponsors from business, faith or voluntary groups working with partners from the local community. Academies provide a teaching and learning environment that is in line with the best in

*the maintained sector and offer a broad and balanced curriculum to pupils of all abilities, focusing on one of more subject specialisms”.*¹

4. PwC was contracted by the public authority to provide an annual, independent evaluation of the academies programme. Their contract ran from 2002 to 2008 and five reports were produced. The public authority advises the Commissioner that the remit of PwC was *“to help inform the policy direction for Academies, indicating which elements of the Programme are most effective, the cost of these elements, and their sustainability over the long term. The effectiveness, cost-effectiveness, and impact of the Academies Programme, will be evaluated.”*
5. On 28 June 2007 the Department for Education and Skills (DfES) was replaced by the Department for Children, Schools and Families (DCSF) which took over DfES functions in its responsibility for improving the focus on all aspects of policy affecting children and young people.
6. For ease of reference the Commissioner shall refer to the public authority, whether at that time referred to known as the DfES or as DCSF, as ‘the public authority.’

The Request

7. The complainant requested the following information from the public authority on 5 February 2007:

“...the original drafts of PwC’s second and third independent evaluation reports...” (the withheld information)
8. The public authority responded to the complainant’s request on 11 May 2007. This response refused the request, with the public authority advising that it considered that the information fell within the exemption provided by section 35(1)(a) of the Act (formulation or development of government policy) and that the public interest in maintaining the exemption outweighed the public interest in disclosure.
9. The complainant returned to the public authority on 23 May 2007 and asked that the public authority carry out an internal review of its handling of the request.
10. The public authority responded with the outcome of the review on 21 June 2007. The public authority upheld its initial refusal of the request under the exemption provided by section 35(1)(a) of the Act.

¹ <http://www.standards.dcsf.gov.uk/academies/>

The Investigation

Scope of the case

11. The complainant contacted the Commissioner on 21 June 2007 to ask that the Commissioner consider the public authority's refusal of the complainant's request for access to the original drafts of the PwC's second and third evaluation reports.

Chronology

12. The Commissioner contacted the public authority on 8 January 2009 requesting that the public authority provide the Commissioner with the withheld information together with its full submissions in support of its position.
13. The public authority provided the Commissioner with its submissions in support of its application of the exemption under section 35(1)(a) on 3 March 2009.

Analysis

Exemption

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

14. Consideration of this exemption is a two stage process. Firstly, in order for the exemption to be engaged, the information in question must relate to the formulation or development of government policy. Secondly, this exemption is qualified by reference to the public interest. If the public interest in maintaining the exemption does not outweigh the public interest in disclosure, the information should be disclosed.
15. This exemption may be applied to information which 'relates to' the formulation or development of government policy. The Commissioner's view is that the term 'relates to' should be interpreted broadly within the Act. Accordingly, the exemption will be engaged where the information may be accurately characterised as relating to formulation or development of government policy.
16. In this case the information was created by PwC on the instruction of the public authority in order that its policy in relation to the Academies programme might be examined, critiqued and developed.
17. The public authority advises that PwC spent some months carrying out qualitative and quantitative research before preparing an initial draft report for comment and discussion. These initial drafts, and other early drafts, were provided to the public authority in order that these might be checked for factual accuracy and clarification in relation to the public authority's policies. The public authority advises that at all stages PwC retained editorial control.

18. The Commissioner notes the public authority's assertion that the remit of PwC in producing these reports was *"to help inform the policy direction for academies."* The Commissioner is satisfied that the government policy on the Academies programme was not only under review but was undergoing a process of refinement and development informed by the reports produced by PwC. The Commissioner accepts the view of the public authority that the government policy on Academies was not yet entirely formed and fixed at the time of request and was subject to change and development based, among other things, on the PwC findings.
19. The Commissioner's conclusion is that the information in question does relate to the development of government policy on the Academies programme and that the exemption under section 35(1)(a) of the Act is, therefore, engaged.

Public interest test

20. Section 2(2)(b) of the Act requires the Commissioner to consider whether "in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."
21. In the case *DfES v the Commissioner and the Evening Standard*² the Information Tribunal set out 11 guiding principles for considering the public interest in relation to section 35(1)(a) of the Act.
22. The Commissioner notes that the majority of these considerations are based on the presumption that information considered to be subject to 35(1)(a) will largely be made up of, or at least will include, contributions from officials within the civil service.
23. That is not the case in relation to the information in question here, which consists of draft research and recommendations from consultants engaged by the public authority. Accordingly, the Commissioner has considered only those of the 11 principles set out by the Information Tribunal which he considers are relevant in this matter.

Public interest factors favouring the release of the information

24. The Commissioner has considered the nature of the information withheld. In this case, the information is comprised of draft reports prepared by PwC on the instruction of the public authority to assess and inform the development of the public authority's policy on Academies.
25. In the *DfES* case, the Information Tribunal stated the following:

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

² EA/2006/0006

case”

26. The Commissioner is satisfied that there is a legitimate public interest in the disclosure of the withheld information in order that the public might have a better understanding of the process by which government policy is formulated with regard to its strategy of diversity in secondary school education. The Commissioner notes that the Academy programme is a significant change to secondary school system and represents a new model for delivering secondary education. There is a significant public interest in understanding the process through which this policy innovation was independently assessed. The Academy programme has been the subject of significant debate by parents, educational professionals and other groups with an interest in the educational system. The issue of measuring and evaluating the success of Academy schools has itself been a matter of significant debate. There is also a public interest in the public assessing the government's claim that the PwC reports were independent and at all stages PwC retained editorial control, noting that PwC did send drafts to DCSF for comment. In this case there is a significant public interest in the understanding the full picture, by providing the information behind the policy it removes any suspicion of spin. The relevance of this factor was acknowledged by the Information Tribunal in *Rt Hon Lord Baker of Dorking CH v Information Commissioner*.³

Public interest factors favouring withholding the information

27. The Commissioner recognises that it may be argued that it is in the public interest for government to have a private space in which to formulate policy, and that such arguments carry particular weight where policy formulation was ongoing at the time of the request.
28. It is also arguable that government, with input from others, should be given sufficient space away from public scrutiny to carry out the policy making process effectively. This includes protecting the government's ability to gather free and frank input from consultants and others to inform its decisions. There is a public interest in ensuring that options are fully debated and that people are not deterred from providing full and frank suggestions and input to ensure that the best options are put forward.
29. The public authority has argued that the public interest may not be served by premature disclosure of material before facts have been thoroughly checked and conclusions reached. The public authority has argued that these draft reports will necessarily contain inaccuracies and, even where final accurate drafts have been published, may mislead the public as to the facts and result in confusion as to the nature of the policy under scrutiny.
30. Further, it is argued that the policy making process would be likely to be prejudiced through disclosure as the frankness and candour of the participants in this process would be compromised as a result of the knowledge that the record of their contributions may later be subject to disclosure through the Act.

³ EA/2006/0043

The balance of the public interest

31. The Commissioner has considered the strong arguments in favour of disclosure of the withheld information noted above. He considers that there is significant public interest in favour of disclosure.
32. The issue of whether the policy development was ongoing at the time of the request has been carefully considered by the Commissioner. At a micro level the process of policy development, in respect of the government's response to each of the PwC reports in question, had completed by the time the request was made⁴. Disclosure of the withheld information would therefore not have had an impact on the immediate policy process in question. The need for a "safe space" had fallen away at the time the government's response to the PwC reports had been made.
33. In terms of a potential "chilling effect" on future exchanges between DCSF and PwC, the Commissioner does not consider this to be an argument that should accorded much weight. There would an expectation that PwC would need to deliver the information they had been contracted to provide and to alter their approach to written processes for consulting on drafts would not be a reasonable response. Also, if the process is as the public authority outlined in paragraph 18 the Commissioner does not agree that a significant "chilling effect" on future PwC – DCSF exchanges on Academy school evaluations would be likely to result from disclosure.
34. The Commissioner has not been provided with a clear explanation as to what the other wider, ongoing policy processes with respect to Academy schools are. It is therefore difficult to understand what "chilling effect" might be caused to policy deliberations on the basis of disclosing the information in question. The Commissioner and Information Tribunal have been generally sceptical about broadly argued "chilling effect" arguments without detailed, convincing arguments, linking the circumstances of the case to general effects. However, as the Commissioner accepts broader policy development was ongoing he accepts a "chilling effect" was possible and has therefore accorded this argument some weight, albeit limited. The Commissioner has taken into account the comments of Mitting J in the High Court judgment *Export Credits Guarantee Department v Friends of the Earth*⁵:

"There is a legitimate public interest in maintaining the confidentiality of advice within and between government departments on matters that will ultimately result, or are expected ultimately to result, in a ministerial decision. The weight to be given to those considerations will vary from case to case. It is no part of my task today to attempt to identify those cases in which greater weight may be given and those in which less weight may be appropriate. But I can state with confidence that the cases in which it will not be appropriate to give any weight to those considerations will, if they exist at all, be few and far between."

⁴ Reports and responses listed at <http://www.standards.dfes.gov.uk/academies/publications/?version=1>

⁵ *Export Credits Guarantee Department v Friends of the Earth* [2008] EWHC 638 (Admin) (17 March 2008).

35. The Commissioner has also considered those arguments in favour of maintaining the exemption, including the inaccurate and potentially misleading nature of the draft documents. He is satisfied that as the final reports are in the public domain and the drafts may be clearly marked as such any factual inaccuracies contained within the drafts need not diminish public understanding of the issues and may assist in informing public debate.
36. Having considered the limited impact of disclosure on the interests inherent in section 35(1)(a) against the significant public interest in favour of disclosure the Commissioner has concluded that the outcome favours disclosure. The Commissioner is satisfied that, in all of the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

Procedural requirements

Section 1(1)(b): duty to provide information

37. Section 1(1)(b) of the Act requires a public authority to provide information to an applicant in response to a request. For the reasons set out above the Commissioner is of the view that the requested information ought to have been disclosed to the complainant at the time of his request. As this information was wrongly withheld the Commissioner concludes that the public authority failed to comply with section 1(1)(b) of the Act.

Section 10(1): time for compliance

38. Section 10 of the Act states that a public authority must comply with section 1(1) promptly and in any event not later than twenty working days after the request has been received.
39. As the Commissioner finds that the public authority wrongly withheld the requested information from the complainant, it follows that the public authority failed to communicate this information to the complainant within the statutory time limit. Therefore the Commissioner finds that the public authority failed to comply with section 10(1) of the Act.

The Decision

40. The Commissioner is satisfied that the section 35(1)(a) exemption is engaged in relation to the withheld information.
41. However, the Commissioner has concluded that, in all the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure of the information.
42. The Commissioner also finds that the public authority breached sections 1(1)(b)

and 10(1) of the Act in failing to provide this information to the complainant in response to his request.

Steps required

43. In light of his findings the Commissioner requires that the public authority disclose to the complainant the withheld information as set out in paragraph 7 above.

Right of Appeal

44. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 1st day of March 2010

Signed

**Steve Wood
Assistant Commissioner**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

Section 1(1) provides that -

“Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him.”

Section 35

Section 35(1) provides that –

“Information held by a government department or by the National Assembly for Wales is exempt information if it relates to-

- (a) the formulation or development of government policy,
- (b) Ministerial communications,
- (c) the provision of advice by any of the Law Officers or any request or the provision of such advice, or
- (d) the operation of any Ministerial private office.”