

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 January 2020

**Public Authority:** Office for Standards in Education, Children's Services and Skills (Ofsted)

**Address:** Piccadilly Gate  
Store Street  
Manchester M1 2WD

### Decision (including any steps ordered)

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1. The complainant has requested inspectors' notes relating to Department for Education guidelines on teaching British values and the Equality Act 2010, produced during inspections of particular schools. Ofsted has withheld the information under section 31(1)(g) of the FOIA (law enforcement) and considers the public interest favours withholding the information.
2. The Commissioner's decision is as follows:
  - The information requested on 22 January 2019 is exempt from disclosure under section 31(1)(g) by virtue of section 31(2)(c) and the public interest favours maintaining the exemption.
3. The Commissioner does not require Ofsted to take any remedial steps.

### Request and response

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4. On 27 December 2018 the complainant made the following request for information under the FOIA:

*"Please may I have copies of inspectors' notes and summary relating to compliance with DfE guidelines on teaching British values – in particular with the reference to paying regard to the protected*

*characteristics in the 2010 Equality Act – in the cases of the following independent schools inspected during the course of the year:*

*Beis Rochel d'Satmar Girls School,  
Hackney Peninim  
Beth Jacob Grammar School for Girls  
Tiferes  
Keren Shloime"*

5. On 22 January 2019 the complainant clarified his request as follows:

*"Recorded evidence of inspectors' judgments on British values, protected characteristics and equality act should be adequate."*

6. On 25 January 2019 Ofsted wrote to the complainant. It indicated that it considered the information he had requested was exempt information under section 31(1)(g) of the FOIA and said it needed more time to consider the public interest test.
7. Ofsted provided a refusal notice on 15 February 2019. It withheld the requested information under section 31(1)(g) and said that the public interest favoured maintaining the exemption.
8. Ofsted provided an internal review on 2 April 2019. It maintained its position.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 8 August 2019 to complain about the way his request for information had been handled.
10. The Commissioner's investigation has focussed on Ofsted's reliance on section 31(1)(g) of the FOIA to withhold the information the complainant has requested, and the balance of the public interest.

### **Reasons for decision**

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11. Under subsection 31(1)(g) of the FOIA information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any public authority of its functions for any of the purposes specified in subsection 31(2).
12. In its refusal notice Ofsted cited subsection 31(2)(c), which is the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

13. Section 31 is subject to the public interest test.
14. The Commissioner considers Ofsted's refusal of the request and its internal review response to have been exemplary in their detail and timeliness. As such she did not consider it necessary to approach Ofsted for a separate submission to her and she has based her decision on its correspondence with the complainant. Had any questions or queries emerged during her considerations the Commissioner would, of course, have sought responses from Ofsted to these. On request, Ofsted did send the Commissioner a copy of the information it is withholding, and she has reviewed this.
15. In its refusal notice, Ofsted advised that the functions referred to under section 31(1)(g) include assessing whether regulatory action needs to be taken against an individual or organisation. It said that it has inspection functions which are closely related to the Department for Education (DfE) role in determining where it is necessary to take regulatory action against independent schools, under the Education and Skills Act 2008.
16. Ofsted said it was concerned that disclosing the information at the time of the request would create conditions that would impair Ofsted's future inspections; particularly when inspections consider compliance with regulations which concern fundamental British values and protected characteristics under the Equality Act 2010. This was, Ofsted said, because providing the public with such precise detail of the evidence considered by inspectors would encourage some schools to target their efforts at reaching only the minimum level required to satisfy regulations. Ofsted considered that some schools might even use this evidence to assist them in presenting a misleading picture to inspectors.
17. Ofsted said it considered that if the requested information was used in such a way it would be likely to undermine the ability of future inspections to identify areas of concern and, in turn, this would harm the overall process of ascertaining the need for regulatory action in those schools. Ofsted confirmed that it was therefore satisfied that disclosing the evidence would harm future inspections of these schools and the regulatory decision-making that then results from inspectors' findings.
18. In his request for an internal review, the complainant had asked for his request to be framed in the context of, what he explained, was a growing debate about teaching Lesbian/Gay/Bisexual/Transgender (LGBT) issues in schools. He highlighted the need for the public to be kept informed of the basis on which inspectors made their decisions in this area. The complainant rejected Ofsted's view that the disclosed information could be used to mislead inspectors or be used by religious groups to put pressure on schools. He had also claimed that there was

a 'precedent' for disclosing the information he had requested. This was because a similar request to his had recently been granted in the case of another Orthodox Jewish school. The complainant considered that the same objections Ofsted had raised concerning his request would have been applicable in that case, but that the information had nevertheless been released.

19. In its review decision Ofsted noted that it appeared that the central contention of the complainant's request was the perceived 'gap' in detail that may exist between the information inspectors have included in their published reports and the discussions recorded in their evidence. Ofsted confirmed it had examined the latter and advised that this evidence includes the precise questions inspectors ask and the precise answers schools gave, when discussing protected characteristics. By referring to the inspection report outcome this information could, Ofsted said, show where a school's answers made a favourable impression on inspectors and where it did not. It also clearly indicated the specific lines of enquiry inspectors use when they explore a school's response to the Equality Act.
20. Ofsted considered that this material – that is, the inspectors' notes - would indicate, to any person reading it, the words schools have used to explain to inspectors about their commitment to British values, protected characteristics and the Equality Act. Disclosing this material would enable a school in the future to take steps to imitate the sentiments expressed by schools praised by inspectors, without necessarily meaningfully enacting these sentiments. They could also avoid making the statements expressed by schools who were subsequently criticised by inspectors. Ofsted said that disclosure would allow schools to prepare their precise responses to inspectors, based on a knowledge of what inspectors will ask and what answers they have previously approved.
21. Ofsted noted that the complainant had dismissed this point when he had said that inspectors should still be able to identify those schools genuinely meeting the requirements. It agreed that inspectors should also be able to rely on other evidence to assess compliance but noted that Ofsted had not claimed that disclosure would completely prevent inspectors from doing their job. It said that section 31 is intended to allow public authorities to prevent any type of harm to the regulatory process. Ofsted said that, at the very least, the effects of disclosure described above would make inspectors' jobs much more difficult, as the true nature of any such school could be carefully concealed behind words intended to provide false assurance. Additional and more challenging work would be required by inspectors to uncover deceptive statements. Ofsted confirmed that it considered that all of this would harm the regulatory process and frustrate the purpose of advising the

Secretary of State about any school's suitability. From scenarios explained by its colleagues, Ofsted said it was confident that the requested information was likely to be used in such a way and that the exemption would therefore be engaged.

22. Ofsted next addressed the scepticism the complainant had expressed about pressure being put onto schools by religious lobby groups, where this has resulted from information being disclosed about the school's approach to LGBT and similar issues. Ofsted said it considered it was evident that such pressure was currently being applied in some communities and has had some effect on schools approaches to teaching in this area. It noted that the complainant had even referred to it in his correspondence. Ofsted went on that it was aware that religious groups or activists do have a desire to use Ofsted inspection evidence to challenge schools who are complying with the regulations. It disagreed with the complainant's view that these harmful activities would not provide a reason for withholding this information. If schools became fearful about complying with legal requirements, then this would, in Ofsted's view, cause obvious damage to the regulatory process and justify use of this exemption.
23. Finally, Ofsted addressed the complainant's point about information having been released in response to a separate but similar request regarding a different school. Ofsted advised that its responses are compliant with the FOI legislation and that it is the particular facts surrounding each request which will determine if an exemption applies. Ofsted said it would be incorrect to expect identical outcomes to requests made at different times, for different information and about different schools. It considered that purpose of reviews such as the one the complainant had requested in this case was to ensure that the legislation is being properly applied.
24. In his complaint to the Commissioner the complainant acknowledged Ofsted's argument that disclosure would be likely to help other schools to 'game' the system. He agreed that that would be unfortunate but considered that one must trust inspectors' professional competence in determining what is genuine compliance with educational standards and what is a sham.
25. The complainant also acknowledged Ofsted's fear that schools would come under pressure from religious groups. The complainant said he was aware that there have been occasions when schools have faced unpleasant tactics. However, he considers that any undue pressure should be dealt with by the appropriate authorities in the appropriate way. It should not, in his view, serve as a pretext for suppressing information that is relevant to public debate.

### *Conclusion*

26. To engage the section 31(1)(g) exemption a public authority must:
- i. demonstrate that it has been entrusted with a function to fulfil this regulatory purpose
  - ii. confirm that the function has been specifically designed to fulfil that purpose; and
  - iii. explain how the disclosure would or would be likely to prejudice that function.
27. The Commissioner is satisfied the first and second of the above conditions have been met. One of Ofsted's functions is to determine whether it is necessary to take regulatory action against independent schools, under the Education and Skills Act 2008. In its internal review, Ofsted advised the complainant that it published its inspection reports for the schools that are the subject of his request under section 109(1) and (2) of the Education and Skills Act 2008.
28. Regarding the third condition, section 31(1)(g) can be engaged on the basis that disclosing the information either 'would' prejudice Ofsted's regulatory functions, or that disclosure would only be 'likely' to prejudice those functions. From its correspondence to the complainant Ofsted appears to have applied the exemption based on the lower threshold of prejudice, ie that disclosure would be likely to prejudice its regulatory functions.
29. The Commissioner agrees that there is a real and significant risk that prejudice would occur if the requested information was released. The complainant himself has appeared to indicate to the Commissioner that schools 'gaming' Ofsted's inspections is a possibility and that he is aware of schools coming under pressure from certain groups. The Commissioner is satisfied that the third condition has been met. She accepts that disclosure would be likely to prejudice Ofsted's function as a regulator because some schools would be likely to use the detail of the inspectors' written reports to present their school in a way that they consider is likely to be favourable to Ofsted, but which is not a true representation of those schools. This would make Ofsted inspectors' job more difficult; harming and frustrating the regulatory process.
30. Since the conditions at paragraph 26 have been met, the Commissioner finds that, at the time the request was submitted, the information engaged the exemption under subsection 31(1)(g). She has gone on to consider the public interest arguments. Even though the section 31 exemption is engaged, the information might still be released if there is sufficient public interest to justify doing so.

## **Public interest test**

### Public interest in disclosing the information

31. In his request for an internal review the complainant acknowledged the sensitivities that surround the subject of his request. He considered it was nevertheless important that people should be properly informed and that there was an overriding case for providing them with the relevant detail, as he was seeking to do. He considered that if Ofsted was to retain public trust and confidence, it must be able to show that it applies its policy objectively and fairly. And to do that, it should be able to disclose on what basis inspectors have made their evaluation in practice.
32. In its correspondence with the complainant, Ofsted agreed him that matters concerning religion and the Equality Act were of considerable public concern at that time. It also agreed that these were highly sensitive issues of particular importance to some minority groups in the UK.
33. Given these factors, Ofsted acknowledged that the public interest would strongly favour the judgments of Ofsted's inspectors, on the operation of the Equality Act in schools, being made known to the public. It noted that to achieve this aim Ofsted must report inspectors' findings to the public. But Ofsted considered that the information it provided must be carefully considered to ensure that it fully represents inspectors' views and also that it is presented in a way that sensitively addresses issues of concern to minority groups.
34. Ofsted said it had taken steps to meet this public interest. It has published reports for these school inspections and said each of these where necessary will include the inspectors' carefully considered views and the basis on which they made judgements on the Equality Act. Ofsted considered the requested information is not able to fully represent the inspectors' views, as it is roughly assembled from a 'word search' of handwritten evidence. It would be likely to only partially represent the information inspectors considered and could not provide a complete reconstruction of inspectors' reasoning. Ofsted considered that this would not meet the complainant's further expectation, that his request would provide an accurate portrayal of "what children are being taught in class" or the "content of their education".
35. Ofsted said that, together, this meant that, even though the subject of this debate is important, the value of the information the complainant has requested is not high. It considered much of the public interest is already satisfied by Ofsted's publication of inspection reports. Any further interest in loosely selected parts of the inspection evidence must, therefore, be balanced against the range of harmful effects disclosure

would have on the regulatory process. Ofsted also said there is a broader objective of ensuring that sensitive issues, such as these, are presented carefully to the public. It considered that issuing isolated sections of inspection evidence on such a sensitive topic was likely to inflame rather than advance public debate on these issues.

#### Public interest in maintaining the exemption

36. In addition to the arguments above, Ofsted has also argued that there is a limited public interest in disclosing isolated extracts from an evidence base that cannot accurately represent the full range of evidence inspectors considered in reaching their judgements. It considered this would be compounded by the fact that such evidence could also consist of personal data that would be exempt from public disclosure, including notes from discussions with identifiable pupils about their views or what they have been taught, or information drawn from observing lessons and pupils' work.
37. Finally Ofsted has confirmed that, in its view, the greater public interest lies in supporting its inspection function, through protecting its ability to obtain evidence which accurately represents schools and submitting its reports to the DfE as an accurate record of its regulatory observations. This facilitates the Secretary of State being able to take regulatory enforcement action, where this is necessary to secure compliance with the legal requirements.

#### Balance of the public interest

38. Ofsted has directed the Commissioner to the published inspection reports for the schools that are the subject of the complainant's request. The Commissioner is satisfied that the information contained in these reports satisfies the public interest that there undoubtedly is in how particular schools are managing the teaching of British values and matters associated with the Equality Act. The reports, which are drawn from and carefully summarise the inspectors' notes, discuss students' personal development, behaviour and welfare in broad terms. The Commissioner accepts Ofsted's arguments for maintaining the section 31(1)(g) exemption and agrees that there is greater public interest in Ofsted being able to carry out thorough and challenging inspections without that process being frustrated. As has been discussed, in the Commissioner's view that would be likely to happen if the requested information was to be released.



## Right of appeal

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39. 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)

40. 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.
41. 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**