

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

### **Decision notice**

**Date:** 16 September 2014

**Public Authority:** The Office for Standards in Education,  
Children's Services and Skills (Ofsted)

**Address:** Aviation House  
125 Kingsway  
London  
WC2B 6SE

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

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1. The complainant has requested a particular version of a report prepared following Ofsted's inspection of Oldfield School in Bath. Ofsted considered that the relevant information it held engaged the regulatory function (section 31), the audit function (section 33) and in part the third party personal data (section 40(2)) exemptions in FOIA. With regard to sections 31 and 33, Ofsted considered the public interest test and found that on balance the public interest favoured maintaining the exemptions. The Commissioner's decision is that section 33 is engaged and that the public interest favours maintaining the exemption. He has not therefore had to consider the application of sections 31 or 40(2) of FOIA. The Commissioner does not require Ofsted to take any steps as a result of this notice.

#### **Request and response**

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2. On 25 February 2014 the complainant wrote to Ofsted and quoted a story in the Bath Chronicle that referred to an unpublished report which was critical of the running of Oldfield School in Bath<sup>1</sup>. The complainant requested a copy of that report.

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<sup>1</sup> <http://www.bathchronicle.co.uk/Pressure-Ofsted-release-Oldfield-School-report/story-20657852-detail/story.html>

3. Ofsted responded on 20 March 2014 and confirmed that it held a number of documents relating to the December 2013 inspection of Oldfield School. However, it considered this information was covered by the regulatory function and audit function exemptions that are set out at sections 31 and 33 of FOIA respectively. Furthermore, with regard to the public interest test attached to each of the exemptions, it decided that the balance of the public interest favoured withholding the information.
4. The complainant contacted Ofsted again on the same day its response was received and asked it to reconsider its handling of the request. In particular, he challenged Ofsted's argument that disclosure would impair the Department for Education (DfE)'s ability to discharge its regulatory functions. Furthermore, he made reference to a leaked version of the report and argued that its formal release would help encourage informed public debate.
5. Ofsted carried out an internal review in light of the complainant's dissatisfaction, the outcome of which was provided to the complainant on 20 May 2014. The reviewer upheld the original application of sections 31 and 33 of FOIA. He also found that the personal data exemption (section 40) also applied to some parts of the requested information.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 21 May 2014 to complain about Ofsted's refusal to provide information covered by his request. This issue therefore forms the focus of the decision notice.
7. It is noted that a document purported to be the requested version of the inspection report has been leaked into the public domain. It is the complainant's view that Ofsted should officially sanction the release of this information so that its contents can be reported and openly discussed.

### **Reasons for decision**

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#### **Background**

8. In 2012 Ofsted rated the overall effectiveness of Oldfield School as Outstanding. On 11 – 13 December 2013 Ofsted conducted an inspection of Oldfield School under section 8 of the Education Act 2005.

The corresponding section 8 monitoring letter setting out Ofsted's findings was dated 11 February 2014 and according to Ofsted's website published on 13 February 2014<sup>2</sup>. This letter explained that the inspection had been carried out because the Chief Inspector was concerned about the number of complaints and allegations made to Ofsted about the effectiveness of safeguarding arrangements at the school.

9. Ofsted concluded that overall Oldfield School's safeguarding arrangements met requirements. However, among other points, Ofsted did find that the "school's governing body has too little understanding of its statutory responsibilities. Its members are over reliant on information provided by the headteacher and it does not ensure that complaints, grievance and whistleblowing procedures are sufficiently robust to enable stakeholders to have confidence that their concerns will be handled in a proper manner." Ofsted set out the priority areas for further improvement, which included undertaking an external review of governance in conjunction with the DfE.
10. In the Bath Chronicle's article referred to by the complainant it was suggested that an alternative report arising from the inspection had been produced that was far more critical of Oldfield School's management. Ofsted has clarified that the document subject to the request is not an official publication of Ofsted or a reflection of any sanctioned judgement but only a draft document that may have only been circulated at an early stage of the reporting process.
11. Over 1000 individuals have petitioned for previously undisclosed information relating to the inspection to be released, which Ofsted considers is guided by the mistaken belief that the information represents an alternative report. Prior to the request being made, information that was claimed to be the 'alternative' report was leaked and a copy placed in the public domain.

### **Section 33 – audit functions**

12. Ofsted considers that all of the requested information engages section 33(1)(b) of FOIA by virtue of section 33(2).
13. Section 33(1)(b) states that the exemption applies to any public authority which has functions in relation to –

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<sup>2</sup> <http://www.ofsted.gov.uk/inspection-reports/find-inspection-report/provider/ELS/136483>

*the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.*

14. Section 33(1) must be read in conjunction with section 33(2) of FOIA. This provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1). As is the case for all prejudice based exemptions, a public authority must decide on the likelihood of the prejudice occurring – either prejudice 'would' occur (a more than 50% chance) or 'would be likely' to occur (less than a 50% chance but nevertheless a real and significant risk). The exemption is also qualified by the public interest test.
15. The first step when considering the application of the exemption is to establish whether Ofsted has the audit functions described in section 33(1)(b). In the Commissioner's guidance on section 33<sup>3</sup> he notes that the expression "economy, efficiency and effectiveness" is not clearly defined. Nevertheless, he considered that it will encompass information about inspections of the use of resources such as staff and premises, as well as the standard of services provided by the authority being audited.
16. Section 5 of the Education Act 2005 states that it is the general duty of the Chief Inspector, when conducting an inspection under this section, to report on various performance indicators of a school. These include, for example, (a) the quality of the education provided in the school, (c) the educational standards achieved in the school, and (d) the quality of the leadership in and management of the school, including whether the financial resources made available to the school are managed effectively. Section 8 of the Education Act 2005 provides for the possibility of inspections taking place in other circumstances, with section 8(1) permitting the Chief Inspector to decide to inspect a school even where he is not required to do so.
17. Ofsted's published inspection letter (11 February 2014) confirms that the inspection was carried out under section 8 of the Education Act 2005 on the basis of concerns made about the safeguarding arrangements at Oldfield. The Commissioner is satisfied that pursuant to the Education Act 2005 Ofsted had a function in relation to the examination of the factors described in section 33(1)(b) of FOIA. The Commissioner's next

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<sup>3</sup>[http://ico.org.uk/for\\_organisations/guidance\\_index/~/media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/public-audit-functions-s33-foi-guidance.pdf](http://ico.org.uk/for_organisations/guidance_index/~/media/documents/library/Freedom_of_Information/Detailed_specialist_guides/public-audit-functions-s33-foi-guidance.pdf)

step is therefore to consider whether disclosure would, or would be likely to, have a prejudicial effect on the functions performed by Ofsted.

18. In his guidance the Commissioner considered that prejudice in the context of section 33 may take different forms. One possibility is that a premature disclosure could affect the behaviour of the organisation being audited. Alternatively, a public authority could point to a more general prejudice to audit functions where, for example, disclosure was about specific audit techniques that were not already known to the public. Finally, the Commissioner recognised that there may be occasions when an authority might wish to argue that disclosure would, or would be likely to, discourage co-operation with the auditor in the future, thus prejudicing the audit function.
19. Ofsted has argued that its purpose from an audit point of view is to make evidence-based judgements. It considers that the audit function cannot properly operate if its proper findings can be readily undermined or called into question by the release of earlier reporting that does not accurately represent Ofsted's fully developed views. This will particularly be the case where the related issues are still being resolved. Ofsted has also argued that members of the public, principally parents and pupils, would be confused by the differences in the separate publications. In Ofsted's view there is "no doubt" that disclosure would have a detrimental effect. The Commissioner has found it reasonable to interpret "no doubt" as meaning Ofsted considers that the prejudice described 'would' occur.
20. When considering whether the exemption is engaged, only prejudice relating to the audit process itself will be relevant. The Commissioner considers that the confusion of parents and pupils, while unhelpful, is not demonstrative of a harmful effect on an audit process. The Commissioner does accept however that Ofsted's argument relating to the harm arising from the early reporting of findings is one that is relevant to the exemption.
21. In this case the consequences of disclosure on the audit process are considered to be two-fold. Firstly, Ofsted has explained that issues related to the school had not been resolved by the time of the request. This is demonstrated in the inspection letter itself, which marked priority areas for improvement. It is contended that disclosure at that stage of the process would affect the behaviour of the school and make officials more reluctant to co-operate.
22. The Commissioner has previously been sceptical of the argument that disclosure would discourage participants from working with Ofsted as part of an ongoing review process. He considered that members of staff would appreciate that inspectors' observations may be of both a positive

and negative nature and considered it unlikely that the level of co-operation of a school would be altered significantly as a result. The Commissioner has also previously acknowledged that, while it might be easier to inspect a co-operative school, the inspection process is based on statute and does not rely on acquiescence (this issue is referred to in more detail below). With regard to the circumstances of this case, the Commissioner has not been presented with evidence that would lead him to change his view and agree that disclosure would have a prejudicial effect.

23. Secondly, it is considered that disclosure would have a wider effect on the supply of information provided to Ofsted. At paragraph 24 of the Commissioner's guidance on the exemption it states that there are occasions when "public authorities carrying out audits and inspections within the definition of s33 receive valuable information from others which them to carry out those functions." The guidance goes on say that in this situation "an authority might wish to argue that disclosure of the information would discourage co-operation with the auditor in the future, thus prejudicing the audit function."
24. The Commissioner considers that Ofsted's audit function can only be effective where honest and candid views are received from individuals involved with, or connected to, the running of a school. He accepts that an individual would be less forthright with their views if they believed that any information provided could be disclosed in a version of a report that was incomplete, or inaccurate, or both.
25. Where a public authority has powers to compel an organisation to engage with its audit activity, the Commissioner considers that this could potentially offset any disruption to the public authority's audit functions. This is because it could in principle oblige an organisation to produce the relevant information it requires. The Commissioner notes that the Education Act 2005 does contain various powers relating to the inspection of schools, which includes a right to inspect and take copies of records that the Chief Inspector considers relevant to the discharge of his functions.
26. Notwithstanding the effect of these powers, however, the Commissioner considers that Ofsted's effectiveness will frequently be dependent on information voluntarily provided by individuals. The Commissioner considers it is this flow of information that would be jeopardized by disclosure. On this analysis the Commissioner is satisfied there is a strong likelihood of prejudice occurring, which equates to more than a 50% chance. He has therefore decided that section 33(1)(b) by virtue of section 33(2) is engaged.

27. In coming to this decision, the Commissioner has acknowledged but placed little weight on the leaking of information connected to Ofsted's inspection. The way in which the information was made available, via an activist website, means that it comes from an unreliable or at least unverified source with no confirmation that it is the same information held by Ofsted. It follows then that Ofsted could not have been automatically expected to disclose the requested information on the assumption that any risk of prejudice had fallen away. To find otherwise would lead to the unsatisfactory conclusion that any official records, no matter how sensitive, should be published due to the existence of uncorroborated information in the public domain.

28. The Commissioner's next step is to consider the public interest test.

*Public interest arguments in favour of disclosure*

29. There is undoubtedly significant public interest in the information. The most visible expression of this is the existence of a petition with over 1000 signatures that has called for all information connected to the inspection to be released.

30. The depth and extent of the public's interest is driven by suspicions that the findings set out in Ofsted's published inspection letter differed markedly from the inspectors' earlier reporting of the inspection. It has been alleged that the amendments were the result of external pressure placed on the inspectors. Accordingly, there would be value in the disclosure of information that could provide further insight into the inspection process itself and how Ofsted's considerations evolved over time. A more informed judgement could then be made on the quality of Ofsted's published report.

*Public interest arguments in favour of maintaining the exemption*

31. Ofsted considers that the decision to refuse the disclosure of the withheld information must be seen in the context of the status of the information itself. At the time of the request Ofsted had already published a letter that summarised its findings following the inspection. It considers these conclusions are based on a full review of the inspection evidence, unlike the withheld information that merely represents an earlier and unfinished draft working. Ofsted has stressed that the two 'versions' are not alternative reports as has been suggested, but form part of what is effectively the same review process.

32. Ofsted argues that although there is value in transparency, this is limited by the nature of the request itself. It considers that the information does not tell us anything about the process by which amendments came to be made and the decisions that fed into this

process. As such, disclosure would not allow the public to get any nearer to understanding why the inspection letter took the form that it did.

33. There is also, in Ofsted's view, a strong public interest in it being able to quality assure its own work in a 'safe space'. It argues that denial of this safe space would mean that "either the quality assurance has to be conducted in a manner not captured by the FOI Act; or it is weak so that internal challenges cannot be recorded against the report; or that FOI requests will be used to disrupt and derail official findings and question the legitimacy of officially sanctioned reports".

*The balance of the public interest*

34. The Commissioner accepts that there is a powerful case for finding that the public interest favours disclosure. This reflects the value that society places on schools and the education they provide and, flowing from this, the importance of effective oversight of the education sector.
35. The requested information relates to the way in which decisions are guided by a body tasked with regulating and improving standards in schools. It is vital that the public can and does have trust in the ability of Ofsted to carry out fair and thorough inspections of schools. It is argued that it is precisely this trust that is at risk because of the conflicting information the public has received about the effectiveness of Oldfield School and the impartiality of Ofsted's inspection findings.
36. The Commissioner appreciates that the conflicting information relating to the inspection of the school will inevitably cause concern to parents and staff. Oldfield School's academy status will also mean that its performance and the way that this performance is managed will attract a greater degree of scrutiny. The academy programme represents a significant shift in the way in which education is delivered and therefore the public will want proof that academies are subject to the same level of regulation as other education providers.
37. However, the Commissioner agrees with Ofsted that disclosure of the requested information would shed little light on the process that led to the changes in Ofsted's reporting of the findings. This, in the Commissioner's view, is a critical point when assessing the public interest test. He considers that the value the information has to the public is not of a sufficient level to justify disclosure in the face of the prejudice the Commissioner has accepted would arise.
38. Just as the public will expect a publicly-funded body to be transparent and accountable, there will also be occasions when a public authority will need room to carry out its functions. The Commissioner will generally not be convinced by arguments that refer to the possibility of poorer



record-keeping as a result of disclosure. However, he does accept that the nature of Ofsted's role means that it may sometimes need space away from external scrutiny in order to operate effectively. For example, an individual considering passing on confidential information on a voluntary basis will want some reassurance that sensitive information received by the public authority can be kept secure. Accordingly, a balance must be struck between these competing interests.

39. Arguments for disclosure will frequently be afforded more weight where it is evident that an organisation's decision-making is not subject to appropriate checks and balances. It is considered significant in this case that Ofsted decided to carry out an inspection because of complaints made about the safeguarding arrangements at Oldfield School. Ofsted also confirmed that some of the issues underpinning the complaints would be passed to the DfE. This not only demonstrates there was an official awareness of concerns connected to the running of the school but also that there were mechanisms in place by which these concerns could be considered and where necessary remedial steps implemented.
40. The Commissioner also considers important the realisation that a report may go through many stages before it is finalised. This in itself is not unusual nor is there evidence in the information in question that indicates the findings were subject to outside pressure. As noted, the information itself does not reveal anything about why amendments were made. While the Commissioner accepts that the public would have a natural expectation that information relating to the inspection of schools would be made available, he considers this expectation is satisfied by Ofsted's routine publication of inspection reports. In his view, the interest promoting accountability is less strong where the information is incomplete and therefore does not represent a public authority's considered position.
41. The Commissioner has therefore determined that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption. In light of this decision on the balance of the public interest in section 33 of FOIA, the Commissioner has not been required to go on to consider the application of sections 31 and 40(2) of FOIA.

## Right of appeal

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

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

43. 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.
44. 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 .....**

**Rachael Cragg**  
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