

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

### **Decision notice**

**Date:** 21 August 2018

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

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

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1. The complainant has requested information about communications and meetings between a named official and a number of other professionals. The Department for Education (DfE) provided some information but refused the majority of it under section 36(2) – prejudice to the conduct of public affairs and 40(2) – third party personal data.
2. The Commissioner's decision is that the DfE has correctly applied sections 36(2) and 40(2) to withhold the requested information. However the original refusal notice it provided to complainant was invalid as it was issued before the DfE had obtained the qualified person's opinion that section 36 was engaged. This resulted in a breach of section 17(1).
3. The Commissioner does not require the public authority to take any further action in this matter.

#### **Request and response**

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4. On 9 February 2017 the complainant wrote to the DfE and requested information of the following description:  
  
"I now request by way of a freedom of information request and or data access request, from the 1st May 2016 to today's date, copies of all communications sent and received in any medium, letters,

emails, notes, texts, records of telephone conversations between [named official A ]and the following:

[named head teacher]

[Named High School] / now an Academy.

Councillor ([named councillor])

Department of Education and additionally the schools complaints unit (SGU).

Manchester City Council' children's department

[named Council Officer] solicitor Manchester City Council

Any one else you find in your search denoting the refinement below.

[named individual].

I also request the dates on which [named official A] met with education colleagues from the SCU on the floor above her office in the period and copies of notes / minutes from those meetings and details of attendees?

In order to assist your search and cost threshold, I require communications that contain or are about [Named School] and or my name [name of complainant] or derivatives of my name such as [shortened name] or [alternative shortened name] or similar or the word 'complaint (s)' in relation to [Named School]. Further I require as above for all communications to be included in your search that have been deleted from your systems within the requested period that will be residing on your server archive system."

5. On Friday 3 March 2017 the DfE responded. It advised the complainant that the information he had requested was exempt under section 36 – prejudice to the conduct of public affairs. However it went on to explain that the exemption was subject to the public interest and that the DfE required additional time to consider that test.
6. On 31 March 2017 the DfE wrote to the complainant again. It disclosed some of the requested information. However, having considered the public interest test, the DfE withheld the remaining information under section 36(2)(b)(i) – inhibition to the free and frank provision of advice and (ii) – inhibition to the free and frank exchange of views for the purposes of deliberation. The DfE also cited section

40(2) – third party personal data, as a basis for withholding some of the information.

7. On 3 April 2017 the complainant requested an internal review. The DfE provided him with the outcome of the review on 22 May 2017. It upheld the original decision to refuse the request under sections 36(2)(b) and 40(2).

## **Scope of the case**

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8. The complainant contacted the Commissioner 31 January 2018 to complain about the way his request for information had been handled. He challenged the DfE's use of section 36. For section 36 to be engaged a qualified person, which in the case of the DfE is one of its ministers, has to be of the opinion that disclosing the requested information would in some way prejudice the conduct of public affairs. The complainant did not accept that the appropriate procedures had been followed when obtaining the qualified person's opinion. He also argued that the matter to which the request related was not of such significance that it would warrant the application of the section 36 and that in any event the public interest in disclosing the information would outweigh whatever limited information there was in withholding it. He also confirmed that he wished to challenge the application of section 40(2).
9. The Commissioner considers that the matter to be decided is whether the either section 36(2) or section 40(2) can be relied on by the DfE to withhold the information.
10. The information in dispute consists of nine emails or email chains together with their attachments. Section 36 has been applied to the majority of the information with section 40(2) being applied to the names and contact details of officials sending or receiving the emails or named within the body of the emails. The DfE has confirmed that it does not hold any information relating to meetings involving the named official A.
11. The Commissioner will start by looking at the DfE's application of section 36.

## **Reasons for decision**

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### **Section 36 – prejudice to conduct of public affairs**

12. So far as is relevant, section 36(2) provides that information is exempt if, in the reasonable opinion of the qualified person, its 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 purpose of deliberation.
13. Section 36 is unique in that its application depends on the qualified person being of the opinion that the inhibition envisaged would, or would be likely to occur. In determining whether the exemptions are engaged the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
  - Ascertain who the qualified person is,
  - Establish that they gave an opinion,
  - Ascertain when the opinion was given and
  - Consider whether the opinion was reasonable
14. For government departments any minister of the crown may act as the qualified person. In this case Caroline Dinenage, who at the time in question was the Parliamentary Under Secretary of State for Women, Equalities and Early Years at the DfE, acted as the qualified person. The DfE has provided the Commissioner with the submission it provided the qualified person with together with a signed statement from the minister stating that she was of the opinion that disclosing the requested information would be likely to inhibit the free and frank provision of advice and exchange of views for the purpose of deliberation. The submission to the minister is dated 17 March 2017 and the actual opinion is dated 27 March 2017.
15. This means that the opinion had not been obtained by the time the initial refusal notice was issued to the complainant on 3 March 2017. It was therefore incorrect to state that the exemption was engaged. It also follows that if the exemption had not been engaged, the DfE was not in a position to extend the time for complying with the request in order to consider the public interest. The Commissioner will consider this matter further under an analysis of section 17 of FOIA later in the notice.
16. The fact that the opinion was not obtained within the statutory time limit for responding to requests does not however undermine the

actual engagement of the exemption. A public authority cannot be prevented from making a late claim that an exemption applies. In this case it is clear that the DfE obtained the qualified person's opinion by the 27 March 2017 and the Commissioner will go on to consider whether that opinion is a reasonable one.

17. When considering whether an opinion is reasonable the Commissioner relies on the Oxford English Dictionary's definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
18. The exemptions provided by section 36(2) can be engaged on the basis that qualified person considers the prejudice either 'would' occur, or the lower threshold that the prejudice would only be 'likely' to occur. Commissioner notes that the qualified person's opinion was that the disclosure "would be likely" to inhibit the free and frank provision of advice or exchange of views for the purposes of deliberation.
19. The qualified person was provided with a submission which set out the background to the request and the arguments in favour of applying the exemptions. The submission includes the briefest of descriptions of the requested information, but the information itself was not included in the submission. The submission did state that the information would be made available if required. The Commissioner is not aware that the qualified person did take the opportunity to view the withheld information, nor does it appear likely that the qualified person would have had any in depth knowledge of the specific issues discussed in the information captured by the request. Those issues include a complaint made against the named school, as may be discerned by 'reading between the lines' of the request. However although the qualified person may not have viewed the withheld information it seems most likely that she would have an appreciation of the process for investigating complaints against schools, the sort of information that would be generated by that process and its sensitivity. The Commissioner is therefore satisfied that the qualified person was in a position to reach an informed opinion as to whether disclosing the information would be likely to prejudice public affairs in the way described by section 36(2)(b). Furthermore having viewed the information the Commissioner recognises there are arguments for applying the exemptions.

20. In light of the above the Commissioner is satisfied that the qualified person's opinion is not an unreasonable one. Section 36(2)(b)(i) and(ii) is engaged.

**Public interest test**

21. The exemptions provided by section 36(2)(b) are subject to the public interest test. This means that although the exemptions are engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in its disclosure.
22. In assessing the public interest in maintaining the exemptions the qualified person's opinion that the exemptions are engaged carries some weight. Having accepted that the inhibitions cited would occur the Commissioner will consider the severity, extent and frequency of that prejudice under the public interest test.
23. Before looking in more detail at the public interest arguments it will be useful to explain the background and context of the request. As already referred to, the requested information relates to a complaint, made against the named school. The DfE regards the complaints process as being confidential and therefore its normal position is to refuse to confirm or deny whether it has received a specific complaint, or a complaint against a specific school when responding to freedom of information requests. The exception to this is when the person making the request is also the person who made the complaint against the school in question which happens to be the case here. In such circumstances the person obviously knows there has been a complaint and therefore the DfE considers that to refuse to confirm or deny the information is held would appear unhelpful.
24. As an aside, the Commissioner notes that although the way the request is phrased there is a suggestion that there has been a complaint against the school, a response that information was held would not necessarily confirm the existence of one, for example it might simply confirm the DfE held correspondence between named official A and the named councillor or head teacher.
25. Returning to the main point, where the requestor is the same person who made the complaint about the school, the DfE is prepared to disclose information to them which would not be made available to other members of the public. Such disclosures are made outside the FOIA. However this does not mean that the DfE is prepared to disclose all the information it holds about their complaint and where the DfE chooses to withhold specific information it will refuse the request using a relevant exemption under the FOIA.

26. Complaints against schools are handled by the DfE's School Complaints Unit (SCU). SCU reports are not published, but copies of the final report are provided to the school which is the subject of the complaint and the person who made the complaint. If appropriate to do so, reports may also be passed to other bodies such as Ofsted which have a role in regulating schools. However the DfE has made it clear that draft reports are not disclosed to anyone outside the DfE.
27. Having reviewed the information the Commissioner is satisfied that the requested information comprises of a draft report, email exchanges relating the draft between its author and more senior colleagues and some of the material which informed the report. The Commissioner is satisfied that this material all relates to the confidential investigation carried out by the SCU, the drafting of the report and its subsequent consideration within the DfE.
28. The Commissioner recognises that section 36(2)(b) provides two distinct exemptions, with (i) relating to the provision of advice and (ii) relating to the exchange of views. Many of the documents contain a mixture of both. For example, one official may offer up their preliminary views in the draft report which is then annotated with questions or advice for a senior colleague. To some extent the exchange of views is a necessary part of the process of forming an opinion on which to base subsequent advice. For example one email may brief, or update colleagues on the progress of the investigation for them to consider before providing any advice, drafts of proposed letters are circulated for comment and then advice is provided. This is a natural part of an investigative and drafting process aimed at producing report with robust conclusions. Given that the advice and the expression of views are so closely linked in this way the Commissioner considers it most appropriate to look at the public interest arguments in respect of both exemptions at the same time.
29. The DfE has directed the Commissioner to specific examples within the withheld information which contain free and frank advice and the expression of views. These examples demonstrate that officials were exchanging candid opinions on issues arising from the investigative process, the performance of the school and its governors, advising on a range of options available to the DfE, posing questions to challenge views expressed and ensuring the final report would be fair and accurate.
30. The DfE argues, and the Commissioner accepts, that it is important that public authorities which carry out some form of regulatory role feel free to have these internal debates. It should be remembered that normally the DfE would not have even acknowledged the existence of a complaint against the particular school. To disclose the contents of a draft report and information relating to the investigation

would undermine the fairness of the complaints process by disclosing preliminary findings before they had been fully considered and tested. The DfE does not argue that the risk of disclosing such information would deter officials from providing advice or sharing their views in such situations. But it is concerned that if there was the potential for such information to be disclosed, it would make officials become more guarded in what they said in emails and the views expressed would be less forthright. The Commissioner notes that there is absolutely nothing unprofessional in the language used in the exchanges, it is simply that they are very direct and candid. The DfE argues that if officials felt unable to contribute to the investigative process in such a manner the internal debate would become diluted, opinions would be less well aired and those opinions may not be challenged quite so rigorously. As a consequence the conclusion of the complaints process would be less robust.

31. In weighing these public interest arguments in favour of maintaining the section 36(2)(b) exemptions the Commissioner notes that the qualified person was of the opinion that the inhibition to the candour with which advice was offered or views expressed was only likely to occur. She also notes that the DfE acknowledges that disclosing this information would not prevent advice being offered or views shared. This reduces the weight attached to the DfE's arguments. Nevertheless there is a real value in officials being able discuss the findings of an investigation as fully as possible. The withheld information contains advice and views expressed in very clear terms. If officials lost the freedom to debate such issues in this way the Commissioner accepts there is a risk the investigative process and the critical analysis of its findings would be less thorough. This would have a significant impact on the quality of the conclusions drawn from the investigation of complaints. Given that the DfE receives around 7,500 complaint enquiries about schools each year, that negative impact would be felt on a very regular basis. The Commissioner is satisfied there are weighty public interest arguments in favour of maintaining both the exemptions provided by section 36(2)(b).
32. The Commissioner notes that when setting out his grounds for challenging the DfE's application of section 36(2)(c), the complainant argued that section 36 was never intended for what he described as "minor considerations of government" such as reports into complaints against schools. He was of the view that it should be reserved for key matters of importance to the government. Although there is likely to be greater sensitivity around the debate of major policies the Commissioner does not accept that the application of section 36 needs to be limited to requests for information on those policy debates. There are many functions carried out by public authorities, not just central government departments, which require safe space in which to make decisions and where the risk of that safe space being eroded



may lead to a chilling effect on the candour with which options are debated in the future. The Commissioner is satisfied that this can extend to the investigation of complaints against schools.

33. The DfE has only considered limited public interest arguments in favour of disclosing the information. It has acknowledged there is a general public interest in disclosing information to the public to demonstrate the openness and transparency of government. It has also taken account of the argument that more openness about process and delivery may lead to greater accountability, an improved standard of public debate and improved trust.
34. The Commissioner would develop those arguments to include importance in the public having access to information that would allow them to reach their own opinion on the robustness of the complaints procedure and the integrity of that process. The performance of schools which in turn reflects on the success of the government's policies on education is a matter of legitimate public debate.
35. The request is focussed on one named official, official A, and it is apparent from the complainant's submission to Commissioner that he has concerns over the conduct of that individual and their involvement in the complaints process. However the Commissioner has discussed this with the DfE and been advised that given the role of that individual it would have been entirely reasonable for them to have been kept informed of the progress of the investigation and to have had sight of the draft report. The Commissioner considers this to be quite plausible. Furthermore having viewed the withheld information the Commissioner has not detected anything that would raise concerns in respect of the integrity of the complaints process. Although there may be a public interest in disclosing information that would assure the public of that this is the case, the Commissioner does not consider that this on its own is sufficient to outweigh the public interest in preserving the freedom of officials to share free and frank views and provide the candid advice necessary to ensure the complaint against the school was thoroughly investigated.
36. Even when account is taken of the more general public interest arguments in favour of the disclosure the Commissioner is satisfied that the public interest in maintaining the exemption provided by section 36(2)(b)(i) – free and frank provision of advice, is greater. Similarly the public interest in maintaining section 36(2)(b)(ii) – free and frank exchange of views, is greater than the public interest arguments in favour of disclosure.
37. The DfE is entitled to rely on these exemptions to withhold the requested information.

## **Section 40(2) – third party personal information**

38. The public's right of access to the personal data of third parties is in effect governed by the Data Protection Act. At the time the request was made and subsequently refused by the DfE the relevant Data Protection Act was the 1998 Act. Since that time the Data Protection Act 2018 has come into force and section 40(2) of the FOIA has been amended to accommodate the changes it has introduced. However the Commissioner's role is to determine whether the DfE correctly applied the legislation that was in force at the time it was handling the request.
39. At that time section 40(2) of the FOIA provided that a public authority is entitled to refuse a request for information which constitutes the personal data of someone other than the person making the request, if disclosing that information would breach any of the data protection principles set out in Schedule 1 of the Data Protection Act 1998.
40. The information which has been withheld under section 40(2) consists of the names of official and their contact details for work, such as email address and direct phone number. The Commissioner is satisfied that this constitutes the personal data of those individuals.
41. The DfE has argued that disclosing this information would have breached the first data protection principle. So far as is relevant, the first principle of the Data Protection Act 1998 provided that personal data shall be processed fairly and lawfully and not be processed unless one of the conditions set out Schedule 2 can be met.
42. The DfE has explained the individuals in question are all below Deputy Director level and, although the information relates to their working lives, these officials would not expect their details to be released given that they do not have the same public facing role as those at the Deputy Director level or above. Therefore the DfE has argued that to disclose the details of these junior officials would be unfair.
  - 'Fairness' is a difficult concept to define. It 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.

Often these factors are interrelated.

43. The Commissioner considers that the expectations of these officials would, in part, be shaped by the provisions of the Freedom of Information Act. There should be recognition amongst public servants that some information about their working life could be disclosed in response to a request. This will however depend on the particular circumstances.
44. The Commissioner accepts that these officials do not have a public facing, or high profile role and that this would lead them to believe that, in the normal course of events, their names and contact details would not be placed in the public domain.
45. There are no obvious reasons to believe that disclosing their association with the issues to which the request relates would have any particularly detrimental consequences for them. However disclosing their names and contact details would not assist the public's understanding of the issues to which the information relates; not to any significant degree. Therefore on balance the Commissioner finds that the disclosure would be unfair and so would have breached breach the first principle of the Data Protection Act 1998. The DfE was entitled to withhold the names and contact details of these junior officials under section 40(2).

### **Section 17 – Refusal notice**

46. So far as is relevant section 17 of the FOIA provides that a public authority which wishes to rely on an exemption to refuse a request must issue a notice to the complainant stating that it is doing so. That notice must specify the exemption being relied on and, if it is not apparent, explain why that exemption applies. Under section 17(1) these details must be provided to the person making the request within twenty working days of the request being made.
47. Where an exemption is subject to the public interest test as is the case here, a public authority must also explain why it considers the public interest favours withholding the information. Normally the explanation of public interest test is provided at the same time as the public authority complies with the other requirements of section 17. However, in recognition of the fact that consideration the public interest can be a complicated issue, under section 17(2) a public authority may extend the time it takes to make that decision.
48. In this case the public authority did issue a refusal notice on the twentieth working day following receipt of the request which set out the exemption it said it was relying on, explained briefly why the exemption applied and then advised the complainant that it needed

further time to consider the public interest. On the face of it, it would appear that the DfE had complied with its duties under section 17.

49. However section 36 can only be engaged once the qualified person provides their opinion. That opinion was not obtained until 27 March 2017. This was after the initial refusal notice was served. Therefore the refusal notice served on the 3 March 2017 was not a valid one. Although the qualified person's opinion had been obtained by the 31 March 2017 when the DfE completed its initial handling of the request, this still means that the requirement to issue a valid refusal notice within twenty working days was not satisfied. This constitutes a breach of section 17(1).

## **Other Matters**

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50. Although the 'Other matters' part of the notice does not form part of the Commissioner's formal decision, the Commissioner uses it to highlight issues that have arisen during the investigation of a complaint which she considers warrant commenting on.
51. In this case it became apparent that the DfE had not properly engaged the exemption provided by section 36 before extending the time for dealing with the request in order to consider the public interest test. The Commissioner wishes to remind the DfE that it cannot extend the time for compliance unless it is actually satisfied the exemption in question is engaged.

## Right of appeal

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52. 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)

53. 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.
54. 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

**Rob Mechan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
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