

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 November 2018

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to the background checks undertaken for the former Chief Executive of the Education Fellowship Trust and correspondence and communication between the DfE, the Education Skills Funding Agency (ESFA) and the regional commissioners between January and the end of March 2017 with regard to any discussions or proposals that deal with measures to tackle poor performance by the Education Fellowship Trust, its trustees, senior management and its schools. The DfE responded, it refused to disclose the requested information under section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) FOIA.
2. The Commissioner's decision is that the DfE correctly applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

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4. On 11 September 2018 the complainant made the following request for information under the FOIA for:

"I would be grateful if you could supply information that sets out the background checks carried out on Johnson Kane, the former Chief Executive of the Education Fellowship Trust. Can you let me know the checks and results of the checks carried out by the Department for Education: the Education Skills Funding Agency (ESFA) and the

regional commissioners. Can you supply communications between the regional commissioners and the Education Fellowship from December 2016 to the present (11/09/2017). Could you supply correspondence and communication between the DfE; the Education Skills Funding Agency and the regional commissioners between January and the end of March 2017 with regard to any discussions or proposals that deal with measures to tackle poor performance by the Education Fellowship Trust, its trustees, senior management and its schools."

5. On 28 November 2017 the DfE responded. It refused to disclose the requested information under section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) FOIA.
6. The complainant requested an internal review on 5 December 2018. The DfE sent the outcome of its internal review on 21 February 2018. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way her request for information had been handled.
8. The Commissioner has considered whether the DfE was correct to apply section 36(2)(b)(i) and (ii), section 36(2)(c) and section 40(2) FOIA to the withheld information.

### **Background**

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9. The Education Fellowship Trust (TEFT) is a multi-academy trust that comprised of 12 academies, educating approximately 6,500 students, the first of which converted to join the Trust on 1 October 2012. Nine of the academies are based in Northamptonshire, two in Wiltshire and one in Maidenhead, Windsor and Maidenhead.
10. The DfE has been investigating concerns into the management and governance of the trust since February 2014, including a Financial Notice to Improve (FNtI) being issued following an ESFA visit in February 2014. This FNtI was lifted in March 2015, once it was confirmed that the conditions had been met.
11. However, an investigation into the trust by the ESFA took place in May 2016, following allegations received by the ESFA regarding the governance and legal framework at TEFT. These concerns related to the

overall long-term financial health and ways of working within the Trust, and the report was published July 2016 on the GOV.UK website:

[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/555087/Investigation\\_report\\_The\\_Education\\_Fellowship\\_Trust.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/555087/Investigation_report_The_Education_Fellowship_Trust.pdf)

12. Following this TEFT received a further FNTI in August 2016 as a result of the Trust's:

Failure to ensure robust governance arrangements (Academies Financial Handbook (AFH) 2.1.3); and

Failure to ensure good financial management and effective internal controls (AFH 2.2.4).

13. In March 2017, TEFT requested the transfer of all of its twelve academies to new sponsors. The DfE accepted this request to terminate their funding agreement and work started to find suitable, strong sponsors to take on these academies. This work was ongoing at the time of the request, at that stage two had been rebrokered whilst the remaining ten academies were still currently part of TEFT until suitable sponsors could be found for these schools. The Commissioner is aware that by March 2018 new sponsors had been found for eight of the schools.
14. TEFT has received national media attention during this period of time, with articles appearing on the BBC News website and in other media outlets including the Times Educational Supplement (TES), the Sunday Times and the Guardian.
15. The DfE's key priority was to ensure that all the children at these academies received the best possible education and it continued to work closely with TEFT to ensure disruption for pupils was kept to a minimum. This included securing additional specialist capacity to support the trust with the transfer process. The DfE was working to transfer the remaining schools as soon as possible, and to wind up the trust by the end of this year.
16. The DfE is clear that every pupil deserves an excellent education, and academy trusts operate under a strict system of oversight and accountability, allowing it to take action to effectively deal with under-performance.

## Reasons for decision

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### Section 36

17. Section 36 FOIA provides that,

“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-

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

18. In this case the DfE has applied section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA. The DfE provided the Commissioner with a spreadsheet containing the 101 pieces of information falling within the scope of the request and labelled this with the relevant limb of section 36 which had been applied to each document.

19. In determining whether the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

20. The DfE explained that the qualified person was Sir Theodore Agnew, Parliamentary Under Secretary of State for the School System. The qualified person's opinion was that section 36(2)(b)(i) and (ii) and section 36(2)(c) is applicable in this case as disclosure would be likely to prejudice the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or would be likely to otherwise prejudice the conduct of public affairs. The DfE explained that the qualified person had access to all relevant material including

the withheld information. A copy of the submissions put to the qualified person were provided to the Commissioner as well as a copy of the qualified person's opinion.

21. The DfE explained that in relation to section 36(2)(b)(i), some of the withheld information contains the exchange of free and frank views, for the purpose of providing advice. It provided the Commissioner with examples taken from the information withheld under this limb of section 36.
22. The DfE said that given the ongoing sensitivities around the transfer of schools, especially as these issues were still 'live' with not all of the TEFT schools having been formally allocated new trusts/sponsors, it believed that the impact of such a release would still be significant and that such information should continue to be withheld, as officials would be likely to be less candid and forthcoming in offering advice if they believed that it could go into the public domain. It could also create delays in resolving these issues in similar situations in the future.
23. Although the DfE does not believe that officials would be deterred from providing advice via such email exchanges, there is a risk that the messages within these emails could be more guarded or become diluted and such provisions of advice may not be as candid and forthright as they are at present. This in turn would lessen the impact of such discussions and advice when it comes to key actions being implemented to resolve issues such as those of sponsored academies being judged as 'inadequate' by Ofsted and their associated trusts being seen as not being viable.
24. The DfE said that it is important that Education Authorities (EAs), the DfE and its officials can provide candid advice when addressing issues or problems relating to the delivery of DfE policies and objectives, in this case excellent standards of education through the academies programme. It considers that to release such information would be likely to deter officials and EAs from providing such free and frank advice in the future, which could hinder the effective delivery of such key policies. The fact that this may also have a detrimental impact on the quality of the education pupils receive is a key consideration.
25. The provision of advice is also key in relation to the delivery of priorities, the delivery of key DfE objectives and effective problem resolution. It is essential that all officials contributing to email exchanges and updates are absolutely clear as to what is needed, what is recommended and what is expected by the DfE. If this were to be affected through the provision of diluted advice, then there could be confusion and/or delay in the future, which would disadvantage all parties involved.

26. The DfE explained that in relation to section 36(2)(b)(ii), the officials involved in these email exchanges were of the impression that their views and the issues raised were provided in confidence.
27. The reallocation of educational provision, in the form of rebrokering academies where appropriate from the existing sponsors to new sponsors, is a hugely important and highly sensitive part of DfE discussion and deliberation, and one which its officials must be able to discuss openly and freely, and consider and deliberate without fear that such discussions will make it into the public domain. To publish this is likely to inhibit such discussion and debate, which in turn could lead to delays in schools rated as 'inadequate' by Ofsted being rebrokered where appropriate to new sponsors who can improve attainment and educational standards.
28. The DfE explained that in relation to section 36(2)(c), as part of a strong and effective working relationship, DfE officials need a safe space in which to work and to deliberate issues, concerns and potential next steps, to ensure that full and frank discussions, investigations and deliberations can take place to achieve the best outcome for key priorities.
29. When such complaints come to the DfE's attention, officials must be in a position to exchange sensitive information so as to deliberate, investigate and ascertain what, if any, action needs to be taken. It is also vital that trust employees have faith that such concerns will be dealt with sensitively and confidentially. This needs to be possible without fear that this would make its way into the public domain, as this would be likely to damage the trust developed between the DfE and academy trusts when dealing with such sensitive issues.
30. Given that issues surrounding TEFT were still 'live', discussions and the release of information around sensitive issues such as the DfE approach to rebrokering the schools and handling the current financial situation of the Trust would be likely to stifle the open and honest discussions between officials. It could impact on the willingness of current and future officials, key stakeholders and trusts to openly and candidly discuss issues, if there are concerns that each step of the process may be published, or that they may be misrepresented through the release of such information. This would be likely to inhibit the effective conduct of public affairs

31. The Commissioner considers that the withheld information reflects the provision of candid advice, the free and frank exchange of views or the DfE's wider conduct in relation to the transfer of the twelve TEFT academies to new sponsors. The qualified person considers that the prejudice claimed would be likely to occur in this case should the withheld information be disclosed. Given that the issues to which the withheld information relates were still live and ongoing, with some of TEFT schools still to be formally allocated new sponsors, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore all three limbs of the exemption were correctly engaged.
32. As the Commissioner has decided that the exemption is engaged, she has gone on to consider whether the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

### **Public interest arguments in favour of disclosing the requested information**

33. The DfE has taken into account that considerations for disclosure add up to an argument that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.
34. There is a general public interest in disclosure of information to the public, to demonstrate the openness and transparency of government.

### **Public interest arguments in favour of maintaining the exemption**

35. The DfE provided the following public interest arguments in favour of maintaining section 36(2)(b)(i):
  - It is essential that DfE officials, as well as other stakeholders such as college principals, can discuss advice on a range of issues without worrying about the public presentation of these discussions.
  - It is also the case that good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of the options.
  - The DfE said that it is clear from the information withheld, that officials and key stakeholders feel able to provide free and frank professional views and advice, due to the fact these exchanges were not intended to go into the public domain. However, should the DfE make such information public the likely result is that future advice given by officials and stakeholders, as well as any issues and concerns raised,

would be less candid, especially when discussing sensitive or high profile issues such as the rebrokerage of academies.

36. The DfE provided the following public interest arguments in favour of maintaining section 36(2)(b)(ii):
- A robust and fair decision-making system relies on considering all points of view before reaching a reasoned conclusion. To do this, all parties should be able to speak freely and frankly and be able to challenge, to ensure that issues are debated widely and that decisions are based on broad and balanced evidence. If there is a risk that sensitive discussions may be opened up to public scrutiny, DfE officials and key stakeholders may be less likely to enter openly into the discussion and subsequent decision-making process, resulting in a reduction in quality of the final decision.
  - Officials and stakeholders must have confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge issues presented to them. If the DfE is required to put this information into the public domain, officials and stakeholders would be likely to be inhibited from entering into free and frank exchanges, which in turn would have a negative impact on the DfE's ability to resolve issues presented.
  - Disclosure of the information outlined above would be likely to remove the space within which officials are able to discuss options freely and frankly. This would limit the DfE's ability to develop the delivery of its policies and priorities where required.
  - DfE believes that the reasoning behind the balance of public interest arguments and the DfE's decision to withhold this information is the same as that which was accepted by the Information Commissioner in a recent decision notice (Ref: FS50587396<sup>1</sup>), as outlined below, particularly as TEFT was at the time of the request a live issue with the majority of their schools yet to be rebrokered:

"The Commissioner considers that there is a strong public interest in openness and transparency and in further public understanding of the process of discussion which leads ultimately to decision-making within public authorities such as the DfE. Disclosure of the withheld

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560340/fs\\_50587396.pdf](https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1560340/fs_50587396.pdf)



information may increase public trust and confidence in the DfE and its decision-making process.

Whilst there are strong arguments in favour of disclosing the withheld information, the Commissioner considers that there is a strong public interest in the DfE being able to discuss issues freely and frankly and to be able to have space to consider all issues and make informed decisions. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision."

37. The DfE provided the following public interest arguments in favour of maintaining section 36(2)(c):

- The DfE relies on information provided by officials and key stakeholders to help make informed decisions in order to determine the appropriate level of action to take when developing the delivery of its objectives and any issues surrounding this. These types of deliberations need to remain confidential to ensure they are handled sensitively and effectively.
- If the DfE is required to disclose the requested information, it would be likely to prejudice its ability to deal effectively with handling significant delivery and business issues, in this instance the cancellation of a master funding agreement and the subsequent rebrokerage of TEFT schools. This could lead to the DfE being unable to decide whether issues or concerns raised require full and formal consideration, and potentially the redirection of its limited resources (including DfE officials) to do so.
- Officials and key stakeholders must have confidence that they can share views with one another, and the DfE, and that there is an opportunity to understand and, where appropriate, challenge issues presented. If the DfE is required to put this information into the public domain, officials would be likely to be inhibited from providing free and frank exchange of views for the purposes of deliberation, which in turn would have a negative impact on its ability to conduct public affairs effectively.
- Disclosure of the information requested would be likely to prejudice the effective conduct of public affairs in the future, as it would remove the space within which officials are able to discuss options and delivery freely and frankly. It would make it more difficult for the DfE to work collaboratively and cohesively when developing and delivering its core business.

- Although it would be unlikely that officials and key stake holders would be completely deterred from providing their views, they are likely to be concerned that their professional reputation may be at risk if such exchanges went into the public domain, resulting in any advice or opinion given being less open and honest. Such diluted advice and opinion would be likely to prejudice the information provided to the DfE and the advice given and therefore the effective conduct of public affairs, by reducing the effectiveness of any views given.
- When considering the citing of s36(2)(c) in this case, the DfE also considered a previous Decision Notice where the Commissioner found in favour of its application of this exemption, issued on 24 July 2017 under the reference FS50670089<sup>2</sup>. The DfE considers that there are similarities between these cases, particularly as it has argued disclosure of the requested information could disrupt and delay the rebrokerage of the remaining TEFT academies as these issues were still live and, in the instance of FS50670089, there were also live issues regarding rebrokerage. In that case the Commissioner stated:

“The Commissioner accepts that DfE is still in the process of resolving the issues highlighted by the review, and certainly was at the time of the request. A degree of confidentiality is required to allow the DfE to fully evaluate the options available to it and to consider the best way forward. To disclose information would inevitably lead to speculation by all interested parties, including pupils, parents, teachers and the wider community. Erroneous conclusions could be drawn and the DfE could find itself being asked to explain, defend or comment on positions that may not accurately reflect the eventual outcome. The Commissioner accepts that the DfE is entitled to safe space in which decide how best to resolve the issues faced by WCAT. To have disclosed the information at the time of the request would have severely prejudiced its ability to properly consider the adequacy of the financial management and governance of WCAT and determine an appropriate course of action.”

- The DfE considers this previous decision reflects its current reasoning and the prejudice that the DfE could face, and so continues to believe that it is appropriate to withhold the requested information, particularly as the rebrokerage issues relating to this current request were still live.

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2014549/fs50670089.pdf>

## **Balance of the public interest arguments**

38. The withheld information would provide the public with a greater understanding of the way in which DfE has been investigating the concerns and overseeing the rebrokerage of the academies which is a high profile issue of significant public interest. Disclosure would provide transparency and accountability particularly for the individuals directly affected by the transfer process.
39. The withheld information does contain the provision of candid advice, the free and frank exchange of views for the purpose of deliberation and more generally the wider handling of the matter.
40. The Commissioner accepts that the DfE was entitled to a safe space in which to continue to oversee the transfer of the remaining TEFT schools to new sponsors. To disclose the withheld information while some schools were yet to transfer to new sponsors would be likely to prejudice the DfE's ability to carry out this work as efficiently and effectively as possible with the welfare of pupils being the paramount concern.
41. The arguments for maintaining the exemptions also relate to the 'chilling effect' argument, that officials would be likely to be less candid in the provision of advice, the free and frank exchange of views for the purpose of deliberation and more widely in relation to the general conduct of this or similar matters in the future.
42. The chilling effect argument will be strongest when an issue is still live. In this case the majority of TEFT schools were still to be formally allocated new sponsors and therefore the matter was still very much live.
43. It is essential that DfE officials, as well as other stakeholders such as college principals, can provide advice, discuss matters openly and candidly and carry out the work required to fulfil the request to terminate TEFT's funding agreement and find suitable, strong sponsors to take on the academies. This is particularly so given the paramount concern is to ensure disruption for pupils is kept to a minimum. As explained above as the majority of the academies were yet to transfer the public interest in protecting the DfE's ability to undertake this work efficiently is particularly strong.
44. Based upon the arguments presented in this case and on viewing the withheld information, the Commissioner considers the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemptions.

45. In this case the DfE has applied section 40(2) FOIA in addition to section 36 to some of the withheld information. As the Commissioner has found section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA to be engaged, she has not considered the application of section 40(2) FOIA any further.

## Right of appeal

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46. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

47. 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.
48. 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 .....**

**Gemma Garvey**  
**Senior Case Officer**

**Information Commissioner's Office**  
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**Wilmslow**  
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**SK9 5AF**