

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 October 2015

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

Decision (including any steps ordered)

1. On 9 December 2013 the Commissioner served a decision notice that found the Department for Education (DfE) had correctly withheld copies of the drafts of the national curriculum for history under the 'information relation to the development or formulation of government policy' (section 35(1)(a)) exemption in FOIA. Referencing the passage of time that had elapsed since that decision, the complainant in this case made a request for the same information and for any other documents from around the same time that would shed light on the public policy process. The DfE decided that section 35(1)(a) continued to apply but also considered that the information would engage the 'prejudice to the effective conduct of public affairs' (sections 36(2)(b) and (c)) exemptions in FOIA. With respect to each of the exemptions applied, the DfE exercised the public interest test and concluded that the public interest favoured withholding the information. The Commissioner considers that section 35(1)(a) of FOIA is engaged and that on balance the public interest favours maintaining the exemption. He does not therefore require any steps to be taken as a result of this notice.

Request and response

2. On 4 January 2015 the complainant contacted the DfE and with regard to proposals relating to a review of the history curriculum asked for "*the document I previously requested, plus any others from late-2012 / early-2013 that would shed light on that public policy process*". The

previous request referred to was submitted to the DfE in early 2013, which resulted in a complaint being made to the Information Commissioner and a decision notice being issued on 9 December 2013 under the reference FS50491842¹. This found that the DfE had been correct to refuse a copy of the draft history curriculum information under section 35(1)(a) of FOIA.

3. The DfE responded to the present request on 29 January 2015 and confirmed that it held the requested information. The DfE considered that the exemptions to disclosure in section 36(2) applied to the information but advised that it required additional time in which to exercise the public interest test. The DfE provided its findings in relation to the public interest test on 16 February 2015, deciding on balance that the public interest favoured maintaining the exemptions.
4. The complainant wrote to the DfE on 17 February 2015 with some queries relating to the response, including a request for clarification of the scope of the information that had been considered. These were addressed by the DfE on 10 March 2015, with the DfE confirming that both draft versions of the history curriculum *and* other documents relating to the draft versions had been taken into account.
5. The complainant replied to the DfE on 17 February 2015. He thanked the DfE for the clarification but also asked for the decision to refuse the request to be reconsidered. Among other points, the complainant argued that the DfE had not properly considered the possibility that the strength of the arguments for withholding the information had diminished with the passage of time. Accordingly, a review was completed and the outcome provided to the complainant by the DfE on 16 April 2015.
6. The DfE's review panel upheld the original decision not to disclose the requested information but revised the reasons for doing so. Following the approach adopted in respect of the earlier request for what was substantially the same information, the panel considered that the section 35(1)(a) exemption continued to apply and should have been considered first. The panel also decided, however, that the exemptions in section 36(2) would apply in the alternative. Regarding the public interest test attached to the exemptions, the panel found that the balance of the competing arguments effectively remained unchanged from the time of the earlier request and therefore the decision should stay with withholding the information.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2013/929584/fs_50491842.pdf

Scope of the case

7. The complainant contacted the Commissioner on 5 May 2015 to complain about the DfE's refusal to disclose the information relating to the drafting of the history curriculum. The Commissioner's analysis of the DfE's decision to withhold the requested information follows.

Reasons for decision

8. The DfE has informed the Commissioner that it is seeking to rely on sections 35(1)(a) and sections 36(2)(b) and (c) of FOIA to withhold the requested information. Section 35 and 36 are mutually exclusive, which means that if any part of section 35 is engaged, section 36 cannot apply – even if the public interest test results in disclosure under section 35. The Commissioner has initially considered the DfE's application of section 35(1)(a).

Background

9. The DfE has helpfully provided the Commissioner with a description of the background to the drafting of a new history curriculum. This is summarised below.
10. The DfE began a review of the national curriculum in January 2011. The DfE explains that the review was carried out internally by officials, with reference to external experts where appropriate. Public consultation exercises were carried out at key points in the review in order to secure wider feedback and, in particular, between February and April 2013 when the draft national curriculum was subject to a statutory consultation which attracted over 17,000 responses.
11. With regard to the consultation process, the DfE published a draft programme of study on 7 February 2013. Significant changes were then made to the programme in light of comments made as part of the consultation and a revised programme that was made publicly available on 8 July 2013. The statutory guidance for the history programme of study was published on 11 September 2013.
12. It would be fair to say that the drafting process relating to the programme of study has attracted some controversy. This stemmed from concerns that the new curriculum would be too restrictive in scope

and outmoded in respect of the way that history was taught. Evidence of these concerns were expressed by Yasmin Alibhai Brown on 10 February 2013 in an article in the Independent², which prompted a response from Elizabeth Truss on 14 February 2013, Parliamentary Under-Secretary of State at the DfE, in the same paper³.

13. The request considered in FS50491842 followed on from a report published by the Observer on 16 February 2013⁴. This stated that an adviser to the DfE on the curriculum had said the draft published earlier in the month had changed significantly from drafts that he and others had recently been working on. According to the piece, the adviser felt that the form the curriculum had taken on failed to provide children with the intended broad and balanced education.

Section 35(1)(a) – government policy

14. Section 35(1)(a) of FOIA states that information held by a government department, or by the National Assembly for Wales, is exempt information if it relates to the formulation or development of government policy.
15. Section 35 is a class-based exemption. This means that section 35(1)(a) will be engaged if the information relates to one of the activities – either the *formulation* or *development* of government policy – described in the exemption. Section 35(1)(a) is also qualified by the public interest test.
16. In his guidance⁵ on the exemption, the Commissioner explains that the purpose of section 35(1)(a) is to protect the integrity of the policy making process, and to prevent disclosure which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private (paragraph 23).
17. To support its position that section 35(1)(a) applies, the DfE has highlighted the Commissioner's previous acceptance that draft

² <http://www.independent.co.uk/voices/comment/pay-attention-michael-gove-this-is-the-british-history-we-really-need-to-learn-about-8488860.html>

³ <http://www.independent.co.uk/voices/comment/the-curriculum-we-are-introducing-captures-british-history-in-all-its-multilayered-omniracial-glory-8495659.html>

⁴ <http://www.theguardian.com/politics/2013/feb/16/historians-gove-curriculum>

⁵ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

curriculum information engaged the exemption and argued that the nature of the information, and the purposes for which it was created, cannot change. For completeness, the relevant parts of the decision notice issued under FS50491842 that refer to the Commissioner's findings on the application of section 35(1)(a) are reproduced below.

11. Quite clearly the requested information relates to the development of the national curriculum for history. The question is whether the development of the national curriculum is a matter of government policy.

12. There is no clear definition of what constitutes government policy making but in broad terms it can be seen as the process by which political ideas are turned into plans or programmes which aim to bring about a desired change. The review of the national curriculum is a means by which the government can bring about changes to the way pupils are taught with a view to improving educational standards. It forms part of the government's reforms of qualifications and the curriculum with the objective of better preparing pupils for life after school. The review was overseen by the Secretary of State for Education and it is understood that the proposed changes can only be introduced by statutory instruments. The Commissioner is therefore satisfied that the changes to the national curriculum for history are a matter of government policy.

13. It follows that the Commissioner is satisfied that the requested information does relate to government policy and that the exemption provided by section 35(1)(a) is engaged. However section 35 is subject to the public interest test.

18. Information that relates to the formulation or development of government policy will be covered by the exemption. The Commissioner accepts the DfE's position that the draft history curriculum information continues to be subject to the exemption as it still relates to the activities of formulating or developing government policy. In coming to this finding, the Commissioner has borne in mind that the present request is broader than the one in FS50491842 and encompasses supporting documents that have not previously had to be considered. However, the Commissioner is satisfied that, like the draft documents, this additional information fits squarely within the ambit of the exemption and particularly the development of government policy.
19. Where section 35(1)(a) is found to apply, the Commissioner must next consider the public interest test.

Public interest arguments in favour of disclosure

20. As referred to in the Background section of this notice, the applicant's request in FS50491842 was prompted by an article published by the Guardian on 16 February of that year⁶. This reported that an external advisor to the DfE on the curriculum had indicated that end product of the review process bore 'no resemblance' to drafts that had only recently been worked on. It was felt by the applicant that the drafts should be disclosed to provide reassurance that the history curriculum was not shaped by a political agenda but rather was the outcome of an objective assessment of the evidence base.
21. The complainant has cogently argued that the urgency of the requirement remains. He has pointed out that unlike other taught subjects, history relies on the available evidence after the event and is inevitably subject to interpretation. The way in which the curriculum is framed is therefore arguably more important than other subjects where facts can be objectively and observably re-created. There is no doubt that the curriculum represents a critical part of the educational process and the complainant considers it is precisely because of this importance that there is a clear and significant public interest in knowing how the curriculum evolved.
22. The complainant accepts that there may have been a stronger case for withholding the information in February 2013, the date of the request considered in FS50491842. This is because the consultation process relating to the curriculum had not been completed. In this regard the complainant recognises that a public authority will on occasion require 'safe space' in which to consider policy options away from the public glare. With the publication of the history curriculum, the complainant contends that this obstacle no longer exists.
23. More generally, the DfE has also acknowledged that greater transparency about the process may lead to better quality policy formulation and development, enhanced accountability, an improved standard of public debate and improved trust.

Public interest arguments in favour of withholding information

24. The DfE has introduced its public interest arguments for maintaining the exemption by referring the Commissioner back to his decision on FS50491842 and particular the findings on the effect that disclosure

⁶ <http://www.theguardian.com/politics/2013/feb/16/historians-gove-curriculum>

would have on the willingness of experts to contribute. The relevant extracts are quoted below.

30. In light of the above the Commissioner accepts that disclosing the draft curriculum would have a chilling effect on the policy making process, by inhibiting the contribution of external experts but also to a lesser degree undermining the willingness of ministers to share such drafts with those experts [...]"

[...]

37. [...] the arguments in favour of disclosure are limited to those relating to understanding the policy process better. In light of this the Commissioner finds that at the time of the request there was a public interest in not disclosing information that could place experts in the spotlight in such a way that individuals would be less willing fulfil that role in the future.

25. The DfE considers that the aforementioned chilling effect on the willingness of external experts to contribute persists beyond this iteration of the curriculum. Taking stock of the earlier decision (paragraph 29), the DfE accepts that individuals selected as experts are likely to be highly motivated to contribute to the debate but considers that this motivation is unlikely in many cases to extend to actions that could be injurious to his or her career.
26. The DfE considers that it is important to place the consequences of disclosure in context. The DfE explains that the drafting of the teaching programme was a high profile issue and differences in opinion about what this should contain would have been well known amongst academics in the field and those interested in the development of curriculum policy.
27. Albeit approaching the issue from a different angle, the DfE agrees with the complainant that developing a history programme of study is particularly challenging. This is because, unlike other subjects, there is little to draw on by way of international evidence. For a subject like history, there is considerable scope for altering the focus of a programme of study and there are often debates in the media about what a programme of work means culturally, with value judgements ascribed to particular points of view. Although the policy formulation stage had been completed with respect to the curriculum referred to in the request, the DfE considers that disclosure would mean that external experts dissenting from a direction of travel in policy will not do so in such candid terms in the future. This would in turn affect the quality of the decision making process.

Balance of the public interest

28. In the context of the public interest test, the Commissioner considers that the purpose of the exercise is to decide whether the value of the information to the public is sufficient to justify making information available to the wider world in the face of the harm that may arise as a result of the disclosure.
29. Education plays a vital role in society. Information relating to the development of decisions that shape what and how a subject should be taught will by its very nature attract significant public interest. This is particularly true of the drafting of a history programme of study, which incorporates a greater degree of value and judgement considerations than many other subjects. Although a broader consensus may not be reached on what should be taught as part of the curriculum, transparency of the process would at least allow the public to understand how a decision was reached about what should be included and equally omitted from the curriculum.
30. When deciding where the balance of the public interest lies, the Commissioner has found the consideration of two factors particularly instructive. Both of these return to the Commissioner's decision on FS504914842. In his determination on FS504914842, the Commissioner acknowledged the wider public interest in the disclosure of information concerning controversial policy options. He also found, however, that the requested drafts would not in themselves "reveal the debates or deliberations" (paragraph 34) that went into the production of the drafts. Insofar as the requested information would "only partially meet the objective of explaining the policy process", and accepting that there would be a chilling effect on the policy making process, the Commissioner concluded that the public interest favoured maintaining the exemption.
31. The Commissioner has observed that the request in the present case not only asks for the drafts referred to in FS504914842 but also includes any other documents that 'would shed light on the public policy process'. This extension of the request potentially modifies the weight of the public interest in disclosure, in that the supporting information could reveal the debates or deliberations that were not evident from the drafts. The second point, which goes back to the heart of the complainant's arguments, is the possibility that the circumstances of the case have changed sufficiently since the earlier decision that the public interest now favours disclosure. The Commissioner looks at each of these points in turn.
32. With regard to the information captured by the scope of the request, the Commissioner has had sight of all the withheld information identified by

the DfE. This documents the evolution of the programme of study leading up to the consultation period and information recording advice and recommendations given by parties involved in the process. The information itself only provides a relatively limited snapshot of the nature of the discussions. The Commissioner is satisfied nevertheless that there would be some value to the public inherent in disclosure.

33. The Commissioner has next gone on to the timing of the request. In the Commissioner's guidance on section 35, he makes the following observation with the regard to the application of the public interest test:

81. The exact timing of a request will be very important. If the information reveals details of policy options and the policy is still ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight.

34. Later on in the guidance the Commissioner goes on to say:

85. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.

35. In FS50491842 the request was made at a time when the proposal for the new curriculum on history had not been finalised and was still subject to change. The Commissioner considered that the need for safe space had to some extent diminished as the consultation phase on the programme of study had already started. He accepted though that the speculation arising from disclosure would not be helpful to the policy making process. This can be contrasted with the circumstances of the present case, where the request was made at a time when the policy making process had been completed some time before and the final version of the curriculum had been published. This would therefore appear to lend weight to the complainant's argument that the case for disclosure remained intact while the strength of the claim for withholding the information had weakened.

36. The DfE, however, considers this approach is overly simplistic. It has emphasised that the process for reviewing the curriculum has not changed. There are likely to be future revisions of the curriculum and the DfE anticipates following the same process. It argues that though the policy formulation of this iteration of the history curriculum is complete, the effectiveness and scope of that policy-making process is as much at risk of damage now as it was when this version of the history curriculum was underway.

37. To support this position, the DfE has drawn the Commissioner's attention to the decision of the First-tier Tribunal (Information Rights) on the *DfE v Information Commissioner* (EA/2014/0079, 28 January 2015⁷). This concerned the DfE's refusal to release the options and advice given to the Secretary of State about the termination of part of the Building Schools for the Future Programme. In that case, the policy-making process was also complete. However, the Tribunal considered this did not automatically remove all the weight from the public interest in favour of withholding information. The Tribunal said the following at paragraph 61 of the decision:

We have taken into account that the consultation process had been completed by the time of the Request and although this lessens the need for a safe space for the Government's decision in this case it does not necessarily lessen the chilling effect on future government conduct as explained by Mr McCully in his detailed evidence.

38. The Commissioner considers that the situation presented in EA/2014/0079 is not analogous to the present case and he must therefore make his own mind up on the severity of any chilling effect that could arise. He does though consider that the principle underpinning the Tribunal's view on the chilling effect does have some relevance.
39. There is little doubt that there remained at the time of the request a strong public interest in transparent Government because of the far-reaching effects that are generated by a programme of study incorporated into the national curriculum. He is also of the view, however, that some categories of information relating to the development of the policy are more essential for the purposes of encouraging constructive public debate than others.
40. The Commissioner considers that the system of consultation connected with the drafting of the programme of study was designed to allow third parties the opportunity to contribute to the process. In this regard it is noticeable that the final history curriculum differed markedly from the draft originally published in February 2013. The consultation mechanism meant there was a degree of transparency and accountability that might not be present in relation to other policy decisions.

⁷<http://www.informationtribunal.gov.uk/DBFiles/Decision/i1474/020%20280115%20Decision%20EA-2014-0079.pdf>

41. The Commissioner considers that a distinction can be drawn between information that records the substance of a decision at each stage of the decision-making process and information that records the procedure by which each decision was reached. In his view, the existence of the consultation exercise meant that the weight of the public interest in the latter category of information was less than the former and also less than it might otherwise have been if third parties had not had the opportunity to participate in the decision-making process.
42. The Commissioner considers that the implementation of the revised curriculum was a relatively recent event, even if a reasonable interval of time has now passed since the process was completed. In his view there is a real risk that disclosure in this situation would shift attention away from the substance of the decision-making and towards the contributors to the drafts of the programme of study. He accepts that officials and external experts should expect a reasonable level of scrutiny of their involvement in an important decision. The Commissioner also considers, however, that the scrutiny which would come from disclosure in this case would not be particularly helpful or constructive. Further, he has decided that there would be a chilling effect, in that parties asked to participate in important education reviews would be less likely to be as free and frank with their views.
43. The Commissioner has found that the weights of the respective arguments for and against the release of the information are finely balanced. Returning to the purpose of the public interest, however, he has ultimately found that the value of the information to the public is not sufficient to risk undermining the integrity of the policy making process as a result of the chilling effect. The Commissioner has therefore concluded that section 35(1)(a) of FOIA is engaged and that in all the circumstances the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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