

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2019

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 any external legal advice on the public consultation titled 'Home Education – Call for Evidence and revised DfE guidance' running from 10 April 2018 to 2 July 2018. 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 16 May 2018, the complainant wrote to the DfE and requested information in the following terms:

"I refer to the public consultation titled 'Home Education – Call for Evidence and revised DfE guidance' running from 10 April 2018 to 2 July 2018.

Please supply all the external legal advice commissioned by the Department prior to the consultation."
4. On 1 June 2018 the DfE responded. It refused to provide the requested information under section 42 FOIA.

5. The complainant requested an internal review on 4 June 2018. The DfE sent the outcome of its internal review on 2 July 2018. It upheld its original position.

Scope of the case

6. The complainant contacted the Commissioner on 28 September 2018 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine whether the DfE is entitled to rely on section 42 of the FOIA for the non-disclosure of the requested information.

Background

8. Section 7 of the Education Act 1996 ("EA 1996") provides that the parent of a child of compulsory school age must ensure that they receive efficient full-time education suitable to their age, ability and aptitude, and to any special educational needs they may have, either by regular attendance at school or otherwise. It is the "or otherwise" which provides the legal basis for home education.
9. There are many reasons why parents may choose home education. These include religious or cultural beliefs, dissatisfaction with the current system and the child's unwillingness or inability to go to school. The local authority's (LA) primary focus is on the suitability of the education provided at home and not the reasons behind it.
10. Home education in England is almost completely unregulated and it is one of the most liberal frameworks in the world. In contrast, in Germany, for example, home education for primary school age children has been illegal since it was outlawed in 1938. Legal attempts through the courts - including the European Court of Human Rights - have so far failed to overturn the ban.
11. Article 2 of Protocol 1 ("A2P1") of the European Convention of Human Rights (ECHR) sets out the right that no person shall be denied the right to education and that parents' convictions should be taken into account. It is this "second limb" - the parental convictions - which is frequently cited by home educators as providing for their "right" to educate their children at home.
12. However, such a right does not exist. The ECHR has made it clear that the second limb of A2P1 is subsidiary to the fundamental right to education as set out in the first limb. Furthermore, the United Kingdom has entered a reservation to A2P1 to the effect that the right of parents to ensure education in accordance with their philosophical convictions is

accepted only so far as it is compatible with the provision of efficient instruction and training and the avoidance of unreasonable expenditure. The Government's position is that it is right that parents may choose to home educate their children if they wish to – and that right to choose should be respected.

13. As highlighted in the request, the DfE undertook a public consultation entitled 'Home Education – Call for Evidence and revised DfE guidance', which ran from 10 April 2018 to 2 July 2018. The consultation had two purposes – to consult on draft DfE guidance documents, for local authorities and for parents, about existing arrangements for the oversight of home education (to replace that published by DfE in 2007 and still current); and a call for evidence about specific issues such as registration and monitoring.
14. The two pieces of legal advice which are the subject of this request were used in drafting the two guidance documents. Just over 3,000 responses were received to the consultation, and the majority of these were from home educators opposed to the issue of new guidance and to many detailed aspects of the guidance. The DfE was continuing to consider the responses received, and intends to publish the finalised versions of the guidance documents.

Reasons for decision

15. 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.
16. 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.
17. There are two types of legal professional privilege (LPP); advice privilege and litigation privilege.
18. In this case the DfE considers the withheld information is subject to advice privilege; the withheld information relates directly to advice requested by the DfE surrounding its legal position and the subsequent advice provided by Counsel when considering the matter of home education and limits on the regulatory framework and a note clearly summarising a discussion and advice provided by Counsel in relation to home education and section 437(1) of the Education Act 1996 written by a DfE legal adviser.

19. The Commissioner has reviewed the withheld information and she is satisfied that they are confidential communications between DfE and Counsel or a summary of the discussion/advice by a legal adviser. The pre-dominant purpose of these communications is the seeking and obtaining of legal advice.
20. 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.
21. The DfE provided the following public interest argument in favour of disclosure:
 - The DfE has taken into account that there is a significant public interest in the matter of children being home educated and that this affects a significant number of people. There are clearly differing views and concerns regarding home education, for example questions around the extent to which home educated children may be inadequately prepared to participate in the social, civil and economic life of the wider community. 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.
 - The DfE has also 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.
 - There is a general public interest in disclosure of information to the public, to demonstrate the openness and transparency of government.
22. The DfE provided the following public interest argument in favour of maintaining the exemption:
 - There is a very strong public interest in maintaining lawyer-client confidentiality. It is vital that officials are able to consult lawyers in confidence to obtain effective legal advice in a safe forum, conducive to a candid exchange of views and consideration and assessment of potential risks without fear of disclosure.
 - It is essential that Government departments 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 their business and to take decisions in a fully informed legal context, and the legal adviser needs to be able to set out arguments for and against a particular line, without fear that this

might expose weaknesses in the Government's position and open it up unnecessarily to legal challenge, which would waste public resources.

- The 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. Neither of these is in the public interest.
- 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 fear of intrusion or disclosure. In *DTI v. Bellamy* (24 October 2005), the Information Commissioner accepted that the exemption set out in s42(1) properly applied to both briefings to, and advice from Counsel, and the accompanying minutes. He further agreed that the maintenance of this exemption overrode the public interest in disclosing the information.
- It has also been recognised both by the courts generally, and the Information Tribunal in particular, that there is a very strong interest in protecting information and documents which are subject to legal professional privilege from disclosure. In particular, the Information Tribunal 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 fear of intrusion. It did not appear to the DfE that there was anything in the withheld information where this exemption has been applied, or the circumstances relating to them, which would justify setting aside the very strong presumption against disclosure of legal professional privileged material.
- The possibility that legal advice given at one point in time may be relevant to future considerations.
- Given the magnitude of some of the issues and areas of debate relating to home education, including concerns that children may be taught extreme or dangerous ideas, or may even be exposed to harm and abuse, it is essential that Government can, as in this case, seek confidential legal advice in relation to the 'powers' and the 'limits' authorities have with regards to monitoring and regulating home education.

- The DfE therefore considers that the very substantial public interest in maintaining the confidentiality of legally professionally privileged material was not outweighed by the public interest in disclosure.
23. The Commissioner considers the DfE has acknowledged the public interest in favour of disclosure in this case, the Commissioner considers the matter of home education affects a significant number of people within the UK as the number of children being home educated has risen by around 40% over the last three years. There are clearly differing views on home education and 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.
 24. 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 of 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 who home educate their children, the Commissioner does not consider this case is exceptional to rule in favour of disclosure.
 25. 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.
 26. 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

27. 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

28. 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.
29. 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.....

Gemma Garvey
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