# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** 22 October 2012

**Public Authority:** The Home Office
**Address:** 2 Marsham Street
London
SW1P 4DF

## Decision (including any steps)

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1. The complainant has requested information relating to the "Educational Oversight" process. The public authority confirmed that it held information but stated that it was exempt under section 35(1) of the FOIA. During the Information Commissioner's investigation the public authority found further information to which it cited sections 43(2) and 36(2)(c). The Information Commissioner's decision is that section 35 is engaged but that the public interest in maintaining the exemption does not outweigh that in disclosure for some of the information. He finds that sections 43(2) or 36(2) are not engaged and this information should therefore also be disclosed.

2. The Information Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

    - Disclose documents 1, 9, 10
    - Disclose documents 7 and 8 other than the small amount of personal data contained in the agreements.

    The documents are described in more detail in a confidential annex.

3. 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 Information Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Background

4. On 22 March 2011 the public authority announced the following on its website[1]:

> *"Tougher entrance criteria, limits on work entitlements and the closure of the post-study work route are among the changes to the student visa system announced today by Home Secretary Theresa May.*
>
> *The announcement follows a major public consultation on reforming Tier 4 of the points-based system, after a Home Office review revealed widespread abuse. A sample of Tier 4 students studying at private institutions revealed that 26 per cent of them could not be accounted for.*
>
> *The main changes are as follows:*
> - *From April 2012, any institution wanting to sponsor students will need to be classed as a Highly Trusted sponsor, and will need to become accredited by a statutory education inspection body by the end of 2012. The current system does not require this, and has allowed too many poor-quality colleges to become sponsors.*
> - *Students coming to study at degree level will need to speak English at an 'upper intermediate' (B2) level, rather than the current 'lower intermediate' (B1) requirement.*
> - *UK Border Agency staff will be able to refuse entry to students who cannot speak English without an interpreter, and who therefore clearly do not meet the minimum standard.*
> - *Students at universities and publicly funded further education colleges will retain their current work rights, but all other students will have no right to work. We will place restrictions on work placements in courses outside universities.*
> - *Only postgraduate students at universities and government-sponsored students will be able to bring their dependants. At the moment, all students on longer courses can bring their dependants.*
> - *We will limit the overall time that can be spent on a student visa to 3 years at lower levels (as it is now) and 5 years at*

[1] http://www.ukba.homeoffice.gov.uk/sitecontent/newsarticles/2011/march/54-student-visas

*higher levels. At present, there is no time limit for study at or above degree level.*

- *We will close the Tier 1 (Post-study work) route, which allows students 2 years to seek employment after their course ends. Only graduates who have an offer of a skilled job from a sponsoring employer under Tier 2 of the points-based system will be able to stay to work.*

*The government has also pledged to develop a new entrepreneur route for bright and innovative students who have a business idea and want to make it work in the UK.*

*The Home Secretary said:*

> *'International students not only make a vital contribution to the UK economy but they also help make our education system one of the best in the world.*
>
> *'But it has become very apparent that the old student visa regime failed to control immigration and failed to protect legitimate students from poor-quality colleges.*
>
> *'The changes I am announcing today re-focus the student route as a temporary one, available to only the brightest and best. The new system is designed to ensure students come for a limited period, to study, not work, and make a positive contribution while they are here.*
>
> *'My aim is not to stop genuine students coming here - it is to eliminate abuse within the system. Our stricter accreditation process will see only first-class education providers given licences to sponsor students.*
>
> *'I am delighted to announce that, alongside our stricter rules, we will ensure that innovative student entrepreneurs who are creating wealth are able to stay in the UK to pursue their ideas.'*

*The government has committed to reforming all routes of entry to the UK in order to bring immigration levels under control. The student changes will work alongside the annual limit on economic migration, and reforms to family and settlement routes planned for later this year…*

*A statement of changes to the Immigration Rules will be published on this website on 31 March. We will publish an impact assessment on the same day".*

5. This announcement was followed up on 13 June 2011[2]:

*"In March the Home Secretary announced changes to Tier 4 of the points-based system for student visas.*

*A key part of the reforms is to strengthen the conditions which an education provider has to satisfy before they are allowed by the UK Border Agency to 'sponsor' an international student to study in the UK. This involves the oversight of their education provision and their compliance with immigration requirements.*

*As regards educational oversight, we announced that from the end of 2012 all sponsors would need to have had a satisfactory inspection or review by one of a number of specified bodies who are involved in the delivery of the regulatory framework for educational standards in the UK ('the educational oversight bodies'). The full list of approved educational oversight bodies is set out below. This is a shorter list than the previous one.*

*It is open to a sponsor to seek review from the appropriate body on the list. The UK Border Agency wishes to rely on existing educational oversight arrangements rather than creating a new framework for the purpose of Tier 4. The high standards set and monitored by the educational oversight bodies on the approved list are adequate for our purposes and will drive up the quality of education on offer to international students through Tier 4. In turn this will improve the quality of students and therefore of immigration compliance.*

*The UK Border Agency has held discussions with a number of the approved educational oversight bodies about extending their current activities to include review of other education providers. This will maximise the opportunity for those other providers to remain, or become, Tier 4 sponsors. It will thereby keep open a place in Tier 4 for privately funded colleges of further and higher education, and English language schools who meet the standards set by the educational oversight bodies.*

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[2] http://www.ukba.homeoffice.gov.uk/sitecontent/newsfragments/49-oversight-qaa-isi

*The UK Border Agency can now announce that the Quality Assurance Agency for Higher Education (QAA) and the Independent Schools Inspectorate (ISI) have agreed in principle to extend their activities to carry out additional reviews …*

*The QAA and ISI will publish on their websites the details of the applicable standards and procedural information about how to apply, charges and how reviews will be carried out. QAA and ISI will communicate with stakeholders in the relevant sectors before commencing reviews, which are expected to begin being scheduled from October…*

*The UK Border Agency will consider with the educational oversight bodies the frequency of reviews required for all providers after the initial round is complete. It is expected a risk-based approach will be adopted…".*

## Request and response

6. On 9 February 2012, the complainant wrote to the public authority and requested information in the following terms:

> *"… copies of all agreements, transcripts and correspondence relating to the "Educational Oversight" process between the UK Border Agency and the Quality Assurance Agency and between the UK Border Agency and the Independent Schools Inspectorate."*

7. The public authority responded on 6 March 2012. It stated that it did not hold any agreements or transcripts. It said that it did hold other information but this was exempt from disclosure by virtue of section 35 of the FOIA.

8. Following an internal review the public authority wrote to the complainant on 13 April 2012. It maintained its previous stance.

## Scope of the case

9. On 16 April 2012 the complainant contacted the Information Commissioner to complain about the way his request for information had been handled.

10. The complainant had accepted that no 'agreements' or 'transcripts' existed and clarified that he wanted the Information Commissioner to consider the citing of section 35 for the remaining information.

11. The public authority initially identified six documents falling within the scope of the request. It provided these to the Information Commissioner and later advised him that two of these were 'drafts' and that it had found the final versions so wished to 'replace' them. The Information Commissioner considers that the drafts are not classed as correspondence (as they were not sent) and are therefore not caught by the request but the final versions fall within scope.

12. The public authority also identified a further four documents. It stated that two of these were also exempt under section 35(1) and the other two - which were 'agreements' - were exempt under 43(2) and 36(2), although it had not yet obtained the necessary opinion in this regard. The Information Commissioner is therefore considering disclosure of 12 items in total.

13. The two 'agreements' each contain the name and private address of a party. The Information Commissioner has confirmed with the complainant that he is happy to remove the 'personal data' element from the scope of his request.

## Reasons for decision

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### Section 35 – formulation of government policy

14. This exemption has been considered in relation to the initial six documents identified and the 'final version' of two of these.

15. Section 35(1) of the Act states that:

> *"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to-*
>
> *(a) the formulation or development of government policy*".

16. Section 35(1)(a) of the Act is a class-based exemption, meaning that it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Instead, it is only necessary to show that the information falls within a particular class of information.

17. The Information Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process

where options are generated, risks are identified and consultation occurs. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.

18. The public authority has advised that:

> *"The information relates to the Government policy on educational oversight for private colleges not already subject to an inspection regime by a body with a role in the statutory framework for educational standards in the UK".*
>
> *"Development of the policy was … ongoing at the time of* [the] *request in February 2012 and the policy remains in development now. We therefore consider that the exemption at section 35(1)(a) applies to the information as a matter of fact, subject to the balance of the public interest in disclosing or withholding the information".*

19. Some of the information is on the borderline between the operation of the policy and its development but the Information Commissioner accepts that this information does not just cover "business as usual", operational information. It is clear from the information that further Ministerial decisions and announcements were possible and there is a strong enough relationship to policy development. However, the Information Commissioner would wish to make clear that all operational information about the education oversight scheme may not be always be classified in this way.

20. The Information Commissioner therefore accepts that the information withheld under section 35(1)(a) relates to the formulation and development of government policy and that the exemption is engaged.

21. Section 35(1)(a) is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Information Commissioner has first considered the public interest in disclosure.

*In favour of disclosure*

22. At refusal stage the public authority provided no public interest arguments. At internal review it found:

> *"The Home Office acknowledges that the way in which it develops policy on the educational oversight system is of genuine interest to the general public. The Department must be accountable in*

*developing and implementing policy decisions that affect the public".*

And:

*"There is [also] a general public interest in improving public understanding of and the transparency of the policy making processes, as this can help improve levels of trust and engagement in the way policy is formulated and developed. This helps stimulate informed public debate which, in turn, helps contribute to subsequent policy making decisions".*

*In favour of maintaining the exemption*

23. At refusal stage the public authority provided no public interest arguments. At internal review it found:

*"There is … a strong argument that, if information relating to policy development were to be routinely released into the public domain whilst policies are still being developed, those who provide guidance and advice may be less forthcoming in expressing their opinions and views, or come under pressure not to challenge or comment on advice relating to the formulation of policy.*

*This in turn could lead to a fall in the quality of the advice that is provided in the development of Government policies. Officials and those who may be commissioned to provide reports and advice might not put forward diverse or controversial suggestions, if there is a risk that that advice may be prematurely disclosed. The formulation of Government policy depends on the provision of broad-based advice and that those who provide such advice have the space in which to consider all the available options.*

*Effective communication with outside bodies requires frank, open and honest discussion. If the detail of such discussions is made public while work on this matter is ongoing it would be likely to undermine the prompt and forthright views required to consider the full ramifications of various courses of action. To release the information at this stage would incur a risk that final policy decisions are not as fully informed as they should be.*

*The information requested by* [the complainant] *relates to an area in which the development of policy is very much live and on-going. I am satisfied that the release of the information would*

> *be detrimental to the development of policy in this area and that would not be in the public interest …*
>
> *With regard to* [the complainant]*'s comment in his internal review request about there being a lack of consultation, I have established that the Home Office did in fact hold a public consultation on the reform of Tier 4 which ran from December 2010 to the end of January 2011. This consultation included a section on reform of the previous accreditation system which was judged to be insufficiently effective at countering immigration abuse and was therefore replaced by the educational oversight process".*

*Balance of the public interest*

24. In reaching a decision as to the balance of the public interest arguments the Information Commissioner has been mindful of the particular circumstances of this case. He has taken into account the relatively small amount of information being withheld under this exemption, namely a log of discussions, 4 letters and notes of 3 meetings, and the limited level of detail within some of that information.

25. There is weight to the public authority's argument that disclosure of information that is subject to on-going policy development may be prejudicial to the process. The Information Commissioner accepts that weight must be given to the need to protect the safe space for effective policy development. He also expects public authorities to develop these arguments in the specific context of the request and the withheld information.

26. The public authority mentioned that the information related to a policy process that was live at the time of the request but did not clearly relate or explain this to the context of the information. It is clear to the Information Commissioner that the policy formulation and development in relation to the educational oversight issue was broken down into several stages with several key "landmarks", where Ministerial decisions and announcements were made, in particular the June 2011 announcement above. As a general rule the Information Commissioner and Tribunal have found that the impact of disclosing certain policy information will be less once a decision has been announced. The public authority has not provided further arguments about the impact of disclosing post-announcement or decision. The Information Commissioner therefore finds that there is a stronger case for withholding certain pieces of information under section 35 but not all. There is some information that clearly relates to the on-going process of policy development after June 2011 and some that primarily relates

to the announcement and decisions made. The Information Commissioner also finds that some of the information reveals little information about policy intentions or detail.

27. The Home Secretary herself drew attention to the importance of the subject matter in her announcement shown in paragraph 5 above, particularly: "… *it has become very apparent that the old student visa regime failed to control immigration and failed to protect legitimate students from poor-quality colleges".* This demonstrates to the Information Commissioner the importance in openness to the public as previous policy has obviously been deemed to have failed. He finds this to be a significant argument in support of disclosure.

28. The Information Commissioner also considers that any existing or potential students who may be affected by the changes to the process will want to be fully informed as early in the process as possible, as too will any of the education establishments that will be affected. Bearing this in mind, he also considers that there is a public interest in allowing parties who would be potentially affected to be able to participate in an informed debate on any application that would affect them, or to be able to make informed representations. The Information Commissioner considers that the disclosure of the withheld information would contribute to this.

29. The public authority has recognised that there is a public interest in openness, transparency and accountability, and in understanding how decisions which could affect people's lives are taken. The Information Commissioner accepts that there are strong arguments about the importance of public oversight of these processes and that disclosure of the requested information would enable the public to take part in this process and debate the extent of the steps being taken.

30. The complainant drew the public authority's attention to his belief that there had been a lack of public consultation when asking for an internal review. He stated:

> *"This process is central to the ability of public and private educational providers to acquire the "Highly Trusted Status" that enables them to sponsor international students (Tier 4) for the purpose of studying in the UK. The process was established roughly a year ago when, without consultation, the Home Office abandoned its former procedures and – again without consultation – authorised the QAA and the ISI to carry out the necessary immigration-related accreditation of institutions wishing to be or to continue to be licensed to sponsor Tier 4 students.*

> *The entire policy was introduced and continues to be modified without the slightest public consultation. Rather, the public has been told what has been privately decided. Yet in designing and implementing their respective Educational Oversight procedures (which are alarmingly dissimilar) both the QAA and the ISI have declared to me that they are following 'advice' and receive 'guidance' from the Home Office. What is this advice? What is the nature of this guidance?*
>
> *What we have here is secret government- all the more secret because neither the QAA nor the ISI – both of which are private bodies (though they carry out public functions) - currently come within the scope of the Freedom of Information Act".*

31. In its internal review the public authority countered this saying:

> *"With regard to* [the complainant]*'s comment in his internal review request about there being a lack of consultation, I have established that the Home Office did in fact hold a public consultation on the reform of Tier 4 which ran from December 2010 to the end of January 2011. This consultation included a section on reform of the previous accreditation system which was judged to be insufficiently effective at countering immigration abuse and was therefore replaced by the educational oversight process".*

32. However, in subsequent correspondence with the Information Commissioner it went on to qualify this statement saying:

> *"… you have asked for our response to* [the complainant]*'s comment that the public consultation that ran between December 2010 and January 2011 did not include questions about the role of QAA and ISI in educational oversight for private colleges. While it is true that the consultation did not mention any specific bodies, the consultation did set out the Government's proposal to raise the quality of accredited education providers to ensure the quality of education provision within private institutions of further and higher education…".*

33. The Information Commissioner therefore gives limited weight to the public authority's arguments regarding the public having been sufficiently well informed. It is apparent that only part of the process was 'open' to consultation, not all of it. This therefore weighs heavier in support of disclosure in order to better inform the public and thereby promote public debate.

34. The Information Commissioner accepts that there are valid public interest arguments for maintaining the exemption. These arguments are stronger for some of the information, as it clearly related to live, on-going policy issues at the time of the request. There are also significant arguments in favour of disclosure. The Information Commissioner makes a partial finding of disclosure – for some information the public interest in favour of maintaining of the exemption outweighs the public interest in disclosure, for other information it does not outweigh the public interest in disclosure. The information to be disclosed is detailed in the steps above with further detail in a confidential annex.

**Section 43 – commercial interests**

35. The term 'commercial interests' is not defined in the FOIA, but the Information Commissioner's awareness guidance states:

> *"…a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services.*
>
> *The underlying motive for these transactions is likely to be profit, but this is not necessarily the case, for instance where a charge for goods or the provision of a service is made simply to cover costs.*"

36. For section 43(2) of FOIA to be applied correctly, a public authority must be able to demonstrate that the following conditions are satisfied:

- disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it);
- in all the circumstances, the weight of the public interest in maintaining the exemption outweighed the public interest in disclosure.

37. The first issue for the Information Commissioner to assess, therefore, is whether disclosure could result in the prejudice that section 43(2) is designed to protect against. If this is found not to be the case, the exemption is not engaged and there is no requirement to consider the public interest factors associated with disclosure.

38. The now standard approach to the prejudice test involves the consideration of three questions:

(1) what are the applicable interests within the exemption?;

(2) what is the nature of the prejudice being claimed and how will it arise?; and
(3) what is the likelihood of the prejudice occurring?

*The applicable interests*

39. The public authority has argued that disclosure of the disputed information would be likely to prejudice the commercial interests of the QAA and the ISI.

40. The information consists of two deeds of indemnity. The public authority has clarified to the Information Commissioner that:

> *"... there is no commercial or contractual basis for our engagement with the QAA and the ISI. This was meant to make it clear that the arrangements whereby the two organisations carry out educational oversight of Tier 4 sponsors are not set out in a formal contract and they do not charge the Home Office for these services".*

*The nature of the prejudice being claimed and how it will arise*

41. The public authority has approached both parties and they have indicated that they believe disclosure would be prejudicial to their commercial interests as they may lose *"tactical litigation advantage"* or be left open to possible exploitation by those wishing to undermine the process. The Information Commissioner is unable to further comment on the content of the two agreements in this notice, or the comments made by the third parties, as this would disclose the information itself.

*The likelihood of the prejudice occurring*

42. For the commercial interests exemption to apply to this information, there must be prejudice which must not be trivial or remote but real, actual or of substance to the commercial interests of a relevant body.

43. The Information Commissioner has viewed the withheld information. The two documents are almost identical and contain was he considers to be 'standard wording' for such documents. He also notes that any third party which is dealing with a public authority must by now understand that it is subject to FOIA legislation and should therefore be aware of the likelihood of disclosure of 'standard documents' such as these in order to satisfy the public interest.

44. The Information Commissioner is not convinced that there is any actual prospect of prejudice to commercial interests associated with

disclosure of this information and he therefore concludes that the exemption is not engaged.

**Section 36 – prejudice to the effective conduct of public affairs**

45. In correspondence with the Information Commissioner the public authority advised:

> *"Some of the above* [section 35] *arguments would also be relevant had we applied the exemption at section 36. The latter cannot, of course, apply to information which is exempt under section 35, but this is because of the specific exclusion at section 36(1)(a). There is nothing inherently contradictory in arguing that the disclosure of information relating to the development of Government policy would prejudice the effective conduct of public affairs in one or more of the ways specified in section 36.*
>
> *We have not applied section 36 in this case, partly because we applied section 35 and partly because we have not approached a Minister for an opinion as a 'qualified person'. We nevertheless consider that there would be a strong case for applying section 36(2)(b)(ii) and 36(2)(c) to the information, in the alternative if the Commissioner were to find that section 35(1)(a) does not apply".*

46. Additionally, in relation to two of the further documents it found during the Information Commissioner's investigation, it stated:

> *"Our primary argument for withholding the two agreements is that they are exempt under section 43(2), for the reasons considered above. We nevertheless consider that they are also exempt under section 36(2)(c)…*
>
> *A Home Office Minister has not yet agreed that section 36(2)(c) applies to the agreements. The application of this exemption is therefore dependent upon such agreement, which we have no reason to think will not be forthcoming…*
>
> *We recognise that the original response to* [the complainant]*'s request indicated that no agreements were in place and did not cite either section 43(2) or section 36(2)(c). We shall write to* [the complainant] *to clarify the position once a Minister's agreement to the application of section 36(2)(c) is obtained".*

47. The Information Commissioner will not revert to a public authority each time he concludes that an exemption is either not engaged or that the public interest favours disclosure. The public authority has not obtained

a qualified opinion and the exemption at section 36 is therefore not engaged.

**Right of appeal**

48. 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,
Arnhem House,
31, Waterloo Way,
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

49. 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.

50. 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 ……**

**Steve Wood**
**Head of Policy Delivery**
**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**