

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 October 2018

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the legal advice the DfE holds in relation to the legality of section 444 of the Education Act for parents who take their children out of school to visit relatives overseas. The DfE responded refusing to disclose the requested information citing section 42 of the FOIA.
2. The Commissioner's decision is that the DfE is entitled to refuse to disclose the requested information under section 42 of the FOIA. She therefore does not require any further action to be taken.

Request and response

3. On 3 March 2018, the complainant wrote to the DfE and requested information in the following terms:

"Has the Department for Education received legal advice on the legality of section 444 of the Education Act for parents who take their children out of school to visit relatives overseas given Article 8 of the European Convention of Human Rights restricts state interference in a citizen's right to a family life? If so, what was that advice?"

I understand the DfE may be inclined to refuse my request given the nature of the legal advice but given that parents can be prosecuted and fined/jailed under section 444 there is an overwhelming public interest in disclosure."

4. The DfE responded on 4 April 2018. It stated that it holds the requested information but considers it is exempt from disclosure under section 42 of the FOIA.
5. The complainant requested an internal review on 10 April 2018.
6. The DfE carried out an internal review and notified the complainant of its findings on 10 May 2018. It confirmed that it upheld its application of section 42 of the FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 13 May 2018 to complain about the way his request for information had been handled. The complainant confirmed that he does not consider the DfE has given sufficient weight to the public interest in favour of disclosure. He stated that there is no right to appeal a penalty notice served under section 444 of the Education Act and the ultimate sanction is imprisonment. He considers it is in the public interest to disclose legal advice on which the DfE has relied.
8. The Commissioner considers the scope of her investigation to determine whether the DfE is entitled to rely on section 42 of the FOIA for the non-disclosure of the requested information.

Background

9. The DfE explained that parents have a duty, under section 7 of the Education Act 1996, to ensure that their child of compulsory school age (approximately 5 to 16) receives an efficient full-time education either by regular attendance at school or otherwise. If parents register their child at school and the child fails to attend regularly, parents may be guilty of an offence under section 444(1) of the Education Act 1996 and may be issued a penalty notices under section 444A or prosecuted. Unless a statutory exception applies.

10. Statutory exceptions in which a child shall not be taken to have failed school regularly include:
 - Where a child is prevented from attending school due to sickness of unavoidable cause;
 - Where a child's absence from school is on a day exclusively set apart for religious observance by the religious body to which their parent belongs;
 - Where the local authority have failed to make any travel arrangements that they have a statutory duty to make to help the child attend school;
 - Where the school is a privately funded independent school and is not within walking distance of the child's home, and no suitable arrangements have been made by the local authority for them to board at or near the school or to attend a state-funded school closer to their home;
 - Where a child has no fixed abode, the parent's trade/business requires them to travel, the child has attended school as regularly as the nature of the trade/business permits, and (for children aged six or older) they have attended at least 200 sessions during the preceding 12 months; and
 - Where leave of absence from school has been granted by the school.
11. The DfE went on to say that The Education (Pupil Registration) (England) Regulations 2006 as amended, provide that only 'exceptional circumstances' warrant leave of absence. Head teachers have the discretion to grant leave, but in maintained schools they may do so only in exceptional circumstances.
12. The DfE advised that it does not specify what constitutes exceptional circumstances. Schools know their pupils best and are able to consider the specific and relevant context behind each request for leave of absence; taking account of the implications for the child's and parents family life.
13. Where a parent wishes to take their child out of school, the onus is on the parent to apply to the school in advance for a leave of absence; demonstrating in their application why they believe there are exceptional circumstances for taking their child out of school. It would then be for the head teachers to consider the merits of their application and decide whether they agree that the case is exceptional.

14. Where a head teacher has declined a request for leave of absence the parent should not take their child out of school. Taking a child out of school without permission can lead to parents being issued a penalty notice or prosecuted (unless a statutory exception applies).
15. The DfE explains further that Article 8 of the European Convention of Human Rights (ECHR) provides a right to respect for private and family life as outlined below:
 - Everyone has the right to respect for his private and family life, his home and his correspondence.
 - There shall be no interference by a public authority with the exercise of this right except such as in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or the protection of the rights and freedoms of others.
16. The DfE said that The European Court of Human Rights has made it clear that states are entitled to require children to attend school (for example in the case of *Konrad v Germany*).

Reasons for decision

17. Section 42 of the FOIA states that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt information.
18. It is a qualified exemption. So, in addition to demonstrating that the requested information falls within the definition of the exemption, the DfE must consider the public interest arguments for and against disclosure and demonstrate in a given case that the public interest rests in maintaining the exemption.
19. There are two types of legal professional privilege (LPP); advice privilege and litigation privilege.
20. In this case the DfE considers the withheld information is subject to advice privilege; it constitutes confidential communications between a DfE official and two DfE lawyers surrounding its legal position when considering whether section 444(1) of the Education Act (i.e. the offence of failing to secure the regular attendance at school of a registered pupil) breaches Article 8 of the ECHR.

21. The Commissioner has reviewed the withheld information and she is satisfied that they are confidential communications between a DfE official and two DfE lawyers concerning its position on section 444(1) of the Education Act and Article 8 of the ECHR. The pre-dominant purpose of these communications is the seeking and obtaining of legal advice.
22. The Commissioner is therefore satisfied that the withheld information is subject to LPP and section 42 of the FOIA is engaged. She now needs to consider the public interest test.
23. The DfE confirmed that it understood there is a public interest in openness and transparency and recognised how this can improve the standard of public debate and trust.
24. However, it considers there are stronger public interest arguments in favour of maintaining this exemption. It stated that it is vital to maintain lawyer-client confidentiality and the ability of officials to consult lawyers in confidence to obtain effective legal advice in a safe forum without the fear of disclosure. If there was the fear of potential public disclosure it would reduce the candidness of the advice sought and the consideration and assessment of potential risks. It argued that it is essential for government departments to have access to high quality and comprehensive legal advice in order to take decisions in a fully informed context. Government departments need high quality, comprehensive legal advice for the effective conduct of its business and to take decisions in a fully informed context. The legal adviser needs to be able to set out the arguments for and against a particular line without the fear that this might expose weaknesses in the government's position and open it up unnecessarily to legal challenge, which would waste public resources.
25. The DfE argued that disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests – both directly, by unfairly exposing its legal position to challenge, and indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favor. It stated that this is not in the interests of the wider public.
26. It went on to say that it is essential to protect the vitally important principle that officials must be able to consult lawyers in confidence to obtain effective legal advice in a forum which is conducive to a free exchange of views without the fear of intrusion or disclosure. The DfE advised that it has been recognised by the courts generally and the First-tier Tribunal (FTT) in particular that there is a very strong public interest in protecting information and documents which are subject to LPP from disclosure. It said that the FTT has stated that it is important that public authorities be allowed to conduct a free exchange of views as

to their legal rights and obligations with those advising them without the fear of intrusion, save in the most clear case. It explained that it does not appear to the DfE that there is anything in the withheld information or the circumstances relating to them which would justify setting aside the very strong presumption against disclosure of LPP material.

27. The DfE notes that the complainant disagrees and that his arguments focus on the importance of section 444, the fact that it can lead to criminal sanctions including potentially imprisonment. It also notes that the complainant has suggested that a legal challenge could be avoided by disclosure of the requested advice. In response, the DfE has stated that it does not consider such points are of relevance to the issue. It stated that they may be reasons why it is important for the public to know whether section 444 is compatible with Article 8 of the ECHR but it is of the opinion that this is a question only a court can answer. It went on to say that legal advice given to the government about that question, like any legal advice given by and to anybody else about it, is no more than an expert prediction about what a court might say. The fact that it has been given to government does not mean that it is any more authoritative or sheds any more light on the issues the complainant is interested in than the legal advice he or anybody else could commission any lawyer with relevant expertise to provide. The DfE said in its view there is certainly no reason why the release of the requested advice should make any difference to the outcomes of any prosecutions under section 444 or to anyone's plans to bring a legal challenge.
28. For the above reasons, the DfE confirms that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
29. The Commissioner considers the DfE has underestimated the public interest in favour of disclosure in this case. In addition to the usual arguments that disclosure would aid transparency and accountability, the Commissioner considers the matter of taking children out of school during term time affects a significant amount of people. There is clearly differing views on whether parents should be able to take their children out of school for certain reasons within defined boundaries and whether they should not. There is also the more recent introduction of fines for doing so and the ability of head teachers to exercise their discretion on authorising absences (albeit in exceptional circumstances) and whether to issue a fine. Access to information which will enable members of the public to understand more clearly the government's thinking in this regard is of notable interest to many and would aid public debate.
30. That being said the Commissioner acknowledges that where material covered by LPP is concerned there is always going to be very strong public interest arguments in favour of maintaining the exemption simply

because we are talking about the long standing, important principle of LPP and the clear and important need for all (not just the public sector) to have access to free, frank and candid legal advice. Only in very exceptional cases can this be overridden when considering where the public interest lies. Whilst the legal advice and the matter to which it relates is of interest to the wider public and in particular those parents that do have children in UK schools the Commissioner does not consider this case is exceptional to rule in favour of disclosure.

31. The Commissioner considers there are stronger public interest arguments in this case in favour of maintaining LPP and the ability of the DfE to seek and obtain good quality legal advice. The Commissioner agrees with the DfE that the quality of advice would be diluted if such exchanges were disclosed into the public domain. This would then have a negative impact on the DfE's decision making and ultimately the statutory functions it is required to perform.
32. For the above reasons, the Commissioner has decided that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining this exemption.

Right of appeal

33. 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

34. 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.
35. 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

Samantha Coward
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