Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 October 2012

Public Authority: The 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 Shannon Matthews Serious Case Review. The Department for Education (DfE) refused to provide the requested information under sections 22, 31, 36, 38, 40(2), 41 and 42 of the Freedom of Information Act 2000 (FOIA).

2. The Commissioner's decision is that DfE has correctly applied section 22 and section 36(2)(c) to withhold the requested information.

3. The Commissioner requires no steps to be taken.

Request and response

4. On 27 January 2012, the complainant wrote to the DfE and requested information in the following terms:

"I would like to ask for a suitably redacted copy of the Shannon Matthews serious case review.

I would also like copies of recorded communications between the department and Kirklees Council/Kirklees Safeguarding Children Board on the issue of full publication since the government decision to publish in full in June 2010.

I would also like the recorded information held by the department relating to those communications regarding publication.

In both cases, redactions of any information of the kind redacted in the (case names redacted) full SCRs is acceptable.

I do think it is unlikely that all the information contained in letters, emails and other records on this specific issue of publication would be subject to redaction."

5. The DfE responded to the request on 24 February 2012, it applied sections 38, 40(2), 41 and 42 FOIA to withhold the information but explained that it required further time to consider the public interest arguments in this case. On 23 May 2012 the DfE wrote to the complainant with its full response. In addition to the exemptions applied in its response of 24 February 2012, it also applied section 22, 31, 36(2)(b)(i) and (ii) and 36(2)(c). It did however provide the complainant with some recorded communications which fell within the scope of the request.

6. As the complainant was dissatisfied with the DfE's response he requested an internal review on 30 May 2012. The DfE provided the internal review on 16 July 2012, it upheld its position communicated to the complainant on 23 May 2012.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled. The Commissioner will consider whether the DfE was correct to rely upon the exemptions applied to the withheld information. This decision notice deals separately with the SCR overview report and the related communications.

Reasons for decision

The serious case review (SCR) overview report

8. The DfE has applied section 22 and section 36(2)(c) to a 'suitably redacted' copy of this report.

Section 22

9. Section 22 of FOIA states that, "Information is exempt information if-

   (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

10. The Commissioner has considered whether section 22 is engaged. He considered whether the requested information was held by the DfE with a view to publishing it at some future date, whether the date has been determined or not.

11. In this case the Commissioner notes that the Government had stated that certain SCRs (including this one) should be published. He also notes that the DfE confirmed that at the time of the request its intention was to publish the SCR, although it did not provide a date.

12. In this case the DfE has provided the Commissioner with further submissions in support of its application of section 22. In summary, the DfE accepted that Kirklees Safeguarding Children Board had consulted relevant individuals, including minors, who would be affected by publication and concluded that publication at the time of the request would be premature. The DfE's arguments are detailed further in the Confidential Annex attached to this Notice.

13. On the basis of these arguments, the Commissioner accepts that it was the DfE's intention to publish the SCR at the time of the request. He also accepts that it was reasonable at the time of the request to withhold the information until various issues had been resolved. He also considers that a precise date for publication could not have been given at the time of the request. In all the circumstances the Commissioner considers that section 22 was correctly engaged. As section 22 is a qualified exemption, the Commissioner has gone on to consider the balance of the public interest in this case.

Public interest arguments in favour of disclosure

14. The DfE has argued that there is a general public interest in openness and transparency and in making information available on request.

Public interest arguments in favour of maintaining the exemption

15. The DfE argued that there is a public interest in public authorities being able to publish information about children and their families in a planned and managed way. It explained that in accordance with the Commissioner's guidance on this issue, one of the reasons why a public authority may wish to control the date of release of information is to ensure that it is fair to all to whom it relates. It said that in this case it is

imperative to manage the impact of disclosure on the welfare of the children involved.

Balance of the public interest arguments

16. The Commissioner considers that there is strong public interest in openness and transparency in this area. The Commissioner also considers that there is a strong public interest in public authorities being held to account through public scrutiny in such a sensitive area.

17. In a previous Decision Notice, case reference FS50391612, a statement made by the Prime Minister on 25 January 2011 relating to the Edlington SCR was quoted as being relevant to the public interest in favour of disclosure:

    "There is a sense at the moment that it is a sort of establishment stitch-up where all the people who have taken part in this issue are not named, they are not having to take proper responsibility, the public isn't able to see what has gone wrong and the pressure isn't there to put it right."

    The Commissioner considers that this is relevant to this case also.

18. However the Commissioner also considers that there is a strong public interest in the DfE being able to disclose the requested information at the most appropriate time as it relates to a very sensitive issue with significant implications for a number of people, including minors.

19. The Commissioner is also aware of the press notice of 10 June 2012 which acknowledged that from 10 June onwards both the overview report and the executive summaries of SCRs were to be published in an anonymised form, withholding identifying details, unless there were compelling reasons relating to the welfare of any children directly concerned in the case for this not to happen. In this case a court action has been brought by the father of the child relating to the disclosure of this information. There was an injunction in place which was superseded by an undertaking to the court, that the SCR would report would not be disclosed prior to the court hearing. The court hearing was listed for October 2012. The Commissioner therefore considers that there is a strong public interest in the information being disclosed at an appropriate time taking into account the welfare of the children involved.

20. In this case, similar to the Decision Notice relating to the Edlington SCR (FS50391612), all of the children involved are alive and therefore the Commissioner accepts that the interests of the children add weight to the public interest arguments relating to the timing of disclosure.

21. In this case the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

22. As the Commissioner considers that section 22 FOIA was correctly engaged in relation to a suitably redacted copy of the SCR overview report he has not gone on to consider that application of section 36(2)(c) to this information.

Recorded Communications

23. A number of redactions were applied to this information which have been highlighted earlier in this Notice. Section 36 has been considered first.

Section 36

24. 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.

25. The DfE has applied all subsections of section 36 to various pieces of the withheld information. Section 36(2)(c) has been applied to all of the withheld information and so the Commissioner has considered the application of this subsection first.

26. Information may be withheld under section 36(2)(c) if its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs. It was stated in the Tribunal decision of Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC (EA/2006/0011 & EA/2006/0013) that:

> "On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable…" (paragraph 60).

On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, "…in order to satisfy the sub-section the opinion must be both reasonable in substance and reasonably arrived at…" (paragraph 64) "…can it really be said that the intention of Parliament was that an opinion reached, for example, by the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?"

27. In determining whether section 36(2)(c) was 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 objectively reasonable and reasonably arrived at.

28. The DfE has explained that Lord Hill, Parliamentary Under Secretary of State for Schools, is the qualified person in this case and his opinion was obtained on 20 April 2012.The DfE has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable the opinion to be reached.

29. The following submissions were put to the qualified person:

- Publication would also be likely to undermine this DfE's relationship with Kirklees LSCB (Local Safeguarding Children Board) and Kirklees Council in this case and most likely with other LSCBs and local authorities in relation to the publication of other SCR overview reports in the future, if it failed in this case to consider what exemptions applied. It is essential to ensure that the LSCBs continue to have trust and confidence when discussing matters as important and as sensitive as child protection and the publication of SCR reports with the DfE. Unless such discussions are characterised by trust and openness, the SCR process itself could be undermined and valuable points missed.

- LSCBs regularly write to the Department regarding issues with publishing SCRs. Publication of correspondence and other information relating to a particular case could lead to LSCBs making decisions not to publish without informing or seeking views from the DfE. This could lead to a failure of the policy to publish suitably redacted SCR overview reports.

- Publication of the communications may lead to and prolong distress for children involved in the case resulting in a detrimental impact on their mental and physical health. This will mean that scarce frontline resources will have to be concentrated on the children. This may threaten the effective conduct of public affairs because there will be fewer resources available for other children and families in the area.

30. The qualified person's response agrees that section 36(2)(c) is engaged. The qualified person's opinion is that the prejudice in this case would be likely to occur.

31. The Commissioner accepts that local authorities must have full trust and confidence when working with the DfE on matters relating to SCRs. It is a very sensitive area and if the trust and confidence between the DfE and local authorities were damaged this would be likely to have a negative impact upon the whole SCR process.

32. The Commissioner accepts that it was reasonable to conclude that disclosure would prejudice, or would be likely to prejudice, the effective conduct of public affairs.

33. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(c) was correctly engaged.

34. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs 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].

1 EA/2006/0011 & EA/2006/0013

35. 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 s 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

36. The DfE acknowledged that there is a public interest in making transparent the workings of public authorities and ensuring that those working with children are held to account and that lessons are learned locally and nationally.

Public interest arguments in favour of maintaining the exemption

37. The DfE said that there was a strong public interest in ensuring that the SCR process runs effectively. It said that there was a strong public interest in maintaining the DfE's relationships with LSCBs and other public authorities as this ensures that the SCR process can run effectively. Finally it said that as the SCR process is a measure to safeguard children from harm, it is in the public interest that this is achieved.

Balance of the public interest

38. The Commissioner agrees that there is a public interest in disclosing information which holds those who are working to protect children to account when things go wrong. He also considers that there is a public interest in demonstrating that lessons are learned both locally and nationally when things go wrong and that measures are put in place to try to ensure that the same things don't go wrong again in the future.

However the Commissioner is aware that in this case it is the intention that a suitably redacted copy of the SCR will be disclosed at some point in the future which will go some way to meeting these public interest arguments.

39. The Commissioner considers that there is a strong public interest in the SCR process running effectively as it is a measure which is designed to protect children. The SCR process relies upon the DfE having a robust and open relationship with LSCBs and other public authorities and there is a strong public interest in maintaining this relationship.

40. On balance the Commissioner considers that public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

41. 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: informationtribunal@hmcts.gsi.gov.uk
    Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

42. 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.

43. 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 ……

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
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SK9 5AF