

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 October 2022

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

Decision (including any steps ordered)

1. The complainant has requested the Department for Education (DfE) to disclose copies of any documents related to the three newly escalated risks presented at the February 2022 Education & Skills Funding Agency (ESFA) board meeting. The DfE refused to disclose the requested information citing sections 35(1)(a), 36(2)(b) and (c) of FOIA.
2. The Commissioner's decision is that the DfE is correct to refuse to disclose the withheld information under section 36(2)(b)(ii) of FOIA. He therefore does not require any further action being taken.

Request and response

3. On 11 March 2022, the complainant wrote to the DfE and requested information in the following terms:

"Hi there, The ESFA board meeting for February 2022:
https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1060238/ESFA_MB_minutes_10_February_22__002_.pdf
States: Performance update – GC 5.1. GC gave an overview of the latest ESFA performance and risk committee meeting, noting 3 newly escalated risks. 5.2. The board discussed and accepted the report with no changes 1. Please could you provide a copy of any documents related to the '3 newly escalated risks' presented at the meeting."

4. The DfE responded on 21 April 2022 refusing to disclose the information citing sections 35(1)(a) and 36(2)(b) and (c) of FOIA.
5. The complainant requested an internal review on 3 May 2022.
6. The DfE carried out an internal review and notified the complainant of its findings on 23 May 2022. It upheld the application of the exemptions previously cited.

Scope of the case

7. The complainant contacted the Commissioner on 30 May 2022 to complain about the way his request for information had been handled. He believes a document discussed during a meeting of this nature should be disclosed.
8. The Commissioner has only considered section 36(2)(b) of FOIA. This is because the Commissioner considers this exemption applies to the withheld information in its entirety. The following section of the notice will explain why.

Reasons for decision

9. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
10. The DfE has confirmed that the qualified person's opinion was obtained on 1 April 2022 and it was their opinion that section 36(2)(b) and (c) of FOIA is engaged. It is felt that disclosure would be likely to inhibit free and frank discussion over the newly escalated risks and hinder its ability to make plans to mitigate them. It was also felt that the DfE needs the safe space to record and discuss those risks without fear of premature public scrutiny.

11. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
12. The Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to hinder the DfE's ability to consider and deliberate free and frankly internally the escalated risks identified. He notes these newly escalated risks were documented in the ESFA board meeting minutes for February 2022. The complainant's request was made only a very short while after on 11 March 2022. It is a reasonable opinion to hold that the DfE required the safe space to deliberate internally and come up with its own plans on how to mitigate them to ensure that they do not become an actual concern, without having to manage the distraction public scrutiny at this point would entail.
13. For the above reasons the Commissioner is satisfied that section 36(2)(b)(ii) of FOIA is engaged.
14. For section 36(2)(c) to also apply, the DfE would need to present arguments that demonstrate that disclosure would be likely to, otherwise, prejudice the effective conduct affairs. The Commissioner therefore considers it would need to provide different arguments to those that would be considered to come under section 36(2)(b)(i) or (ii). In this case, the DfE has not presented any other arguments. Just the need for safe space whilst they deliberate and freely and frankly exchange views and opinions to enable them to come up with plans to mitigate the new risks identified. These appropriately come under section 36(2)(b)(ii).
15. As the DfE has not presented any arguments to demonstrate why disclosure would be likely to otherwise prejudice the effective conduct of public affairs, the Commissioner does not consider section 36(2)(c) applies.

Public interest test

16. The DfE said that it recognised the public interest in transparency, especially where it has concerns about potential risks relating to ongoing work. However, it considers the public interest rests in maintaining the exemption. It argued that it needs the safe space to record and discuss potential risks frankly and in detail so that plans to mitigate them can be properly managed and challenged. It argued that it is in the public

interest to ensure that the risks do not become an actual concern and to do that it needs the time and space to internally discuss and deliberate on what its plans will be. It felt disclosure would be likely to prejudice the mitigation work and this is not in the public interest.

17. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
18. The Commissioner recognises the public interest in openness, transparency and accountability. She also notes the public interest in members of the public having access to information which enables them to understand more clearly how identified risks are considered and what plans are being put into place to mitigate them. It is important to ensure that appropriate measures are being considered to prevent such risks becoming a real concern. Access to information promotes public debate and enables the public to scrutinise how public authorities are being managed and what challenges they are facing.
19. However, considering the circumstances at the time of the request, the fact that the request was made only a month after reference to these newly identified risks was made in the ESFA board meeting minutes, the Commissioner considers there are stronger public interest arguments in favour of maintaining the exemption.
20. The Commissioner accepts that disclosure at the time of the request would have been likely to prejudice the DfE's ability to deliberate freely and openly. Safe space is required to enable public authorities to explore and discuss options, especially when the matters under discussion are still live and ongoing. This ensures that appropriate decision making takes place and the best possible decisions are made. He does not consider it is in the wider interests of the public to hinder or prejudice these processes. At a time when deliberations are still ongoing and the issues under discussions are live, he accepts that the consequences of disclosure are likely to be more severe and extensive.

Right of appeal

21. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

22. 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.
23. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF