

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 October 2016

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

Decision (including any steps ordered)

1. The complainant requested from the Department for Education a copy of the latest version of the Small Schools Task Force's report into Universal Infant Free School Meals in small schools.
2. The Department for Education withheld the report under section 36(2)(c) of the FOIA.
3. The Commissioner's decision is that the Department for Education has not successfully engaged section 36(2)(c) of the FOIA.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the latest version of the Small Schools Task Force's report into Universal Infant Free School Meals in small schools.
5. 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

6. On 25 November 2015 the complainant wrote to the Department for Education (DfE) and requested information in the following terms:

'I would like a copy of the small school task force report into UIFSM¹ in small schools'.

7. The DfE responded on 11 and 23 December 2015. It said it had interpreted the request as relating to the 'final version' of a report into the implementation of universal infant free school meals in small schools by the Small Schools Task force. The DfE also said that, as it had not received a final version it did not hold the information requested.
8. On 5 January 2016, the complainant requested an internal review. He pointed out that he had not requested the 'final report' and clarified that what he was looking for was the most recent draft. The complainant also pointed out that the DfE was under a duty to provide advice and assistance under section 16 of the FOIA and the Code of Practice to assist applicants to describe information requested more clearly. Finally, the complainant said as it was clear the DfE did hold a version of the report at the time of the request it should have disclosed it or applied an FOIA exemption.
9. The DfE responded on 2 February 2016 and said it was upholding its original decisions made on 11 and 23 December 2015.
10. On 11 December 2015 the complainant said to the DfE that it should interpret his original request dated 25 November as being for the latest draft held.
11. The DfE responded to this clarified request on 4 February 2016. It said that it held the information requested but was withholding it under section 36(2)(c) of the FOIA.
12. On 8 February 2016 the complainant requested an internal review. He said that the small schools taskforce report was designed and written to be published.
13. Following an internal review, the DfE wrote to the complainant on 4 March 2016 stating that it was upholding its original decision to withhold the requested information under section 36(2)(c) of the FOIA.

¹ Universal Infant Free School Meals

Scope of the case

14. The complainant contacted the Commissioner in February and April 2016 to complain about the way his request for information had been handled. In particular, he expressed dissatisfaction with the DfE's decision to withhold the information he had requested in his clarified request on 11 December 2015 under section 36(2)(c) of the FOIA.

Background

15. The 'School Food Plan'² published by the Department for Education in 2013 sets out 17 actions to transform what children eat in schools and how they learn about food. One of the recommendations in the School Food Plan was the introduction of a phased roll out of free meals for all children in primary schools across the country.
16. In September 2004 the government introduced the Universal Infant Free School Meals (UIFSM)³ policy which requires all state funded schools in England to offer every pupil in reception, year 1 and year 2 a free school meal.
17. Under the terms of the scheme schools were given £2.30 for each meal and those with 150 or fewer pupils received an additional £3.00 per annum in 2014/15 and £2,300 in 2015/16 to help deliver the policy.⁴
18. The Small Schools Task Force was set up to develop solutions for the particular challenges faced by small schools in establishing a viable meals service, as part of the School Food Plan.
19. In or about 2015 the Department for Education commissioned the Small Schools Task Force to prepare a report which helped small schools with ways of making their school meals service profitable to enable them to deliver UIFSM.

² <http://www.schoolfoodplan.com/>

³ <https://www.gov.uk/guidance/universal-infant-free-school-meals-guide-for-schools-and-local-authorities>

⁴ This has now been discontinued as from 2016/17. <http://schoolsweek.co.uk/dfe-axes-universal-infant-free-school-meals-support-grant/>

20. The last version of the report prepared the Small Schools Task Force dated May 2015 is the one which the complainant has requested and the one which the DfE has withheld under section 36(2)(c) of the FOIA.
21. The DfE received the report but after considering its contents decided not to publish it. Instead, it decided to publish the good practice findings from the report within the small schools toolkit. This was published in December 2015.⁵

Chronology

22. On 29 April 2016, the Commissioner contacted the DfE and requested a copy of the withheld information, the qualified person's reasonable opinion together with the submissions presented to him and any further arguments it wished to raise in support of its application of section 36(2) of the FOIA. The Commissioner also asked the DfE to clarify whether it anticipated there would be a final report and pointed out it was the complainant's view that the report was drafted with the intention of it being published. He supported this view by providing evidence of various references to the report in the media.⁶
23. The DfE responded on 31 May 2016 with copies of the information requested by the Commissioner, including that which had been withheld with its further arguments in support of section 36(2).
24. On 31 August 2016 the Commissioner contacted the DfE again and asked it whether it was prepared to disclose the Small Schools Task Force's report in view of the fact that some or parts of it were already in the public domain.⁷
25. The DfE responded on 9 September 2016. It accepted that the headline details in the report had been leaked. However, it said it believed disclosure of the complete report would not be in the public interest in view of its capacity to cause confusion and uncertainty in small schools which in turn could cause considerable harm.

⁵ <http://www.thegreatschoolslunch.co.uk/media/169570/CFT-SmallSchoolToolkit.pdf>

⁶ <http://www.educateringmagazine.co.uk/news/2015-06-06-small-schools-taskforce>

⁷ <http://schoolsweek.co.uk/leaked-report-reveals-small-schools-needed-extra-cash-for-free-meals-yet-government-still-ended-it/>

26. The Commissioner responded on 9 September 2016. She reiterated the complainant's view that the May 2015 report was the last version produced and also that there was always an intention to publish it. The Commissioner also said she had been informed by the complainant that the whole report and not just the headlines were already in the public domain. In view of these points, the Commissioner invited the DfE to reconsider its position again regarding the disclosure of the report.
27. The DfE responded on 26 September 2016. It said although it was aware that parts of the report had been placed in the public domain through the media it was not aware that the full text had been published on-line. The DfE confirmed that the May 2015 report was the last one it had received. However, having reviewed the report it concluded that it was unreliable with a weak evidence base. It therefore decided to commission the Children's Food Trust to produce a report for small schools which it thought would serve a more useful purpose. This was published in December 2015 and called 'Good food for small schools-A practical toolkit'.⁸

The Decision

Recorded information held

28. The complainant has questioned whether the Small Schools Task Force's report dated May 2015 was in fact the last report received by the DfE. He based his view on the fact that the DfE interpreted his 'first' request as one for the 'final report' which it said it was yet to receive. Accordingly, the DfE stated that it did not hold it.
29. The DfE has explained to the Commissioner that the May 2015 report was not a final one but a draft version which was abandoned before publication for the reasons explained above. The DfE said that it never held a final report, as the document never reached that stage.
30. The Commissioner accepts the DfE's explanation and is satisfied that the only information falling within the scope of the complainant's request is the Small Schools Task Force's report dated May 2015.

Section 36(2)(c) of the FOIA

⁸ <http://www.thegreatschoolslunch.co.uk/media/169570/CFT-SmallSchoolToolkit.pdf>

31. The DfE has cited section 36(2)(c), which provides an exemption where disclosure would, or would be likely to, prejudice the effective conduct of public affairs in a way other than specified elsewhere in section 36. The Commissioner's approach is that section 36(2)(c) should be cited only where the prejudice identified would not be covered by any of the other exemptions in Part II of the FOIA.
32. This exemption can only be cited on the basis of a reasonable opinion from a specified qualified person (QP). In the case of government departments, the QP is any Minister of the Crown. The task for the Commissioner when deciding whether this exemption is engaged is to reach a conclusion on whether the opinion of the QP was objectively reasonable. This exemption is also qualified by the public interest, which means that the information must be disclosed if the public interest in the maintenance of the exemption does not outweigh the public interest in disclosure.
33. As to whether this exemption is engaged, the first issue to cover here is whether this exemption was cited on the basis of an opinion from a government minister. On this point the DfE stated that this exemption was cited on the basis of an opinion from Lord Nash and it supplied evidence that this opinion was given on 2 February 2016. On the basis of this evidence, the Commissioner accepts that an opinion was given by a valid QP.
34. Having accepted that the opinion was given by a qualified person, it is incumbent on the Commissioner to consider whether that opinion was reasonable in the circumstances.
35. In order to obtain the view of the qualified person, the DfE provided him with submissions that gave some background to the request, outlined the use of the exemption in section 36 and explained why it considered it applied in this case. The DfE also set out the recommended position. As stated above, for the exemption in section 36(2) to be engaged it is not sufficient that a qualified person has given an opinion; instead, that opinion must be reasonable. The test to be applied is not whether the opinion is the most reasonable opinion but only whether it is an opinion that a reasonable person could hold. In other words, an opinion will only be unreasonable if it is an opinion that *no* reasonable person could hold.
36. For section 36(2)(c) of the FOIA there are two possible alternatives upon which the application of the exemption can be hung depending on the qualified person's views on the likelihood of the prejudice occurring. The first, is the lower threshold which states that disclosure 'would be likely to' have a prejudicial effect or, the second, is the higher threshold which stipulates that disclosure 'would' be prejudicial. 'Would' means that the likelihood is more probable than not. 'Would be likely', on the other

hand, refers to a lower level of probability than 'would' but still requires that the likelihood is significant. Establishing the appropriate level of likelihood is not only important for engaging the exemption but also because it has an effect on the balance of the public interest test.

37. The record of the qualified person's opinion agreeing to the application of the exemption in section 36(2)(c) states that disclosure of the requested information 'would be likely' to otherwise prejudice the effective conduct of public affairs.
38. The Commissioner will consider all relevant factors when assessing whether the opinion was reasonable, including the nature of the information and the timing of the request, and whether the prejudice relates to section 36(2)(c) as claimed by the DfE.
39. Section 36(2)(c) refers to the prejudice that may *otherwise* occur through the release of the requested information.
40. The Commissioner will now briefly summarise the arguments advanced in relation to the section 36(2)(c) exemption to which the qualified person had effectively subscribed.
 - *The Small Schools Task Force report received by the DfE in the Spring of 2005 was in draft form and not a final document ready for publication.*
 - *The report recommended that the additional funding to support small schools in delivering UIFSM should continue. However, the evidence base in the report upon which the recommendations were based was weak. Therefore it was considered it would be better to publish a toolkit than finalising the report. The Children's Food Trust was commissioned to produce this toolkit which was published before Christmas 2015.*
 - *Disclosure of the report would provide small schools with a snap shot of the challenges faced by similar size ones in implementing UIFSM together with case study examples of how the challenges could be overcome. However, the majority of the findings were already in the public domain following the publication of the toolkit. Therefore the publication of the report would not provide any extra help to small schools in delivering UIFSM further to what was already in the toolkit for small schools. To disclose a report where the findings were based on evidence not considered strong enough to warrant publication would undermine the effective conduct of public affairs.*
41. The Commissioner is satisfied that it was not unreasonable for the qualified person to consider disclosure of the requested information

would be likely to otherwise prejudice the effective conduct of public affairs.

42. In summary, the Commissioner has found that the qualified person has given an opinion endorsing the application of the exemption in section 36(2)(c) and, furthermore, that the opinion was reasonable.

The public interest test

43. Having accepted that the opinion of the QP was reasonable, it is not the role of the Commissioner to challenge or reconsider that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP. In forming a view on the balance of the public interests, the Commissioner has taken into account the general public interest in the openness and transparency of the DfE, as well as those factors that apply in relation to the specific information in question in this case.

Factors in favour of disclosure

44. The DfE recognises there is a general public interest in openness and transparency and has argued that disclosure of the Small Schools Task Force's report would provide small schools with a snapshot of the challenges that similar size schools have faced in implementing UIFSM along with case study examples of how these challenges can be overcome.
45. The complainant has argued that there is a significant interest around the discontinuation of small schools funding⁹ and the ability of small schools to provide UIFSM.¹⁰
46. The complainant has argued there is a public interest in the disclosure of the Small Schools Task Force's report as it was one that was intended for publication¹¹.

⁹ <http://schoolsweek.co.uk/dfe-axes-universal-infant-free-school-meals-support-grant/>

¹⁰

<http://schoolsweek.co.uk/free-infant-meals-unsustainable-at-flagship-school/>
<https://www.theguardian.com/education/2015/sep/01/cuts-free-healthy-school-dinners-infants-budget-universal>

<http://www.dailymail.co.uk/news/article-2950109/How-Clegg-s-free-school-meals-left-poor-pupils-WORSE-Leaked-documents-reveal-devastating-unforeseen-fall-flagship-policy.html>

47. The complainant believes considerable weight should be given to the public interest for the publication of an expert report that recommends 'government should continue to provide additional capital investment to put back permanent production kitchens into small schools' and also one that advocates 'an ongoing small schools subsidy should be given to those schools serving fewer than 100 meals a day. The £2,300 additional UIFSM subsidy funding announced for schools with fewer than 150 pupils for 2015-16 is welcome news for small schools; but this will not cover all meal costs in some schools. The P&L for the pilot schools showed that meals for small schools could cost an additional 17p-36p per meal served; without any additional subsidy, this would lead to an annual loss.'¹²

Factors in favour of withholding the information

48. The DfE has pointed out that the majority of the information regarding the report's findings is already in the public domain following the publication in December 2015 of the 'Good food for small schools-A practical toolkit'.¹³ This toolkit includes practical guidance and links to case studies which are helpful to small schools in considering options for the delivery of UIFSM. However, it is concerned that disclosure of the complete report would still pose a risk of prejudice. Furthermore, the DfE does not believe disclosure of the remaining information would substantially add to the public's knowledge.
49. The DfE believes it is not in the public interest to disclose a report which it has decided is not strongly evidence based to warrant publication. Such a disclosure in its opinion would undermine the effective conduct of public affairs. The DfE has argued that releasing such a report with potentially misleading information would cause confusion and uncertainty within small schools. This in turn could lead to a number of adverse effects, including the choices that schools make in providing meals for children or unnecessary diversion of resources from other areas of school budgets.
50. On balance the DfE is of the view that the public interest lies in withholding the report prepared by the Small Schools Task Force. From the perspective of transparency, it has pointed out that the

¹¹ <http://www.educateringmagazine.co.uk/news/2015-06-06-small-schools-taskforce>

¹² <http://www.educateringmagazine.co.uk/news/2015-06-06-small-schools-taskforce>

¹³ <http://www.thegreatschoolslunch.co.uk/media/169570/CFT-SmallSchoolToolkit.pdf>

substantiated findings from the report are already in the public domain as part of the released tool-kit. This provides information about good practice, including budget management, without undermining small schools' confidence in their ability to provide nutritious meals for young children in their care or leading them to divert resources from elsewhere in their budgets unnecessarily. The DfE therefore believes releasing the report would not substantially add to that knowledge or good practice around the country, but would still pose a risk of prejudice.

Balance of the public interest

51. The Commissioner has viewed the Small Schools Task Force's report. She has also considered the public interest arguments for and against disclosure which she finds are finely balanced. She accepts that some of the findings and good practice suggestions in the report are publically available in the practical toolkit published in December 2015. However, she also believes there is a public interest in disclosing all of the findings in the report even if there were some concerns regarding the adequacy of the evidence upon which they were based. The Commissioner accepts that when the report was commissioned by the DfE there was an understanding that it would be published.
52. The Commissioner concludes that the public interest arguments in favour of maintaining the exemption under section 36(2)(c) of the FOIA are outweighed by those in favour of disclosure. Accordingly, the Commissioner orders that the report should be disclosed.

Right of appeal

53. 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

54. 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.
55. 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

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