

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 February 2013

**Public Authority:** Department for Culture, Media and Sport  
**Address:** 2-4 Cockspur Street  
London  
SW1Y 5DH

### Decision (including any steps ordered)

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1. The complainant requested information relating to advice from officials to the Minister regarding library closures. The Department for Culture, Media and Sport (DCMS) refused to disclose the requested information citing section 35 (formulation of government policy).
2. The Commissioner's decision is that DCMS correctly applied section 35(1)(a) to withhold the requested information in this case. He requires no steps to be taken.

### Request and response

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3. The complainant wrote to DCMS on 15 March 2012 and requested information in the following terms:

*"The minister Mr Vaizey has consistently said in public that he hasn't intervened in any of the local authorities restructuring of their library services because he was acting on the advice of his civil servants/officers. He repeated this the other day at the DCMS select committee.*

*Can you please provide me with copies of this advice for the cases where the department has looked into what is happening. If this is too wide in scope then Oxon, Glos, Brent, Doncaster or any where there has been judicial reviews. Please also include any references in meeting minutes, emails and reports."*

4. DCMS sought clarification from the complainant on 12 April 2012. He provided that clarification on the same day:

*"Specifically as suggested above, the Minister hasn't yet intervened to enforce the act in any of the cases where there has been judicial reviews or other threats of legal action. Because he hasn't it can only mean one of two things:*

- 1. He has received no advice at all from his staff to intervene on any of the cases.*
- 2. He has received advice telling him not to intervene and the reasons for it.*

*If the answer is number one and there has been no advice given to intervene can you confirm this is the case?*

*If the answer is number two can you please provide the advice in whatever form it takes (meeting notes, emails etc) for the cases when this advice has been given".*

5. DCMS treated that as a new request for information, providing its substantive response on 20 June 2012. It confirmed that, as at 12 April 2012 - the date of the request - the Minister had received specific advice about a number of library authorities. However it refused to provide that information citing the section 35 exemption (formulation of government policy).
6. Following an internal review DCMS wrote to the complainant on 21 September 2012 maintaining its original position.

## **Background**

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7. The Public Libraries and Museums Act 1964 (the 1964 Act) sets out the statutory duty for all local authorities to provide a comprehensive and efficient library service for library users in their area. A parallel duty is placed on the Secretary of State to oversee and promote the public library service and to secure the proper discharge of local authority functions under the Act.
8. Under the 1964 Act, the Secretary of State may intervene by setting up a local inquiry if he is of the opinion that a local authority is failing to carry out its duty under the Act to deliver a '*comprehensive and efficient library service for library users*'.

9. The Commissioner understands that the 1964 Act does not require a local authority to obtain the minister's decision before closing a library.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 12 October 2012 to complain about the way his request for information had been handled. He complained about DCMS' refusal to release information and about the delay in responding to his request.
11. Accordingly the Commissioner considers the scope of his investigation to be DCMS's citing of section 35. He has also considered the timeliness with which DCMS handled the request.

### **Reasons for decision**

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#### **Section 35 Formulation of government policy**

12. Section 35 is a class-based exemption. This means that if, as a matter of fact, information falls within any of the categories listed in that section, it is exempt.
13. DCMS is relying on section 35(1)(a) in this case. In other words, it is claiming that the withheld information is held by a government department and relates to the formulation or development of government policy.
14. This exemption is intended to prevent harm to the internal deliberative process of policy-making within government. 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 and does not specifically need to be information on the formulation or development of that policy.
15. In this case the withheld information relates to the formulation of government policy on local authority provision of public library services. Having viewed the withheld information, the Commissioner is satisfied that it falls within the category of information relating to 'the formulation or development of government policy'. He therefore finds the exemption engaged.

*The public interest*

16. Although the Commissioner is satisfied that the exemption is engaged, the public interest test must be applied to determine whether or not the withheld information should be disclosed.

*Public interest arguments in favour of disclosing the requested information*

17. Generally speaking, the public interest is served where access to the information would:
- further the understanding of, and participation in, the debate of issues of the day;
  - facilitate the accountability and transparency of public authorities for decisions taken by them;
  - facilitate accountability and transparency in the spending of public money;
  - allow individuals to understand decisions made by public authorities affecting their lives and, in some cases, assist individuals in challenging those decisions;
  - bring to light information affecting public safety.

18. Arguing in favour of disclosure the complainant told DCMS:

*"... libraries are being closed and the minister STILL hasn't made his final decision. I believe we as taxpayers all have to be given the reasons as to why the minister hasn't intervened in these cases....There is a great feeling by campaigners that the minister is neglecting his duty and this is more damaging to the conduct of public affairs than releasing the information".*

19. DCMS acknowledged that greater transparency around policy decisions might lead to increased accountability for the decisions taken. It accepted that allowing access to the information sought might allow informed debate about the development of government policy and decisions in the area of local authority provision of public library services. It also recognised that disclosing the information:

*"may allow people (including local campaigners) to assess the quality of advice being given to ministers which may increase trust in the scrutiny process being undertaken by the libraries policy team".*

*Public interest arguments in favour of maintaining the exemption*

20. In favour of maintaining the exemption, DCMS argued the need for ministers to be able to hold free and frank conversations with officials. It told the complainant:

*"No final decisions have been taken by the Secretary of State to date on library cases and there needs to be a free space in which it is possible for officials and ministers to conduct rigorous and fair assessments of library cases, including consideration of the pros and cons of any proposed decision, without fear of premature disclosure".*

21. In correspondence with the Commissioner, DCMS argued that if the requested information in this case was disclosed:

*"there would be reduced space in which ministers could hold a free and frank conversation with officials".*

22. DCMS also said that:

*"The Department is at present subject to a voluminous amount of correspondence and pressure from campaign groups about public library closures. Release of policy advice provided to date is likely to fuel more correspondence and criticism from campaigners without adding substantively to the central issues being considered here".*

23. These are sometimes referred to as 'safe space' arguments: in other words, arguments which concern the need for Ministers and officials to have a safe space to formulate policy, debate live issues and reach decisions without being hindered by external and/or media comment.

24. DCMS also argued that access to "interim advice" – advice which is in the process of revision and development - "may be unhelpful" on the basis that it would detract from informed debate rather than assist it.

25. In this respect, it explained that current policy advice "is in the process of being updated and amended as developments unfold" but that such advice may not necessarily be accepted by the Secretary of State without further scrutiny. In DCMS's view, the public interest in seeing such interim advice is limited.

26. With respect to the timing of the request, DCMS told the complainant:

*"Whilst a final decision may not have been reached on a specific library case, to date, the library policy team are actively considering a number of library cases in parallel and these are live and continuing issues for the department. In the case of Oxfordshire –*

*this library authority is being closely monitored and reviewed by the library policy team".*

27. In correspondence with the Commissioner, DCMS confirmed its view, previously expressed to the complainant, that the public interest lies primarily in knowing the reasoning behind any final decision by the Secretary of State. In support of that view, DCMS explained that, when a final decision is made on any library case, a full explanation of the reasoning behind that decision is made available – set out in a decision letter.
28. DCMS told the complainant that it considered that the decision letter would meet the public interest *"in understanding why the Secretary of State has decided to intervene or not in any particular case"*.
29. The Commissioner acknowledges that details of a number of such decision letters have been published on the DCMS website.

#### *Balance of the public interest arguments*

30. When balancing the competing public interests in a case, the Commissioner is deciding whether it serves the public interest better to disclose the requested information or to withhold it because of the interests served by maintaining the relevant exemption. If the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure, the information in question must be disclosed.
31. In dealing with the complaint in this case, the Commissioner is mindful that the complainant has expressed concerns *"that the minister is neglecting his duty"* in respect of intervening to enforce the Libraries Act.
32. The Commissioner understands that the Secretary of State has a wide discretion as to how he exercises his duties. In the absence of any evidence of wrongdoing in the exercise of those duties, the Commissioner gives no weight to the suggestion of neglect with respect to the public interest in disclosure in this case.
33. The Commissioner recognises that, at the time of the request, the policy making process to which the requested information relates was current. He further acknowledges that the issue of local authority library provision was a sensitive one that was controversial and a matter of debate.
34. He acknowledges that, from the evidence he has seen, members of the public have strong feelings about the changes being made to the provision of library services. He also recognises that the decisions made

about the provision of such services by local authorities may not always be popular.

35. The Commissioner considers that disclosure of the requested information would enable the public to gain a better understanding of the issues in this area of policy and would thereby further public discussion and debate. In his view this adds weight to the public interest in disclosure.
36. He also recognises the significance of the public interest in the debate about the provision of library services and the potential for government policy and decisions on library cases to affect individuals in relation to how the library service is provided. Again, this adds weight to the public interest in favour of disclosure.
37. The Commissioner considers, however, that there is a strong public interest in Ministers and officials being able to discuss issues openly and candidly. He recognises that the argument concerning the preservation of a space within which to carry out the policy making process is, in general, valid on the grounds that this will assist in the open discussion of all policy options, including those that may be considered unpopular. However, he recognises that the weight that this argument carries in each case will vary, depending on the circumstances.
38. In this case the Commissioner accepts that there is a general need for safe space to allow free and frank debate and that this exists to ensure that any decisions are reached without being significantly hindered by external comment or intrusion. In the context of policy on restructuring library services, the public interest in protecting that safe space in respect of a specific decision about provision in a particular area will diminish once that decision has been made.
39. In balancing the public interest arguments in this case, the Commissioner does not underestimate the importance of transparency on matters that are clearly of public concern. He has recognised a strong public interest in favour of disclosure of this information on the grounds of the subject matter and the likely effect on the communities involved.
40. However, he has also recognised that disclosure may result in harm to the policy making process. In his view, while there is a public interest in informing public debate, in this case there is a weightier public interest in allowing Ministers and officials the safe space to further develop the policy in question and to be able to continue to discuss issues in a frank and open manner.

41. The Commissioner therefore considers that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption in this case.

## **Section 10 Time for compliance**

## **Section 17 Refusal of request**

42. There is a provision in FOIA, at section 10(3), which allows the 20 working day time limit to be extended to a 'reasonable' time, where the authority is required to apply the public interest test, because one of the 'qualified' exemptions applies.
43. Where the authority does require an extension of time, it must issue an initial refusal notice, within 20 working days, specifying the exemption, explaining why the exemption applies and giving an estimated date by which the public interest test will be completed. The extension only gives extra time to consider the public interest test: a public authority cannot claim additional time to consider whether the exemption(s) are engaged.
44. In this case, DCMS confirmed that it holds information within the scope of the request but advised that it required additional time to consider the public interest. It told the complainant that some of the requested information fell within the scope of section 36 (prejudice to effective conduct of public affairs). However, in its substantive response DCMS relied on section 35 and not on section 36. It subsequently told the complainant:

*"it would have been better for the same exemption to have been applied throughout the handling of your request and apologise that it has changed mid case....It was only after full and final consideration of this matter that the department concluded that section 35 is the correct exemption in this case".*
45. During the course of his investigation, the Commissioner invited DCMS to explain its initial refusal of the request, including its reference to section 36. DCMS told the Commissioner that while it initially considered that information might need to be withheld under that section, it subsequently considered that section 35 of FOIA and its public interest test *"was more pertinent"*.
46. The Commissioner acknowledges that section 35 is closely related to section 36 and that information which is exempt under section 35 cannot also be exempt under section 36.
47. Section 17 (refusal notices) requires an authority to accurately communicate any exemptions it is relying on. The Commissioner is



concerned to note that, during the extended time for compliance, DCMS changed its view about the exemption it was relying on to withhold information. However, the Commissioner accepts that DCMS had accurately communicated its position by the internal review response at the latest.

48. He requires no remedial steps to be taken.

## **Other matters**

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### *The internal review*

49. The complainant wrote to DCMS on 6 August 2012 about its delay in responding:

*"It has now been 32 working days since my request for an internal review ..... This failure only adds further weight to the argument that the department and its ministers are failing in their statutory duty to enforce the library act".*

50. On 20 August 2012 he wrote:

*"I am still waiting for the outcome of the internal review..... I believe the department has been intentionally obfuscating and delaying to try and protect a minister who refuses for political reasons to uphold his statutory obligations under the libraries act to ensure councils provide a comprehensive and efficient service for all who desire to use it".*

51. There is no statutory time set out in FOIA within which public authorities must complete a review. Accordingly, a delay in responding to a request for internal review does not constitute a breach of FOIA. However, the Commissioner considers that internal reviews should be completed as promptly as possible and has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.

52. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed.

## Right of appeal

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53. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

54. 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.
55. 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 .....**

**Graham Smith**  
**Deputy Commissioner**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**