

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

### **Decision notice**

**Date:** 21 July 2015

**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 information relating to the new Independent Schools Standards (ISS) and the consultation exercise that was launched by the DfE.
2. The DfE addressed some elements of the request but refused to disclose other information under sections 35(1)(b) and 36(2)(b)(i) and (ii) of the FOIA.
3. The Commissioner has considered both exemptions and finds that both exemptions are engaged for the information they were applied to. In both cases, he has decided that the public interest in maintaining the exemption outweighs the public interest in disclosure.
4. The Commissioner does not require any steps to be taken.

#### **Request and response**

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5. On 11 August 2014, the complainant wrote to the DfE and requested information in the following terms:

"Public Consultation: Proposed New Independent School Standards  
Launch date: 23 June 2014

1 Why did the department launch this consultation close to the end of the summer term with the response dates in the summer holiday?

- 2 Why were there two different response dates?
- 3 What steps were taken to ensure that the relevant schools, headteachers and chairs of governors knew of the consultation?
- 4 Copies of any pro-forma documents that were used in such steps.
- 5 Copies of any internal memoranda, file-notes, or other material relating to any decisions relating to 1 to 3 above."
6. The DfE responded on 10 September 2014. The DfE responded to questions one to four but in relation to question five informed the complainant that the requested information is exempt from disclosure under sections 35(1)(b) and 36(2)(b)(i) and (ii) of the FOIA.
7. The complainant requested an internal review on 7 November 2014.
8. The DfE responded on 5 December 2014. It stated that it required a further 20 working days to consider the complainant's request for internal review.
9. The DfE responded in full on 24 December 2014. It stated that it remained of the opinion that the withheld information is exempt from disclosure under the exemptions previously cited.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 24 December 2014 to complain about the way his request for information had been handled.
11. The Commissioner's investigation has considered all remaining withheld information. The DfE has first applied section 35(1)(b) of the FOIA to one document and then section 36(2)(b)(i) and (ii) of the FOIA in the alternative. For all other remaining withheld information, the DfE has applied section 36(2)(b)(i) and (ii) of the FOIA.
12. It is important to note that section 35 and section 36 of the FOIA are mutually exclusive. This means that if any part of section 35 is engaged, section 36 cannot apply – even if the public interest rests in disclosure under section 35 of the FOIA.
13. Because the DfE wishes to apply section 35 of the FOIA to one document in the first instance, the Commissioner will consider this exemption first. If he finds that section 35 is engaged but the public interest rests in disclosure, he will not go on to consider section 36 for

the reasons explained above. The notice would then order disclosure of this information.

14. The Commissioner will then go on to consider section 36 of the FOIA for all remaining information.

## **Reasons for decision**

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### **Section 35**

15. Section 35 (1)(b) of the FOIA states information held by a government department or by the National Assembly for Wales is exempt information if it relates to Ministerial communications. The FOIA states that "Ministerial communications" means, in this case, any communications between the Ministers of the Crown and includes, in particular, proceedings of the Cabinet or of any committee of the Cabinet.
16. The DfE has stated that the document in question is a letter from Lord Nash to the Deputy Prime Minister and Secretary of State for Business, Innovation and Skills dated 30 May 2014. The letter is a communication between Ministers of the Crown and therefore falls within the definition of the exemption. The DfE explained that this letter was sent from one Minister to a number of others and it is standard practice for a Minister to write to Cabinet colleagues seeking agreement to launch a consultation when the consultation is potentially controversial and news worthy.
17. The DfE confirmed that the principle of collective responsibility is set out in the Ministerial Code at paragraphs 2.3–4:

"The internal process through which a decision has been made, or the level of Committee by which it was taken should not be disclosed. Decisions reached by Cabinet or Ministerial Committees are binding on all members of the Government. They are, however, normally announced and explained as the decision of the Minister concerned..."
18. The DfE explained that members of the Cabinet must not reveal the content of the discussion which takes place. This allows for Cabinet members to privately debate and raise concerns before a decision is made, since they will need to collectively stand behind it once a decision is reached.
19. It advised that paragraph 2.6 of the Ministerial Code sets out how these arrangements apply to consultations:

"Before publishing a policy statement (white paper) or a consultation paper (green paper), departments should consider whether it raises issues which require full collective ministerial consideration through the appropriate Cabinet Committee. The expectation is that most such papers will need collective agreement prior to publication..."

20. The Commissioner has reviewed this document and he is satisfied that it does fall within the definition of "Ministerial communications". It is quite clearly a letter from Lord Nash to Nick Clegg, Deputy Prime Minister and Vince Cable, the Secretary of State for Business, Innovation and Skills relating to the launch of the consultation at the centre of this request. As he is satisfied that section 35(1)(b) of the FOIA is engaged, he now needs to go on to consider the public interest test.
21. The DfE confirmed that it understood there is a public interest in openness and transparency about information relating to the process of policy formulation. It understood more openness and transparency can result in better quality policy formulation and development. The DfE stated that it also accepted that there is a public interest in improving the standard of public debate and trust.
22. However, in this case, the DfE considers the public interest rests in maintaining the exemption. It stated that it believes Ministerial communications require a self-contained space to ensure good decision making which is based on a full and honest disclosure of all the facts between ministerial colleagues. The DfE explained that the letter is very open about the issues the Department faced in trying to make changes to the ISS. It also openly discusses the relevant policy issues, on a sensitive area.
23. The DfE explained that disclosing a letter that seeks a collective decision (in this case to a non-conventional fast track route to making regulations) from fellow Ministers could undermine the collective responsibility of government; this is the opportunity for Ministers to circulate any concerns they may have about a proposed course of action before they must stand behind a collective decision. To do this effectively, the Minister seeking a decision must be able to raise salient points for consideration. Should this principle be undermined, future Ministers would worry about how candid and honest they could be with colleagues about all the circumstances of a consultation. If there was a fear that the correspondence would be subject to publication further down the line.
24. The DfE said that it is essential that Ministers (and the officials who work with Ministers to draft correspondence) have the confidence to know that they can be open about problems and delays within the policy-

making process without the fear of such disclosure becoming public knowledge.

25. The DfE also advised the Commissioner that there is already a significant amount of information in the public domain, which it considers meets the public interest in understanding and taking part on the decision making process. It stated that ultimately the consultation, consultation response form and draft regulations that the letter refers to were published and can be found via the following link:

<https://www.gov.uk/government/consultations/proposed-new-independent-school-standards>.

26. The Commissioner accepts that Ministerial communications require safe and private thinking space to ensure that free and frank deliberations take place about the options available. He acknowledges that good decision making is based on such free and frank exchanges of views and the ability of Ministers to circulate their views among themselves in order to reach a collective decision. The Commissioner agrees that such processes would be hindered and undermined if disclosure was required prior to decisions being made and that this would impact on the overall quality of decision making.

27. In terms of weight to be placed on maintaining the exemption the Commissioner has noted the position set out by the Upper Tribunal in the case of *Cabinet Office v Information Commissioner [2014] UKUT 461 (AAC) (20 October 2014)*:

"[57]. Even where the information sought itself falls squarely within the definition of "ministerial communications", as opposed to being merely information which "relates to" ministerial communications, disclosure may not necessarily, on the facts of the particular case, bring into play to any significant extent any of the policy reasons behind the exemption. I would respectfully endorse what was said in paras. 85 to 87 of the Scotland Office case."

28. In *Scotland Office v Information Commissioner (EA/2007/0070, 8 August 2008)* the Information Tribunal considered ministerial correspondence relating to Scottish territorial waters. It said:

"To the extent that the Appellant is suggesting that ... there is some form of presumption against the disclosure of such information implicit in that exemption, or that the public interest in maintaining the exemption under section 35(1)(b) is inherently weighty, we must disagree."

and

*"not all information coming within the scope of section 35(1)(b) will bring the convention of collective Cabinet responsibility into play. Some communications may be completely anodyne or may deal with process rather than policy issues. Communications may also be purely for information purposes, such as when reports are circulated."*

29. It is therefore important that the Commissioner considers the Ministerial communications on the circumstances of case, assessing the context and the content of the information. On the issue of collective responsibility the Commissioner's guidance on section 35(1)(b) states<sup>1</sup>:

*"[113] If collective responsibility arguments are relevant, they are likely to carry significant weight. However, departments should be careful to ensure that collective responsibility actually applies to the particular information in question: ie that it reveals the view of an individual minister on a government decision. Not all information falling within this exemption will automatically engage the convention of collective responsibility."*

30. The Ministerial communications withheld under the exemption in this case relate to a collective decision making process and disclosure of the information would reveal information about collective discussions, therefore the Commissioner accepts that convention of collective responsibility is engaged and significant weight should be applied.
31. The Commissioner notes in this case that the requested information relates to the DfE's decision to launch the public consultation in two stages and the decision to have a shorter consultation period for the spiritual, moral, social and cultural development of pupils (SMSC) (Part 2 of ISS) and the suitability of staff, supply staff and proprietors (Part 4 of ISS) when compared to the remaining parts of the ISS and to request clearance to begin the consultation. At the time of the complainant's request these decisions had already been made, there was to be no further deliberation on these specific points of timing as the online public consultation had already been launched (23 June 2014). The need for private thinking space in which to deliberate on these specific points was no longer required, as a final decision to launch a two stage consultation process and a shorter consultation for some elements of the ISS had already been made and acted upon. However, the Commissioner also accepts that the information related to a broader policy issue that was

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

live and ongoing at the time of the request. Therefore, while the Commissioner does not completely accept the need for safe space and the likely chilling effect proposed by DfE he accepts that they can carry weight.

32. The Commissioner notes the complainant's concerns that the consultation was particularly short for Part and Part 4 of the ISS and that it was launched very close to the end of the school summer term with a closing date in the summer holiday. He also acknowledges that the DfE has said in its responses to him that it has publically acknowledged itself that the length of the consultation was not an "ideal situation".
33. The Commissioner considers the timing of the consultation and the short period for responses adds weight to the public interest in disclosure. The Commissioner notes the public interest such standards have attracted particularly due to their association with extremism and the Trojan horse allegations in Birmingham in 2013 and he considers the public interest in understanding why these decisions were taken and why the DfE carried out the consultation for Parts 2 and 4 of the ISS in the manner it did close to the end of the summer term carries some weight
34. Although the DfE states that a significant amount of information is in the public domain relating to the consultation, the Commissioner understands that much of this information was published later in around November and December once the responses had been analysed. The Commissioner can only consider the circumstances at the time of the request and he understands that the only information publicly available at this point was the consultation document itself and the proposed new ISS.
35. There are significant arguments on both sides. The Commissioner has concluded that in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Section 36**

36. The Commissioner will however now go on to consider the application of section 36(2)(b)(i) and (ii) of the FOIA to the remaining withheld information. The remaining withheld information consists of:
  - (a) a timetable paper produced for Lord Nash; and
  - (b) a submission to Lord Nash seeking his approval of the consultation package and consent to seek approval from the Home Affairs Committee (HAC) and the Reducing Regulation Committee (RRC).



37. Section 36(2)(b) of the FOIA states that information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure of the information 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.
38. The DfE confirmed that Minister Gyimah, in his capacity as the qualified person, authorised the application of section 36(2)(b)(i) and (ii) of the FOIA in this case. He believed the disclosure of this information would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
39. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
40. The DfE argued that it is the qualified person's opinion that these documents contain honest appraisals and summaries of the issues they faced at the time trying to press ahead with the implementation of the new standards and the different options that were available to it. The qualified person stated that disclosure of this type of information to Ministers would have a chilling effect on officials' ability to write openly to Ministers in the future if they feared it would be published. He also felt that officials should be able to write to Ministers with a full range of options available without having to worry that in the future those options will be published and potentially be held up to ridicule. The DfE went on to say that officials need to be comfortable that deliberation can be based on free and frank advice and where required decisions can be made based on that advice and in some cases, where required, take a different route and not be fearful of historic option papers being held against those decisions or the way they had to be adapted to emerging events.
41. The DfE also claimed that it was the qualified person's opinion that one of the documents contained a "detailed analysis" of the financial costs involved and disclosure of this information would hinder the ability of officials to consider such costs in a free and frank manner. Timeframes are also mentioned and the DfE felt that disclosure of such information would be likely to hinder officials from putting timeframes forward in



future. It explained that events often emerge and timeframes can change and if such information was disclosed this would have a chilling effect on officials offering free and frank recommendations in the future.

42. The Commissioner has reviewed the contents of the remaining withheld information. He is satisfied in this case that the qualified person's opinion that disclosure would be likely to inhibit the free and frank provision of advice and the free and frank exchange of views is a reasonable opinion to hold. It is noted that the information is not of a trivial nature. It discusses the issues the DfE faced with the implementation of the new ISS and its wishes to have these in place within specific timeframes. The information discusses openly and frankly the various options available and any merits or issues identified with a particular approach. For these reasons, the Commissioner can only conclude that the qualified person's opinion that section 36(2)(b)(i) and (ii) is engaged is a reasonable opinion to hold.
43. The Commissioner will therefore now go on to consider the public interest test.
44. The DfE stated that again it recognises the general public interest in the deeper workings of government and that openness and transparency assists the public in their overall understanding. However, it stated that good government depends on good decision making and this has to be based on the best advice available and a full consideration of the options. Without protecting the thinking space and the ability of Ministers and senior officials to receive free and frank advice, there is likely to be a corrosive effect on the conduct of good government, with a risk that decision making will become poorer and will be recorded inadequately. For these reasons, the DfE concluded that the public interest rested in maintaining the exemption.
45. The public interest test considerations under section 36 of the FOIA require the Commissioner to consider the extent, severity and frequency of the inhibitions claimed.
46. Similar to the document considered under section 35(1)(b) of the FOIA above, the contents of the two documents withheld under section 36(2)(b)(i) and (ii) of the FOIA relate in the main to the DfE's decision to launch the public consultation on 23 June 2014 to consider the proposed new ISS in the way it did. They also detail the proposed new requirements and background to the new ISS and the different options that were available to the DfE.
47. At the time of the request, the consultation had already been launched. The Commissioner is therefore of the view that much of the deliberations discussed in these documents had already been decided

and acted upon by the time the complainant's request was made. The need for private thinking space and the space to deliberate further on launching consultation exercise was therefore no longer required by this time. However, as above, the Commissioner accepts that the information relates to a broader live and ongoing process and disclosure could make these ongoing processes harder to manage.

48. The Commissioner considers that in general terms senior Civil Servants would not be easily deterred from discussing policy options freely and frankly in the future and would be willing to offer their honest advice on the options available despite the potential for future disclosure. The Commissioner considers the FOIA has been in place for some time now and the purpose of such legislation is to promote an open and transparent government. Senior officials should expect that once decisions are made they will be open to public scrutiny.
49. The Commissioner notes that the DfE considers there would be a chilling effect on future decision making. Whilst the Commissioner does not accept that any inhibition to future decision making would be as severe or as frequent as the DfE has claimed he does give some weight to the chilling effect argument given the nature of advice provided, the timing of the request, and the sensitivity of the issues.
50. The Commissioner is also of the view that it is generally accepted and acknowledged that timeframes do change with the implementation of new government policy and that events do emerge which then result in adaptations being required. With this mind, the Commissioner is sceptical that the DfE would be 'held up to ridicule' or challenged if such information was disclosed.
51. The Commissioner acknowledges that there is a public interest in members of the public understanding how consultations change and how effectively such matters are managed. However, this is not a matter that attracts a high level of public interest.
52. With regards to the DfE's argument that one document contains an in depth cost analysis, the Commissioner accepts that one document does discuss the potential impact of the new ISS but he does not agree that the text can be considered to be an 'in depth' cost analysis. Much of what is mentioned appears to be fairly obvious consequences of introducing new standards. He hasn't given this specific argument significant weight.
53. As stated above, the Commissioner considers there is significant public interest in the new ISS due to well publicised problems in Birmingham in 2013 relating to the Trojan Horse allegations. Although the DfE has stated that the new ISS are not linked to these allegations it accepts

that they are closely associated due to the concerns of extremism in the UK. It is also noted that the consultation process for Parts 2 and 4 of the ISS was particularly short, was launched very close to the end of the school year with a closing date for responses in the school summer holidays. The Commissioner considers the public interest in knowing why such decisions were made and were deemed necessary carries weight.

54. The Commissioner recognises significant arguments on both sides. Whilst the Commissioner has rejected some of the DfE's arguments in favour of maintaining the exemption, he has agreed that significant weight can be placed on them given the timing of the request, which was made whilst the wider process was still ongoing, relatively close to when the decision about timing was made, and this would have impacted on a wider safe space needed for ongoing work and made a chilling effect more likely. Whilst the Commissioner recognises the significant wider public interest in ISS he finds that the specific public interest in the timing of this particular consultation is not as strong.
55. In all the circumstances the Commissioner he has concluded that the public interest in maintaining this exemption outweighs the public interest in disclosure.

## Right of appeal

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56. 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: 0870 739 5836

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)

57. 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.
58. 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**  
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