

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 August 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Education (DfE) correctly applied the exemption under section 35(1)(a)(formulation of government policy) to the requested revisions to "Guidance for Schools and Colleges: Gender Questioning Children" and the public interest favours maintaining the exemption.
2. It's not necessary for DfE to take any corrective steps.

Request and response

3. The complainant made the following information request to DfE on 19 March 2024:

"I am writing to make a new freedom of information request related to ref 2023-0046379 and 2023-0046380. In previous responses, you provided a list of internal revisions for "Guidance for Schools and Colleges: Gender Questioning Children".

Please send me a copy of the following revisions:

#2 - 6 Oct 2022 2:14
#12 - 30 Jan 2023 17:54
#12 - 30 Jan 2023 17:54
#27 - 26 Apr 2023 03:38
#55 - 4 July 2023 09:25

- #70 - 13 Oct 2023 17:54
- #77 - 31 Oct 2023 10:47
- #90 - 27 Nov 2023 14:02
- #99 - 16 Dec 2023 07:06

Given the nature of the published draft guidance, I understand that none of the information is exempt from disclosure under the Freedom of Information Act 2000.”

4. DfE’s final position was that the requested information is exempt from disclosure under section 35(1)(a) of FOIA.

Reasons for decision

5. This reasoning discusses DfE’s application of section 35(1)(a) of FOIA to the complainant’s request, but its focus is on the associated public interest test.
6. Under section 35(1)(a), information held by a government department is exempt information if it relates to the formulation or development of government policy.
7. In correspondence to the Commissioner on 25 July 2024, the complainant said they conceded that DfE was entitled to withhold the information they’d requested under section 35, but they consider there are public interest arguments for its disclosure.
8. In its submission to the Commissioner, DfE has noted that in recent years, an increasing number of children have been questioning their gender. This is why, it says, it has developed the policy around this and the associated new guidance for teachers on how best to support these students in schools and colleges.
9. DfE says the request relates to the drafts of the guidance that the department put to consultation for schools and colleges on Gender Questioning Children¹. This consultation ran between 19 December 2023 and 12 March 2024, with the request being received one week after the closure of the consultation.

¹ <https://consult.education.gov.uk/equalities-political-impartiality-anti-bullying-team/gender-questioning-children-proposed-guidance/>

10. Obviously, DfE says, since the consultation closed and the request was received, there has been a general election and change of Government. The new Secretary of State has been clear that children's wellbeing must be at the heart of both the relationship, sex and health education (RSHE) and Gender Questioning guidance for schools.
11. DfE considers it's vitally important that teachers and the sector have clear guidance, which is why it will be looking carefully at the consultation responses and considering the relevant evidence before setting out next steps to take the RSHE guidance forward.
12. DfE has advised that the consultation on proposed changes to the statutory guidance on teaching relationships, health and sex education closed on 11 July [year not given]. The consultation on the draft non-statutory guidance for schools and colleges about children questioning their gender closed on 12 March 2024.
13. DfE says that the government will re-engage with stakeholders, look carefully at the consultation responses and consider the relevant evidence before setting out next steps, to make sure it's drawing from the best available evidence. The Secretary of State has also written a letter to education workforces to make clear the valuable role they'll play in the government's agenda for change.
14. With this in mind, DfE says, it's clear that at the time of the request, and at the time of it preparing its submission, this is a policy still very much under development and therefore DfE considers its application of the exemption section 35(1)(a) remains fair and appropriate.
15. The Commissioner agrees, and as has been noted, the complainant accepts that DfE was entitled to apply section 35(1)(a) to the requested information. The Commissioner is satisfied this exemption is engaged and he's gone on to consider the public interest test. The information could still be disclosed if there's a strong public interest in doing so.

Public interest test

16. In their request for an internal review, the complainant presented the following arguments for the information's disclosure:
 - "As you may be aware, ICO guidance states that a "thinking space" or safe space only lasts for a short time. Once the government has had a chance to properly set out its policy position and frame the debate, a " thinking space" to present the policy is no longer needed.

- There is a significant public interest in allowing public scrutiny of the policy details (including risks and alternatives) while the policy is still in the public consciousness, and before it is finalised.
 - Furthermore, Ministers and officials are not easily deterred from expressing their views about the safety and wellbeing of gender-questioning pupils by the possibility of future disclosure.
 - I draw your attention to section 35(4), which specifically provides that there is a particular public interest in disclosing background factual information. In particular, disclosing information on the topic of indirect discrimination will increase public understanding of the guidance (or policy) in question and enable public debate and scrutiny of both the guidance (or policy) itself and how it was arrived at.”
17. In their correspondence to the Commissioner of 25 July 2024, the complainant said that it had recently come to their attention that a teacher used the draft guidance to challenge the Secretary of State's decision to ban them from teaching, *Sutcliffe v Secretary of State for Education* [2024] EWHC 1878 (Admin)².
18. In the complainant's view, there appears to be a further public interest at the time of the request (which they weren't aware of then) in understanding whether the professional conduct proceeding prompted the DfE to create the draft guidance, and to what extent the draft guidance aims to covertly change the Teachers' Standards.
19. DfE has provided the following public interest arguments for disclosing the information in its submission to the Commissioner:
- “This request covers previous draft versions of the guidance that subsequently went to consultation, on a particularly sensitive and emotive area of policy. The developing policies surrounding this area and the department's policy around such guidance, is a topic that draws significant interest from key stakeholders, including parents, pupils, schools, teachers, unions and the media. Releasing this information would provide greater transparency around the development process surrounding such guidance and

² <https://www.judiciary.uk/wp-content/uploads/2024/07/Sutcliffe-v.-Secretary-of-State-for-Education-judgment.pdf>

associated policies, and would add to the public debate on this topic.

- The department has taken into account that considerations for disclosure add up to an argument that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.
- There is a general public interest in disclosure of information to the public, to demonstrate the openness and transparency of government. This is particularly the case when considering evidence around the implementation of government policy.”

20. For reasons of confidentiality the Commissioner is unable to provide all the public interest arguments for withholding the information that DfE provide to him, but they include the following:

- “The department is committed to transparency. Regarding information relating to the development of this guidance and associated policies, we sought full engagement with external parties via the consultation on the final draft of the guidance.
- As mentioned earlier, and particularly in light of the change of government, the development of this area of policy is still ongoing at the time of writing. This can be seen through the letter from the Secretary of State to the sector.
- As our policy surrounding Gender Questioning Children is based on consultation, evidence, and associated emerging data/expertise on this area, releasing previous drafts of the guidance that subsequently went to consultation would heighten the possibility of having an out-of-date policy position, in the form of guidance that was ‘draft and under development’ in the public domain. This is particularly the case given that the documents contain the free and frank views of officials, whilst our policy position is being developed. To release would be likely to dilute the free, frank and candid nature of any future advice and decision-making, for fear of ‘outdated’ advice, policy positions and risks perceived at the time of writing making it into the public domain in the future, which could in turn create confusion for the education sector, their staff, parents and pupils. It is therefore essential that only the latest position is in the public domain, as was the case with the final draft of the guidance going to consultation at that time.
- At the time of the request, the department was continuing to explore a range of policy positions and options for the delivery of this guidance, following the completion of the consultation period.

This is clearly the case where, within the withheld information, we are discussing a range of options, policy positions and the professional views of officials, which require input from others to reach a final decision, a decision which will have a direct impact on our policy.

- The department accepts that in some instances, the public interest in continuing to withhold information will reduce after the policy and formulation stage is complete. However, even after the date of the request, this policy continues to be developed. This was, and is, very much a 'live' policy area, that will undergo further development dependent on the position of the new government. Due to this, the department does not believe that the public interest in withholding has diminished at all, and that release of this information has the potential to inflict damage on this 'live' policy, and the overall policy-making process.
- The department's clear focus is the development of this policy and the development and provision of effective and considered guidance relating to it. As we develop this policy, based on the outcomes from the consultation and the subsequent change in government, and prior to this this policy or guidance being fully developed and finalised, the previous drafts of the guidance with the various comments and notes embedded within them, ultimately remain as an evidence base that shapes the policies that the department is committed to delivering, and provides background evidence which the new ministers rely on in order to inform their policy decisions. It is critical that their 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 previously considered draft guidance, being released into the public domain.
- To release the withheld drafts is likely to have a prejudicial impact on the development of this policy, as release could influence the behaviours, reactions and responses of the key stakeholders affected by the policy, particularly the education sector, parents and pupils.
- It is crucial that when undertaking any policy development, and the development of associated guidance that goes to consultation, we are able to compare and contrast not only the latest evidence and findings, but also previous evidence and advice provided to officials and ministers when further developing our policy relating to Gender Questioning Children and the wider RSHE policy. We must have a safe space in which all evidence, findings, and the professional views and opinions of officials, can be recorded and

considered in what is a policy that is undergoing ongoing development based on the evidence and consultation responses provided. To release information that would have a detrimental impact on the development and delivery of a set of key and significant government policies cannot be in the public interest, as this would have a direct impact on the policy-making process and subsequent effectiveness of the delivery of policies and guidance relating to very sensitive and emotive policy areas.

- This is a high-profile policy, and it is essential that all evidence, professional opinions and findings, past and present, relating to the policy and its delivery can be considered freely and frankly within a safe space, when making further changes to our delivery policy around provision of associated guidance.
 - Ensuring that this is possible, goes to the very heart of the policy-making process, and the ability of contributors to offer honest, candid advice and evidence during the initial drafting phases, without influence or prejudice. If these drafts were to be released, and used to undermine the current delivery of a policy under consideration, it is likely to have a considerable and negative impact on the development of this policy, and the policy-making process would clearly be poorer without such unbiased evidence, findings and input from officials.
 - It is important that the development and delivery of such policies can be undertaken by officials within a 'safe space' and then continues to be supported with input from external partners and stakeholders through subsequent consultation, and we remain committed to ensuring that our policies provide the best possible guidance and clear position so as to meet the needs of the sector, its professionals and children attending their schools and colleges.
 - Good government depends on good decision-making and this needs to be based on the best advice and a full consideration of the options available at that point in time. Without protecting this 'safe space' and the ability for ministers and senior officials to receive unbiased evidence and findings from DfE officials and associated partners, there is likely to have a corrosive effect on the conduct of good government, with a significant risk that policy and decision-making will become poorer. Where policy is dealing with such significant issues as Gender Questioning Children, any such corrosion of the conduct of good government would not be in the public interest."
21. Public interest arguments under section 35(1)(a) focus on protecting the policymaking process. This reflects the purpose of the exemption.

22. The relevance and weight of the public interest arguments depends entirely on the content and sensitivity of the information in question and the effect of its release in all the circumstances of the case. Arguments should therefore focus on the effect of disclosing the information in question at the time of the request.
23. The key public interest argument for this exemption usually relates to preserving a 'safe space' to debate live policy issues away from external interference and distraction. There may also be related arguments about preventing a 'chilling effect' on free and frank debate in future and preserving the convention of collective responsibility.
24. The exact timing of a request is also very important. If the information reveals details of policy options and the policy process remains ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight.
25. However, even if the policy process is still live, there may be significant landmarks after which the sensitivity of information starts to wane.
26. To address one of the arguments the complainant has made, in the Commissioner's view, the timing of the request is a key factor in this case because the policy process was, in fact, still live at the time of the request, and currently. As the requested information relates to that policy making, he considers that the need for a 'safe space' to debate policy and reach decisions without external comment is an entirely valid argument. It has been generally accepted by both the Commissioner and First-tier Tribunal that significant weight should be given to maintaining the exemption where a valid need for safe space is identified. A compelling public interest in favour of disclosure is required when a need for safe space is demonstrated.
27. The Commissioner recognises the public interest there is at this time in the matter of children questioning their gender. However, he doesn't consider that's a compelling enough interest in and of itself to justify removing the safe space DfE needs to develop its policy around this, and the associated guidance. Children questioning their gender is a sensitive subject and one that's potentially difficult to navigate, for children and young people and the adults around them, including their teachers. Clear, considered and robust guidance for those working in education is therefore vital.
28. To address another of the complainant's arguments, the information DfE is withholding, which it has provided to the Commissioner, isn't "background factual information". Through a 'Comments' feature, the information evidences officials sharing views and advice – their own and others' - on issues discussed in the draft material; the issues themselves

or how they're framed or worded in the drafts. The information very much demonstrates officials debating a policy and reaching decisions about it. The Commissioner doesn't consider the information would address the more recent public interest argument the complainant put forward.

29. As discussed, the policy in question was live at the time of the request, and currently. The content of the withheld information, and the matter that it concerns, is somewhat sensitive and disclosing it before the policy is finalised could generate attention and queries that would distract DfE from the business at hand. The public interest in DfE demonstrating transparency has been met to a sufficient degree through the consultation(s) DfE has run on a draft version of the guidance in question, which included publishing that draft. In all the circumstances, the Commissioner is therefore satisfied that there's greater public interest in this case in maintaining the 'safe space' in which officials can debate the issues and reach decisions, away from the public gaze.
30. The Commissioner has therefore determined that the public interest in protecting the policy making process at the time of the request outweighed the general public interest in transparency on this occasion.

Right of appeal

31. 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

32. 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.
33. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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