

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested the Department for Education (DfE) to disclose correspondence with the Home Office over the last six months relating to its plans to create a register of children not in school. The DfE disclosed some information but refused to disclose the remainder, citing sections 35(1)(a), 35(1)(b) and 42 of FOIA.
2. The Commissioner's decision is that the DfE is entitled to rely on section 35(1)(a) of the FOIA in this case. He therefore does not require any further action to be taken.

Request and response

3. On 7 June 2022, the complainant wrote to the DfE and requested information in the following terms:

"I would like to request copies of all correspondence from the last six months between the Department for Education and the Home Office about plans to create a register of children not in education."
4. The DfE responded on 14 July 2022. It disclosed some information but withheld the remainder, citing sections 35(1)(a), 35(1)(b) and 42 of FOIA.
5. The complainant requested an internal review on 14 July 2022.

6. The DfE carried out an internal review and notified the complainant of its findings on 1 August 2022.

Scope of the case

7. The complainant contacted the Commissioner on 4 August 2022 to complain about the way his request for information had been handled. The complainant does not believe the exemptions cited can apply to all remaining withheld information and where they do, there will be a strong public interest argument in favour of disclosure.
8. The Commissioner has proceeded straight to a decision notice without sight of the withheld information. He does not consider it is necessary in this particular case to see it to make a decision. He has only considered section 35(1)(a), as he has reached the conclusion that this applies to all remaining withheld information. The next section of this decision notice will explain why.

Reasons for decision

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

9. Section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates to the formulation or development of government policy.
10. The Commissioner's guidance 'Section 35 – Government Policy'¹ states '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.'
11. Section 35 is a class-based exemption; this means that information simply has to relate to the formulation or development of government policy; there is no requirement for disclosure to prejudice either of those policy processes.

¹ [government-policy-foi-section-35-guidance.pdf \(ico.org.uk\)](https://ico.org.uk/government/policy-foi-section-35-guidance.pdf)

12. Section 35 only applies to central government departments, such as the DfE. It is also a qualified exemption and therefore subject to the public interest test.
13. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. Information does not have to contain policy options, advice or decisions; any significant link between the information and the formulation or development of government policy is sufficient.
14. The Commissioner is aware that the plans to create a register of children not in education is part of the Schools Bill, currently making its way through Parliament. As detailed in paragraph 45 of the Commissioner's guidance, in such cases, policy formulation can continue all the way up to the point the bill finally receives royal assent and becomes legislation. He is therefore satisfied that all the remaining withheld information 'relates to' the formulation and development of government policy and therefore section 35(1)(a) is engaged.

Public interest test

15. The DfE outlined clearly the arguments for and against disclosure in its refusal notice to the complainant. It acknowledged that disclosure would increase public knowledge of how government works and takes decisions, as well as how government policy evolves. It recognised that plans to introduce a register of children not in school forms part of the Schools Bill currently making its way through Parliament and this will likely have an impact on certain groups and individuals, which heightens the public interest in disclosure.
16. That being said, the DfE considers there is a powerful public interest in allowing and preserving the self-contained space that is needed to formulate and develop government policy. Without protecting the thinking space and the ability for ministers and officials to exchange free and frank advice or views, there is likely to be a corrosive effect on the conduct of good government, with a risk that decision making will become poorer and recorded inadequately.
17. The Commissioner acknowledges the compelling public interest arguments on both sides. There is clearly a significant public interest in the potential creation of a register for children not in school and the wider impacts of the proposed Schools Bill. The policy will have a significant impact on certain groups and individuals across the UK and there is a real and significant interest in understanding what has been proposed, why and on what basis.

18. However, considering the circumstances at the time of the request, the fact that the Schools Bill is still making its way through Parliament and therefore considered to still be in the formulation and development phase, the Commissioner considers the public interest rests in maintaining the exemption. The Commissioner considers in this case there is a stronger public interest in ensuring that the formulation and development of government policy takes place effectively and officials and ministers are permitted the safe space to ensure that this is done well without the fear and premature intrusion of the public.
19. As the Commissioner is satisfied that section 35(1)(a) applies to all remaining withheld information, there is no need to go on to consider the other exemptions cited by the DfE.

Right of appeal

20. 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

21. 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.
22. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF