

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 February 2019

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the arrangements with the Permanent Secretary and Cabinet Office to ensure that processes were in place to prevent any conflict of interest between Lord Theodore Agnew's ministerial role and his charitable interests.
2. The Commissioner's decision is that the Department for Education (DfE) has correctly applied the exemptions at section 35(1)(d) and section 41(1)(a) and (b) of the FOIA. However, the DfE breached section 17(3) as it did not provide the complainant with public interest arguments associated with its application of section 35 within the statutory timeframe.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 25 October 2017, the complainant wrote to the DfE and requested information in the following terms:

'In a press statement on September 28 about the appointment of Sir Theodore Agnew as an education minister, the DfE said Sir Theodore was "agreeing arrangements with the Permanent Secretary and Cabinet office to ensure that processes are put in place to prevent any conflict of interest between his ministerial role and his charitable interests".

Please could you send me a copy of these arrangements?'

5. The DfE responded on 21 November 2017 refusing to provide the requested information and citing section 35(1)(d) of the FOIA. The DfE stated that it intended to provide the public interest arguments within the extra time allowed to consider these matters.
6. However, due to staff error the full response was not provided until 1 May 2018 when the DfE cited section 35(1)(d) and additionally applied section 41(1)(a) and (b). The complainant asked for this refusal to be reviewed on 29 May 2018.
7. The DfE provided an internal review on 26 June 2018 in which it maintained its original position.

Background

8. Lord Theodore Agnew was appointed Parliamentary Under Secretary of State for the School System on 28 September 2017. His background as one of the founding members of the East Norfolk Academy Trust (later renamed the Inspiration Trust) led to media interest in his appointment.
9. Ministers are provided with a private office consisting of a small team of civil servants to help organise their diary and workload.

Scope of the case

10. The complainant contacted the Commissioner on 16 July 2018 to complain about the way his request for information had been handled. He stated that his reason for doing so was the one he had provided in his internal review request. He believed that the public interest test had been applied incorrectly in respect of section 35 and that there was a need for transparency with regard to this agreement.

11. The Commissioner considers that the matters to be decided are whether the DfE correctly applied section 35(1)(d) and section 41(1)(a) and (b) to the withheld information.

Reasons for decision

Section 35 – the formulation or development of government policy

12. The DfE cited section 35(1)(d) which covers information relating to the operation of ministerial private offices as the reason for withholding the requested information. In this case, the processes that are put in place in a conflict of interest agreement to prevent a conflict of interest occurring which are subsequently used for operational purposes.
13. Section 35(5) defines the “*Ministerial private office*” as *any part of a government department which provides personal administrative support to a Minister of the Crown...*”
14. This exemption only applies to central government and is class based which means the public authority does not have to show harm. As long as the information falls within the class cited, the exemption is engaged:

“The purpose of section 35 is to protect good government. It reflects and protects some longstanding constitutional conventions of government, and preserves a safe space to consider policy options in private.”¹
15. The purpose of section 35(1)(d) is to ensure that ministerial business is managed effectively and efficiently. It is limited to information about routine administrative and management processes, the allocation of responsibilities, internal decisions about ministerial priorities and similar issues.
16. The Commissioner has been provided with the withheld information and she accepts that it is information held by central government, that it falls within section 35(1)(d) and therefore it is engaged.

Public interest test

17. The Commissioner has gone on to consider the public interest in the DfE’s application of the exemption at section 35.

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

Public interest arguments in favour of disclosure

18. The DfE explained that it had taken into account the argument that openness about governmental processes could improve the standard of public debate and trust. It acknowledged that transparency about ministerial conflicts of interest are also of particular interest to the public.
19. The DfE also considered whether the time that had taken place since Lord Agnew's appointment meant that the negative effect on the Department's private office had lessened.
20. The complainant's view is that there is a strong public interest in transparency around the management of Lord Agnew's conflicts of interest. Although the complainant acknowledges that Lord Agnew's interests are declared in the ministerial register, it does not provide information about how these are dealt with. He argues that both the prominent position of Lord Agnew and the prominence of the Inspiration Trust makes the disclosing of this information of great public interest as it would enable the public to have confidence in the measures that have been put in place to avoid any conflict of interest.

Public interest arguments in favour of maintaining the exemption

21. Government departments rely on their ministers being candid regarding their interests. Private office staff need to keep information confidential when it is first provided and need to continue to do so in respect of this type of information whilst they continue to manage potential conflicts of interest.
22. The DfE's view is that the effective running of the private office would be affected by disclosure. During busy times such as government change when new ministers are installed, it could hamper the private office and the Permanent Secretary's Office's ability to investigate potential issues and conflicts or put checks and measures in place to ensure propriety and manage what matters may arise.
23. The DfE's view is that ministers and private officials must be able to share sensitive information with each other and the latter need the opportunity to challenge potential conflicts that may emerge. This free and candid exchange between ministers and their private office is likely to be inhibited should conflict of interest agreements be disclosed.
24. The DfE put forward the view that ministers need time to settle into a new post and build relationships with their staff based on trust. The minister has to have confidence that private office staff will treat agreements sensitively. The DfE's view is that the public interest is satisfied by the minister's interests being placed in the public domain.

25. Releasing this information is likely to lead to challenges concerning the basis upon which decisions are taken which could be distracting to the effective operation of the minister's office. Private office staff need to be able to use their judgement when making decisions to prevent conflicts of interest without considerations of external scrutiny. The DfE argues that officials needed this 'safe space' to make decisions that are in line with the conflict of interest agreements. They need to be able to delegate if a conflict of interest arises without external interference or influence.

The balance of the public interest

26. The Commissioner accepts that there will always be a public interest in disclosure of this type of information to promote government transparency and accountability and to increase public awareness.
27. Nonetheless, the Commissioner's view is that the release of the specific process that has been put in place to avoid conflicts of interest would potentially cause damage to the effective administration of the private office. Additionally, there are wider implications in the release of this information because all ministers are subject to such agreements.
28. The Commissioner accepts that a minister's private office requires a 'safe space' in order to avoid the distraction and the possible disruption to those operations. The issue of Lord Agnew's conflict of interests agreement remains live whilst he remains in his role. The public interest in preventing a disruption to the process by which the private office of a minister manages potential conflicts of interest outweighs the public interest in disclosing this information.

Section 41 – information provided in confidence

29. The DfE has applied section 41(1)(a) and (b) to the information provided by Lord Agnew that informed the conflict of interest document drawn up by the DfE. In other words, Lord Agnew provided the DfE with information that formed a basis from which the agreement was drawn up.
30. Section 41(1) states that information is exempt from disclosure if:
 - (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.

31. In the Commissioner's advice on section 41 she states that in order for section 41 to be engaged, the following criteria must be fulfilled:

- the authority must have obtained the information from another person...²

The DfE generated the agreement itself but some of the information was provided to it by Lord Agnew. The agreement is a mixture of information and the exemption can only apply to the part that was given to the DfE by an other person.

32. The Commissioner accepts that the information withheld under section 41 was obtained from Lord Agnew and therefore it was from a person other than the public authority itself.

33. The Commissioner then needs to consider if disclosure of this information would constitute an actionable breach of confidence. The Commissioner uses the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* as a framework for assessment. Judge Megarry suggested that three elements were usually required to bring an action for a breach of confidence:

- the information must have the necessary quality of confidence;
- it must have been imparted in circumstances importing an obligation of confidence; and
- there must have been an unauthorised use of the information to the detriment of the confider.

34. In order to have the necessary quality of confidence, the information must be more than trivial and not otherwise accessible. The requested information contains what Lord Agnew had informed the DfE regarding his interests that might create a ministerial conflict of interest. As this concerns an incoming minister of the Crown it is of a serious nature, certainly not trivial. The DfE has confirmed that the information has been disseminated amongst a few individuals but is not accessible to the public. However, the DfE explained that Lord Agnew's interests are listed on two government websites³. The DfE also released a press notice

² <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

³ <https://www.gov.uk/government/publications/list-of-ministers-interests>

which addressed the matter of conflicts of interest and provided a link to the Commissioner.⁴

35. The presence of a letter⁵ written by Lord Agnew to Lord Watson has also been highlighted by the DfE as containing information about the former's conflicts of interest. However, it was written on 5 June 2018 almost eight months after the request. The Commissioner considers that the situation at the time of the request is the relevant one.
36. Information will be in the public domain if it is realistically accessible to the general public at the time of the request, or at any time if commercially confidential. There is a list of ministers' interests and there is other publicly available biographical information that contains Lord Agnew's interests. The DfE acknowledges that information concerning Lord Agnew's interests is not particularly sensitive because much of it is publicly available. However, the focus of the information he provided as it appears in the agreement is not publicly available.
37. There are two circumstances in which an obligation of confidence may apply:
- The confider attached explicit conditions to any subsequent use or disclosure of the information, for example in the form of a contractual term or the wording of a letter; or
 - The confider hasn't set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances.
38. The confider, Lord Agnew, has disclosed a fair amount of information

and

<https://www.parliament.uk/biographies/lords/lord-agnew-of-oultton/4689>

⁴ <https://www.gov.uk/government/news/sir-theodore-agnew-appointed-as-minister>

⁵ http://data.parliament.uk/DepositedPapers/Files/DEP2018-0536/Letter_to_Lord_Watson.pdf

about his interests into the public domain, some of it because he has been required to do so. However, the restrictions on the use of this information in its entirety are obvious and explicitly stated in the Ministerial Code:

*"7.5 The personal information which Ministers disclose to those who advise them is treated in confidence. However, a statement covering relevant Ministers' interests will be published twice yearly."*⁶

39. The Commissioner considers the exemption to be engaged.

Is there a public interest defence for disclosure?

40. Section 41 is an absolute exemption. The law of confidence contains its own built in public interest test with one defence to an action being that disclosure is in the public interest. Case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence. The Commissioner therefore needs to consider whether such a defence would be available if the DfE disclosed this information.

41. The complainant has argued that there is so much information available in the public domain about Lord Agnew's interests that any quality of confidence has been eroded and that the Nolan principles surrounding transparency have primacy.

A legal person must be able to bring an actionable case for breach of confidence

42. A breach of confidence must be actionable by either the legal person who gave the information to the public authority, or by any other legal person. The use of "actionable" was defined by Lord Falconer during a debate on the FOI Bill:

*"Actionable' means that one can go to court and vindicate a right in confidence in relation to that document or information. It means being able to go to court and win." (Hansard HL (series 5) Vol. 618, Col. 416).
"...the word "actionable" does not mean arguable... It means something*

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/672633/2018-01-08_MINISTERIAL_CODE_JANUARY_2018_FINAL_3.pdf

that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, "I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure." This is not the position. The word used in the Bill is "actionable" which means that one can take action and win." (Hansard Vol. 619, Col 175-176).

Case law on the common law of confidence suggests that a breach of confidence will not succeed and therefore won't be actionable, in circumstances where a public authority can rely on a public interest defence.

43. The DfE does not believe that there would be a defence in breaching confidence by releasing the requested information on the grounds that disclosure might lead to the discovery of a conflict or some misconduct.
44. The Commissioner must afford weight to the general public interest in preserving the principle of confidentiality and preventing an unnecessarily negative impact on the interests of the confider. In this instance she considers it unlikely that the release of this information would be detrimental to the confider. However, the principle of confidentiality overrides this and there is little doubt that the Ministerial Code affords confidentiality to the confider, Lord Agnew.
45. The Commissioner does not accept that there is a public interest defence in disclosing the information provided by Lord Agnew in confidence in order to inform the conflict of interest agreement. If the agreements made between government departments and the incoming minister breached confidentiality it would set a precedent and no incoming minister would have faith in the confidentiality that had been promised. There are public declarations required by law as set out in the footnotes to paragraph 34 of this notice. The Commissioner considers that these satisfy the public interest.

Section 17 – refusal of request

46. Section 17(1) states that if a public authority is relying on an exemption in Part II of the FOIA to either withhold information it holds, or to refuse to confirm or deny it holds relevant information, it should issue the applicant with an appropriate refusal notice within the timescale for complying with section 1(1).
47. Section 17(3) obliges a public authority to include, where it is applicable, a breakdown of the public interest factors which were taken into account and the reasoning behind the authority's conclusion that the public interest lay in maintaining the exemption.

48. The DfE failed to provide to the complainant its public interest arguments regarding its application of section 35 for over five months and therefore breached section 17(3) of the FOIA.

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

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SK9 5AF