

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 14 July 2021

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

Decision (including any steps ordered)

1. On behalf of the NASUWT, the complainant has requested an Equality Impact Assessment associated with the Department for Education's response to the coronavirus pandemic, specifically the re-opening of schools in 2020. The Department for Education (DfE) withheld the relevant information it holds under section 35(1)(a) of the FOIA (formulation or development of government policy) and advised it considered the public interest favoured maintaining this exemption.
2. The Commissioner's decision is as follows:
 - At the time of the request, DfE was entitled to withhold the requested information under section 35(1)(a) of the FOIA and the public interest favoured maintaining this exemption.
3. The Commissioner does not require DfE to take any remedial steps.

Request and response

4. On 22 June 2020, and as part of wider correspondence, the complainant wrote to DfE and requested information in the following terms:

"...The NASUWT met with your officials on 8/6/20 and received assurances that the Department would further discuss with the

NASUWT the matters we had raised and our strongly held view that there is a need for the Department to publish its plans for assessing the equality impact of the wider reopening of schools and the actions it is taking to minimise any discriminatory effects and outcomes. To date, we have received no further information or communication on this important issue...

...We note that whilst your Department has stated that it has developed an Equality Impact Assessment (EIA) alongside its response to the coronavirus, no EIA has yet been published, despite our requests and in spite of various announcements and decisions made by you on the wider reopening of schools and, most recently, on the funding for catch-up and support interventions in schools..."

5. DfE responded on 3 August 2020. It withheld the requested information under section 35(1)(a) of the FOIA and said it considered the public interest favoured maintaining this exemption.
6. DfE provided an internal review on 4 September 2020; it upheld its position.

Scope of the case

7. The complainant contacted the Commissioner on 14 September 2020 to complain about the way the request for information had been handled.
8. The Commissioner's investigation has focussed on whether DfE was entitled to rely on section 35(1)(a) of the FOIA to withhold the information it holds that is relevant to the request, and the balance of the public interest.

Reasons for decision

Section 35 – formulation of government policy, etc

9. Under section 35(1)(a) of the FOIA information held by a government department is exempt information if it relates to the formulation or development of government policy. The Commissioner understands the term "formulation or development of government policy" to refer broadly to the design of new policy, and the process of reviewing or improving existing policy.
10. The Commissioner's guidance says that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be

discussed in Cabinet and agreed by Ministers. Policies can be formulated and developed within a single government department and approved by the relevant Minister.

11. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:
 - the final decision will be made either by the Cabinet or the relevant Minister
 - the government intends to achieve a particular outcome or change in the real world; and
 - the consequences of the decision will be wide-ranging.
12. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. It 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 - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.
13. The section 35 exemption does not cover information relating purely to the application or implementation of established policy.
14. The Commissioner's guidance on section 35 also says the following:

"In general terms, government policy can therefore be seen as a government plan to achieve a particular outcome or change in the real world. It can include both high-level objectives and more detailed proposals on how to achieve those objectives." (paragraph 26)

"To be exempt, the information must relate to the formulation or development of government policy. The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy." (paragraph 33)
15. The Commissioner recognises that there are no universal rules. Policymaking models are always evolving and may vary widely between departments and situations. It is likely that some policy areas will follow a more rigid, formal development process to maintain stability and certainty, while other policy areas are inherently more fluid and need to evolve more quickly. Depending on the context, policymaking may also be proactive or reactive, formalised or management.

16. In its submission to the Commissioner, DfE has explained that the information it is withholding is an Equality Impact Assessment entitled "COVID-19: childcare, school and other educational settings wider opening". It says that it considers that there were three Equality Impact Assessments that fell within the scope of the request. The first was a document prepared in advance of the decision to proceed with the return of more pupils to schools on 1 June 2020, which was dated May 2020 (the "May 2020 EIA"). Two further versions of this document, dated May 2020 (updated 19 June 2020, the "June 2020 EIA") and July 2020 (the "July 2020 EIA"), were prepared as part of the decision to welcome back all pupils from the start of the autumn term. In its submission DfE has referred to these documents collectively as "the EIAs" and has provided the Commissioner with copies of those documents.
17. The complainant submitted the request on 20 June 2020. The third EIA is dated 'July 2020' and the Commissioner considered whether this version could have been held at the time of the request. She noted that it is stated in the July 2020 EIA that it was most recently updated "...to 28 June 2020". As such, the Commissioner will accept that DfE also held the July 2020 EIA at the time of the request.
18. The Commissioner had asked DfE to clarify exactly which government policy or policies it considers the information to relate to, and why DfE considers the formulation or development of this particular policy was ongoing at the time the complainant submitted the request.
19. In response, DfE has told the Commissioner that the EIAs relate to the decision to proceed with the return of more pupils to schools, first announced on 10 May 2020, with detail published in guidance to schools the following day. The EIAs were then kept under review and updated at further decisions points including, of relevance here, when schools were asked to welcome back all pupils from the start of the autumn term. This decision was announced on 19 June 2020, with detail published in guidance to schools on 3 July 2020. The decision was then kept under review throughout the remainder of the summer until students returned to school in early September 2020 as the passage of the virus through the UK changed and developed.
20. DfE considers that the EIAs clearly and directly relate to the formulation and development of the Government's policy on the return of more pupils to schools; they were prepared to inform decision-making directly, and to identify a number of the key considerations. Therefore, at the time of the original request (22 June 2020) and response (3 August 2020), the request for an internal review (5 August 2020) and the response to the internal review (4 September 2020), the policy under consideration was, according to DfE, plainly and actively live.

21. However, DfE says, that decision was not the end of the matter; the status of schools, and the extent to which they should be offering face to face education to pupils, has been under active consideration by the Department, and Ministers, since that time. The information considered with the EIAs continued, from September 2020, to be engaged and considered through live policy discussions around the continued operation of schools, and any limitations on attendance during the pandemic.
22. DfE says it has had to take a number of unprecedented decisions about the coronavirus (COVID-19) pandemic and educational settings. The decisions involve balancing considerations of grave import on public health, education and wellbeing. The decision-making relating to welcoming back pupils has continued to be a live process, with the issue of the extent to which schools should continue to offer face to face education to all pupils being one that has been at the forefront of Ministerial consideration throughout the pandemic.
23. On 31 October 2020, the Prime Minister announced new national restrictions which did not include limiting attendance at early years settings, schools, further education colleges or universities. On 4 January 2021 the Prime Minister announced that attendance at school settings would be restricted, as infection and hospitalisation rates climbed. On 8 March 2021, restrictions on attendance at schools were eased. At the time it prepared its submission to the Commissioner, DfE notes that the Government was continuing to monitor closely the extent to which easing restrictions through the Roadmap impacts on the transmission of COVID-19 in the community, including the wider opening and operation of schools.
24. The considerations set out in the EIAs continued to be analysed as part of that further decision making; risks identified and balanced in May/June 2020 (and July 2020) then remained under consideration through Autumn 2020 and during the decision-making over the easing of restrictions in March 2021. By way of examples, DfE has referred to, and briefly discussed, specific risks identified in the EIAs. The Commissioner does not intend to reproduce those risks in this notice.
25. DfE says that a further reason why the decision-making in relation to the EIAs has remained a live process is because the evidence on which decisions are made continues to develop, emerge and change. This is the case in both in the public health space (in for example the transmission of the virus, mitigating the effects of new strains of the virus, and the drivers behind ethnic disparities in the outcomes from COVID-19) and the education space (for example the extent of lost learning, and collateral effects of time out of the classroom and the most effective mitigations).

26. In addition, according to DfE, the considerations set out in the EIAs do not apply only to decisions taken around the wider opening of schools at a national level. A number of other policy areas relied on the withheld EIAs as an evidence base, and the risks identified therein are therefore key to ongoing policy making. By way of examples, DfE has referred to, and briefly discussed, specific risks identified in the EIAs that are relevant to other policy areas. Again, these have not been included in this notice.

The Commissioner's conclusion

27. As has been noted, the Commissioner understands the term "formulation or development of government policy" to refer broadly to the design of new policy, and the process of reviewing or improving existing policy.
28. In this case, the matter in question was students' return to schools. This was in the context of the exceptional situation of the coronavirus pandemic and all UK schools having been closed in March 2020. Primary schools in England began re-opening on 1 June 2020 and secondary schools began opening for some year groups on 15 June 2020. The complainant submitted the request on 22 June 2020.
29. The Commissioner is satisfied that the requested information concerns both the design of a new policy and the process of reviewing a policy – namely DfE's policy on students' return to schools in the context of the coronavirus pandemic. The EIAs were produced to inform DfE's decision making about that policy and therefore relate to the formulation and development of policy process.
30. With regard to the criteria at paragraph 11, the Commissioner is satisfied that the decision on when students should begin to return to schools was made by the relevant Minister and Cabinet; that, through the decision, the Government intended to achieve a particular outcome or change in the real world; and that the consequences of the decision were wide-ranging.
31. As such, the Commissioner has decided that the relevant information being withheld engages the exemption under section 35(1)(a) of the FOIA. She has gone on to consider the public interest test associated with this exemption.

Public interest test

Public interest in maintaining the exemption

32. In its submission to the Commissioner, DfE has provided a number of public interest arguments for withholding the information in question and these are detailed below:
- i. The EIAs reflect some of the key considerations which were taken into account when it was decided to welcome more pupils back to school in June 2020, and then for the autumn 2020 term.
 - ii. The EIAs also feed into the Government's wider work around the roadmap out of COVID-19 restrictions. This is through emphasizing the risks to children and young people if they are not fully attending educational settings and receiving the social, mental and pastoral care which fully open educational settings can provide. This roadmap includes the relaxation of measures within step 3 of the roadmap on 17 May 2021, such as the return of indoor sport and the removal of face masks within educational settings, and the measures which could be relaxed in step 4 of the roadmap, such as reducing the need for social distancing and getting educational settings back to operating in more of a pre-pandemic way.
 - iii. The decision-making around coronavirus and educational settings has been fast-paced and multi-faceted, responding to both evolving scientific information and knowledge of the virus and the changing impact of the virus on the UK's population.
 - iv. Importantly, the evidence on which decisions are made continues to develop, emerge and change, both in the public health space (e.g. the transmission of the virus, virus variants and the drivers behind ethnic disparities in the outcomes from COVID-19) and the education space (e.g. the extent of lost learning, the collateral effects of time out of the classroom and the most effective mitigations).
 - v. The EIAs engage in particular with the need to eliminate discrimination, advance equality of opportunity and foster good relations. Ministers, and officials, are required to balance these considerations as part of the decision-making around welcoming more pupils back into a school setting and continuing to offer face to face education to pupils.
 - vi. DfE has noted in its submission that the considerations Ministers and officials have been asked to balance raise difficult and sensitive issues. It has discussed this point and specific

paragraphs of the EIAs in more detail in its submission but, as has been noted, the Commissioner does not intend to reproduce that detail in this notice. DfE goes on to argue that it is essential that Ministers and officials are able to consider the potential impacts of fast-moving policy changes in a safe space in order to reach their decisions. It is particularly important, given the pace of change, that these considerations can be couched clearly and candidly. In this environment, Ministers and officials need the safe space to explore both radical options and safe ones. Here, disclosing the EIAs would risk undermining the safe space needed to consider the sensitive and complex issues regarding the wider, and continued, return of pupils to educational settings.

- vii. To make these key policy decisions, Ministers and officials have had to rely, on occasion, on analysis and extrapolation based on limited data. This reflects the fact that scientific understanding of the virus has developed over the course of the pandemic at a fast pace. While the analysis in the EIAs is the best available which could have been provided to Ministers and officials at that time, that analysis was, at times, based on extrapolation and sensible and informed estimation. Ministers and officials should have a safe space to consider this analysis, on the basis that is the best available, and thus a useful aid to decision making.
- viii. The EIAs are, of course, only one part of the information which fed into decisions taken last summer around the wider return of pupils to schools. There is a risk that piecemeal disclosure, ie disclosure of just the information in the EIAs, will create a distorted picture of policy development or direction. Ministers and officials will then have to incur scarce time and resources countering this narrative; this will lead to media and public pressure on Ministers and officials, which in turn will compromise their ability to advise and deliberate. This impacts public confidence in policy and government at a time that is more critical than ever.
- ix. As DfE has explained elsewhere in its submission, many issues considered in the EIAs continue to be directly relevant to, and inform, ongoing policy and decision-making regarding coronavirus planning and recovery; the decision around the wider return of pupils to schools last summer was not taken in isolation. The considerations set out in the EIAs impact on other aspects of the Department's approach to the management of the COVID-19 pandemic. For example, the analysis of disadvantaged pupils/risks to vulnerable children and young people continues to be relevant to ongoing advice and decisions, for example on attainment and attendance disparities.

- x. Disclosing the EIAs is also likely to have a chilling effect on further advice and deliberation regarding both wider return of pupils to schools and other departmental priorities. Many issues considered within the EIAs which are likely to be subject to media scrutiny and use are relevant for wider decision-making, including ongoing Ministerial priorities around the operation of schools. The likely media and public coverage arising from disclosure of the EIAs could limit free and frank advice and deliberation on a host of issues where these considerations are relevant – including on support for disadvantaged pupils, addressing risks to vulnerable children and young people and work to ensure schools can fulfil their own equalities duties.
- xi. DfE says there is a significant amount of information in the public domain which shows the department's commitment to transparency and addresses the health and safety concerns raised by the NASUWT, including, as examples: *The Schools Operational Guidance; Guidance for Special Schools and other specialist settings: coronavirus* and *Guidance: what parents and carers need to know about early years providers, schools and colleges during Covid-19*.
- xii. DfE has shared a draft copy of the May 2020 EIA with the NASUWT. This draft was shared by email in confidence to the NASUWT and other education unions. At the same time, other guidance, such as the draft Schools Operational Guidance, was shared in confidence. DfE says that, importantly, the draft was shared on a private, non-disclosable to others basis, as the NASUWT accepts. The fact that this draft was shared on this limited basis supports DfE position that disclosure to the wider public is not in the public interest. The concerns DfE has raised flow from wider public knowledge, and the media scrutiny which flows from that context.
- xiii. Finally, while the EIAs rely, in some parts, on publicly available information, this cannot be separated out, and disclosed, as the selection of the information ties into the considerations which are identified and balanced, as a whole. As per the Commissioner's published guidance on section 35, these are documents which cannot be easily divided into sections or topics and should be considered as a whole.

Public interest in disclosing the information

33. In their request for an internal review of 5 August 2020, the complainant noted that the Prime Minister's statement to Parliament on 23 June 2020 had announced that the full reopening of all schools "will recommence in September with full attendance ... because it is safe." The complainant went on to argue that, despite these commitments by the Government, DfE had failed to publish any evidence to demonstrate that the measures being taken would address public concerns over the disproportionate and adverse impact of coronavirus transmission within "Black, Asian and other Minority Ethnic (BAME) populations."
34. The complainant advised that concerns had been expressed that measures introduced by the Government or by schools and colleges should not force the Reproduction rate of the disease - the "R" rate - back up over 1, either for the population as a whole or for sections of the population based on their protected characteristics. The complainant said that the NASUWT was seeking clarification on how the Government's commitments and measures to reopen schools to more children would take into account and contribute towards meeting its statutory obligations under the Equality Act 2010, including the need to prevent further discriminatory impacts related to the transmission of the coronavirus whilst also advancing equality and securing good relations between persons with different protected characteristics.
35. The complainant noted the "considerable" evidence that BAME groups were disproportionately more likely to be impacted by COVID-19 infections and deaths. They said the recently published Public Health England reviews of racial disparities in relation to COVID-19 had confirmed there is an association between belonging to some ethnic groups and the likelihood of testing positive and dying with COVID-19.
36. NASUWT was concerned, the complainant said, that the failure by DfE to publish any equality impact assessments was impeding the efforts of schools and colleges to identify and take appropriate actions to address and/or mitigate discriminatory impacts of their decisions on wider reopening, as they were required to do. In order to meet their duties under the Equality Act 2010 to provide healthy and safe working and learning environments for staff and pupils with different protected characteristics, school and college employers would need to have access to a range of baseline information to inform their own decision-making.
37. The complainant said that the NASUWT was further concerned by the absence of such information or clear guidance from DfE on how schools and colleges could ensure that their plans do not contribute to widening discriminatory or adverse impacts, including for staff, pupils and parents from BAME backgrounds.

38. With plans, at that time, for the full opening of schools in September 2020 just a few weeks away, NASUWT argued that DfE's Equality Impact Assessment evidence, analyses and deliberations should be published as a matter of urgency and utmost priority.
39. In its submission to the Commissioner DfE has acknowledged the general public interest in openness, transparency and accountability, noting that open and transparent government engenders trust between government and citizens. DfE recognised that clear policy decisions taken around the impact of the COVID-19 pandemic on the return of more pupils to schools and the education of the country's children are of vital importance to parents, teachers and children in education settings. Where, as here, there is a strong public interest in the policy making, there is a greater public interest in making the decision-making process more transparent.
40. DfE said that there may also be a benefit to educational settings and parents/carers in understanding how Ministers and officials have engaged and worked to mitigate the equalities impacts of the return of more pupils to schools.
41. Disclosure would contribute to, and inform debate on, a matter of significant public interest. On a related point, disclosure may have the effect of increasing participation in the public debate around the issue of the operation of schools during the pandemic.
42. Under section 35(4) of the FOIA, a public authority should consider the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to decision-taking.
43. DfE noted that the EIAs rely in part on unpublished data to estimate and evaluate impacts on groups with protected characteristics. DfE says that it has considered its obligation under section 35(4) and confirmed that, overall, it does not consider that this is a particularly weighty factor in favour of disclosure. First, the majority of the statistical information relied upon is public (as is clear from the footnotes and links in the documents themselves). Second, as DfE has explained above, the decision making to which this data contributes is ongoing.

Balance of the public interest

44. Public interest arguments under section 35(1)(a) should focus on protecting the policymaking process. This reflects the underlying purpose of the exemption.
45. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in

question and the effect its release would have in all the circumstances of the case.

46. The key public interest argument for section 35(1)(a) will usually relate 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'.
47. The exact timing of a request will be very important. If the information reveals details of policy options and the policy process is still ongoing at the time of the request, safe space and chilling effect arguments may carry significant weight. However, even if the policy process is still live, there may be significant landmarks after which the sensitivity of information starts to wane.
48. In some cases, however, the formulation or development of policy may not follow a linear path (ie where the policy becomes more and more settled as time goes on). There may actually be several distinct stages of active policy debate, with periods in between where policy is more settled. The importance of a safe space can wax and wane, depending on how fixed the policy is at the exact time in question.
49. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.
50. And on the other side of the public interest balance, there is likely to be significant public interest in allowing public scrutiny of the details of the policy (including risks and alternatives) while the policy is still in the public consciousness, and before it is implemented.
51. In general, there is often likely to be significant public interest in disclosure of policy information, as it is 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.
52. In particular, departments should always consider whether the information contains factual information about the background to the policy. Section 35(4) specifically provides that there is particular public interest in disclosing background factual information. On this point however, the DfE has advised that the majority of the statistical information it relied on is already in the public domain. DfE has also

noted that the decision making to which the data [both published and unpublished] contributes remains ongoing.

53. Schools, colleges and nurseries were opened to more students from 1 June 2020, but it seems to the Commissioner that a key decision here was the decision on when all primary and secondary school students should return to schools. In a statement on 23 June 2020 the Prime Minister announced that it was the intention for all primary and secondary education to recommence in September 2020 with full attendance. But as DfE has noted, the situation with the COVID-19 pandemic continued to change and develop up to and beyond September 2020. As such, the decision for some students to return to school on 1 June 2020 and any decision at 23 June 2020 could not be said to have been final decisions.
54. The Commissioner fully accepts the public interest in any risks associated with students' return to schools from 1 June 2020, particularly those associated with particular populations. There was, of course, a strong public interest in people being satisfied that it was safe for students to return. However, the Commissioner has taken account of the 'live' nature of the requested information, discussed above. At the point of the request the COVID-19 pandemic was still in its fairly early stages in the UK; DfE was formulating and developing its policy on the re-opening of schools in response to the emerging situation, with the EIAs informing that policy.
55. The Commissioner has also taken account of the effect of releasing just one part of the information which fed into the decision to reopen schools ie the EIAs. She accepts DfE's argument that such a disclosure would risk creating a distorted picture of the policy's development or direction. Dealing with resulting queries and media or other interest would in turn frustrate Ministers' and officials' ability to focus on deliberating and planning. Disclosure would intrude on the 'safe space' the Commissioner considers would be necessary for DfE to formulate its policy away from external interference and distraction.
56. Having considered all the circumstances, and recognising the gravity of those circumstances, the Commissioner considers that the balance is tipped in favour of non-disclosure in this case, because of the timing of the request.
57. The wider public interest in the public understanding DfE's decision-making on students' return to schools was sufficiently addressed, in the Commissioner's view, through the related news items, updates and guidance that DfE (and other bodies) had published up to the point of the request. That material included the information "Overview of scientific advice and information on coronavirus (COVID-19)", published

by DfE on 15 May 2020, the Education Secretary's statement on coronavirus (COVID-19) published on 16 May 2020 and the Prime Minister's press release on 24 May 2020 about the phased reopening of schools. DfE has advised that much of the statistical information informing the EIAs was also in the public domain. And finally, the Commissioner notes that DfE has provided the NASUWT with a copy of the May EIA outside of the FOIA.

58. At the point of the complainant's request on 22 June 2020, the Commissioner has decided that there was greater public interest in DfE being able to focus its Ministerial and officer resources on drawing up a policy on students' return to schools – informed by the EIAs – that it considered to be an appropriate response to the exceptional challenges brought about by the COVID-19 pandemic.
59. The Commissioner is therefore satisfied that DfE was entitled to rely on section 35(1)(a) of the FOIA to withhold the information that the complainant requested and that the balance of the public interest favoured maintaining that exemption.

Right of appeal

60. 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

61. 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.
62. 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

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