

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Autumn 2021 exam policy.
2. The DfE refused to provide the requested information, citing section 21 (information reasonably accessible to applicant via other means), section 35(1)(a) (formulation of government policy etc) and section 35(1)(b) (ministerial communications) of FOIA. The DfE also applied section 36(2)(b)(ii) (the free and frank exchange of views for the purposes of deliberation) and section 36(2)(c) (prejudice to the conduct of public affairs) 'in the alternative'.
3. The Commissioner's decision is that:
 - Section 35(1)(a) is not engaged.
 - Section 35(1)(b) is engaged and the public interest favours maintaining the exemption.
 - Since section 35(1)(b) is engaged, and section 35 and section 36 are mutually exclusive, it follows that section 36 cannot apply.
4. The Commissioner does not require the public authority to take any steps.

Background information

5. Ofqual is a non-ministerial department and as such it is independent of government; it reports directly to Parliament. Ofqual's remit is to regulate qualifications, examinations and assessments and to maintain examination standards and public confidence in GCSEs, AS and A levels in England.
6. In its submission to the Commissioner, the DfE has explained that, as a non-ministerial department, Ofqual is 'ultimately responsible for decisions on policy areas it is responsible for under the powers vested in them and policies that it delivers in line with their duties and objectives.'
7. During the pandemic, Ofqual made the decision to hold a permissive approach to AS and A level examinations in Autumn 2021. More information about the specifics of the policy can be found in the consultation decision.¹
8. Before Ofqual made this decision, it held a consultation period, from 17 March 2021 to 9 April 2021, and published an analysis of the 1053² responses that it received.
9. The DfE has explained that although Ofqual is independent from government, often ministers and the DfE share their views with Ofqual, and vice-versa, as decisions taken by one organisation can affect the other.

Request and response

10. On 14 May 2021, the complainant made the following request for information:

"As you know, the Secretary of State's direction to Ofqual was not "to provide for an exam series": it was that "there needs to be a full series of GCSE, AS and A level examinations". Could you please pass on the records of the DfE's and Secretary of State's support for Ofqual's decision?

¹ [Arrangements for GCSE, AS and A level exams in autumn 2021 \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97122/arrangements-for-gcse-as-and-a-level-exams-in-autumn-2021.pdf)

² [Consultation on arrangements for an autumn 2021 exam series: analysis of responses \(publishing.service.gov.uk\)](https://publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/97122/consultation-on-arrangements-for-an-autumn-2021-exam-series-analysis-of-responses.pdf)

As I expect you're aware, the government's chaotic approach to autumn exams has caused yet another crisis for home-educated students. It's difficult to understand why the DfE was willing to funnel vast sums into the largely pointless private candidate support grant, but wouldn't spend the relatively tiny amount needed to run the full autumn exam series that the Secretary of State had announced, and that children were depending on."

11. On 26 July 2021, the Department for Education ('DfE') responded. It refused to provide the requested information citing section 35(1)(a), section 35(1)(b) and section 21 (information reasonably accessible via other means) of FOIA.
12. The complainant requested an internal review on 26 July 2021.
13. The DfE sent the outcome of its internal review on 14 October 2021. It upheld its original position.

Scope of the case

14. The complainant contacted the Commissioner on 14 October 2021 to complain about the way that their request for information had been handled. The complainant did not express any concern about the DfE's application of section 21.
15. However, the complainant did express concern that section 35 had been applied erroneously. The complainant also expressed concern that the DfE had failed to take into account, in its consideration of the public interest, the widespread effects of the policy and the inappropriate interference of ministers in Ofqual reaching its policy decision.
16. During this investigation, the DfE informed the Commissioner that, if he did not agree with its application of section 35, it was also applying 36(2)(b)(ii) and section 36(2)(c) 'in the alternative.' The DfE provided the Commissioner with a copy of the qualified person's opinion, in support of the application of section 36.
17. The Commissioner considers the scope of his investigation to be to determine whether the withheld information engages section 35 and, if so, whether the public interest lies in disclosure or in maintaining the exemption.
18. Depending on his findings, the Commissioner may go onto consider the DfE's application of section 36.
19. There is one document being withheld in response to this request. It is an internal email sent from the Secretary of State at the time, Gavin

Williamson, to other DfE officials and also the Children's Commissioner.
In this email the Secretary of State provides his views on Ofqual's policy regarding Autumn 2021 exams.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

20. Section 35 of FOIA states:

“(1) Information held by a government department is exempt information if it relates to

(a) the formulation or development of government policy.”

21. Section 35 is a class-based exemption; this means that information simply has to relate to the formulation or development of government policy; there is no requirement for disclosure to prejudice either of those policy processes.
22. It is also a qualified exemption which means that it is subject to the public interest test. Information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.
23. Section 35 only applies to central government departments, such as the DfE.
24. FOIA does not define 'government policy' and the Commissioner's guidance 'Section 35 – government policy'³ acknowledges that 'There is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms.'
25. Not all government policy has to be discussed in Cabinet and jointly agreed by Ministers. However, the guidance is clear that 'the important point is that government policy will ultimately be signed off either by the cabinet or the relevant minister. This is because only ministers have the mandate to make policy on behalf of the government. If the final decision is taken by someone other than a minister, that decision will not in itself constitute government policy.'

³ [section-35-government-policy.pdf \(ico.org.uk\)](https://ico.org.uk/section-35-government-policy.pdf)

26. The complainant, in their internal review request of 26 July 2021, argued that as the decision relating to Autumn 2021 exams was Ofqual's, and did not require ministerial approval, section 35(1)(a) cannot apply.
27. According to the DfE, it is common practice for Ofqual to seek submissions from the DfE relating to its policy decisions. Ofqual may also engage other stakeholders outside of government. As the DfE has said, the decisions of the DfE and Ofqual affect each other and the Commissioner acknowledges that this collaboration will have been even more important during the rapidly developing pandemic.
28. However, the complainant is concerned that this ministerial involvement represents 'clandestine political interference.' It is not the Commissioner's role to comment on such allegations – it is just his role to decide whether the withheld information relates to government policy.

The Commissioner's view

29. The Commissioner's guidance states 'arm's-length bodies are created to deliver specialist services which do not require the day-to-day engagement of ministers, or which need to be independent of government. As only ministers can approve government policy, it follows that the day-to-day business of these bodies will not involve government policymaking. By delegating an activity to a body at arm's length from ministers, the government has in effect signalled that the activity is considered operational or otherwise independent of government.'
30. The DfE has argued that, since Ofqual is delivering government policy, the exemption can apply. The Commissioner acknowledges that whilst the Secretary of State, and the DfE, provided feedback on Ofqual's proposed policy decision; by the DfE's own admission Ofqual is ultimately responsible for decisions on policy areas it is responsible for.
31. To reiterate, the Commissioner's guidance states, 'If the final decision is taken by someone other than a minister, that decision will not in itself constitute government policy.' The withheld information relates to a decision taken by Ofqual, not the DfE or the Secretary of State and therefore section 35(1)(a) cannot apply.
32. Since the exemption is not engaged, the Commissioner does not need to go onto consider the public interest test. Instead, he has gone onto consider the DfE's application of section 35(1)(b).

Section 35(1)(b) – Ministerial communications

33. Section 35 of FOIA states:

“(1) Information held by a government department is exempt information if it relates to

(b) Ministerial communications”

34. Like section 35(1)(a), section 35(1)(b) is a qualified exemption. Information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure.

35. The Commissioner’s guidance states ‘The purpose of section 35(1)(b) is to protect the operation of government at ministerial level. It prevents disclosures which would significantly undermine ministerial unity and effectiveness or result in less robust, well-considered or effective ministerial debates and decisions.’

36. The DfE has explained ‘The email is clearly a communication from the Secretary of State (SoS), and therefore falls within the definition of the exemption.’

37. However, in order for section 35(1)(b) to be engaged, the communication must be **between** ministers. It does not include communications from a minister to a non-minister.

38. The DfE has explained that the withheld information ‘was sent from the SoS’s private office to other ministerial private offices (and therefore other DfE ministers) and key departmental officials, sharing his views on Ofqual’s proposed exam policy.’

39. Having viewed the withheld information, the Commissioner accepts that one of the recipients of the email is the private office of the School Standards minister. The Commissioner has previously accepted that section 35(1)(b) can apply if communications have been exchanged between ministers’ private offices.

40. Furthermore, communications do not have to be exclusively between ministers: the exemption will cover communications between two (or more) ministers even if others are copied in, as is the case here.

41. When it comes to section 35(1)(b), the definition of ‘communications’ between ministers is broad. The Commissioner’s guidance states, ‘It includes written communications such as letters, memos, emails and any other documents written to convey information between ministers, and it also includes meetings and telephone conversations between ministers.’

42. The Commissioner notes that the email not only includes the SoS's views on Ofqual's proposal, but also his agreement with the views of another minister.
43. The Commissioner is satisfied that the email in question represents communications between ministers. Therefore, the exemption is engaged. Now the Commissioner needs to go on to consider whether the public interest lies in maintaining the exemption or in disclosure.

Public interest test

Public interest arguments in disclosure

44. The DfE acknowledges that 'Releasing this information would provide greater transparency around the SoS's arguments in relation to the development of Ofqual's exam policies as outlined in the email and would be likely to add to the public debate on these policies.'
45. Expanding on this argument, the DfE acknowledges that disclosure would generally make the process more open and improve trust in the department. The DfE also acknowledges that 'This is particularly the case when considering evidence around the implementation of government policy.'
46. Finally, the DfE acknowledges that both of the above arguments are made more pertinent when 'there is significant public interest in government's response to the pandemic, including Ofqual's approach to examinations during the pandemic.'

Public interest arguments in maintaining the exemption

47. The DfE has explained that the exemption must be maintained as 'Ministers must be able to continue, within a safe and private policy space, to collectively share their policy positions, issues and concerns with other ministers, prior to final decisions being made.' This is what is known as the 'safe space' argument.
48. The DfE has also explained that, if this safe space was compromised, ministers may be sceptical to provide fully frank and candid views, which would undermine effective decision making. This is what is known as the 'chilling effect' argument.
49. The DfE has also stressed that the exemption must be engaged in order to protect ministerial unity, effectiveness and protect the collective decision-making process. This is what is known as 'collective responsibility.'
50. The key public interest argument for section 35(1)(b) will usually relate to preserving the convention of collective responsibility. If collective

responsibility arguments are relevant, they are likely to carry significant weight. However, collective responsibility arguments are only relevant if the withheld information actually reveals the view of an individual minister.

51. Returning to paragraph 42, the Commissioner is satisfied that the withheld information reveals the Secretary of State's, and another minister's, views on Ofqual's proposal. Therefore, collective responsibility arguments are relevant.
52. Collective responsibility arguments carry such weight because 'collective responsibility is the longstanding convention that all ministers are bound by the decisions of the Cabinet and carry joint responsibility for all government policy and decisions. It is a central feature of our constitutional system of government. Ministers may express their own views freely and frankly in Cabinet and committees and in private, but once a decision is made, they are all bound to uphold and promote that agreed position to Parliament and the public.'

The Commissioner's view

53. In this case, the Commissioner considers that the balance of the public interest in this decision is fine. However, he has decided that the public interest lies in maintaining the exemption.
54. The Commissioner acknowledges that the request for information was made on 14 May 2021. The withheld information is dated 27 April 2021. Ofqual had made its decision regarding the Autumn exam series and therefore the chilling effect and safe space arguments become weaker. Furthermore, once an initial announcement has been made there will be an increasing public interest in scrutinising and debating the details of the decision.
55. To reiterate, under section 35(1)(b) public interest arguments should focus on collective responsibility which carry considerable weight. The Commissioner acknowledges that ministers need to present a united front in justifying and promoting agreed positions. If disclosure would undermine this united front, this would undermine ongoing government unity and effectiveness.
56. Furthermore, whether or not the issue is still 'live' will not reduce the public interest in maintaining government responsibility. This is because the need to defend an agreed position will, by its very nature, continue to be relevant after a decision has been taken, and because of the constitutional importance of maintaining the general principle of collective responsibility for the sake of government unity.

57. However, section 35(1)(b) is not an absolute exemption and the public interest in disclosure is particularly strong in relation to historically and politically significant events such as the coronavirus pandemic.
58. The decision to hold a permissive approach to AS and A level examinations in Autumn 2021 affected AS and A Level students across England, though not to the extent that Ofqual's algorithm⁴ of 2020 did. The complainant seems particularly concerned with the affect the policy would impose upon home-educated students.
59. The Commissioner does not underestimate the upheaval and disruption that students faced during the pandemic. However, potentially compromising the fundamental, constitutional importance of collective responsibility will only be justified if the requested information sufficiently adds to public debate which the Commissioner does not think is the case.
60. In reaching this decision, the Commissioner has considered the information about the policy already in the public domain, including the consultation decision (paragraph 7) and consultation responses (paragraph 8). The Commissioner notes that both the consultation decision and consultation responses discuss home-educated students.
61. The Commissioner acknowledges that the complainant has concerns about ministerial interference over Ofqual's decision making process. It is not the role of the Commissioner to comment on such accusations and the Commissioner notes that the email in question was not sent to Ofqual – all recipients bar one are internal.
62. The direction⁵ to which the complainant refers in their request clearly outlines the DfE's vision for Ofqual's policy. Following on from this direction, the withheld information demonstrates that the Secretary of State shared his views with his own officials internally. For that reason, the Commissioner is not convinced that disclosure of said response, and the individual ministerial views within, would further the debate about the political interference with which the complainant is concerned.
63. Since the Commissioner has decided that the requested information has been appropriately withheld under section 35(1)(b), he does not need to go onto consider the DfE's application of section 36.

⁴ [A-levels: Algorithm at centre of grading crisis 'unlawful' says Labour - BBC News](#)

⁵ [Letter from Gavin Williamson to Ofqual \(publishing.service.gov.uk\)](#)

64. To reiterate, the Commissioner considers the public interest in relation to section 35(1)(b) to be fine. Had he decided that the public interest favoured disclosure, he still would not have gone onto consider the DfE's application of section 36. This is because section 35 and section 36 are mutually exclusive and, should any part of section 35 apply, it follows that section 36 cannot.

Right of appeal

65. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

66. 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.

67. 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

Alice Gradwell
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF