

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 August 2017

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 information on complaints and reports submitted to the Department for Education ("the DfE") regarding a specific Prep School and related Senior School.
2. The Commissioner's decision is that the DfE has appropriately withheld some of the requested information in reliance of sections 31(1), 36(2)(b)(i) & (ii) and (c) and section 40(2).
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 21 March 2016, the complainant wrote to the DfE and requested information in the following terms:

"1) Please supply all information on complaints submitted to the Department for Education by parents/guardians or any organisation in relation to St John's Prep School and St John's Senior School. The information must include any complaints or reports pertaining to the conduct of the proprietors, the head mistress, the headmaster and teachers.
2) This must include all information on complaints **or reports** from January 1989 to present.
3) Please redact any information which might identify or cause of[sic] any complainant to be identified."

5. On 15 April 2016 the DfE requested clarification on the type of reports requested. The complainant responded on the same day explaining:

"1. Reports from/of any investigation carried out by/on behalf of the DfE, following any complaints.

2. Reports/Referrals from any agencies/organisation in relation to any breaches by the school (teachers or proprietors)."
6. The DfE responded on 18 May 2016. It stated that section 36 FOIA was being considered in respect of the request and anticipated that it would require until 16 June 2016 to consider the public interest test. On 24 May 2016 the DfE determined that it would not be considering the public interest test and therefore the extended timeframe was not required.
7. On 27 May 2016 the DfE responded providing some of the requested information and withholding some information in reliance of sections 31, 40(2) and 41 FOIA. The public interest considerations for section 31 were provided but no public interest arguments for the section 41 exemption were considered.
8. Following an internal review the DfE wrote to the complainant on 13 July 2016. It stated that in addition to section 41 it was relying on section 36(2)(c) to refuse the requested information. The public interest determination in favour of withholding the information was provided on 11 August 2016.

Scope of the case

9. The complainant contacted the Commissioner on 11 September 2016 to complain about the way his request for information had been handled. The complainant considers that his request has been handled in a "contradictory and inconsistent" way. He particularly referenced the DfE's correspondence in respect of the public interest test. He also explained to the Commissioner that his request was based on matters occurring during court proceedings in November 2015 which he considered demonstrated "serious misconduct".
10. The Commissioner considers the scope of her investigation to be the DfE's application of the exemptions at sections 31(1)(g), 36(2)(b)(i) & (ii) and (c), section 40(2) and section 41. The DfE introduced its reliance on section 36(2)(b)(i) & (ii) when reconsidering the case at the time of the Commissioner's investigation.

Reasons for decision

11. Section 31(1) of FOIA states that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

Section 31(2)

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,”

12. Section 31 is a prejudice based exemption and is subject to the public interest test. This means that not only does the information have to prejudice one of the purposes listed but, before the information can be withheld, the public interest in maintenance of the exemption must outweigh the public interest in disclosure.

13. In order for section 31 to be engaged, the following criteria must be met:

- the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
- it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure ‘would be likely’ to result in prejudice or disclosure ‘would’ result in prejudice.

14. The DfE explained that it has statutory responsibility for ensuring that independent schools meet statutory standards. The Education (Independent School Standards) Regulations 2014, derived from sections 94(1) and (2) and 166(6) of the Education and Skills Act 2008(a) is the applicable legislation and consequently may ask Ofsted to undertake no notice inspections. In this case the DfE is relying on the section 31(2)(c) exemption to withhold some information within the scope of the request.

15. The DfE argued that disclosure of the withheld information could prejudice its ability to enforce the independent school standards by

inhibiting future decisions or actions the DfE may take following the outcome of an inspection. The DfE advised the Commissioner that inspectorates could modify their recommendations if they considered that the information would be released in the public domain. Any restriction on the information reported to the DfE could prejudice its ability to take appropriate action which could in turn be detrimental to improvements in school standards. The DfE also explained to the Commissioner that at the time of the request investigation of a particular complaint was on-going with the DfE yet to receive an ordered report.

16. The Commissioner accepts that the harm envisaged by the DfE relates to the applicable interests in this exemption.
17. The Commissioner also accepts that the DfE has demonstrated the causal relationship between disclosure of the withheld information and actual prejudice to its function related to the legislation set out in paragraph 14.
18. The DfE confirmed to the Commissioner that it wished to rely on the lower level of prejudice such that prejudice would be likely to follow disclosure of the information. The Commissioner agrees with the DfE's determination that disclosure of the requested information would be likely to influence the content of reports provided to the DfE which in turn, would be likely to prejudice the DfE's on-going ability to exercise its function of regulating the independent schools standards. The Commissioner therefore concludes that the exemption at section 31(1)(g) is engaged by virtue of 31(2)(c).

The public interest

19. The DfE did not provide the Commissioner with its public interest considerations in respect of section 31. It provided the complainant with a perfunctory public interest in its initial response. However, it confirmed to the Commissioner that the public interest considerations provided in respect of section 36 also covered section 31.
20. The Commissioner therefore notes that the DfE cited the general public interest in disclosure of information to the public in order to demonstrate the openness and transparency of government. Disclosure would assist the public's understanding of the information under consideration by the DfE in determining whether any regulatory action was required.
21. In favour of maintaining the exemption to withhold the requested information is the likely prejudice to the DfE's ability to effectively handle any regulatory failings and determine improvements, in future circumstances. The DfE explained that the inspectorate may be less

likely to engage fully or provide the DfE with the required level of detail relating to sensitive cases.

22. In considering the weight apportioned to the arguments in favour of disclosure and in favour of maintaining the exemption the Commissioner notes that in finding the exemption is engaged she has accepted that the release of the information would be likely to have a prejudicial effect. Notwithstanding the general public interest in transparency of matters at the school, on balance the Commissioner has determined that any benefit of disclosure is not sufficient to justify disclosure in the face of the prejudice which would be likely to occur.

Section 36 – Prejudice to effective conduct of public affairs

23. Section 36(2) states:

“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.”

24. The majority of the withheld information has been withheld in reliance of the section 36(2) exemption. This comprises reports and email exchanges, including complaints from different sources, between the DfE, Ofsted and Local Authority Designated Officers.
25. 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.
26. 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.

27. The DfE informed the Commissioner that it sought ministerial views twice in regard to the application of this exemption. Edward Timpson MP was contacted in July 2016 in regard to section 36(2)(c) and Caroline Dinenage MP was contacted in December 2016 in regard to section 36(2)(b)(i)&(ii) during preparation of the DfE's submission to the Commissioner, both as appropriate qualified persons in their capacity as the Parliamentary Under Secretary of State at the DfE at the stated times. Their respective opinions on the application of the exemptions were provided on 12 July 2016 and 20 December 2016. 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 Ministers, the persons consulted about the request meet the definition of a qualified person set out by section 36(5) of FOIA.
28. 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 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.
29. In seeking the advice of the qualified persons, the DfE prepared submissions 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 persons 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 be likely to 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.
30. The Commissioner notes that these exemptions are about the processes that may be inhibited, rather than what is in the information. She considers that the issue is whether disclosure would inhibit the processes of providing advice or exchanging views. In order to engage the exemption, the information requested does not necessarily have to contain views and advice that are in themselves notably free and frank.
31. 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. It relies on the information provided by the inspectorate to make decisions on whether regulatory action is required.

32. In relation to section 36(2)(b)(i), the submission emphasises the risk that disclosure of the advice held would be likely to prejudice the DfE's ability to deal effectively with handling any regulatory failings for which it has responsibility. It is essential that the DfE has a clear understanding of any investigated issues in order to make decisions about appropriate regulatory action if required. The Commissioner's guidance provides examples of 'advice' which includes recommendations made by more junior staff to more senior staff, professional advice tendered by professionally qualified employees, advice received from external sources, or advice supplied to external sources.
33. With regard to section 36(2)(b)(ii), the submission states that schools and the inspectorates must have confidence that they can share views with one another on a free and frank basis. Disclosure of information shared in this way would weaken such confidence with the likely result that the same level of co-operation and communication would not be offered in future exchanges.
34. 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 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) 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.
35. With reference to section 36(2)(c), the submission explained that the release of the withheld information could have an adverse impact on how public bodies are able to effectively deliver public services. Information which is currently shared between public bodies, such as Ofsted and DfE, could be adversely effected, such that sensitive issues are less likely to be shared. This would create difficulties for the DfE to work collaboratively and cohesively with schools and the inspectorates to deliver its task of ensuring independent schools meet the Independent School Standards and to work effectively with those that fail to do so.
36. The Commissioner is satisfied that the arguments presented are ones that relate to the activities described by the exemptions cited. She also considers the opinions that disclosure of the information may result in

the prejudice being claimed, to be ones that a reasonable person could hold. She has therefore found that sections 36(2)(b)(i) and (ii) and section 36(2)(c) are engaged.

37. Each of the limbs of section 36(2) is a qualified exemption, which means that they are subject to the public interest test.

The public interest

38. The DfE explained to the Commissioner that it considers that the severity of the prejudicial and inhibitive effects which the qualified person accepted would be likely to occur, means that the arguments for disclosure carry less weight in comparison with the arguments for withholding the information.
39. As stated in paragraph 20 there is always a general public interest in disclosure of information to the public to demonstrate openness of government. Disclosure would assist the public's understanding of the information considered by the DfE and the reasoned explanations for decisions taken. The public would be likely to find it helpful to see that public authorities and their officers have provided reasoned explanations for any decisions taken based on credible information.
40. In the view of the DfE, it is in the public interest that it can rely on the information and advice provided by the inspectorates and local authorities to help make informed decisions in order to be able to effectively monitor the performance of schools so that, where necessary, appropriate steps can be taken to address any failings. Exchanges of information and advice may include sensitive information which if placed in the public domain could inhibit the inspectorates from sharing such information in future cases. This would be likely to prejudice the effective conduct of public affairs. The benefits of disclosure in this case would not therefore compensate for the likely weakening of this regulatory mechanism.
41. The DfE went on to explain that 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. Sensitive handling of information and the following of specific recommendations from inspectorates provides for a free and frank exchange of views. Prejudice arising from the inspectorate being less likely to engage in exchanges with the DfE would therefore not be in the public interest.
42. The Commissioner accepts that the regulatory regime will be more effective where honest and candid advice and views are received. She agrees that there may be a less forthright exchange of views if such discussions are subsequently disclosed.

43. On balance she finds that the weight of public interest in disclosure is not sufficient to justify disclosure in the face of the prejudice which would be likely to result. She recognises that the public expects a process designed to regulate education standards in independent schools to be as transparent as possible. However, there are circumstances when a public authority needs space to carry out its functions effectively.
44. The Commissioner notes the complainant's view that his opinion of matters pertaining to the schools should weigh significantly in favour of disclosure. As stated in paragraph 9 the complainant has concerns about the management of the schools, however, his allegations of misconduct are not supported with sufficient evidence to tip the balance in favour of disclosure. The Confidential Annex provides further detail.
45. Having viewed the withheld information the Commissioner has determined that in the circumstances of this case, the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption.

Section 40 – Personal information

46. Section 40(2) of FOIA states that the personal data of someone other than the applicant can be withheld if its disclosure to the public would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).
47. Personal data is defined as information which both identifies a living individual and relates to that individual.
48. Some of the information withheld under section 40(2) is withheld in entirety and some information has been provided to the complainant with redactions. The information relates to different individuals some of whom have made complaints. The redactions made in the information provided relate to names and contact details of complainants or junior members of staff.
49. On inspecting the information withheld in its entirety the Commissioner is satisfied that it is information directly concerning individuals, and therefore is the individuals' personal data.
50. The data protection principles are set out in schedule 1 of the DPA. The DfE has explained to the Commissioner that it considers that the first data protection principle would be breached in disclosing the withheld information in this case.
51. The first principle states that personal data should be processed fairly and lawfully, and in particular shall only be processed if a condition in Schedule 2 of the DPA can be met.

52. The Commissioner's approach when considering the first principle is to start by looking at whether the disclosure would be fair. Only if the Commissioner finds that it would be fair will she proceed to look at lawfulness or whether a Schedule 2 condition can be satisfied.
53. 'Fairness' involves consideration of:
 - The possible consequences of disclosure to the individual.
 - The reasonable expectations of the individual regarding how their personal data will be used.
 - The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.
54. The Commissioner accepts that individuals making complaints to public authorities would have no expectation that they would have their name or any information which might identify them put in the public domain. In this case some of the withheld information concerns complaints made by parents of children at the school detailing various concerns which the Commissioner is satisfied they would reasonably expect not to be placed in the public domain. The Commissioner accepts that disclosure of some of the withheld information may cause some distress to particular individuals, who would have expected their information to remain private.
55. The DfE also explained to the Commissioner that some personal information within the scope of the request had previously been placed in the public domain and had subsequently been subject to a judicial order to remove the information from the public domain following a successful libel action. In such circumstance it would clearly be unfair to again place that information into the public domain.
56. The Commissioner is satisfied that disclosure of the individuals' personal information would be unfair and that there would be no legitimate interest in disclosure which would outweigh the likely detriment to those individuals.
57. Having made this determination the Commissioner has gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the right of the data subject as set out above.
58. The Commissioner does not consider that there is any significant legitimate public interest in disclosure of the redacted names and contact information. In respect of the information wholly withheld, disclosure would not, to any significant extent, promote openness or transparency surrounding the DfE's involvement.

59. After considering the nature of the withheld information, and the reasonable expectations of the data subjects, the Commissioner believes that the disclosure under FOIA would be unfair and in breach of the first principle of the DPA and that any legitimate public interest would not outweigh the right of the data subjects in this case.
60. Therefore the Commissioner believes that section 40(2) FOIA is engaged and provides an exemption from disclosure.

Section 41– Information provided in confidence

61. Section 41(1) states -

“Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

62. Having reviewed all the withheld information the Commissioner notes that none of the information is withheld solely in reliance of this exemption. As she has determined that the information engages the previously detailed exemptions she sees no need to consider this exemption.

Other Matters

63. As noted in paragraph 9 the complainant explained his concerns to the Commissioner that the DfE had addressed his request in a contradictory and inconsistent way suggesting that this was a deliberate attempt to create 'tactical delays'. The Commissioner does not agree and explained to the complainant the timing of responses from the public authority's receipt of clarification and the further time available for consideration of the public interest.
64. However, the Commissioner would usually expect a public authority to seek clarification of a request promptly to avoid unnecessary delay. She also accepts that the complainant was confused by the DfE's correspondence advising that extra time would be taken to consider the public interest, followed by notification that this was mistaken, followed by a response including a public interest consideration, albeit for a different exemption. The Commissioner considers that greater clarity in the DfE's handling of the request would have assisted the complainant's understanding and avoided unnecessary correspondence.

Right of appeal

65. 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

66. 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.

67. 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

**Gerrard Tracey
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