

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 April 2017

Public Authority: Office for Standards of Education

Address: Aviation House
125 Kingsway
London
WC2B 6SE

Decision (including any steps ordered)

1. The complainant has requested information from the Office for Standards of Education ("Ofsted") relating to the number of complaints it has received over the last four years for a number of schools.
2. The Commissioner's decision is that Ofsted has incorrectly applied section 33(3) (public audit functions) of the FOIA to the request.
3. The Commissioner requires Ofsted to take the following steps to ensure compliance with the legislation.
 - Issue a fresh response to the request which does not make reference to section 33(3) of the FOIA.
4. Ofsted must take this step 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 26 July 2016, the complainant wrote to Ofsted and requested information in the following terms:

"This is a Freedom of Information request. Please can you tell me how many complaints there have been in the last 4 years (unsubstantiated as well as substantiated) for the following schools: -

Worthing High

*Bohunt School Worthing
St. Andrew's School, Worthing
Durrington High*

Please state what the complaints were about (eg. Bullying)".

6. Ofsted responded on 12 August 2016. It neither confirmed nor denied that the requested information was held under section 33(3) of the FOIA. It explained that to do so, would be prejudicial to its inspection activity. Ofsted further explained that the public interest favoured maintaining the exemption.
7. Following an internal review Ofsted wrote to the complainant on 19 September 2016. It maintained its position that it was correct to withhold the requested information under section 33(3).

Scope of the case

8. The complainant contacted the Commissioner on 21 September 2016 to complain about the way her request for information had been handled.
9. The Commissioner has considered whether Ofsted was correct to apply section 33(3) to the request.

Reasons for decision

10. Section 33 of the FOIA states:

33(1) This section applies to any public authority which has functions in relation to-

(a) the audit of the accounts of other public authorities, or

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their function

(2) 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 function in relation to any of the matters referred to in subsection (1).

(3) The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) 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).

11. Section 1(1)(a) of the FOIA requires a public authority to inform the requester "whether it holds information of the description specified in the request". This is known as the duty to confirm or deny. This duty applies even if the information itself is exempt from disclosure, unless that duty is excluded.
12. In this case, Ofsted is seeking to rely upon section 33(3). The withheld information if held would consist of complaints (unsubstantiated as well as substantiated) made against the four schools detailed in paragraph 4.
13. Ofsted explained it has functions under section 33(1)(b) which have been accepted by the ICO¹ and the Information Tribunal for all previous cases of this type of request (for information relating to school inspections).
14. In particular, Ofsted explained that it has an obligation under section 5 of the Education Act 2005² to inspect maintained schools and produce a report on how well those schools discharge their own functions. Ofsted further explained that with regard to those inspections, it is also required to operate a complaints function so that parents of children at schools can make a complaint that may lead to an inspection³.
15. Ofsted explained this requires that such complaints may be considered:
"(...) for the purposes of determining, in the light of the complaint (...) when to carry out an inspection under section 5 (insofar as the timing of such an inspection is within his discretion)"
16. To support this, Ofsted stated that its audit function is required by statute to incorporate the process of parents making complaints about schools. This process also initiates an investigation by Ofsted, the purpose of which is to determine what steps to take in response to the complaint, including bringing forward an inspection or placing a complaint 'on file' to inform a future inspection.

¹ <https://ico.org.uk/media/for.../1210/public-audit-functions-s33-foi-guidance.pdf>

² <http://www.legislation.gov.uk/ukpga/2005/18/section/5>

³

<http://www.legislation.gov.uk/ukpga/2005/18/part/1/chapter/1/crossheading/investigation-of-complaints>

17. From this, the Commissioner is satisfied that Ofsted has functions as set out in section 33(1)(b). The Commissioner has now gone on to consider whether confirming whether or not the requested information is held, would or would be likely to prejudice the exercise of any of Ofsted's functions referred to in section 33(1)(b).

18. Ofsted explained that its guidance clearly stated:

"It is important to understand that Ofsted's role in considering a complaint about a school is solely to determine if there is a need to inspect. Ofsted cannot seek to resolve or establish cause for any individual complaint"

19. Ofsted confirmed that it is not required to 'substantiate' any complaint from a parent. It also confirmed that many types of complaints are received by Ofsted but are not for Ofsted to resolve such as:

- *where a parent has not previously followed the school, local authority or Education Funding Authority*
- *about individual pupil issues*
- *admission procedures*
- *legal exclusions of individual pupils*
- *providing education for individual pupils with special educational needs*
- *religious education or the religious character of a school, or*
- *temporary changes to the curriculum.*

20. Despite the above complaints not being in the remit of Ofsted, it confirmed that it can still receive complaints about them. Ofsted therefore argued that disclosure of the requested information would have a number of prejudicial effects on its audit process.

21. Ofsted explained, that if it confirmed, in relation to a named school, whether and how many complaints had been received, such information may be viewed as an indication as to whether Ofsted may or may not inspect the school and it may also be seen as indicating the outcome of an inspection. Ofsted explained:

"This is in view of the fact Ofsted states the sole purpose of investigating complaints is to determine the need to inspect and in view of the careful measures Ofsted puts in place to ensure inspections are conducted with as little notice as possible. The number of complaints would be viewed as a measure of the likelihood of imminent inspection".

22. Ofsted also argued:

"Ofsted may not deem it appropriate to share details of a complaint with a school, particularly where the complaint is not within Ofsted's scope to

investigate. However, if schools became aware of the raw number of complaints being received, regardless of their merit or the relevance to Ofsted's role, such schools may become alarmed and begin preparing for an imminent inspection. The audit function is damaged if schools are either forewarned about an inspection, or if schools operate on 'high alert' for extended periods of time. In neither case do inspectors see the school as it truly is, which would harm the effectiveness of audit function to accurately determine performance of each school. There is ample evidence reported in the press and elsewhere of the perceived impact of forthcoming Ofsted inspections on schools".

23. Adding to this, Ofsted also explained:

"...the expectation for complainants is that they would have already raised their complaint through local channels. The operation of this function is entirely reliant on parents approaching Ofsted with their concerns. There is a strong case to suggest that Ofsted providing details of complaints received about a particular school, will tend towards parents being discouraged from coming forward to report failings in their child's school. Ofsted is capable of sifting through the complaints it does receive to identify those which do cover whole school issues, however, if less overall complaints are reported to Ofsted it may never get the opportunity to inspect the school at the right time. That would have a direct impact on the overall effectiveness on Ofsted's ability to target its audits at schools where these have urgent risks of failings".

24. Ofsted confirmed that it considered prejudice 'would' occur because:

"(i) if Ofsted started providing any numbers of complaints lodged against schools, this would be quickly picked up and reported by local press, regardless of accuracy

(ii) many parents, particularly those from small school communities, seem anxious about the fact their complaint being surmised within those communities by other parents

(iii) some of those parents, with genuine and relevant causes for concern, will not take the risk of upsetting their close relationships associated with the school without some level of assurance against public exposure of the process".

The Commissioner's decision

25. Based on the submissions provided by Ofsted, the Commissioner has determined that section 33(3) is not engaged. She considers that confirming whether or not the requested information is held, would not prejudice the exercise of Ofsted's functions as set out in section 33(1)(b).

26. The Commissioner accepts that the nature of the harm cited by Ofsted is of substance. Section 33(3) will only be found to apply however where a public authority can demonstrate a causal link between the act of confirming or denying whether the requested information is held and the prejudice claimed.
27. There are two possible limbs on which a prejudice-based exemption in FOIA might be engaged in respect of the likelihood of the prejudice occurring. The first limb relates to 'would' and the second to 'would be likely'. Ofsted has claimed that confirming or denying 'would' result in the prejudice cited. In this context 'would' means more probable than not and accordingly Ofsted should be able to demonstrate that the chain of events is so convincing that prejudice is clearly more likely than not to arise.
28. To establish whether the test of prejudice has been satisfied, the Commissioner has considered a hypothetical example in which Ofsted did confirm that it held complaint information about a school. This act in itself would not disclose the number, nature or even the seriousness of the complaint or complaints that had been received. The Commissioner therefore disagrees with Ofsted that it is more likely than not individuals would be deterred from making complaints in the future.
29. In addition to this, the Commissioner understands that the making of a complaint will not necessarily be sufficient to trigger an investigation but instead Ofsted will use a range of data to determine whether an inspection would be an appropriate step in the circumstances. The Commissioner considers it is therefore unlikely that without further details a school would modify its behaviour as a result of it learning that one complaint or more had been submitted to Ofsted; a complaint that may well have already come to the school's attention in any event.
30. The Commissioner therefore requires Ofsted to take the steps detailed in paragraphs 3 and 4.

Right of appeal

31. 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

32. 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.
33. 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
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF