

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 November 2022

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

Decision (including any steps ordered)

1. The complainant has requested information about guidance on elective home education. The Department for Education (DfE) withheld the information under sections 36(2)(b)(ii), 36(2)(c), 40(2) and 42(1) of FOIA. These exemptions concern prejudice to the effective conduct of public affairs, personal data and legal professional privilege respectively.
2. The Commissioner's decision is as follows:
 - At the time of the request DfE correctly applied section 36(2)(b)(ii) of FOIA to the information it withheld and the public interest favoured maintaining the exemption.
3. The Commissioner does not require DfE to take any corrective steps.

Background and context

4. In its submission to the Commissioner, DfE has provided the following background and context.
5. It is the Government's position that parents have a right to educate their children at home and must provide a suitable full-time education if the child is of compulsory school age. Local authorities (LAs) are responsible for ensuring all children in their area are receiving a safe

and suitable education. To support parents and children who may be considering or have already withdrawn their child from school for elective home education (EHE), the Government remains committed to a registration system for children not in school.

6. The Government issued a call for evidence on EHE in April 2018 and a consultation on Children Not in School in April 2019. Alongside this consultation and call for evidence, DfE also consulted on content for a revised version of the existing DfE-issued EHE guidance for LAs and parents/carers. This led to the publication of updated guidance in April 2019. The revised guidance strengthened expectations around the steps that LAs should take when determining whether a child receiving EHE is getting a suitable education.
7. There is a strong and passionate lobby for EHE, and they are often at odds with existing policy. Responses to the call for evidence in 2018 were split between EHE parents and LAs, with parents tending to view any proposal that could be perceived to enable undue monitoring or interference by LAs as unwelcome and an intrusion of their right to home educate their child. LAs welcomed the proposal, including the revised guidance, as a means by which to strengthen and apply their safeguarding obligations.
8. In particular, there are opposing views between EHE parents and LAs in relation to the latter's application of its duties under the 2019 guidance to assess whether EHE children are receiving a suitable education. One group of EHE parents issued judicial review proceedings against Portsmouth City Council, which was heard in October 2021 and decided in favour of the Council. There was strong interest in that case from parents and groups nationwide. The result was poorly received by them in the face of their experiences in dealing with LAs. It exacerbated their concerns about the effect the case could have on EHE policies and the existing guidance referred to above. Groups on all sides have a keen interest in EHE policy and will be quick to latch onto any information published about it.
9. In July 2021, the Education Select Committee published its report into EHE and made several recommendations for changes to DfE guidance and policy in this area. Evidence was taken from many home-educating parents as well as LA and public figures. The report's recommendations triggered many comments from LAs and EHE parents over the course of the summer, as well as several Freedom of Information requests to the department. These were dealt with in accordance with normal procedures.
10. From May 2022, the Schools Bill has been progressing through the House of Lords. The Bill contains the Children Not in School measures which seek to create statutory registers in LAs in addition to a duty on

LAs to provide support to home educators. At this time, the Schools Bill is being reviewed along with all current legislation in light of changes to Prime Ministers.

Request and response

11. On 25 August 2021 the complainant wrote to DfE and requested information in the following terms:

"I am requesting documentation relating to the drafting and publication of "Elective home education Departmental guidance for local authorities April 2019" ("the guidance").

The following would be examples of such documentation:

- (3a) Any drafts of the guidance that differ from the published version.
- (3b) Any e-mails in which a draft of the guidance is attached or otherwise referenced.
- (3c) Any other form of electronic communication referencing a draft of the guidance.
- (3d) Any record of written comments on a draft of the guidance (for instance a scanned image that includes hand-written comments).
- (3e) Any record of instructions or advice sent to the author or authors of the guidance relating to the guidance."

12. On 5 November 2021 DfE responded. It withheld the requested information under section 36(2)(b)(ii) and section 36(2)(c) of FOIA. DfE also advised that some of the requested information is exempt under section 40(2) and that some information is exempt under section 42.
13. The complainant requested an internal review on 5 November 2021, seeking clarification and putting forward arguments to support their view that the withheld information should be disclosed.
14. DfE provided an internal review on 9 December 2021. It maintained its position but clarified that it considered that the prejudice envisioned under section 36(2) would be likely to occur, rather than would occur.

Scope of the case

15. The complainant contacted the Commissioner on 4 January 2022 to complain about the way their request for information had been handled.

16. The Commissioner's investigation has focussed on DfE's application of section 36(2)(b)(ii) of FOIA to the request and the balance of the public interest. If necessary, he will consider DfE's application of section 36(2)(c) and/or section 40(2) and/or section 42(1).

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

17. Section 36 of FOIA is an exemption that differs from all other prejudice exemptions in that, in most cases, the judgement about prejudice must be made by the legally authorised, qualified person for that public authority.
18. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person (QP) considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
19. DfE has provided the Commissioner with a sample copy of the information it is withholding, which he has reviewed: two different versions of the draft EHE guidance document ('the guidance'). DfE says that there are a total of 55 documents in scope of the request. These comprise 12 versions of the draft guidance prior to the consultation version being published, and 43 versions prepared once the consultation had closed. DfE confirmed it was content to send all these versions to the Commissioner if he considered he needed to see them all. The Commissioner did not.

Section 36(2)(b) – prejudice to the exchange of views

20. Section 36(2)(b)(ii) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information would prejudice, or would be likely to prejudice, the exchange of views.
21. To determine, first, whether DfE correctly applied this exemption, the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
22. Therefore, in order to establish whether the exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.

23. In this case, the QP was Baroness Barran MBE, at September 2021 the Parliamentary Under Secretary of State and Minister for the School System. The Commissioner is satisfied that, under sub-section 36(5)(a) of FOIA, Baroness Barran was an appropriate QP at the time of the request.
24. DfE has provided the Commissioner with copies of two submissions it sent to the QP; the first dated 23 September 2021 and the second dated 7 October 2022. DfE explained to the Commissioner that the second submission to the QP was necessary as it became apparent that the first submission had incorrectly cited section 36(2)(b)(i) (which concerns the provision of advice) and not 36(2)(b)(ii).
25. The submissions seek the QP's opinion on DfE's proposed approach to the complainant's request. Both submissions discuss section 36(2)(c) and the second also discusses section 36(2)(b)(ii).
26. The QP submission of 7 October 2022 shows that the QP confirmed that, in her opinion, disclosing the withheld information would be likely to have the effect set out under both section 36(2)(b)(ii) and section 36(c). The Commissioner is therefore satisfied that an opinion was given by the QP.
27. The request was submitted on 25 August 2021 and DfE provided its internal review on 9 December 2021. The first QP submission is dated 23 September 2021 but is not signed or dated. The QP's opinion in the second submission is signed and dated 14 October 2022.
28. DfE's confusion with the QP's submissions is regrettable; the first submission is dated appropriately but cites an incorrect exemption and the version provided to the Commissioner is not signed or dated. The second submission cites the correct exemptions and is signed and dated by the QP but the opinion was given, in effect, 10 months after DfE's internal review response.
29. Despite the shortcomings in the QP's submission(s), considered in the round and because of the connection between sections 36(2)(b)(i) and 36(2)(b)(ii), the Commissioner will accept on this occasion that the QP gave an opinion about section 36(2)(b)(ii) at an appropriate time.
30. The Commissioner has gone on to consider whether the opinion regarding section 36(2)(b)(ii) is reasonable. It is important to note that 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion.

31. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
32. The QP's opinion in this case is that the prejudice envisioned under the section 36(2)(b)(ii) exemption would be likely to occur if DfE disclosed the withheld information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
33. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in public authority's interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
34. In the later submission it provided to the QP, DfE included: a background to, and copy of, the request, a description of the section 36(2)(b)(ii) exemption, reasoning as to why the information should be withheld under that exemption and a recommendation. DfE explained why disclosing the information being withheld could prejudice the exchange of views. This was because it expected the guidance to be reviewed periodically and disclosure could prejudice the safe space it would have to review this information prior to updates being released. DfE considered that parties involved in this process (both ministers and officials) would be less likely to be as free and frank with their views as part of the process of discussion and deliberation in the future.
35. DfE also advised that the material contains draft versions of the EHE guidance as it is being discussed between officials and private office. Candid views are expressed, questions are raised and officials use the drafting process to discuss the implications of including particular statements within the guidance, and how certain elements could be perceived by home educators. DfE considered that the sensitivity of this policy area meant that government documents are always open for misconstruction or misinterpretation. It considered it would be detrimental to DfE's efforts to build good working relationships with home educators and LAs if officials' draft comments are scrutinised to such a degree in order to find fault with the policy discussions and intentions prior to final drafts of such guidance being released. Opening these drafts to public scrutiny would be likely to discourage, or certainly dilute, the views presented by officials when free and frank discussions are taking place, and views are being shared for the purposes of deliberation, during the development of policy and guidance. This would inhibit the quality of that policy and undermine working relationships.

36. The Commissioner is satisfied that the QP had sufficient appropriate information about the request and the section 36(2)(b)(ii) exemption to form an opinion on the matter of whether reliance on that exemption with regard to the withheld information was appropriate.
37. The Commissioner has noted the evidence at paragraph 34 and 35 and, since he is satisfied that the remaining points at paragraph 22 have also been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that DfE was entitled to rely on section 36(2)(b)(ii) to withhold the information. The Commissioner will go on to consider the public interest test associated with that exemption.

Public interest test

Public interest in disclosing the information

38. DfE has presented the following arguments:
- Releasing the information could enhance scrutiny of DfE's drafting processes when developing key departmental guidance, and therefore provide transparency and accountability.
 - There is a public interest in how effectively the department drafts and provides guidance to the sector, in this instance LAs and parents involved in EHE, to ensure the best guidance can be made available.

Public interest in maintaining the exemption

39. DfE has presented the following arguments:
- DfE officials must have confidence that they can share views with one another. There must be an opportunity to understand and, where appropriate, challenge each other's views and opinions etc as part of a process of deliberation during the drafting process. The withheld information contains some frank comments regarding the clarity and, at times, accuracy of some of the statements being made within the draft versions of this guidance. It is essential, as part of this process, to 'iron out' any confusion, inaccuracies or discrepancies, so as to provide the sector with the clearest and most accurate guidance possible.
 - This is in the context of DfE requiring candid views, opinions and advice to be provided in draft versions of such guidance, to allow officials to come to a consensus during this process. If DfE is required to put this information into the public domain, officials would be likely to be inhibited from providing such fully free and frank views when considering such drafts. This in turn would have

a negative impact on its ability to deliver clear and accurate guidance to the sector. This would have a particularly negative impact on the drafting and clearance of such guidance should DfE's lawyers feel inhibited in providing free and frank advice for DfE officials to deliberate prior to agreeing the final draft.

- Disclosing the information would be likely to remove the space within which officials are able to discuss the clarity, accuracy and legality of statements made within the draft guidance. Officials would also be more likely to dilute any recorded versions of their views/opinions and advice if they were concerned that this would make it into the public domain. This would possibly jeopardise the clarity and impact of final drafts of such guidance once released.
- DfE believes that to jeopardise a drafting process which aims to ensure accuracy and clarity, so that the sector has access to the best and most accurate (in terms of policy and legality) final versions of the guidance on EHE available, would not be in the public interest.

Balance of the public interest

40. As is usual, the Commissioner will consider the circumstances as they were at the time of the request in August 2021 and up to the internal review in December 2021.
41. At that point the EHE guidance that is the subject of the request had been published for 12 years and had last been updated approximately two years previously, in April 2019. DfE was in the process of reviewing the guidance again in response to the Education Select Committee findings in July 2021. As such, the matter of the EHE guidance review was still 'live' at the time of the request. The Commissioner understands no updated guidance had been finalised or published, at that point or at the date of this notice.
42. DfE's submission has indicated that there exists a strong interest in, and strength of feeling, about elective home education and in DfE's guidance on that matter. The Commissioner accepts that the subject is somewhat contentious. He also accepts that those re-drafting and reviewing the guidance would be likely to feel less willing to exchange views freely and frankly if draft versions of the guidance and communications about the re-drafting were disclosed to the public while the process of finalising the guidance was ongoing.
43. The Commissioner acknowledges the public interest in transparent decision-making and, to that end, has noted that DfE has consulted with home educators, LAs and public figures on the matter of home education and the guidance.

44. In this case, however, the Commissioner considers that at the time of the request, and while the guidance review remains ongoing, there is greater public interest in officials feeling able to discuss revisions to the guidance openly. This is more likely to result in the final version of the guidance being prepared efficiently and as quickly as possible, and in that updated guidance being accurate and clear. The content of the final version of the guidance is more important, in the Commissioner's view, than the drafting process that led to it.
43. On balance therefore, the Commissioner finds the public interest favoured maintaining the section 36(2)(b)(ii) exemption. The Commissioner has decided that DfE correctly applied section 36(2)(b)(ii) to the withheld information is exempt and that the public interest favoured maintaining the exemption. As such, it has not been necessary to consider DfE's application of the remaining exemptions.

Right of appeal

45. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. 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

Cressida Woodall
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