

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 February 2012

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

Decision (including any steps ordered)

1. The complainant requested the release of documents in which corporal punishment was discussed in relation to part-time education providers between 3 August 2007 and 26 November 2008. The Department for Education ("DfE") disclosed some information but withheld the remainder under sections 35, 36, 40 and 42 of FOIA.
2. The Commissioner's decision is that the DfE has correctly applied sections 36 and 42 to the information that it withheld under those exemptions. However, it has incorrectly applied section 35. In addition, it breached section 17 by failing to provide a refusal notice within 20 working days of receipt of the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant the information to which it applied section 35 except for the personal data of junior officials.
4. The public authority must take these steps within 35 calendar days of the date of this Decision Notice. Failure to comply 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 FOIA and may be dealt with as a contempt of court.

Request and response

5. On 4 February 2010, the complainant wrote to the DfE and requested

"...the release of all documents, correspondence, notes of meetings etc in which corporal punishment was discussed in relation to part-time education providers catering for children of compulsory school age between 3 August 2007 and 26 November 2008."

6. The DfE provided a full response to the complainant on 7 April 2011. It disclosed some information but withheld the remainder under sections 35, 36, 40 and 42.
7. Following an internal review, the DfE wrote to the complainant on 24 May 2011 to inform, him that the outcome of the review was to uphold its original decision.

Scope of the case

8. The complainant contacted the Commissioner to complain about the DfE's delays in providing a response and its failure to disclose all of the information falling within the scope of his request.
9. The complainant subsequently confirmed that he did not wish to challenge the DfE's application of section 40(2) to the personal data of junior officials provided this did not adversely affect the understanding of any information that was ordered to be disclosed. The DfE identified to the Commissioner the individuals whose personal data appears in the withheld information and who it considered to be junior officials.
10. The Commissioner considered whether the DfE had breached FOIA in terms of the time taken for its response to the request and whether it had correctly applied exemptions to the information that it had withheld that fell within the scope of the complainant's request.

Reasons for decision

Procedural breaches

11. Section 17(1) of the Act requires a public authority to issue a refusal notice within 20 working days of the receipt of a request. The request was submitted by the complainant on 4 February 2010. The DfE issued a refusal notice in respect of all of the information that it was seeking to withhold under Part II of FOIA on 7 April 2011. It therefore breached section 17(1).

Exemptions

12. The Commissioner considered the DfE's application of sections 35, 36 and 42. He is unable to discuss the content of the information to which the exemptions have been applied in detail as to do so might give an indication as to what information has been withheld.

Section 35 – Formulation and development of government policy

13. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class based exemption. Therefore if the information relates to the formulation or development of government policy the exemption is engaged.
14. In the Commissioner's view, the term "relates to" should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question. However, it does not have to be information specifically on the formulation or development of that policy.
15. The DfE explained that, prior to the enactment of the Education and Skills Act 2008 in November 2008, there had been concerns that the existing regulatory standards for independent schools did not cover part-time education providers and that some providers might be claiming that they were part-time educators in order to continue with practices, such as corporal punishment, that were prohibited in full time schools.
16. Section 92 of the Act sought to change this situation by requiring part-time education providers to register if they operated for a minimum number of hours a week and weeks a year. Once an education provider was obliged to register under the Act, this could potentially have an impact on a number of issues including the question of the legality of the use of corporal punishment by such education providers.
17. However, section 92 required the consent of the relevant Minister for the changes that it introduces to come into force. At the time of the complainant's request, Ministerial consent had not been provided, nor has it been to date. The DfE therefore argued that until such a decision had been taken by a Minister, the policy could not be regarded as fixed and the development stage in relation to this policy area completed.
18. The DfE explained that at the time of the creation of the communications and documents to which section 35 has been applied, the policy making process was not complete as the relevant legislative provisions had not received the Royal Assent. The exact form of those legislative provisions was still under consideration.

19. The Commissioner has considered the withheld information and is satisfied that, at the time that it was created, all of the information to which the DfE applied section 35 related to formulation or development of policy regarding part-time education providers catering for children of compulsory school age. He therefore accepts that section 35(1)(a) is engaged in relation to that information.

Public interest arguments in favour of disclosing the requested information

20. The Commissioner accepts that there is a strong public interest in transparency and accountability and in increasing the understanding of how government works. Disclosure of the withheld information may assist the public in gaining a better understanding of the policy making process and the discussions that took place in this area.
21. The Commissioner notes that the subject being considered, the use of corporal punishment by education providers, is controversial and sensitive and is one on which people hold strong and opposing views and on which there has been some public debate. Disclosure of the withheld information may therefore assist in informing the public debate in this area.
22. The complainant explained that during 2007 the Government carried out two consultations in relation to possibly making registration a requirement for certain part-time education providers. He contended that at no time was the issue of corporal punishment in part-time education settings raised as an issue. The DfE had denied suggestions that this was the motivation behind the proposal regarding registration contained in the Bill which was introduced into Parliament. However, subsequent statements by the Schools Minister, made during the passage of the Bill, appeared to contradict this.
23. In the complainant's view, the DfE had been less than transparent over this issue and consequently there was a significant public interest in disclosure of information that would shed more light on the real reasons for the introduction of the provision in the Bill which required certain part-time education providers to go through a registration process.

Public interest arguments in favour of maintaining the exemption

24. DfE argued that it was particularly important that advice provided to Ministers should be as clear and frank as possible when a topic is controversial and, as in this case, where the parties hold such strong and opposing views and where the rights of individuals and children are affected. It was therefore in the public interest that the formulation of government policy and government decision making could proceed in the self contained space needed to ensure that it is done well. Good government depended on good decision making and this needed to be

based on the best advice available and a full consideration of the options. If Ministers were required to disclose details of all of the advice that they receive, and the discussions that took place in light of that advice, it could limit discussion of all of the options and result in weaker government.

25. The DfE pointed to the Information Tribunal's decision in *Department for Education and Skills v The Information Commissioner (EA/2006/0006)*. When considering information created in 1999, it stated:

"The timing of a request is of paramount importance to the decision...In broad terms, the age of information makes it easier for it to be disclosed without impinging on the safe space required for policy development. Disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for instance, it exposes wrongdoing in Government."

26. It argued that in this case, however, the withheld information was relatively recent and the policy that was relevant to corporal punishment in part-time education institutions was not settled at the time of the request. The issue was a sensitive one, with strong views held by many about the relative merits of a spectrum of possible outcomes.
27. In addition to the potential harm to the safe space required to consider policy options, the DfE considered that a chilling effect would be likely to result from disclosure in that there could be a potential loss of frankness and candour in internal debates and advice. This in turn would lead to poorer quality advice and less well formulated policy and decisions.

Balance of the public interest arguments

28. The Commissioner recognises that there is a public interest in openness and transparency regarding education issues. This is particularly the case where the issues are controversial ones such as the use of corporal punishment in an educational setting.
29. However, the Commissioner also notes that at the time of the request the relevant provision in section 92 of the Education and Skills Act requiring part-time educators to register had not been brought into force. A decision had therefore not been taken as to whether or not to proceed with this particular policy approach. It is therefore likely that the policy options, and any debate about those options, might need to be revisited before any decision is taken on whether to implement the relevant provisions.
30. Clearly of critical importance when considering the application of section 35 is the content of the actual information to which it has been applied. The information to which the exemption has been applied in this case is

quite diverse in nature and therefore not easily summarised. As was stated earlier, it all relates to the issue of corporal punishment in the context of part-time education providers so as to engage section 35. However, having carefully examined this information, the Commissioner is not convinced that it contains significant information about the policy options that were under consideration prior to the passing of the Act or any detailed debate about those options. Consequently, he has determined that the public interest in withholding this information is not sufficient to outweigh the public interest in disclosure and it should therefore be disclosed. The only information that should be withheld is the personal data of junior officials which the complainant has accepted is exempt under section 40(2).

Section 36 – Prejudice the effective conduct of public affairs

31. The DfE applied section 36(2)(b)(i) and (ii) and (2)(c) to some of the withheld information.

32. Section 36(2)(b) and (c) provides that:

'Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -

...(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation...'

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

33. In order to determine whether section 36 has been correctly applied the Commissioner has:

- (i) ascertained who the qualified person is for the public authority;
- (ii) established that an opinion was given;
- (iii) ascertained when the opinion was given; and
- (iv) considered whether the opinion given was reasonable.

The engagement of section 36

34. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the

qualified person is any Minister of the Crown. In this case the opinion was given by the Solicitor General. The Commissioner is satisfied that he was an appropriate qualified person for these purposes.

35. In support of the application of section 36, the DfE has provided the Commissioner with a copy of the submissions to the qualified person, which identifies the information to which it is suggested that section 36 should be applied, and copy of the qualified person's opinion.
36. The Solicitor General provided his opinion that section 36 was engaged on 25 March 2011. In his view, disclosure of the information detailed in Annex B and C to the submission would be likely to prejudice the free and frank provision of advice (section 36(2)(b)(i)), would be likely to prejudice the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)) and would be likely to otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).
37. In relation to section 36(2)(b)(i), the Solicitor General accepted the argument in the submission that it was in the public interest that officials be allowed freedom to develop their views. Disclosure of the withheld information would have been likely to result in a more circumscribed exchange of views in future as officials would be likely to couch discussions in far less frank terms in order to avoid adverse public reactions and damage to the relationships with parties being discussed.
38. In relation to section 36(2)(b)(ii), the Solicitor General accepted the argument in the submission that the withheld information contained candid advice and discussions between a range of officials on corporal punishment in the context of part time education providers. Disclosure would be likely to result in them being more guarded in future when seeking to resolve issues in order to avoid creating misunderstandings amongst the wider public or allowing education providers to identify weaknesses in the Department's position. This would lead to problems not being candidly described or addressed and prevent Ministers being given a full understanding of the real situation in the advice provided to them.
39. In relation to section 36(2)(c), the Solicitor General accepted the argument that disclosure of the withheld information might assist those seeking to identify, and exploit, potential gaps in the law in this area.
40. After reviewing the content of the withheld information to which this section had been applied, the Commissioner initially considered whether it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) applied to all of the information withheld under section 36. He accepts that disclosure of the information to which section 36 has been applied would reveal free and frank discussions between civil servants.

41. The Commissioner also accepts that the opinion of the qualified person, that the disclosure of this information would be likely to lead to officials being less free and frank in the exchange of such views for the purpose of internal deliberations in future, is a reasonable one. The Commissioner consequently concludes that section 36(2)(b)(ii) is engaged in relation to all of the information withheld under section 36. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information

Public interest test

42. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'.

43. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus "...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant." Therefore, in the Commissioner's opinion, this means that whilst due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of inhibition to the free and frank exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the requested information

44. The Commissioner considered the same public interest arguments in favour of disclosure as those considered for section 35 and which are outlined in paragraphs 20-23 above.

Public interest arguments in favour of maintaining the exemption

45. The Commissioner initially notes that the reasonable opinion of the qualified person was that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. The consequences of the opinion is that it is accepted that there is a plausible causal link between the disclosure of the withheld information and the inhibition to the free and frank exchange of views and that there is a real possibility that the circumstances giving rise to this inhibiting effect could occur. The Commissioner has taken this into account in assessing the public interest arguments in favour of maintaining the exemption.
46. If the information were to be disclosed, this would place in the public domain free and frank discussions between civil servants on the issue of corporal punishment in an educational setting. As has been acknowledged, this could lead to officials being less free and frank in their future discussions and deliberations on this issue. The result of this could be that problems may not be candidly described and may not therefore be properly addressed. This would not be in the public interest as it would have a negative impact upon the development of government policy in this area.
47. The DfE argued that it is particularly important that advice provided to Ministers should be as clear and frank as possible when a topic is controversial and, as in this case, where the parties hold such strong and opposing views and where the rights of individuals and children are affected. It is therefore in the public interest that officials should not feel inhibited in their discussions of the issues as this could lead to poorer advice and less well formulated policy and decisions.
48. The DfE also pointed out that the withheld information relates to an issue that was still live and sensitive at the time of the request as no decision had been taken as to whether to implement the provision on requiring part-time educators to go through a registration process with the potential impact this might have on the issue of the use of corporal punishment. Therefore the withheld information may well need to be drawn on before a decision as to whether to implement the relevant provision is made so as to ensure that all the relevant options are considered and the reasoning behind the introduction of the provision into the Act in the first place is fully explored.

Balance of the public interest arguments

49. In considering where the balance of the public interest lies, the Commissioner is mindful of the possible public interest in disclosure that he has identified. However, he believes that there is a strong public interest in the DfE being able to discuss the issues in this area freely and

frankly to ensure the effective development of government policy. At the time of the request the issue was still live as no decision had been taken as to whether to introduce the legislative provisions regarding part time educators contained in section 92 of the Education and Skills Act.

50. Having considered the severity, extent and frequency of inhibition to the free and frank exchange of views for the purposes of deliberation which disclosure of the withheld information might pose, the Commissioner considers that there is a real risk that disclosure of the withheld information might affect the openness and candour in relation to future exchanges of views in this area. As a result the Commissioner considers that the public interest in withholding the information outweighs the public interest in disclosure and that the DfE was correct to withhold it on the basis of section 36(2)(b)(ii).

Section 42 – Legal professional privilege

51. Section 42 provides an exemption in respect of information to which legal professional privilege (“LPP”) applies. LPP protects the confidentiality of communications between a lawyer and client.
52. The DfE identified to the Commissioner the withheld information that it believed was exempt under section 42. It informed him that this information was subject to legal advice privilege. Advice privilege will apply where no litigation is in progress or being contemplated. For it to be applicable, the communications must be:
- made between a client and professional legal adviser acting in their professional capacity;
 - communicated in the legal advisor’s professional capacity; and
 - made for the sole or dominant purpose of obtaining legal advice.
53. The DfE informed the Commissioner that, in its view, these criteria were met. It also confirmed that the requested information had not been made available to the public or to any third party without restriction which could have resulted in privilege being lost.
54. Having examined the information in relation to which the DfE has claimed section 42, the Commissioner is satisfied that LPP applies to it and that therefore the exemption is engaged.
55. As section 42 is a qualified exemption, the Commissioner went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosing the requested information

56. The DfE identified the following public interest arguments in favour of disclosure:

- that it would increase transparency in the decision making process;
- that there is a legitimate public interest in increasing participation in public debate about matters of public policy, including the use of public policy; and
- that in allowing individuals and organisations to understand decisions by public authorities affecting their lives and work, and where appropriate, to challenge those decisions.

57. The Commissioner also considers that the public interest arguments in favour of disclosure would include allowing the public to verify that decisions had been made on the basis of good quality legal advice.

58. The Commissioner also considered the public interest arguments in favour of disclosure provided by the complainant which are detailed in paragraphs 22-23 above.

59. In the case of the *Foreign and Commonwealth Office v IC* (EA/2007/0092) the Tribunal considered what sort of public interest is likely to undermine the maintenance of LPP:

"There can be no hard and fast rules but, plainly, it must amount to more than curiosity as to what advice the public authority has received. The most obvious cases would be those where there is reason to believe that the authority is misrepresenting the advice which it has received, where it is pursuing a policy which appears to be unlawful or where there are clear indications that it has ignored unequivocal advice which it obtained." (para. 29)

60. The Commissioner is not aware of any evidence which would suggest that any of these factors are applicable in this case.

Public interest arguments in favour of maintaining the exemption

61. The DfE argued that there is a very strong public interest in maintaining lawyer-client confidentiality. It is vital that officials are able to consult lawyers in confidence to obtain effective legal advice in a safe forum, conducive to a candid exchange of views and assessment of potential risks without fear of disclosure.

62. It believed that Government departments need high quality, comprehensive legal advice for the effective conduct of their business and to take decisions in a fully informed legal context. Legal advisers needs to be able to set out arguments for and against a particular line, without fear that this might expose weaknesses in the Government's position and open it up unnecessarily to legal challenge, which would waste public resources. It is also clearly in the public interest for the drafting of legislation to be effective as possible.
63. The DfE's view was that the disclosure of legal advice has a high potential to prejudice the Government's ability to defend its legal interests, both directly by unfairly exposing its legal position to challenge and indirectly by diminishing the reliance it can place on the advice having being fully considered and presented without fear or favour. Neither of these is in the public interest. It is essential to protect the vitally important principle that officials must be able to consult lawyers in confidence to obtain effective legal advice in a forum which is conducive to a free exchange of views without fear of intrusion or disclosure.
64. It has been recognised by the Information Tribunal that there is a very strong public interest in protecting documents which are subject to LPP from disclosure. In particular, the Tribunal has stated that it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear cases. It did not appear to the DfE that there was anything in these documents, or the circumstances relating to them, which would justify setting aside the very strong presumption against disclosure of LPP material.
65. It would appear to the Commissioner that the legal advice that has been withheld is relatively recent advice and still 'live' in that it is still being relied upon and relates to an issue which could give rise to legal challenges by those unhappy with courses of action adopted based on that advice. He does not believe that the legal issue has ceased to be 'live' on the passing of the Education and Skills Act. This is particularly the case as no decision had been taken by the Government at the time of the request as to whether to implement the provision in the Act relevant to this issue.

Balance of the public interest arguments

66. The Commissioner's view, based on a number of decisions of the courts and Information Tribunal, is that there will always be an initial weighting in favour of maintaining the exemption contained in section 42. This is due to the importance of the concept behind LPP, namely, safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. However, it is not an

absolute exemption and where there are equal or weightier countervailing factors, then the public interest in maintaining the exemption does not outweigh the public interest in disclosing the information.

67. In relation to the factors in favour of maintaining the exemption, as well as the initial inbuilt weight to be given to LPP, the Commissioner has given additional weight to the fact that the legal advice that has been withheld is still 'live'.
68. As regards the factors in favour of disclosure, the Commissioner has seen no evidence that raises concerns that the legal advice may have been misrepresented or that the DfE is pursuing a policy which appears to be unlawful or that it has ignored unequivocal advice. He acknowledges the complainant's argument that there may be some public interest in disclosure to promote transparency in terms of the reasoning behind the introduction of the provision regarding registration of part time educators contained in the Act. However, in his view, the public interest factors in favour of withholding the information outweigh the factors in favour of disclosure. He has therefore decided that the DfE correctly applied section 42 to the legal advice that it withheld.

Other matters

69. The DfE took 14 months to provide a full response to the complainant's request. The Commissioner regards this as totally unacceptable. He acknowledges that the period surrounding a change of government can present practical difficulties for Government departments in responding to requests under the Act. However, this does not provide an excuse for the extreme delays that occurred in this case.
70. The DfE's delay in providing a response to this request was evidence that influenced the Commissioner to decide that it was necessary to undertake monitoring of the performance of the DfE in handling FoI requests with a view to considering whether he needed to take further action.

Right of appeal

71. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

72. 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.

73. 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

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