

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2017

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

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Education (DfE) for information about the performance of Regional Schools Commissioners against their Key Performance Indicators.
2. The DfE provided the complainant with some of the requested information however refused to disclose the remainder citing section 36(2)(c) of the FOIA.
3. The Commissioner has determined the exemption is engaged but concluded that on balance the public interest favours disclosure.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - Disclose the data relating to Key Performance Indicator (KPI) 6.
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.

Background

6. Eight Regional Schools Commissioners (RSCs) were appointed in 2014. They are civil servants who play a wide role across the system and help

deliver the government's key educational priorities. Each year a set of KPIs is agreed to monitor RSCs' performance against these priorities. This complaint to the Information Commissioner relates to a KPI in year 1 (2014-15), known as KPI 6. KPI 6 in year 1 was "Percentage change in sponsor attainment RAG rating".

7. Sponsors are approved by the DfE as having the capacity and capability to drive up standards in underperforming schools. The DfE has a duty to issue an Academy Order to all maintained schools that have been judged inadequate by Ofsted so that they become sponsored academies. This is to secure rapid and sustainable improvement. Schools can also apply to convert to academy status voluntarily and most now do so in multi-academy trusts (MATs). MATs can apply to be approved as a sponsor.
8. The RSC is responsible for holding academy trusts and sponsors to account where academies or free schools are underperforming. When an academy trust is failing to improve a school that has been identified as underperforming, it is important that RSCs are able to take action. In cases where formal intervention measures are required, RSCs will take action to address underperformance and bring about rapid improvement. RSCs act in the name of the Secretary of State for Education, and are accountable to her and to the National Schools Commissioner, who is also a civil servant.
9. In this case the complainant was specifically interested in the Key Performance Indicators (KPIs) in relation to the department's RSCs.
10. As part of its transparency agenda, the department already reports on RSC performance. The latest Academies Annual report outlining the titles of the year 2 RSC KPIs can be found by following the link below:
<https://www.gov.uk/government/publications/academies-annual-report-academic-year-2014-to-2015>
11. KPI 6 for year 1 "Percentage change in sponsor attainment RAG rating" was calculated based on the attainment of the schools within the sponsor. The analysis covered four main metrics: average change in attainment (2012 to 2013, and 2013 to 2014); proportion of academies with large falls in attainment; proportion of academies (open for 2 or more years) showing consistent improvements; and proportion of academies (open for 2 or more years) below the floor standards. Separate ratings for Key Stage 2 (KS2) and Key Stage 4 (KS4) results were calculated then combined to give an overall rating. Different weightings were assigned to each metric depending on the number of academies included in that metric at each stage, for example if sponsors

predominantly have secondary schools, then the KS4 results contribute more to a metric than the KS2 results.

12. KPI 6 was removed from active use during year 1 (2014-15) as the data was based on a flawed methodology. It was not a robust assessment of performance because of its focus on changes in attainment over time leading to insufficient consideration of progress measures. Aspects of the methodology such as inclusion of a floor standards assessment for academies open at least two years under the sponsors meant that relatively few academies could be included in that metric. The approach it used was superseded by a more robust progress-focused assessment of the performance of the performance of academy sponsors and multi-academy trusts for the 2013-14 school year that was published on GOV.UK in March 2015:

<https://www.gov.uk/government/statistics/schools-in-academy-chains-andlasperformance-measures>

13. At the time of the request which is the subject of this decision the department was engaged in the production of a follow-up publication covering the 2014/15 school year that was published on GOV.UK on 7 July 2016:

<https://www.gov.uk/government/statistics/multi-academy-trust-performance-measures-2014-to-2015>

14. Subsequently the department has now released a further follow-up publication covering the 2015/16 school year that was published on GOV.UK on 19 January 2017:

<https://www.gov.uk/government/statistics/multi-academy-trust-performance-measures-2015-to-2016>

Request and response

15. On 15 June 2016 , the complainant contacted the DfE on Twitter and requested information in the following terms:

"... can you please release RSC KPI performance?..."

16. The DfE responded on 17 August 2016 in which it provided the complainant with some of the requested information, however withheld all KPI data for 2014-15 under section 36(2)(c) and KPI titles for 2015-16 under section 22.
17. The complainant requested an internal review on 30 September 2016.

18. The DfE carried out an internal review and notified the complainant of its findings on 16 January 2017. It was agreed that the requested information covering all KPIs would be released (which it did) with the exception of KPI 6 which the DfE maintained is exempt under s36(2)(c). Furthermore it confirmed that information previously withheld under section 22 had been published and provided the complainant with an access link.

Scope of the case

19. The complainant contacted the Commissioner on 19 January 2017 to complain about the way her request for information had been handled. She stated that she was unconvinced that the withheld information (KPI 6 data) is covered by an exemption.
20. The Commissioner considers that the scope of the case is whether the exemption under section 36(2)(c) of the FOIA was applied correctly by the DfE.

Reasons for decision

Section 36 – effective conduct of public affairs

21. Section 36(2)(c) of the FOIA states that information is exempt from disclosure if, in the reasonable opinion of a qualified person, disclosure would or would likely to prejudice the effective conduct of public affairs.
22. Section 36(2)(b)(i) and (ii) refer to the likely prejudice to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation. As section 36(2)(c) is worded specifically as “would otherwise prejudice”, it is the Commissioner’s opinion that if a public authority is claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).
23. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.

24. The DfE confirmed that the qualified person for the purposes of section 36 of the FOIA is Minister Gibb. Having received a detailed submission setting out the request, the nature of the withheld information and the arguments for and against disclosure, the Minister authorised the use of section 36(2)(c) of the FOIA in this case on 16 August 2016.
25. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
26. The Commissioner would emphasise that section 36 is concerned with the processes that may be inhibited by disclosure of information, rather than what is in the information itself. In this case, the issue is whether disclosure of the withheld information would, or would be likely to, otherwise prejudice the effective conduct of public affairs. The DfE has confirmed to the Commissioner that the prejudice claimed is "likely to occur".
27. In her request for an internal review, the complainant asked the DfE to reconsider its decision to withhold the information on the basis that "the National Schools Commissioner said he could not see any reason why this data, which his staff are judged by, could not be released. Therefore, while there are potentials for harm, there is no evidence of a likelihood of harm, which is what section 36 relies upon. In fact, the [National Schools] Commissioner said he could not see a reason for believing there would be harm, so one would suggest it is, on the balance of an expert's view, unlikely to be harmful."
28. She also pointed out that "if earlier iterations of data are inaccurate, it would be fair and permissible for the DfE to provide a note saying so, and also - in due course - release the updated metrics which will show the difference. That the public might misinterpret something is not a reason for not releasing information under section 36. Mistakes are also not covered by section 36."
29. In its arguments advanced to the Commissioner, the DfE explained that the withheld information includes early versions of metrics which were subsequently considered to be inaccurate or misleading. Releasing this data would damage the effective conduct of public affairs because it risks inaccurate conclusions being drawn a) regarding parties external to the department, which could result in undue reputational harm and

could have a negative impact on their ability to operate, and b) provide inaccurate data on progress against certain KPIs.

30. The DfE explained that it was already committed to reporting on RSC performance as part of the Academies Annual Report (as set out in the background to this decision). The report gives a full and accurate picture of academy, sponsor and RSC performance in delivering key government policies and objectives.
31. The DfE believes that release of inaccurate data, specifically the publication of inaccurate data on KPI 6, with or without an associated caveat, could result in a number of potentially negative impacts in the department's and wider public bodies' ability to effectively deliver the Academies Programme.
32. From the perspective of the impact on schools, the DfE states there is the potential that schools in the region could be perceived as not improving or indeed worsening, which could have an adverse effect on sponsors' reputation and their willingness to take on and improve other schools. Parents may not want to send their children to a school which is perceived as not achieving which could lead to falling school rolls and less sustainable schools. Further, teachers may decide to leave a school that is perceived to be unsustainable or struggling and it may be difficult to recruit replacements. The DfE believes that such risk of reputational damage could potentially be on a regional level which could lead to adverse financial and possible recruitment/staffing impact of schools.
33. The DfE went on to explain that should inaccurate information regarding sponsored academies be released that shows 'no change' in attainment at regional level, or even attainment apparently becoming 'worse', its academy sponsors are likely to be concerned that their professional reputation may be at risk. This in turn could result in some sponsors becoming more 'risk adverse' and thus reducing the department's pool of accessible, high quality sponsors.
34. It is also submitted that as KPI 6 refers to a 'RAG' rating, sponsors would be likely to ask what their particular 'rating' is, even though such ratings are purely for internal use and allow RSCs to prioritise internal resources on its weakest schools. This unnecessary distraction would take away resource away from addressing the issues in the trusts that need the department's help, and so would be likely to delay relevant intervention and hinder the delivery of departmental and government priorities.
35. As well as reputational impact on existing sponsors, the department considers that release of the KPI 6 data could result in new sponsors being unwilling to show an interest in some RSC regions that wrongly

appear to be 'struggling' or 'underperforming'. Such a potential reduction in high-quality sponsors in regions where they are needed would have a negative impact on the delivery of the Academies Programme and therefore the effective conduct of departmental and public affairs.

36. There is also a possibility that potential sponsors could be discouraged from expressing an interest in academy sponsorship in RSC regions which, quite wrongly, look to have sponsors and sponsored academies 'struggling' or 'underachieving'. This in itself could lead to reputational issues for our RSCs, as it may be perceived that RSCs are not supporting schools and sponsors as well as they should be, as well as unwarranted criticism of regional sponsors who are wrongly perceived to be underperforming.
37. The DfE has further explained that as well as the possible reputational impact, there is a risk that release of this information could have a more significant impact: a possible loss of confidence in its RSCs. If this were to happen it is clear that, while trying to rebuild any lost confidence, there would be an impact on the RSCs' ability to deliver the department's, and government's key objectives and priorities, which would have a negative impact on its effective conduct of public affairs, particularly a potential delay regarding necessary improvements in schools.
38. It is the DfE's position that it is important that the department and its RSCs are able to maintain a positive and trusting relationship with its academy sponsors, regional stakeholders and local parents and pupils, which would likely to be diminished if this inaccurate information was to go into the public domain. Given that building such relationships takes considerable time, resource and effort, the possibility that they could be diminished due to the release of inaccurate information, means that the effort it would require for them to be re-established could only have a negative impact on the department's and RSCs' ability to effectively deliver the Academies Programme, which was a government and departmental priority and manifesto commitment at the time of the FOI request.
39. The DfE considered releasing the information with a caveat explaining that this data was found to be inaccurate and that KPI 6 was subsequently dropped however has concerns that once the information goes into the public domain such caveats can be lost or removed. This in turn could raise interest in regional performance and result in the department's regional teams (of c40 plus people led by RSCs) and academy sponsors needing to defend themselves against this inaccurate information, thus shifting resources away from the key priority of providing all children with a high-quality education and the opportunity

to achieve their potential. This cannot be in the public interest, especially as accurate performance data is now published annually and that information on multi-academy trust performance is now published on a regular basis.

40. The Commissioner has considered these arguments in detail and she is satisfied that the qualified person's opinion that disclosure would be likely to prejudice the effective conduct of public affairs is a reasonable opinion to hold. She considers that the release of information which is inaccurate or misleading could lead to the consequences set out in the DfEs arguments, including reputational damage and loss of confidence in schools, sponsors and the RSCs themselves. This, including the need to manage such reputational damage and loss of confidence, would in turn impact upon the DfEs ability to effectively deliver its key objectives and priorities including delivery of the Academies Programme.
41. The Commissioner is aware that following its internal review of the complainant's request, the DfE released some information previously withheld under section 36(2)(c) with a caveat, and has considered whether to do so in respect of the withheld information would negate the effect of the prejudice claimed by the DfE. The Commissioner considers that the nature of the data included within KPI 6 and the fact that it refers to a 'RAG' rating could have the effect of distracting resources away from its primary role in managing the effect of disclosure, irrespective of whether a caveat is issued with disclosure. This is because sponsors would be alerted to the existence of the 'RAG' rating which would be likely to lead to enquiries about the rating applied to respective sponsors. The Commissioner also accepts that it is reasonable to conclude that resources could be redirected from the key priority of providing high quality education in order to defend its position in light of release of inaccurate and misleading data.
42. The Commissioner is therefore satisfied that the qualified persons opinion is a reasonable one to hold and therefore section 36(2)(c) is engaged.

Public interest test

43. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition would be likely to result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of the case, the public interest in maintaining either of the exemptions outweighs the public interest in disclosing the information.
44. When considering complaints about the application of section 36, where the Commissioner finds that the qualified person's opinion is reasonable,

she will consider the weight of that opinion in applying the public interest test.

Public interest arguments in favour of disclosure of the information

45. The public interest in disclosure will always attract some weight simply by virtue of the inherent importance of transparency and accountability.
46. The DfE has accepted that considerations for disclosure add up to an argument that more openness may lead to greater accountability, and improved standard of public debate, and improved trust.

Public interest arguments in favour of maintaining the exemption

47. In many ways the arguments advanced by the DfE reiterate and develop the concerns expressed about disclosure that were set out in its submissions presented to the qualified person.
48. In summary, release of inaccurate data (the metric for which has been discontinued) would damage the effective conduct of public affairs because it risks inaccurate conclusions being drawn:
 - a) regarding parties external to the DfE (ie. academy sponsors), which could result in undue reputational harm and could have a negative impact on their ability to operate; and
 - b) providing inaccurate data on progress by RSCs against their KPIs.
49. The DfE argued there is a potential negative impact of release of the inaccurate KPI 6 data on the relationship with RSCs and their local academy sponsors, as release could leave sponsors to be wrongly seen as underperforming.
50. It explained that it is important that the DfE's sponsors and their RSCs are able to have an open, honest and trusting relationship to help improve attainment and the life chances of all pupils, and such information could put an unwarranted strain on these relationships.
51. Publishing the data on RSC KPI 6 could result in creation of league tables or rankings of the RSCs' performance based on an incomplete picture, which does not fully take into account pupil progress and the context of the schools within the sponsor or MAT arrangement and the wider region. This would not accurately portray RSCs' performance and could undermine confidence in RSCs.
52. The DfE has pointed out that, when it released the rest of the KPI data to the complainant it was indeed published:

<http://schoolsweek.co.uk/regional-schools-commissioner-league-tables-2014-15/>.

For this reason the DfE considers it likely that if it were to release this piece of information, there is a strong possibility that it would be reported in the same way. If this happened the DfE considers it likely that the adverse effects described above could take place, and that it could not be in the public interest for school improvement or the ongoing education of children to be undermined in this way.

53. The DfE also notes that there is already information in the public domain which enables the public to understand the role and performance of RSCs, academy sponsors and multi-academy trusts. Adding inaccurate data to this is likely to confuse rather than enlighten, which could not be in the public interest.
54. The DfE's position therefore is that the public interest in withholding the information outweighs the public interest in disclosure.

Balance of the public interest arguments

55. In finding that the above exemption is engaged, the Commissioner has already accepted the qualified person's opinion (that the disclosure of this information is likely to result in the effects set out in the exemption) is a reasonable opinion to hold. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any prejudice that would or might occur. In order to determine this, the Commissioner has considered both the nature of the requested information and the timing of the request.
56. The Commissioner notes that the withheld information was created at a time when the role of the RSCs was relatively immature and the process of monitoring their performance against key government priorities in delivery of the Academies Programme was being developed and improved. KPI 6 was removed from active use during year 1 and was superseded by a more robust method of measuring performance. The data relating to these improved and robust measures is published by the DfE on an annual basis.
57. At the time of the complainant's request in August 2016 the DfE had already published data relating to performance, based upon the more robust progress-focused assessment (in March 2015, as per paragraph 12 of this decision) and was engaged in publishing data relating to the 2014/15 school year (published on 7 July 2016 as per paragraph 13 of this decision). It has since published data relating to the 2015/16 school year (paragraph 14 of this decision).

58. The DfE's concerns that the public would receive an inaccurate and misleading picture based upon the release of inaccurate KPI 6 data are, in the Commissioner's view, significantly weakened by the passage of time and the fact that data based upon the improved and more robust assessment had already been published over a year prior to the request, and has continued to be published. Accordingly there is a significant period of time subsequent to the removal of KPI 6 in which accurate data has been available to the public, and which would enable the public to make an informed view. The Commissioner considers that any prejudice caused by disclosure of inaccurate or misleading information based upon the use of KPI 6 can be mitigated by provision of an associated caveat, and whilst she accepts that there is a risk that any associated caveat may be lost or removed in the future, the severity and extent of the prejudice is not in her view significant for the above reasons.
59. On balance, the Commissioner has found that the severity and extent of the prejudice in this case would not be sufficient to justify maintaining the exemption. In forming this view, the Commissioner recognises that the public will expect a process designed to monitor the performance of RSCs in their delivery of the government's key educational priorities to be as transparent as possible, and perceived concerns about public interpretation of inaccurate data are not sufficiently strong to support a decision to maintain the exemption.
60. The Commissioner therefore concludes that the public interest arguments in favour of maintaining the exemption under section 36(2)(c) are outweighed by those in favour of disclosure. Accordingly, the Commissioner orders that the withheld information should be disclosed.

Right of appeal

61. 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

62. 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.
63. 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

**Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**