

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 16 April 2025

**Public Authority:** Office for Students  
**Address:** Nicholson House  
Lime Kiln Close  
Bristol BS34 8SR

### **Decision (including any steps ordered)**

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1. The complainant has requested information related to three consultations on free speech regulation. The Office for Students (OfS) advised that it doesn't hold some of the information, it communicated some and withheld the remaining information under sections 36(2)(b)(ii), 36(2)(c) and 42(1) of FOIA. These exemptions concern prejudice to the effective conduct of public affairs and legal professional privilege, respectively.
2. The Commissioner's decision is that the information being withheld under sections 36(2)(b)(ii) and 36(2)(c) engages those exemptions. He doesn't require any further steps.

### **Background**

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3. In its submission to the Commissioner, OfS has provided the following background and context.
4. The Higher Education (Freedom of Speech) Act 2023 (HEFSA), which will amend the Higher Education and Research Act 2017 (HERA), was passed in May 2023. It was set to impose new free speech duties on higher education providers, their constituent institutions, and some student unions.
5. These new duties were initially expected to come into force on 1 August 2024. HEFSA also gave OfS more powers and duties to regulate higher education providers and their student unions on free speech issues. Some of these provisions were initially expected to come into force on 1 August 2024, with others expected to come into force on 1 September 2025.

6. On 26 July 2024, the Education Secretary announced plans to stop the implementation of HEFSA while OfS focuses on the financial stability of the sector and ensuring the delivery of better quality and outcomes for students.
7. On 15 January 2025, the Education Secretary announced that some provisions of HEFSA will be brought into force, while other provisions were to be repealed.
8. OfS's understanding is that the government will bring forward legislation that amends HEFSA in order to change the requirements in respect of the complaints scheme. These changes mean that the final scheme that OfS is required to implement may differ significantly from the one it originally consulted on. In addition, OfS understands that the provisions in HEFSA relating to student unions will be repealed, although these changes haven't yet been put forward in amending legislation.
9. There are three OfS consultations that are relevant to the scope of the complainant's request:
  - A public consultation setting out OfS's proposals for how it will operate the new free speech complaints scheme, which was launched on 14 December 2023 and closed on 10 March 2024.
  - A public consultation setting out OfS's proposals for how it will regulate student unions on free speech issues, which was launched on 14 December 2023 and closed on 17 March 2024.
  - A public consultation setting out OfS's proposals for regulatory advice and other matters relating to freedom of speech which was launched on 26 March 2024 and closed on 26 May 2024.
10. OfS received a significant volume of responses from a wide range of stakeholders for all three consultations. These included student unions and representative bodies, higher education providers, legal associations, free speech advocacy groups, interest groups, sector bodies such as GuildHE, other government departments, the Office of the Independent Adjudicator for Higher Education, and individual professionals.
11. Following the conclusion of the consultations, OfS started preparing analyses of the consultation responses, and OfS's draft policy responses, in preparation for the new duties which were to come into effect at the start of August 2024. However, this work was paused on 9 July 2024 due to the government's expected decision to stop the implementation of HEFSA.

12. At that point, the relevant documents were working drafts. Given the complexity and nuance involved in this policy area, and the fact that the drafts hadn't yet been finalised or undergone an advanced stage of review by senior officials or the ultimate decision-maker, the drafts were still capable of being changed significantly.
13. As a result, at the time of the government's announcement on 26 July 2024 to stop the implementation of HEFSA they didn't in any way reflect OfS's settled position.

### **Request and response**

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14. The complainant made the following information request to OfS on 5 September 2024:

"I would like a copy of the draft responses to/summaries of/decision notices re the formal consultations on free speech regulation that were set to be published in August.

I would also like to request a copy of the "list" of students unions relevant to the regulation that you were compiling"

15. OfS' final position is that the draft policy response to the consultation and consultation summaries are exempt from disclosure under sections 36(2)(b)(ii), 36(2)(c) and 42(1) of FOIA.
16. It had advised that it doesn't hold "decision notices" and it had provided the requested list of student unions.

### **Reasons for decision**

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17. The complainant's complaint to the Commissioner is focussed on OfS's application of section 36(2) to information within scope of their request. They've said,

"Crucially, when then applying the public interest test, I believe the organisation has overweighted an "elevated likelihood" that it would have to divert resources to manage any response necessary following disclosure, not properly taken into account a suggestion of a sensible set of caveats to accompany the disclosure, and has implied that there was still considerable deliberation to be done internally when the information I requested must have been in near-final form."
18. The information being withheld under section 36(2) is contained in consultation summary material and draft policy responses.

19. Under section 36(2)(b)(ii) of FOIA information is exempt information if, in the reasonable opinion of a qualified person, its disclosure would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
20. Under section 36(2)(c) information is exempt information if, in the reasonable opinion of a qualified person, its disclosure would or would be likely to otherwise prejudice the effective conduct of public affairs.
21. The qualified person (QP) in this case is OfS's Director of Resources and Finance. The Commissioner is satisfied that this individual was authorised as the QP under section 36(5) of FOIA.
22. OfS has provided the Commissioner with a copy of a memo provided to the QP, dated 11 November 2024, which includes a copy of the QP's opinion. From that memo the Commissioner accepts that the QP gave their opinion that the two exemptions were engaged. The memo indicates that the QP gave their opinion on 19 November 2024 which was before OfS provided its internal review on 22 November 2024. The opinion was therefore given at an appropriate time.
23. The QP was provided with details of OfS's correspondence with the complainant including the wording of their request. They were advised which section 36(2) exemptions were being considered and the exemptions were explained. The QP was advised why the inhibition and prejudice envisioned under the two exemptions could occur.
24. The QP's opinion was that:

"This is clearly a request for policy work that is still in development. The documents do not represent formal guidance etc of the OfS. Until formally approved by a delegated decision-maker, [the information is] simply policy in development, representing the views of the persons drafting them. The suggestion of deleting comments etc does not change that. As stated in the memo there is no 'near final' status as such.

The documents are part of the whole 'outcomes of the consultations' packages – and development of those is paused pending the outcome of the government's review on further implementation of the Free Speech Act. They are still live as we await the end of the pause."
25. The QP's opinion confirms that they considered that disclosing the draft policy response information "would" cause the envisioned inhibition and prejudice – as this information directly concerns policy development- and that disclosing the summary information "would be likely to" cause the inhibition and prejudice – as this information is one step removed from the policy development process.

26. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
27. The Commissioner considers that the QP had sufficient background knowledge and was provided with sufficient information to enable them to form an opinion on the matter.
28. The Commissioner considers it to be a reasonable opinion that disclosing information derived from, and associated with, the consultations and the relevant policy development, while those matters were still 'live,' would or could create a chilling effect and inhibit people from exchanging views on those matters.
29. It's also a reasonable opinion that disclosing the information in scope would or could give stakeholders a misleading impression. In its internal review, OfS said:

"It would be easy for an individual item to be removed from the context of the document it is recorded in, and in such a case the provision of an explanatory note would not sufficiently mitigate the risk of misunderstanding. Given the interest from a range of stakeholders across the entire higher education sector, there is a risk that providers and other stakeholders would be misled about actual rather than draft OfS policy.

Further, in the event that the associated legislation is resumed and contradictory policy is later published by the OfS, there is a significant risk of confusion within the sector, which would result in harm to our ability to regulate effectively."

30. Finally, the Commissioner has considered the likelihood of the envisioned inhibition and prejudice occurring.
31. He considers that the view that disclosing the summary information would be likely to cause the envisioned inhibition and prejudice is credible. The Commissioner is less persuaded that disclosing the draft policy response information would cause inhibition and prejudice - that is, would be more likely to than not - because OfS hasn't made a compelling case to support this. He will accept the lower level of likelihood, however.
32. At the time of the request, while the consultations themselves had concluded the resulting analyses and associated policy work were still live. As such, the Commissioner finds that the QP's opinion that

disclosing the summary information and draft policy response information would be likely to create a chilling effect and mislead stakeholders is a reasonable opinion. The information being withheld therefore engages sections 36(2)(b)(ii) and 36(2)(c) of FOIA. The Commissioner has gone on to consider the public interest test.

## **Public interest test**

### **Public interest in disclosing the information**

33. In their request for an internal review of 1 October 2024, the complainant said that, even though the HEFSA 2023 had been paused, OfS continues to regulate universities under existing legislation such as the Higher Education and Research Act 2017, including its public interest governance principles.
34. The complainant said that the public has a strong interest in understanding how OfS intended to interpret and enforce free speech obligations under these existing legal frameworks. And since universities are still bound by these laws, they said, the July 2024 draft analysis would provide valuable insight into how OfS planned to interpret its regulatory powers and their underpinning legislation, which remain in effect even without the new Act.
35. The complainant considered that the public also has a right to understand how OfS planned to regulate universities under the existing framework. In their view, withholding the draft information deprives universities and the public of important guidance that would assist with compliance under current laws.
36. Finally, the complainant said that, given the advanced state of the draft and its direct relevance to ongoing regulatory duties, the public interest in disclosing near-final drafts outweighed the potential harm. They consider that risks of disclosing draft material can be mitigated by “a sensible set of caveats to accompany the disclosure.”
37. As well as the general public interest in accountability, OfS has acknowledged that its views on freedom of speech duties are of particular public importance because they relate to the fundamental rights of staff and students at higher education providers. Further, the summaries of responses to its consultations provide valuable insights into how students, higher education staff, and leaders at providers expect the new powers and duties to operate in practice.
38. But OfS submits that it can best discharge its transparency obligations by publishing its final policy responses, and summaries of consultation responses, to the public consultations when policy development is no

longer live. OfS says that this argument holds at the time of the original response, ie policy development was still 'live' at that time, notwithstanding that the government hadn't yet made an announcement whether it would recommence its implementation of HEFSA.

39. OfS has also addressed the complainant's view that the information is "near final drafts" in a very advanced state, and that the risk of misleading or confusing stakeholders could be mitigated.
40. OfS says that, at 9 July 2024, when its work was paused, its draft policy responses were working drafts subject to potentially significant change, rather than near-final versions. It was due to commence an intense process of internal scrutiny of the drafts at that point in time, with a view to finalising the drafts in the coming weeks. However, that work was paused in light of the government's imminent announcement to stop the implementation of HEFSA.
41. OfS has confirmed its view that disclosing the draft policy responses, while policy development is still live, would give a misleading impression of its position on the issues discussed in the three consultations. This would therefore cause significant confusion within the higher education sector on a highly sensitive, nuanced, and topical policy issue.
42. In addition, OfS says, it understands that the government plans to repeal parts of HEFSA relating to student unions. Publishing how OfS intended to regulate student unions as of July 2024 would inevitably cause confusion among students' unions, particularly given the variance in size, experience and knowledge within those student unions.
43. Similarly, OfS understands that one of the key changes the government is likely to make is to the complaints scheme. It considers that prematurely releasing the summaries of consultation responses, and its draft policy response, in relation to the original draft scheme would cause confusion about the mechanism through which students can raise concerns about important freedom of speech matters. In OfS's view, such regulatory uncertainty is clearly undesirable.
44. Disclosing the summaries of consultation responses would also be likely to have a similar effect given they form part of the entirety of the outcomes of the consultations.
45. OfS has acknowledged that the consultation documents made clear that higher education providers could expect summaries of their responses to be included in its future response documents. However, it considers that disclosing them prematurely, particularly if this is done without any supporting policy response, wouldn't be consistent with providers' expectations.



46. OfS confirmed that it's firmly of the view that a disclaimer would be insufficient to avoid the envisioned prejudice occurring.

**Public interest in withholding the information**

47. In its submission to the Commissioner OfS has argued that public officials require a space in which they're free to formulate and develop policy. This is particularly important to test theories and different approaches while a particular policy is being developed, especially in relation to a complex, nuanced and highly sensitive issue such as freedom of speech in the higher education sector.
48. The documents containing the summaries of consultation responses, and OfS's draft policy responses to the three consultations, were working drafts and hadn't yet been subject to review by senior officials or the ultimate decision-maker. As such, they don't represent OfS's views and disclosing them would be misleading and cause significant confusion in the sector, as has been discussed.
49. OfS says that the consultation on providers' duties, the summaries of consultation responses, and OfS's final policy response, will now be published this summer [ie summer 2025] alongside finalised guidance to providers. As such, there will be significant changes between the draft documents as of 9 July 2024, and the final published documents.
50. The purpose of the guidance is to help higher education providers to comply with their freedom of speech duties. Releasing the summaries of consultation responses prematurely, and OfS's draft policy response as of 9 July 2024, would cause significant confusion, and so have the opposite effect.
51. In relation to the consultation on the complaints scheme, OfS says that the government has confirmed that OfS's statutory duty to operate a free speech complaints scheme, and power to impose a free speech condition of registration, will come into force following future legislation incorporating certain amendments to HEFSA. The government has indicated specified changes; for example, that students won't have access to the scheme, and that OfS will have discretion over which complaints to investigate. The impact of these potential amendments will require further policy development by OfS. Given this context, OfS doesn't consider it to be in the public interest to release summaries of consultation responses, or its draft policy position, in relation to a complaints scheme that is likely to change once the government's amendments are in place.
52. In relation to the consultation on student unions' duties, OfS says that although the government announced in January 2025 its intention to



remove this part of HEFSA, the relevant provisions haven't yet been repealed. OfS considers that premature disclosure of the consultation response summaries, and its draft policy position, would cause confusion and misunderstanding within the higher education sector about how it may apply its wider free speech regulatory powers, given the significant overlap between these policy areas. In light of this, and the likely prejudicial effects of disclosure, OfS considers that releasing the information at this stage would be disproportionate.

53. OfS has also said that releasing the withheld information prematurely would also cause an unnecessary diversion of resources both for OfS and higher education providers. For providers, this would likely involve spending time trying to understand the implications of the draft documents and would inevitably spur further responses to OfS, akin to reopening the consultations. For OfS, this would involve considering those responses, fielding related queries, and issuing public clarifications in advance of final copies of the requested documents being published.
54. OfS says that this would in turn adversely affect OfS's ability to use its staff resources in an efficient and planned manner and impose a disproportionate burden on OfS.
55. Finally, OfS argues that releasing the summaries of consultation responses, and OfS's draft policy position, at this stage would undermine the ability of OfS officials to develop policy effectively in the future.
56. When they're working on complex and sensitive issues, such as freedom of speech in higher education, OfS staff need the freedom to share their views, explore different options, and debate, without concern that their initial proposals will be subject to premature public scrutiny.
57. If OfS staff know that unfinished or untested thinking could be prematurely released and taken out of context, they're likely to become more cautious in how they communicate. OfS says that this would reduce the quality of internal debate and hamper the development of credible and informed policy. Over time, that could lead to a more cautious and defensive way of working. In a fast-moving and politically sensitive regulatory environment, this kind of hesitation would interfere with OfS's ability to respond effectively to legislative changes, stakeholder input and sector needs.

### **Balance of the public interest**

58. The Commissioner has accepted that disclosing the requested information would be likely to prejudice the effective conduct of public affairs; it would be likely to create a chilling effect and mislead and confuse OfS's stakeholders and divert OfS's resources.
59. He has considered whether, in September 2024, the public interest in the information was such that it would justify causing the above inhibition and prejudice.
60. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity and extent of the envisioned inhibition and prejudice.
61. First, the Commissioner considers that, OfS's QP had the requisite knowledge of how their organisation works and the consequences of any disclosure. The Commissioner has therefore given their opinion a measure of respect.
62. At the time of the request and OfS's response, the process of considering and preparing a response to the consultation in question was still 'live.' The public interest in OfS being able to conduct its affairs without inhibition or prejudice will be greater if the issue is ongoing and live at the time of a request.
63. Interfering with OfS's planned timetable by disclosing the information would be likely to impact negatively on OfS. The Commissioner is satisfied that there's greater public interest in OfS being able to deliberate, analyse, discuss, re-draft, finalise and publish a considered response to the freedom of speech consultations to the timetable it has planned.
64. The Commissioner acknowledges the complainant's arguments but considers that OfS has presented a stronger suite. There's undoubtedly a public interest in OfS's findings and response in relation to freedom of speech regulation. However, the Commissioner finds that the degree of public interest isn't sufficient to warrant causing the envisioned inhibition and prejudice.
65. On balance therefore, the Commissioner accepts that, at the time of the request and response, the public interest favoured maintaining the exemptions under sections 36(2)(b)(ii) and 36(2)(c).

## Right of appeal

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66. 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)

67. 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.
68. 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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