

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 April 2023

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the departmental spending review settlement letter from the Department for Education (DfE). The DfE refused to provide the requested information citing section 35 – formulation and development of government policy.
2. The Commissioner's decision is that section 35 of FOIA has been correctly cited and that the public interest favours non-disclosure.
3. The Commissioner does not require further steps.

Request and response

4. On 12 September 2022 (received on 13 September 2022), the complainant wrote to the DfE and requested information in the following terms:

`...I would like to request the following information under the FOI act. Within this letter it says -
<https://www.gov.uk/government/publications/department-for-education-major-projectsaccounting-officer-assessments/accounting-officer-assessment-initial-teacher-training-itt-marketreview> "delivery and impact reporting is provided to HM Treasury as outlined in the

- departmental spending review settlement letter." Please can I request a copy of the SR settlement letter?'
5. The DfE responded on 7 October 2022. It stated that the requested information was being withheld under section 35(1)(a) of FOIA.
 6. On 8 November 2022 (received on 9 November 2022) the complainant asked for an internal review to be carried out on the basis of the public interest in disclosure.
 7. Following an internal review, the DfE wrote to the complainant on 23 January 2023. It stated that it was upholding the citing of section 35(1)(a) of FOIA and added that section 35(1)(b) also applied.

Scope of the case

8. The complainant contacted the Commissioner on 8 February 2023 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to consider the DfE's citing of section 35(1)(a) and (b) of FOIA.

Reasons for decision

Section 35(1) – formulation and development of government policy

10. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

“(a) The formulation or development of government policy.

(b) Ministerial communications...”

11. The Commissioner will look at the DfE's citing of section 35(1)(a) first and consider section 35(1)(b) later in this decision notice.
12. The Commissioner's guidance states that,

“There is no standard form of government policy... not all government policy needs to be discussed in Cabinet or Executive Committee and jointly agreed by Ministers. Some policy is formulated and developed within a single government department, and approved by the Minister responsible for that area of government...only Ministers have the mandate to make policy. If

the final decision is taken by someone other than a Minister, that decision does not in itself constitute government policy.”¹

13. In order to be exempt, the requested information must relate to the formulation or development of government policy. The guidance explains that the terms refer to “the design of a new policy, and the process of reviewing or improving existing policy”. It is important to identify where formulation or development ends and implementation starts as the exemption doesn’t cover the application or implementation of policy that is established. The term “relates to” is a broad term and means that, “Any significant link between the information and the activity is enough”. The timing of the request is not relevant but whether the information relates to the activity.
14. The Commissioner’s guidance² considers that certain factors are indicators of the formulation or development of government policy:
 - The final decision will be made by the Cabinet or Executive Committee or the relevant Minister.
 - The government intends to achieve a particular outcome or change in the real world.
 - The consequences of the decision will be wide-ranging.
15. This is not a prejudice-based exemption, and the public authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described.
16. The DfE has explained to the Commissioner that -

“the request is for a copy of the Spending Review (SR) settlement letter, dated 12 January 2022, sent from the Rt Hon Simon Clarke MP (the Chief Secretary of the Treasury, HMT, at that time), to the Rt Hon Nadhim Zahawi MP, the then DfE Secretary of State”.

The DfE has provided this letter to the Commissioner and describes it as a formal document between HMT and the DfE setting out the details of the settlement received. The letter confirms funding for 2022-23 and 2024-25 and the conditions attached, providing the example of evaluation programmes and what the funding could or could not be

¹ [Section 35 - Government policy | ICO](#)

² Ibid

spent on. The letter covers funding up to the end of the 2024-25 financial year, and the policies "must be framed within the funding available". How the "policies are developed is dependent on the funding allocated" within the letter.

17. The information is sensitive and is not shared widely within the DfE. The Central Strategic Finance division only shares "relevant extracts from the document with the relevant policy teams, and only when absolutely necessary and required".

18. The DfE explains that the letter contains costings but that it does not consider them to be statistical evidence as they detail the funding allocated "to develop and deliver policies" and "to meet any unplanned challenges" and that funding "impacts the development of our policies and our policy direction". Negotiations were carried out,

"...to ensure that the DfE has the required funding to continue core activities, developing and delivering all departmental policies, ..."

19. The costings can become part of future negotiations between the DfE and HMT which has proved to be the case. The DfE argues that ministers need a safe protected space as policies develop. The information in the letter and the annexes "will be used to frame the arguments put forward by the DfE SoS [Secretary of State] in their future letters and bids to HMT for funding to develop and deliver key departmental and government policies".

20. Spending review settlement letters -

"are formal documents between HMT and the relevant government departments, following on from the published 2021 Spending Review in October 2021³, which provides a level of transparency as to the outcome of these negotiations".

21. The DfE argues that the requested information is "an example of a 'live' policy that is currently under development and was so at the time of the request". The request was made in September 2022 and the DfE's submission in March 2023 stated that an evaluation and developments to the policy that underpin the Turing Scheme would be considered in Spring 2023.

³ <https://www.gov.uk/government/publications/autumn-budget-and-spending-review-2021-documents>

22. The areas of government policy within the withheld information relate to policy and funding and the key policy areas are "throughout the department's portfolio:

- a. Early Years;
- b. Education recovery;
- c. Children's social care, families and support for the disadvantaged;
- d. Apprenticeships;
- e. Further Education/Adult Skills;
- f. Higher Education and the Turing Scheme
- g. Raising educational standards;
- h. The Academies programme and broader Core Schools funding;
- i. Teacher training and professional development; and
- j. Free School Meals and Pupil Premium.

23. The DfE has approached the citing of section 35(1)(a) by following ICO guidance. "There is a significant link to the current and 'live' development of...key government policies" and it quotes the following:

"This means the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough. Information may 'relate to' the activity due to its original purpose when created, or its later use, or its subject matter. Information created before the activity started may still be covered if it was used in or affected the activity at a later date. And information created after the activity was complete may still be covered if it refers back to the activity."⁴

24. The DfE argues that the exemption is engaged because the withheld information relates to the development of government policy. Ministers need to be able to engage in free, frank and candid engagement when difficult decisions have to be made, such as when funding shifts require the development and adaptation of policy areas. It supports its contention by referring to a previous decision ([FS50185270](#)) of the

⁴ [Section 35 - Government policy | ICO](#)

Commissioner's which agreed that an Spending Review settlement letter had been appropriately withheld under section 35 of FOIA.

25. The Commissioner accepts that the exemption is engaged and that the requested information has been correctly withheld under section 35(1)(a) of FOIA and that it satisfies the bullet points listed in paragraph 14.

Section 35(1)(b)

26. The DfE also cited section 35(1)(b) of FOIA to the requested information. The requested information is a letter from the Chief Secretary to the Treasury to the DfE Secretary of State. Neither Minister is still in post but they are both politicians and MPs in the House of Commons. The DfE provides similar arguments as it did for section 35(1)(a) regarding the need for a 'safe space' to have a free and frank exchange of views to conduct negotiations in order to reach future final positions regarding funding allocation for key policies. Its view is that the Chief Secretary to the Treasury believed the conditions set out in the settlement letter to be a "private and safe policy space".
27. The Commissioner considers that the requested information relates to Ministerial communications. The exemption is class-based which means there is no need to show any harm in order to engage the exemption. The disputed information simply has to relate to those communications. For these reasons, the Commissioner finds that the DfE was also entitled to engage the exemption at section 35(1)(b) FOIA.
28. The Commissioner must next consider whether the public interest lies in maintaining the exemption or disclosing the requested information.

Section 35(1)(a)

Public interest factors in favour of disclosing the requested information

29. The complainant argues that the "initial teacher training reform is a huge overhaul of teacher training in England and has proven to be controversial". The details of the delivery and the impact of these reforms is, according to the complainant, in the settlement letter and it is in the public interest to see that detail. They state that it has been mentioned in publicly available accounting office assessment⁵. The

⁵ [Accounting officer assessment: initial teacher training \(ITT\) market review - GOV.UK \(www.gov.uk\)](http://www.gov.uk)

complainant queries whether the “‘expectation’ that the letter would not be shared externally is a written commitment or just implied”. Given the level of funding, difficulties in recruitment, and retention, they do not accept that this outweighs the public interest in disclosure. Ministers should be aware that their views may be “made available to the general public who are impacted by these decisions”.

30. The DfE provided its arguments under this heading as follows:

“Releasing this information would provide greater transparency around the HMT’s arguments in relation to the funding required to develop the policies outlined in the letter and would be likely to add to the public debate on these policies.”

31. Greater openness and transparency about the process and delivery “may lead to greater accountability, an improved standard of public debate, and improved trust”. The DfE acknowledges the importance of disclosure when it comes to the allocation of public money.

Public interest factors in favour of maintaining the exemption

32. The DfE is committed to transparency and, as regards the settlement letter, “there is considerable information already in the public domain”. The DfE “publishes annual reports⁶, which specify progress and spending against policy areas”. The Treasury publishes its own departmental spending - [AUTUMN STATEMENT 2022 \(publishing.service.gov.uk\)](https://www.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/105422/autumn-statement-2022.pdf).

33. The DfE lists “parliamentary answers to parliamentary questions raised on related areas⁷” involving DfE areas of programme expenditure and areas of cross-departmental programme expenditure.

34. The DfE believes that the disclosure of the information “would be likely to inhibit the development of thinking in this policy space because these are ‘live’ policies”. Funding and design policy (existing and new) “is under constant review and subject to development” as it continues to deliver manifesto commitments made by the government. There are additional matters that impact on policy and require funding and it gives the example of the war in the Ukraine and the education of refugee children: “Government needs a self-contained space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.” The Ukraine conflict and post-pandemic recovery are

⁶ [DfE: annual reports - GOV.UK \(www.gov.uk\)](https://www.gov.uk/government/publications/departmental-annual-reports)

⁷ <https://questions-statements.parliament.uk/written-questions/detail/2022-07-21/42010>

“live and sensitive areas where policy remains under development”. The DfE considers the withheld information to be policy under development according to ICO guidance. These matters require a “self-contained space” otherwise there will be poorer quality decisions in policy development.

35. Releasing the information would affect broader DfE policies -

“given that this funding and the thinking behind how this funding will be utilised touches on policy development across the department’s portfolio”.

It argues that the amount of funding and the conditions attached to that funding by HMT for specific policy areas will impact on the development of those policies and what can be delivered via those policies. The DfE states that in the interests of transparency the Government publishes funding allocations to each department and its policies in the [Autumn Budget and Spending Review 2021](#). The DfE’s allocation is on pp.96-98.

36. The policies referred to in the settlement letter were undergoing development at the time of the request, the internal review, and are being revisited as they are part of “an ongoing evaluation and review process”. The DfE expects further changes to take place during the period covered by the spending review until the end of the 2024-5 financial year. Changing priorities leading to development, possible key changes and radical reform to policy areas need to be discussed with other ministers/departments. A safe space is required “to develop and deliver effective policies”.

37. The DfE stresses that the withheld information relates to ‘live’ policy development as there are “conditions attached to the funding...” Policies change depending on the amount of funding that HMT provides to the DfE. Alongside the funding, there are Ministerial/departmental policy announcements in the public domain. The DfE believes that providing the latest detail is essential. Providing the settlement letter “may dilute the free, frank and candid nature” of the requested information. The DfE also explains that “a number of the key policies also feeds into the development of the broader government’s Levelling-Up policies and agenda”.

38. The DfE has its focus on four key areas: driving economic growth; boosting and levelling up education standards; support for the most disadvantaged and vulnerable; and, providing the best start in life. Release of the requested information -

“is likely to have a prejudicial impact on the development of these policy areas, as release could influence the behaviours, reactions

and responses of the key stakeholders affected by the policy, particularly where ministers have highlighted conditions attached to funding in order to develop and deliver key policies”.

39. Ministers must be able to be frank, candid and forthright in their views and intentions when providing the funding through which departments can develop their policy portfolio...” Release would be likely to have a negative impact regarding the development of policy and as a result, good government. The DfE does not suggest that ministers would not address difficult decisions etc but that “the wording and phraseology may be diluted”. Lack of candour in the attached conditions could cause confusion and this is not in the public interest.
40. The DfE needs a “safe space in which all proposals, and any specific conditions set by the Treasury, can be incorporated when developing policies to be delivered within a set funding envelope”. If the information is released, the DfE might have to defend conditions that have been set by the Treasury that relate to the release of specific funding. Additionally, any confusion will have a detrimental impact on the wider community which is not in the public interest.
41. As explained earlier, policy development is on-going regarding the settlement letter and it can “go to the wire”. Policy is often being developed up to the point of an announcement. The DfE argues that the requested information plays “a key role in future funding negotiation cycles”. Should these be undermined it is likely to have a negative impact on policy development at a time of financial constraint. It underpins its argument by quoting from a past decision⁸ of the Commissioner’s:

“the Commissioner is persuaded that the Spending Review process has a cyclical nature – in which one Spending Review feeds into the next one – and in which issues raised in one Spending Review could remain live and sensitive for several years to come. Therefore the Commissioner believes that information relating to one Spending Review process can remain sensitive after its publication”.

42. The DfE concludes its public interest arguments by reiterating its arguments about good decision-making by protecting the ‘safe space’ within which ministers can “make such clear and unvarnished directions and provide clarity on the conditions attached to the funding of the key

⁸ [FS50185270](#)

policies we need to develop and deliver". Release of the information would be likely to have a corrosive effect on the conduct of good government" and risk policy and decision-making being adversely affected.

Section 35(1)(b)

43. The DfE also provided the Commissioner with specific arguments regarding the public interest in non-disclosure that it considers relevant to section 35(1)(b).
44. It contends that "ministers need to present a united front in defending and promoting agreed positions, following their internal discussions and negotiations with other ministers..." The DfE states that "disclosure would be likely to undermine government unity and effectiveness". The principle of collective responsibility and the ability to freely and frankly discuss concerns is set out in the Ministerial Code⁹ at paragraph 2.1. Members of the Cabinet cannot reveal the contents of the discussions that takes place in cross-departmental ministerial correspondence. This allows private debate to take place and concerns to be raised because Cabinet Ministers need to stand behind policies once decisions have been reached.
45. Ministers need to have "a safe and private policy space, to collectively share their policy positions, issues and concerns with other ministers". Specifically here the "terms and conditions attached to the funding allocations for the development of key DfE policies".
46. Referring to the previous Commissioner's decision in paragraph 24 the DfE highlighted the inhibition to the views of ministers in settlement letters and their ability to express those views freely, frankly and robustly resulting in a chilling effect.
47. Ministers need to be able to "work collegiately with other ministers and departments when meeting Treasury requirements..." The DfE does not believe that it is in the public interest to deter ministers "from candidly outlining" those requirements which may result in confusion and "hinder the effective development of policy".

Balance of the public interest

48. The Commissioner acknowledges the complainant's view that the details
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⁹[2022-12-22 Ministerial Code Final.docx \(publishing.service.gov.uk\)](#)

in the review settlement letter involve important educational concerns to the public that should be transparent. However, he is not persuaded that transparency, given the detail that is already in the public domain, is more compelling in this instance. Arguments regarding the so-called 'chilling effect' on ministers are more persuasive when the information is still 'live' and the process was clearly 'live' at the point the request was made. Policies develop during the settlement period and are not in their final form. The Commissioner accepts that disclosure is likely to result in undue external interference requiring a defence of the conditions attached to specific funding in the settlement letter. On balance, maintaining ministerial unity and protecting discussions in this instance is more in the public interest.

Other matters

49. The section 45 code of practice¹⁰ recommends that public authorities complete the internal review process and notify the complainant of their findings within 20 working days, and certainly no later than 40 working days from the receipt.
50. In this case The DfE provided an internal review beyond the recommended timeframe.

¹⁰ [CoP FOI Code of Practice - Minor Amendments 20180926 .pdf \(publishing.service.gov.uk\)](#)

Right of appeal

51. 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

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

52. 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.
53. 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

Janine Gregory
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