

## **Freedom of Information Act 2000 (Section 50)**

### **Decision Notice**

**Date: 26 September 2011**

**Public Authority: The Department for Education**

**Address: Sanctuary Buildings  
Great Smith Street  
London SW1P 3BT**

#### **Summary**

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The complainant requested information about the age up to which parents should be able to withdraw their children from sex and relationship education lessons, prior to 6 May 2010. The Commissioner's view is that the Department for Education has applied section 35(1)(a) appropriately. However the Commissioner finds that the Department for Education has breached section 17.

#### **The Commissioner's Role**

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1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

#### **Background**

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2. The complainant made a similar request for information in 2009. This complaint was closed on the basis that both section 42 and 35(1)(a) had been applied correctly. The present request is for information generated before 6 April 2010 and therefore under the previous government, not the present one.

## The Request

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3. On 1 November 2010, the complainant submitted 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 discussions about the age up to which parents should be able to withdraw their children from sex and relationship education lessons, prior to the 6 May 2010. (This request arises from a comment made by the Secretary of State in Press Notice 2009/0208, where he stated: "Over the last few months an issue has arisen about the age up to which parents should be able to withdraw their children from SRE, if they wish to exercise their right to do so" and the relevant clause in the subsequent Children, Schools and Families Bill.)'.*

4. On 25 November 2010 the Department for Education ("DfE") contacted the complainant explaining that it need more time to consider the request. On 15 December 2010 the DfE issued its refusal notice, stating that it was withholding the requested information under sections 35(1)(a) and 42.
5. On 15 December 2010 the complainant requested an internal review; on 20 January 2011 the DfE confirmed that it had carried it out. It disclosed a list of the key partners that were consulted on the appropriate point at which the parental right to withdraw their children from sex and relationship education ("SRE") should cease. It withheld the rest of information under sections 35(1)(a) and 42.

## The Investigation

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### Scope of the case

6. On 24 January 2011 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
- There was no public consultation on this policy.
  - The previous administration lacked the evidence base for the policy.

7. During the course of the Commissioner's investigation the following matters were resolved informally and therefore are not addressed in this Notice:
  - The application of section 42: The complainant accepted the Commissioner's explanation that section 42 had been applied appropriately and agreed that the Commissioner did not have to consider this part of his complaint any further.

## **Analysis**

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### **Exemptions**

8. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class based exemption therefore if the information relates to the formulation or development of government policy it falls under this exemption.
9. The Commissioner must consider whether the withheld information relates to the formulation and development of government policy. 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 policy in question. However, it does not have to be information specifically on the formulation or development of that policy.
10. The DfE explained that in the run-up to the General Election in 2010, a number of provisions in the subsequent Children, Schools and Families Bill ("the Bill") were dropped. One provision on which the parties could not agree was fixing the age at which parents ceased to have the right to withdraw their children from SRE at 15 years. The entire provision was dropped from the Bill and therefore SRE is not currently statutory.
11. The Commissioner has considered the withheld information and is satisfied that it relates to SRE. It is the Commissioner's view therefore that section 35(1)(a) applies to this information.

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

12. The Commissioner accepts that there is a strong public interest in transparency and in understanding the debates about the age up to which parents can withdraw their children from SRE.

13. He also accepts that disclosure could help build public confidence in the way in which this issue has been debated and in knowing who took part in these debates.
14. The complainant explained that he had deliberately asked for information before the change of government. He also explained that the previous government had published its intention to set the age up to which parents could withdraw their children from SRE at 15 years. He explained that this had been included in section 14 of the Bill.
15. The complainant argued that the fact that this provision had not passed into law was irrelevant. He explained that it was a clearly-stated and published policy by the government of the time. He also pointed out that his request had been made after that particular policy decision had been made and published.
16. The complainant explained that there has been no public consultation on this policy and that the last administration lacked the evidence base for this policy. He explained that Ministers had admitted that there was no evidence that 15 and 16 year old pupils whose parents have withdrawn them from SRE were at any greater risk of teenage pregnancy or sexually transmitted infections than other pupils. However, the complainant did not provide any evidence to support these points.

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

17. The DfE acknowledged that there is a general public interest in disclosure. It also acknowledged that the issue of the appropriate age at which the parental right of withdrawal from SRE is a controversial and sensitive one on which people hold strong and opposing views. The DfE accepted that there was a general public interest in being able to see if Ministers are being briefed effectively on the key areas of policy it was taking forward.
18. The DfE went on to explain that a number of provisions in the Bill were dropped in the run-up to the General Election. One provision on which agreement between the parties could not be found was fixing the age at which parents ceased to have the right to withdraw their children from SRE, at 15 years old. As an amendment raising the opt-out age to 16 was unlikely to be compliant with ECHR, the entire provision had been dropped from the Bill; therefore SRE is not currently statutory.
19. The DfE explained that other measures in Parliament and the subsequent change of administration meant that this issue remained live at the time of the request and remains so. The DfE also explained that Ministers would be required to take a position on the issues

surrounding the parental right of withdrawal from sex education. It explained that the withheld information is likely to be drawn on to help with this.

20. The DfE also explained that the Education Bill currently before Parliament includes a House of Lords amendment to change certain aspects of sex education. It explained that a background note provided to Ministers highlighted the fact that they will need to consider the issue of parental right to withdraw if they make any changes to the legislation. The DfE also explained that there is a Private Members Bill – 'Sex and Relationships Education Bill 2010 – 11' brought by an MP which is still to be heard. It has had its first reading and the second reading is due in October 2011.
21. This Bill is described as 'a Bill to require schools to provide sex and relationships education to registered pupils; and for connected purposes'. The DfE also explained that a response from a fellow MP made it clear that the right of parents to withdraw their children from SRE will be central to the debate.
22. The DfE went on to explain that Ministers would wish to formulate a policy on this and would need to consider all the arguments and options outlined in the requested information. The DfE also argued that Ministers would need to be able to take account of the views of other interested parties. It explained that SRE is an area of the curriculum on which there were strongly held views; it was important that Ministers had the opportunity to reflect on free and frank views in deciding how to develop the subject in the future.
23. The DfE argued that good government depended on decisions being made based on the best advice and full consideration of options. It maintained that it was essential that officials are able to brief freely and frankly and Ministers are able to consider privately advice on the options that are available. It also argued that Ministers should be able to discuss policy options in the same free and frank manner.
24. The Commissioner considers arguments about the need for officials to be able to brief freely and frankly and Ministers to be able to consider options and advice to be 'safe space' arguments. These arguments are about the need for a safe space to formulate policy, debate live issues and reach decisions without being hindered by external comment and/or media comment. The DfE also explained that the requested information included the views of stakeholders provided in confidence to the previous administration.
25. It went on to explain that there was a forthcoming review of Personal, Social, Health and Economic education ("PHSE"). It also explained that

this would undoubtedly produce requests by stakeholders to make PHSE, including SRE, statutory.

26. The DfE argued that disclosure could undermine the confidence of others in giving their views on this and other important policy issues to the current administration. It went on to state that this could severely inhibit the DfE's ability to engage effectively with those with an interest in this policy to ensure that their views are properly reflected in the policy once finalised.
27. It also argued that if the thinking space for Ministers and senior officials to receive and reflect on free and frank advice is not protected, there is likely to be a corrosive effect on the conduct of good government. This would lead to a risk that decision making on such important issues as this would become poorer and will be recorded inadequately.
28. The Commissioner has considered the argument about disclosure possibly severely inhibiting the DfE's ability to engage effectively with those with an interest in the policy to ensure that their views are properly reflected in it. He has also considered the DfE's argument that disclosure could lead to the risk of decision making becoming poorer and being recorded inadequately.
29. He considers these to be 'chilling effect' arguments. These arguments are concerned with disclosure under the Act leading to the loss of frankness and candour in debate/advice. This in turn it is argued, would lead to poorer quality advice and less well formulated policy and decisions.

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

30. The Commissioner notes that the complainant requested information which relates to the previous government's decision to set the age of withdrawal from SRE at 15 years. He also notes that the former government had published its intention to make the age at which parents could withdraw their children from SRE at 15 years.
31. The Commissioner recognises that there is a public interest in openness and accountability regarding the sex education of children. He also notes the complainant's arguments that there had not been a public consultation about this.
32. However, the Commissioner notes that the DfE explained that a decision about whether the age of withdrawal should be set at 15 years had not been agreed. Therefore the previous government's decision to set the age of withdrawal at 15 years had not become law.

33. The Commissioner accepts the DfE's explanation that the information considered by the previous government will also be considered by the present government.
34. When considering the DfE's arguments regarding Ministers and officials needing a 'safe space' in which to consider this issue, it is the Commissioner's view that he needs to look at the age of the requested information. He also needs to consider whether the formulation and development of the policy in question was still underway at the time of the request.
35. In this case the Commissioner notes that the requested information was created between 2009 and 2010. He also notes that the date of the request was 1 November 2010. Therefore he is satisfied that the information was not old at the time of the request.
36. The Commissioner then went on to consider whether the policy making process was still in process at the time of the request. He notes that the previous government had published its intention to fix the age of withdrawal at 15 years. Therefore he accepts that the previous government had made it clear its policy regarding the age up to which parents could withdraw their children from SRE.
37. However the Commissioner notes that this provision was not included in the Children, Schools and Families Act 2010 even though it had been included in the Bill. He also notes that the DfE explained that there was an Education Bill currently before Parliament which includes a House of Lords amendment to change certain aspects of sex education. The Commissioner also notes that there is a Private Members Bill which is concerned with SRE, which was still waiting to be heard.
38. Therefore the Commissioner accepts the DfE's arguments that this provision was still live at the time of the request and that the policy was still in the formulation and development stage. He considers that the arguments that a safe space was still needed to protect the policy making process are relevant.
39. With regard to the 'chilling effect' arguments the Commissioner will often reject these arguments if they are deployed in a general manner with little reference to the specifics of the case. However he notes that in this particular case the policy process was still ongoing.
40. He further notes the DfE's comments that disclosure could undermine the confidence of people giving their views on this and other important issues. It is his view that in this particular case this is an important consideration.

41. However the Commissioner does not accept the DfE's arguments that disclosure could lead to the risk of decision making becoming poorer and being recorded inadequately. Given the level of seniority of officials advising Ministers he would expect that they would understand their impartial role as counsellors in this context.
42. The Commissioner has considered all of the arguments. Given the timing of this request, the Commissioner accepts the DfE's arguments regarding the need for a safe space and has accorded it significant weight.
43. With regard to the 'chilling effects' of disclosure, he accepts that disclosure could undermine the confidence of people giving their views on this and other important issues and has accorded it significant weight. However given that he does not accept the argument that disclosure could lead to the risk of decision making becoming poorer and being recorded inadequately as discussed in paragraph 40 he has not accorded this any weight.
44. The Commissioner accepts that in this case, the public interest in maintaining section 35(1)(a) outweighs the public interest in disclosure.

### **Procedural Requirements**

45. Section 17 allows a public authority to extend the time limit for considering the public interest. However it must inform the applicant that is the case. In this particular case, although the DfE informed the complainant that it was extending the time limit in order to consider the case, it did not explain whether it was to consider the public interest. Therefore the Commissioner considers that the DfE is in breach of section 17.

### **The Decision**

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46. The Commissioner's decision is that the public authority dealt with the following elements of the request in accordance with the requirements of the Act:
  - The application of section 35(1)(a)
47. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:
  - Section 17

## **Steps Required**

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48. The Commissioner requires no steps to be taken.

## Right of Appeal

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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: 0116 249 4253

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

Website: [www.informationtribunal.gov.uk](http://www.informationtribunal.gov.uk)

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.

**Dated the 26<sup>th</sup> day of September 2011**

**Signed .....**

**Faye Spencer  
Group Manager  
Information Commissioner's Office  
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