

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

### **Decision notice**

**Date:** 29 September 2021

**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 requested details of external parties who had been consulted about specific sections of non-statutory government guidance on the development of Relationships, Sex and Health Education curricula. The Department for Education ("the DfE") denied holding any information within the scope of the request.
2. The Commissioner's decision is that on the balance of probabilities, the DfE holds no information within the scope of the request. However, as the DfE failed to inform the complainant, within 20 working days, that it held no information within the scope of the request, the DfE breached section 10 of the FOIA.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 1 October 2020 the complainant requested information of the following description:

*"Which external organizations were consulted in the formulation of the sections "Using external agencies" and "Choosing Resources" in the Guidance published on 24 September 2020 titled "Plan your relationships, sex and health curriculum" and what was the nature of such consultation, when did it take place and how frequently with each external organization."*

5. On Friday 13 November 2020, the DfE responded. It provided some basic information.
6. The complainant requested an internal review on 22 November 2020. He argued that the specific information he requested had not been provided. The DfE sent the outcome of its internal review on 15 January 2021. It revised its position. The DfE now stated that it held no information within the scope of the request and it explained why this was the case.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 15 March 2021 to complain about the way his request for information had been handled.
8. The Commissioner considers that the scope of her investigation is to determine whether or not the DfE holds an information within the scope of the request.

### **Reasons for decision**

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#### **Section 1 (Held/Not Held)**

9. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

10. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's evidence and arguments. She will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, she will consider any reason why it is inherently likely or unlikely that information is not held.
11. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a

judgement on whether the information is held on the civil standard of the balance of probabilities.

*The complainant's position*

12. Explaining why he considered that the DfE would hold information relevant to the request, the complainant noted to the Commissioner that:

*"My request referred to two entire sections of the guidance. Some of their provisions were new and, in my view, contentious. Others were the kind of routine guidance that one would expect to find in any such a document. Given the broad scope of the material concerned it is difficult to believe that it had all been added, in its entirety, after all consultation had been concluded and that no part of them had featured in the various formal and informal consultations which the department says had taken place.*

*"Even if the section headings to the guidance were added at a late stage, it seems likely that at least some, if not all, of the contents that now appears under them would have been present when any consultation was carried out. My request asked "Which external organizations were consulted in the formulation of" the two sections concerned. If the material in those sections had previously appeared under different section headings, any consultation on that material (regardless of where it appeared in the document) would still fall within the terms of the request...*

*"...It is unlikely that straightforward suggestions such as this would have been absent from all drafts of the guidance and inserted only at the very final stage. Nothing about this extract indicates that it is the kind of recommendation likely to have been overlooked until the last minute."*

13. Turning to the implications of the paragraphs more generally, the complainant added that:

*"The two passages introduce substantial new prohibitions on the materials that can be used in teaching about relationships, sex and health in schools. To take just the final bullet point from the last extract. This appears to mean that no material produced by any mainstream family planning organisation could be used in schools unless it could be shown that the organisation had condemned all unlawful activities occurring at any, or perhaps every, demonstration on say abortion organised by any unrelated body. It might also mean that the ICO's own published FOI or DP guidance on access to, or the protection of, information about health or*

*sexual orientation would be banned from classrooms if the ICO had failed to publicly condemn a breach of the peace at a demonstration organised by other bodies which supported changes to the relevant statutory provisions which the ICO also supported.*

*"These are far-reaching implications. It would be remarkable if the provisions concerned had not featured in any consultation with any external body about the guidance."*

#### *The DfE's position*

14. The DfE explained that the particular sections of the guidance had been developed internally by the department and had not been subject to any external consultation. Therefore it should not be expected to hold any recorded information within the scope of the request.
15. The DfE stated that it had not carried out searches. It had asked the relevant team that had worked on the guidance to explain how the consultation had been carried out. The team had confirmed that the sections in question had been developed internally and had not been consulted on. As a result, the DfE had determined that carrying out searches would be a pointless exercise.
16. When pressed by the Commissioner, the DfE confirmed that the entire sections had been added to the guidance after the consultation and that no parts or early drafts of these particular sections had gone out to consultation.

#### *The Commissioner's view*

17. Having the DfE's arguments, the Commissioner considers that, on the balance of probabilities, it does not hold the requested information.
18. The complainant has put forward reasonable arguments to suggest why the DfE *ought* to hold the requested information: namely that such controversial paragraphs would have benefitted from external input.
19. However, although such arguments are reasonable, the DfE has stated that, as a matter of fact, it does not hold the requested information – and no persuasive argument has been put forward to undermine that assertion.
20. The relevant policy team would have known whether the requested information did or did not exist. The Commissioner accepts that, given that there is nothing to undermine such an assertion, carrying out further searches is likely to be a fruitless exercise.

21. It is not for the Commissioner to pass judgment on the adequacy of the DfE's policy formulation or consultation processes. Nor is it her role to question whether the resulting guidance is or is not fit for purpose. Her sole concern is whether the DfE holds recorded information within the scope of the request.
22. In the circumstances, the Commissioner accepts that the DfE holds no information within the scope of the request.

### **Procedural Matters**

23. Section 10 of the FOIA states that a public authority must comply with its duty under section 1(1) of the FOIA "*promptly and in any event not later than the twentieth working day following the date of receipt.*"
24. The DfE did not issue any substantive response to the complainant within 20 working days and, when it did respond, it failed to inform the complainant that it held no relevant information. The Commissioner therefore considers that the DfE breached section 10 of the FOIA in responding to the request.

## Other matters

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### *General request handling*

25. On 29 October 2020, the DfE acknowledged the complainant's request, confirmed that it was dealing with the request under the FOIA and allocated a reference number.

26. Despite this clear implication that the request was being dealt with under the FOIA the response the DfE originally provided was generic, included no details of any internal review procedure and did not even include the request reference number. When the complainant queried this, the DfE's internal review informed him that:

*"the internal review concluded that it was legitimate for the Department to consider and respond to your original correspondence as a policy request rather than under the FOI Act, as you did not request any recorded information held by the Department, nor was there any relevant recorded information in scope, in accordance with the guidance here at <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/receiving-a-request/>.*

*"I am sorry that our previous response did not fully address your questions, and can confirm that your request will now be dealt with under the Freedom of Information Act 2000, as you have specifically asked for this to be the case."*

27. The Commissioner recognises that there will be occasions where it will be advantageous to a requestor if the public authority deals with correspondence in the normal course of business rather than as a formal request under the FOIA – as this can result in a quicker response. However, public authorities should be cautious about doing so in situations where they cannot provide all the requested information straight away. If a public authority is in any doubt as to how the requestor wishes their correspondence to be dealt with, it should consult the requestor.

28. In the circumstances of this case, the DfE's failure to deal with the request under the FOIA caused it to breach section 10. The fact that it did not hold any relevant recorded information did not mean that the request was not one which was valid.

29. The DfE should be careful about when it chooses to deal with requests via the formal process.

## Right of appeal

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30. 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)

31. 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.
32. 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**