

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 August 2014

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

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between the Department for Education (DfE) and Patrick Kelly, the now retired Archbishop of Liverpool, about the provision of education in the Archdiocese and information recording the outcomes of this correspondence. The DfE confirmed that it held information covered by the request but considered this was exempt information under sections 36(2)(b) and (c) (prejudice to the effective conduct of public affairs) of FOIA, finding that the balance of the public interest favoured maintaining the exemption. During the course of the Commissioner's investigation the DfE also introduced the exemption set out at section 41 (information provided in confidence) of FOIA as a further ground for withholding three items of correspondence included in the requested information.
2. The Commissioner's decision is that items 1, 2 and 3 of the requested information engage section 36(2)(b) and that on the balance of the public interest does favour maintaining the exemption. In light of this finding, the Commissioner has not had to consider the separate application of section 41 of FOIA. With regard to items 4 and 5, the Commissioner has also decided that the exemptions in section 36(2)(b) and/or (c) are engaged but that in all the circumstances the public interest favours disclosure. He therefore requires the DfE to disclose this

information with the exception of a limited amount of personal data that is considered to be exempt under section 40(2) (third party personal data) of FOIA.

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 5 August 2013 the DfE received a request from the complainant that asked for information in the following terms:

Shortly before Archbishop Kelly retired there was some correspondence between the DfE and Archbishop Patrick. This focused on the Archbishop's knowledge of his schools and the support he could receive if he increased the number [sic] Academies operating in the Archdiocese. Mr. Gove [Secretary of State for Education] was also involved in this process. I would like to request copies of all this correspondence and the eventual outcomes. I believe this is in the public interest and make the request under the Freedom of Information Act.

5. The DfE responded on 3 September 2013 and confirmed that it held information covered by the scope of the request. However, the DfE considered the information was subject to the exemptions to disclosure provided by sections 36(2)(b) and (c) of FOIA. With regard to the public interest test attached to the application of section 36(2), the DfE found that on balance the public interest favoured maintaining the exemption.
6. By way of a letter received on 30 October 2013, the complainant asked the DfE to reconsider its refusal of the request. He referred to the contribution the information would make to the local education debate and the corresponding strength of the public interest in disclosure.
7. In view of the complainant's dissatisfaction, the DfE carried out an internal review into its handling of the request. The outcome of the review, which was provided to the complainant on 27 November 2013, upheld the DfE's original position.

Scope of the case

8. The complainant contacted the Commissioner on 12 March 2014 to complain about the DfE's refusal to disclose the information he had requested. This issue therefore forms the scope of the Commissioner's decision outlined below.

Reasons for decision

9. The withheld information identified by the DfE comprises the following categories of information: items 1 – 3) correspondence between the DfE and Archbishop Kelly; item 4) school performance information; and item 5) notes of a meeting between the DfE and the Archdiocese of Liverpool officials. The DfE considers that one or more of the limbs of section 36(2) covers all of these categories of information. Furthermore, having revisited the request at the invitation of the Commissioner, the DfE also decided that information captured in items 1 - 3 would also be exempt information under section 41 of FOIA.
10. In terms of the scope of the information considered, the DfE has explained that it interpreted "eventual outcomes" in the request as meaning discussions and meetings between interested parties that were a direct result of the correspondence referred to in the request. The Commissioner considers this was a reasonable interpretation and his starting point was therefore to consider the DfE's application of the exemptions cited in section 36(2) of FOIA to the withheld information.

Sections 36(2)(b)(i)(ii) and (c) – prejudice to the effective conduct of public affairs

11. The DfE has variously applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to the requested information. These exemptions state that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:

(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

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

12. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be engaged where a public authority has consulted with a relevant qualified person and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure. To find that an exemption in section 36(2) is engaged, the Commissioner must be satisfied not only that the qualified person gave an opinion on the likelihood of prejudice occurring but also that the opinion was reasonable in the circumstances. In other words, the qualified person must have reasonably concluded that there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against.
13. With regard to sections 36(2)(b)(i) and (ii), it is common ground that it is the process that may be inhibited rather than what it is necessarily contained within the requested information itself. The vital question is whether disclosure could inhibit the process of providing advice or exchanging views in the future. Section 36(2)(c), on the other hand, refers to the prejudice that may *otherwise* be produced through the release of requested information. If section 36(2)(c) is used in conjunction with any other exemption in section 36(2), the prejudice envisaged must be different to that covered by the other exemption. It has previously been found by different constituted Information Tribunals that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority's ability to offer an effective public service.
14. On 28 August 2013 the DfE contacted the Parliamentary Under-Secretary of State for Schools to ask for her opinion on the application of the exemptions in section 36(2) of FOIA. The Under-Secretary's agreement to the application of the exemptions was communicated the following day.
15. Section 36(5) of FOIA describes what is meant by a 'qualified person' for the purposes of the legislation; with section 36(5)(a) stating that in relation to information held by a government department in the charge of a Minister of the Crown, a qualified person means any Minister of the Crown. The Commissioner is satisfied that the Under-Secretary was a qualified person according to this description. Furthermore, the DfE has provided evidence recording that the qualified person had agreed with the application of the exemption. The next step is therefore to consider

whether the qualified person's opinion with regard to sections 36(2)(b) and (c) was reasonable.

16. In seeking the advice of the qualified person, the DfE prepared submissions that quoted the request, set out the relevant background to the requested information, explained the operation of the exemptions, provided an analysis of the relevant arguments and gave an overall recommendation for the application of the exemptions in respect of the five items covered by the request (which the DfE informed the qualified person could be produced for inspection if required):
 - Item 1 (correspondence) – section 36(2)(b)(i)
 - Item 2 (correspondence) – section 36 (2)(b)(ii)
 - Item 3 (correspondence) – section 36(2)(b)(ii)
 - Item 4 (performance information) – section 36(2)(c)
 - Item 5 (note of meeting) – sections 36(2)(b)(i)(ii) and (c)
17. By agreeing to the application of the exemptions, the qualified person effectively subscribed to the arguments included in the submissions – accepting that it *would be likely* the prejudice described in sections 36(2)(b) and (c) would occur through disclosure. While the level of prejudice designated by '*would be likely*' is lower than the alternative threshold '*would*' prejudice, it nevertheless still requires that there is a real and significant risk of prejudice occurring.
18. In respect of each of the section 36(2)(b) limbs, the submissions initially spoke of the importance of allowing Ministers and officials space to develop their thinking and explore available options with relevant stakeholders and partners. It was considered that the items 1 – 3 represented a free and frank exchange of views and advice, the disclosure of which might have an inhibiting effect because it would lead others in the future to conclude that their correspondence including such views would also be released.
19. With reference to item 5, the qualified person agreed that disclosure would have the effect of inhibiting Ministers and officials from discussing (sometimes controversial) issues and options due to the fear that information about them could be placed in the public domain. This could, in turn, distort or restrain dialogue which would lead to a reduction in the quality and range of advice available to Ministers.

20. Regarding the possible application of section 36(2)(c) of FOIA, the submissions explained that the exemption was intended to cover residual situations that could not have been foreseen but where it is necessary to withhold information in the interests of good government. The arguments presented for finding the exemption was engaged were two-fold. Firstly, disclosure could deter potential academy sponsors and therefore disrupt the academies programme. Secondly, disclosure could have a disruptive impact on the education providers referred to in the information.
21. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. As the Commissioner has repeatedly acknowledged in previous decisions, the critical issue is whether the arguments being advanced by the qualified person not only correspond with the factors described in the exemption but also correspond with the withheld information itself. The Commissioner is satisfied that in this case they do.
22. The Commissioner considers it is appropriate here to consider the purpose for which the information was created. In the case of items 1 – 3, the Commissioner accepts that the correspondence constitutes a candid exchange of advice and views in respect of which it can be assumed there was an implicit expectation of confidence. On this basis the Commissioner considers the qualified person's opinion, which found that disclosure would be likely to deter individuals from being as forthright with their views in the future, to be reasonable.
23. The Commissioner is also prepared to accept that disclosing a note of a meeting on a potentially sensitive education area (item 5) could make contributors to future meetings more wary of airing controversial views and options for fear of embarrassment or public criticism.
24. With regard to the opinion given in relation to items 4 and 5, to which section 36(2)(c) has been applied, the Commissioner considers that there is a real and significant risk that disclosure would be detrimental to the smooth implementation of the government's policy on education in schools. The Commissioner accepts that the qualified person could reasonably regard that as prejudicing the effective conduct of public affairs.
25. For these reasons, the Commissioner has found that each of the cited exemptions in section 36(2) is engaged. He has therefore gone on to consider the balance of the public interest test in respect of the five items of withheld information. When deciding on the strength of the

arguments for and against disclosure, it is acknowledged that the qualified person's opinion should be afforded a degree of weight befitting their senior position. However, in weighing the public interest, the Commissioner must consider the severity of the prejudice claimed.

Public interest arguments in favour of disclosure

26. The complainant has argued that there is a strong public interest in the disclosure of information relating to an education policy that, in his view, marks a radical departure from the previous programme for education. Ultimately, the relationship between the Catholic Church and the DfE in the context of education services and the decisions made arising from the education strategy adopted will have a significant effect on families in the Archdiocese. In the complainant's view, Ministers and advisers should be sufficiently strong to make decisions in the view of the public, particularly when the importance of the issues to the public is taken into account.
27. The DfE has also acknowledged the benefits of open policy making, with greater transparency potentially leading to increased trust and engagement between citizens and government. Feeding into this is the awareness that disclosure could provide confidence that any decisions made were based on a sound and objective analysis of the relevant evidence. There is also an acceptance that disclosure of some of the information may inform and encourage public debate on education in the Archdiocese and the role of the Catholic Church.

Public interest arguments in favour of maintaining the exemption

28. The DfE has provided a number of arguments to support its application of the exemptions, relating them in some cases to specific items of withheld information. All of these have been considered by the Commissioner as relevant, although for the present purposes he has felt it appropriate to summarise the main thrust of the arguments:
 - Disclosure would not significantly add to the quality of the public debate on education provision but would instead risk jeopardising the possibility of the DfE having unfettered communications with external stakeholders. This effect, in the DfE's view, is particularly pertinent in connection with items 1 – 3.
 - Disclosure, particularly when issues were still live and under active consideration, could end up stifling the possibility that Ministers were able to think through the implications of particular options. It

may therefore result in officials closing off the analysis of potentially better options for fear of the public scrutiny that would follow the release of the information.

- The decision-making process may not be properly recorded to avoid creating information which is disclosable.

Balance of the public interest

29. The Commissioner considers that a distinction can and should be drawn in this case between the information in items 1 – 3 and the information contained in items 4 and 5.
30. In the case of the former, the Commissioner agrees with the DfE that disclosure would not add anything particularly meaningful to the important debate on education in the Archdiocese. This is not to say that the information is devoid of interest. However, in the context of the public interest test, the Commissioner considers that the purpose of the exercise is to decide whether the value the information has to the public is sufficient to justify disclosure in the face of the likely prejudice that the Commissioner has accepted may arise. In his view, it is not.
31. The information itself represents a frank exchange of views that, as previously mentioned, the Commissioner accepts took place in the expectation that it would be kept confidential. Significantly, the Commissioner does not consider this information would allow the public to gain further insight into what was being discussed or proposed with regard to education provision in the Archdiocese. The Commissioner has therefore concluded that in all the circumstances the public interest in disclosure is outweighed by the strength of the arguments in favour of maintaining the exemption.
32. The factors leading to the finding on items 1 – 3 can, however, be contrasted with those relating to items 4 and 5. This latter information directly relates to discussions about the management of education in the local area. In the Commissioner's view, this greatly strengthens the public interest in disclosure.
33. The Commissioner accepts that there will be occasions when a public authority will require safe space in which to explore potential options to help improve performance in education. While it is acknowledged that the investment that the public has in education supports the need for transparency in decision-making, it also reinforces the need for officials to have room to develop ideas in private because of the likely scrutiny and potential criticism that disclosure of incomplete considerations might bring.

34. The Commissioner considers a critical factor in this case to be timing. Generally speaking, there is a direct correlation between the sensitivity of information and the age of the information at the date a request was made. Information is more likely to be contentious when the issue to which it relates is still under active debate and consideration.
35. In finding that the exemptions in section 36(2) are engaged, the Commissioner has accepted that disclosure would be likely to have a harmful effect to some degree. The DfE has argued that at the time of the request the issues featured in the information remained live, which would increase the disruption caused by disclosure. However, the Commissioner considers that the severity of the prejudice being claimed has been exaggerated. In this regard, he notes that items 4 and 5 record events as they stood over a year before the request was made. It is also noticeable that some of the performance data referred to in item 4 would already have been publicly available at the time the request was made.
36. The Commissioner understands that settled decisions had yet to be made on the management of the performance issues outlined in the information. He also considers however that the wider education picture would have moved on as a result of the elapsing of another school year. Consequently, while the Commissioner has been prepared to accept that disclosure is likely to have some degree of inhibitive or detrimental effect, he has decided that the severity of this effect does not provide sufficient justification for withholding the information in the face of the strong public interest in disclosure. The Commissioner has also not placed any significant weight on the possibility that disclosure could lead to poorer record keeping in the future. The Commissioner is generally sceptical of such arguments. He has not been presented with any evidence that would lead him to change his view in this case.
37. However, in finding that the public interest favours disclosure in respect of items 4 and 5, the Commissioner has also been mindful of his role as regulator of both FOIA and the Data Protection Act 1998 (DPA). Where there is the possibility that an inappropriate disclosure of personal data may take place, the Commissioner considers it appropriate to take a proactive approach and apply an exemption on behalf of a public authority. Prior to ordering disclosure the Commissioner has considered whether any of the information in items 4 or 5 constitutes personal data which should be redacted to ensure compliance with the DPA.
38. Item 5 makes reference to a member of staff in respect of their current employment status at a school (the relevant extract is quoted in the confidential annex appended to his notice). Although the name of the

individual is not included, the Commissioner considers that they could be identified from and linked to the information. This would therefore be their personal data. The Commissioner further considers that the disclosure of the information would be in contravention of the first data protection principle because it would be unfair to the data subject. The effect of this is that the 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 this limited amount of personal data.

Right of appeal

39. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

40. 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.

41. 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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Wilmslow
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SK9 5AF