

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 November 2022

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

### **Decision (including any steps ordered)**

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1. The complainant has requested the Department for Education (DfE) to disclose information relating to 'A Fertile Heart', which is a Relationships, Sex and Health Education (RSHE) resource that was produced by an independent group of priests and teachers and was previously mandated for use in all schools within the Archdiocese of Cardiff. The DfE disclosed some information but withheld the remainder citing sections 36(2)(b)(ii) and (ii) of FOIA.
2. The Commissioner's decision is that the DfE is entitled to refuse to disclose the remaining withheld information in accordance with section 36(2)(b)(i) and (ii) of FOIA. He therefore does not require any further action to be taken.

### **Request and response**

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3. On 27 September 2021, the complainant wrote to the DfE and requested information in the following terms:

"Good afternoon. I am submitting an FOI request for all information you hold about a "mapping exercise" carried by the Catholic Education Service (CES) with yourselves, on a programme being taught in schools under Relationship and Sex Education (RSE) called "A Fertile Heart" (AFH). I am particularly interested in information on the work carried

out regarding how the AFH material meets the Government's mandatory secondary school RSE curriculum. The publishers of AFH have told me that the CES have worked with yourselves at the DfE to map where the AFH programme material meets the Government's RSE Curriculum Guidance. The AFH Publisher is called Panda Publishing, and they have a section on their AFH website about DfE compliance, which is in fact only a simple request form. The Publisher has declined to provide me any of this information as I'm not a member of a school senior leadership team. Given that I've been told that this "mapping" information work was carried out by the CES in conjunction with yourselves at the DfE, and the DfE is public body, I believe the information is subject to this FOI request".

4. The DfE responded on 17 November 2021. It disclosed some information but refused to disclose the remainder citing section 36(2)(b)(i) and (ii) of FOIA.
5. The complainant requested an internal review on 13 December 2021. They consider there are significant public interest arguments in favour of disclosing the remaining withheld information.
6. The DfE carried out an internal review on 31 January 2022. It upheld its previous application of sections 36(2)(b)(i) and (ii) of FOIA and advised the complainant that it also felt section 36(2)(c) applied.

### **Scope of the case**

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7. The complainant wrote to the Commissioner on 8 February 2022 to complain about the DfE's handling of their information request. They consider there are significant public interests arguments in favour of disclosing the remaining withheld information.
8. The Commissioner has reviewed the withheld information and received further submissions from the DfE. He is satisfied that section 36(2)(b)(i) and (ii) of FOIA are engaged and the following section of this notice will explain why.
9. For clarity the Commissioner has not considered section 36(2)(c) of FOIA.

## Reasons for decision

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### Section 36 – Prejudice to the effect conduct of public affairs

10. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
11. The exemption can only be engaged on the basis of the reasonable opinion of a qualified person. The Commissioner has seen the submission made to DfE's qualified person and he is satisfied that the qualified person's opinion was appropriately obtained. It is the qualified person's opinion that section 36(2)(b)(i) and (ii) of FOIA apply to the remaining withheld information in its entirety.
12. The Commissioner's guidance on section 36<sup>1</sup> states that information may be exempt under sections 36(2)(b)(i) and (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff, and others, to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.
13. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
14. The DfE explained that 'A Fertile Heart' is a RSHE resource produced by an independent group of priests and teachers and was previously mandated for use in all schools within the Archdiocese of Cardiff. The resource combines RSHE and religious education and the DfE believes that it is used by one secondary school in England, which falls within the Archdiocese, as well as three English primary schools.
15. The DfE reviewed the full set of the Fertile Heart booklets after ministers asked officials to consider the material following concerns raised by two

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<sup>1</sup> <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

MPs about its use. Officials found that the resource contained material which would be hard for a school to teach in a way that is compatible with the RSHE statutory guidance. As a result of the review, in June 2021, a minister wrote to the publisher of 'A Fertile Heart, the CES and others to express serious concerns about the material contained within the RSHE resource. This letter was later published by an MP<sup>2</sup>.

16. As the letter confirms, in June 2021 and at the time of the request, the DfE was still working with the CES and the Welsh Office to monitor the situation.
17. It is the qualified person's opinion that the remaining withheld information contains free and frank advice and the free and frank exchange of views for the purposes of deliberation. The DfE pointed the Commissioner to a few examples in the remaining withheld information to highlight this further. It is also their opinion that officials must be able to share such clear advice with ministers and other officials without the fear that it will make its way into the public domain. This helps the DfE to agree a clear course of action in relation to the materials that may be incompatible with statutory guidance. It confirmed that this advice fed into the final decision making process, where a minister wrote to the publisher and the CES to highlight their concerns.
18. It is the qualified person's opinion that disclosure would be likely to prejudice the DfE's ability to obtain free and frank advice in the future and deliberate effectively on such matters. Disclosure would be likely to prejudice the safe space that is required to consider and debate such matters candidly and robustly.
19. The Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to prejudice the DfE's ability to obtain free and frank advice and to exchange free and frank views for the purposes of deliberation. The DfE required the safe space to consider the concerns raised about the educational materials and decide effectively what action was required. The letter published highlights that the matter required further monitoring by relevant parties. Disclosure at the time of the request would have been likely to prejudice the DfE's ability to do that and to continue any further free and frank deliberations that may be required.

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<sup>2</sup> [2021-0019914-Jesse-Norman-Fertile-heart-1.pdf \(humanists.uk\)](#)

20. For the above reasons, the Commissioner is satisfied that section 36(2)(b)(i) and (ii) are engaged.

### **Public interest test**

21. The DfE acknowledges that there is a public interest in disclosing the specific rationale and decision making process behind the work carried out regarding the "A Fertile Heart" materials and the decision to raise concerns about this resource in letters to MPs and to the publisher. It accepted that this would allow members of the public to scrutinise and hold the DfE to account more thoroughly. It would allow the public to challenge or accept the thinking behind the DfE's position on this matter, which may in turn improve the effectiveness of its work.
22. The DfE also said that disclosure would also demonstrate the probity and proper conduct of officials and ministers in the department. It argued that this may serve to benefit the public interest by offering assurances about the effective and comprehensive safeguards on decision making and increase trust, improve accountability and transparency.
23. However, the DfE considers the public interest rests in maintaining the exemption. It argued that good government depends on good decision-making. This needs to be based on the best intelligence, advice, data and metrics available, and a full consideration of concerns put to the department. In this instance these relate to the externally produced RSHE materials, based on the expertise of DfE officials. It stated that the withheld information contains advice from officials, advising on their position regarding the suitability and compatibility of these materials when compared with the statutory RSHE guidance.
24. The DfE considers if such reviews were disclosed, it is likely that the advice and evidence provided by officials would be less free and frank in the future. This would lead to the parties not being fully abreast of the information and issues raised and ultimately impair decision making. The DfE felt that disclosure would also be likely to remove the safe space that is required for officials and ministers to discuss the suitability of such materials free and frankly. This could then lead to diluted views and opinions in the future due to the fear of public disclosure.
25. The Commissioner considers the public interest test considerations under section 36 of the FOIA require him to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
26. The Commissioner acknowledges the public interest arguments in favour of disclosure. The complainant has provided a detailed submission explaining why it is in the public interest to disclose the remaining

information and the Commissioner does not disagree. It is clear that there are significant concerns around the material in question and its use in schools. There are strong public interest arguments in favour of disclosing the consideration the DfE gave to such concerns and why it felt it necessary to write to the publisher and other parties. Disclosure would enable the public to clearly see what the DfE's position is and why, and why it took the action that it did.

27. However, it is important to consider the timing of the request in relation to the matters at hand. At the time of the request in September 2021 the DfE had only just contacted the publisher and the relevant parties. The letter published noted that the situation required ongoing monitoring. At the time of the request the issue was still live and ongoing and it is reasonable to assume that further work and deliberations may be required.
28. Despite the significant public interest arguments in favour of disclosure, due to the timing of the request and matters still being live, the Commissioner has decided that the public interest rests in maintaining the exemption. However, he would point out that this may not be his decision if the request were made today or at a time when ongoing deliberations and exchange of views and advice on the matter had come to an end.
29. It is important to protect the safe thinking space of public authorities. It allows officials and ministers the free thinking space to openly and candidly discuss issues such as this, robustly consider the options available to it and decide on the most efficient and effective approach. The safe space enables officials and ministers to provide their candid and honest opinions and to robustly deliberate and consider them, without the fear of premature public disclosure. It allows the public authority the space it requires to consider what to do and why. It is not in the public interest to prejudice the ability of a public authority to deliberate and exchanges views and advice in such a manner, particularly when the issue at hand is still so fresh and subject to further monitoring and consideration. To do so would be likely to prejudice the ability of the public authority to continue its ongoing work in that area and ultimately hinder the effectiveness of its decision making process and the decisions it makes.

## Right of appeal

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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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://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

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**