

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 February 2015

Public Authority: The Department for Education (DfE)

Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested the minutes from the meeting that Tim Boyes had with Ministers in 2010 as specified in the following BBC article: <http://m.bbc.co.uk/news/uk-27476643>. The DfE refused to provide the requested information under section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) FOIA.
2. The Commissioner's decision is that the DfE has correctly applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 8 August 2014 the complainant made the following request for information under the FOIA for:

["http://m.bbc.co.uk/news/uk-27476643](http://m.bbc.co.uk/news/uk-27476643)

I would like to request the minutes from the meeting that Tim Boyes had with Ministers in 2010 as specified in the BBC article above."

5. On 8 September 2014 the DfE responded. It refused to provide the requested information under section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA.

6. The complainant requested an internal review on 9 September 2014. The DfE sent the outcome of its internal review on 17 October 2014. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 12 November 2014 to complain about the way his request for information had been handled.
8. During the course of the Commissioner's investigation, the DfE also applied section 40(2) FOIA to some of the withheld information.
9. The Commissioner has considered whether the DfE correctly applied section 36(2)(b)(i) and (ii), section 36(2)(c) or section 40(2) FOIA to the withheld information.

Background

10. A meeting took place on 15 December 2010 at which Tim Boyes, a Birmingham head teacher, presented to Lord Hill, the then Parliamentary under-Secretary of State for Schools, his thoughts on the challenges facing schools with a large Muslim population. Other attendees included the then head of Security Research and the then special adviser to the Secretary of State for Education and two junior civil servants. Lord Hill is no longer a Minister in the department and all other attendees have since changed roles. At the time of the meeting the department's Preventing Extremism Unit (now the Due Diligence and Counter Extremism Group) was newly created (having being formed in October 2010), and at an early stage of policy formation and development. The meeting was seen as a helpful way for the department's thinking on the work of its new team to be informed by Mr Boyes' experience. However, it is important to note that the extremism agenda and issues discussed in the note were still live at the time of the request as the Permanent Secretary at the DfE was investigating whether the DfE missed any warning signs, and in particular how the DfE dealt with warnings both since the formation of this Government in 2010 and before.

Reasons for decision

11. Section 36 FOIA provides that,

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(b) would, or would be likely to, inhibit-

- i. the free and frank provision of advice, or
- ii. the free and frank exchange of views for the purposes of deliberation, or

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

12. The DfE has applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to the withheld information.

13. In determining whether the exemptions were correctly engaged by the DfE, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

14. The DfE explained that the qualified person is Sam Gyimah MP. It explained that the qualified opinion was provided on 5 September 2014. The qualified person's opinion was that section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA were applicable in this case. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions to the qualified person and the qualified opinion was provided to the Commissioner.

15. The qualified person considers that it is an essential principle that officials should have a safe space in which to offer Ministers advice without fear or favour. He considers it is important therefore that

- information provided to Ministers is protected to avoid inhibiting the free and frank exchange of advice to Ministers. He considers that disclosing the withheld information risks officials becoming concerned about how their advice might be perceived or presented in the public arena rather than presenting frank and uninhibited advice to Ministers. This could have a detrimental effect on Ministers' ability to make decisions informed by all the facts.
16. The qualified person considers that it is also important for the process of effective government that officials and stakeholders, are able to freely exchange views for the purposes of deliberation. He considers that releasing documents relating to deliberations would be likely to have the effect of inhibiting officials' freedom to think and contribute freely to considerations if they thought that ideas/views about the conduct of a meeting would be published.
 17. The qualified person also considers that releasing information about Mr Boyes' presentation at the meeting would also be likely to prejudice an ongoing investigation. At the time of the request the Permanent Secretary at the DfE was investigating whether the DfE missed any warning signs, and in particular how the DfE dealt with warnings both since the formation of this Government in 2010 and before. The information requested was therefore the subject of this investigation. The qualified person considers premature release could adversely affect the effectiveness of the investigation process thereby impeding the effective conduct of public affairs
 18. The qualified person's opinion is that disclosure of the withheld information whilst it is relevant to an ongoing investigation would be likely to inhibit the free and frank provision of advice, impede the free and frank exchange of views for the purposes of deliberation and would be likely otherwise to prejudice the effective conduct of public affairs, involving discussions relating to a particularly sensitive and complex subject area.
 19. The Commissioner considers the opinion of the qualified person is a reasonable one.
 20. As the Commissioner has decided that the exemptions are engaged, he has gone on to consider whether the public interest in maintaining the exemptions outweigh the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information

Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.

21. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

22. The DfE considers that the main public interest in favour of disclosing this information centres around transparency in decision making. It said that this issue has gained public attention and therefore it can be argued that disclosing information would help the public understand how decisions were made and what information the DfE had access to at the time and thereby hold the Government to account.

Public interest arguments in favour of maintaining the exemption

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

Safe Space

Ministers and officials need a 'safe space' in which to develop thinking in this policy area and to continue to explore options to policy development and implementation in communication and discussions. There needs to be a free space in which it is possible to think and discuss freely. The issues around extremism are inevitably sensitive and complex, and it is

¹ EA/2006/0011; EA/2006/0013

inevitable that a fear of public reaction to disclosing ideas under discussion may lead to less innovation, or a rejection of ideas at an early stage that might later on prove effective. Closing off this 'safe space' in which to consider evidence during the review and beyond, and to implement actions, would harm the conduct of public affairs. The DfE did provide some further arguments which are contained in the Confidential Annex attached to this Notice.

The Chilling Effect

Issues raised in the note are still live and the policy area is particularly sensitive. A major challenge in counter-extremism and safeguarding policy has been the stigma around discussing openly issues which can potentially cause offence. The current position which has enabled more open discussion of problems, paving the way for individuals to express their concerns more freely is a fragile one. Disclosure of a note containing views on this topic would be likely to impact upon how candid individuals feel they can be in meetings in future and whether they would wish to attend meetings discussing counter-extremism if they thought their attendance and views would be disclosed.

The Timing of the Request

The DfE said that it would not be in the public interest to disclose the withheld information whilst the DfE was investigating whether the department missed any warning signs, and in particular how the DfE dealt with warnings both since the formation of this Government in 2010 and before.

Balance of the public interest arguments

24. The Commissioner considers there is a strong public interest in openness and transparency, particularly in relation to a sensitive issue such as in this case. This is because it would provide the public with a greater understanding of decision making relating to this issue and the type of information and advice the Government had at the time.
25. The Commissioner does however consider that this issue does require a 'safe space' for Ministers to be able to obtain and digest advice from the most appropriate individuals with the relevant experience and knowledge of this sensitive area. There is also a requirement for free and frank discussion and the sharing of views. Disclosure of information which would prevent this 'safe space' for consideration and which would be likely to inhibit the frankness and candour of such discussions would not be in the public interest. This is particularly as at the time the

request was made the DfE was investigating whether any warning signs had been missed.

26. The Commissioner considers that there is a strong public interest in disclosure of information relating to this sensitive issue as it would provide the public with greater understanding of decision making in relation to this. However the Commissioner considers that there is a strong public interest in allowing the relevant individuals safe space for discussion and to enable views to be shared freely and frankly relating to this sensitive and complex issue. As the DfE were conducting an investigation to determine whether warning signs had been missed at the time of the request, the Commissioner considers that this adds greater weight to the chilling effect arguments.
27. On balance the Commissioner considers that in this case, the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption. Section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA were therefore correctly applied in this case.
28. As the Commissioner has concluded that section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA were correctly applied to the requested information he has not gone on to consider the application of section 40(2).

Other matters

29. The report in relation to the investigation into whether the DfE missed any warning signs, and in particular how the DfE dealt with warnings both since the formation of this Government in 2010 and before has now been published. It can be accessed at the following link:

<http://www.parliament.uk/business/publications/written-questions-answers-statements/written-statement/Commons/2015-01-16/HCWS203/>

Despite the fact that this report is now in the public domain and the investigation complete, the Commissioner has considered the circumstances at the time the request was made.

Right of appeal

30. 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

31. 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.
32. 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

**Gerrard Tracey
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