

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 March 2023

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

Decision (including any steps ordered)

1. The complainant has requested copies of any formal applications made to Her Majesty's Treasury (HMT) for catch-up funding. The Department for Education (DfE) refused the request under section 35 of FOIA.
2. The Commissioner's decision is that the DfE has correctly applied the exemption and the public interest lies in withholding the information.
3. The Commissioner does not require the DfE to take any steps as a result of this decision notice.

Request and response

4. On 1 October 2021, the complainant made the following request for information under FOIA:

"Full copies of any formal applications made to Her Majesty's Treasury for catch-up funding."
5. The DfE responded on 29 October 2021 and refused to provide the requested information, citing section 35(1)(a) (formulation of government policy), and section 35(1)(b) (ministerial communications) as its bases for doing so.

6. The complainant wrote to the DfE on 2 November 2021, requesting an internal review of its decision to withhold the requested information.
7. The DfE provided the outcome of its internal review on 25 November 2021, maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 26 November 2021 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to consider whether the DfE can withhold the requested information under section 35 of FOIA.

Reasons for decision

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

10. Section 35(1)(a) of FOIA provides an exemption from the duty to disclose information to the extent that it requires the disclosure of information relating to the formulation and development of government policy. The Commissioner understands 'formulation' to broadly refer to the design of new policy, and 'development' to the process of reviewing or improving existing policy.
11. The purpose of subsection 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 policy options in private.
12. The exemption is class based and so it is only necessary for the withheld information to 'relate to' the formulation or development of government policy for the exemption to be engaged – there is no need to consider its sensitivity. However, the exemption is subject to a public interest test.
13. In accordance with the Tribunal decision in *DfES v Information Commissioner and the Evening Standard* (EA/2006/0006, 19 February 2007), the term 'relates to' is interpreted broadly. Any significant link between the information and the process by which government either formulates or develops its policy will be sufficient to engage the exemption.

14. The DfE considers the withheld information directly relates to the development of government policies that are undergoing active development.
15. The DfE is of the view that it is almost impossible to separate catch-up funding from the wider policies of the department. This is because the catch-up funding and the thinking behind how this funding will be utilised touches on policy development across the department's portfolio. It argued that the catch-up funding amounts agreed by HMT for specific policy areas and recovery policies/programmes will have a direct impact on what can be delivered via these policies and therefore directly impact the development of these policies prior to delivery.
16. The Commissioner is unable to set out further arguments provided by the DfE because to do so would involve specific reference to the content of the withheld information.
17. Having considered the withheld information and DfE's explanation of specific detail, the Commissioner is satisfied that it clearly comprises information relating to the formulation or development of government policy. The Commissioner is satisfied that the exemption at section 35(1)(a) has been correctly applied by the DfE.
18. Turning to the public interest in the information, the DfE accepts that there is a general public interest in disclosure. Releasing the withheld information could increase access to information held by the department and allow assessment of the quality of information being used in policy making. This can lead to more informed debate and increased trust in the quality of decisions. It could also provide greater transparency around the policy and decision-making processes about education recovery in the lead up to the spending review and any future fiscal events.
19. Conversely, it is in the public interest that the formulation of government policy and government decision making can proceed in the self-contained space needed to ensure that it is done well. Government needs space in which to develop ideas, debate live issues and make decisions without external pressure or interference, which disclosure of this information could cause. This would likely lead to poorer quality decisions and closing off of better options.
20. DfE has provided more detailed arguments as to why disclosure would not be in the public interest. However, the Commissioner is unable to set out the detail of these arguments because to do so would involve specific reference to the content of the withheld information.

The Commissioner's conclusion

21. The Commissioner accepts that there is a general public interest in openness and transparency. He also accepts that there is a more specific public interest in education recovery policy following the Covid-19 pandemic. This will extend to understanding how the DfE developed policy on specific areas, and the requested information in this case would go some way to increasing the public's understanding of how the DfE formulated its position.
22. The Commissioner is mindful that 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.
23. However, in this case, the Commissioner gives weight to the argument that disclosure would harm the effectiveness of the policy itself as it continues to evolve and change as the recovery rolls out.
24. 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 evidence in a candid, free and frank manner. There is a public interest in preserving this safe space.
25. The education recovery is still live, and, at the time of the request, there were areas still under consideration and therefore still to be discussed and evaluated. The Commissioner accepts that this gives weight to the argument that it is not in the public interest to disclose information while the issues are still live and under review.
26. 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.
27. The Commissioner therefore concludes that section 35(1)(a) is engaged in this case, and the public interest favours withholding the requested information.

Right of appeal

28. 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

29. 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.
30. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF