[1]Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **1 October 2020**

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

Decision (including any steps ordered)

1. The complainant has requested the Department for Education (DfE) to disclose the analysis conducted of each education sector in connection with the proposal to increase funding to teachers' pensions employer contributions. Initially, the DfE refused to disclose the information under section 40 of the FOIA. Later the DfE applied section 35(1)(a) of the FOIA.

2. During the Commissioner's investigation the DfE also sought to rely on section 42 of the FOIA for a section of the withheld information labelled 'Legal position'.

3. The Commissioner's decision is that while section 35(1)(a) is engaged, the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure. With regards to section 42 of the FOIA, the Commissioner accepts that this applies to the section labelled 'Legal position' and that the public interest rests in maintaining this exemption.

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4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.

   - The DfE is required to disclose the withheld information, except the section labelled 'Legal position' which is exempt from disclosure under section 42 of the FOIA.

5. 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

6. On 23 May 2019, the complainant wrote to the DfE and requested (in reference to page 17 of its 'Funding increases to teachers' pensions employer contributions consultation response) the following information under the FOIA:

   "can the Department provide a copy of the analysis referred to in the quotation above, and which led the Secretary of State to conclude that universities did not need the support which has been provided for schools and further education colleges."

7. The DfE responded on 18 June 2019. It confirmed holding the information but refused to disclose it, citing section 40(3)(a) of the FOIA.

8. The complainant requested an internal review on 1 July 2019. The complainant clarified that he required the initial analysis conducted on each sector.

9. The DfE carried out an internal review on 29 July 2019. It confirmed holding the initial analysis but now wished to rely on section 35(1)(a) of the FOIA.

Scope of the case

10. The complainant contacted the Commissioner on 13 August 2019 to complain about the way his request for information had been handled. He confirmed that he disagrees with the DfE's analysis of the public interest test and believes the public interest rests in favour of disclosure.

11. During the Commissioner's investigation the DfE decided to also rely on section 42 of the FOIA for a small part of the withheld information (page 4 and 5 of the withheld information, headed 'Legal position'.)

12. The Commissioner considers the scope of her investigation to be to determine whether the DfE is entitled to withhold the requested information under section 35(1)(a) of the FOIA. As this has been applied to the withheld information in its entirety, she will consider this first. She will only go on to consider section 42 if she finds section 35(1)(a) does not apply.

Reasons for decision

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

13. So far as is relevant, section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates to the formulation or development of government policy.

14. For information to be exempt under section 35(1)(a) it simply has to relate to the formulation or development of government policy; there is no requirement for the disclosure of the information to be in any way prejudicial to either of those policy processes.

15. In line with Tribunal decisions the Commissioner considers that the term 'relates to' should be interpreted broadly. This means that any significant link between the information and the policy process is sufficient to engage the exemption.

16. The DfE confirmed that on 15 January 2019 it launched a consultation on the proposal to support certain education institutions with the increase in employer contributions to the Teachers' Pension Scheme (TPS) in financial year 2019-20. The consultation period ended on 12 February 2019. The consultation received 2336 responses.

17. It explained that the proposed changes affect state funded schools, further education, higher education and independent schools. In response to increasing employer contribution costs for the TPS from financial year 2019/20, the DfE proposed to provide funding to state funded schools and further education institutions, as these institutions are most directly funded by government grants. However, it proposed to not provide funding to independent schools and universities.

18. The withheld information is the analysis that underpinned the recommendations that went to the Secretary of State for his approval in March 2019. The Secretary of State approved the recommendations

the same month and the government's response was published in April 2019, which can be accessed here:

https://www.gov.uk/government/consultations/funding-increases-to-teachers-pensions-employer-contributions

19. The Commissioner has reviewed the information and she is satisfied that it is information which relates to the formulation and development of government policy. As the DfE states it is the analysis that underpinned the recommendations put to the Secretary of State relating to the government's policy to provide funding to state funded schools and further education institutions to assist with the additional costs of increased employer pensions contributions. She is therefore satisfied that section 35(1)(a) of the FOIA is engaged.

Public interest test

20. The DfE confirmed that there is a general public interest in disclosure of information to the public to demonstrate the openness and transparency of government. It stated that this is particularly the case when considering evidence around the implementation of government policy.

21. However, it considers the public interest in maintaining the exemption is stronger in this case. It argued that the department's clear focus in the initial application of the withheld information was on reviewing the impact on education institutions and tax payers, as well as teachers, resulting from the review and proposed changes to the provision of teachers pensions, and for the associated policy to be developed and delivered following a tested and evidence-based process. It stated that as it develops policy based on the consultation and provision of advice from policy experts, the outcomes of such essential evidence based advice shapes the final policy that the department develops, and provides evidence which ministers ultimately rely on in order to inform their policy decisions. The DfE confirmed that it is critical that the minister's understanding of policy implementation, delivery and impact at grassroots level, and the consideration of policy options and the implications of its delivery, is not hampered by advice and evidence being prematurely released into the public domain.

22. The DfE stated that disclosure would be likely to have a prejudicial impact on the current review, development and delivery phase, as release could influence, and would be likely to dilute, the provision of candid and forthright advice provided to ministers by officials. It stated that it would also be likely to have the same prejudicial impact in the current financial health of the sector as a result of the coronavirus.

23. It refers to the specific elements of the withheld information and states that in its opinion it is obvious from the language used that officials felt that they were able to share extremely forthright and unambigious advice, within a safe space, to allow the ministers to make an informed decision. The DfE stated that it is very likely that the use of the language would be significantly diluted or omitted if there is concern that such advice will make it into the public domain.

24. The DfE went on to say that it is essential that when undertaking such policy reviews, the advice, information and findings relayed by officialsv to ministers, can be evidence based, unambigious, forthright and candid in nature. To release the information that would have a detrimental impact on the advice provided to ministers, particularly in relation to key government policies such as this, cannot be in the public interest, as potential dilution of advice would have a direct impact on the policy making process.

25. It stated that the area of teacher pensions and associated policy is a sensitive topic, with strongly held views across the spectrum, so having candid advice and evidence on which to deliver the final iteration of this reviewed policy is vital.

26. The DfE commented that ensuring that this is possible goes to the very heart of the policymaking, review and development process, and the ability of contributors and officials to offer honest, candid advice without influence or prejudice. If the withheld information were to be disclosed, and used to undermine the current policy development, it is likely to have a considerable and negative impact on the development of policy, and the policy making process would clearly be poorer without such unbiased evidence.

27. The DfE also stated that the withheld information is currently being used as part of the department's work in relation to the coronavirus. It argued that the modelling within it is being utilised as part of the department's work in assessing the current financial health of the sector, as well as planning the options available as way of policy planning and a range of potential responses to the possible impact of the coronavirus on the sector. It stated that as this is fast paced and ongoing, it is essential that the advice provided by officials is unvarnished and straightforward. Disclosure is likely to dilute the language officials use when presenting options and advice to ministers. This would have a detrimental impact on good government and the informed development of government and departmental policies. Due to this and given the current situation (with resources and capacity being pulled into the departmental and wider government response to coronavirus) it is not in the public interest to disclose the withheld information.

Balance of the public interest

28. Firstly, the Commissioner considers she is only permitted to consider the balance of the public interest up to the date the internal review is carried out; which in this case is up to and including 29 July 2019. This was endorsed in Supreme Court in R (Evans) v Attorney General [2015] AC 1787 at paragraph 72. She is therefore not able to consider any public interest arguments presented by the DfE relating to the impact of the coronavirus and the potential usage of the information in relation to that, as the Covid-19 pandemic occurred several months later. Even if she was, she does not consider the arguments presented carry much weight and are fairly weak.

29. The withheld information is the analysis that underpinned the recommendations put to the Secretary of State for his approval in March 2019. Approval was given later that month and there was a public announcement in April 2019. The Commissioner considers at the time of the request the formulation and development of policy had ended; the policy had received approval and had been published. She considers at the time of the request the DfE was in the process of implementing the policy agreed (which took place in September 2019 for further education institutions and in October 2019 for state funded schools).

30. The Commissioner does not consider the development and formulation of policy was live at the time of the request or the internal review. There was therefore no need for private thinking space to discuss and debate policy options and to assess the withheld information. As a result the Commissioner does not consider the arguments presented by the DfE in this regard carry as much weight as it has claimed. Given that the policy had been agreed and published, the public interest arguments in favour of maintaining the exemption are significantly reduced.

31. The Commissioner does not consider senior officials will be easily deterred from offering free and frank advice and views in the future; that is their role and comes with the level of responsibility they have. She expects senior officials will continue to provide their free and frank views and understand that this is necessary in all decision making and policy development processes to ensure that the most appropriate and effective decisions and policies are reached. She therefore does not attach as much weight to the chilling effect argument as the DfE has claimed.

32. The Commissioner considers there is a strong public interest in members of the public being able to understand more closely why particular decisions have been made and how government policy is

formed, particularly once the formulation and development has ended and it has been publicly announced. There is a public interest in allowing the public to understand why additional funding has been provided to some institutions but not to others and what information was considered to determine this policy. The additional funding will also be at a considerable cost to the public purse. There is a public interest in the public being in a position to scutinise the utilisation of public funds and to evaluate for themselves whether those costs are appropriate.

33. Given the specific circumstances at the time of the request and internal review in this case, the Commissioner considers the public interest rests in favour of disclosure. She has therefore decided that section 35(1)(a) does not apply.

Section 42 – legal professional privilege

34. Section 42 provides an exemption under FOIA for information subject to legal professional privilege.

35. The DfE confirmed that it wishes to rely on advice privilege for the subheading 'Legal position' contained in the withheld information. It argued that privilege is attached to communications between a client and its legal advisers and any part of a document which evidences the substance of such a communication, where there is no pending or contemplated litigation.

36. It stated that this element of the withheld information is advice provided to policy colleagues, and subsequently ministers, from DfE lawyers. It is satisfied that this information directly relates to advice requested from the DfE official surrounding the legal position when considering differing positions relating to the pension provision of different education providers within the education sector.

37. The Commissioner has reviewed this section of the withheld information from the perspective of section 42 of the FOIA, and she is satisfied that it does detail and present legal advice the DfE policy colleagues received from a DfE lawyer on the different positions of different education providers within the education sector. She is therefore satisfied that it is falls within the definition of advice privilege and is therefore subject to legal professional privilege and exempt under section 42 of the FOIA.

Public interest test

38. The DfE states that it has taken into account the public interest in openness and transparency and in allowing members of the public access to information to enable them to consider and evaluate how this

policy decision was made and why. It acknowledges the public interest in improved public debate and improved trust.

39. However, in this case it considers the public interest in favour of maintaining this exemption is stronger. It stated that there is a 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.

40. It confirmed that 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 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.

41. The DfE went on to say 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 neither of these is in the public interest.

42. It commented 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 fear of intrusion or disclosure. The DfE stated that it has been recognised by the Commissioner and the First-tier Tribunal that there is a very strong public interest in protecting information and documents which are subject to legal professional privilege from disclosure.

43. In terms of the balance of the public interest, the Commissioner considers the same arguments recorded in paragraph 32 above apply here. However, for this element of the withheld information she considers the public interest rests in maintaining the exemption. This is because of the strong public interest built into maintaining legal professional privilege and the ability of the DfE to consult with lawyers in confidence. If the DfE was unable to consult lawyers in private and have access to candid and frank legal advice it would be at a disadvantage to others. It would have a negative impact on decision making and hinder its ability to defend its legal position, should it come

up for challenge, fairly and effectively and obtain good quality legal advice in the future. This is not in the interests of the wider public. The Commissioner does not consider there are overwhelming public interest factors in favour of disclosure in this case that warrant overriding the strong principle of legal professional privilege.

44. For these reasons, the Commissioner has decided that section 42 of the FOIA applies to this element of the withheld information.

Right of appeal

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

46. 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.

47. 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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