

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 January 2014

**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 copies of all email correspondence between anyone purporting to act on behalf of two named companies or a named Trust between 1 October 2012 and 31 May 2013. The Department for Education (DfE) provided some information to the complainant but made redactions under section 40(2) and section 43(2) of the Freedom of Information Act 2000 (FOIA). It withheld some information in full under section 41 FOIA.
2. The Commissioner's decision is that the DfE has correctly applied section 40(2), section 41 and section 43(2) FOIA in this case.
3. The Commissioner requires no steps to be taken.

### Request and response

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4. On 14 June 2013 the complainant requested information of the following description:  
  
"...copies of all emails that passed between the DfE and [named individual] and/or [named individual] and/or [named individual] or

anyone else purporting to act for [named company], [named company] or [named Trust] from 1st October 2012 to 31 May 2013."

5. On 4 July 2013 the DfE responded. The DfE provided some information but made redactions under section 40(2) and section 43(2) FOIA. It withheld some information in full under section 41 FOIA.
6. The complainant requested an internal review on 5 July 2013. The DfE wrote to the complainant with the result of the internal review on 26 July 2013. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 29 July 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether section 40(2), section 41 and section 43(2) FOIA have been correctly applied in this case.

### **Background information**

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9. The DfE has explained that the requested correspondence relates to a Sponsor Capacity Fund application. It said that this fund is focused on supporting new organisations, including high performing academies, as well as existing academy sponsors to develop their Trusts and help build their capacity to take on underperforming schools.

### **Reasons for decision**

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#### **Section 40(2)**

10. Section 40(2) FOIA provides an exemption for information that constitutes the personal data of third parties:

*"Any information to which a request for information relates is also exempt information if—*

*(a) it constitutes personal data which do not fall within subsection (1), and*

*(b) either the first or the second condition below is satisfied."*

Section 40(3)(a)(i) FOIA states that:

*"The first condition is-*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress),"*

11. The DfE explained that it had made redactions to the names and contact details of junior civil servants as well as the names and contact details of individuals external to the DfE under section 40(2) FOIA. Upon considering the redacted information the Commissioner considers that it would be personal data from which the data subjects would be identifiable.
12. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) FOIA are met. The relevant condition in this case is at section 40(3)(a)(i) FOIA, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.

### **Likely expectation of the data subject**

13. The DfE explained that the redacted information entails personal information relating to DfE staff, and whilst it is important to be clear that civil servants do not have an absolute right to anonymity it considers that more junior officials would not expect their names and contact details to be disclosed into the public domain.
14. It went on to argue that data subjects external to the DfE, similarly would not have an expectation that their names and contact details

would be disclosed into the public domain. It said that this was seen to be particularly the case where names were linked to correspondence within its whistle blowing process.

### **Would disclosure cause damage and distress to the data subject**

15. The DfE argued that disclosure would cause damage and distress to the individual who provided the DfE with information within its whistleblowing process. The data subject concerned has confirmed that they do not wish information shared within this process to be disclosed into the public domain.

### **The legitimate public interest**

16. The Commissioner considers that there is a legitimate public interest in transparency and accountability relating to the issue of Academy schools and the expenditure of public money within this programme. However the DfE argued that disclosure of the redacted names and contact details would go little way to meeting any legitimate public interest in this case.
17. The Commissioner considers that the DfE has disclosed a significant amount of information to the complainant in response to this request. He considers that disclosure of the redacted names and contact details would not meet any legitimate public interest in any further substantive way. The Commissioner accepts that the data subjects would have a reasonable expectation that their names and contact details would not be disclosed into the public domain and that for some of the data subjects disclosure would cause damage and distress due to the nature of information to which their identity would be linked to. The Commissioner therefore considers that the interests of the data subjects outweigh the legitimate public interest in this case and this information should therefore remain redacted.

### **Section 41**

18. Section 41(1) is an absolute exemption under the FOIA and provides that information is exempt from disclosure if it was obtained by the public authority holding it from any other person (including another public authority) and the disclosure of the information to the public by the public authority would constitute an actionable breach of confidence.

19. Therefore, in order for the exemption to be engaged, the relevant information must meet the following two criteria:

Was the information obtained by the public authority from a third party? Would the disclosure of the information constitute an actionable breach of confidence?

20. The DfE has applied the section 41 exemption to information it has received from a third party within its whistleblowing process. This is therefore information which was provided to the DfE by a third party. However, for the exemption to be engaged disclosure of the withheld information must also constitute an actionable breach of confidence. In the Commissioner's view a breach will be actionable if:

- i. The information has the necessary quality of confidence. (Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
- ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
- iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.

21. The DfE reiterated that the information that has been withheld under section 41 relates to whistleblowing. It said that this information needs to be withheld to protect the confidentiality of the individual involved. It contacted the individual who has confirmed that the information was provided to the DfE in confidence. It said that disclosure of such information could deter members of the public from reporting any suspicions within the whistleblowing process in the future which would be detrimental to the DfE.

22. After viewing the withheld information and taking into account the submissions made by the DfE, the Commissioner considers that the information withheld is not trivial and is not publicly available. This is not considered to be trivial information to the third party involved in the correspondence.

23. The DfE has argued that there was an explicit duty of confidence in this case which has been confirmed by the confider. After viewing the withheld information and again taking into account the submissions made by the DfE, the Commissioner does consider that there would also

have been an implied duty of confidence at the time the information was provided due to the nature of the whistleblowing process.

24. The Commissioner accepts that if the information were disclosed it would cause detriment to the DfE if individuals were deterred from raising issues within its whistleblowing process in the future.
25. Finally the Commissioner has considered whether the DfE could rely on a public interest defence so that a breach of confidence would not be actionable. After viewing the withheld information and taking into account the fact that should this information go into the public domain it would threaten the confidence that the public has in the DfE's whistleblowing processes and procedures, he does not consider that there is an exceptional public interest in disclosure which would override the duty of confidence in this case.
26. The Commissioner therefore considers that section 41 FOIA was correctly applied to the withheld information in this case.

### **Section 43(2)**

27. Section 43(2) FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
28. The DfE has explained that it has redacted information relating to a company's successful bid for the Sponsor Capacity Fund (SCF). It said that the SCF is a competitive bidding process and it would be likely to prejudice the company's commercial interests if full details of their bid, including the commercial and financial details they provided, were disclosed into the public domain. It also said that the DfE's commercial interests would be likely to be prejudiced, if it disclosed sensitive commercial information into the public domain it may deter other bids within this programme in the future.
29. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the named company's commercial interests.
30. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

31. The Commissioner considers that the company submitted a successful bid within a competitive bidding process. The company is therefore competing with other companies to secure a successful bid and the DfE want to attract wide ranging quality bids to make a success of its overall SCF programme. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.
32. The Commissioner has gone on to first consider how any prejudice to the commercial interests of the successful bidder would be likely to be caused by the disclosure of the requested information.
33. The DfE has explained that if the redacted information were disclosed the company's competitors would be likely to use its financial data, budgets and proposed spend as a template for their own bids, thus putting the company in question at a commercial disadvantage as well as having an impact on the competitive nature and bidding rounds associated with the SCF. The DfE also believes that disclosing such information is likely to deter other potential SCF bidders from approaching the DfE with their proposals, for fear of such sensitive commercial and financial information being made public.
34. In this case the DfE has contacted the company to obtain its views on disclosure and whether it considers the prejudice would be likely to occur. The DfE has explained to the company that it considers that disclosure of the redacted information would be likely to prejudice the company's commercial interests. The company has confirmed that it would not want commercially sensitive information to be disclosed into the public domain.
35. The Commissioner must determine whether the prejudice claimed is "real, actual or of substance". In this case, having viewed a sample of the withheld information and the DfE's submissions contained in the confidential annex attached to this Notice, the Commissioner is satisfied the prejudice claimed is real, actual and of substance. The Commissioner acknowledges that the DfE has not withheld the successful bid in its entirety but has limited redactions to particularly commercially sensitive information relating to the company's financial data, budgets and proposed spend. The Commissioner considers that there is a real risk that the company's competitors would use this information to its commercial disadvantage and that future bidders may be deterred from the SCF programme if very sensitive commercial information of this nature could potentially be disclosed into the public domain. The DfE has provided the Commissioner with further supporting arguments in support of its position within the confidential annex to this Notice.

36. The Commissioner therefore considers that section 43(2) FOIA was correctly engaged in this case.
37. As section 43(2) is a qualified exemption, the Commissioner has gone on to consider the public interest arguments in this case.

### **Public interest arguments in favour of disclosing the requested Information**

38. The Commissioner considers that there is a public interest in the DfE operating in an open and transparent way and that the DfE is held accountable for the decisions it makes. The issue of Academy schools is a sensitive one in relation to which there is strong public opinion and interest.

### **Public interest arguments in favour of maintaining the exemption**

39. The DfE has explained that as disclosure would be likely to deter sponsors from bidding for the SCF in the future, for fear of their commercial data being made public, this in turn would be likely to have a negative impact on this DfE programme, which it argued is not in the public interest.

### **Balance of the public interest**

40. The Commissioner considers that there is a public interest in openness and transparency, and in accountability in relation to the SCF programme. The Commissioner also considers that there is a public interest in disclosure of information which will inform the public about how decisions are made. The Commissioner acknowledges that the DfE has provided the complainant with some information, which goes some way to meeting the public interest arguments in favour of disclosure.
41. The Commissioner does however consider that there is a strong public interest in not disclosing information which would be likely to commercially disadvantage private companies nor disclosing information which would be likely to have a negative impact on the overall SCF programme.
42. On balance, the Commissioner considers in this case that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in favour of maintaining the exemption.



## Right of appeal

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43. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

44. 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.
45. 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 .....**

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**