

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 27 September 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested a report, considered when the requirement for facemasks to be worn in English schools was lifted. The Department for Education ("the DfE") relied on section 35 (development of government policy) to withhold the information.
2. The Commissioner's decision is that the withheld information engages section 35(1)(a) of FOIA and that the balance of the public interest favours maintaining the exemption. The DfE breached section 10 and section 17 of FOIA as it failed to issue its response within 20 working days.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 8 June 2021, the complainant wrote to the DfE and requested information in the following terms:

"Please supply the report that was undertaken prior to the decision to no longer recommend masks on the 17th May. Could you also provide details of who was involved in the consultations prior to this decision being made, like which epidemiologists? Which teaching unions? Which parent groups? Which student groups? Which building ventilation experts? Which medical experts?"

5. The DfE responded on 17 August 2021. It provided some information and pointed to some relevant information in the public domain. However it continued to withhold one report and relied on section 35 to FOIA to withhold it.
6. Following an internal review the DfE wrote to the complainant on 4 January 2022. It upheld its original response.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 27 January 2022 to complain about the way her request for information had been handled.
8. The Commissioner wrote to the complainant on 15 September 2022 to note that he had considered a complaint previously where he found (and the Tribunal had agreed) that the DfE was entitled to withhold very similar information. He also explained that he could not see sufficient differences between the two cases to cause him to depart from his previous approach. The complainant did not accept the Commissioner's view.
9. The Commissioner considers that the scope of his investigation is to consider whether the DfE was entitled to rely upon section 35 of FOIA to withhold the requested information.

### **Reasons for decision**

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#### **Section 35 – development of government policy**

10. In decision notice IC-72508-Q4B0,<sup>1</sup> the Commissioner considered a request for information about risk assessments carried out prior to the DfE publishing advice (on 26 August 2022) on the use of facemasks within schools and colleges. In paragraphs 8 to 23 of that decision notice, the Commissioner set out why he considered section 35 of FOIA to be engaged.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2021/4017785/ic-72508-q4b0.pdf>

11. The Commissioner considers that the withheld information in this case will also engage section 35 of FOIA – for the same reasons as set out in paragraphs 8 to 23 of decision notice IC-72508-Q4B0.

### **Public interest test**

12. In paragraphs 25 to 52 of decision notice IC-72508-Q4B0, the Commissioner set out his assessment of where the balance of the public interest lay. This assessment was upheld by the First Tier Tribunal in *Michelle Fleet v Information Commissioner (EA/2021/0216)*<sup>2</sup>
13. The Commissioner has considered carefully whether there has been a change of circumstances that would alter the balance of the public interest significantly. He has concluded that, at the time the request was responded to, there had not been.
14. The guidance issued by the DfE, that applied from 17 May 2021, stated that the wearing of a facemask in schools and colleges was no longer necessary.<sup>3</sup> This approach was in line with Step 3 of the Government's routeplan out of Covid-19-related restrictions.
15. In both August 2020 and in May 2021, infection rates were low. However the future direction of travel remained uncertain (infection rates started to climb in both September 2020 and June 2021). There remained a possibility, in both periods that the guidance that had been issued would need to be withdrawn or updated to respond to the latest scientific data (both the August 2020 guidance and the May 2021 guidance were replaced within two months of being issued). Therefore, even in June 2021, this was still a "live" policy issue and the policy was still under development.
16. The recent decision of the Upper Tribunal in *Montague v Information Commissioner & Department for International Trade [2022] UKUT 104 (AAC)* requires the Commissioner to consider the balance of the public interest at the point the public authority issues its refusal notice. Whilst it could well be argued that the development of this policy has reached a

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<sup>2</sup>

[https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2986/Fleet,%20Michelle%20\(EA.2021.0216\)%20Dismissed.pdf](https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2986/Fleet,%20Michelle%20(EA.2021.0216)%20Dismissed.pdf)

<sup>3</sup> <https://www.gov.uk/government/publications/face-coverings-in-education/face-coverings-in-education>

natural conclusion now, that was not the case at the point at which the request was made.

17. The Commissioner considers that the public interest arguments set out in paragraphs 25 to 52 of decision notice IC-72508-Q4B0 apply more or less equally to the present request. He therefore relies on the analysis set out in those paragraphs as his reasoning for finding that the balance of the public interest once again favours maintaining the exemption.

### **Procedural matters**

18. Section 10 of FOIA requires a public authority to confirm whether or not it holds the requested information and to communicate any non-exempt information within 20 working days of receiving an information request.
19. Section 17 of FOIA requires a public authority that wishes to rely on an exemption to either withhold information or to neither confirm nor deny that any information is held, to issue a refusal notice within 20 working days.
20. In this case, the DfE did not confirm whether any information was held and did not issue a refusal notice specifying the exemption on which it was relying to withhold the requested information within 20 working days. The DfE therefore breached both section 10 and section 17 of FOIA in responding to the request.

## Right of appeal

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21. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

22. 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.
23. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**