

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 May 2016

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

Decision (including any steps ordered)

1. The complainant has requested from the Department for Education (DfE) copies of communications relating to an emergency inspection of a school carried out by the Independent Schools Inspectorate (ISI). The DfE considered that it was not obliged to disclose the information caught by the scope of the request under the 'information reasonably accessible to an applicant' (section 21) and 'prejudice to the effective conduct of public affairs' (sections 36(2)(b)(i) and (ii) and section 36(2)(c)) exemptions to disclosure in FOIA. The complainant has asked the Commissioner to consider whether the DfE was entitled to withhold the items of information to which it had applied the exemptions in section 36(2). On inspection, some of the information was found to be the complainant's personal data and therefore the Commissioner has instructed the DfE to consider this under the Data Protection Act 1998 (DPA) rather than FOIA. For the remaining material that did not fall under this description, the Commissioner has decided that the cited exemptions in section 36(2) are engaged and that in all the circumstances the public interest favours withholding the information. He does not therefore require the DfE to take any steps as a result of this notice.

Request and response

2. On 7 August 2015, the complainant wrote to the DfE and requested information in the following terms:

On [date redacted] an Emergency visit report was posted on the Independent Schools Inspectorate website detailing an emergency inspection of [name of school and date of inspection redacted]. I would like to request copies of all DfE correspondence and details of telephone calls relating to this issue. This should also include any correspondence directly with the school, [name of other school redacted], or parties associated with either school.

3. The DfE responded on 14 August 2015 and stated that it required some further information from the complainant. In particular, the DfE said that it would be useful to know if the request was for documents relating to the emergency inspection or for documents relating to the publication of the report. The DfE also invited the complainant to confirm whether the request concerned other records. The complainant replied the following day and clarified that the request related to both the emergency inspection and the publication of the report.
4. On 9 September 2015 the DfE wrote to the complainant and said that the request had been interpreted to mean all correspondence, including letters, emails, documents, reports and details of telephone calls, which led to the decision to conduct the inspection right through to the report being published. The DfE said that using this interpretation it had found that compliance would exceed the appropriate costs limit applicable to central government (£600) in section 12 of FOIA. It advised the complainant that it may be able to comply with a request for a narrower category of information and suggested two ways in which the request could be revised.
5. The complainant contacted the DfE later the same day and clarified his request, stating that it could be limited to correspondence dating from November 2014 and confirming he did not require copies of any correspondence he had already seen. It is this clarified request that forms the focus of the present notice.
6. The DfE responded to the clarified request on 8 October 2015. It stated that the new request had been read as asking for information that held from November 2014 that was related to the emergency inspection and the publication of the report. The DfE confirmed that it held information relevant to the request but that this was being withheld. The DfE stated that the emergency inspection report had already been published and therefore the department was not under a duty to provide the information in accordance with section 21 of FOIA. For the remainder of the records held, the DfE considered this was exempt information under sections 36(2)(b)(i) and (ii) and section 36(2)(c). The exemptions in section 36(2) are qualified by the public interest test and the DfE found that on balance the public interest favoured withholding the information.

7. On 9 October 2015, the complainant informed the DfE of his dissatisfaction with the refusal to disclose the information he was seeking and enquired how he could escalate his concerns about the decision. This was treated as a request for an internal review and the DfE provided the outcome of this process on 30 October 2015. The reviewer upheld the DfE's original position.
8. The complainant wrote to the DfE on 30 October 2015 and said that he had only asked for clarification on how to escalate a complaint and the decision to carry out the internal review was done unilaterally and without input from him. He went on to set out a number of concerns relating to the way that the school in question had been regulated and the delays connected to the publication of the emergency inspection report. The complainant also took issue with the DfE's decision not to include post-inspection activity information as part of its consideration of the request. It would appear that the complainant's complaint to the Commissioner was generated in the absence of a response to this letter.

Scope of the case

9. The complainant contacted the Commissioner on 10 November 2015 to complain about the way his request for information had been handled.
10. Following a review of the papers provided, the Commissioner provided the complainant with a summary of his understanding of the complaint. In particular, he observed that the complaint matters apparently related to the application of the section 36(2) exemptions and did not extend to the DfE's use of section 22 of FOIA. He also set out his preliminary view that, based on the way in which the versions of the request developed, the DfE was entitled to view the scope of the request as not including post-inspection information. He therefore suggested that the complainant may want to make a separate request for this information.
11. The complainant has not disputed the Commissioner's reading of his complaint and therefore the Commissioner has proceeded on the basis that it is correct. This has meant using the DfE's interpretation of the scope of the information captured by the request and considering the DfE's application of the exemptions in section 36(2) to this information.
12. Upon being notified of the complaint, the DfE has revisited the disputed information. This resulted in a limited amount of information being disclosed to the complainant under FOIA. It was further found that elements of the withheld information comprised the personal data of the complainant. Insofar as requested information is the personal data of the applicant, the legislation that applies is the DPA and not FOIA. The DfE has therefore dealt with the personal data under the subject access

rights in section 7 of the DPA and it has not been further considered further as part of this notice.

13. The Commissioner's analysis of the application of section 36 to the remaining information is set out in the body of this notice.

Reasons for decision

Section 36(2) – prejudice to the effective conduct of public affairs

14. The DfE has applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to the withheld 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

15. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure.
16. To find that any limb of section 36(2) is engaged, the Commissioner must be satisfied not only that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring but also that the opinion was reasonable in the circumstances. This means that 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. A public authority may rely on more than one exemption in section 36(2) as long as the qualified person has offered a view on each of the exemptions cited and the arguments advanced correspond with the particular exemption.

17. The Commissioner's guidance on section 36¹ explains that information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would, or would be likely to, inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority. It follows therefore that the exemptions are about the process – namely, the process of providing advice or exchanging views – which may be inhibited rather than what is necessarily contained within the requested information itself.
18. With regard to section 36(2)(c), the legislation does not define what is meant by the use of the term 'otherwise'. The prejudice must though be different to the prejudice covered by other exemptions in section 36(2). The Information Rights Tribunal in *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068, 4 February 2008)² found that the exemption may apply in circumstances where disclosure would harm an authority's ability to offer an effective public service or meet its wider objectives due to the disruption caused by placing information in the public domain.

The opinion of the qualified person

19. The DfE has informed the Commissioner that the individual contacted in his capacity as the qualified person was the Parliamentary Under Secretary of State at the DfE and his opinion on the application of the exemptions was provided on 2 October 2015. To evidence this, a copy of a signed and dated statement endorsing the use of the exemptions has been provided to the Commissioner. The Commissioner is satisfied that, as a Minister, the person consulted about the request meets the definition of a qualified person set out by section 36(5) of FOIA. He has therefore next had to consider whether the qualified person's opinion with regard to sections 36(2)(b) and (c) was reasonable.
20. 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

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

² <http://www.informationtribunal.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

stated, the critical issue is that the arguments being advanced by the qualified person not only link to the factors described in the exemption but also relate to the information to which the exemption has been applied.

21. In seeking the advice of the qualified person, the DfE prepared a submission that quoted the request, provided some context to the requested information, explained the operation of the exemptions cited and gave an overall recommendation that supported the application of the exemptions. By agreeing to the application of the exemptions, the qualified person effectively subscribed to the arguments included in the submissions, including the acceptance 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 there to be a real and significant risk of the prejudice occurring.
22. With respect to each of the limbs of section 36(2)(b), the submission explains that the DfE is the regulatory body for independent schools and has responsibilities to ensure schools meet the necessary school standards. It further clarifies that the DfE relies on information provided by inspectorates to help make informed decisions when considering an appropriate course of action.
23. In relation to section 36(2)(b)(i), the submission emphasises the risk that disclosure of internal and external advice would be likely to prejudice the DfE's ability to deal effectively with handling regulatory failings. This is because the inspectorate would be less likely to engage in such exchanges with the DfE in the future and would also jeopardise the possibility of convincingly putting forward a united front. With regard to section 36(2)(b)(ii), the submission states that both schools and the inspectorates must have confidence that they can share views with one another on a free and frank basis. Disclosure would weaken this confidence with the likely result that the same level of co-operation would not be offered in future exchanges.
24. With reference to section 36(2)(c), the submission explained that the release of the withheld information may remove the space within which officials are able to discuss options and delivery freely and frankly. It would make it more difficult for the DfE to work collaboratively and cohesively with schools and the inspectorates to deliver its core business of ensuring independent schools meet the Independent School Standards and work effectively with those that fail to do so.
25. The Commissioner is satisfied that each of the arguments presented are ones that relate to the activities described by the exemptions cited.

Furthermore, the Commissioner considers the opinion that the disclosure of information concerning an emergency inspection of a school may result in the prejudice being claimed is one that a reasonable person could hold. He has therefore found that sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged.

26. Each of the limbs of section 36(2) is a qualified exemption, which means that they are subject to the public interest test. The Commissioner's analysis of the application of this test follows.

The balance of the public interest

27. The public interest test is separate from the qualified person's opinion. Befitting the status of the qualified person, however, his or her opinion should be afforded some weight when exercising this test. That being said, the Commissioner must form his own view on the severity, extent and frequency of the prejudicial or inhibitive effects being claimed when determining whether the public interest favours disclosure.
28. It is clear that the complainant is extremely concerned by the way in which the school was being run. The particular reasons that explain why an applicant wants access to information may not though always carry much weight in terms of the wider public interest in the information. This will particularly be the case where the information relates to a very narrow set of interests. It is evident that the request in this case is bound up with a complaint made against the school. The complainant has, however, also alleged that the lack of transparency with regard to the way that an investigation was carried out undermines the potential trust a member of the public can have in the soundness of any decisions reached. Linked to this, the complainant has questioned why there had been a delay in publishing the report connected to the inspection. In the view of the Commissioner, these points do translate into a legitimate case for disclosure in the public interest.
29. The DfE has acknowledged that more openness about the process and delivery of its functions may potentially lead to greater accountability, an improved standard of public debate, and improved trust. It considers though that the severity of the prejudicial and inhibitive effects that the qualified person accepted would be likely to occur means that the arguments for disclosure ultimately suffer in comparison with the case for withholding the information. In the view of the DfE, it is clearly in the public interest that the DfE and the inspectorates are able to monitor effectively the performance of schools so that, where necessary, appropriate steps can be taken to address any failings. The benefits of disclosure in this case would not therefore compensate for the likely weakening of this regulatory mechanism.

30. In order to reach a determination on where the balance of the public interest lies, the Commissioner has had regard to the following factors; the timing of the request, the extent to which disclosure would stimulate and assist public debate, and the nature of the regulatory tools used to improve the standards of schools.
31. The DfE has explained that at the point at which the request was made, the inspectorate and the DfE were still in communication with the school about designing an action plan that would ensure compliance with the several regulatory standards that the inspection had found were not met. This is significant because it demonstrates that the regulatory phase following the inspection had not been completed, meaning therefore that the issue to which the information related remained live.
32. The Commissioner has next reviewed the withheld information, with the objective of deciding what would emerge through disclosure and the value of the information to the public. The information itself includes correspondence between the DfE and the ISI, an advice note and letters to and from representatives of the school. In the view of the Commissioner, what the information does do is outline from an administrative point of view the next steps for the DfE and the inspectorate, including the publication of the inspection report. It also provides an insight into the school's reaction to the findings. What the information does not do to any meaningful extent, however, is either go into detail about the way the inspection was carried out and its findings or expose potential failings in the regulatory system. It is further observed that the findings of the inspection had been published in the corresponding inspection report. The Commissioner considers that this weakens to an extent the need and urgency of placing this information in the public domain.
33. A critical consideration when exercising the public interest test, however, is the severity of any prejudice occurring. If this is on the lower end of the scale, it is less likely that a public authority would be entitled to refuse disclosure.
34. The DfE's reliance on the section 36(2) exemptions in this case is driven by the concern that its regulatory functions are able to be carried out effectively. The DfE and the associated inspectorates are charged with regulating independent schools, with the aim of ensuring that the schools are accountable, well run and meet their legal obligations, albeit in the context of the relative freedom that schools in this sphere enjoy. It is not, for example, the responsibility of the DfE or the inspectorate to investigate individual members of staff.
35. In finding that the exemptions are engaged, the Commissioner has accepted that the release of the information would be likely to have a

prejudicial effect. With respect to the public interest test, the DfE has reiterated its reliance on candid discussions with inspectorates when making decisions about the nature of the remedial action that should be contemplated. Furthermore, it considers that a school is more likely to co-operate, and therefore provide valuable information pertaining to its performance, where the school has confidence that any frank admissions are kept confidential. This will particularly be the case when the regulatory investigation was still active.

36. The DfE's responsibilities regarding independent schools are covered by Part 4 of the Education and Skills Act 2008, and prior to January 2015 Part 1 of the Education Act 2002. In accordance with these pieces of legislation the DfE has powers to arrange an inspection of a registered independent school by an inspectorate and the inspectorate shall make a report on the extent to which the school meets the standards against which the inspection took place. The fact that the inspection process is founded in statute means that the DfE does not need to rely on the acquiescence of a school in order to test its compliance with the standards. Equally, the inspectorate must produce its report for the DfE. Consequently, there can be no question of disclosure preventing the inspection process taking place.
37. The Commissioner does accept however that the regulatory regime will be more effective where honest and candid views are received from individuals involved with, or connected to, the inspection. He agrees that individuals would be less forthright with their views if they believed that evidence of discussions could be disclosed while the monitoring of compliance was still active. In the view of the Commissioner, the severity of this likely prejudice is significant because of the detrimental effect it would have on the monitoring procedure. Set against this is the Commissioner's finding that disclosure of the withheld information would shed little light on the substance of the inspection itself.
38. On balance, the Commissioner has found that the benefit of disclosure is not sufficient to justify disclosure in the face of the prejudice the Commissioner has decided would be likely to occur. In forming this view, the Commissioner recognises that the public will expect a process designed to maintain or improve education standards in independent schools to be as transparent as possible. He also acknowledges, however, that there will be occasions when a public authority will need room to carry out its functions effectively. The Commissioner further considers that the requirement for transparency will be satisfied to an important extent by the publication of the inspection report.
39. 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.

Right of appeal

40. 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

41. 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.
42. 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

Alun Johnson
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