

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 January 2019

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

Decision (including any steps ordered)

1. The complainant has requested copies of all briefings to Nick Gibb relating to new multiplication tests for school children.
2. The Commissioner's decision is that the Department for Education (DfE) was entitled to rely on section 36(2)(b) to withhold the requested information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 20 February 2018, the complainant wrote to DfE and requested information in the following terms:
"Please provide copies of all briefings for Nick Gibb between February 12, 2018, and February 16, 2018, which relate to plans for new multiplication tests for primary school children"
5. DfE responded on 17 April 2018 and refused to provide the requested information. It cited section 36(2)(b)(i) and (ii) and 36(2)(c) as its basis for doing so.
6. Following an internal review DfE wrote to the complainant on 31 May 2018 and maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 20 June 2018 to complain about the way his request for information had been handled. After providing the original correspondence, the Commissioner accepted the complaint on 6 July 2018. The complainant did not challenge the application of section 40(2) – third party personal data.
8. The Commissioner considers the scope of this case is to determine if DfE were entitled to rely on section 36(2) to withhold the requested information.

Background

9. DfE explained that the Multiplication Tables Check (MTC) is a key stage 2 (KS2) assessment to be taken by pupils at the end of year 4. It is focused on the fluent recall of multiplication facts. This is included in the national curriculum (2014) statutory programme of study for mathematics at key stage 1 (KS1) and KS2.
10. From the 2019/20 academic year onwards, schools in England will be required to administer the online multiplication tables check to year 4 pupils. The purpose of the check is to determine whether year 4 pupils can fluently recall their multiplication tables. This short, easy to administer, on-screen check will help teachers to identify those pupils who may need more support in mastering their times tables. The MTC aims to achieve educational excellence and is based on evidence from other high performing jurisdictions, such as Shanghai and Singapore.
11. A national voluntary pilot will take place between 10 June and 28 June 2019. Schools can use this to familiarise themselves with the check before it becomes statutory in June 2020. The national curriculum specifies that pupils should be taught to recall the multiplication tables up to and including 12×12 by the end of year 4.
12. Schools will have a 3 week window to administer the MTC. Teachers will have the flexibility to administer the check to individual pupils, small groups or a whole class at the same time. Results for pupils will be available to schools once all pupils on their register have taken the check and the check window has closed.
13. Pupils will be able to try out the MTC through a familiarisation area. This will allow pupils to get used to the check and understand the accessibility features if they require them.

14. The launch of the voluntary pilot of the MTC led to widespread media coverage, with the minister being interviewed live on TV, as well as articles in the press, e.g. the Guardian.

Reasons for decision

Sections 36(2)(b) and 36(2)(c)

15. DfE provided the Commissioner with the withheld information, however, it is noted that in its submissions it directly quotes parts of this.
16. Consequently, the Commissioner will not present all of DfE's examples and arguments in full, as that would disclose part of the withheld information.
17. Section 36(2) states –
"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act -
(b) 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, or
(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."
18. As mentioned, the exemptions can only be engaged if, in the reasonable opinion of a qualified person, disclosure would or would be likely to result in any of the effects set out in section 36(2)(b)(ii) and 36(2)(c).
19. "Qualified Persons" are described in section 36(5) FOIA. The Commissioner is satisfied that at the time of the request, Nick Gibb was the appropriate qualified person for the public authority by virtue of section 36(5)(c) FOIA. The opinion was also provided before DfE's response of 17 April 2018.
20. In keeping with the requirement of the exemption, the Commissioner has considered whether the qualified person's opinion was reasonable. In doing so the Commissioner has considered all of the relevant factors including:

- Whether the prejudice relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.
 - The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue on which there needs to be a free and frank exchange of views or provision of advice.
 - The qualified person's knowledge of, or involvement in, the issue.
21. Further, in determining whether the opinion is a reasonable one, the Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
 22. It is the view of the qualified person that disclosing the information would be likely to inhibit not only the free and frank provision of advice in the future but also the free and frank exchange of views for the purposes of further deliberations.
 23. The DfE has provided the Commissioner with the submission it provided the qualified person together with a signed statement from the minister stating that he was of the opinion that disclosing the requested information would be likely to inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation.
 24. The qualified person's opinion is dated 30 March 2018. The Commissioner is satisfied that the qualified person's opinion relates to the prejudice in section 36(2)(b)(i) and (ii) and also that the qualified person had an adequate level of knowledge of the issue, and was provided at the appropriate time.
 25. DfE stated that the official would not have been so frank and candid in the advice he provided the minister, and that the official presented this advice to the minister believing that it would not be placed in the public domain.

26. It further stated that given the timing of the request, the process that officials follow to provide advice or exchange views with ministers and their private offices, the ongoing 'live' nature of this policy, and the advice and views presented within the withheld information DfE considers that it is appropriate to cite section 36.
27. DfE went on to explain that given the nature and detail contained within the withheld information, the officials involved were of the impression that their views and the issues raised and pre-empted in the Q&A briefing were provided in confidence. This was also the case for the briefing paper.
28. As part of effective government, ministers are provided with such briefings and Q&A papers ahead of any policy announcement and subsequent media engagements. This allows ministers time to consider the views and opinions provided by officials, and to consider, deliberate and question any statements or Q&A provided, requesting further information, support or advice where required.
29. A ministerial Q&A ahead of media engagements is by its very nature a free and frank exchange of views drawn together by officials for ministers to deliberate ahead of such engagements. Officials and ministers will often question key points raised in these Q&As, providing different questions and/or responses, before the final draft of the Q&A is agreed, embedded and used. DfE provided the Commissioner with an example of this.
30. DfE therefore considered there is sensitivity around identifying such Q&A briefings, particularly when the issues highlighted are 'live' at the time of the FOI request and are still 'live' at date of this response. Officials, ministers and the department must be able to have a 'safe space' to develop their arguments, evidence and defence when launching such new policy initiatives.
31. Having inspected the withheld information, the Commissioner is satisfied that it was reasonable for the qualified person to conclude that disclosure would pose a real and significant risk to the free and frank exchange of views between officials and ministers. Furthermore, the matter was still live at the time of the request, and has yet to be piloted.
32. The Commissioner considers that disclosure would be likely to hinder free and frank provision of advice and deliberations and that section 36(2)(b)(i) and (ii) is engaged.
33. The Commissioner has not considered section 36(2)(c) as she is satisfied that section 36(2)(b) apply to the entirety of the withheld information.

34. Section 36 is subject to the public interest test. This means that the requested information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In assessing the public interest in maintaining the exemption the Commissioner will consider the impact on the DfE's ability to deliberate on any future options and on the willingness of individuals to engage in any debate and offer opinions.

Public interest arguments in favour of disclosing the information

35. DfE has taken into account that considerations for disclosure add up to an argument that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.
36. There is a general public interest in disclosure of information to the public, to demonstrate the openness and transparency of government.

Public interest arguments in favour of maintaining the exemption

37. DfE argued that it is essential that departmental officials can provide ministers with candid advice on a range of issues without worrying about the public presentation of such advice.
38. It is also the case that 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 and arguments presented to ministers.
39. DfE stated that it is clear from the information withheld, that officials feel able to provide free and frank professional views and advice, due to the fact these documents were not intended to go into the public domain.
40. DfE consider that should it make such information public the likely result is that future advice given by officials, as well as any issues and concerns raised, would be less candid, especially when discussing sensitive or high profile issues such as the MCT. Such inhibition would not be in the public interest.
41. It further argued that a robust and fair decision-making system relies on considering all points of view before reaching a reasoned conclusion. To do this, all parties should be able to follow a process which allows them to speak freely and frankly and be able to challenge media briefings and Q&As to ensure that issues are debated widely and that final versions are based on broad and balanced evidence. If there is a risk that the process of developing and delivering sensitive initial drafts, which are exchanged between officials and ministerial private offices, may be opened up to public scrutiny, departmental officials may be less likely to

enter openly into the discussion, resulting in a reduction in quality of the final advice provided.

42. DfE also considered that officials must have confidence that they can share views with ministers and that there is an opportunity to understand and, where appropriate, challenge issues, briefings, and Q&As presented to them. If the DfE is required to put this information into the public domain, ahead of such media engagements or when the issues themselves are still 'live', officials would be likely to be inhibited in providing free and frank exchange of views, which in turn would have a negative impact on its ability to provide a quality service to ministers.
43. Disclosure of the information would be likely to remove the space within which officials and ministers are able to discuss options freely and frankly. This would limit the DfE's ability to develop the delivery of its policies and priorities where required.
44. DfE also stated that given the timing of the request, the process that officials follow to provide advice or exchange views with ministers and their private offices, the ongoing 'live' nature of this policy, and the advice and views presented within the withheld information, it maintains that it is appropriate to cite these two limbs of s36.

Balance of the public interest

45. As explained earlier, the Commissioner does not have to agree with the qualified person's opinion to accept the exemption is engaged. However in this case, by accepting the opinion is reasonable, the Commissioner does recognise there is the potential for the disclosure of the information to cause individuals to be less willing to participate in discussions and to offer opinions, resulting in the potential impact on the effectiveness of decision making. The question is one of whether this inhibition is likely to be severe and frequent enough to outweigh any public interest in disclosure.
46. The severity and extent of the inhibition to the free and frank provision of advice and exchange of views that would be caused by disclosure has to be considered in this context.
47. The DfE has only considered limited public interest arguments in favour of disclosing the information. It has acknowledged there is a general public interest in disclosing information to the public to demonstrate the openness and transparency of government.
48. The Commissioner would include importance in the public having access to information that would allow them to reach their own opinion on the robustness and integrity of a fair decision-making system.

49. Although there may be a public interest in disclosing information that would assure the public that this is the case, the Commissioner does not consider that this on its own is sufficient to outweigh the public interest in preserving the freedom of officials to share free and frank views
50. The withheld information contains the provision of candid advice, and the free and frank exchange of views for the purpose of deliberation.
51. The Commissioner accepts that the DfE was entitled to a safe space in which to continue to discuss and prepare for the launch of the MTC. Disclosure of the requested information at this time would be likely to prejudice the DfE's ability to carry out this work as efficiently and effectively as possible.
52. The arguments for maintaining the exemptions also relate to the 'chilling effect' argument. The chilling effect argument will be strongest when an issue is still live. In this case the MTC has not yet been formally implemented and is due to be piloted later this year. Therefore the matter is still very much live and the Commissioner considers that disclosure would mean that officials would be likely to be less candid in the provision of advice, the free and frank exchange of views for the purpose of deliberation and more widely in relation to the general conduct of this or similar matters in the future.
53. It is essential that DfE officials, as well as other stakeholders in such matters are able to freely provide advice and exchange views for the purposes of deliberation.
54. Even when account is taken of the more general public interest arguments in favour of the disclosure the Commissioner is satisfied that the public interest in maintaining the exemption provided by section 36(2)(b)(i) – free and frank provision of advice, is greater.
55. The Commissioner's decision is therefore, that DfE was entitled to rely on section 36(2)(b) to withhold the requested information.

Right of appeal

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

Website: 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

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