

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 October 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 an investigation report and any other correspondence and documents relating to a Financial Notice to Improve and subsequent investigation into St Neots Learning Partnership. The Department for Education (DfE) considered this information exempt from disclosure on the basis of section 36(2)(b)(ii) and (c).
2. The Commissioner's decision is that the DfE has correctly applied the provisions of section 36(2)(b)(ii) to the information and the public interest favours maintaining the exemption.

#### Request and response

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3. On 3 September 2018 the complainant made a request to the Education and Skills Funding Agency (the ESFA), an executive agency of the Department for Education (DfE). For ease, this decision notice refers to the DfE. The request was in the following terms:

*"The ESFA issued a Financial Notice to Improve to St Neots Learning Partnership (SNLP) on 1 August 2018. The notice required SNLP to investigate grant advances to two private companies and to report back to the ESFA by 31 August."*

*Please provide:-*

- *A copy of the investigation report and copies of any supporting evidence provided to the ESFA alongside the report.*

- *Copies of all other correspondence and documents provided by SNLP in response to the advance payments or other issues raised in the Financial Notice to Improve.”*
4. The DfE responded on 1 October 2018. It confirmed that information was held but was being withheld on the basis of section 31 and 36 of the FOIA. A further response was sent on 29 October after consideration of the public interest and confirmed that the information was being withheld on the basis of section 36(2)(b)(ii) and (c) of the FOIA. No mention was made of section 31.
  5. An internal review was conducted and the outcome communicated to the complainant on 22 January 2019. The internal review upheld the initial decision to withhold the requested information under the cited exemptions.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 8 February 2019 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine what information is held by the DfE and if the DfE has correctly withheld the information on the basis of section 36(2)(b)(ii) or (c) of the FOIA.

### **Background**

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8. St Neots Learning Partnership comprised two secondary schools in Cambridgeshire, Ernulf and Longsands Academy. In 2018, the trust had been on the DfE's concerns list for some time and had also been of concern to the Regional Schools Commissioner (RSC). The RSC issued a Pre-Termination Warning Notice regarding Ernulf on 26 January 2018. The trust's response to this notice did not address the RSC's concerns.
9. A School Resource Management Adviser (SRMA) was appointed to SNLP in June 2018. Prior to this, in March 2018 the trust board took the decision to transfer the two schools to Astrea Academy Trust, a Multi-Academy Trust (MAT) based in South Yorkshire that had been seeking to establish a hub in Cambridgeshire. The RSC Head Teacher Board (HTB) approved this.
10. The ESFA issued a Financial Notice to Improve (FNtI) to SNLP on 1 August 2018. The notice required SNLP to conduct an independent

review of grant advances to two private companies by 31 August. This report is part of the information in the scope of the request.

11. Following the board and RSC HTB decision, and the FNtI, the re-brokerage of these schools was undertaken and successfully completed on 1 September 2018. This information request was made a few days after this date.

## **Reasons for decision**

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

12. The information that is being withheld in this case is the audit/investigation report, a report of the SRMA and email exchanges between various parties with attached papers.
13. 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 (ii) the free and frank exchange of views for the purposes of deliberation.
14. 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.
15. In its submission the DfE has confirmed it considers disclosing the information would be likely to prejudice the free and frank exchange of views for the purposes of deliberation (36(2)(b)(ii)) and the effective conduct of public affairs (36(2)(c)).
16. 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.
17. 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 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.
18. The qualified person in this case was the Academies Minister, Lord Agnew. 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.
  19. The 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 and the submission evidences that the Minister confirmed his opinion was that the prejudice argued was likely to occur. The Commissioner is therefore satisfied that an opinion was given by the qualified person.
  20. 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.
  21. The qualified person's opinion in this case is that the prejudice envisioned under section 36(2) would be likely to occur if the DfE disclosed the withheld information.
  22. 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.
  23. 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 and public interest arguments relevant to the exemption.
  24. The arguments presented by the DfE to the Minister in relation to section 36(2)(b)(ii) focussed on the fact that stakeholders and officials involved in the production of the reports and email exchanges would

have been under the impressions that their views provided and the issues raised were done so in confidence.

25. The DfE argued that the views, opinions and advice within the various documents were provided to the DfE for its officials to consider whilst resolving the re-brokerage of the trust's two schools and the financial and governance issues raised around the trust.
26. The company that produced the audit report was contacted regarding this information being in scope and has explicitly stated that they do not want this information to go into the public domain. The DfE has pointed to the wording on the reports first page which states that the report was prepared for the sole use of the trustees of SNLP and should not be shared with anyone other without the agreement of the authors of the report or the ESFA.
27. The report in particular is an auditor's report addressing concerns raised in the DfE's FNTI letter and its purpose was to provide the trust and DfE with the auditor's free and frank views, findings and conclusions for the purposes of deliberation. The DfE argues that as the report investigates concerns raised in the FNTI and provides findings and its views on the issues investigated it is by its very nature a document for deliberation so that the DfE and the trust can take into account their candid professional opinions and findings and decide what action, if any, was required outside of the FNTI.
28. It was argued that auditors must be able to give free, frank and candid views and opinions when presenting their reports for deliberation. The findings in these reports are based on the information put before the auditors themselves, as well as interviews undertaken with key stakeholders during the investigative process. Those who were interviewed and referred to in the report took part voluntarily as there is no statutory obligation for individuals to attend such interviews.
29. The DfE considers that individuals would be less willing or likely to volunteer to take part in these investigations, or would be less candid in any views they put forward, if they believed that their comments and responses would go into the public domain. If this were to happen, the value and impact of such investigations and their subsequent reports would be significantly diminished.
30. The DfE considers it needs to seek the views, opinions and input from key stakeholders and external professionals to help ascertain whether any formal action is necessary. Should such partners believe that their views might make it into the public domain, in this instance associated with possible breaches of the Academies Handbook, it is likely that they will either be reluctant to give such views or, where given, dilute the

views they will provide. This is particularly the case where their views could draw criticism if made public and potentially damage their own, other professionals or their organisations' reputation.

31. As the report was part of a process of deliberation with the individuals interviewed offering their thoughts, views and recollections to the auditing company on the use of finding, the DfE believes that releasing the report could lead to future interview feedback being more guarded and the views and advice provided becoming more diluted or abstract. This would lead to issues where a lack of clear and candid external input could lead to confusion or misinterpretation of stakeholder views, resulting in key opinions not being fully considered as they should be when undertaking such investigations.
32. The DfE pointed to specific other correspondence and documents it held within the scope of the request that demonstrate the candidness of the opinions given by stakeholders and professionals on the subject of governance at the trust. The DfE argued that it is essential when dealing with concerns and issues relating to the governance of academy trusts, particularly where there are concerns regarding their management of funding from the public purse, that the DfE is able to receive the free and frank views of its officials and SRMA's when considering what action, if any, is required.
33. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the exemption at section 36(2)(b)(ii) in order to form an opinion on the matter.
34. The Commissioner therefore 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(2)(b)(ii) to withhold the audit report, a report of the SRMA and email exchanges between various parties with attached papers
35. 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.

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

36. In its submission to the Commissioner the DfE has acknowledged the argument that more openness about its processes and how it produces

guidance 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.

37. The complainant argues that the SNLP is no longer active and in the process of being wound up as a legal entity. He therefore considers that publishing the requested information would not have the prejudicial effects stated as the organisation is no longer active. He further states that anyone conducting an investigation into the conduct of a public body should assume their findings will be made public in due course.
38. In addition to this, the complainant pointed out that the SNLP published its annual accounts for the year ending August 2018 and the accounts stated that the investigation had concluded there was no evidence that the requirements of the Academies Financial Handbook had been breached. The accounts also show the trust lost over £1 million in its last year before transferring its assets so there is still a significant public interest in publishing the report and associated correspondence in full.

#### *Public interest in maintaining the exemption*

39. The DfE acknowledges that the schools had been re-brokered and transferred before the request was made, but that there were still 'live' issues being resolved after this point and ongoing questions relating to the trust's use of funding.
40. The DfE considers the impact of disclosing the requested information would be significant as disclosure could result in the DfE being unable to seek and receive sufficient in-depth and free and frank views in future auditor reports. This would be likely to hinder departmental investigations into the use of public funding and this would not be in the public interest.
41. Whilst the DfE accepts that SRMAs or departmental officials would still provide their professional views on such issues, it is likely that the frankness of such views would be diluted if they believe that this information would make it into the public domain. To dilute such advice risks the possible misunderstanding or misinterpretation of an officials views which, in turn, could unnecessarily prolong the time taken to resolve the issues at hand and this would not be in the public interest.
42. The DfE argues that an open, honest and fair process by which professionals and officials can discuss and resolve issues 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

on key issues such as the use of public funding are based on broad and balanced evidence. If there is a risk that sensitive discussions may be opened up to public scrutiny, departmental officials and key stakeholders may be less likely to enter openly into such discussions, resulting in a reduction in quality of any such investigations.

43. The DfE considers that officials and stakeholders must have confidence they can share views with one another and, as in this instance, auditors 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 it argues stakeholders would be likely to be inhibited from providing free and frank exchange of views, which in turn would have a negative impact on the DfE's access to information pertaining to financial concerns received following the full engagement of external, professional stakeholders.
44. The DfE has also referred to the 'safe space' argument – that disclosing the information would be likely to remove the space within which officials and external professionals are able to discuss options freely and frankly. This would limit the department's ability to quickly identify and where necessary take action in relation to the financial actions of a trust.

#### *Balance of the public interest*

45. 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 interest, the question here is what the severity, extent and frequency would be of the prejudice identified by the qualified person.
46. 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 disclosing the requested information is held *would be likely to* cause the prejudice under section 36(2)(b)(ii) is, in the Commissioner's 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.
47. 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 and to investigate and take necessary action against trusts.

48. In addition to the general public interest in public authorities being open and transparent, the Commissioner recognises there is some public interest in disclosing correspondence between the DfE and stakeholders, officials and auditors on this subject given that it was already known to the wider public knowledge of the issues at SNLP when the request was made.
49. The Commissioner recognises that it is important for the DfE to be able to rely on the professional views and advice provided by its SRMAs and stakeholders. There is a need to ensure that communications from these parties are candid, open and honest when reporting to the DfE on their investigations into concerns raised around academy trusts and the schools they govern. The Commissioner recognises the argument that disclosing information may impact on the quality and speed of the views and advice being provided and therefore impact on the ability of the DfE to act quickly, effectively and decisively to resolve and address concerns and issues raised. The consequence of this may be that it then impacts on the ability of schools and trusts to provide the best possible education for pupils at their schools and this would not be in the public interest.
50. In relation to the withheld email exchanges, it is of importance that the DfE and trusts can build and develop positive, trusting and open working relationships and disclosing this information is likely to undermine this trust and hinder future exchanges. The Commissioner recognises this may also impact on the way other trusts engage with the DfE and hinder future investigations.
51. Although the DfE acknowledges that disclosing the correspondence would be unlikely to completely deter officials and key stakeholders from providing their view, there is a risk that their professional reputations may be damaged if such exchanges went into the public domain given that there were still ongoing issues relating to the trust being addressed and considered by the DfE at the time of the request. This may lead to advice or opinions given being less open and honest and such diluted advice and opinions would be likely to prejudice the information provided to the DfE and reduce its effectiveness.
52. Whilst there are 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.

53. As such the Commissioner considers that there is a stronger public interest in ensuring that DfE is able to engage freely and frankly with stakeholders, officials and auditors to consider issues and take action where the use of public funds are involved. In light of this the Commissioner has concluded that the public interest favours maintaining the exemption at section 36(2)(b)(ii) and the correspondence and reports should be withheld.

## Right of appeal

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54. 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)

55. 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.
56. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
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**Water Lane**  
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