

**Freedom of Information Act 2000 (FOIA)  
Environmental Information Regulations 2004 (EIR)**

**Decision notice**

**Date:** 30 July 2021

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

**Decision (including any steps ordered)**

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1. The complainant has requested any risk assessment related to the Department for Education's (DfE's) advice on face coverings in schools published in August 2020. The complainant also asked for the rationale behind the policy. The DfE refused the request on the basis of section 35(1)(a) of the FOIA.
2. The Commissioner's decision is that the DfE has correctly applied the section 35(1)(a) exemption and the public interest favours maintaining the exemption and withholding the information.

**Request and response**

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3. On 23 September 2020 the complainant made a request to the DfE in the following terms:

*"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."*
4. The DfE responded on 20 October 2020. It stated the requested information was being withheld under section 35(1)(a) of the FOIA and provided some arguments to support this.
5. The complainant requested an internal review of this decision on 23 October 2020. An internal review was conducted and the response sent to the complainant on 19 November 2020. The DfE upheld its decision to refuse to provide the requested information under section 35(1)(a) of the FOIA.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 22 November 2020 to complain about the way their request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld the information held in scope of the request on the basis of section 35(1)(a) of the FOIA.

### **Reasons for decision**

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

8. Section 35(1)(a) FOIA provides that:

*"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"*

9. Section 35 is a class based exemption, therefore if information falls within the description of a particular sub-section of 35(1) then this information will be exempt; there is no need for the public authority to demonstrate prejudice to these purposes.

10. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister or decision makers.
11. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
12. Whether information relates to the formulation or development of government policy is a judgement that needs to be made on a case by case basis, focussing on the content of the information in question and its context.
13. In its submissions to the Commissioner the DfE has explained that the requested information relates to a submission sent to ministers in August 2020. This set out the DfE's proposed policy position on face coverings and included an impact assessment on the potential impacts of wearing face coverings in schools.
14. The DfE has stated that its policy on face coverings has changed throughout the pandemic. Guidance on face coverings in education was first introduced by the DfE on 26 August 2020<sup>1</sup>. In October 2020 (after the date of this information request) the guidance was updated to reflect the local alert level framework announced by the government. In November 2020 new guidance was published on national restrictions which included revised advice on face coverings and, on 27 November 2020, the guidance was updated to reflect the local restriction tier system coming into place.
15. More recently, on 22 February 2021, the DfE published updated guidance to support the return to full attendance from 8 March, which included updated advice on face coverings and the recommendation that face coverings should now be worn in classrooms by those that attend settings in year 7 and above, unless social distancing can be maintained.
16. The DfE's position is that this guidance on face coverings usage in classrooms, and in all areas of settings for pupils, is currently subject to the roadmap process. The latest version of this guidance was updated on 6 April 2021. This reflected the DfE's position on face coverings, which it considers remains a 'live' policy issue, which is constantly under review and currently under development.

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<sup>1</sup> [\[Withdrawn\] Face coverings in education \(applies until Step 4\) - GOV.UK \(www.gov.uk\)](#)

17. In addition to this, the DfE points to the Department of Health and Social Care (DHSC)<sup>2</sup> leading a procurement exercise on the use of transparent masks. At the time of the request and the internal review these masks were being piloted. Due to the pilot being 'live' the DfE considered that to release the withheld information would have been likely to impact on its policy on transparent face coverings. The DfE has stressed that the DHSC's work on transparent face coverings is still ongoing and may impact future DfE guidance.
18. The DfE has explained to the Commissioner that since the request and internal review was completed its policy on transparent face coverings, as it thought, has continued to change. It has recently updated its guidance to advise that transparent face coverings can be worn. The DfE worked closely with the DHSC and Public Health England (PHE) to include this in its guidance, caveating this by including reference to the need for further work by PHE and the DHSC to understand the impact of transparent face masks further.
19. The DfE has further explained that there has been stakeholder interest in the policy area, with parliamentary questions and particular interest from the special educational needs and disabilities (SEND) sector relating to the impact that face coverings may have on children who, for example, rely on lip reading or clear sounds to communicate. The DfE states that additional evidence from this sector over time may lead to further policy changes in this area if it is felt there is more that can be done to support individual needs. As an example of this the DfE points to recent updates to its advice on supporting students with SEND that includes updated advice that clear face covering can be worn to assist communication with someone who relies on lip reading, clear sound or facial expression to communicate, and advice that face visors or shields can be used by those exempt from wearing a face covering in some circumstances.
20. 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.

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<sup>2</sup> [DHSC recognises the importance of transparent face masks to make communication easier - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/news/dhsc-recognises-the-importance-of-transparent-face-masks-to-make-communication-easier)

21. The Commissioner has viewed the withheld information that is relevant to this request and considers that the information directly relates to the development of government policy on face coverings in educational settings. The information includes an impact assessment on the potential impacts of wearing face coverings in schools and the Commissioner again considers this directly relates to the development of government policy.
22. It is clear to the Commissioner that this policy was actively being developed when the request was made. The guidance that is the subject of this request was published on 26 August 2020. At the time the request was received this was the most recently published advice from the DfE. This advice was then updated in October 2020 which the Commissioner notes was still during the internal review process of this request. It therefore seems apparent that the policy was under constant review by the DfE in response to the government's roadmap out of lockdown and in the face of further evidence and changes to the pandemic such as the emergence of new variants.
23. The Commissioner is therefore satisfied that the withheld information relates to the development of government policy on face coverings in educational settings as it was information provided to ministers to assist in making a decision on this. The policy was 'live' as it was under review and subject to future alterations as the situation changed and new evidence emerged. As such the Commissioner considers the exemption has been correctly engaged.
24. Section 35 is a qualified exemption and therefore the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 35(1)(a) outweighs the public interest in disclosing the information.

*Public interest arguments in favour of disclosure*

25. The DfE recognises that the information in this case covers part of the decision-making process that informed its initial position on the use of face coverings in education settings. The DfE acknowledges this is a topic that has drawn significant interest from parents, pupils, schools, teachers and the media and that releasing this information would provide greater transparency of the decision to recommend the use of face coverings in education settings and this in turn would add to the public debate.
26. The DfE also accepts that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust. There is a general public interest in disclosure of information to the public, to demonstrate the openness and

transparency of government. This is particularly the case when considering evidence around the implementation of government policy.

27. The DfE has also taken into account there is significant public interest in government's response to the pandemic, including the provision of education and the safety of children and staff during the different phases of the pandemic.
28. The complainant did not consider the DfE had provided any reasonable explanation to explain why it was not in the public interest to disclose the details of how they concluded the potential risks of their recommendations would outweigh the benefits. The complainant highlighted that at the time of the request the advisory Committee on Dangerous Pathogens was of the opinion that Covid-19 should no longer be classified as a high consequence infectious disease (HCID).
29. The complainant further argued that it is in the public interest to know if there was more information considered, including advice from government advisors. The complainant stated that the DfE guidelines gave discretion to headteachers to make masks mandatory areas of their school for children aged 11+. The complainant argued that disclosure of the information would identify the range and depth of advice and information sourced to robustly support the decision-making process and withstand scrutiny.

*Public interest arguments in favour of withholding the information*

30. The DfE has stated that it is committed to transparency and as such has placed information in the public domain. The DfE has provided the Commissioner with links to several sources which demonstrate that ministers have answered parliamentary questions on face coverings and reasonable adjustments for disabled students and other related subjects. Most of the links provided by the DfE relate to information placed in the public domain since the request was made but the Commissioner accepts it does demonstrate the DfE is attempting to be transparent where it deems it appropriate.
31. The DfE has also pointed to the guidance it has produced on the impact of Covid-19 on educational settings<sup>3</sup>, which include the use of face

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<sup>3</sup> [Actions for schools during the coronavirus outbreak - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/actions-for-schools-during-the-coronavirus-outbreak)

[Actions for FE colleges and providers during the coronavirus outbreak - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/collections/actions-for-fe-colleges-and-providers-during-the-coronavirus-outbreak)

coverings by staff and pupils. The DfE considers, as well as demonstrating its commitment to transparency, this also show that policy making on face coverings was ongoing with the guidance being subject to change, for example the 'Face coverings in Education' guidance was published on 26 August 2020 and the most recent version published on 6 April 2021. This guidance has been updated seven times so far based on wider policy changes and the DfE anticipates it will continue to change based on a number of factors such as the need to keep any guidance in line with the Covid-19 alert level framework, national restrictions, local restrictions, and updated advice on reasonable adjustments.

32. The DfE has stated that its policy is based on evidence and public health advice from other government departments, including the DHSC and PHE and the evidence base relating to the transmission of Covid-19 changes at a faster pace in comparison to other policy areas. As such releasing the information in question would heighten the possibility of having out-of-date evidence used for policy making decisions in the public domain. The DfE argues this may dilute the free, frank and candid nature of any future advice which could in turn create confusion for schools, staff, parents and pupils.
33. The DfE considers any confusion or uncertainty must be avoided, giving the devastating impact the virus can have. It is therefore essential that only the latest advice and guidance is in the public domain, to help safeguard students and staff, as well as the broader community and population.
34. The DfE has provided the Commissioner with some additional arguments which cannot be included in the decision notice as they describe parts of the withheld information. However, the Commissioner considers they specifically evidence parts of the information that show the transient nature of the advice.
35. The DfE further argues that its face coverings policy is one element of the control measures that should be implemented in education setting to reduce the risk of transmission. Releasing this information without that of the other policies which are in part owned by separate departments including PHE and the DHSC, would likely lead to further confusion across the sector. The DfE considers that any confusion created through



the release of this information, when compared to the latest available advice and guidance cannot be in the public interest.

36. The DfE accepts that in some instances, the public interest in continuing to withhold information will reduce after the policy and formulation stage is complete. However, the DfE considers it has demonstrated that this policy has been developed and changed in line with the latest evidence, advice and scientific guidance available. The DfE therefore does not believe that the public interest in withholding has diminished at all, and that release of this information has the potential to inflict damage on this 'live' policy, and the overall policy-making process.
37. The DfE states that its focus is on allowing children to safely access education during this pandemic, as well as allowing their parents to safely return to work. As it develops policy based on the latest advice, evidence and facts, as well as the outcomes of evidence-based trial periods, in association with the latest evidence available, this ultimately shapes the policy that the DfE is committed to delivering, and provides evidence which ministers eventually rely on in order to inform their policy decisions. It is critical that their understanding of policy implementation, delivery and impact at grassroots level, and the consideration of policy options and the implications of its delivery, is not hampered by previously considered evidence being used to develop live and future policy, being prematurely released into the public domain.
38. The DfE therefore argues that to release the withheld advice is likely to have a prejudicial impact on the development of this policy, as release could influence the behaviours, reactions and responses of the key stakeholders affected by the policy, as well as cause undue confusion for parents, pupils and the school workforce.



39. To potentially cause confusion on what face coverings are/are not appropriate in educational settings is not in the public interest. Any such confusion could also further exacerbate the distress and anxiety of some SEND pupils, where impromptu changes to their routine has a direct impact upon their wellbeing and potentially their behaviour.
40. The DfE argues that it must have a safe space in which to consider all evidence and findings and compare and contrast not only the latest evidence and advice but also previous evidence and advice provided to ministers. This is a high-profile police and the DfE considers it essential that all evidence and findings, past and present, can be considered freely and frankly within a safe space, when making further changes to the policy around face coverings in educational settings.
41. The DfE states that work is currently ongoing on forward planning for controls informed by PHE advice and stakeholder feedback. In particular, the DfE at the time of responding to the Commissioner was in the process of working with the Cabinet Office to understand the relaxing of the restrictions and the specific circumstances of the education setting. The DfE maintains a safe space is needed to balance these considerations when planning for any future policy changes to the system of controls, including the policy on face coverings.
42. Lastly, the DfE argues that good government depends on good decision-making and this need to be based on the best advice available and a full consideration of the options. Without protecting this safe space and the ability for ministers and officials to received unbiased evidence and findings from DfE official and associated experts, there is likely to be a corrosive effect on the conduct of good government with a risk that policy and decision-making will become poorer. This would not be in the public interest, particularly where policy is dealing with significant issues such as the pandemic.

*Balance of the public interest arguments*

43. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures 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.
44. The Commissioner accepts there is a general public interest in openness and transparency. She also accepts there is a significant public interest in all matters surrounding the pandemic and how the government reached decisions. This will extend to understanding how individual government department developed policy on specific areas and the information in this case would go some way to increasing the public's

understanding of how the DfE determined its position, at the time of the request.

45. The Commissioner is mindful there is no inherent or automatic public interest in withholding information that falls within the section 35 exemption. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. 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.
46. At the time of the request the pandemic was far from over and government policies relating to public health measures that were in place or may need to be amended would naturally be kept under review and in development. The policy in question remained 'live' due to emerging scientific evidence and understanding of the impacts on pupils.
47. The Commissioner gives weight to the argument that disclosure would harm the effectiveness of the policy itself as it continues to evolve and change. The information reveals details of the thinking at the time, based on the evidence available, and the Commissioner accepts the policy process is still ongoing.
48. The safe space arguments therefore carry significant weight; there is a need for ministers and officials to be able to discuss and debate and consider the most recent advice and evidence in a candid, free and frank manner. There is a public interest in preserving this safe space and given the fast-changing environment this policy was being developed in the safe space arguments carry significant weight as ministers needed to be able to make decisive decisions based on consideration of all evidence and advice, including previous advice and policy positions.
49. The timing of the request is also relevant in this case. The policy on face coverings in educational settings was still relatively new and was clearly still being developed as the effects of the initial advice were collated and evaluated, alongside changing scientific evidence. The Commissioner accepts this gives weight to the argument 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.
50. Taking all of the above into account, the Commissioner is satisfied that there remains a need for an appropriate degree of safe space within which to develop ideas and consider policy issues away from external

interference and distraction and to protect the policy and the formulation/development process.

51. In the Commissioner's view, disclosure of the withheld information presents a significant risk of undermining the confidential space needed by the DfE to discuss policy making in this area, and moreover presents a genuine risk of encroaching on the candour of any future discussions in respect of such policy making.
52. She has therefore concluded that, in all the circumstances of this case, the public interest in maintaining the exemption is stronger than that in disclosing the information. The Commissioner's decision is that the DfE was entitled to apply section 35(1)(a) of the FOIA to withhold the requested information.

## Right of appeal

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53. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

54. 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.
55. 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 .....**

**Jill Hulley**  
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