

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 9 December 2013

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested a copy of the draft national curriculum for history that had been shared with a named government adviser in advance of a formal proposal for changes to the national curriculum being published as part of a consultation exercise. The Department for Education (DfE) refused the request on the basis that the information was exempt under section 35(1)(a) – information relating to the development or formulation of government policy and the public interest favoured maintaining that exemption. During the Commissioner’s investigation the DfE applied section 36 – prejudice to the conduct of public affairs, in the alternative.
2. The Commissioner’s decision is that the DfE was correct to refuse the request under section 35(1)(a). It follows that he has not gone on to consider the application of section 36.

#### **Request and response**

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3. On 17 February 2013, the complainant wrote to the DfE and requested information in the following terms:  
  
“According to one of the newspapers I read today, [name of expert]– one of the advisers to the Secretary of State for Education on the revised History National Curriculum that is currently being consulted upon – says that that part of the consultation ... bears “no resemblance” to a draft that was being worked on in January 2013. ... please could you send me a copy of the last version of the History

National Curriculum pages from the draft Framework Document that was shared in January 2013 with [named expert]?"

4. The DfE responded on 7 March 2013. It refused to provide the requested information, relying on section 35(1)(a) to do so. Under section 35(1)(a) information is exempt if it relates to the formulation or development of government policy.
5. Following an internal review the DfE wrote to the complainant on 27 March 2013. It upheld its application of section 35.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 1 April 2013 to complain about the way his request for information had been handled. In particular he argued that in the circumstances of this specific case the public interest favoured disclosure.
7. During the course of the Commissioner's investigation the DfE applied section 36 in the alternative. That is, in the event that the Commissioner found that section 35 was not engaged, the department argued that the exemption provided by section 36 would apply.
8. The Commissioner considers the first issue which needs to be decided is whether section 35(1)(a) is engaged and if so whether the public interest favours maintaining the exemption. Only if he finds that section 35 is not engaged will he go on to consider the application of section 36.

### **Reasons for decision**

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#### **Section 35**

9. Section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates to the formulation or development of government policy.
10. The requested information comprises of the last draft of the national curriculum for history that was shared with a named expert. The Commissioner understands that the policy process involved sharing a draft version of the curriculum with a number of experts which was then refined and revised in light of the comments from those experts to produce the next version. The experts selected were seconded to the DfE and were required to sign confidentiality agreements prohibiting them from disclosing any document or information that was made available to them during their secondment.

11. Quite clearly the requested information relates to the development of the national curriculum for history. The question is whether the development of the national curriculum is a matter of government policy.
12. There is no clear definition of what constitutes government policymaking but in broad terms it can be seen as the process by which political ideas are turned into plans or programmes which aim to bring about a desired change. The review of the national curriculum is a means by which the government can bring about changes to the way pupils are taught with a view to improving educational standards. It forms part of the government's reform of qualifications and the curriculum with the objective of better preparing pupils for life after school. The review was overseen by the Secretary of State for Education and it is understood that the proposed changes can only be introduced by statutory instruments. The Commissioner is therefore satisfied that the changes to the national curriculum for history are a matter of government policy.
13. It follows that the Commissioner is satisfied that the requested information does relate to government policy and that the exemption provided by section 35(1)(a) is engaged. However section 35 is subject to the public interest.

### **Public interest**

14. The public interest test is set out in section 2 of FOIA. The test involves weighing the public interest factors in favour of maintaining the exemption against the public interest factors in favour of disclosing the information. The information can only be withheld where the public interest in favour of maintaining the exemption outweighs the public interest in disclosure.
15. Section 35(1)(a) exists to protect the policy making process. Therefore when considering the public interest in maintaining the exemption the Commissioner will only consider the harm that could result to that process if the information was disclosed.
16. An important consideration when assessing the public interest is the timing of the request. The request was made on 17 February 2013. The formal proposals for changes to the national curriculum had only been published 10 days before on 7 February 2013. This signalled the start of a consultation exercise in which academics, professionals, representative bodies and the general public were invited to comment on the proposals. The proposals would then be reviewed in light of the responses to that consultation. It was intended to publish a final proposal in September 2013 and then lay the necessary statutory instruments before Parliament with a view to implementing the new curriculum by

September 2014. It should be noted that the proposed changes do not just affect the history curriculum. The entire national curriculum was being reviewed. This included English, mathematics and science, but the planned timetable for the review meant the formal proposal for these subjects would not be finalised until spring 2014. Therefore it is clear that at the time of the request policy development was still going on and that a consultation exercise in respect of part of the national curriculum was underway.

17. The DfE has argued that disclosing the draft curriculum would harm the policy process in a number of ways. It has argued that as the policy making process was ongoing at the time of the request the DfE was entitled to safe space in which to properly consider all its policy options. Safe space refers to the need for any decision maker to be able to fully consider and discuss all the issues in private away from the glare and distraction of publicity. This prevents discussions being stifled through fear that ideas, which have not yet been considered in detail, will be misrepresented as firm proposals.
18. The Commissioner accepts that at the time of the request the proposal for the new curriculum on history had not been finalised and was still subject to change. He also accepts that work on the curriculum for other subjects was on-going at that time. Clearly though the publication of the proposed changes and the start of the consultation exercise was a significant landmark in the development of that policy. The need for safe space to reach that point had, at least to some extent, diminished with the start of the consultation exercise.
19. Nevertheless the policy making process was still ongoing. The DfE believe that disclosing earlier drafts of the curriculum would lead to public speculation about the changes that had been made and who was responsible for initiating those changes. The DfE argued that such speculation would not be helpful to the policy making process that would take place following the consultation exercise. The Commissioner accepts that this could be the case.
20. The Commissioner also considers that to disclose an earlier draft of the curriculum whilst the consultation exercise was underway could undermine that consultation. By the time of the request it was already apparent that the new history curriculum was the subject of heated debate and was attracting adverse comment.
21. It is likely that responding to issues raised by the disclosure of the earlier draft would involve the DfE in additional work. However the Commissioner considers it is unlikely that this would involve any significant distraction of resources.

22. Of more weight is the possibility that the disclosure could prove a distraction to those responding to the consultation exercise. The consultation exercise is an important part of the policy making process. That consultation process would benefit from respondents making submissions focussed on the government's formal proposals rather than being influenced by earlier versions. The Commissioner therefore gives some weight to the public interest in the DfE being able to manage the consultation exercise so as to maximise the quality of the feedback it received.
23. The DfE has argued that disclosing the draft would set, what it described as, a 'dangerous precedent'. In broad terms the argument is that disclosing the draft in response to this request would signal to those involved in policymaking that other, early versions of draft policy documents would also be disclosed. This would have a chilling effect on the candour of the discussion of officials and input from external advisers.
24. The Commissioner has considered the validity of this argument. As already made clear the public interest in maintaining section 35 has to take account of all the circumstances of the case and each case is different. Therefore disclosure of information in response to one request cannot signal the routine disclosure of information in response to other requests. Nevertheless it is possible that disclosing information in one case can have some influence on how those involved in policymaking behave in the future. The Commissioner understands the DfE's arguments to relate both to willingness of ministers and officials to share information with external experts and the willingness of external experts to participate in the policy making process.
25. The DfE has explained that draft curriculums are produced to illustrate the different policy options available. The DfE has argued that if it had anticipated that early drafts would be released it was less likely that they would have been produced in the first place and that the different policy options would then have to be discussed in abstract. The Commissioner accepts that if this happened it would be detrimental to good policy making. However he is sceptical that the department would actually forego the opportunity to develop draft curriculums as a means of focussing discussions on the issues simply because it would result in the very problem identified by the DfE.
26. The DfE has also argued that even if such drafts were produced for internal consumption, ministers would be less willing to share those drafts with external experts. The contribution of such external experts helps produce robust, fully considered policy options.

27. This argument only holds water if sharing the information with an external expert in some way made it more likely that it would be disclosed. In this case it was the expert's comments to a national newspaper that made the public aware of the existence of an alternative, earlier draft and aroused interest in its content. The Commissioner recognises that although it is possible to protect the policy making process with confidentiality agreements, the department inevitably risks losing some control over the confidentiality of the process when sharing information with third parties. This can erode confidence that the safe space required for policy development will be respected. However the Commissioner considers that the risks of relinquishing control over the material shared with third parties exist regardless of the operation of FOIA and the outcome of this particular request.
28. Nevertheless the Commissioner does accept that if information was targeted by an FOIA request, and subsequently disclosed, as a result of the actions of an external adviser, human nature is such that ministers may be more cautious of sharing information in the future. But although the Commissioner accepts that ministers and officials may not feel as free to share information with external experts, the Commissioner considers it unlikely that such experts would be excluded from the process altogether because of the important contribution they have to make.
29. The DfE has also argued that if the draft was disclosed it would have a chilling effect on the contribution of the external experts. When arguing that disclosing the draft would invade the safe space necessary for good policy development, the DfE argued that such disclosure would inevitably lead to speculation over why changes were made and who supported or opposed those changes. The Commissioner has applied this argument to the role of external advisers. Concern that their contribution may result in them becoming the focus of public controversy could prove a disincentive for some to be involved. This has to be balanced against the fact that in this case any scrutiny of the named expert's role was initiated by his comments to the press and therefore to some extent he would be seen as having placed himself in the spotlight. Account also has to be taken of the fact that the individuals selected as experts are likely to be highly motivated to contribute to the policy debate. Nevertheless the Commissioner considers this argument has some weight.
30. In light of the above the Commissioner accepts that disclosing the draft curriculum would have a chilling effect on the policy making process, by inhibiting the contribution of external experts but also to a lesser degree undermining the willingness of ministers to share such drafts with those experts. The chilling effect is more pronounced where the policy to

which a request relates is still live. The Commissioner recognises that not only was the policy on the national curriculum for history still being developed at the time of the request, so was the policy on the other subjects included in the consultation exercise. Furthermore, the policy work on english, mathematics and science was at an even earlier stage in its development. Therefore the Commissioner is satisfied that the chilling effect would impact on a number of areas of policy work that were ongoing at the time of the request. The Commissioner gives some weight to the public interest in preventing the chilling effect in these circumstances.

31. The public interest factors in favour of disclosure do not have to focus on the effect releasing the information would have on policy making. However it is clear from the complainant's request that he wished to consider the draft curriculum when responding to the consultation exercise which formed part of that policy making process.
32. It would not serve the public interest if disclosing the draft resulted in people commenting on that version of the curriculum rather than focussing on the merits or demerits of the formal proposal. However the Commissioner has also considered whether disclosing the draft would in any way inform their consideration of the formal proposal. The Commissioner is not convinced it would. The published formal proposal sets out in full what the government's intention was. People could reach a view on the benefits or weaknesses of those proposals without knowing what alternatives had previously been considered.
33. This is borne out by the fact that the consultation exercise has now been completed and the history curriculum attracted a great of interest. The submissions that were received have now been considered resulting in significant changes to it. The Commissioner is satisfied that this demonstrates that the refusal to disclose the requested draft did not diminish the value of the consultation exercise to the policy making process.
34. It is not disputed that the formal proposal that was published attracted a lot of adverse criticism. Clearly many people considered the proposal was flawed. It can therefore be argued that there is a public interest in understanding the policy process that culminated in that proposal. Although this would include having access to earlier drafts of the history curriculum, these drafts would not, in themselves, reveal the debates or deliberation that went into their production. The Commissioner accepts there is a public interest in disclosing information on the development of controversial policy options. The more important the policy and the more people it impacts on, the greater the public interest will be. Clearly the quality of the education is an important policy area affecting not only pupils, but the country as a whole. However the actual information that

has been requested in this case would only partially meet the objective of explaining the policy process.

35. The Commissioner has also considered the implications arising from the fact that a newspaper reported a very different version of the curriculum was being worked on as late as January 2013, only weeks before the formal proposal was published. This may well suggest to some that the version that was published for consultation had been hastily prepared. Although the Commissioner accepts that this does add weight to the public interest in favour of disclosure he notes that ability to redraft the proposal quickly does not necessarily indicate a drop in quality.
36. There is always a general public interest in disclosing information to support transparency and accountability. In this case the general public interest is bolstered by fact that releasing the information could improve the public's understanding of the policy process. Furthermore, in the circumstances of this case the disclosure may help promote trust and confidence in the government's competence to develop policy in this important area.
37. Importantly however the Commissioner finds that disclosing the draft would not have assisted those responding to the consultation process. Therefore the arguments in favour of disclosure are limited to those relating to understanding the policy process better. In light of this the Commissioner finds that the public interest in maintaining the exemption is greater. In particular the Commissioner considers that at the time of the request there was a public interest in not disclosing information that could place experts in the spotlight in such a way that individuals would be less willing fulfil that role in the future. Furthermore at the time of the request there was a public interest in not risking disruption to the consultation exercise and preserving the safe space in which to continue working on the reform of the national curriculum.
38. The Commissioner finds that section 35(1)(a) is engaged and can be maintained in the public interest. He has therefore not gone onto the application of section 36.



## Right of appeal

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39. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed .....**

**Pamela Clements**  
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