

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2017

Public Authority: Home Office
Address: 2 Marsham Street
London
SW1P 4DF

Decision (including any steps ordered)

1. The complainant has requested information relating to a public consultation: 'Reporting and Acting on Child Abuse and Neglect'. The Home Office withheld the requested information, citing section 35(1)(a) (the formulation or development of government policy) of FOIA.
2. The Commissioner's decision is that the Home Office has applied section 35(1)(a) of FOIA appropriately. However, she considers that the Home Office has breached sections 10(1) (time for compliance) and 17 (refusal of a request) of FOIA.
3. The Commissioner does not require the Home Office to take any steps as a result of this decision.

Background

4. The public consultation, Reporting and Acting on Child Abuse and Neglect, was launched on 21 July 2016 and sought views on possible new measures relating to reporting and acting on child abuse and neglect, including the introduction of a new mandatory reporting duty or a new duty to act. The consultation closed on 13 October 2016.
5. On 13 October 2016, the complainant wrote to the Home Office (HO) and requested information in the following terms:

"I am writing to make an open government request for all the information to which I am entitled under the Freedom of Information Act. In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand

that under the act, you are required to advise and assist requesters.

The public consultation titled: Reporting and acting on child abuse and neglect closed on 13th October at noon.

I wish to be provided with a copy of the full submission from each of the following organisations:

*The National Union of Teachers
The Boarding Schools Association
National Association of Schoolmasters Union of Women Teachers
Association of Teachers and Lecturers."*

6. The HO responded on 14 December 2016, explaining that it held some of the requested information. It refused to provide the information, citing the following exemption:
 - Section 35(1(a) (formulation of government policy) of FOIA.
7. Following an internal review the HO wrote to the complainant on 14 February 2017. It upheld its original decision and also clarified that it did not hold information in relation to The Boarding Schools Association.

Scope of the case

8. The complainant contacted the Commissioner on 24 February 2017 to complain about the way his request for information had been handled. He explained that he did not agree that the information could not be disclosed, especially as it related to a public consultation. He also explained that he considered that the HO would hold a response from The Boarding Schools Association. The Commissioner raised this point with the HO, who confirmed that it did not hold information in relation to The Boarding Schools Association. She explained this to the complainant who did not complain about it any further. The Commissioner therefore will not consider this point.
 9. During the Commissioner's investigation the HO confirmed that work on the report was still ongoing.
 10. The Commissioner will consider the HO's application of section 35 and the length of time taken to deal with the request.
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Reasons for decision

Section 35 – Formulation of government policy, etc

11. Section 35(1)(a) of the FOIA states:

*"Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to—
(a) the formulation or development of government policy".*

12. In order for the exemption to be engaged, it must relate to the formulation or development of government policy. In her guidance on section 35¹ (the guidance) the Commissioner explains that the term 'relates to' can be interpreted broadly. The guidance also explains that the Commissioner considers that the term 'the formulation or development of government policy' refers to the design of new policy and the process of reviewing or improving existing policy. However, the section 35 exemption does not cover information relating purely to the application or implementation of established policy.
13. The Commissioner also recognises that the purpose of section 35(1)(a) is to protect the integrity of the policy making process and 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.
14. Consideration of this exemption involves two stages. First, the exemption will be engaged if the information in question falls within the class described in this section. Secondly, as section 35 is a qualified exemption, it is subject to the public interest test: the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

Does the withheld information relate to the formulation or development of government policy?

15. The Commissioner's approach to defining government policy is set out in her guidance which indicates that policy can be developed in many ways and in a wide range of circumstances.

¹ <https://ico.org.uk/media/for-organisations/documents/1200/government-policy-foi-section-35-guidance.pdf>

16. The HO explained to the Commissioner that the government had received responses from a wide range of interests, including practitioners and others in the education, health, social care and local government sectors, children's charities, survivors' groups, the police and members of the public. It confirmed that it and the Department for Education had carefully reviewed all the responses received. It also explained that new Ministers would consider their final decisions on the Government's response to Parliament, including agreement on a proposed date for publication of the consultation report.
17. Furthermore, the HO explained that disclosure of stakeholder comments and views at this stage would inhibit the free and frank exchange of views for the purpose of deliberation and would prejudice the effectiveness of the HO in fulfilling its responsibilities towards ongoing work on child abuse and neglect.
18. The Commissioner has viewed the withheld information and notes that it consists of responses made by three of the named organisations to the 'Reporting and Acting on Child Abuse and Neglect' public consultation.
19. The Commissioner is satisfied that the information relates to the development of government policy regarding reporting and acting on child abuse and neglect and therefore engages the exemption at section 35(1)(a). She notes that the complainant requested the information on the same date as the public consultation closed and therefore considers that the requested information is very up-to-date.
20. As the Commissioner considers the exemption is engaged, she will go on to consider the public interest arguments.

Public interest arguments in favour of maintaining the exemption

21. The HO argued that the public interest in maintaining section 35(1)(a) outweighed the public interest in disclosure. It explained that disclosure of the requested information would be misleading if made public, especially if it was used to evidence arguments for, or against, any of the options offered by the government under its consultation exercise, as this would be using the information out of context. The HO argued that its disclosure would therefore prejudice the government's report on the outcomes of the consultation to Parliament and the formulation of policy.
22. In its internal review, the HO explained to the complainant that the Commissioner has accepted that government needs a 'safe space' to develop ideas, debate live issues and reach decisions away from external interference and distraction. It explained that this applies equally to discussions with internal stakeholders as well as those from external organisations (such as the NASUWT, ATL and NUT) who may be invited to comment. The HO argued that if it disclosed submissions from

such organisations, this safe space would be compromised before policy decisions had been reached and the ability to reach a considered decision could be influenced by outside interests. This in turn would potentially lead to poorer decision-making, which would not be in the wider public interest.

23. In addition, the HO also explained that section 35 is about the processes that may be inhibited if information was disclosed about policy-making. In other words, it is not only about the specific information itself, but the broader issues of whether disclosure would inhibit the processes of providing advice in general, lead to poorer decision/policy-making and have a 'chilling effect'. The HO explained that the chilling effect argument concerned the disclosure of discussions inhibiting the free and frank discussions in the future, on any issue, and that the loss of frankness and candour would damage the quality of advice provided to decision-makers and potentially lead to poorer decision/policy-making.
24. Furthermore, the HO explained that the Commissioner does not automatically consider that chilling effect arguments carry significant weight. However, it argued that crucially, because the policy issue in question – mandatory reporting of child abuse and neglect – was still very much a live issue which was both sensitive and contentious and continued to generate much debate and consideration, it considered that the merits of such chilling effect arguments in this case were particularly compelling.
25. The HO also argued that disclosure at this point would result in the loss of public confidence.

Public interest arguments in favour of disclosing the requested information

26. The HO acknowledged that whether new statutory measures regarding child protection arrangements were needed and any responses to a public consultation exercise on this topic, were matters of public interest.
27. The complainant explained that the consultation in question was a public one and that the organisations in question operated in regulated activities which serve the public. In addition, the complainant also argued that these organisations represented those who have roles that were vital to the safety and welfare of children and as such, it was essential that the public understood their position and policy in relation to this.
28. The complainant also explained that education was the largest regulated activity. He explained that he could not see how the requested information could be out of context, as claimed by the HO.

Balance of the public interest arguments

29. The Commissioner has considered the public interest arguments from both parties. She recognises the importance of transparency in policy-making and in this case, the particular public interest in understanding the development of a policy which deals with reporting and acting on child abuse and neglect.
30. The Commissioner notes the complainant's argument that the organisations in question represented those who have roles that are vital to the safety and welfare of children and as such, it was essential that the public understood their position and policy in relation to this.
31. The Commissioner also notes that the HO has submitted a combination of 'safe space' and 'chilling effect' arguments in favour of maintaining the exemption.
32. With regard to the safe space arguments, the Commissioner accepts the general importance of safe space for policy formulation and development. Policy-makers need a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction. This is because rather than having robust discussions about the options under consideration, officials and Ministers could instead be forced to expend time and resources justifying why an option was or was not being considered and/or whether sufficient weight was being given to an option under consideration. This would be detrimental to policy development.
33. The Commissioner considers that this argument carries significant weight when the issue under consideration is still live and ongoing, as was clearly the case here. The HO confirmed that at the time of the request, the consultation in question had just closed.
34. In view of this, the Commissioner has attached considerable weight to the HO's safe space arguments in this case.
35. With regard to attributing weight to the chilling effect arguments, the Commissioner recognises that civil servants (particularly senior ones) and Ministers are expected to be impartial and robust when giving advice, and that, in general, they should not easily be deterred from expressing their views by the possibility of future disclosure.
36. However, where the formulation or development of the policy to which the withheld information relates is still live and ongoing, the Commissioner does accept that disclosure would be likely to have a chilling effect on those specific, ongoing policy discussions.

37. As discussed above, the Commissioner is satisfied that the policy making in question here was live and ongoing at the time of the request. The Commissioner therefore accepts that disclosure of the withheld information would have a significant chilling effect on the government's ongoing policy discussions regarding this specific policy. She therefore considers that this argument carries significant weight in the present case.
38. The Commissioner also notes that the HO has explained to her that a decision will be taken regarding the date the report will be published.

Conclusion

39. Taking all of the above into account, the Commissioner is satisfied that section 35(1)(a) has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure.

Procedural matters

40. The complainant submitted his complaint on 13 October 2016 and the HO responded on 14 December 2016.

Section 10 – time for compliance

41. Section 10(1) requires that the public authority must respond to a request promptly and in any event no later than 20 working days after the date of receipt.
42. The Commissioner considers that the HO has breached section 10(1) as it took longer than 20 working days to respond to the request.

Section 17 – refusal of a request

43. Section 17(1) states that if a public authority wishes to refuse any part of a request it must issue a refusal notice within the 20 working day time for compliance, citing the relevant exemptions.
44. The Commissioner considers that HO has breached section 17(1) as it took longer than 20 working days to respond to the complainant, citing the relevant exemptions.

Other matters

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45. The complainant requested an internal review on 19 December 2016. The HO sent the outcome of its internal review on 14 February 2017

46. Part VI of the section 45 Code of Practice (the code) makes it good practice for a public authority to have a procedure in place for dealing with complaints about its handling of requests for information.
47. While no explicit timescale is laid down in the code, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of receipt of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days.
48. The Commissioner is concerned that it took over 20 working days for the HO to complete the internal review.

Right of appeal

49. 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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

50. 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.
51. 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

Jon Manners
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