

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

### **Decision notice**

**Date:** 25 June 2019

**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 a complaint report associated with a particular school, and information associated with the report. The Department for Education (DfE) has refused to either confirm or deny it holds the requested information under section 36(3) of the FOIA (prejudice to effective conduct of public affairs). It considers the public interest favours maintaining this position.
2. The Commissioner's decision is as follows:
  - DfE can rely on section 36(3) to neither confirm nor deny it holds the requested information, and the balance of the public interest favours maintaining this exemption.
3. The Commissioner does not require DfE to take any remedial steps.

#### **Background**

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4. DfE has provided a general background to a particular aspect of its work. It says that the department receives approximately 7,500 school complaint enquiries across all communication channels every year. Complaints are dealt with on an individual basis. If multiple complaints about the same school are received or if serious failings at individual schools are identified, DfE may share information with relevant

authorities to help them carry out their regulatory functions (for example; Ofsted, local authorities, OfQual etc).

5. DfE says it also receives FOI requests concerning the number of school complaints received and/or accepted for investigation, together with requests for outcomes and any associated reports. General information is released wherever possible and where it can be processed within the cost threshold. However, information about complaints against specific, named schools is not released. The department's position is to neither confirm nor deny that it holds information about a complaint against a named school.
6. The exception to this is when DfE receives a request for information from a complainant on whose behalf it is reviewing or has reviewed the school's handling of their complaint. These requestors are in the 'privileged position' of being in possession of information it would not disclose to the general public.
7. Normal business process is to make available copies of case files to the named complainants, so they can be reassured DfE has fully considered their complaint and that the outcome is reasonable. These are dealt with outside the FOIA but processed according to its principles. For example, third party information is withheld to safeguard their privacy.
8. DfE's Education and Skills Funding Agency handles complaints about open academies and free schools. Part of its role is to make sure academies comply with the terms of their funding agreement, which is a contract between the academy and the Secretary of State.
9. Academies must make available on request a procedure for dealing with complaints from parents of pupils. The department recommends that academies publish this online. For complaints from parents of pupils, this procedure must comply with The Education (Independent School Standards) Regulations 2010 and offer:
  - an opportunity to resolve the complaint with the academy on an informal basis, for example through discussion with a senior member of staff;
  - a formal complaint stage when the complaint is made in writing and usually responded to by the chair of governors; and
  - a hearing with a panel set up by the academy trust, comprising at least three people not directly involved in the matters detailed in the complaint, one of whom must be independent of the management and running of the school. Parents must be allowed to attend the panel and be accompanied if they wish.

10. DfE will consider complaints about academies that fall into the following areas:
  - undue delay or non-compliance with an academy's own complaints procedure;
  - an academy's failure to comply with a duty imposed on it under its funding agreement with the Secretary of State; and
  - an academy's failure to comply with any other legal obligation, unless there is another organisation better placed to consider the matter as set out in the next section.
11. DfE's School Complaints Unit (SCU) considers complaints against local authority maintained schools. It also considers complaints about recent academy converters, where the complaint arose or was not fully dealt with in the 12 months prior to the school's conversion. The SCU's role is to ensure that maintained schools are compliant with education legislation and that they act lawfully and reasonably in the exercise of their duties and adhere to the policies they must have under education law.
12. The legislation on complaints handling is not as prescriptive for maintained schools as it is for academies. Maintained schools must have a procedure to deal with all complaints about the school and any services or facilities it provides, and the procedures must be publicised. Since September 2016, this has meant they must be on the school's website. However, DfE does not prescribe what that procedure should include.
13. On receipt of a complaint, the SCU considers the handling of it against the school's published complaints procedure. It can also consider the school's actions in relation to a broad range of topics if they have a statutory underpinning. The SCU examines the evidence and, if appropriate, makes findings about the school's compliance or non-compliance through a Complaint Report. Breaches of legislation and failures to adhere to statutory policies will result in the SCU seeking written assurances that corrective action will be taken.
14. The SCU does not publish their finalised Complaint Reports dealing with investigations into school complaints and adherence to legislation. They are confidential documents only shared with the complainant, so that they can see their complaint has been properly dealt with, and the school, so that they are advised of any failings in compliance or reassurance that they have acted correctly. The SCU may share such reports with Ofsted or the relevant local authority in order to ensure they can carry out their statutory functions.

15. DfE has gone on to provide a background on the specific circumstances of the request in this case, which the Commissioner does not intend to reproduce in detail in this notice.

## **Request and response**

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16. On 16 June 2018, the complainant wrote to DfE and requested information in the following terms:

*"... a copy of Complaint Report Care [sic] Reference [Redacted] dated [Redacted] concerning [Redacted]. If you are not able to provide the full report I would be grateful to receive a summary of the key findings and assurances required. Secondly I would be grateful if you could provide copies of the responses to the assurances required. If this is not possible, please can you confirm whether or not the school has satisfactorily complied with the assurances required..."*

17. DfE responded on 2 July 2018. It neither confirmed nor denied that it holds information relevant to the request, by virtue of section 36(3) of the FOIA. DfE considered the public interest favoured maintaining this exemption.
18. Following an internal review DfE wrote to the complainant on 3 October 2018. It upheld its original position.

## **Scope of the case**

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19. The complainant contacted the Commissioner on 21 November 2018 to complain about the way his request for information had been handled.
20. The Commissioner's investigation has focussed on whether DfE can rely on section 36(3) to neither confirm nor deny it holds the information the complainant has requested, and the balance of the public interest.

## **Reasons for decision**

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21. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to have it confirmed whether or not the authority holds the information and (b) to have the information communicated to him or her if it is held and is not exempt information.
22. Section 36(3) of the FOIA says the duty to confirm or deny under section 1(1)(a) does not arise in relation to information to which this

section applies (or would apply if held by the authority) if, or to the extent that, in the reasonable opinion of a qualified person, complying with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection 36(2).

23. Having obtained the opinion of the qualified person, the public authority must still carry out a public interest test to decide whether the public interest in not confirming or denying outweighs the public interest in complying with s1(1)(a). The refusal notice should indicate which subsection of section 36 is engaged, without disclosing whether the information is held or not.
24. Of relevance here, section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure 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.
25. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
26. In its submission DfE has said it believes that to confirm or deny that it holds the requested information would, or would be likely to, have “*any of the effects mentioned in section 36(2) - prejudice to the conduct of public affairs*”. By this the Commissioner understands DfE to mean that confirmation or denial would have all the effects under both section 36(2)(b) and 36(c).
27. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person’s opinion must also be a “reasonable” opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
28. To determine, first, whether DfE correctly applied the exemption, the Commissioner is required to consider the qualified person’s opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the section 36(3) exemption has been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.

29. The qualified person in this case was Lord Theodore Agnew, Parliamentary Under Secretary of State for the School System. Sub-section 36(5)(a) to (n) of the FOIA defines who the qualified person is for a number of specific authorities. Sub-section 36(5)(a) says that in relation to information held by a government department in the charge of a Minister of the Crown, any Minister of the Crown is the qualified person. As such, the Commissioner is satisfied that the qualified person in this case is appropriate.
30. DfE has provided the Commissioner with the submission it provided to the Minister, seeking his opinion with regard to its approach to the complainant's request. The annex on page 5 of this document evidences the Minister confirming that, in his opinion, confirming or denying the requested information is held would be likely to have the effects set out in section 36(2). The Commissioner is therefore satisfied that an opinion was given by the qualified person.
31. The Minister's opinion is dated 27 June 2018. The request was submitted on 16 June 2018 and, as such, the Commissioner is satisfied that the opinion was given at the appropriate time.
32. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the *most* reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
33. The qualified person's opinion in this case – given in the qualified person submission - is that the prejudice envisioned under section 36(2) *would be likely to occur* if DfE confirmed or denied it holds the requested information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
34. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.

35. In the submission it provided to the Minister, DfE provided: a background to the request, the request, arguments for and against relying on section 36(3) – with reference to the prejudices under section 36(2) - and public interest arguments.
36. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the exemption in order to form an opinion on the matter of whether reliance on the provision under section 36(3) was appropriate.
37. The Commissioner has noted the evidence at paragraph 35 and, since she is satisfied that the remaining points at paragraph 28 have also been addressed, she must accept that the qualified person's opinion is one a reasonable person might hold. She therefore finds that DfE can rely on section 36(3) to neither confirm nor deny that it holds the requested information.
38. The next step is to consider the balance of the public interest. Having accepted that the opinion of the qualified person - that prejudice would be likely to result - was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the qualified person. In forming a view on the balance of the public interests, the Commissioner has taken into account the general public interest in the openness and transparency of DfE, as well as those factors that apply in relation to the specific information in question here.

### **Public interest test**

#### *Public interest in disclosing the information*

39. The complainant says that the existence of a complaint concerning the school in question and the involvement of the DfE is already in the public domain as the issue is referred to in particular meeting minutes from 2017.
40. DfE's submission to the Minister references the fact that certain issues about the school in question are in the public domain and acknowledges the right that members of the public have under section 1(1).
41. In its submission to the Commissioner DfE has again acknowledged the argument that more openness about its processes and how it delivers its services may lead to greater accountability, an improved standard of public debate, and improved trust. It says there is a general public interest in disclosing information to the public, to demonstrate the openness and transparency of government.

*Public interest in maintaining the exemption*

42. DfE argues that good government depends on good decision-making, and must be based on the best advice available and a full consideration of the facts and options, and the need to protect the thinking space and ability for departmental officials to exchange and receive free and frank advice.
43. In its submission DfE says that in applying section 36(3), the FOIA requires that DfE balances the public interest on withholding the information [if held] against the public interest in disclosing the information [if held]. It says that while disclosing whether it does or does not hold the requested information could contribute to the public debate on how it investigates complaints made, it is in the public interest that any investigation of such complaints and the provision of DfE's findings can proceed in the self-contained space needed to ensure this is done effectively. DfE believes that it meets its obligations to transparency by a complainant (that is, any individual submitting a complaint about a school to DfE) and the school/trust involved receiving a copy of DfE's report and finding.
44. DfE says it relies on information provided by external stakeholders and officials to help make informed decisions in order to determine the appropriate level of action to take relating to allegations or complaints made against a named school or trust. These types of deliberations need to remain confidential to ensure they are handled sensitively.
45. It argues that if it is required to confirm or deny it holds the requested information in this case, it would be likely to prejudice the department's ability to deal effectively with handling any current or future complaints made against schools or trusts. This could hinder its ability to investigate potential issues, as the 'whistle blowers', officials and schools in question would be less likely to candidly engage in such exchanges going forward. This could lead to the department being unable to decide whether allegations require a full and formal investigation and/or further action.
46. Stakeholders, schools and officials must, DfE says, have confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge issues, allegations and the interpretation of evidence as part of any investigative process. If the department is required to confirm or deny whether a specific school has been subject to a complaint, parents, schools and officials would be likely to be inhibited from providing free and frank exchange of views for the purposes of deliberation. This in turn would have a negative impact on DfE's ability to conduct public affairs effectively. DfE argues that schools/trusts would also be less likely to co-operate in this way going



forward and the department would be less sighted on any immediate progress schools are making following investigations.

47. DfE argues that confirming or denying that it holds the requested information 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 outcomes freely and frankly. It would make it more difficult for DfE to work collaboratively and cohesively with schools and trusts to deliver its core business. It would also make it more difficult to ensure that schools adhere to the guidance it provides on administering complaints procedures and other key functions.
48. DfE has provided other arguments which would support a position that the public interest favours maintaining the section 36(3) exemption, which the Commissioner does not intend to reproduce in this notice.
49. DfE has finally confirmed its view that the public interest in upholding its approach to neither confirm nor deny that it holds the requested information outweighs the public interest in confirmation/denial in this case. It considers that confirming or denying would be likely to have a potentially corrosive effect on good government and lead to less fully informed decision making when investigating complaints. This is not in the public interest in DfE's view.

*Balance of the public interest*

50. To summarise the situation. DfE is relying on section 36(3) to neither confirm nor deny it holds information falling within the scope of the complainant's request. This is because in DfE's view, if it was to confirm or deny it holds the information, this would be likely to cause the prejudice envisioned under section 36(2) because it would indicate whether or not a particular school had been subject to a complaint. This would prejudice the effective conduct of public affairs as it would, according to DfE: prohibit other schools and trusts fully engaging with it in similar situations; harm DfE's ability to deal effectively with any current or future complaints made against schools or trusts; and could hinder its ability to investigate potential issues.
51. DfE did not specify what subsection of section 36(2) was relevant in this case – it has simply referred to section 36(2) broadly. The Commissioner is, however, satisfied that the concerns DfE raises in its wider submission to her relate to the prejudices under section 36(2)(b)(i) and (ii) and section 36(c).
52. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm DfE's ability to carry out its work. As to how

much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the prejudice identified by the qualified person.

53. As covered above, the Commissioner has accepted that the qualified person's opinion is reasonable. While it might be towards the lower end of the scale, that confirming or denying whether the requested information is held *would be likely to* cause the prejudice under section 36(2) is, in the Commissioner's own opinion, a credible position. The Commissioner is of the view that the severity, extent and frequency of the prejudice identified by the qualified person would be moderate. This means that the weight that the qualified opinion carries as a public interest factor in this case is less than would be the case were the likely severity, extent and frequency of the identified prejudice greater, but does nonetheless carry some weight.
54. The Commissioner must also recognise the importance of DfE's work and weigh avoiding prejudice to that work in the balance of the public interest. Clearly it is public interest that DfE is able to do the work that it does (described in the 'Background') effectively. In general the Commissioner could only find that the public interest would favour compliance with section 1(1)(a) even if this would be likely to result in prejudice to DfE's work in this area where there was clear and weighty factors in favour of this.
55. The Commissioner has turned next to arguments in favour of confirmation or denial. In addition to the general public interest in public authorities being open and transparent, the complainant has told the Commissioner that it is already in the public domain that a complaint has been made against the school in question because the matter is referred to in particular published minutes. The Commissioner has reviewed those minutes. The minutes refer to an "ongoing complaint" and that DfE had been approached. They do not refer to any specific complaint report, or provide any reference number or date for such a report. As such, the Commissioner does not consider that it can be said that it is already in the public domain that a complaint of the nature suggested by the detail in the complainant's request has been submitted to DfE, or that it is in the public domain that DfE would therefore hold the information that the complainant has requested – a particular report.
56. In the Commissioner's view, any issues associated with the school in question are a local matter. These matters may be of interest to school staff and parents of students who attend the school but they do not appear to the Commissioner to have any wider public interest.

57. As such the Commissioner considers that there is a stronger public interest in ensuring that DfE is able to investigate any complaints effectively. Confirming whether a particular school is subject to an investigation by DfE risks directly impacting not only the conduct of any such investigation, should one exist, but also risks having much broader consequences by undermining DfE's ability to conduct such investigations in the future. In light of these broader consequences, the Commissioner has concluded that the public interest favours maintaining the exemption contained section 31(3) of FOIA.

## Other matters

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58. In his covering letter to the Commissioner, the complainant expressed dissatisfaction that DfE had not offered him any advice as to how he could make his request more acceptable.
59. A public authority's duty to offer an applicant advice and assistance is discussed in the '*Freedom of Information Code of Practice (Jul 18)*<sup>1</sup>'. The Code advises, broadly, that this duty comes into play with regard to: clarifying a request; reducing the cost of complying with a request or transferring requests to another authority. These factors are not relevant to this case and the Commissioner considers that DfE handled the complainant's request satisfactorily.

## Right of appeal

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

60. 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@justice.gov.uk](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

61. 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.
62. 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**