

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 May 2023

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

Address: 2 Rivergate
Temple Quay
Bristol
BS1 6EH

Decision (including any steps ordered)

1. The complainant has requested evidence from a school inspection. The above public authority ("the public authority") relied on section 33 (audit functions) and section 40(2) of FOIA (personal data) to withhold the information.
2. The Commissioner's decision is that the public authority has correctly relied on section 33 of FOIA and that the balance of the public interest favours maintaining the exemption. He is also satisfied that the public authority was entitled to rely on section 40(2) of FOIA in the manner that it has
3. The Commissioner does not require further steps to be taken.

Background

4. On 23 January 2023, the public authority published its report of an inspection it carried out at King Edward VII School ("the School") the previous September. It judged that the School was inadequate. Amongst the inspectors' findings was that the School had a lack of oversight of those pupils accessing their education via alternative provision.

Request and response

5. On 20 February 2023, the complainant wrote to the public authority and, referring to the published report, requested information in the following terms:

"Please tell me

- a) Which member/s of the Ofsted team lead inquiries into the oversight of alternative provision and how did they gather evidence to determine their judgement?
- b) Which members of school staff were interviewed/inspected in relation to oversight of alternative provision?
- c) How inspectors were able to conclude that there 'is a lack of clear leadership regarding pupils who attend alternative provision'.

"Please include copies of all correspondence, including minutes, notes, letters and emails along with any meetings, discussions or telephone calls pertaining to this aspect of the report's judgement specifically, but not limited to, correspondence between the 17th September 2022 and the 23rd January 2023."

6. The public authority responded on 2 March 2023. It relied on section 40(2) of FOIA (third party personal data) to withhold the information within the scope of elements a and b. In respect of element c it relied on section 33 of FOIA. It upheld this position following an internal review.

Reasons for decision

Section 33 – audit functions

7. Section 33 of FOIA allows a public authority to withhold information whose disclosure would harm the public authority's ability to carry out its audit functions.
8. The Commissioner accepts that the public authority has audit functions because it investigates how effectively and efficiently other public authorities (schools, colleges and children's services) are using their resources.
9. In its refusal notice, the public authority noted that:

"Our inspection of King Edward VII School found the school to be providing an inadequate quality of education, and that the school

requires significant improvement because it is performing significantly less well than it might in all the circumstances reasonably be expected to perform, as set out in section 44 of the Education Act 2005. As a result the school will be subject to monitoring by Ofsted, as detailed in our inspection handbook and school monitoring handbook.

"We consider that making inspection evidence available to the public, while this process is ongoing, has the potential to harm any future inspection activity that may be necessary. This is because disclosure is likely to draw focus on previous inspection events rather than on improvements and changes that need to be made. Consequently, we are satisfied the evidence is currently exempt from disclosure under section 33 of the Act."

10. In its internal review, the public authority expanded on its arguments:

"This anticipated new inspection activity is likely to be harmed by the disclosure of the information you requested.

"In these circumstances it is vital, as you have indeed identified, that the school direct their efforts towards improving outcomes for children, and in demonstrating such improvement to Ofsted during the monitoring process, rather than spending this time analysing previous inspection material.

"If 'prior' evidence is introduced to the school community, shortly before a new set of inspectors arrive, this would inevitably disrupt any planned inspection, as it creates a means to overwhelm those inspectors and deflect them from their primary inspection task, if the previous inspection judgement is disputed in any way."

11. The Commissioner notes in this case that, whilst Ofsted had published its report on the inspection, because of the findings of that report, further inspections would be necessary. Disclosing the more detailed inspectors' notes would risk distracting the School from the work that it needs to do to improve. It also risks inspectors recording less detailed or less frank observations if they are concerned that their notes will be made available to the world at large.
12. The Commissioner also notes that where the withheld information records the views of individual staff members it would be obvious (certainly within the School) which member of staff had expressed which view. Disclosure would therefore discourage staff from speaking candidly to inspectors as they would be worried that their observations (which would have been provided in a certain expectation of confidence) would become known to their colleagues and the wider public.

13. The public authority did not state explicitly whether it was claiming the higher bar of likelihood ("would" prejudice). In the circumstances, the Commission considers that the lower bar of "would be likely to" prejudice applies. This means that the chance of the prejudice occurring is less than 50% but remains more than a purely hypothetical risk.
14. The Commissioner is thus satisfied that section 33 of FOIA is engaged.

Public interest test

15. The Commissioner recognises that those parents whose children attend the School will wish to know why it has been judged Inadequate and will wish to hold it account for any improvements that are deemed necessary. There will be a significant public interest in disclosure of information that allows parents to hold the School to account.
16. The complainant has also noted that, because the School has been judged Inadequate, it now faces being forced to convert to an academy – therefore there is a public interest in understanding why this is justified.
17. Whilst the Commissioner recognises the public interest in standards in education, in his view that public interest has already been largely satisfied via the publication of the inspectors' report. That report sets out in detail why the public authority concluded that the School was Inadequate and what steps it needs to take in order to bring itself up to reasonable standards.
18. Disclosure of the information being withheld in this case would not add considerably to the information already disclosed – but would undermine the public authority's ability to carry out future inspections of the School and other schools more generally.
19. The Commissioner considers that there is a strong public interest in allowing the public authority to carry out its audit functions so as to maintain the highest standards in education and children's services.
20. Finally, the Commissioner notes that the request only seeks the inspectors' evidence in relation to alternative provision. Alternative provision was only one of several areas where the School's performance was judged to be inadequate. Therefore, disclosing the withheld information would provide, at best, a very limited explanation as to the ultimate outcome of the inspection – thus lessening the public interest in disclosure.
21. The Commissioner is therefore satisfied that the relatively limited public interest that might arise from disclosure is outweighed by the stronger public interest in preserving the public authority's ability to discharge its

audit functions. He is thus satisfied that the balance of the public interest favours maintaining section 33 and the information can be withheld.

Section 40(2) – third party personal data

22. Section 40(2) of FOIA allows a public authority to withhold information which is the personal data of someone other than the requester where there would be no lawful basis, under data protection law, that would allow the information to be published.
23. The names of the inspectors and the School's staff will already be in the public domain. The personal data in this case will be the precise contribution that each of those individuals made to the inspection process. The Commissioner is not satisfied that the information could be anonymised sufficiently to break the link between any individual and their contribution.
24. As none of the individuals appears to have consented to disclosure of their personal data, the Commissioner considers that the only lawful basis on which the information could be disclosed would be if disclosure were necessary to satisfy a legitimate interest.
25. The Commissioner recognises that there will be a legitimate interest in understanding whether inspectors are appropriately qualified and whether they have any potential conflicts of interest. However this interest is already satisfied because the report already includes a list of the inspectors who contributed – which can be compared to information already in the public domain.
26. The Commissioner also notes that there is an (albeit much weaker) interest in transparency and accountability in respect of both the inspectors and the staff.
27. However, the Commissioner does not consider that publication would be the least intrusive means of achieving the legitimate interest. The public authority will have its own internal processes to ensure that its inspections are of a high standard and that any conclusions drawn by individual inspectors are appropriately challenged. This is less intrusive than publishing the information.
28. The legitimate interest in understanding what evidence was provided by the School is met by publication of the report. It is not necessary to ascribe views to individuals in order to do this. The public authority will also have mechanisms in place to ensure that relevant staff members at the School have been spoken to and to challenge any gaps in the evidence.

29. The Commissioner does not therefore consider that disclosure is necessary and it follows that there is no lawful basis for processing the personal data. The public authority is thus entitled to rely on section 40(2) of FOIA to withhold the information.

Right of appeal

30. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

31. 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.
32. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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