

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 22 May 2007

Public Authority: Department for Education and Skills
Address: Sanctuary Buildings
Great Smith Street
Westminster
London SW1P 3BT

Summary

The Commissioner's decision in this matter is that the Department for Education and Skills (DfES) has partially failed to comply with its obligations under section 1(1) of the Freedom of Information Act 2000 (the Act).

The Commissioner requires DfES to disclose the information previously withheld under section 35 of the Act but decided it had acted correctly in withholding information under section 42.

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.

The Request

2. On 20 February 2005 the complainant asked the Department for Education and Skills (DfES) for copies of whatever documents it held that related to the Society of Teachers Opposed to Physical Punishment (STOPP) between 1982 and 1987. On 9 March 2005 DfES told the complainant that it held four documents that met the request. On the same date the complainant made a follow on request to DfES for information held relating to the issue of corporal punishment in schools for the period 1982 to 1987. During further email exchanges, DfES invited the complainant to view the relevant files but also asked him to specify the types of information he was interested in to ease the task of preparing the files for viewing. On 28 April 2005 the complainant told

- DfES that he was interested in the legal advice given to ministers, and also in policy advice and letters between ministers.
3. On 28 June 2005 DfES released to the complainant much of the information requested but withheld information about legal and policy advice. On 30 June 2005 the complainant asked for an internal review of the decision to withhold this information.
 4. On 26 July 2005 DfES confirmed to the complainant that some information was being withheld. DfES cited section 35 of the Act (formulation of government policy, etc) and instanced section 35(1)(a) (formulation or development of government policy) and section 35(1)(b) (information relating to Ministerial communications). DfES also cited section 42 (Legal and professional privilege). DfES said that some files relating to the time period specified in the request had been destroyed prior to the request being made as part of its normal arrangements for reviewing files. DfES added that it had conducted a public interest test and had concluded that, despite the age of the material, the public interest favoured applying the exemptions and withholding the information.

The Investigation

Scope of the case

5. On 31 July 2005 the complainant contacted the Commissioner to complain about the way in which his request had been handled. The complainant specifically asked the Commissioner to consider the following points: release of the information would allow full insight into government thinking at the time; the material was of historical interest only and had no implications for current government policy; it would become public under the 30 year rule in due course anyway. He said that there was significant public interest in the material being released now and that DfES had provided no evidence that the public interest would be harmed if that was done.

Chronology

6. On 12 September 2006 the Commissioner's staff began to investigate the complaint. During the investigation DfES consulted with other government departments, notably with the then Department for Constitutional Affairs and the Cabinet Office. On 9 November 2006 DfES told the Commissioner that, following a further review, it had decided to release some more information to the complainant.
7. On 21 November 2006 a member of the Commissioner's staff met with DfES and DCA officials and reviewed the information being withheld. Subsequently, the classification of some of the material was reviewed by DfES. More of the information withheld under section 35(1)(a) of the Act was released to the complainant on 21 December 2006. DfES said that those papers related to the

development of a policy which had been settled a considerable time ago and which was no longer a sensitive issue. However, DfES maintained its refusal to disclose information for which the exemptions arising from sections 35(1)(b) and 42 of the Act were engaged and, on 14 December 2006, provided the Commissioner with a detailed account of its reasoning.

8. On 8 February 2007 DfES told the Commissioner which of those former Ministers named in the papers still played some role in public life, as well as identifying those who had died. DfES also said that a number of the then more junior officials named in the papers were still in active public service.
9. On 19 February 2007 the Information Tribunal published its Decision in the case of *DfES v Information Commissioner and The Evening Standard (EA/2006/0006)* in which the Information Tribunal found against DfES and upheld a Decision Notice by the Commissioner. DfES did not appeal the Tribunal's decision and released the information as directed. The case concerned the application by DfES of the exemption contained in section 35(1)(a) of the Act and the public interest test. In the light of the Tribunal's Decision in the *Evening Standard* case, DfES reviewed its application of section 35(1)(b) and the related public interest test to the facts of this case and discussed the matter with other government departments. On 27 March 2007 DfES told the Commissioner that it had concluded that the balance of the public interest still lay in favour of withholding the information.

Findings of fact

10. The Commissioner found that the policy issues contained in the relevant papers are now generally considered to have been settled following the policy debate and subsequent legislation in the late 1980s. The issues set out in the papers being withheld are not, therefore, a matter of current debate.

Analysis

Procedural matters

11. There were a number of procedural failings by DfES but the complainant indicated that they did not form part of his complaint and the Commissioner has not therefore considered them.

Exemptions

12. Three exemptions were initially cited by DfES, relating to sections 35(1)(a), 35(1)(b) and 42 of the Act. DfES has now disclosed the information it had initially withheld under section 35(1)(a). The Commissioner's consideration of the exemptions under sections 35(1)(b) and 42 is as follows.

Section 35 – Formulation of government policy, etc

13. The Commissioner is satisfied from his review of the papers that meeting this request would mean disclosing communications between senior Ministers of the day about the formulation and development of policy by the then government and that section 35(1)(b) of the Act is thus engaged. The exemption is qualified and the Commissioner has therefore considered whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the information.

Balance of the public interest in relation to section 35

14. The Commissioner expects public authorities to apply the public interest test robustly since the exemption protects the premature publication of ministerial communications whose disclosure would harm the public interest. However, not all ministerial communications will harm the public interest if they are disclosed and, in those cases, it will be difficult for authorities to justify withholding the information. In general terms, timely disclosure of information promotes accountability and transparency and can reassure the public. It can also further public understanding of the workings of the machinery of government and improve participation in the public debate of issues of the day. Greater openness has the potential to improve the quality of advice and debate by deterring the giving of advice, or the taking up of policy positions, which are specious or expedient. The public is already well aware that differences of opinion between ministers can arise so a timely disclosure of information can help to demonstrate that ministerial decisions have been made after a variety of views have been expressed and a robust debate has taken place. On the other hand, it is necessary sometimes to withhold information: to preserve collective responsibility, preventing high level government decisions from becoming personalised; and to allow ministers the space to be totally frank and candid in their discussions. The following paragraphs set out the Commissioner's detailed consideration of where he believes the balance of the public interest lies in this case, and his final decision.
15. The complainant told the Commissioner that it was in the public interest for the public to have access to greater understanding of the government's approach on this important historical issue, which had been a significant educational reform, and that the public should be allowed full insight into government thinking at the time. He said that there was no public interest in withholding it as the information he was seeking was between 18 and 23 years old; the material was entirely historical; and had no implications for current government policy. The public interest test conducted by DfES had been formulaic and had not taken into account the circumstances of the case. He said that DfES had made virtually no attempt to assess his particular case at all. He did not accept the DfES suggestion that ministers, officials or legal advisers - knowing that their views would become public in due course under the '30 years rule' - would be constrained now in what they said or did on account of the publication of material that was now so old and lacking in

- contemporary policy relevance. He concluded that DfES had offered no evidence of any kind to support withholding the information.
16. DfES told the Commissioner that questions relating to the disclosure of Cabinet papers and communications had government wide implications. DfES said that it had concluded that the public interest favoured withholding the information for the following reasons:
- protecting the space for frankness and candour in communications between Ministers about policy formulation was essential to good government. Without space to discuss options, the policy discussion could be distorted or watered down.
 - collective responsibility was a crucial and continuing component of Cabinet government. DfES did not agree that the public interest in withholding Cabinet papers and Ministerial communications necessarily, and in all cases, diminished over time (it did not do so in this case as there had been a change in policy). That remained the case even after a change of government, and even though more than 20 years had passed.
 - collective responsibility was particularly important in this case as the then government's initial policy was eventually abandoned and a total ban on corporal punishment in maintained schools was put in place. All the members of that government were then expected to defend a policy they had previously been repudiating.
 - all members of government must be taken to have collective responsibility to Parliament and to the public for policy. Otherwise the legitimacy of government decisions could not be ensured. DfES said that such legitimacy was of vital importance to the public interest and there was a consequent need for confidentiality. DfES added that disclosure which undermined the convention would change the way in which government functioned to the detriment of the policy-making process, which was not in the public interest.
 - this underlined the importance of protecting the policy debate without which there was a risk that government would be unable convincingly to put forward a united front and properly accept collective responsibility. DfES considered that there was a risk that Ministers might not express open and dissenting views if they believed that these might enter the public domain at a future date.
17. In reaching his decision the Commissioner has noted, and has applied to the facts of this case, the principles set out by the Information Tribunal in the *Evening Standard* case (see paragraph 9) to guide decisions about the balance of the public interest: of particular relevance are paragraphs 62 and 65 of the Tribunal's Decision. The central question determining the public interest in this, as in every case, is the content of the particular information in question.
18. In that context the Information Tribunal has decided, in the case of *Hogan (Hogan v Information Commissioner EA/2005/0026)*, that the passage of time has an important bearing on the balance of the public interest and that the public interest in preventing disclosure generally diminishes over time, an issue reinforced by the Tribunal's decision in the *Evening Standard* case

(paragraph 9 above), for example at paragraph 75(iv) of the Tribunal's Decision. That this was also the intention of Parliament is demonstrated by the fact that some of the exemptions in the Act cease to apply after specified periods of time. The Commissioner has seen from sections 62 and 63 of the Act that a record becomes an historical record 30 years after the year in which it was created and that an historical record cannot be exempt by virtue of section 35. The Commissioner does not accept that it will always be appropriate for a public authority to wait 30 years before disclosing information relating to Ministerial communications under the exemption at section 35 of the Act. Such an approach would have the effect of treating the exemption for ministerial communications as an absolute exemption. The Commissioner considers moreover that the public interest in withholding information will decline at different rates, depending on the facts of the individual case. In some cases, perhaps many, any public interest in withholding the information will have ceased well before 30 years have elapsed.

In this case the Commissioner has seen that the information withheld is some 20 years old and relates to a government and a Ministerial team that left office a considerable time ago. He regards the passage of time as having at the very least substantially weakened the DfES case for withholding the information.

19. The Commissioner recognises that maintaining the principle of collective responsibility among Ministers is key to Cabinet government. Underlying that principle is a recognition that, while collective responsibility requires Ministers to first agree a policy line and then promote it in public discussion and debate, there may be times when disagreements, even fundamental disagreements, can occur in private before a policy line is agreed. On the facts of the present case, a collective policy line was first settled and promulgated by the then Cabinet but, later on, was substantially changed. DfES referred to the importance of maintaining the effectiveness of the system of Cabinet collective responsibility, with frankness and candour in policy discussions, measured and developed decisions and proper record-keeping, and has put to the Commissioner the view that releasing any information about the policy formulation and development process that might expose any divisions there may or may not have been among the then ministerial team, would weaken the principle of their collective responsibility.
20. However since none of the then policy issues are matters of current political or policy debate, and since none of the then Ministers are, to the best of his knowledge, still in relevant positions in public life now, the Commissioner does not accept that argument. It is surely not, for example, the case that the principle of collective responsibility would be weakened by any release of information which made it clear that Cabinet Ministers might have disagreed with one another at some time or another: to suggest otherwise implies a rather low opinion of the public understanding of Cabinet Government,. He has seen that memoirs and diaries published by former Cabinet members themselves can appear to air past disagreements. Indeed the Commissioner believes that there are valuable insights into the workings of the machinery of government to be gained from enabling the public to be made aware of the then policy issues, of how they were debated, and of how the policy disagreements were resolved. He sees these as matters of proper public

interest and capable of adding value to current policy studies. He sees the new statutory powers, given to teachers from 1 April 2007, which allow them to use reasonable force to restrain or control unruly or disruptive pupils in class, as strengthening the public interest in disclosure.

21. The Commissioner follows the decision of the Information Tribunal in the *Evening Standard* case, already cited above and which was made in the context of section 35(1)(a) of the Act, in regarding the principal purpose of confidentiality as the protection from compromise or unjust opprobrium of civil servants, rather than Ministers. He again follows the Tribunal in not seeing unfairness in exposing an elected politician to challenge, after the event, for having supported or rejected a policy option, or for any changes of mind that might have taken place. So far as Ministers are concerned, the Commissioner sees the case for maintaining the confidentiality of their communications as being substantially weaker once elected politicians have left the relevant ministerial office or political life altogether, even weaker still when the issue that forms the subject matter of the policy is no longer a live one.
22. The Commissioner recognises and fully supports the importance of protecting the process of policy debate from unwanted influences during the process of policy formulation and development. Ministers and officials are entitled to time and space for candour in deliberation to enable them to hammer out policy and explore fully their policy options, assessing the likely consequences, and including any options that may be unpalatable in some respects. The principal risk that Ministers face is that of premature publicity for their views at a time when those views may still be in the process of being fashioned, and may be subject to revision. Once that process is complete, and even more so once the policy issues have ceased to be matters of public concern and the relevant Ministers have left office, the Commissioner sees no reason in principle for their views to receive further protection by virtue of the section 35 exemption. The Commissioner considered, but does not accept, the argument put to him that the possibility of an expression of view by a Minister or a senior official being exposed to the light of public scrutiny at some indefinite time in the future will inhibit the policy formulation and development process.
23. The Commissioner considered that, in the present case, the then government has left office, the then principal Ministers and senior officials have left public political life, and the then current policy issues have not been matters of live public debate for many years. He sees value for policy studies in furthering public understanding and debate of the policy making process by making more widely available details of how the policy debate was conducted and making plain how and why decisions were reached. The Commissioner does not see the public interest being best served by DfES continuing to withhold this information about ministerial communications under the section 35 exemption. His conclusion is that, in all the circumstances of this case, the public interest in maintaining the exemption does not outweigh the public interest in disclosure, leading to the decision that the information should be released.

Cabinet Committee paper

24. The Commissioner has noted that one document being withheld under this exemption is a paper submitted to a Cabinet Committee. Traditionally, the only information in the public domain regarding the Cabinet and its committees relates to membership and terms of reference. During his review of the practice of other public authorities, the Commissioner noted that the Parliamentary Ombudsman's powers to see documents do not extend to Cabinet or Cabinet committee papers. He has also noted the Cabinet Office guidance which says that papers concerning Cabinet or Cabinet committee proceedings are deemed to be classified and therefore not to be made public. However, although considerable caution is needed with recent and current Cabinet or Cabinet Committee papers, the Freedom of Information Act does not make any special provision for such papers. Moreover the current practice releasing Cabinet papers after 30 years acknowledges that their sensitivity decreases over time. He has seen that the boundaries have become further blurred in recent years by the increasing volume of memoirs and diaries published by former Cabinet members themselves.
25. The Commissioner has considered the relevant document in the light of the arguments he has set out above about the promotion of accountability and transparency and showing that decisions have been made after a variety of views have been expressed and a robust debate has occurred. He has taken into account: the age of the material; the need to respect ministerial collective responsibility; and the need to preserve space for Ministers and officials to be frank and candid in their discussions.
26. Having weighed all of these issues, the Commissioner's decision is that the balance of the public interest does not justify DfES withholding this document and that the relevant Cabinet committee paper should be included in the material to be released.

Section 42 – Legal and professional privilege

27. As regards the application of the exemption under section 42 of the Act, the maintenance of legal and professional privilege, the Commissioner accepts that the exemption is engaged in respect of the legal professional advice given to Ministers and officials as recorded in the DfES papers. So far as the balance of the public interest is concerned, the Commissioner is clear that the exemption is not absolute and that in some instances, for example where the legal advice is stale, the case for disclosure will be strengthened. However he recognises that there is a very strong public interest inherent in maintaining legal professional privilege. This recognition has been reinforced by the recent persuasive decisions from the Information Tribunal in the cases of *Shipton (Shipton v National Assembly of Wales (EA/2006/028))* and *Bellamy (Bellamy v Information Commissioner and the DTI (EA/2006/0023))*.
28. The Commissioner believes that, for the information to be released, there would need to be a countervailing public interest in favour of disclosure that was even more persuasive than the very strong public interest in maintaining

legal professional privilege. What this means in practice is that only in cases of exceptional public interest would there be an argument for releasing legal advice covered by this exemption. This is not, in the Commissioner's view, such a case. His decision is therefore that DfES acted correctly in maintaining the section 42 exemption in respect of the legal professional advice.

The Decision

29. The Commissioner's decision is that the public authority dealt with elements of the request correctly in accordance with the requirements of section 42 of the Act. However, the Commissioner also decided that those elements of the request refused under section 35(1)(b) were not dealt with correctly in accordance with the Act.

Steps Required

30. The Commissioner requires the public authority to release to the complainant the information wrongly withheld under section 35 to ensure compliance with the Act.
31. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

32. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

33. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

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

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 22nd day of May 2007

Signed

**Richard Thomas
Information Commissioner**

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

Legal annex

Freedom of Information Act 2000

Formulation of Government Policy, etc

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 for the provision of such advice, or
- (d) the operation of any Ministerial private office.

Legal Professional Privilege

Section 42(1) provides that –

“Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.”

Historical record

Section 62(1) provides that –

“For the purposes of this Part, a record becomes a "historical record" at the end of the period of thirty years beginning with the year following that in which it was created.”

Section 63(1) provides that –

“Information contained in a historical record cannot be exempt information by virtue of section 28, 30(1), 32, 33, 35, 36, 37(1)(a), 42 or 43.”