

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 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 relating the inclusion of Roman numerals in the national primary curriculum.
2. The Commissioner's decision is that the Department for Education (the DfE) has correctly applied section 35(1)(a) (formulation of government policy) of the FOIA to part of the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information contained in Annex C
4. 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.

Request and response

5. On 21 September 2015, the complainant wrote to the DfE and requested information in the following terms:

“Please can you give me the evidence used to justify the inclusion of Roman numerals within the national primary curriculum for maths.

Please can you give me a copy of any correspondence on the inclusion of Roman numerals within the national primary curriculum for maths".

6. DfE responded on 19 October 2015 and refused to provide the requested information citing section 12 of the FOIA as its basis for doing so.

7. The complainant submitted a refined request on 21 October 2015 asking for:

"Please can you give me the evidence used to justify the inclusion of Roman numerals within the national primary curriculum for maths.

Please can you give me a copy of any correspondence made by or made to ministers in the DfE or any other department on the inclusion of Roman numerals within the national primary curriculum for maths between January 2011 and 11 September 2013"

8. On 4 November 2015 DfE responded and again refused to provide the information citing section 12.

9. The complainant made a further refined request on 18 November 2015 for:

"Please can you give me the evidence used to justify the inclusion of Roman numerals within the national primary curriculum for maths.

Please can you give me a copy of any correspondence made by or made to ministers in the DfE on the inclusion of Roman numerals within the national primary curriculum for maths between 16 April 2013 and 11 September 2013."

10. DfE responded on 19 January 2016 and refused to provide the requested information citing section 35(1)(a) of the FOIA as its basis for doing so.

11. DfE provided an internal review on 8 July 2016. It revised its position and provided some information within the scope of the request. However, it refused to provide the remainder again citing section 35(1)(a) of the FOIA as its basis for doing so.

Scope of the case

12. The complainant contacted the Commissioner on 7 December 2016 to complain about the way her request for information had been handled.

13. The Commissioner considers the scope of this case to be to determine if DfE has correctly applied section 35(1)(a) to the withheld information.

Reasons for decision

Background

14. DfE explained that the National Curriculum provides pupils with an introduction to the core knowledge that they need to be educated citizens. It introduces pupils to the best that has been thought and said; and helps engender an appreciation of human creativity and achievement.
15. The National Curriculum is just one element in the education of every child. There is time and space in the school day and in each week, term and year to range beyond the National Curriculum specifications. The National Curriculum provides an outline of core knowledge around which teachers can develop exciting and stimulating lessons in specific subjects.
16. Pupils of compulsory school age in all local authority maintained schools must follow the National Curriculum. It is organised on the basis of four key stages and twelve subjects, classified in legal terms as 'core' and 'other foundation' subjects.
17. The Secretary of State for Education is required by the legislation to publish programmes of study for each National Curriculum subject, setting out the 'matters, skills and processes' to be taught at each key stage. Schools are free to choose how they organise their school day, as long as the content of the National Curriculum programmes of study is taught to all pupils.
18. In February 2013, the department issued a National Curriculum consultation document, which sought to consult experts in the field, key stakeholders and the broader public on the proposed structure of the new National Curriculum, in terms of which subjects are compulsory at each key stage.
19. The consultation took place between February and April 2013 and was followed by the publication of final proposals for the new National Curriculum for all subjects and key stages (except for key stage 4 English, mathematics and science) in July 2013.
20. Part of the consultation proposed, in relation to mathematics, that pupils should be taught the relevance of Roman numerals so as to be able to:
 - a. "tell and write the time from an analogue clock, including using Roman numerals from I to XII, and 12-hour and 24-hour clocks" at Year 3";

- b. "read Roman numerals to 100 (I to C) and understand how, over time, the numeral system changed to include the concept of zero and place value" at Year 4; and
 - c. "read Roman numerals to 1000 (M) and recognise years written in Roman numerals" at Year 5".
21. This element of the consultation, and communication associated with this is the focus of this request. The DfE acknowledged that the request had been made after the consultation on the National Curriculum had been made, however, it maintained that the application of section 35 continued to be relevant to this policy development.

Section 35(1)(a) – formulation of government policy

22. Section 35(1)(a) states:

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

23. Section 35(1)(a) is one of the class-based exemptions in the FOIA. This means that there is no need to show any harm in order to engage the exemption. The information simply has to fall within the class described. Furthermore, the term 'relates to' (ie to the formulation or development of government policy) can be interpreted broadly. This means that the information does not itself have to be created as part of the formulation or development of government policy. Any significant link between the information and those activities is enough.
24. Furthermore, if the majority of a piece of information relates to a particular activity, any associated or incidental information will also relate to that activity, even if in isolation it would not be covered.
25. DfE explained that this consultation fed directly into the government's policy and vision for a National Curriculum that is slimmer, focused on essential subject knowledge and which, especially in the core subjects of English, mathematics and science, compares favourably with the curricula taught in the most successful education jurisdictions.
26. The reason for undertaking this consultation was to improve the department's policies surrounding the delivery of a reformed National Curriculum. The information collected draws in the contributions of experts and key stakeholders and provides the department with a better evidence base for the ongoing development of government policy.

27. The DfE referenced the Commissioner's own guidance on section 35¹, particularly from the perspective that there only needs to be a significant link between information and the activity, and particularly as within the withheld information there is such a link to the development of government policy.
28. The DfE further referenced a previous decision notice (FS50580887²), which it considered was fundamentally the same as the current request, and FS50491842³ in which the Commissioner recognised that the release of such information would also impact on the willingness of experts to contribute.
29. The information requested clearly falls into the class of information described in the exemption i.e. *it relates to the formulation or development of government policy* and therefore the exemption is engaged.
30. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner has therefore also considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest test

31. The DfE has presented the following arguments in favour of maintaining the exemption.
 - In this instance the DfE does not believe that the public interest in withholding has diminished. This is because it continues to develop policy areas relating to the delivery of the National Curriculum and will continue to seek the input of key stakeholders and experts in the field via future consultations. The release of this information has the potential to inflict damage on the policy-making process.
 - It is also in the public interest that the formulation of government policy and decision-making can proceed in the self-contained space

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

² https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560090/fs_50580887.pdf

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2013/929584/fs_50491842.pdf

needed to ensure that it is done well. Good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of the options. Without protecting the thinking space and the ability for Ministers and senior officials to receive and exchange 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.

- The DfE believes that this chilling effect on the willingness of external experts to contribute persists beyond these historic contributions to the National Curriculum consultation. As mentioned earlier, while the DfE takes the Commissioner's point that experts and key stakeholders 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.
 - Such experts and key stakeholders 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 contributors 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.
 - If the withheld information is made public, it could have a detrimental effect on future consultations, as contributors may become reluctant to support proposed changes, which are in the best interests of pupils and the sector, if they are likely to be unpopular and such contributions made it into the public domain.
 - Without contributors being able to offer advice and opinion freely and in confidence, this could mean that consultations in changes to DfE policies may be diminished, which in itself would be detrimental to good government.
 - Due to this, the DfE considered it would be reasonable for contributors to expect that any comments made by them, and recorded as part of such consultations, would be treated in confidence.
 - It is also worth noting that to provide transparency, the department published its response to the consultation in July 2013 and this continues to be available on the GOV.UK website.
32. The DfE stated that it had 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.

33. 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.
34. However, it is in the public interest that the effective formulation of government policy and government decision making can proceed in the self-contained space needed to ensure that it is done well. This includes free and frank dialogue between ministers, officials, and contracted experts.
35. Without protecting the thinking space and the ability for ministers and senior officials and experts 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.
36. DfE considered that working effectively with subject experts is of the public interest and releasing the information would jeopardise future policy interactions with its subject experts. These experts would become wary of sharing advice with the DfE for fear of their comments being released. Thus, it would encourage policy development to be undertaken in a less consultative manner, which would damage the quality of the policy making as a result.
37. The DfE acknowledged there is a case for releasing the information as it would allow the public greater insight into policy development and how ministers are briefed.
38. Based on the above the DfE considered that the public interest favoured maintaining the exemption and withholding the information.
39. The complainant has argued that:
 - The national curriculum is of over-riding public interest, it sets out what must be taught in all local authority maintained schools (around 85% of primaries). In its own words, the national curriculum aims to “provide pupils with an introduction to the essential knowledge that they need to be educated citizens”.
 - The creation of the national curriculum is thus, correctly, an open process involving consultation with the public and the profession, as well as input from experts.
 - During the process of consultation and subsequent formulation of this policy, judgements on conflicting positions will have to be made. But now, given the importance of the national curriculum in shaping the education of millions of children, the process by which those judgements were arrived at should be transparent.

- While the DfE says that it has taken into account the general public interest in disclosure it adds:

“Conversely, it is in the public interest that the formulation of government policy and decision making can proceed in the self-contained space needed to ensure that it is done well. Good government depends on good decision making and this needs to be based on the best advice available and a full consideration of the options. Without protecting the thinking space and the ability for 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.

The panel concluded in relation to some of the information that the public interest in maintaining the exemption and not disclosing it outweighs the public interest in its disclosure.”

40. The complainant further argued:

- The DfE puts forward the ‘safe space’ argument - But the discussion is no longer live.
- The chilling effect of giving advice - as the curriculum has now been in place for two years, and government has continued it is unlikely that there could be a chilling effect on future discussions about it.
- Record keeping arguments - as stated above the national curriculum is a policy based on public consultation. Records of the consultation responses will be kept by all the parties providing the responses, as well as the department receiving them. If the information then collated and recommended to ministers based on these responses (which is what I am asking for) differs from the responses then that is a matter for public interest and the idea that this could be withheld on the basis that in future no such advice would be recorded seems to undermine rather than uphold the public interest.

Conclusion

41. The Commissioner acknowledges the complainant’s arguments and that the ‘safe space’ argument generally loses some weight over time, as does the chilling effect argument.
42. It is the Commissioner’s position that the need for safe space exists primarily while a policy is actually under development. Her guidance does acknowledge that it may be required for a short time after policy

decisions have been made in order to give the government *"the opportunity to properly promote, explain and defend its key points"*.

43. The Commissioner's decision is that the DfE has correctly applied section 35(1)(a) to part of the withheld information. The Commissioner has reviewed the withheld information, and although limited it is clearly in relation to the formulation of government policy ie the National Curriculum.
44. However, the information in Annex C has been provided by a committee rather than a specific individual. Given that the constitution of such panels can change over time the chilling effect argument loses significant weight, and the safe space argument is negligible given that the consultation was published in 2013 and Roman numerals are now included in the National Curriculum.
45. However, the Commissioner considers that section 35(1)(a) has been correctly applied to the remaining withheld information. This information is more sensitive in that it is a personal opinion and even if it was anonymised its disclosure would signal to others involved in the same sort of work that information of a similar sensitivity could be released – ie the chilling effect, and, because the DfE is involved in similar work on a regular basis, this chilling effect would be felt frequently. This therefore increases the public interest in maintaining the exemption.
46. The Commissioner does not consider that sufficient time has yet elapsed for the potential chilling effect to have ceased, however there will come a time when it is no longer as sensitive and therefore potential consultees would not be alarmed by its release.

Right of appeal

47. 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

48. 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.

49. 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

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