

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 September 2017

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

Decision (including any steps ordered)

1. The complainant has requested minutes of a meeting discussing the sale of the student loan book. The Department for Education ("DfE") refused the request on the basis of section 36(2)(b)(i), (ii) and 2(c).
2. The Commissioner's decision is that the DfE has correctly applied the provisions of sections 36(2)(b)(i) and (ii) and the public interest favours withholding the information.

Request and response

3. On 7 February 2017, the complainant wrote to the DfE and requested information in the following terms:

"1. [...] all impact assessment completed as to the effects of the sale of parts of the student loan book from January 1st 2012 to date.

2. [...] communications between the National Union of Students and ministers of the Department of Education concerning the sale of parts of the student loan book from January 1st 2016 to date.

3. [...] communications between the University and College Union and ministers of the Department of Education concerning the sale of parts of the student loan book from January 1st 2016 to date.

4. [...] the minutes of all meetings held between the staff at the Department of Education and Martin Lewis concerning the sale of parts

of the student loan book (as per the below article).

<https://www.theguardian.com/money/2017/feb/06/universities-minister-announces-sale-of-student-loan-book>"

4. The DfE responded in March 2017 and stated that no information was held for any of the parts of the request. The complainant then clarified his request on 13 March 2017, specifically part 4 of his request confirming the meeting the article referred to was with the Minister of State for Universities, Science, Research and Innovations and stated that:

"Martin Lewis has confirmed that the meeting to which the Guardian article was referring to concerned increases in Student Loan fees, but also covered the sale of the student loan book.

As per my original request, please could you provide these minutes?"

5. The DfE responded to this on 13 April 2017 confirming that it did hold information within the scope of the refined request but it was being withheld by virtue of the exemptions at section 36(2)(b)(i), (ii) and (c) of the FOIA.
6. Following an internal review the DfE wrote to the complainant on 12 May 2017. It stated that it upheld the decision to refuse to provide the information it had withheld under the cited exemptions.

Scope of the case

7. The complainant contacted the Commissioner on 16 May 2017 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation is to determine if the DfE has correctly applied either the section 36(2)(b)(i), (ii) or 2(c) exemptions to withhold the information it holds.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

9. The Commissioner did consider whether the DfE should have considered the relevance of section 35 to the information in the first instance as this relates to the formulation and development of government policy and should be applied if the information relates to an ongoing policy process. On this point the DfE argued that the purpose of the discussions with Martin Lewis was not to obtain advice on the development of the student

loan policy going forwards, but to seek advice and opinions on specific aspects of student loans, such as terms and conditions.

10. The Commissioner accepts that general discussions on student loans cannot all be said to be part of the development of policy on student loans. In this case, the DfE had announced the decision to sell the student loan book in February 2017 so the government policy on this had been formulated at the time of the request. The question is then whether any of the information relates to the continued development of that policy. Having viewed the withheld information the Commissioner notes the meeting was to discuss with Martin Lewis any concerns, in his expert opinion.
11. The Commissioner does not consider that fine-tuning the details of a policy will always be policy development and this can be seen as adjustments to its implementation. For the information to be part of the development of existing policy it would need to relate to the process of reviewing, improving or adjusting existing policy. If the information relates to adapting to changing circumstances to avoid unintended consequences or better achieve goals then this can be seen as implementation and the Commissioner, having viewed the information, considers that this is the case here. She therefore accepts the view of the DfE that the information does not 'relate' to the formulation or development of government policy on the sale of the student loan book and it is appropriate to consider it under section 36.
12. The DfE considers that sections 36(2)(b)(i), (ii) and (2)(c) are engaged in relation to the information it holds. The Commissioner has viewed this information and it is an account of the meeting that took place between Martin Lewis, Jo Johnson and DfE officials discussing the increase in student fees. The DfE has stated these are not formal minutes for this meeting and having read the minutes the Commissioner would accept they do not appear to be formal minutes but rather an informal record of the discussions. Nevertheless the information is relevant to the request.
13. Section 36(2)(b)(i) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank provision of advice.
14. Section 36(2)(b)(ii) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
15. In determining whether either of the two limbs of the exemption was correctly engaged, the Commissioner is required to consider the

qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:

- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
16. The DfE sought ministerial views in July 2017 which the Commissioner notes is after the request was initially considered and refused on the basis of section 36. The opinion was provided by the Minister on 4 July 2017 and the Commissioner is satisfied that Parliamentary Under Secretaries of State are qualified persons as defined in section 36(5) of the FOIA.
 17. The qualified person may apply the exemption on the basis that the inhibition to the free and frank exchange provision of advice or exchange of views either 'would' occur or would only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
 18. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur.
 19. The qualified person has stated that the opinion is that the prejudice 'would be likely' to occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.
 20. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
 21. The DfE has argued that there is an important to ministers and officials being able to receive high quality advice from external experts so as to make sound decisions. It considers the information contains the exchange of free and frank views for the purposes of providing such advice.

22. The Commissioner notes that the information dates back to 2016 and at the time discussions were ongoing about student loan fees and the student loan book and external experts providing candid advice was an important part of the process of addressing problems relating to the delivery of departmental policy. The DfE therefore considers that disclosing the information in this case would be likely to deter existing or potential experts from providing such free and frank advice in the future which in turn could hinder the effective delivery of key policies. More specifically, without external opinion the DfE could miss opportunities based on expert opinion and experience.
23. The qualified person's opinion is also that this free and frank exchange of views between DfE officials and external experts if allows the DfE to gain an oversight of issues and concerns and any changes in guidance that may be needed at a policy level and in the operation of delivering student funding.
24. It is therefore 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.
25. The Commissioner recognises that disclosing the information would undermine the discussion of issues as external contributors may be less free and frank in their commentaries, if they participated at all, if they believed their opinions would not be kept confidential. She has considered this in the context of the information that is being withheld and the purpose of the discussions and she accepts that Martin Lewis was brought in as a respected expert on the issue of student loans to offer a different perspective and opinion to the debate and allow the DfE to fully consider all issues when implementing policies. The Commissioner accepts that the process of using external experts is important to the effective delivery of policy and as such she is satisfied that section 36(2)(b)(i) and (ii) are engaged, that the qualified person's opinion that the disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation and the free and frank provision of advice, is a reasonable one. The Commissioner has not considered section 36(2)(c) as she is satisfied the two limbs of section 36(2)(b) apply to the entirety of the withheld information.
26. 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 disclosure

27. The DfE acknowledges there is a general public interest in disclosing information which increases openness and transparency in relation to the process and delivery of policy. Disclosing this information may leader to greater accountability and improved trust.
28. The complainant has argued that the possibility of the selling off of the student loan book has been met with concern by recent and future University students who are worried that this will affect their ability to afford University fees. As such the public interest in disclosing information which shows some of the discussions that took place would outweigh the potential chilling effect.

Public interest arguments in favour of maintaining the exemption

29. The DfE argues that it is essential ministers are able to commission advice on a range of issues without worrying about the public presentation of these commissions.
30. Further to this, the DfE is of the view that good government depends on good decision-making and this needs to be based on the best advice possible and a full consideration of options. With regard to the specific information in question, the DfE states it is clear that Martin Lewis and DfE officials felt able to provide free and frank views due to the fact these exchanges were not intended to go into the public domain. It would not be in the public interest to disclose information which may inhibit the candour with which advice is given and therefore impact on the quality of decision-making.
31. The DfE argues that external experts and DfE officials must have confidence they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge issues presented to them. If the DfE is required to put this information into the public domain external experts and officials would be likely to be inhibited from providing free and frank views, affecting the DfE's ability to resolve issues it is presented with.

Balance of the public interest test arguments

32. 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.

33. The Commissioner understands the sale of part of the student loan book was launched in February 2017 and was expected to take several months to complete. The sale covered loans issued under the previous system (pre-2012) and specifically students who entered repayment between 2002 and 2006.
34. Therefore at the time of the request the DfE was still in the process of refining and finalising the process and exploring options about how best to effectively deliver the policy on this. Whilst overall decisions had been made, there was still much debate and discussion on other points with decisions yet to be made. 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.
35. Disclosure would make discussions more difficult as external experts would be more reluctant to engage. Key to this is the fact that the arguments presented by the DfE are not necessarily that DfE officials would be less willing to offer free and frank advice but it is the external experts who would be less willing to offer candid advice and opinions, if to contribute at all. The Commissioner cannot ignore the fact that external experts are under no obligation to offer their expert opinions or to contribute to discussions and do so willingly with a view to assisting in decision-making and exploring options to deliver effective policies. She therefore must put significant weight to the public interest in withholding this information due to the potential that disclosure might undermine this process by making external experts less likely to engage with the DfE and in turn impact on the effective delivery of policy.
36. In view of the above, the Commissioner finds that disclosing the information would be likely to impact on the ability of the DfE to explore all option and discuss the best way forwards in order to make sound decisions factoring in all opinions and issues.
37. There is clearly a public interest in maintaining the exemption provided by section 36(2)(b)(i) and (ii) in order to prevent this level of harm. It is now necessary to consider the public interest factors in favour of disclosure.
38. The Commissioner recognises that the issue of student loan fees is of interest to a large number of students both past, present and future. Decisions around whether to sell the student loan book would be of interest to a large number of individuals looking at options for further education and those who have recently graduated. That being said, having viewed the content of the withheld information the Commissioner

notes that the majority of the discussions focused on the increased student loan rates which she understands are a product of the sale of the student loan book, rather than discussions solely on the sale.

39. The Commissioner does recognise that there is a genuine public interest in the disclosure of information about student loans, whether it be the sale of the student loan book or any changes to fees or repayments. Clearly disclosing information which would shed some light on the discussions and advice that led to decisions made by the DfE on student loans would be in the public interest as it would provide greater transparency and encourage debate.
40. In conclusion, the Commissioner finds there is a public interest in disclosing the requested information. However, disclosing the information would be likely to have a chilling effect on the willingness of external experts to participate in discussions to make decisions on how to move forwards following the sale of the student loan book and on future contributions that may be needed. Such a chilling effect would undermine the ability of the DfE to effectively deliver policy by removing the expert opinions which allow it to explore all options and get a range of opinions to fine-tune and adapt the existing policy. This would not be in the public interest and the Commissioner is satisfied this harm outweighs the value in disclosing the information.
41. She therefore finds that the public interest favours maintaining the section 36(2)(b) exemptions and she requires no steps to be taken.

Right of appeal

42. 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

43. 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.
44. 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

Jill Hulley
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