

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 28 November 2024

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

Decision (including any steps ordered)

1. The complainant has requested all copies of draft responses to the Office for Students (OfS) 'Consultation on Data Futures and data Collection'. The Department for Education (the DfE) initially refused the request under section 35(1)(a) of FOIA but later withdrew it and cited section 36(2)(c) – prejudice to the effective conduct of public affairs.
2. The Commissioner's decision is that the DfE cited section 36 appropriately and that the public interest favours non-disclosure.
3. The Commissioner does not require further steps.

Request and response

4. On 5 May 2024, the complainant wrote to the DfE and requested information in the following terms:

"I would like all copies of draft responses to the following Office for students consultation 'Consultation on Data Futures and data Collection' in particular any relating to part two. I am specifically asking DfE and not the OFS and I do not expect this to be passed to them to respond as you are required to make your own determination. Furthermore, I do not expect to be refused as policy under development as given that a response to this was promised

and fully drafted in summer 2022 it is clearly not actively under development.”

5. The DfE refused to provide the requested information on 24 May 2024, citing section 35(1)(a) of FOIA – formulation or development of government policy.
6. On 25 May 2024 the complainant made an internal review request. The complainant had waited to make a request in order to avoid section 35 being cited.
7. Following an internal review on 2 July 2024, the DfE withdrew its citing of section 35(1)(a). However, it cited section 36(2)(c) (prejudice to the effective conduct of public affairs) to refuse the request instead.

Background

8. The OfS describes itself on its website as -

“a non-departmental public body, meaning we’re accountable to Parliament and we receive guidance on strategic priorities from the Department for Education, but our operations are independent of government”.

9. The DfE describes the ‘data Futures program’ as a “sector-wide transformation program aimed at enhancing the arrangements for the collection, sharing and dissemination of data and information about the higher education (HE) system”. The OfS shared an initial draft of its consultation response with the DfE.
10. The draft was not published and the OfS published the following:

‘short statement’¹. The OfS broadly states that “Since we published our consultation, there have been a number of significant developments in higher education in England that are likely to affect our requirements”.’

The DfE stated that this meant that any decisions would need to be revisited and further work done before any final decisions were made.

¹ [OfS consultation on Data Futures and data collection - responses parts 2-3](#)

Scope of the case

11. The complainant contacted the Commissioner on 7 July 2024 to complain about the way their request for information had been handled.
12. The Commissioner considers that the scope of his investigation is to decide whether the DfE appropriately cited section 36(2)(c) to the requested information.

Reasons for decision

Section 36 prejudice to effective conduct of public affairs

13. Sections 36(2)(b) and 36(2)(c) of the FOIA state that:

“2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person (“QP”), disclosure of the information under this Act –

[...]

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs”.

14. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. It is engaged only if, in the reasonable opinion of a QP, disclosure of the information in question would, or would be likely to result in inhibition or, in this case prejudice, relevant to the activities set out in the sub-sections of 36(2).
15. To determine whether the exemption was correctly engaged by the Authority, the Commissioner is required to consider the QP’s opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - ascertain who the QP is;
 - establish that they gave an opinion;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
16. The Commissioner is satisfied that Baroness Diana Barran (Parliamentary Under Secretary of State at the Department for Education from 27 October 2022 to 5 July 2024) was the Qualified Person for the purposes of section 36(5) of the FOIA at the time of the request.

17. The QP's opinion was sought on 26 June 2024. The QP was presented with the arguments for the engagement of the exemption and signed to the opinion that release of this information would be likely to otherwise prejudice the effective conduct of public affairs. The public interest arguments were not presented to them.
18. In determining whether the exemption is engaged, the Commissioner must consider whether the qualified person's opinion was a reasonable one. The Commissioner takes the approach that if the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable. This is not the same as saying that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold.
19. The DfE argues that in order to have a "strong and effective working relationship" with its "officials and key partners" it needs "a safe space in which to work collegiately and share proposed drafts of findings and reports without fear of these drafts prematurely making it into the public domain". It allows the DfE "time and space to understand the proposed position of key partners" in this case, the OfS, allowing the DfE to "raise any questions or potential concerns" before "any potential future publication". The DfE needs to determine the effect, either negative or positive on its position. It believes that it is vital that draft information is shared with it in order that advice can be provided ahead of release or publication.
20. It allows the OfS the same space to consider their drafts and react to changed circumstances and developments in Higher Education, meaning that the initial draft in this case would not meet requirements and would need revisiting prior to a final version being considered and/or published.
21. All parties can then challenge the draft information in a candid manner in a 'safe space'. It allows time to ask further questions and seek clarification. Any deterrent effect would be likely to be detrimental to the DfE's relationship with the OfS. In this instance, to release a draft document when the overall direction of the OfS's response and policy thinking was changing would be likely to make a collaborative relationship more difficult. The OfS 'shared the following with the public in the response that they did publish:

"We are concerned that any decisions we make now would need to be revisited in the short or medium term as we develop our

understanding of future data requirements; this would create uncertainty and would increase burden if we concluded we should reintroduce requirements we had previously removed”.’

22. Sharing the superseded draft would damage the working relationship that the DfE has with the OfS. This document was shared in confidence and the OfS would have had the expectation that it would not be “prematurely disclosed”. If disclosed, “stakeholders are unlikely to openly share such information” with the DfE in future. The OfS is “under no obligation to share these drafts” and disclosure would compromise effective engagement.
23. The QP signed to the opinion that release of this information would be likely to otherwise prejudice the effective conduct of public affairs.
24. The complainant does not accept that the exemption applies, referring to the Higher Education and Research Act 2017, section 78, that states –
 - “78 Power to require information and advice from the OfS
 - (1)The OfS must provide the Secretary of State with—
 - (a)such information regarding any of its functions, or obtained in the performance of any of its functions, as the Secretary of State may require it to provide, and
 - (b)such advice regarding any of its functions as the Secretary of State may require it to provide.
 - (2)The OfS must provide information or advice under subsection (1) in such form as the Secretary of State may require.”

They argue that -

“OfS is under a duty to disclose any and all information to the DfE upon request and the DfE would be aware of this and similar information it is not credible that this would harm the relationship...”

The Commissioner’s view

25. The Commissioner considers that the QP had adequate information to enable them to make a decision on the matter.

“This need for a safe space will be strongest when the issue is still live. Once you have made a decision, a safe space for deliberation will no longer be needed. If it was a major decision, there might still be a need for a safe space to properly promote, explain and defend its key points without getting unduly side-tracked. However,

this can only last for a short time and you would have to explain clearly why it was still needed at the time of the request on the facts of each case. The timing of the request will therefore be an important factor.”²

26. Bearing in mind the Commissioner’s guidance, whether this exemption is engaged depends on whether the QP’s opinion is one that a reasonable person could hold. The Commissioner accepts that it was reasonable for the qualified person to hold the opinion that disclosure of the requested information would be likely to result in prejudice to the effective conduct of public affairs. He has reached this view despite the length of time between the draft being written (July 2022) and the request being made (May 2024). Disclosure of a draft that was not published because it was not representative of later thinking would be likely to prejudice the DfE in its relations with both the OfS and other bodies submitting draft documents in the expectation of confidentiality, whether or not the legislation requires them to do so. He therefore finds that the exemption is engaged.

Public interest

27. Section 36 is a qualified exemption and therefore the Commissioner must consider the public interest test and whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Public interest factors in favour of disclosing the withheld information

28. The complainant does “not accept that the public interest test has been properly applied in this case”. In the complainant’s internal review request they contend that there is a public interest in the disclosure of “thinking that existed at the time that may have reduced burden on the sector but was not taken forward”. The complainant refers to press articles that describe the “perilous state of the finances of the Higher Education sector” to which “data burden contributes significantly” and consequently there is “significant public interest” in thinking that might reduce it and “ease pressure on the public finances”.
29. The complainant also considers that there is “significant interest in the Jisk Data Futures project” and that the proposals would have “simplified

² [Section 36 - Prejudice to the effective conduct of public affairs | ICO](#)

the exercise” and represent “a significant contribution to the debate surrounding Data Futures”.

30. The DfE’s view is that it is a responsibility for it to be open and transparent, to assure the public that there is good decision making between public bodies, and that standards of integrity and fair treatment have been upheld.
31. There is a public interest in understanding how the DfE and its key independent partners work together in relation to shared areas of policy and responsibility.

Public interest factors in favour of maintaining the exemption

32. The DfE’s view is that “release of this information will lead to trust between the OfS and DfE being damaged”. It states that the OfS shared their thinking in confidence with the expectation that it would not be prematurely disclosed. To release it would damage relations and future policy development through lack of engagement. This could undermine effective government as the DfE “needs to be abreast of the sectors it engages with” in order to develop and deliver government policies.
33. Lack of candid engagement would be detrimental to their shared areas of responsibility and collaborative work with agencies. Hindering how the DfE and other agencies “react quickly and effectively to changes within the sector” is not in the public interest. The DfE’s opinion is that “future policy development is likely to suffer” should the information be released. If preliminary thinking was disclosed it “could lead to the ‘closing off’ of better options, particularly if the proposed options are seen to be controversial”. For good government all options need to be considered. It is in the public interest to have the ability to adapt to changing circumstances before a final position is reached.
34. The document is a draft “OfS response to a consultation which was not subsequently published”. The DfE argues that the OfS would be concerned if the information was released “as it contains views that no longer represent the OfS policy position on data futures”, it relates to a 2022 position and would “likely cause confusion” which is not in the public interest.
35. The DfE addresses the complainant’s point that it has “powers to require information and advice from the OfS regarding any of its functions under section 78” of the HERA Act 2017³. The OfS are the independent

³ [Higher Education and Research Act 2017](#)

regulator for Higher Education and the DfE has policy responsibility for Higher Education. It contends that "the provision of the withheld information was reflective of the good relationship established between the OfS and DfE, and the document was shared proactively and openly in confidence". Any damage to the "good relationship" in releasing this information potentially affects the future sharing of information.

The balance of the public interest

36. Each case has to be looked at individually but disclosing drafts can be time-consuming for a public authority as each draft can generate further requests and questions from the public. In this instance, the information no longer represents the OfS's policy position.
37. The Commissioner has considered the complainant's argument that the OfS is legislatively obliged to share this information with the DfE. The legislation itself says – "The OfS must provide information or advice under subsection (1) in such form as the Secretary of State may require". To what extent this applies to the draft in question is uncertain. The DfE has stated that the OfS was not obliged to share the draft. The Commissioner also understands the complainant's argument about the public interest in knowing what the thinking had been at that time and how that might help the current situation as they see it. However, the Commissioner does not accept that the positive effects from releasing the draft outlined by the complainant would outweigh the negative effects of a deterioration in OfS's relationship with the DfE, the wider agencies, and the potential confusion caused by its release.
38. In conclusion the Commissioner is therefore satisfied that section 36 applies to the withheld information and finds that the public interest in maintaining section 36(2)(c) outweighs the public interest in disclosure in respect of the same.

Right of appeal

39. 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

40. 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.
41. 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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