

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2017

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street

London

SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Education (DfE) relating to meetings of the Star Chamber Scrutiny Board (SCSB) regarding the addition of pupil data items 'country of birth' and 'nationality' to the National Pupil Database. The Commissioner's decision is that the DfE is correct in stating that section 35(1)(a) of the FOIA is engaged in relation to the withheld information, however the balance of public interest, in all the circumstances of the case, lies in favour of disclosing the withheld information
 2. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information to the complainant.
 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 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.
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Request and response

4. On 4 July 2016 the complainant wrote to the DfE and requested information in the following terms:

"Please provide copies of the following in original format (such as pdf) between 01 June 2015 and January 31 2016:

"Meeting minutes with reference to the addition of pupil data item 'country of birth'. The participants may include the Secretary of State for Education and other Departments, and/or the Education Data Division and other Departments, whether to each other or involving other third parties, that is related to or resulted in the Request for Change for items pupil nationality (100564) and pupil country of birth (100565). This should include meeting dates and attendees."

5. The DfE responded on 1 August 2016 and confirmed that it held information falling within the scope of the request. However, it stated that, to provide the requestor with the information would exceed the costs limit and that it could therefore not provide it as per the provisions of section 12 of the FOIA. The DfE, by way of advice and assistance, offered the complainant the opportunity to narrow or refine her request. The complainant submitted a revised request on 1 August 2016, in the following terms:-

"At your suggestion, I therefore request specifically the meeting minutes from January 2015 until and including July 2016 of the Star Chamber Scrutiny Board (SCSB). Either in their original format or copies of that, such as pdf.

I also request the departmental correspondence to third parties, resulting from the outcome of their expansion of data collection to include 'country of birth' decision taken in November 2015."

6. The DfE responded on 30 August 2016, providing some information (with redactions of personal information as per section 40(2) of the FOIA) however, it stated that the remaining information (the withheld information) could not be disclosed, citing section 35(1)(a) of the FOIA (formulation or development of government policy) as a basis for non-disclosure. The withheld information consisted of the meeting minutes requested.
7. On 31 August 2016, the complainant requested an internal review of the DfE's decision. She stated that she had been supplied with incorrect information in respect of part 2 of her request (departmental
8. correspondence) as the DfE had not supplied department correspondence relating to the November 2015 meeting. The

complainant also sought an internal review of the DfE's decision to apply section 35(1)(a) of FOIA to the withheld information, as the policy had already been decided upon and, in any case, she argued that the public interest in favour of disclosure outweighed that in favour of maintaining the exemption.

9. On 14 November 2016, the DfE communicated the result of its internal review to the complainant. It stated that it was upholding the decision to apply section 35(1)(a) to the withheld information and that it did not hold any records of correspondence with other government departments regarding discussions which arose as a direct result of the November 2015 decision. It clarified that it had sent the complainant correspondence preceding the November 2015 decision, however it stated that this correspondence all related to that decision and had been provided in order to give a full picture to the complainant.

Scope of the case

10. The complainant contacted the Commissioner to complain about the way her request for information had been handled, specifically the DfE's application of section 35(1)(a) of FOIA to the withheld information and the time taken by the DfE to respond to the complainant's request for internal review.
11. The Commissioner has considered the DfE's application of section 35(1)(a) of FOIA to the withheld information together with the delay incurred by the DfE in providing a response to the complainant's request for internal review.

Background to request

11. The Star Chamber was established in 1999 in the then Department for Education and Skills (DfES) to review and control data collection proposals emerging from the Department. It was initially an internal body, but was strengthened in 2006 by the addition of an external scrutiny group of local authority and school representatives.
12. With the DfE publicly committing to reducing its data collections, the external scrutiny group was given the power to make decisions on data collections. It was re-launched as the Star Chamber Scrutiny Board (SCSB) on 1 November 2008. Annual reports have been published since the SCSB has been in operation. The reports can be viewed on the GOV.UK website at the following address:

www.gov.uk/government/groups/star-chamber-scrutiny-board

13. The SCSB meets monthly, primarily to consider data collection business cases put forward by policy areas across the DfE and its Executive Agencies. The meetings also discuss relevant data developments and look at how new collections are progressing, acting as a consultation forum where required.
14. The board's operations are seen as an excellent example of joint working on the wider education and children's services agenda, something that was highlighted by HM Treasury in their 2011 report. The board's service has also been recognised by other bodies including the National Audit Office who have previously consulted the SCSB for advice about their proposed collections.
15. The school census is the DfE's primary source of administrative data about pupils attending schools in England. The data collected is vital in supporting a number of the DfE's strategic objectives and policies, and is widely used for the purpose of improving, and promoting, the education or well-being of children in England. It helps to make sure that the DfE is allocating funds where they are needed and that no groups of children are missing-out on the education they deserve.
16. The SCSB decision to which this requests refers is the decision to collect information on pupil nationality, country of birth and proficiency in English via the school census.

Reasons for decision

Section 35 – formulation or development of government policy, etc

17. Section 35(1)(a) of FOIA states that –

“Information held by a government department or by the National Assembly of Wales is exempt information if relates to (a) the formulation or development of government policy,”

18. The complainant has argued that the exemption is not engaged as the SCSB is purely for scrutiny of operational matters, not formulation of policy. However, the DfE has informed the Commissioner that the Star Chamber feeds directly into the government policy to reduce the burden of data collection, data in this instance that relates to the development of Departmental policies in relation to education and children’s services.

19. The Commissioner therefore accepts that the withheld information relates to the formulation or development of government policy. The exemption at section 35(1)(a) is therefore engaged. As it is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in favour of maintaining the exemption and those in favour of disclosure.

Public interest arguments in favour of disclosure:

20. The DfE has taken into account that considerations for disclosure add up to an argument that more openness about the process and development of policy may lead to better quality policy formulation and development, greater accountability, an improved standard of public debate, and improved trust. The Commissioner considers that there is a significant public interest in all of these as public authorities should be open, transparent and accountable with regard to their decision-making processes.

21. The complainant believes that there is a strong public interest in disclosure of the withheld information as there is a need for strong public scrutiny of the policy in order to understand the cost versus public benefit of this national data collection and systems recoding across every school in England, and the importance of being accountable for the decision-making on 8 million children’s personal confidential data. The complainant and other individuals and

organisations have also expressed concern about the method of data collection and the purposes for which the data will be used, which would be addressed by disclosure of the withheld information. The Commissioner accepts that these are strong public interest factors in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

22. The DfE accepts that in some instances, the public interest in continuing to withhold information will reduce after the policy and formulation stage is complete. However, in this instance the DfE does not believe that the public interest in withholding has diminished. This is because policy areas with which the SCSB continues to deal are still live and often sensitive. The release of this information has the potential to inflict damage on the policy-making process.
23. The DfE believes that this chilling effect on the willingness of external experts to contribute persists beyond these historic copies of the SCSB minutes. As mentioned earlier, while the DfE takes the Commissioner's point that experts are likely to be highly motivated to contribute to the debate, the DfE does not believe that they would be willing to risk damaging their careers or reputation to do so. The DfE considers that such experts may not wish to have their contributions made public, whether those are dissenting from a direction of travel, or compromising on some areas in order to achieve balance. Such experts are far less likely to provide input – or contribute at all - if they know that this is likely to be exposed to the public gaze. This would have a direct impact on the policy-making process.
24. The SCSB is an independent external panel of representatives from schools and local authorities with responsibility for representing the sector and ensuring that all data collection proposals are necessary, provide value for money and are designed to add as small a burden to the frontline as possible. All such requests for changes to data collections have to be approved by the SCSB. If details of these discussions are made public this could have a detrimental effect on the efficient operation and decision-making powers of this board, as they may become reluctant to approve necessary changes, which are in the best interests of the sector, if they are likely to be unpopular and such decisions made it into the public domain.

25. The DfE states that, without Star Chamber being able to offer advice freely and in confidence, this could mean that sector involvement/consultation in changes to DfE data collections and the direct link to policies may be diminished, which in itself would be detrimental to good government.
26. The Star Chamber terms of reference states:

"Due to the nature of the discussions, which may involve areas not yet in the public domain, SCSB members are asked to exercise caution in sharing papers with local colleagues and, if in any doubt, not to do so."
27. Due to this, the DfE also thinks it would be reasonable for SCSB members to expect that any comments made by them, and recorded at these meetings, would be treated in confidence.

Balance of the public interest arguments

28. The Commissioner fully accepts that there is a strong public interest in retaining the integrity of the policy-making process by maintaining a safe space in which policy can be formulated and developed whilst matters are still being considered. Having regard to the SCSB's terms of reference, and in particular to the excerpt above, the Commissioner also accepts that the SCSB's members would reasonably expect the meetings of the SCSB to constitute a safe space in which to express their views. Should the minutes of these meetings be disclosed to the public, the Commissioner accepts that this may lead to a future reluctance among members of the SCSB to participate in future discussions, which would overall be likely to be detrimental to the efficacy of the SCSB's decision-making process and ultimately to the policy-making process.
29. The Commissioner also accepts, to some extent, the argument that there may be a chilling effect on future contributions to discussions by external experts, although she is of the view that experts in a field should be accustomed to contributing to such discussions and should have enough confidence in their own views and opinions not to be deterred from contributing to future discussions. Nevertheless, the Commissioner accepts that there is some risk of such experts being reluctant to provide as much input into future discussions, which could overall be detrimental to the policy-making process and she accords some weight to this argument, as a less effective policy and decision-making process could be detrimental to the process of good government, which would not be in the public interest.

30. On the other hand, the Commissioner accords significant weight to the need for transparency and accountability in the policy-making process and also the public interest in informing public debate about important policy issues being discussed. The decision to add 'nationality' and 'country of birth' to the categories of data being collected and stored on the National Pupil Database was an extremely controversial one. The DfE states that the new data items will not be passed to other government departments, or anyone else and are solely for the DfE to use internally to allow it to better plan to meet needs within the school system. For example, what extra support it may need to provide to schools with high numbers of children who do not speak or understand English sufficiently to access the curriculum, whether particular groups of pupils are making good progress with their education, or where there is evidence of good practice with children of different nationalities that could be shared. The DfE states that understanding trends in migration and the associated needs in the school system helps it to ensure that all children, wherever they are from, have the best possible education.
31. However, despite the DfE's assurances, there are a number of public concerns regarding the decision to add these extra categories of data. The addition of these categories does not oblige parents to provide the data, as they are able to opt out of providing these categories of data. Nevertheless, there are significant concerns about the collection of the data, how long it will be held and whether, even if it is published in an anonymised format, 'migrant' children may be able to be identified from it. Another concern is that the data will not help inform the DfE which schools have high numbers of children who do not speak or understand English, as nationality and country of birth are not in themselves indicators of ability to speak or understand English – for example, many children who were born abroad and have non-British citizenship are able to speak fluent English, and there are children born in Britain who may need help with English. This raises concerns about the benefits of collecting such data, versus the cost of doing so.
32. At the time of the request, the decision was to add the categories of 'country of birth' and 'nationality' to the pupil data stored in the National Pupil Database. However, in October 2016 Lord Nash, the Parliamentary Under-Secretary of State for the school system, stated that the new data would be held separately to the other pupil data and would not be in the National Pupil Database.
33. Whilst the Commissioner accepts that this goes some way to addressing privacy concerns, this statement had not been made at the time of the request. Further, the public privacy concerns around the use of the data were not so much to do with where it was held, but

how it would be collected and used. The fact that it has now been decided to hold the extra data separately does not really address these specific concerns.

34. The Commissioner is aware, in the post-Brexit referendum climate, of a number of concerns about 'migrant' pupil data being shared with the Home Office and potentially used to formulate an 'immigration enforcement' list. Whilst she appreciates that many of the concerns may arise from 'scaremongering' in the current climate, she nevertheless considers that the concerns are valid. Although parents have the option not to supply the data, the Commissioner is aware that some parents may fear that this could lead to negative connotations. There is also public concern that the decision was rushed through in a very short period of time, with no debate in the House of Commons about the issues. Having perused the withheld information, the Commissioner considers that disclosure of this would go a long way towards alleviating many of these concerns.
35. On balance, although the Commissioner accepts the strong public interest in maintaining the integrity of the policy-making process, she can see that there are a number of significant public concerns about this specific decision, which she considers would be addressed by disclosure of the withheld information, which would allow the public to see the thinking and rationale behind the decision to add the extra categories of data to the census. Although the public interest in maintaining the exemption and that in disclosure are very finely balanced, with compelling arguments on both sides, the Commissioner considers that ultimately the balance of public interest arguments weighs in favour of disclosure of the withheld information.

Other matters

Section 36 of the FOIA

36. The DfE requested that the Commissioner, should she not consider that section 35(1)(a) applied to the withheld information, give the DfE the opportunity to consult the Minister as to the application of section 36. The Commissioner considered this request, however, since she is of the view that section 35(1)(a) is engaged, her decision was made on the balance of public interest considerations, which she believes would be the same whichever of the two exemptions was applied. She has therefore made this decision solely on the basis of the DfE's application of section 35(1)(a) to the withheld information at the time of the request.

Internal review

37. The complainant informed the Commissioner that she was dissatisfied with the length of time taken by the DfE to carry out an internal review. She requested the internal review on 31 August 2016, however the DfE did not respond to this until 14 November 2016. The DfE in its submissions to the Commissioner apologised for the delay, citing unusually high levels of correspondence during that time period. The Commissioner trusts that the DfE will in future, where possible, follow good practice guidelines with regard to its internal review processes.

Right of appeal

38. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

39. 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.
40. 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

Deirdre Collins
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