

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 December 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 exemptions under section 35(1)(a) and 40(2) of FOIA to the request for information associated with a review of level 3 qualifications. These exemptions concern the formulation of government policy and personal data, respectively.
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 25 July 2024:

"... I am particularly interested in the details concerning the review into the reform of Level 3 qualifications. Please provide the following information:

Terms of Reference: The exact wording of the terms of reference for the review.

Timeframe: The expected timeframe for the review, including the specific start and end dates.

Personnel conducting the Review: The names and roles of the individuals or bodies conducting the review. I understand that the

identity of staff of a certain level of seniority is not considered personal information and thus should be disclosed...”

4. In its response of 9 September 2024, DfE provided information about the timeframe for the review. It advised that the Terms of Reference document is exempt from disclosure under section 35(1)(a) of FOIA and withheld information about the personnel carrying out the review under section 40(2). DfE maintained its reliance on these exemptions in its internal review of 30 September 2024.

Reasons for decision

5. This reasoning covers DfE’s application of section 35(1)(a) of FOIA to the complainant’s request for the Terms of Reference (ToR) document, and its reliance on section 40(2).

Section 35 – formulation of government policy, etc

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 its submission to the Commissioner dated 12 December 2024, DfE explained that it's reforming level 3 qualifications to make A Levels and their new technical alternative, T Levels, the main further education qualification options at age 16 in England. Following a reformed approvals process, they will sit alongside complementary level 3 academic and technical qualifications deemed to meet new quality criteria. Apprenticeships will remain available as an alternative post-16 option.
8. On 25 July 2024, government announced a “short review” of post-16 qualification reforms at level 3 and below, alongside the re-contracting of T Level qualifications to ensure these high-quality qualifications continue to be available to learners.
9. This internal DfE review of this policy examined the planned reforms, and DfE noted that Ministers had now announced the provisional outcomes of this review¹.

¹ <https://www.gov.uk/government/publications/review-of-level-3-qualifications-reform-provisional-outcomes>.

10. DfE considers that disclosing the information in question would be likely to inhibit the development of thinking in this policy space due to this remaining a 'live' policy that is under review and "currently under development."
11. It says that the information being withheld clearly relates to and directly impacts the 'live' policy regarding the review of post-16 qualification reforms at level 3 and below. At the time of the request, and due to the change in government, the ToR were in draft form and were still being considered as part of the wider review. Given that DfE has said in its submission to the Commissioner that the ToR were still being worked on, the Commissioner understands that the ToR were also still in draft at the point that DfE responded to the request.
12. DfE considers that it applied the exemption fairly and appropriately, given that this policy continued to be under development and evaluation at the time of the request, and after receiving the request, with the review being due to conclude this month [December 2024].
13. DfE acknowledges that delivering key policies reforming level 3 qualifications requires expertise on what is an emotive area, as the review will lead to government funding for some level 3 qualifications being withdrawn. This will obviously have an impact on students who may have wished to undertake a qualification that is no longer available. This review and the development of its policy allows DfE to access, and at times challenge, the professional expertise and input from key officials. This is all within a framework of policy development tools and methods, including developing and considering the ToR at the time of the request.
14. At that time, senior policy officials were actively considering the withheld ToR. It hadn't been signed-off by senior officials or ministers as the final version. DfE considers that to release such drafts, which would not necessarily reflect the final position subsequently agreed with senior officials and ministers, would be likely to have a negative impact on the continued development of this policy. This was even more the case, it says, given the change in administration.
15. DfE says that senior officials and ministers must have the space to consider and adapt any policy development tools they have at their disposal, including considering and developing ToR. They must also be able to commission a wide range of advice, expertise and evidence that will test and help formulate and improve government policy. In accordance with this, DfE says it considers that good government depends on good decision-making. This needs to be based on the ability to consider, to reconsider, and to develop tools and elements such as ToR, within a safe space. Such tools help to frame such reviews, and to develop and deliver effective policies.

16. DfE concludes its submission by confirming it's confident that this information falls within the provisions of section 35(1)(a). The exemption was properly engaged, it says, because the subject matter of the withheld information is directly related to the development of the government policies relating to the reform of level 3 qualifications.
17. The Commissioner would normally expect a project's 'Terms of Reference' to be finalised before the project begins. Amongst other elements, ToR generally include a background to the project – such as the review in this case - its scope and purpose, its oversight and its deliverables.
18. The ToR in this case – which is titled '...Terms of Reference and High-Level Plan' - appears to be a 'fluid' document subject to change over time. The Commissioner finds this surprising, but he must consider the information as created by DfE.
19. The Commissioner is satisfied that the information to which DfE has applied section 35(1)(a) relates to the development of policy on level 3 qualifications. This policy was 'live' at the time of the request and response to the request and was subject to review and change. As noted, the ToR associated with this policy was also a 'live' document at the time of the request and response. The Commissioner is therefore satisfied that DfE was entitled to rely on section 35(1)(a) of FOIA to withhold the ToR that the complainant has requested. The Commissioner's gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

20. In their request for an internal review, the complainant presented the following public interest arguments in favour of disclosing the ToR:
 - Disclosing this information would enhance public understanding of the review process; it would provide transparency without undermining the policy formulation process.
 - The public interest in transparency, particularly in a review that could significantly impact the education sector is substantial. Similar documents have been disclosed in other cases – such as the curriculum and assessment review in July 2024 - without detrimental effects on policy formulation, which suggests that DfE is being overly cautious in this case.
 - In a 2010 First-tier Tribunal decision about a request to HM Treasury relating to the formulation of government policy during the 2008 financial crisis, the Tribunal found that, given the significant impact of the decisions on the economy and public

finances, the public interest in transparency outweighed the need for confidentiality.

21. In their initial complaint to the Commissioner on 3 October 2024, the complainant argued that DfE should have provided the ToR as they consider that there is a clear and significant public interest in providing this information. They said that ToRs for reviews are usually published, and that there's no realistic prospect that publishing the ToR would in any way hinder the government's job. Particularly, they said, given the level of transparency around decision making and policy in this particular area (post-16 technical education reform).
22. In subsequent correspondence to the Commissioner on 20 November 2024, the complainant said that the government would rely on the review findings to justify its policy choice, but that the ToR or details of the review remain unknown. They provided a link to a recent news story that they said outlines this².
23. On 11 December 2024, the complainant wrote again to note that the government was understood to be due to announce the outcomes of its review the next day and that concerns about its refusal to share the ToR had been raised twice in the House of Commons.
24. DfE has acknowledged that developing policies about qualifications, and the framework within which they're developed and agreed, is a topic that draws significant interest from key stakeholders, including students, teachers, unions, the wider sector and the media. Releasing the disputed information would provide greater transparency about the development process and would add to the public debate on this topic.
25. DfE says it has also 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.

Public interest in withholding the information

26. DfE says it's committed to transparency. However, it goes on to say, the requested ToR were under development and in draft form and that was the case at the time of the request [and at the point that it responded to the request]. This is because this document relates to a policy the

² <https://feweek.co.uk/btec-review-terms-kept-secret-despite-transparency-pleas/>

department was, and is, developing, and the delivery tools available to it as part of the overall development of that policy.

27. DfE notes that this is clear from the extensive 'track-changes' and comments throughout the withheld information, with some of the comments in the version it provided to the Commissioner postdating the request. This shows that the ToR was and remains a 'live' document.
28. It's essential, DfE says, particularly in the light of the change of administration and the manifesto commitments made prior to the election, that it has the space to review, amend, discuss and consider the application of the tools it has available to it when it's developing its policies, in this instance the draft ToR. This is so as to accurately reflect the development path of this policy as set by the new government.
29. The development of this area of policy wasn't concluded at 12 December 2024 and is due to be completed later in December 2024. DfE says that this can be seen, for example, through an article in 'FEWeek' by the DfE's Minister for Skills, which was published 30 September 2024³. Another example that the development of this policy was still under development at the time of the request in July 2024 is the publication in the House of Commons Library of 'The reform of level 3 qualifications in England' research briefing on 15 November 2024⁴.
30. DfE has noted the extensive 'track changes' and comments in the ToR document. It says that these show that the development of the ToR, which was clearly related to the key work surrounding the development of this review and the policy itself, was ongoing at the time of, and after, receiving the request. DfE argues it must be allowed to consider and develop such thinking and process within a safe space, without fear that draft versions will make it into the public domain. To potentially dilute or make more guarded such commentary, challenge and changes, would be detrimental to the development and delivery of effective policy, which would not be in the public interest.
31. DfE says that its policy surrounding level 3 qualifications is based on an internal review of the existing policy. It takes into account previous evidence and officials' expertise (as can be seen in the comments and 'track changes' within the withheld information). Releasing previous

³ <https://feweek.co.uk/how-well-go-about-reforming-the-level-3-landscape/>

⁴ <https://commonslibrary.parliament.uk/research-briefings/cbp-9858/#:~:text=Labour%20government%27s%20pause%20and%20review%20of%20the%20reforms&text=On%2025%20July%202024%2C%20the,the%20end%20of%20the%20year.>

drafts of a ToR would, DfE says, heighten the possibility of having an out-of-date information about this review in the public domain. This is because DfE was undertaking this rapid review to meet one of the new government's manifesto commitments. Out-of-date drafts and incomplete ToR would be likely to negatively impact the delivery of this policy development and the delivery of this manifesto commitment. It would confuse the sector and wider public about the direction of travel for this review and the subsequent development of this policy. Because of the tight timescales involved, having to unnecessarily explain or defend incomplete drafts that weren't signed off would be likely to have an even greater impact on the development and delivery of the policy. None of that would be in the public interest.

32. Disclosure would be likely to dilute the free, frank and candid nature of any future development of ToR relating to such policy development or rapid internal reviews, or both. Officials would fear 'outdated' information relating to this manifesto commitment, and the subsequent policy positions perceived at the date of DfE's submission, making it into the public domain in the future. This would, in turn, DfE says, be likely to create confusion within the sector, with 'draft' information being in the public domain ahead of the results of the review itself. DfE considers it's therefore essential that only the latest position on this policy is in the public domain.
33. DfE says it accepts that, in some instances, the public interest in continuing to withhold information will reduce after the policy and formulation stage is complete. However, it says, even after the date of the request, this policy continued to be developed, with the review due to conclude later in December 2024. DfE repeats that this was, and is, very much a 'live' policy area up until the time the results of the review and any proposed changes to this policy are formally announced. Until then, the information may undergo further development dependent on the findings of the review and the position of the new government. DfE therefore doesn't believe that the public interest in withholding has diminished at all and believes that releasing this information has the potential to inflict damage on a 'live' policy, and the overall policy-making process.
34. In DfE's view, releasing the withheld draft ToR 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 and its students.

35. This is a high-profile policy, DfE says, and it's essential that all evidence, professional opinions and findings, past and present, relating to the policy on level 3 qualifications and its delivery can be considered freely and frankly within a safe space, ahead of, and during, reviews taking place.
36. DfE considers that ensuring that the ability of contributors to offer honest, candid advice and challenge during the development of information and tools such as ToR, without influence or prejudice goes to the very heart of the policy making process. If preliminary and unapproved drafts of working documents were to be released and used to undermine the live review of a policy under consideration, this would clearly be likely to prejudice the development and delivery of this policy.
37. DfE concludes by stating that 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. It needs to protect this 'safe space' and the ability of ministers and senior officials to agree its approach to such reviews. In turn this leads to DfE being able to consider unbiased evidence and findings from officials. Not being able to do this would be 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 the availability and funding for certain qualifications, corroding the conduct of good government wouldn't be in the public interest.

Balance of the public interest

38. The Commissioner recognises that there is often likely to be significant public interest in disclosure of policy information, as it's likely to promote government accountability, increase public understanding of the policy in question, and enable public debate and scrutiny of both the policy itself and how it was arrived at.
39. However, the purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.
40. The Commissioner has considered the likely effect of disclosing the draft ToR for the level 3 qualifications review, at the time of the request.
41. The timing of a request is very important. The information – which the Commissioner has reviewed – reveals details of policy options and the policy process was ongoing at the time of the request. The ToR was, and remains, very much a draft document that continues to be revised and commented on.

42. The Commissioner notes that the review had been announced on the day the complainant submitted their request and was therefore very much a 'live' matter at that point. 'Safe space' and 'chilling effect' arguments therefore carry significant weight. Disclosing the draft ToR risked inhibiting officials, confusing the education sector and wider public with incomplete or out of date information and diverting DfE's resources from the policymaking work at hand.
43. In cases where the policy process is still live, there may still be significant landmarks after which the sensitivity of information starts to wane. In this case, a landmark might be considered to be the provisional outcomes of the review, published on 12 December 2024. Clearly however, that landmark hadn't occurred at the time of the request and, as such, the information was still very sensitive then.
44. The Commissioner recognises the public interest in the review of level 3 qualifications. But he doesn't consider that's a compelling enough interest in and of itself to justify removing the safe space DfE needed, at the time of the request, to discuss and revise the review's Terms of Reference.
45. The general public interest in DfE demonstrating transparency has been met satisfactorily through its disclosure of some of the information the complainant requested.
46. The Commissioner has therefore determined that the public interest in protecting DfE's safe space at the time of the request outweighed the general public interest in transparency on this occasion.

Section 40 – personal data

47. Under section 40(2), information is exempt from disclosure if it's the personal data of an individual other than the applicant and disclosure would contravene any of the principles relating to the processing of personal data that are set out in Article 5 of the UK General DataProtection Regulation (UK GDPR).
48. The most relevant principle is Article 5(1)(a). This states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
49. The Commissioner has first considered whether the information DfE is withholding under section 40(2) can be categorised as other people's personal data.
50. In their request, the complainant said that they understood that the identity of officials of a certain level of seniority isn't personal data. That isn't correct. Personal data is defined as information that relates to a

living individual and from which the individual can be identified. It doesn't matter how senior those people are, if it meets this criteria, it's personal data. However, when he considers whether disclosing personal data is lawful, the Commissioner takes account of the fact that those in a senior grade may have more of an expectation that their personal data will, or could, be disclosed.

51. The information DfE is withholding under section 40(2) is the names and details of officials involved in the level 3 qualifications review. As well as names, the details include Grade, Budget, Division, Team and Location. The information doesn't include individuals' roles or job titles.
52. The Commissioner is satisfied the information meets the above definition and is the personal data of other individuals – the 'data subjects' – the information relates to them, and they can be identified from it.
53. The Commissioner has gone on to consider whether disclosing that data would breach Article 5(1)(a) which, as above, states that personal data must be processed lawfully.
54. Personal data is processed when it's disclosed in response to a FOIA request. In order to be lawful under Article 5(1)(a), the lawful basis under Article 6(1)(f) of the UK GDPR must apply to the processing. It must also be generally lawful.
55. Article 6(1)(f) states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child.”
56. In order to determine whether disclosing the personal data would be lawful the Commissioner has considered three 'tests': the legitimate interest test, the necessity test, and the balancing test.
57. DfE considers that there's no legitimate interest in the withheld information. It says it has previously disclosed the names of those at the level of Director involved in the review because those Directors are in an outward facing role.
58. However, the Commissioner considers that the complainant's interest in the review of level 3 qualifications, with which the ToR is associated, is a perfectly valid interest for them to have. Given the likely impact of the review, there's also a wider public interest in the withheld information. The information could indicate whether the review is being carried out by individuals who are appropriately qualified and experienced to do so.

59. The Commissioner has next considered whether disclosing the information would be necessary to meet the above legitimate interests.
60. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
61. DfE has noted that the information relates to more 'junior' DfE officials, and that, as above, it has previously released the names of the Directors leading on this review directly to the complainant. DfE doesn't consider it necessary to put into the public domain the details of more 'junior' officials who report to the Directors whose names it has provided. It says it's the Directors who are ultimately accountable for the work the officials who report to them undertake during this policy development and associated review.
62. In their request for an internal review, the complainant said that it was "common practice to disclose the names and roles of individuals in senior or public-facing positions when they are responsible for conducting significant public reviews." They said that disclosing information about such individuals wouldn't be an unfair invasion of privacy "particularly if these individuals hold positions that involve public accountability."
63. In their complaint to the Commissioner, the complainant said that DfE should have provided the identity of anyone involved in the review at Director level or above and it should also have provided the professional role or title of those below that level.
64. The Commissioner has considered the information being withheld and whether disclosing any of it would be necessary to address the legitimate interests that have been identified, for example whether the individuals' grades alone could and should be disclosed (as noted roles and job titles aren't included in the information).
65. In the Commissioner's view it's not necessary to disclose any of the information. The range of grades amongst the officials concerned is as one would expect in a government department conducting such a review. Disclosing that information won't shed any light on the appropriateness of those carrying it out, or the quality of the review. Ultimately, it's those at Director level who are accountable. The complainant considers DfE should therefore disclose the names of those at Director level but, as has been noted, DfE says it has already disclosed this information.

66. The Commissioner has decided in this case that disclosure isn't necessary to meet the legitimate interest in disclosure and so he hasn't gone on to conduct the balancing test. As disclosure isn't necessary, there is no lawful basis for this processing, and it's unlawful. It therefore doesn't meet the requirements of the principle at Article 5(1)(a).
67. The Commissioner's decision is that DfE is therefore entitled to withhold the personal data under section 40(2) of FOIA.

Right of appeal

68. 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

69. 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.

70. 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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