

FREEDOM OF INFORMATION ACT 2000 (SECTION 50)

DECISION NOTICE

Dated 4th January 2006

Name of Public Authority: Department for Education and Skills

Address of Public Authority: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Nature of Complaint

The Information Commissioner (the "Commissioner") has received a complaint which states that on the 4th January 2005 the following information was requested from the Department for Education and Skills (the "DfES") under section 1 of the Freedom of Information Act 2000 (the "Act"):

"all minutes of senior management meetings at the Department for Education and Skills from June 2002 to June 2003 regarding the setting of school budgets in England."

It is alleged that:

The DfES incorrectly applied the exemptions provided by section 35 and section 40 of the Act, which relate to the formulation and development of government policy and to personal information respectively, and therefore failed to communicate the information in contravention of section 1 of the Act.

The DfES interpreted the request as referring to the minutes of meetings of the DfES Board which includes the Permanent Secretary and the heads of each of the Department's Directorates as well as the meeting of Schools Directorate Management Group (SDMG). The information in question consisted of the names of those attending the meetings and the actual minutes themselves, which include references to civil servants contributing to the discussions or who were assigned action points.

The DfES originally refused to provide any information in response to the request. It issued a refusal notice on the 8th February 2005 in which it explained that it was withholding the information under the exemption provided by section 35(1)(a) of the Act on basis that the information related to the formulation or development of government policy. The refusal notice identified the public interest arguments it had considered when determining whether to maintain the exemption. These included whether disclosing the information would improve the public's knowledge of how government worked,

whether it would allow the public to contribute to the policy process and whether it would allow the public to assess the quality of advice given to Ministers and subsequent decision making. However the notice did not explain what weight was given to these interests or what public interest arguments it had considered in favour of maintaining the exemption. Following an internal review the DfES provided the complainant with some information on the 15th April 2005 but maintained the exemption in relation to the names of those attending or, who were mentioned elsewhere in the minutes. In addition, other information that reveals the issues being discussed was withheld from the minutes of the Board Meetings and some of the SDMG's meetings.

During the course of the Commissioner's investigation the DfES also cited the exemptions provided by section 35(1)(b) (information relating to Ministerial communications) in respect of one particular minute and section 40 (personal information) in relation to the names of civil servants.

The Commissioner's Decision

Under section 50(1) of the Act, except where a complainant has failed to exhaust a local complaints procedure, or where the complaint is frivolous or vexatious, subject to undue delay, or has been withdrawn, the Commissioner is under a duty to consider whether the request for information has been dealt with in accordance with the requirements of Part I of the Act and to issue a Decision Notice to both the complainant and the public authority.

The Commissioner's decision, for the reasons set out in more detail in the Statement of Reasons, is as follows:

In respect to the minutes of one particular Board Meeting the Commissioner does not accept that all of the information relates to the formulation or development of government policy. These minutes do however contain one bullet point which does relate to policy development. The exemption provided by section 35(1)(a) is engaged in respect to this one bullet point, but not to the information in the rest of the minutes of this particular meeting. The minutes in question and relevant bullet point will be identified to the DfES.

All the other information contained in the remaining minutes of Board Meetings and the meetings of the Schools Directorate Management Group does relate to the formulation or development of government policy and so is also exempt information under section 35(1)(a).

However this exemption is subject to the public interest test. The Commissioner's decision is that, in all the circumstances of this particular case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The DfES has claimed that information contained in one of the SDMG meetings is exempt under section 35(1)(b) in that it is information relating to Ministerial communications. The Commissioner agrees that the exemption is engaged. Again this exemption is subject to the public interest test. The Commissioner's decision is that, in all the circumstances of this particular case, the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

The DfES has also claimed that the names of civil servants attending the meetings or who are otherwise referred to in the minutes is exempt information under section 40 of the Act. The Commissioner's decision is that this personal information can be disclosed without contravening any of the principles of the Data Protection Act 1998 and that therefore the exemption provided by section 40 is not engaged.

Since the exemptions cited by the DfES either do not apply, or cannot be maintained in the public interest, the DfES have contravened section 1 of the Act in that it has failed to communicate the information that was requested.

Action Required

In view of the matters referred to above and for the reasons described in more detail in the attached Statement of Reasons, the Commissioner hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

The Department for Education and Skills shall, within 30 days of the date of this Decision Notice, –

Communicate to the complainant all the information relating to school budgets, together with the names of those attending those meetings or to which particular comments or action points were attributed, contained in the minutes of the meetings, identified by the DfEs as falling within the scope of the request, which have previously been withheld.

Failure to comply

Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the court of Session in Scotland) pursuant to section 54 of the Act, and may be dealt with as a contempt of court.

Right of Appeal

Either party has the right to appeal against this Decision Notice to the Information Tribunal (the "Tribunal"). Information about the appeals process can be obtained from:

Information Tribunal	Tel: 0845 6000 877
Arnhem House Support Centre	Fax: 0116 249 4253
PO Box 6987	Email: informationtribunal@dca.gsi.gov.uk
Leicester	
LE1 6ZX	

Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 4th day of January 2006

Signed:

Richard Thomas
Information Commissioner

Information Commissioner
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Statement of Reasons

The meetings referred to in this request span a period of time when there was a perceived crisis in school funding which received considerable press attention. The DfES was involved both in reviewing current policy in light of concerns over its implementation as well as considering future policy options as part of an ongoing reform of school funding.

The application of section 35(1)(a)

Section 35(1)(a) provides an exemption for information which relates to the formulation and development of government policy. The DfES has cited this exemption in relation to all the information withheld, including that which identifies individual civil servants.

Although the Commissioner is satisfied that the exemption does apply to most of the information requested, he is not satisfied that the exemption applies to all the information in the minutes of one particular Board Meeting. In general terms, the minutes of this particular meeting provide a summary of the background of the perceived funding crisis as well as suggesting what issues may arise in the future. As such the Commissioner is not persuaded that the information relates to the formulation or development of government policy and so the exemption is not engaged. However one of the bullet points contained in these minutes does discuss changes to how government policy will be implemented in the future and therefore the Commissioner accepts that this one bullet point relates to policy development

In relation to the information contained in the body of the remaining meetings, some of the issues discussed concern the refining or amending of existing policy. Although there is a distinction between the implementation of existing policy and the development of future policy, it is accepted that in these circumstances, the information falls within the scope of the exemption since this process of amending the existing policy amounts to policy development.

Other minutes clearly discussed options for introducing new policies in the future. As such they relate to policy formulation. In light of this the Commissioner found that the information in the remainder of the minutes did engage the exemption provided by section 35(1)(a) in relation to the formulation or development of government policy.

The DfES has also argued that section 35(1)(a) applies to the information which identifies individual civil servants. Such information is contained in the list of attendees and in the body of the minutes for example where a comment is attributed to an individual or where an individual is assigned an action point. The Commissioner accepts that the lists of attendees are associated with the agenda items discussed at the meeting. The Commissioner is satisfied that where an agenda item relates to the formulation or development of policy, the list of attendees also relates to the formulation or development of policy.

In relation to the names of individuals contained within the body of the minutes about school funding the Commissioner is satisfied that these references form an integral part of that minute and so also attract the exemption.

The public interest in maintaining section 35(1)(a)

Section 35(1)(a) is a qualified exemption and therefore it is necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Candour of policy discussion

The DfES argued that civil servants need to be able to discuss difficult policy issues with candour and that records need to accurately reflect those internal debates. The DfES is concerned that to disclose records of such discussions would reduce the candour of those discussions and result in weaker policy. The DfES contend that to release this information would not simply inhibit officials at the DfES candidly discussing school funding, but would have a negative impact on the willingness of officials to properly to discuss policy issues across all government departments. This is partly because even if relatively innocuous information was released, officials would view this as setting a precedent that all records of policy discussions would be disclosed.

The Commissioner recognises that frank and honest debate is necessary for high quality policy formulation and that there is a public interest, in appropriate situations, in maintaining private space for discussion away from public scrutiny to formulate policy. But this is not to imply that all the records of all discussions relating to the formulation of policy must be kept confidential.

In this case, having reviewed the relevant information, the Commissioner is not satisfied that it is of a nature that requires protection. It simply records how the Department is properly responding to serious issues relating to school funding, but its disclosure would not have any detrimental effect on that issue. It does not follow that the release of this information would have any detrimental impact on the frankness and candour of future debates.

Accurate record keeping

The Commissioner also accepts that there is a public interest in accurate record keeping. Although openness may have some effect on the way meetings are minuted, ensuring accurate enough records are kept to meet the public authority's business needs is primarily a management issue. Again it does not follow that disclosure of these minutes would lead to less full or accurate record keeping.

Creation of a precedent

The general import of the DfES arguments is that releasing this information would set a precedent in the minds of civil servants across all government departments that any records of policy discussions must be released. However it is not clear that disclosure of these minutes would set any precedent or have the “chilling” effect claimed. The logical extension of such an argument may lead some to believe that the exemption should be treated as an absolute one. This is not the case. The Act clearly contemplates that a wide range of information – including minutes of meetings – should be made public in appropriate circumstances. The possibility of disclosure, with a presumption to that effect, is well-known, but the Act will protect the formulation and development of government policy when it is sufficiently in the public interest to do so. The possibility that civil servants will misunderstand a decision to disclose this information is not a ground for withholding the information.

Extent of disclosure

The DfES maintains that there is little public interest in providing additional information on school funding since it has already published a large amount of information explaining the adopted policy. However to properly understand the reasons for adopting one policy and to have confidence in the policy making process it is often necessary to have access to information about the processes and arguments leading to the development and adoption of that policy. This is central to the public interest in disclosing this information.

Time of disclosure

The DfES has advised the Commissioner that it would have less concerns over disclosing this information if it was several years older. The Commissioner accepts that the public interest in maintaining an exemption may decline over time. In this case the Commissioner is satisfied that any public interest arguments in favour of withholding the information that may have existed at the time the information was created were greatly diminished by the time the request was received.

Names of officials

In respect to the names of civil servants contained in the body of the minutes, the DfES has also argued that it is an important principle that public officials should be able to express views and provide advice without direct attribution. The DfES makes the point that Ministers, not civil servants are responsible for policy decisions and it is therefore inappropriate for civil servants to be held accountable for the advice they present. There is concern that this would politicise civil servants or deter them from contributing to sensitive policy discussions.

However the public interest test has to be applied in the all circumstances of the case and having regard for the nature of the information in question, the Commissioner is not convinced its release, in this case, would have results suggested by DfES. As stated by the DfES civil servants are part of a non political and professional service with a duty to provide impartial advice to any administration. The Commissioner does not accept that to release information of this nature would undermine these values. Furthermore it is an issue for the public authority's management to ensure standards are maintained.

The DfES is also concerned that if individual civil servants become associated with particular policies this could jeopardise their working relations with Ministers of future administrations. However the Commissioner considers that politicians will be fully aware of the role that civil servants play in the formulation and development of government policy.

Weighing the competing public interest considerations

The Commissioner has carefully considered and evaluated all the public interest considerations as set out above. He recognises that the public interest arguments for non-disclosure put forward by the DfES – both general and specific, for example in relation to timing and to the names of officials - may be powerful and persuasive in some circumstances.

Against these considerations, in passing the Freedom of Information Act Parliament has signalled a new approach, with an expectation of greater transparency than hitherto. The Act – in the context of a mature democracy - creates a new legal framework for openness to enable the public to access more information about the way in which government has reached decisions, to improve trust and confidence in government and to enable citizens to understand and participate in debates on issues of public importance from a more informed standpoint.

It is fundamental that this is a qualified exemption, subject to the public interest. Parliament has clearly anticipated that, notwithstanding the confidentiality associated with the exemption, it is qualified and can be overridden, on a case by case basis, where the public interest in the maintaining the exemption is not sufficiently powerful. There can be no guarantees of confidentiality. If there are any deterrent or “chilling” effects, these are attributable to the Act, not to individual decisions made under it. The logical extension of the DfES argument is that, once a qualified exemption is engaged, there can be no disclosure because of the implications for the future conduct of policy formulation and public administration. This is not what the Act contemplates.

In this case, the Commissioner is not satisfied that the information was of such a nature that its release must, or would, have any significantly detrimental impact on future policy making, especially if this Decision is seen to be limited to the circumstances of this case.

Accordingly, having weighed the competing public interest considerations, the Commissioner concludes that, in all the circumstances of this case, the public interest in transparency and understanding policy decisions, and their development, is stronger than the public interest in maintaining the exemption.

The application section 35(1)(b)

The DfES has claimed that section 35(1)(b), which provides that information is exempt if it relates to Ministerial communications, applies to the information contained in the minutes of one particular meeting of the SDMG. The minute does report on a topic of debate at Cabinet Committee and so engages the exemption. The Commissioner accepts that the exemption is engaged. However, this is also a qualified exemption.

The public interest in maintaining section 35(1)(b).

The DfES has argued that the minute reveals one policy option which was considered at a Cabinet Committee and that regardless of whether or not the policy option was adopted, its disclosure would undermine the convention of the collective responsibility of government. The rationale is that to disclose which option a Minister took forward to Cabinet Committee would identify that policy as the Minister's preferred option. It therefore follows that if that option was later rejected this would identify disagreement amongst ministers. If only information on those options that were adopted was disclosed, any refusal of a request would indicate a disagreement.

The Commissioner accepts that the minute does reveal information about the Cabinet process. However the Commissioner believes that the public appreciates that a range of options may be debated by Cabinet when making decisions on policy, and that there may be disagreement between Cabinet members. The fact that one policy option is rejected does not prevent the promoters or supporters of that policy being persuaded by the arguments in favour of an alternative option or being prepared to accept responsibility for that policy. The Commissioner recognises that, by its nature, the Act must have some implications for collective responsibility. But collective responsibility for adopted decisions is not the same as expecting the public to believe that there was unanimous agreement at every stage as that policy was formulated, discussed, developed and adopted.

Specifically, he is not persuaded that to release the information requested in this case which engages the exemption in section 35(1)(b) would undermine the convention of the collective responsibility of government to any detrimental or significant extent. In any event, the same public interest considerations as were set out above in relation to section 35(1)(a) apply and have been weighed with the same result.

Accordingly, having weighed the competing public interest considerations, the Commissioner concludes that, in all the circumstances of this case, the public interest in transparency and understanding policy decisions, and their development, is stronger than the public interest in maintaining the exemption in relation to Ministerial communications.

The application of section 40

In broad terms section 40(2) provides an exemption where the release of personal information about someone other than the applicant would contravene the data protection principles contained in the Data Protection Act 1998. These data protection principles combine to protect the privacy of individuals.

The references to civil servants constitute personal data about those individuals. However the Commissioner is not persuaded that to release this information would contravene any of the data protection principles. In particular the Commissioner has considered whether disclosure would breach the fairness element of the first data protection principle. When considering whether the release of personal data would be unfair a distinction can be drawn between information relating to some one's private life and information relating to their professional or working life. The information in question merely identifies civil servants as attending a meeting in their official capacity or giving their professional advice. The Commissioner does not believe that to release this information would be intrinsically unfair to those individuals, particularly when considering their seniority. Disclosure would not contravene any of the data protection principles. Therefore the Commissioner does not accept that the information is exempt under section 40 of the Act.