

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 February 2016

Public Authority: Department of Education Northern Ireland
Address: Rathgael House
43 Balloo Road
Rathgill
Bangor
BT19 7PR

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Education Northern Ireland (DENI) relating to an inspection carried out of St John the Baptist Primary School, Finaghy, Belfast. DENI disclosed some of the requested information, however it refused to disclose the remainder (the withheld information) citing sections 33, 40(2) and 41 of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the DENI has correctly applied section 33 of the FOIA to the majority of the withheld information, however there is one part of the withheld information to which it has been incorrectly applied. The Commissioner has further decided that the redactions made by the DENI under section 40(2) of the FOIA in relation to some of the information it disclosed under part 6 of the request were appropriate, and therefore DENI correctly applied section 40(2) of the FOIA to that part of the requested information. As the

Commissioner considers that the majority of the withheld information, bar the one piece of information mentioned above, is exempt from disclosure under either section 33(1) or 40(2) of the FOIA, she has not gone on to consider DENI's application of section 41 to part of the withheld information.
3. The Commissioner requires DENI to take the following steps to ensure compliance with the legislation.

- To disclose the part of the relevant withheld information to which section 33 of the FOIA does not apply, namely the final inspection report published on the ETI's website in May 2015.
4. 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

5. On 12 October 2015, the complainant wrote to the DENI and requested information in the following terms:
- "1. Every iteration of the written inspection report from first draft through to final written report published on the ETI website in May of 2015.
 2. All notes, written and electronic, prepared by all inspectors involved directly or indirectly, before, during and after the inspection in St John the Baptist PS relating to the completion of the final written report.
 3. All communications of a written and electronic nature between and amongst the Reporting Inspector and Deputy Reporting Inspector for this inspection and the Deputy Chief Inspector with responsibility for inspections in the primary sector and the Chief Inspector concerning this inspection and production of the final written report in May of 2015.
 4. All communications of a written and electronic nature between and amongst the Chief Inspector and the Deputy Chief Inspector with responsibility for inspections in the primary sector relating to this inspection and the Deputy Permanent Secretaries and Permanent Secretary in the Department of Education from the completion of the inspection in March 2015 up to and following the publication of the final written report in May of 2015.
 5. All communications of a written and electronic nature between and amongst the ETI and parents of children attending St John the Baptist PS, the Board of Governors of St John the Baptist PS, third parties such as the CCMS, community or political representatives, trade unions other than INTO and members of

the public relating to the inspection in St John the Baptist PS completed in March 2015.

6. Any other documents held by the ETI pertinent to this inspection."
6. DENI responded to the complainant on 10 November 2015. It refused to disclose the requested information in parts 1-5, citing sections 33 and 40(2) of FOIA as a basis for that refusal. It did disclose some information in relation to part 6 of the complainant's request.
7. Following an internal review DENI wrote to the complainant on 20 January 2016. The reviewer upheld the original decision and stated that, in relation to part 5, he believed that section 41 of the FOIA also applied to the withheld information.

Background to request

Work of the Education and Training Inspectorate (ETI)

8. The Education and Training Inspectorate is a unitary inspectorate, which is part of DENI. The ETI provides independent inspection services and policy advice for DENI and the Department for the Economy (DFE). In addition, ETI inspects the education services provided by the agricultural colleges funded by the Department of Agriculture, Environment and Rural Affairs (DAERA), the prison service (conducted collaboratively with the Criminal Justice Inspectorate) as well as providing inspection services on behalf of the Home Office.
9. The work of the ETI covers early years, primary and post-primary schools, special education, further education, work-based learning, youth, initial teacher education as well as policy, planning and improvement work.
10. The ETI's key priority is always the interests and well-being of the learners. Inspection is at the centre of raising standards for all learners, ensuring that best practice is highlighted and poor provision is identified and can be improved.

Inspection of St John the Baptist Primary School

11. The ETI completed an inspection of St John the Baptist Primary School in March 2015. The outcome of that inspection was that the school required significant improvement and it was subsequently placed in the formal intervention process by DENI. This is not a punitive process, it is a recognition that some organisations require external support to raise standards, which can be provided by the EANI and the Managing Authority (the CCMS in this case). A school in formal intervention is subject to further monitoring by ETI inspectors.

Scope of the case

12. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
13. The Commissioner has considered DENI's application of the exemptions specified above to the withheld information.

Reasons for decision

Section 33 – Audit functions

14. Section 33(1) of the FOIA states that:-
"This section applies to any public authority that has functions in relation to -

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions."
15. Section 33(2) says that information held by a public authority to which this section applies 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).
16. Section 33 is a qualified exemption which means the public authority must apply the public interest test to the withheld information.

DENI has stated that the information requested in parts 1-4 of the complainant's request is exempt from disclosure under the exemption set out in section 33(1)(b) of the FOIA by virtue of section 33(2).

17. The Commissioner notes that part 1 of the complainant's request includes a request for the final written inspection report published on the ETI website in May of 2015. DENI has noted to the Commissioner that it had erroneously included that report in the withheld information to which it had applied section 33(1) of the FOIA. As the report was published on the ETI website, it is clearly not subject to the exemption under that section, therefore the Commissioner finds that section 33(1) of the FOIA is not engaged in relation to that particular report and that DENI should have disclosed the report to the complainant. She has gone on to consider whether section 33(1) of the FOIA is engaged in relation to the remainder of the withheld information.
18. 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.
19. The first step when considering the application of the exemption is to establish whether DENI has the audit functions described in section 33(1)(b). In the Commissioner's guidance on section 33 she 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.
20. The ETI derives its legal powers from Articles 102 and 102A of the Education and Libraries (Northern Ireland) Order 1986. That Order provides that inspectors have a duty to monitor, inspect and report on educational standards achieved in a school, the nature, scope and effect of advisory and support services, and any other aspect of the establishment, such as the management, staffing, equipment and other resources, including whether the financial resources made available to the school are managed effectively.

21. The inspection of St John the Baptist Primary School was carried out in the week beginning 23 March 2015. The focus of the inspection was the quality of provision for learning and the quality of leadership and management in the school. The Commissioner is satisfied that pursuant to the Education and Libraries (Northern Ireland) Order 1986 the ETI had a function in relation to the examination of the factors described in section 33(1)(b) of the FOIA. The Commissioner's next step is therefore to consider whether disclosure would, or would be likely to, have a prejudicial effect on the functions performed by the ETI.
22. In her 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 cooperation with the auditor in the future, thus prejudicing the audit function.
23. DENI has argued that the main function of the ETI is to inspect and report on all education and training provision, with a particular emphasis on statutory provision. The ETI provides each of the key departments with evidence-based policy advice, evaluates the effectiveness and impact of key policies in practice and, via the biennial Chief Inspector's report, makes evaluative comment on the quality of education being provided system-wide including strengths and areas for improvement. In addition to the more familiar institutional inspection function, ETI also conducts a wide range of inspection evaluations, which provide an opportunity to focus on an aspect of education and/or training in greater depth. DENI has stated that, as both of these functions – accurate reporting and evaluation of the quality of educational provision in an organisation rely on inspection evidence and would be prejudiced by the disclosure of the information that was withheld under section 33 of the FOIA.
24. DENI has further argued that the purpose of the ETI 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 the ETI's fully developed views.

Threshold of likelihood

25. DENI has stated that it is relying on the higher threshold of 'would' in this case, meaning that it considers that there would be a strong likelihood of prejudice occurring should the withheld information be released.
26. DENI has argued that disclosure of the withheld information would prejudice the ETI's exercise of the functions set out in section 33(1)(b) of the FOIA in the following ways: -
 - a) It would inhibit the free and frank recording by inspectors of evaluations; would lead to less candid and robust inspections; would result in more average evaluations being made; and would hamper decision making.
 - b) Inspectors would take more time and caution over the recording of their notes, which in turn would reduce the amount of information recorded and diminish the inspection evidence base resulting in delaying the timely production of inspection reports within agreed deadlines.
 - c) The ETI's audit function to make evidence-based evaluations would not properly operate if findings could be readily undermined or called into question by the disclosure of earlier reporting that does not accurately represent the ETI's fully developed view and evaluation, i.e. the final holistic reported evaluations of the quality of provision within an organisation.
27. The Commissioner considers that the ETI'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. She 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.
28. The Commissioner does not generally accord much weight to the argument that fear of early disclosure would result in poorer record-keeping. The ETI inspectors have a statutory duty to carry out inspections and record their findings and should do so in a timely manner. However, she does accept the need for the ETI to retain some degree of private thinking space while decisions are being made between members of the inspection team and the ETI's senior management in order to discuss the relevant issues openly and frankly, without fear of premature disclosure.

29. The Commissioner accepts also the statement of DENI that an initial or summary evaluation of a school can be quite different from the final evaluation. During inspection, new lines of enquiry may emerge as evidence is shared between team members during meetings and ultimately inspectors deploy their professional judgement as inspectors of education. The final evaluations are only arrived at through the moderation process and final moderation meeting. The Commissioner accepts the importance of being able to go through the process and arrive at a final evaluation without fear of early and inaccurate reporting of the evidence and views exchanged.
30. The Commissioner considers that the ETI's effectiveness will be dependent on the ability of those in the inspection team to share information, freely and frankly exchange views and deliberations and to be as candid and robust as possible in their evidence. The Commissioner considers that it is this flow of information that would be jeopardised by disclosure of the withheld information. Therefore, the Commissioner is satisfied there is a strong likelihood of prejudice occurring, which equates to more than a 50% chance. She has therefore decided that section 33(1)(b) by virtue of section 33(2) is engaged and has now gone on to consider the public interest factors in favour of disclosure and those in favour of maintaining the above exemption.

Public interest factors in favour of disclosure

31. DENI accepts that there is a public interest in openness and transparency on the part of public authorities so that they may be accountable to the public for the decisions they take. It also accepts that disclosure of the information may promote public understanding of the issues concerned and allow individuals to better understand the ETI's decisions and the decision-making process.

Public interest factors in favour of maintaining the exemption

32. DENI has informed the Commissioner that inspection evidence recorded by an individual inspector often covers only part of the evaluation of an aspect of the organisation's provision. This inspection evidence, in turn, informs emerging and summary evaluations of the associated aspects of the organisation's provision and could be subject to misrepresentation when taken in isolation.
33. DENI has also stated that the publicly published inspection report is the formal or official record of the inspection. Inspectors will often write several versions of a report, or sections of a report, as they build up to

the final version. Disclosure of unfinished versions or working drafts of the report could lead to the public coming to an erroneous conclusion about the findings in the final report.

34. The purpose of the ETI from an audit point of view is, as stated, to make evidence-based evaluations. This audit function cannot properly operate if findings can be readily undermined or called into question due to earlier reporting of draft or unfinished evaluations.

Balance of public interest factors

35. 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.
36. 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 the ETI to carry out fair and thorough inspections of schools.
37. 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, as stated above, will generally not be convinced by arguments that refer to the possibility of poorer record-keeping as a result of disclosure. However, she does accept that the nature of the ETI'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.
38. 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. While the Commissioner accepts that the public would have a natural expectation that information relating to the inspection of schools would be made available, she considers this expectation is satisfied by DENI's routine publication of inspection reports. In her view, the public interest in promoting accountability is less strong where the information is incomplete and therefore does not represent a public authority's final considered position.

40. 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.

Section 40(2) of the FOIA

41. DENI had stated that it was applying section 40(2) to some of the information requested in part 5 of the complainant's request and was withholding the information on that basis. However, when supplying a copy of the requested information to the Commissioner, DENI pointed out that the majority of documents held by it which would fall within the scope of part 5 would actually, in its opinion, be exempt under section 33(1)(b) of the FOIA as they formed part of the inspection materials. The Commissioner, having considered the information which falls within the scope of part 5, considers that all of that information would form part of the inspection materials and therefore section 33(1)(b) by virtue of section 33(2) of the FOIA would cover all of the information requested in part 5 of the request.
42. Therefore, the Commissioner has only considered DENI's application of section 40(2) to the withheld information falling within the scope of part 6 of the complainant's request, which takes the form of redactions to the information under this part of the request which was disclosed to the complainant.
43. Section 40(2) of the FOIA states that information is exempt from disclosure if it is the personal data of third parties, i.e. someone other than the requester, and the conditions under either section 40(3)(a) or 40(4) are also satisfied.
44. DENI has applied section 40(2) by virtue of section 40(3)(a)(i) as it considers that disclosure of the relevant withheld information would contravene the first, second and seventh data protection principles.

The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle states -

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in Schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

45. The Commissioner must first consider whether the relevant withheld information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and/or unlawful. If she finds that disclosure would be unfair and/or unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on any of the data subjects concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3 (sensitive personal data) if appropriate are also met.
46. The Commissioner has therefore first considered whether the FOIA is the personal data of third parties.

Is the redacted information personal data?

47. The Data Protection Act (DPA) says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable. The Commissioner is satisfied that the withheld information is the personal data of DENI staff, school governors and staff at St John the Baptist Primary School. The Commissioner accepts that these individuals could be identified from the redacted information if it were disclosed or from a combination of the redacted information and other information otherwise available to a member of the public.
48. As the Commissioner is satisfied that the redacted information here constitutes the personal data of a number of third parties, she now needs to consider whether disclosure would be unfair to these data subjects.
49. Before she considers this issue, the Commissioner believes that it is important to highlight here what disclosure under the FOIA effectively means. If information is disclosed under the FOIA it is essentially being released into the public domain for anyone to see. The consideration here is not whether the redacted information should be disclosed to the complainant but whether the information should be released to the world at large.

Would disclosure be fair?

50. In her consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:
 - a. The reasonable expectations of the data subjects.

- b. Consequences of disclosure.
- c. The legitimate interests of the public

The reasonable expectations of the data subject

51. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life. Although the guidance acknowledges that there are no hard and fast rules it states that:

"Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned."

52. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.
53. The Commissioner considers the seniority of the data subject is an important factor when considering their reasonable expectations, and in her view, the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.
54. The information withheld under section 40(2) is either the names, telephone numbers or passwords for DENI staff or the same information for the governors and staff at St John the Baptist Primary School. DENI has informed the Commissioner that it did not find it appropriate to seek consent from any of the individuals in question regarding the disclosure of their personal information. In respect of DENI staff, DENI has a policy of redacting all officials' personal details from disclosed information if they are below Grade 5, which is the case in this instance. Whilst this cannot be a blanket policy, and surely will not apply in every case, as circumstances are different in every case, the Commissioner nevertheless accepts that such a policy would be likely to create a reasonable expectation among DENI staff below Grade 5 that their personal details would not be disclosed.
55. The Commissioner has considered the information and the arguments from DENI and is satisfied that the DENI staff, also the governors and

staff at St John the Baptist Primary School, whose details have been redacted, would not reasonably expect that this type of information would be placed into the public domain.

Consequences of disclosure

56. DENI has not made any arguments as to the consequences of disclosure, however the Commissioner has considered these. She considers that, as the data subjects would have had a reasonable expectation that their personal information would not be disclosed, disclosure would be likely to cause them some distress regarding the loss of privacy.
57. Notwithstanding the data subjects' reasonable expectations, or any distress caused to them by disclosure, it may still be fair to disclose the withheld information if it can be argued that there is a more compelling public interest in disclosure.
58. The Commissioner notes that the complainant has an overall personal interest in obtaining the requested information as a whole, and may have a personal interest in obtaining the personal details of the data subjects, although this is not specified. However, whilst the Commissioner acknowledges the complainant's personal interest in obtaining this information, she is mindful that any disclosure under the FOIA is to the world at large. Additionally, the Commissioner can see no compelling legitimate public interest in the disclosure of this information.
59. As the Commissioner is satisfied that disclosure of the information withheld under section 40(2) would be unfair, and that no legitimate interest exists to override the reasonable expectations of the data subjects, she has concluded that DENI has correctly applied section 40(2) by virtue of section 40(3)(a)(i) to the relevant withheld information.

Right of appeal

60. 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

61. 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.
62. 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

Deirdre Collins
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF