

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 15 October 2024

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

#### Decision (including any steps ordered)

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1. The complainant has requested information held on the common law duty of care owed by Higher Education providers to their students that the Department for Education (DfE) used to respond to a parliamentary petition. The DfE relied on section 42(1) – legal professional privilege – to withhold the information it held.
2. The Commissioner's decision is that the DfE has correctly applied section 42(1) to withhold the information and he requires no steps.

#### Request and response

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3. On 3 October 2023 the complainant made an information request to the DfE. This followed on from an earlier information request by another individual made on 2 August 2023 in the following terms:

"Please supply all information you hold on any Common Law duty of care owed by higher education providers to their students, that was used to generate your response to a recent parliamentary petition calling for a statutory duty of care in higher education."

4. The follow-up request by the complainant on 3 October 2023 was for:

“Please supply appropriately redacted and anonymised copies of every item that was withheld from [name redacted] under section 42 of the FOI Act on 31<sup>st</sup> August 2023.”

5. The DfE responded on 26 October 2023 refusing the request under section 42 FOIA.
6. The complainant requested an internal review on 27 October 2023 stating that entire documents cannot be withheld just because parts of it might engage an exemption.
7. The DfE conducted an internal review and provided the outcome on 23 November 2023 upholding its decision and adding that section 40(2) had also been applied to redact personal data.
8. The complainant wrote to the DfE again on 2 April 2023 and asked:  
  
“Please explain why redacted and anonymised copies of pertinent documentation could not be supplied – as was specifically requested.”
9. The DfE responded on 5 April 2023 referring back to its earlier responses. The complainant responded again on 7 April stating they understood why unedited fully unredacted copies of the original documents couldn't be supplied but failed to understand why redacted and anonymised versions could not be disclosed. The DfE reaffirmed its position on 23 April 2024.

## **Scope of the case**

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10. The complainant contacted the Commissioner on 16 May 2024 to complain about the way their request for information had been handled.
11. In their submissions to the Commissioner the complainant emphasised they had asked for redacted and anonymised documents. The complainant does not suggest that some of the information in any documents held may not engage legal professional privilege or be personal data but that there must be other information in the documents that does not engage either exemption and therefore can be provided.
12. The complainant also stressed that the use of section 40(2) was surprising given they had explicitly excluded personal data from their request by asking for anonymised material. The Commissioner is therefore not considering the use of section 40(2) to withhold any personal data.

13. The Commissioner considers the scope of his investigation is to determine if the DfE has correctly withheld information in the documents under section 42 and if the documents can be withheld in full under these exemptions.

## **Reasons for decision**

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### **Section 42 – legal professional privilege**

14. Section 42(1) of FOIA provides that information is exempt from disclosure if the information is protected by legal professional privilege (LPP) and this claim to privilege could be maintained in legal proceedings. LPP protects the confidentiality of communications between a lawyer and client.
15. There are two categories of LPP – litigation privilege and legal advice privilege. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Legal advice privilege may apply whether or not there is any litigation in prospect but legal advice is needed. In both cases, the communications must be confidential, made between a client and professional legal adviser acting in their professional capacity and made for the sole or dominant purpose of obtaining legal advice.
16. In this case the DfE is relying on legal advice privilege.
17. The Commissioner notes there appear to be some misunderstanding about exactly what information is held by the DfE in scope of this request. The complainant has suggested they believe there are no legally privileged documents but just text copied from widely available guidance documents or material cut and pasted from the internet.
18. In fact the information in scope of the request is a series of email exchanges between DfE officials seeking legal advice from the Government Legal Department (GLD) and responses from lawyers providing the requested legal advice.
19. The DfE states that it has treated the request as being for any information held which specifically mentions, or is related to, a common law duty of care within higher education settings, which was used to

develop a response to the parliamentary petition<sup>1</sup> referred to in the request. The Commissioner accepts this is a reasonable and wide-reaching interpretation of the request.

20. The DfE's explained its position on common law duty of care was developed following DfE officials requesting legal advice from the lawyers. However, not all the information in the emails is related to common law duty of care or was used to generate the response to the parliamentary petition in question. For example, there are opening and closing salutations and background as to why legal colleagues are being contacted.
21. The DfE's position is that the information in the emails cannot be redacted and released as all the information is either out of scope of the request or is in scope and engages section 42 FOIA.
22. Having viewed the emails the Commissioner is satisfied that the withheld information comprises confidential communications between client and legal adviser for the dominant purpose of seeking and giving legal advice. It falls within the definition of advice privilege and is therefore subject to LPP. Accordingly, the Commissioner finds that the exemption is engaged in respect of the withheld emails. Any information in the body of the emails that is not subject to LPP is out of scope of the request.
23. Section 42 is a class-based exemption, so there is no need for a public authority to demonstrate any prejudice or adverse effect. It is however qualified by the public interest test.
24. The request relates to a petition for the government to introduce a statutory duty of care in Higher Education settings following tragic incidents in which students in Higher Education settings have taken their own lives. The Government's response to that petition stated that a statutory duty was unnecessary because a common law duty already existed. There is a public interest in establishing if a common law duty of care exists in a Higher Education context in the same way it does in other limited circumstances, such as between employers and employees.
25. The DfE recognises this public interest and notes the subject matter of this request is sensitive and has attracted media attention. As such

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<sup>1</sup> [Create statutory legal duty of care for students in Higher Education - Petitions \(parliament.uk\)](https://www.parliament.uk/petitions/create-statutory-legal-duty-of-care-for-students-in-higher-education)

there is a public interest regarding what measures are in place or can be put in place to prevent future incidents.

26. However, in balancing the opposing public interest factors under section 42(1), the Commissioner considers that it is necessary to take into account the in-built public interest in this exemption: that is, the public interest in the maintenance of legal professional privilege.
27. The general public interest inherent in this exemption will always be very strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
28. While the Commissioner accepts the undoubted public interest in the wider subject matter in this case, the issue to be determined in this case relates to the public interest in disclosure of communications subject to LPP.
29. The Commissioner is mindful of the following from his guidance:

“What is quite plain, from a series of decisions beginning with *Bellamy v IC EA/2005/0023*, is that some clear, compelling and specific justification for disclosure must be shown, so as to outweigh the obvious interest in protecting communications between lawyer and client, which the client supposes to be confidential”.
30. In reaching his decision, the Commissioner has taken into account the fact that at the time of the request the legal advice was still recent.
31. In order to conclude that the balance of the public interest favours disclosure, the Commissioner must be satisfied that any significant public interest in disclosure is sufficient to outweigh the normal interest in protection of LPP.
32. The DfE have strongly argued that Government departments need high quality, comprehensive legal advice for the effective conduct of their business and to take decisions in a fully informed legal context. Legal advisers need to be able to set out arguments for and against a particular line, without fear that this might expose weaknesses in the government's position.
33. The disclosure of legal advice has a high potential to prejudice the government's ability to defend its legal interests. This applies directly, by unfairly exposing its legal position to challenge. It also applies indirectly by diminishing the reliance it can place on the advice having been fully considered and presented without fear or favour. The

Commissioner accepts neither of these outcomes is in the public interest.

34. The Commissioner considers the public interest in this information, specifically in knowing that the DfE has sought legal advice on this issue and its position is based on this advice and not on, as the complainant suggests, general guidance documents and publicly sourced information, is met to some extent by the confirmation that such emails seeking and obtaining legal advice exist. Knowing the specific details of such advice would certainly provide greater transparency about what the exact nature of the advice was but the Commissioner does not consider compelling arguments for disclosure have been provided that would outweigh the inherent public interest in preserving the privilege attached to legal advice.
35. In this case, having weighed the factors for and against disclosure, the Commissioner is satisfied that the public interest in maintaining the exemption outweighs the public interest in favour of disclosure.

## **Right of appeal**

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36. 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)

37. 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.
38. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
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**SK9 5AF**