

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

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

Decision (including any steps ordered)

1. The complainant has requested copies of the assessments generated by officials on the possible impact that the Wave 1 free schools would have on other educational establishments. The assessments are required to be produced under section 9 of the Academies Act 2010. The Department for Education (DfE) confirmed that it held this information but claimed it was exempt from disclosure under section 36 (effective conduct of public affairs) of FOIA.
2. The Commissioner's decision is that section 36 is engaged but that the public interest in disclosure outweighs the public interest in maintaining the exemption. He therefore requires the DfE to disclose the requested information in order to comply with the legislation subject to the redaction of a limited amount of information described at paragraph 52 in the notice.
3. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

4. On 11 October 2011 the complainant wrote to Michael Gove MP, Secretary of State for Education, and requested information in the following terms:
 - 1) *Copies of the impact and statutory assessments, in all cases, made by you as Secretary of State of the impact of the Wave 2 approved free schools on maintained schools, academies and institutions within the further education sector in the area in which the additional school is (or proposed to be) sited.*
 - 2) *The information detailed in (1) (above) in respect of the 24 Wave 1 free schools that opened in September 2011.*
 - 3) *The information details in (1) (above) in respect of the free schools forming part of the eight Wave 1 process to open in 2012 or beyond.*
5. The DfE responded on 6 December 2011. It explained that its impact assessments had not been completed for free schools expected to open in 2012 and 2013. In terms of the impact assessments produced in relation to the other free schools, the DfE considered this information was exempt information under sections 36(2)(b)(ii) and 36(2)(c) of FOIA.
6. The complainant wrote to the DfE on 24 January 2012 challenging its application of section 36 of FOIA. They also made a separate information request which does not concern us here. The DfE subsequently carried out an internal review, the outcome of which was sent to the complainant on 2 March 2012. This upheld the original decision to refuse the request, although the DfE clarified that it was in fact relying on section 36(2)(b)(i) and not section 36(2)(b)(ii) of FOIA.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way their request for information had been handled. Primarily, they have asked the Commissioner to consider the DfE's refusal to disclose the impact assessments produced in connection with the Wave 1 free schools. They have though also invited the Commissioner to make a finding on the timeliness of the DfE's response to their information request.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

8. The requested information relates to free schools. According to the DfE's website, these are "all-ability state-funded schools set up in response to what local people say they want and need in order to improve education for children in their community."¹ The DfE has explained that the Wave 1 described in the request relates to free schools that were approved in the first year of the programme, 24 of which went on to open in September 2011.
9. Under section 9 of the Academies Act 2010 the Secretary of State has a duty to take *into account what the impact of establishing the additional school would be likely to be on maintained schools, Academies and institutions within the further education sector in the area in which the additional school is (or is proposed to be) situated*. Reflecting this duty, an impact assessment has been produced for each of the Wave 1 free schools. An impact assessment is included as part of a submission put before the Secretary of State in order to help him decide whether to enter into a funding agreement with a free school.
10. Officials tasked with completing an impact assessment will examine a variety of different information sources, including where available: information from departmental public sources, such as Ofsted reports and school performance tables; local authority data on subscription levels to local schools and parent choices; school level data; general demographic statistics; and any representations received about a free school proposal, including those collected by the free school group itself.
11. Section 36(2)(b)(i) and section 36(2)(c) of FOIA states information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the legislation –

[...]

(b) would, or would be likely to, inhibit –

(i) the free and frank provision of advice, or

¹ <http://www.education.gov.uk/schools/leadership/typesofschools/freeschools>

[...]

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

12. Breaking down the components of the exemption, the successful application of sections 36(2)(b)(i) and 36(2)(b)(c) by a public authority is dependent on its ability to demonstrate –
 - who was the qualified person that gave their opinion;
 - when an opinion was given by the qualified person and of what this opinion comprised; and
 - that the opinion of the qualified person was objectively reasonable in substance.
13. Where each of these conditions are found to be met for section 36(2)(b)(i) or section 36(2)(c), or both, it is then necessary to consider whether in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. If this is not the case, the Commissioner will find that the exemption does not apply.

The qualified person

14. The DfE has confirmed that Nick Gibb, the Minister of State for Schools, was consulted about the freedom of information request in his capacity as a qualified person. The Commissioner is satisfied that this in line with section 36(5)(a) of FOIA, which refers to who is meant by a qualified person in relation to information held by a government department.

The qualified person's opinion

15. The Commissioner has been provided with a copy of a declaration signed by the qualified person on 5 December 2012, which consents to the application of section 36 to the requested information. The Commissioner has also had sight of the submissions put before the qualified person, which included the withheld information, in addition to minutes recording a meeting with the qualified person in which the application of the exemption was discussed.
16. The submissions, which recommend refusing the request under section 36, and the minutes effectively document the opinion of the qualified person.

The reasonableness of the qualified person's opinion

17. The Commissioner considers that the test of whether an opinion is 'reasonable' is based on the plain meaning of the word. In effect, this means that an opinion will be considered reasonable if it is an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion and not necessarily the 'most' reasonable opinion.
18. For each part of sections 36(2)(b) and (c), there are two possible limbs of the exemption upon which the reasonable opinion could be based; firstly, the lower threshold which states that disclosure 'would be likely to' have an inhibitive or prejudicial effect or, secondly, the higher threshold which stipulates that disclosure 'would' be prejudicial or inhibiting.
19. In this case the qualified person has indicated that disclosure 'would be likely' to have an inhibitive or prejudicial effect on the factors described at section 36(2)(b)(i) and section 36(2)(c). The Commissioner has therefore considered his arguments on this basis, looking at each of the sections of section 36(2) being applied in turn.

Section 36(2)(b)(i)

20. In his decision notice involving the Foreign and Commonwealth Office (FS50421724)², the Commissioner perceived that the exemption provided by section 36(2)(b)(i) is about the processes that may be inhibited, rather than what is necessarily in the information. The issue is whether disclosure would, or would be likely to, inhibit the process of providing advice.
21. It is the view of the qualified person that disclosure would be likely to hinder ministers and officials from exploring, sometimes controversial, ideas and options. If officials thought that their advice, which presented the 'stark realities' of an impact assessment, was going to be published, the qualified person considers they would be more likely to pull their punches. This, in turn, would have the effect that ministers would only receive coded advice and therefore risk the possibility of poor decisions being made.
22. When considering whether the opinion outlined above can be considered reasonable, the Commissioner has acknowledged the evident importance that the authors of FOIA placed on the qualified person by

² http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50421724.ashx

making his or her opinion a condition of the application of the exemption. While this does not preclude the possibility of finding their opinion was unreasonable, it does mean that any opinion should be afforded due weight and not dismissed lightly.

23. Critically, the arguments being advanced by the qualified person must not only correspond with the relevant part of the exemption being cited but also correspond with the withheld information itself. The Commissioner is satisfied that these conditions are met in this case.
24. In coming to this conclusion, the Commissioner has had regard to the fact that an impact assessment provides a forum by which candid judgements can be made on the effect that a free school is likely to have on surrounding educational establishments, bearing in mind the status of these establishments themselves. Taking this into account, he finds reasonable the qualified person's opinion that there is a real risk that disclosure could lead to the prejudice described by section 36(2)(b)(i).

Section 36(2)(c)

25. In terms of section 36(2)(c) of FOIA, the Commissioner considers that the exemption will cover information where its disclosure would, or would be likely to, prejudice a public authority's ability to offer an effective public service or otherwise divert a public authority from meeting its wider objectives because of the disruption caused by disclosure. This agrees with the findings of the Information Tribunal in *McIntyre* (EA/2007/0068)³.
26. In the framework of this exemption, the qualified person has decided that the nature of the observations and judgements made in an impact assessment could have a significant effect on local schools. Specifically, there is a likely to be a detrimental effect on a school's morale if judgements on its weaknesses were made publicly available. This effect would be particularly acute because at the time of the request the local conditions were likely to be unsettled.
27. The Commissioner accepts that one purpose behind an impact assessment is to explore possible worse-case scenarios. This will include an analysis of how the viability of an existing school may be vulnerable

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

to the introduction of a free school owing to factors such as size and past performance. As mentioned above, much of the qualitative information will already be available to the public by other means, such as Ofsted reports. However, the Commissioner considers that the effect of placing extra attention on the weaknesses of a school, particularly in the context of a 'rival' school, is likely to lead to the demoralisation described by the DfE. The Commissioner has therefore found that the qualified person's argument is one that a reasonable person could hold and is relevant to the exception itself. Thus, section 36(2)(c) is also considered to be engaged.

28. It is therefore left for the Commissioner to consider the public interest test. When assessing the public interest, the Commissioner has taken on board the qualified person's opinion which says that disclosure of the requested information would be likely to have a detrimental effect. However, the Commissioner has formed his own view as to the severity of the detriment occurring.

The public interest test

29. The test to be applied is whether the public interest in maintaining the exemption outweighs that in disclosing the information. If the public interest is evenly balanced then the information should be released.

The public interest in favour of disclosure

30. The Commissioner understands that some weight must always be attached to the public interest in the general virtues of openness, transparency and accountability. In previous decisions the Commissioner has also recognised the particular public interest in understanding more about the decision-making connected with the free schools project. This feeds in to the strong argument concerning the importance of public oversight of education spending and its distribution.
31. For example, in his decision notice issued on FS50415927⁴ which similarly involved the DfE, the Commissioner made the following observation –

"28. The Commissioner considers that the introduction of the Free School policy is an area of considerable public debate. This policy

⁴ http://www.ico.gov.uk/~media/documents/decisionnotices/2012/fs_50415927.ashx

represents a change in national educational policy and also entails the expenditure of considerable sums of public money. The introduction of the Free Schools programme attracted a considerable amount of public, political and media attention and subsequent debate. The Commissioner therefore considers that there is a public interest in increasing the transparency of the programme and enabling the public to take part in the debate about the merit of the Free School policy.”

32. The nature of the requested information also means that it possesses particular significance in terms of the public interest. An impact assessment features as part of the reasoning behind the Secretary of State’s decision to enter into a funding agreement with a free school. As an instrument which seeks to measure the effect that a free school could have on other local education establishments, disclosure of an impact assessment would help the public better understand what factors were taken into account and, perhaps more importantly, how these factors were assessed in respect of deciding what, if any, detrimental effect could occur.

Public interest in favour of maintaining the exemption

33. The DfE has stated that the arguments advanced in order to demonstrate that section 36(2)(b)(i) and (c) are engaged also hold considerable weight for the purposes of the public interest test.
34. In relation to the first strand of its arguments, the DfE has described the effect that disclosure could have in fairly drastic terms. Specifically, it has referred to the possibility that disclosure would discourage an official from giving a complete picture of a free school’s impact, with the result that the Secretary of State would not be supported to exercise his duty under section 9 of the Academy Act. This potential effect must be considered in the knowledge that the free schools policy is not static, with applications relating to a new wave of free schools due to be considered in the future. The DfE therefore considers that the public interest in disclosure cannot match the public interest in ensuring that an important educational policy is allowed to proceed without disruption.
35. Regarding the second strand, the DfE has pointed out that the purpose of an impact assessment is to decide on, and evaluate, any weaknesses of the schools in the proximity of a free school site and the possibility that a local school may lose entrants to the free school.
36. The DfE has accepted that the analysis contained in an impact assessment is underpinned by information already publicly available, such as performance tables and Ofsted reports. However, it considers the more pertinent issue to be the format in which the information is contained.

37. In particular, it has noted that in the context of ministerial advice, there is a risk that an impact assessment is seen as labelling a school as a failure and criticising the standard of education which is being offered. This could result in reduced teacher morale, uncertainty about the school's future and possibly a significant movement of pupils away from what is perceived as the 'failing' school. Building on this point, the DfE has indicated that although they were not designed to have such an effect, the release of the impact assessments into the public domain could precipitate a naming and shaming exercise of what are thought to be weak schools. This would only compound the adverse effects on schools described above and, commensurately, reinforce the public interest in maintaining the exemption.

The balance of the public interest

38. It is clear that the public interest arguments in favour of disclosure are very strong in this case. This is a corollary of the undoubted importance that society places on schools and the education they provide.
39. The requested information relates to the way in which decisions are guided, and ultimately reached, in relation to the implementation of a new educational policy. This has far-reaching ramifications both on a local and national level. A key feature of a free school should be that there is a gap for a new education provider in a particular location. The disclosure of the impact assessments could therefore either assuage any doubts the public had concerning, or alternatively help stimulate public debate on, the reasons for entering into an agreement with a free school.
40. The Commissioner considers that the arguments in favour of maintaining the exemption suffer in comparison. As stated, the Commissioner has accepted that it is reasonable to conclude disclosure would be likely to result in the effects described by the DfE. However, he does not share with the DfE its view regarding the severity of the detriment that may arise through disclosure.
41. Firstly, related to section 36(2)(b)(i), the Commissioner has acknowledged that the disclosure of information, which features judgements and opinions, could inhibit the free and frank provision of advice. This was predicated on the knowledge that the free school policy is an ongoing concern. As such, while the requested information only relates to Wave 1 schools, disclosure could hinder contributions made to the consideration of future free school applications.
42. However, in line with the position previously endorsed by the Information Tribunal, the Commissioner believes that some reliance can be placed on officials to give robust and independent advice in the face

of a risk of publicity. Simply by virtue of the fact that a careful and objective assessment is required for an important decision should mean that an official is not easily deterred from performing his or her role, independent of extraneous considerations.

43. The Commissioner has also reminded himself of the status of the requested information itself in the context of the free schools policy. The application window for the creation of free schools is opened on a periodic basis, with each application process more commonly referred to as a 'wave'. These are separate phases for the purposes of considering whether a batch of applications for new free schools should be approved. At the time of the request, the Wave 1 application process had been completed.
44. The Commissioner recognises that the lessons learnt from each wave will feed into the next. As such, it would be incorrect to treat a wave as entirely independent from another, with entirely separate considerations. Nevertheless, the Commissioner feels that the timing of the request will have an important effect on the nature of the prejudice that could result through disclosure. There was not a strong need for a safe space related to the school applications in question at the time of the request. In particular, the Commissioner considers that any inhibiting effect will likely be more severe where an official thought that his or her assessment could be disclosed at a time when a decision had yet to be made on the application of the free school in question; a period of the process when an application was still being debated and therefore at its most contentious. This is not the case here. Instead, the request in this case was only made after the decisions regarding the Wave 1 free schools had been settled.
45. Therefore, while the Commissioner accepts that disclosure would be likely to have an inhibitive effect, he considers that the severity of this effect should not be overstated and is not of sufficient strength to outweigh the compelling arguments in favour of disclosure.
46. Secondly, the Commissioner recognises that any attention brought to bear on the weaknesses of a school is likely to have a negative effect on that organisation. This effect is likely to be magnified by the fact that the highlighting of underperformance is contained in ministerial advice, which may afford a judgement a greater vestige of legitimacy.
47. Yet, the Commissioner has also borne in mind the fact that the analysis contained in an impact assessment is dependent to an important extent on publicly available information, such as Ofsted reports. This in itself does not mean that a member of the public could necessarily second-guess the judgements arrived at in an impact assessment. However, it does mean that a member of the public could take steps to research

how schools were performing, which in the Commissioner's view would lessen the effects of any prejudice.

48. Furthermore, to the Commissioner's mind, it is reasonable to assume that any school included in an impact assessment would already have knowledge of its weaknesses as a result of both internal and external reviews of performance. Therefore, the substantive issues stated in an impact assessment should not come as a surprise. For this reason, the Commissioner considers there is no evidence on which to conclude that disclosure would further undermine a school's morale to a meaningful extent. The Commissioner therefore believes these arguments relating to section 36(2)(c) are significant but not very strong arguments in favour of maintaining the exemption.
49. Equally, even if it was found that a school was not familiar with the issues raised in an assessment, the Commissioner does not consider this would advance the case for withholding the information. Instead, he considers that staff of a school would have a legitimate expectation that this information should be disclosed, on the basis that it demonstrates the reasoning behind a decision that could come to affect them. This, again, only serves to strengthen the public interest in disclosure.
50. It is for the reasons outlined above that the Commissioner has found that the public interest favours disclosure. In his view the public interest in disclosure is very strong. For sections 36(2)(b)(i) and (c) the public interest in maintaining each of the exemptions does not outweigh the public interest in disclosure.
51. However, in finding that section 36(2) of FOIA has been misapplied, the Commissioner has also been mindful of his role as regulator of both FOIA and the Data Protection Act 1998 (DPA). Where the inappropriate disclosure of personal data is potentially at stake, the Commissioner may take a pro-active approach and apply an exemption on behalf of a public authority.
52. In this case it has been found that the impact assessment produced for Eden Primary School includes the name of a particular parent (page 11). The Commissioner considers that the disclosure of this name would be in contravention of the first data protection principle because it would be unfair to the data subject. It therefore follows that this information would be exempt information under section 40(2) (third party personal data) of FOIA. He therefore requires the DfE to disclose the requested information with the exception of the name mentioned above.

Procedural issues

53. Section 17(1) states that any public authority which, in relation to a request for information, is relying to any extent on an exemption contained II of FOIA, must issue a refusal notice specifying this fact within the statutory period of 20 working days.
54. The Commissioner has found that the DfE failed to issue a refusal notice within this timeframe and has therefore found it in breach of section 17(1) of FOIA.

Right of appeal

55. 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

56. 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.
57. 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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