

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 June 2014

Public Authority: Department of Education for Northern Ireland
Address: Rathgael House
Balloo Road
Rathgill
Bangor
BT19 7PR

Decision (including any steps ordered)

1. The complainant has requested information relating to proposals concerning cross-border education. The Department of Education for Northern Ireland (DENI) provided some clarification in response but has refused the disclosure of the results of surveys on the potential demand for cross-border education under section 27(1)(a) (international relations) and section 35(1)(a) (formulation of government policy) or, insofar that section 35(1)(a) was found not to apply, section 36(2)(c) (prejudice to the effective conduct of public affairs) of FOIA. The Commissioner's decision is that section 35(1)(a) of FOIA is engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in maintaining the exemption.

Request and response

2. On 10 September 2013 the complainant requested information in the following terms:

[...] may i start by bringing you attention to a news report 2 April 2012 Last updated at 17:48 on the bbc news where he is supporting cross border¹ [...].

[...]

quote "both education departments have agreed to carry out a survey in schools and community groups in border areas."

(question) was a survey carried out and was time scales made clear and the difference between G.C.S.Es and junior and leaving certificate

quote "He believes that pupils could make the choice between studying for GCSEs and A Levels in Northern Ireland and Junior and Leaving Certificates in the Republic."

(question) were both sides of the borders informed Junior and Leaving certificates were higher than G.C.S.Es and started earlier and pupils from this side would be at a disadvantage to catch up and students from the other side would have to learn a different system

quote "There are practical barriers, including different school ages, transition years and examinations, but Mr Burns is convinced these can be overcome and the experience would be of benefit to pupils in all of the schools."

(question) will the quote above need legislation to be changed or does the minister have the power and authority to make these changes without going through stormont.

quote "Arrangements could be in place as soon as September 2013."

(question) can you confirm is that year 8s going to the irish republic as stated in news paper report or is that the start of the consultation on the phone you gave me a run down of the procedure can i formally request it to be itemized in order of procedure estimated time scales this is a request under the freedom of information act you mentioned on the phone

¹ <http://www.bbc.co.uk/news/uk-northern-ireland-17581757>

something like from idea to ccms consultation to the minister the minister agrees survey to actually having it in place and working can you strip down bullet point and estimated time of each one and can you confirm it will have to go through stormont or not

under the freedom of information act i formally request a copy of the cross border [...]

3. Following DENI's acknowledgement of the receipt of the above, the complainant wrote to DENI again on 15 September 2013 and explained that "in reference to the survey I'm not requesting peoples personal information addresses and names but if it was provided to schools names the schools and the etc. that you mentioned is a complete breakdown of how to take it cross border and what you would need to go through including any change of legislation."
4. DENI provided its substantive response to the complainant on 26 September 2013. This was split into two parts. Firstly, DENI explained that the results of the aforementioned survey had not yet been published and could not be considered for release until they had been reviewed by a North South Ministerial Council meeting and disclosure had been approved by a Minister. No reference was made at this stage to an exemption in FOIA that DENI was relying on to refuse the request. Secondly, DENI advised that a final decision had not been made on the cross-border education proposal and so it was not possible at the present time to confirm what legislative and policy changes would need to be made.
5. The complainant wrote to DENI later the same day and asked it to reconsider the decision to withhold the results of the cross-border survey. DENI subsequently carried out an internal review in light of the complainant's dissatisfaction, the outcome of which was provided on 25 October 2013. The reviewer accepted that DENI had failed to set out the legal basis for withholding the requested information and apologised for this shortcoming. Notwithstanding this admission, the reviewer upheld the decision to refuse the request, advising that the information was exempt information under sections 27(1) and 35(1)(a) of FOIA.

Scope of the case

6. The complainant contacted the Commissioner to complain about DENI's decision to withhold the results of the cross-border survey. This took the form of a report prepared for an education meeting of the North South Ministerial Council (NSMC).

7. To investigate whether FOIA had been correctly applied, the Commissioner contacted DENI for further clarification on its position under the legislation. In response, DENI confirmed its reliance on the exemptions provided by sections 27(1)(a) and 35(1)(a) of FOIA. However, it also introduced the possibility that section 36(2)(c) would apply to any information that was found to fall outside the scope of section 35(1)(a).

Reasons for decision

Background

8. The cross-border education survey was commissioned by the NSMC in its Education Sector format. According to its website, the NSMC was established under the Belfast/Good Friday Agreement (1998), to develop consultation, co-operation and action within the island of Ireland – including through implementation on an all-island and cross-border basis – on matters of mutual interest and within the competence of the Administrations, North and South. The NSMC, therefore, comprises Ministers of the Northern Ireland Executive and the Irish Government, working together to take forward co-operation between both parts of the island to mutual benefit.² Areas of co-operation include; agriculture, education, environment, health, tourism and transport.

9. The provision of cross-border education poses a number of problems, with DENI identifying the fact that the Administrations have different curricula and school starting ages. There will also be other issues to take into account, such as transport resources and the question of assistance with the cost of schooling. The survey was designed to determine the level of parental demand for cross-border education, the information from which would be considered by the NSMC as part of its planning for education services.

² <http://www.northsouthministerialcouncil.org/index.htm>

10. The survey itself was conducted jointly by the DENI in the North and the Department of Education and Skills in the South over the course of a few weeks during October and November 2012. With regard to the undertaking of the survey, NSMC's Education Joint Communique of 17 October 2012 stated the following:

13. The Council noted the progress made towards the development of a questionnaire and mechanisms for a joint attitudinal survey to inform cross-border pupil movement and school planning. The survey will be issued in the last week of October by the Department of Education and in late November by the Department of Education of Skills.

14. Ministers re-affirmed that a final report on the results from the survey and proposals on the way forward will be available for consideration no later than their first NSMC Education meeting of 2013.

Section 35 – government policy

11. Section 35(1)(a) states that information held by a government department or by the National Assembly of Wales is exempt information if it relates to the formulation or development of government policy.
12. The exemption is class-based, which means that if the requested information relates to the activities that the exemption describes it will necessarily be engaged; there is no requirement for disclosure to have a prejudicial effect on these activities. Section 35 is qualified by the public interest test however.
13. What is meant by "the formulation or development of government policy" is not made clear in the legislation. Indeed, it is common ground that providing a definition of "policy" is in itself problematic in that it can be produced in many ways. In his decision on FS50083726³, which involved the Foreign and Commonwealth Officer (FCO), the Commissioner stated that the formulation and development of government policy could broadly be described thus:

³ http://ico.org.uk/~media/documents/decisionnotices/2009/FS_50083726.ashx

60. The Commissioner takes the view that the 'formulation' of policy comprises the early stages of the policy process – where options are generated and sorted, risks are identified, consultation occurs, and recommendations/submissions are put to a Minister. 'Development' may go beyond this stage to the processes involved in improving or altering existing policy such as piloting, monitoring, reviewing, analysing or recording the effects of existing policy. At the very least 'formulation or development' suggests something dynamic, i.e. something that it is actually happening to policy [...]."

14. When considering whether information engages the exemption, a distinction should be made between information relating to the formulation and development of policy, which would be captured by the exemption, and information concerning the implementation of policy, which would not.
15. To support its view that the survey results report is covered by the exemption, DENI has referred to the quote from the Modernising Government White Paper (March 1999) that the Commissioner cited in his guidance on section 35⁴. This described policymaking as "the process by which governments translate their political vision into programmes and action to deliver 'outcomes', desired changes in the real world." DENI considers that the survey information forms part of the policy development taking place in relation to cross-border school provision, which was still under active consideration by both Ministers and their respective officials. According to DENI, the expectation from Ministers is that the policy consideration process may lead to a specific cross-border pilot initiative.
16. The Commissioner appreciates that a report presenting the results of a survey may not be readily considered as information that concerns the formulation or development of government policy. It is though necessary to bear in mind that the exemption speaks of information 'relating to' the formulation or government policy. The Commissioner interprets 'relates to' broadly, which means that information which relates to any significant extent to the formulation or development of policy will be covered.
17. The consequence of this is that the exemption will capture a wide range of information. However, following the lead of earlier decisions of the

⁴http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/government-policy-foi-section-35-guidance.ashx

Information Tribunal, the Commissioner considers it is appropriate to apply a broad interpretation because, even where the exemption was found to be engaged, any non-harmful information should be disclosed as a result of the consideration of the public interest test.

18. The Commissioner is satisfied that the survey and the resultant report was a direct response to an attempt by government to prepare and manage its education estate, with the possibility of producing a policy that would foster greater cross-border co-operation on education. The Commissioner has therefore found that the information relates to the development of government policy to a significant extent and, as such, engages section 35(1)(a) of FOIA. He has therefore gone on to consider the balance of the public interest test.

Public interest arguments in favour of disclosure

19. The complainant has raised a number of arguments for the disclosure of the requested information. All of these have been considered by the Commissioner, although for the present purposes he has felt it appropriate to summarise the essence of the points made.
20. A key part of the complainant's case relates to the importance of the information to the public. In his view, any evidence produced that could potentially lead to a shift in the way that education is provided would attract considerable public interest; a position that the Commissioner accepts. This is because of the critical role that education plays in modern society, which means it is in the interests of every parent potentially affected to understand more about the changes that were being proposed and the justification for them.
21. The complainant has further claimed that the reluctance to release the survey results is driven at least in part by the government's want to suppress information that did not actively support its own education agenda. Although the Commissioner has not been provided with any evidence that would directly support this view, he is aware of wider concerns about the possibility that the decision not to publish the survey

results was due to the fact that they did not correspond with the government's prior assumptions on cross-border education.⁵

Public interest arguments in favour of maintaining the exemption

22. DENI has argued that the timing of the request is a critical consideration when deciding on where the balance of the public interest lies. Although DENI accepts that there is a clear public interest in disclosure, it considers this is outweighed by the damage to the policy development process that release at the time of the request would have caused.
23. DENI has explained that there is a general political consensus that greater co-operation on the matter of cross-border education would mutually benefit the citizens in both jurisdictions. However, the question of how this could be achieved was far from being settled at the time of the request. The fact that the issue remained live, and the policy consideration was at a critical point of its development, meant the NSMC continued to require room in which to discuss ideas and debate pertinent information, away from external interference and scrutiny; the so-called 'safe space' argument.
24. DENI considers that in the circumstances the 'safe space' argument potentially carries more weight than might normally be expected because progress in what can be a politically charged area requires more effort, discussion and obstacles than would be the case for a policy being developed within a single jurisdiction.

Balance of the public interest

25. The Commissioner considers that the strength of the arguments for disclosure is strong in this case. As recognised in previous decisions of the Commissioner involving the delivery of education, this is a corollary of the undoubted importance that society places on schools and the education they provide.
26. The information in this case would help demonstrate to what extent there is an appetite for improvements in cross-border education. From this, the public would have greater insight into whether any changes suggested to existing education policies were necessary and proportionate. In the Commissioner's view, therefore, it is clear that publication of the information would help inform and stimulate public

⁵ <http://www.bbc.co.uk/news/uk-northern-ireland-25323574>

debate. Furthermore, the information will be of most value when there is still an opportunity for the public to affect decision-making.

27. However, the Commissioner also considers that there will frequently be occasions when government departments should be afforded space in which to deliberate on what may be controversial issues without fear of being second-guessed. To intrude into the safe space at a critical time of policy development could impede, or otherwise deflect, the progress of the policy.
28. The withheld report was originally presented to an NSMC education meeting on 27 February 2013. It is therefore noticeable that a number of months had passed between the date of the initial review by NSMC officials and the date of the request. It is also noted though that the NSMC intended acting on the survey information by setting up a working party to consider its policy implications. The conclusions from this review were only expected to be put before Ministers at a meeting due to be held after the date of the request. As such, it is fair to say that consideration of the survey information and the wider policy options available was still in its relative infancy.
29. It is the Commissioner's view that at the time of the request the NSMC would not have had a reasonable opportunity to complete its review and response to the survey's findings. Allowing that the NSMC was not near to settling its position on cross-border education, the Commissioner accepts that disclosure would therefore increase the distraction caused by public scrutiny of the information. Furthermore, he considers that the harmful effects of disclosure would be severe because of the significance of the policy area and the acute sensitivities that it attracts.
30. In conclusion, the Commissioner has found that the public interest arguments for disclosure attract considerable weight. However, acknowledging the particular circumstances as they stood at the time of the request, the Commissioner has found that on balance the public interest favours maintaining the exemption. As he has decided that section 35(1)(a) of FOIA applies to the withheld information, the Commissioner has not gone on to consider the other exemptions cited by DENI.

Right of appeal

31. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

32. 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.
33. 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

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