

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

### **Decision notice**

**Date:** 7 January 2013

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

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

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1. The complainant has requested information relating to the King James Bible project. The DfE provided the complainant with some information relevant to the scope of the request but refused to provide the remainder under section 35(1)(a) and section 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the DfE has correctly applied section 35(1)(a) FOIA in this case. However, the Commissioner finds that section 43(2) was not correctly applied in this case.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the parts of the contract which contain information relating to the number and cost of the bibles which has been withheld under section 43(2) FOIA.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 17 January 2012, the complainant wrote to the DfE and requested information in the following terms:

"Regarding the story in the Guardian about M Gove's bibles sitting in a warehouse abroad, please supply the following information:

1. A copy of the information (e.g. purchase order / invoice / quote/ email) that confirms the number and cost of these bibles, and information showing the company that has produced them and the company's location
  2. A copy of the delivery note / other relevant documentation (inc email) that shows the company (and their location) involved in storing the bibles.
  3. A copy of the information (e.g. purchase order / invoice / quote / email) that shows the cost of storage of the bibles to date.
  4. A copy of any letters or any form of communication that the Gvt have produced and sent in an attempt to secure sponsorship for the bibles, and the names of the companies or organisations they have approached to date."
6. The DfE responded on 15 February 2012. It refused to provide the information requested at point 1 of the request under section 43(2) FOIA. It provided the information requested at point 2 of the request. The DfE also explained that there were no storage costs in relation to this project and so it did not hold the information requested at point 3 of the request. Finally, it refused to provide the information requested at point 4 of the request under section 35(1)(a) FOIA..
7. The complainant was dissatisfied with the DfE's application of section 43(2) and section 35(1)(a) FOIA to points 1 and 4 of the request. The complainant therefore asked the DfE to carry out an internal review. Following the internal review the DfE wrote to the complainant on 9 March 2012. It upheld its original position.

## Scope of the case

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He explained that he was dissatisfied that some of the information he requested was withheld. The

Commissioner has considered whether or not section 35(1)(a) and section 43(2) FOIA were correctly applied in this case.

## **Reasons for decision**

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9. Section 35(1)(a) FOIA states that, "Information held by a government department or by the National Assembly for Wales is exempt information if it relates to- (a) the formulation or development of government policy".
10. The Commissioner has first considered whether the information requested at point 4 of the request relates to the formulation or development of government policy.
11. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs and recommendations or submissions are put to a minister. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy.
12. The DfE has explained that the complainant requested a copy of any letters or communications produced by the government to secure sponsorship, and the names of companies or organisations which have been approached for sponsorship. Six draft letters to potential sponsors of the project, as well as email correspondence between one of the sponsors and the lead policy official in the DfE were found to be in the scope of the request, but were withheld under section 35(1)(a). It is clear that the information relates to a policy was under development and this included work being undertaken to identify and secure sponsorship.
13. The Commissioner considers that the policy to which the withheld information relates was the decision to mark the 400<sup>th</sup> anniversary of the publication of the King James Bible by sending an authentic copy to state schools in England. He therefore considers that the information clearly relates to the formulation or development of government policy and falls within the section 35(1)(a) exemption.

## **Public Interest Test**

14. Section 35(1)(a) is a qualified exemption and accordingly subject to the public interest test. The Commissioner has therefore gone on to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing

the information. In *DfES v The Information Commissioner and the Evening Standard* (EA/2006/0006) the Tribunal set out 11 principles that should be used as a guide when weighing up the balance of the public interest in connection with section 35(1)(a). The Commissioner has considered the principles that are relevant to this case.

### **Public interest arguments in favour of disclosing the requested information**

15. The DfE has explained that it recognises that the following public interest arguments favour disclosure of the requested information:
- There is a general public interest in disclosure, in transparency and accountability.
  - The issue of sending the King James Bible to schools, even though in this case it was to mark the 400<sup>th</sup> anniversary of this specific edition, can be a controversial and sensitive one about which people hold strong and opposing views. Disclosure of the information requested would inform public debate on this issue.

### **Public interest arguments in favour of maintaining the exemption**

16. The DfE has explained that it believes the following public interest arguments favour maintaining the exemption:

#### **Safe Space**

- Correspondence and documents from officials about critical issues which Ministers would need to consider in order to proceed through to the policy decision approval process need to be able to take place in a self-contained space. Without protecting the thinking space and the ability for officials to provide free and frank options, there is likely to be a corrosive effect on the conduct of good government, with a risk that decision making will become poorer.

#### **Chilling Effect**

- Ministers need to be able to consider privately the options that are available to them, in this case the sponsorship available for the policy, and subsequently be able to discuss policy options in the same free and frank manner.
- It is particularly important that the options provided to Ministers should be as clear and frank as possible when a topic is

controversial, and, as in this case, where interested parties hold such strong and opposing views, and where the opportunities and educational outcomes for individuals are affected. It is therefore in the public interest that the formulation and development of government policy and government decision making can proceed without the fear of disclosure of information into the public domain to ensure that it is done well.

- Good government depends on good decision making, and this needs to be based on a full consideration of the options, in this case the sponsorship available. If Ministers were required to disclose details of all the options they consider, and the discussions that subsequently take place in light of the options, it could limit free discussion of all of the options and result in weaker government.
- The release of the withheld information could act as an inhibiting effect, on the grounds that releasing this information could prevent these sponsors (or others) from coming forward and supporting other philanthropic projects in the future, thus reducing opportunities to enrich the curriculum and impacting on educational/cultural (or other) opportunities in schools.

### **Timing**

- The information was requested when the policy was still being developed, two months after it became publicly known. The information, which is controversial in nature due to its subject matter, had not diminished in sensitivity in the very short time between its creation and the request. (Strong views are held across the spectrum on whether the Bible should be sent to schools). Furthermore the DfE does not consider the development stage of this policy to have been completed at the time of the request. The first Bibles arrived in schools on 14th May 2012, and the distribution was not complete until the end of May 2012.

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

17. The Commissioner considers that disclosure of the requested information would enable the public to glean a better understanding of the issues in this area and would thereby further public discussion and debate. This adds weight to the public interest in favour of disclosure.
18. The Commissioner is also aware that the DfE has explained that this is a policy which the public has differing views upon and the issue has

attracted considerable public debate. He considers that due to the nature of the withheld information in this case, this also adds weight to the public interest in favour of disclosure.

19. The Commissioner does however consider that the relevant government policy in this case was still under development at the time of the request and therefore there is a strong public interest in protecting the safe space for Ministers and officials to be able to develop policy on a live issue away from external scrutiny. It said that at the time that the request was made, the decision to mark the 400th anniversary of the publication of the King James Bible by sending an authentic copy to state schools in England had been made. However important elements of the policy were still under development, this included: identifying potential sponsors; considering how best to support schools in using the King James Bible in their teaching; agreeing distribution arrangements; and developing a communications strategy. He considers that decisions as to how to put this into effect and how to manage the project were still under consideration at the time of the request.
20. The Commissioner also considers that there is a strong public interest in Ministers and officials being able to discuss issues openly and candidly. If the requested information were disclosed whilst the government policy was still under development Ministers and officials may be less open in their further discussions.
21. The Commissioner considers that the timing of the request adds significant weight to the public interest in favour of maintaining the exemption. Whilst the Commissioner accepts that at the time of the request the decision to mark the 400<sup>th</sup> anniversary of the publication of the King James Bible by sending an authentic copy to state schools in England had been made, other important elements of the policy were still under development. This included identifying potential sponsors; considering how best to support schools in using the King James Bible in their teaching; agreeing distribution arrangements; and developing a communications strategy.
22. The Commissioner considers that whilst there is a public interest in informing public debate surrounding this issue, he considers that in this case there is a more significant public interest in allowing Ministers and officials the safe space to further develop the policy in question and to be able to continue to effectively discuss issues in a frank and open manner. The Commissioner therefore considers that the public interest in maintaining the exemption outweighs the public interest in disclosure in this case.

## **Section 43(2)**

23. Section 43(2) provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
24. The DfE has explained that the complainant requested a copy of the information that confirms the number and cost of these bibles at point 1 of the request. It explained that the contract between the DfE and Oxford University Press (OUP) was found to contain this information and therefore the contract was found to be in scope of the request.
25. The Commissioner considers that the parts of the contract which contain information relating to the number and cost of the bibles would fall within the scope of the request. The Commissioner does not however consider that the whole contract falls within the scope of the request. He has therefore only considered the DfE's section 43(2) arguments in relation to the parts of the contract which fall within the scope of the request.
26. In this case DfE has stated that disclosure of the requested information would be likely to prejudice the commercial interests of the DfE and the OUP, the contractor for the King James Bible policy.
27. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the DfE's commercial interests.
28. The term 'commercial interests' is not defined in the Act. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,  
  
"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
29. The Commissioner considers that information relating to an agreement between the DfE and OUP for it to produce and supply the King James Bible relates to the commercial interests of those bodies.
30. The Commissioner considers that the withheld information falls within the scope of the exemption.

31. The Commissioner therefore went on to consider how any prejudice to the commercial interests of the DfE and OUP would be likely to be caused by the disclosure of the requested information contained in the contract.
32. The DfE has explained that disclosure of the requested information contained in the contract held between the DfE and OUP would be likely to prejudice the DfE's commercial interests because it could adversely affect its bargaining position during contractual negotiations in the future. This would affect the DfE's ability to achieve the best possible value for tax payers' money in the future and result in the less effective use of public money. In addition, the disclosure of the requested information contained in the contract could make it less likely that other individuals or companies would be willing to contract with the DfE or conduct commercial transactions if the commercially sensitive information could be disclosed in the future, for fear of being commercially disadvantaged. This would consequently undermine the ability of the DfE to fulfil its role.
33. In addition, it explained that disclosure of the contract would be likely to prejudice OUP's commercial interests. It explained that OUP have expressed that they do not want the information contained in their contract with the DfE to be disclosed as the detail it contains would be likely to prejudice future sales of the Bible with other customers. It provided further supporting arguments which are contained at paragraphs 1 and 2 of the Confidential Annex attached to this Notice.
34. The Commissioner must determine whether the prejudice claimed is "real, actual or of substance". The Commissioner will first consider whether the prejudice claimed relating to OUP's commercial interests fits this criteria. The Commissioner acknowledges that the DfE has consulted with OUP to obtain its views on disclosure of the requested information. The DfE has confirmed that OUP considers that disclosure of the requested information would be likely to prejudice future sales of the Bible with other customers. It has provided the Commissioner with further arguments in support of this contained in the Confidential Annex to this Notice which the Commissioner has taken into account. The Commissioner accepts that the prejudice described can be characterised as "real, actual or of substance" but he must also consider whether there is a causal link between disclosure and the prejudice and the likelihood.
35. The Commissioner's conclusion is that the prejudice claimed in relation to the DfE's commercial interests is not likely to occur – whilst he can see the potential causal link he has concluded that the risks are not real and significant. This is because this was a very specialised

project and it he cannot see any evidence that the DfE would be involved in any similar contractual negotiations in the near future. The uniqueness of the information is a key factor. In relation to OUP's commercial interests again the Commissioner considers the prejudice is unlikely to occur. This is because again this was a very specialised and particular contract with the Government to supply the Bibles on a mass scale.

36. As the Commissioner does not accept that the prejudice to the commercial interests of DfE or OUP is likely to occur and section 43(2) is not engaged in this case. The Commissioner has not therefore gone on to consider the public interest.

## Right of appeal

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37. 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: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

38. 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.
39. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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