

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 February 2016

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

Decision (including any steps ordered)

1. The complainant requested information about any contact that the Department for Education ("DfE") had with the British Humanist Association ("BHA") over Christian-ethos schools in the North East of England. The DfE relied on sections 36, 38, 40(2) and 41 as a basis for withholding the information.
2. The Commissioner's decision is that the DfE has correctly applied section 36(2)(b)(ii) to the withheld information. The Commissioner therefore does not require the DfE to take any further steps to ensure compliance with the legislation.

Request and response

3. On 15 May 2015 the complainant requested the following information from the DfE under FOIA:

"1. Please release to me any recorded information, correspondence, emails, etc. between the DfE and the British Humanist Association concerning Christian-ethos schools (primary or secondary) in the North-East of England, particularly the Durham Free School and the Grindon Hall Christian School, going back to 2010.

2. Please also release to me any recorded information, correspondence, emails, etc. between the DfE and Ofsted regarding the selection of the four Christian-ethos schools in the

North-East of England in 2014 for Section 8 so-called "British values" inspections, particularly on the criteria for selection, as well as any recorded information concerning schools that were considered for inspection but ultimately not inspected."

4. On 12 June 2015 the DfE responded. It provided some information relevant to part 2 of the request. In relation to part 1 of the request, it refused to provide the requested information. It cited the exemptions in sections 38, 40(2) and 41 as its basis for withholding information.
5. The complainant requested an internal review on 22 June 2015 in relation to part 1 of his request. The DfE sent him the outcome of its internal review on 11 September 2015. It upheld its original position in relation to part 1 of the request. In addition, it applied the exemption in section 36 to the withheld information.

Scope of the case

6. The complainant contacted the Commissioner on 17 September 2015 to complain about the way his request for information had been handled, specifically that the DfE had refused to disclose the information falling within scope of part 1 of his request.
7. The Commissioner considered whether the DfE was entitled to rely on the exemptions it had cited to withhold the information falling within part 1 of the request.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

8. The DfE applied section 36(2)(b)(i) and (ii) and (c) to the withheld information.
9. Section 36(2)(b) and (c) 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 -

...(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...'

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

10. In order to determine whether section 36 has been correctly applied the Commissioner has:
- (i) ascertained who the qualified person is for the public authority;
 - (ii) established that an opinion was given;
 - (iii) ascertained when the opinion was given; and
 - (iv) considered whether the opinion given was reasonable.

The engagement of section 36

11. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. In this case the DfE has informed the Commissioner that the opinion was given by Parliamentary under Secretary of State for Childcare and Education. The Commissioner is satisfied that he was an appropriate qualified person for these purposes.
12. In support of the application of section 36, the DfE has provided the Commissioner with a copy of the submissions to the qualified person. This included the information to which it was suggested that section 36 should be applied.
13. The Commissioner understands that Minister provided an opinion that section 36 was engaged on 3 September 2015. In the Minister's view, disclosure of the information detailed in the submission would be likely to prejudice the free and frank provision of advice (section 36(2)(b)(i)), would be likely to prejudice the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)) and would be likely to otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).
14. The Commissioner initially considered the application of section 36(2)(b)(ii) to the withheld information. In relation to section 36(2)(b)(ii), the Minister considered that it applied to all of the withheld information on the basis of the arguments in the submission. These arguments were that:

- Individuals and organisations that provided information to the DfE about third parties often did so on a confidential basis. The implications of the release of this information could be to discourage exchanges of information. The DfE wanted to avoid this because informal intelligence could be invaluable in finding out about issues within individual schools and institutions. Equally, if documents like these were released, officials might also be inhibited from discussing sensitive issues like those contained in the withheld information, with a consequent negative impact on the quality of advice provided to Ministers and potentially on the quality of education provided to young people.
 - The disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs by potentially discouraging any individual or organisation from approaching the DfE about concerns they may have over children being exposed to unsuitable views. This in turn would reduce the DfE's capacity to identify and prevent unsuitable groups from gaining control of state or independent schools. By releasing this information it could severely impact the DfE's ability to effectively monitor free schools in future because officials will be worried that their conversations will be made available to the public.
15. After reviewing the content of the withheld information to which this section had been applied, the Commissioner initially considered whether it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) applied to all of the information withheld under section 36. The Commissioner accepts that disclosure of the information to which section 36 has been applied would reveal free and frank discussions between a civil servant and the BHA. The Commissioner also accepts that the opinion of the qualified person, that the disclosure of the withheld information would be likely to lead to officials and third parties being less free and frank in the exchange of such views for the purpose of deliberations in future, is a reasonable one. He therefore accepts that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) applied to all of the withheld.
16. The Commissioner consequently concludes that section 36(2)(b)(ii) is engaged in relation to all of the information withheld under section 36. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

Public interest test

17. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Information Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'.

18. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so "...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant." Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of inhibition to the free and frank exchange of views for the purposes of deliberation.

Public interest arguments in favour of maintaining the exemption

19. The Commissioner initially notes that the reasonable opinion of the qualified person was that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. The consequences of the opinion is that it is accepted that there is a plausible causal link between the disclosure of the withheld information and the inhibition to the free and frank exchange of views and that there is a real possibility that the circumstances giving rise to this inhibiting effect could occur. The Commissioner has taken this into account in assessing the public interest arguments in favour of maintaining the exemption.
20. The Commissioner has set out below the public interest arguments in favour of maintaining the exemption provided by the DfE.

(i) Prejudice to whistleblowing process and willingness to raise concerns

21. The DfE argued that many groups who apply to become free schools were new or unknown to it and, initially, it would have little or no background information or soft intelligence on them. Information provided by the public or groups with an interest might alert it to any potential issues with the proposer group or any issues which could arise at the school, which enabled it to take forward any investigations or actions deemed appropriate. The DfE explained that its primary concern was to ensure that pupils were safe in school and receiving a high quality education. It informed the Commissioner that it hoped that anyone who had concerns about the proposer groups or how free schools were being run would come forward and share that information with it, but for that to be possible it was essential that its processes were designed to encourage people to do this.
22. The DfE argued that whistle-blowers must feel confident that they were able to provide it with information anonymously and in confidence. It contended that releasing the requested information would undermine that process as it would become clear that the public were not able to rely on confidentiality and if people believed that their own information would be likely to be put into the public domain, it would be likely to deter them from coming forward with information in the future. The DfE believed that this was particularly likely to be the case when the individuals considering alerting it to concerns were directly concerned with the school in question or where it concerned particularly sensitive allegations. If it were not alerted, the DfE contended that this could mean that an early chance to investigate allegations, or vital evidence relating to them could be lost and could put children at risk in the future. It went on to argue that, if it did not receive such whistleblowing information on significant issues, such as financial mismanagement or unsuitable views, such issues might go unnoticed for longer periods of time, thus preventing it from acting swiftly to investigate the allegations and intervene, as appropriate.

(ii) Prejudice to relationships with stakeholders

23. The Commissioner was informed by the DfE that, while it did not support the BHA's objections to faith schools, it recognised that the organisation had genuine concerns which it might wish to bring to its attention. It went on to state that if a relationship of trust existed, it was more likely to be able to enter into an exchange of views and understand those concerns in detail in order to decide whether further action needed to be taken. It explained that the BHA provided information to it on a confidential basis. If its discussions with the BHA were to be released, it believed that it would be unlikely that this organisation or other

members of the public would feel able to raise concerns informally or before further evidence had been gathered. If such concerns related to unease rather than hard proof about a situation, and so were not reported, important issues of safety could be missed. This could not be in the public interest.

24. The DfE informed the Commissioner that while the withheld information focused on exchanges about specific schools, it believed that there were wider policy areas where religious stance or unsuitable views could be an area on which the BHA had a contribution to make. Damage to the relationship with the BHA, as outlined above, would be likely to have the effect of damaging the information it was willing to pass on to the DfE in the future.
25. The DfE went on to explain that exchanges of information, such as that with the BHA, assisted it in being able to have a robust and fair decision-making system, which relied on considering all points of view before reaching a reasoned conclusion. To do this, it believed that all parties should be able to speak freely and frankly, to challenge, to ensure that issues were debated widely and that decisions were based on broad and balanced evidence. For this reason, the DfE argued that it was essential that officials had a clear understanding of any issues or inside intelligence relating to free schools and academies. Some of these reported concerns might be investigated further and others might not, but it would often be important that a dialogue was opened up in order to ensure that all relevant information had been gathered. The DfE was of the view that if there was a risk that sensitive discussions might be opened up to public scrutiny, officials and potential whistle-blowers might be less likely to enter openly into the decision making process, resulting in a reduction in quality of the final decision.
26. The DfE informed the Commissioner that it had received whistleblowing concerns on a range of important issues in the past, including the safeguarding of children, deliberate fraud or financial mismanagement and inadequate standards of education or care. It contended that delays in investigating potential instances of any of these would not be in the public interest.

Public interest arguments in favour of disclosing the requested information

27. The DfE acknowledged that there was a general public interest in disclosure in order to promote open and transparent government and to promote the concept that the sharing of information with the public should be free and open. It noted, however, that it regularly published information about free schools on the Gov.uk website.

28. The DfE also recognised the public interest in transparency, accountability and the ability of the public to understand the basis on which decisions which may affect them have been taken. It considered that this might lead to an improved standard of public debate and improved trust in those decisions.
29. The Commissioner believes that there is a strong public interest in transparency and accountability and in increasing the understanding of how government works. Disclosure of the withheld information may therefore assist the public in gaining a better understanding of how government engages with interested parties when they raise, what they believe to be, matters of concern in relation to the running of free schools.
30. The complainant argued that there was a public interest in disclosure because he believed that it was misleading and contrary to the spirit of FOIA for the DfE to characterize arguments made as part of an advocacy effort by a well-known campaigning body as 'information' or 'intelligence'.
31. The complainant noted the DfE's argument that the implications of the release of the withheld information could be to discourage exchanges of information and that it wanted to avoid this because informal intelligence could be invaluable in finding out about issues within individual schools and institutions.
32. The complainant contended that the BHA did not claim to have - nor was there any suggestion that it had - 'information' or 'intelligence' about 'individual schools and institutions' that was not already public. He argued that it was a campaigning organization which objected to faith schools on principle, regardless of what might be the facts about any particular school or group of schools, as was shown on its website.
33. The Commissioner was informed by the complainant that the BHA was particularly concerned, for example, that children should not be taught 'creationism' in Christian schools - a view he believed that it was perfectly entitled to in a free society. He accepted that it was also free to lobby governments accordingly. From his perspective however, what was at issue was whether it should be able to do so in secret, and whether the government response (which was what he was more interested in) could be properly exempted from FOIA disclosure.
34. The complainant argued that, in this instance, where the BHA's arguments (not 'information') might have contributed to the closing of a school (the Durham Free School) and the disruption of the education of nearly 100 children, the process by which the BHA case was heard and

the exchanges that followed between it and the DfE were of entirely legitimate public interest.

35. The complainant noted that the DfE had argued that whistle-blowers must feel confident that they were able to provide it with information anonymously and in confidence and that disclosure of the withheld information would undermine that process. However, he argued that, again, there was no suggestion that the BHA acted - nor did it claim to have acted - as a 'whistle-blower' in the case of the Christian schools in the North-East. Nor did he believe, could its approaches to the DfE be in any sense compared to 'the public' whistle-blowing on organizations engaged in illicit activity. He noted that the BHA itself said it 'employs the only campaigner working full-time in opposition to the state funding of "faith" schools and against religious discrimination in admissions, employment and the curriculum' and that it did so openly. The complainant stated that he would again stress that there was nothing improper about this; what was arguably improper was the DfE's concealing of the extent to which it might have been swayed by the BHA's arguments.
36. Finally, the complainant noted that the DfE had argue that it believed that all parties should be able to speak freely and frankly, to challenge, to ensure that issues were debated widely and that decisions were based on broad and balanced evidence. He contended that this could not by definition be true if no one other than the DfE knew what the BHA said, and if the BHA's 'concerns' were raised before evidence had been gathered.
37. The complainant argued that, given that one school (the Durham Free School) was actually closed and another (Grindon Hall Christian School) is reportedly now being forced out of the Christian-ethos sector by the DfE, he suspected that the real reason that the Department did not want these exchanges disclosed was because they did not in any way justify such draconian measures, but might reveal instead an undercurrent of sympathy for the BHA's stance on the part of relatively junior DfE officials, but he admitted that this was speculative.
38. As regards the point made by the complainant in the previous paragraph, having reviewed the withheld information, the Commissioner believes that there is no evidence which would support the complainant's, as he accepts, speculative concerns about an undercurrent of sympathy for the BHA's stance from the official that corresponded with it. From the information that he has seen, it appears to the Commissioner that the relevant official dealt with the issues raised in an entirely appropriate manner and in line with general government policy in this area, which he understands is to promote the

setting up and running of free schools by a range of groups, including faith based groups.

39. Whilst the Commissioner obviously cannot discuss in detail what is contained in the withheld information, he notes that it is not lobbying in general against faith based schools by the BHA. The withheld information contains very detailed, specific concerns raised by the BHA about the running of particular schools falling within the scope of the complainant's request and the DfE's detailed responses to those concerns.

Balance of the public interest arguments

40. In considering where the balance of the public interest lies, the Commissioner is mindful of the public interest arguments in favour of disclosure that have been identified. However, he notes that the withheld information contains free and frank exchanges of views between an official at the DfE and the BHA about very detailed, specific concerns that the BHA raised about the running of particular free schools. The Commissioner believes that the disclosure of this information would be likely to result in, not only the BHA, but other organisations and individuals being less willing to enter into such dialogues in future. This would be detrimental to the DfE's ability to gather relevant information to ensure that it effectively discharged its duties with regard to the monitoring and, where appropriate, taking action in relation to the setting up and running of free schools.
41. After carefully considering the severity, extent and frequency of inhibition to the free and frank exchange of views for the purposes of deliberation which disclosure of the withheld information might pose, the Commissioner has concluded that there is a real risk that disclosure of the withheld information might affect the openness and candour in relation to future exchanges of views in this area. As a result he considers that the public interest in withholding the information outweighs the public interest in disclosure and that the DfE was correct to withhold it on the basis of the exemption in section 36(2)(b)(ii).
42. As the Commissioner has found that the withheld information is exempt from disclosure under section 36(2)(b)(ii), he has not gone on to consider the DfE's application of the other exemptions to the same information.

Right of appeal

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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: 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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF