

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 June 2012

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

#### Decision (including any steps ordered)

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1. The complainant requested information from the Department for Education ("DfE") relating to the formulation of the current Government's policy on the physical punishment of children. The DfE applied section 35(1)(a) (formulation and development of government policy) and section 36 (prejudice to the effective conduct of public affairs). The Commissioner's decision is that the DfE correctly applied section 35(1)(a) to the withheld information. He therefore does not require the DfE to take any further steps to ensure compliance with the Act.

#### Request and response

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2. On 14 July 2011, the complainant wrote to the DfE and made the following request:

*"I am writing under the provisions of the Freedom of Information Act to request the release of all correspondence, notes of meetings, discussion papers, file notes and all other documents in relation to the formulation of the coalition government's policy position on the physical punishment of children since 6 May 2010.*

*The information requested includes, but is not limited to, the following:*

- (a) *the research basis on which the government's overall policy of discouraging the physical punishment of children rests*

- (b) *the research basis on which it was decided to 'encourage the provision of evidence-based parenting programmes that promote alternatives to physical punishment to manage children's behaviour' rather than to encourage the provision of evidence-based programmes that may include physical punishment*
  - (c) *other factors which contributed to the formulation of the government's policy position as it was communicated to me in emails from [official's name] dated 6 April 2011, 16 May 2011 and 6 June 2011*
  - (d) *the names of any organisations and individuals who were consulted on the physical punishment of children prior to Ministers' agreement of their policy position*
  - (e) *why the coalition government has not adopted a policy position on any other form of discipline, but has singled out physical punishment for special attention.*
3. The DfE responded on 11 August 2011. It disclosed some information but withheld the remainder under sections 21, 35 and 40(2) of FOIA. However it explained that it needed further time to consider the public interest in relation to the application of section 35. On 12 September 2011 the DfE wrote to the complainant to confirm that it believed that the public interest favoured the withholding of the information to which section 35 had been applied. It also explained that it believed that section 36(2) applied in the alternative to section 35.
4. The complainant requested an internal review. The outcome of this was sent to the complainant on 9 November 2011. The DfE upheld its application of sections 35 and 36 to the withheld information.

### **Scope of the case**

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- 5. The complainant contacted the Commissioner to complain about the DfE's failure to disclose the information that he had requested.
- 6. The Commissioner considered whether the DfE was entitled to withhold the requested information under section 35 or 36.

## Reasons for decision

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### Section 35(1)(a)

7. Section 35(1)(a) of 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*

8. The Commissioner initially considered whether the withheld information relates to the formulation or development of government policy.
9. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the relevant policy. It does not have to be information specifically on the formulation or development of that policy.
10. The DfE claimed that the withheld information related to the formulation and development of the Government's policy on the physical punishment of children. Having viewed the information, the Commissioner accepts that this is the case and that therefore the exemption in section 35(1)(a) is engaged. As this is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosing the information at the time that the request was made.

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

11. The Commissioner acknowledges the public interest in transparency and accountability in relation to the factors and arguments being considered by government in the formulation and development of its policies. Disclosure would assist the public in understanding the rationale for policy decisions that are subsequently taken and help to ensure that any decisions take into account all the relevant evidence and factors. This is particularly relevant where the policy relates to a contentious subject such as the use of physical punishment in the disciplining of children.
12. Disclosure would also enhance the public's understanding of the way in which government works in terms of its policy formulation and development. This could help the public in being able to make a more effective contribution to the policy making process.

13. There is also a public interest in disclosure to allow the public to see if Ministers are being briefed effectively on key areas of policy that the DfE is taking forward

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

14. The DfE explained that the withheld information contains a series of discussions, briefings and notes created during the process of seeking to establish policy positions and identifying further work that needed to be undertaken. At the time of the request, the DfE considered that the development stage of the policy in question was not complete. It therefore believed that the withheld information related to a 'live' issue.
15. In applying section 35, the DfE explained that it was seeking to protect the safe space needed for the effective consideration of policy options. This is sometimes referred to a 'safe space' argument which concerns the need for Ministers and officials to have a safe space to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or media comment.
16. The DfE argued that it was essential that Ministers were able to consider privately advice on the options that were available and were subsequently able to discuss policy options in the same free and frank manner. It was particularly important that the advice provided to Ministers should be as clear and frank as possible when a topic was controversial, and, as in this case, where interested parties held such strong and opposing views, and where the rights of individuals, and children, were affected. It was therefore in the public interest that the formulation of government policy and government decision making could proceed in the self-contained space needed to ensure that it was done well.
17. In the DfE's view, good government depended on good decision making, and this needed to be based on the best advice available and a full consideration of the options. If Ministers were required to disclose details of all the advice they received, and the discussions that took place in the light of that advice, it could limit free discussion of all of the options and result in weaker government. This was not in the public interest.
18. It pointed out that, in this case, the withheld information was relatively recent and highly sensitive, since it contained Ministerial and official views on a controversial topic. It felt that it was in the public interest that Ministers should be able to air their views without the fear that release of candid discussions could be utilised to the benefit of one or other lobby group.

19. In addition, the DfE argued that, as the requested information related to an ongoing policy issue, its release would be likely to have a chilling effect on the further development of policy in the areas. Disclosure of the information could lead to officials discussing options in a more guarded way or could impact on the quality of advice subsequently being provided.

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

20. The Commissioner recognises the public interest in openness, transparency and accountability, particularly in relation to subjects which are likely to engender significant public debate, such as the physical punishment of children.
21. The DfE argued that there is a significant public interest in protecting a safe space to allow it to consider the options in formulating and developing its policy in this area and in preventing the chilling effect on free and frank discussions that might occur from disclosure.
22. The Commissioner notes the views of the Information Tribunal in *Department for Education and Skills v ICO and The Evening Standard (EA/2006/0006)* in relation to the safe space argument that:

*"The timing of a request is of paramount importance to the decision...disclosure of discussions of policy options, whilst policy is in the process of formulation, is highly unlikely to be in the public interest, unless, for example, it would expose wrongdoing within government. Ministers and officials are entitled to time and space, in some instances considerable time and space, to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."* (para 75)

23. In light of the above, when considering the safe space argument, the Commissioner will look at the age of the requested information and whether the formulation and development of the policy in question was still underway at the time of the request.
24. As regard the age of the requested information, the Commissioner notes that the first of documents falling within the scope of the request came into existence a short time after the present Government took office in May 2010 and that the last of the documents came into existence only a relatively short time before the request was made. He therefore views the information as very current information.
25. The Commissioner also considered whether the policy making process was live at the time of the request and whether the requested information related directly to that process. After viewing the withheld

information, the Commissioner accepts that there was work ongoing at the time of the request which the DfE anticipated would lead to further development of the policy in this area. He therefore accepts that this information relates to a policy which was 'live' at the time of the request. He is also satisfied that the withheld information is directly related to that process. The Commissioner therefore accepts the DfE's argument that a safe space was still needed at the time of the request to protect the policy making process.

26. The Commissioner believes that there is a significant public interest in government having a safe space to formulate policy, debate "live issues" and reach decisions without being hindered by external comment and media involvement.
27. The Commissioner accepts that the timing of a request is of paramount importance when determining whether information that relates to the formulation and development of government policy should be released. He notes that in this case the request was made only a relatively short time after some of the documents falling within the scope of the request were created. In light of this, he has determined that the public interest in protecting the safe space at that time was sufficient to outweigh the public interest in disclosure. Consequently, he has determined that the DfE was entitled to withhold the requested information under section 35(1)(a).
28. As the Commissioner has accepted that in this case the public interest in protecting a safe space for the formulation and development of government policy justified the withholding of the requested information, he has not gone on to consider the merits of the DfE's arguments about the potential chilling effect of disclosure.

## Right of appeal

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29. 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)

30. 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.
31. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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