

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 July 2017

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

Decision (including any steps ordered)

1. The complainant has requested the DfE to disclose a copy of the financial management and governance review findings into the Wakefield City Academy Trust (WCAT) and copies of any written correspondence between the regional schools commissioner and WCAT between 1 January 2015 and the date of his request. The DfE responded refusing to disclose the requested information citing sections 36(2)(b)(i) and (ii), 36(2)(c), 43 and 40 of the FOIA.
2. The Commissioner's decision is that section 36(2)(b)(i) and (ii) and section 36(2)(c) of the FOIA applies to all the withheld information and the public interest rests in maintaining this exemption. She has however found the DfE to be in breach of section 10 of the FOIA, as it failed to respond to the request within 20 working days of receipt.
3. Overall, the Commissioner does not require any further action to be taken in this case.

Request and response

4. On 15 February 2017, the complainant wrote to the DfE and requested information in the following terms:

"1. a copy of the financial management and governance review findings into the Wakefield City Academy Trust.

2. copies of any written correspondence between the regional schools commissioner and WCAT, between January 1, 2015, and up to the present date."
5. The DfE responded on 22 March 2017. It stated that it holds the requested information but is unwilling to release it, citing sections 36(2)(b)(i) and (ii), 36(2)(c) and 40 of the FOIA.
6. The complainant requested an internal review on 24 March 2017.
7. The DfE carried out an internal review on 25 April 2017. It upheld its previous application of sections 36(2)(b)(i) and (ii), 36(2)(c) and 40 of the FOIA and also stated that it wished to rely on section 43.

Scope of the case

8. The complainant contacted the Commissioner on 28 April 2017 to complain about the way his request for information had been handled. Specifically, the complainant disagrees with the application of sections 36 and 43 of the FOIA and stated that reviews of this nature have been released in the past without any harm. He also considers that WCAT has received a significant amount of public money and it is in the public interest to disclose any issues with finance and governance, as it may reflect any problems with the DfE's processes for awarding grants. He also wishes the Commissioner to consider whether the DfE has breached section 16 of the FOIA by, in his view, failing to adequately explain its use of the exemptions and the application of the public interest test.
9. The Commissioner will consider the application of section 36(2)(b)(i) and (ii) and 36(2)(c) first. She will only go on to consider sections 43 and 40 if she finds that sections 36(2)(b)(i) and (ii) and section 36(2)(c) do not apply to some or all the withheld information.

Reasons for decision

10. Firstly, it is important to highlight here that the Commissioner has had to use a Confidential Annex to record the DfE's submissions and the reasons for the Commissioner's decision which will now follow but only in brief. This is because she has been asked by the DfE to treat the majority of its submissions as private and confidential, as the disclosure of this information itself would be likely to engage the exemptions cited. The Commissioner has respected the DfE's position in this case and proceeded on this basis.

11. Section 36(2) of the FOIA states that information is exempt from disclosure if in the reasonable opinion of the qualified person, disclosure:
 - (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, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
12. This exemption is also subject to the public interest. So, in addition to demonstrating to the Commissioner that one or both limbs of section 36 of the FOIA is engaged, the public authority must also consider the public interest arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.
13. The DfE confirmed that the qualified person 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)(b)(i) and (ii) of the FOIA and section 36(2)(c) in this case on 21 March 2017.
14. 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.
15. The Commissioner has reviewed the withheld information, the submissions made to the qualified person and the submissions she has recently received from the DfE during her investigation and she is satisfied that the qualified person's opinion in this case that section 36(2)(b)(i) and (ii) and section 36(2)(c) is engaged is a reasonable opinion to hold. As stated above, she cannot explain here in the main body of the notice why she has reached this decision, as to do so would disclose information which is exempt from disclosure, but she is satisfied that the opinion is a reasonable opinion to hold and so both limbs of the section 36 exemption are engaged.
16. She now needs to go on to consider the public interest test. The public interest test considerations under section 36 of the FOIA require the

Commissioner to consider the extent, severity and frequency of the inhibitions claimed.

17. Again, she is not able to discuss the arguments for and against disclosure in the main body of this notice or how she has considered them. But the Commissioner can say that she has in this case considered the extent, severity and frequency of the inhibitions claimed by the DfE and she has reached the decision that the public interest rests in maintaining this exemption.
18. As the Commissioner has found that section 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA applies to the withheld information there is no need for her to go on to consider the application of the other exemptions cited.

Procedural matters

19. Section 10 of the FOIA states that a public authority shall respond to a request for information promptly and in any event no later than 20 working days from receipt.
20. In this case it is noted that the request was received on 12 February 2017. However, the DfE failed to respond until 22 March 2017. As the DfE took longer to respond than the 20 working days permitted by the FOIA, the Commissioner has found the DfE in breach of section 10 of the FOIA.
21. With regards to section 16 and the complainant's assertion that the DfE has breached this section of the FOIA by failing to adequately explain why exemptions have been applied and how it considered the public interest test, the Commissioner has reached the decision that there has been no breach of section 16 of the FOIA in this case.
22. Section 16 states that it shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to so do, to persons who propose to make, or have made, requests for information to it.
23. Reasonable advice and assistance includes advice and assistance whilst making a request, so, informing an applicant of their rights under the FOIA or assisting them in framing or wording their request appropriately. It also includes advising an applicant if the requested information is available elsewhere and directing them to it or how to narrow a request if the public authority considers compliance with an existing request would exceed the cost limit. Furthermore, it includes keeping the applicant update on the progress of their request.

24. Any potential issues with how a public authority explains how a particular exemption applies comes under section 17(1)(c) of the FOIA not section 16. Section 17(1)(c) of the FOIA states that a public authority should state why an exemption applies. The Commissioner has reviewed the refusal notice and she is satisfied that the DfE stated why a particular exemption is engaged and why it considered the public interest rested in maintaining the exemption albeit not in the level of detail required by the complainant. This section of the FOIA does not specify what level of detail needs to be included in this explanation although the Commissioner would consider it a matter of good practice to explain as fully as possible in a given case why information is being refused.
25. It is also worthy of note here that the Commissioner has used a Confidential Annex to record the DfE's submissions and her decision in full. This is because this information itself is exempt from disclosure. The DfE would not have been in a position to explain in its refusal notice why these exemptions applied and how the public interest test had been considered in the level of detail the complainant requires for the same reason.

Right of appeal

26. 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

27. 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.
28. 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

Samantha Coward
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Wycliffe House
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