

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2019

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

Decision (including any steps ordered)

1. The complainant has requested a copy of the evidence that was considered by the Regional Schools Commissioner (RSC) as part of their decision to allow a particular academy to reduce the number of pupils it admitted. The Department for Education (DfE) has refused to provide some of the requested information under section 36 – prejudice to the effective conduct of public affairs.
2. The Information Commissioner's decision is that section 36(2)(b)(i) is engaged in respect of all the withheld information. However the public interest favours disclosing a limited amount of that information. Section 36(2)(c) has also been applied to those same pieces of, information. However the Information Commissioner finds that that exemption is not engaged. Finally the Information Commissioner finds that the DfE breached section 10 by failing to respond to the request within twenty working days of receipt.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information that is not covered by either section 36(2)(b)(i) or 36(2)(c). This is identified in the confidential annex which has been provided to the DfE only.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court

pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 5 March 2018 the complainant wrote to the Office of the Regional Schools Commissioner for South East England and South London. She requested information of the following description:

"The International Academy of Greenwich (IAG), 21 Meadowcourt Road, London, SE3 9DU applied for, and was granted an in-year variation to reduce its 2018 Planned Admissions Numbers by 40%.

1. Please provide me with a copy of all of the evidence that was considered by the RSC as part of the decision to grant the PAN reduction for 2018.
 2. Please provide details of how the public are allowed to challenge a decision to approve an in-year variation for a PAN reduction.
 3. For the time period: 1st August 2015 to 1st February 2018 - Please provide the number of free/academy schools that applied for an in-year variation to reduce their PAN. Please provide the reason given for each free/academy school's need to reduce their PAN."
6. On 25 May 2018 the DfE responded. It only handled the first part of the request under the FOIA. It provided some information within the scope of that part of the request, but refused to provide the remainder. The DfE cited the following exemptions as the basis for doing so:
- section 36(2)(b)(i), prejudice to the free and frank provision of advice,
 - section 36(2)(c), otherwise prejudice the conduct of public affairs,
 - section 40(2), third party personal data.
7. The complainant requested an internal review on 28 May 2018. The DfE sent her the outcome of its internal review on 21 August 2018. It provided a limited amount of additional information, but maintained its position that the remaining information requested at part one was exempt from disclosure under sections 36 and 40.

Scope of the case

8. The complainant contacted the Commissioner on 1 November 2018 to complain about the way her request for information had been handled.
9. During a telephone conversation with a member of the Information Commissioner's staff on 18 March 2019 she explained she was prepared to limit the scope of her complaint to the DfE's application of section 36 to the information withheld from the first part of her request and the time it had taken the DfE to respond to her request.
10. The Commissioner considers that the matter to be decided is whether the DfE is entitled to rely on section 36 to withhold information from that captured by the first part of the request, i.e. the evidence that was considered by the RSC when making his decision in respect of granting a reduction in the number of admissions. The Commissioner will also consider whether the DfE responded to her request within the time limits imposed by section 10 of the FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

11. So far as is relevant, section 36(2) of FOIA states that information is exempt if its disclosure:
 - (2)(b) 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 purpose of deliberation, or
 - (2)(c) would, or would be likely to otherwise prejudice the effective conduct of public affairs.
12. Section 36(2) is unique in that it depends on the reasonable opinion of the qualified person in order to be engaged.
13. When considering the application of section 36 the Commissioner will:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person;
 - Ascertain when the opinion was given;
 - Consider whether the opinion was reasonable.
14. In the case of a government department such as the DfE, any minister may act as its qualified person. The DfE has provided the Commissioner with a copy of a completed pro-forma setting out the arguments for and

against the application of section 36(2)(b)(i) and 36(2)(c). An annex to that pro-forma signed by Lord Agnew, the Parliamentary Under Secretary of State for the School System on 21 May 2018, confirmed that it was his opinion that disclosing the information would, or would be likely to, inhibit the free and frank provision of advice and prejudice the conduct of public affairs.

15. It is clear that the conditions set out in the first three bullet points of paragraph 13 have been satisfied.
16. It is now necessary to consider whether the qualified person's opinion that disclosing the information would be likely to inhibit the free and frank provision of advice, or otherwise prejudice the conduct of public affairs, was a reasonable one. From the DfE's submission the Information Commissioner understands that both exemptions have been applied to all the withheld information apart from the limited amount of information withheld under section 40 – personal information.
17. It should be noted that the provisions within section 36 can be applied on the basis that disclosing the information either 'would', or 'would be likely' to cause the alleged harm. This means there are two thresholds of likelihood on which the exemptions can be applied. In respect of section 36(2)(b)(i) the pro-forma signed by the qualified person does not specify how likely he considers the inhibition to the free and frank provision of advice would be. In such cases the Information Commissioner will take the exemption to have been applied on the basis of the lower threshold, i.e. that the inhibition is only 'likely' to occur. Although relying on the lower threshold makes the exemptions easier to engage, less weight is afforded to maintaining the exemption under the public interest test.
18. In respect of section 36(2)(c) – otherwise prejudice the conduct of public affairs, the pro-forma does make it clear that the exemption is applied on the basis that the harm is only likely to occur. The term 'would be likely' is taken to mean that there has to be a real and significant likelihood that the inhibition or prejudice envisaged will occur, even if this falls short of being more likely than not.
19. When considering reasonableness the Information Commissioner relies on the Oxford English Dictionary definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person can hold.

Section 36(2)(b)(i) – inhibition to the free and frank provision of advice

20. The Information Commissioner will start by looking at the DfE's application of section 36(2)(b)(i).
21. The Information Commissioner has viewed the withheld information. It is contained in a short paper prepared by DfE officials to provide advice to the Head Teachers Board (HTB) which in turn informs its recommendation to the Regional Schools Commissioner (RSC) on whether or not to grant the change in admissions to the academy. The majority of the information from the paper has been disclosed. The Information Commissioner cannot discuss the specific contents of the withheld information, but she is satisfied that the vast majority is of a different character to that which has already been released and is of a more sensitive nature.
22. By way of brief background, the HTB is comprised of academy trust chief executive officers and experienced professional leaders, who support the RSC by providing advice on a range of issues including applications to make significant changes to academies and free schools such as a reduction in planned admission numbers. Due to their composition, HTBs are able to provide sector expertise and local knowledge into the decision making process. They are not however, decisions makers themselves, their role is advisory. DfE state that since their introduction in 2014, HTBs have become key to the department's priority to create a self-improving, school-led system.
23. The DfE argues that, as with other HTB papers, the withheld information was produced for the purpose of providing the RSC and his HTB members with free and frank advice which in turn enabled them to ask questions and engage in discussions about an important issue affecting the academy, the school community and the wider local community.
24. HTB papers contain the views of officials which can include the effectiveness of academy trusts and individuals, matters affecting third parties as well as, on occasion, financial, personnel and commercially sensitive information. It argues that if HTB meeting papers were published, there is a risk that the quality and range of advice provided by officials and HTB members to RSCs in the future would be compromised.
25. The DfE argues that although it does not believe that officials would be deterred from providing advice to HTBs and RSCs through the production of these reports, there is a real risk that the messages within the reports could become more guarded or diluted in comparison to the forthright way such advice is currently presented. As a consequence the effectiveness of the papers would be reduced.
26. In this specific case, DfE believe it was particularly important that its officials had the free space necessary in which to share their views and

advice, so that the important issue of the proposed admission variation could be considered and decided without undue delay.

27. The Information Commissioner recognises that these arguments are reflected in the submission to the qualified person. The qualified person was also provided with a copy of the withheld information. Having viewed the withheld information herself, the Information Commissioner appreciates that there is some validity in the concerns expressed and that therefore the view of the qualified person certainly cannot be regarded as unreasonable. The Information Commissioner finds that the exemption provided by section 36(2)(b)(i) is engaged.

Public interest test

28. The exemption is however subject to the public interest test. This means that even though the exemption is engaged the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
29. When considering the public interest in favour of maintaining section 36(2)(b)(i) the Commissioner will give some weight to the opinion of the qualified person. This means that the Commissioner accepts that it is likely that there would be some inhibition to the provision of advice. It is noted that the exemption is engaged on the basis that the inhibition was only 'likely' to occur, rather than the higher threshold of likelihood, i.e. that it 'would' occur. Although some weight is given to the qualified person's opinion the Commissioner will go on to consider the severity, extent and frequency of that inhibition before weighing that against the value in disclosing the information.
30. The Information Commissioner considers that the severity of the inhibition will be determined largely by the sensitivity of the information to which the exemption has been applied. For example, if the information was of a relatively uncontroversial nature, its disclosure would have little impact and not cause officials to shy away from including similar details in future papers. In this case, although the Information Commissioner does not consider the withheld information to be extremely sensitive, she does recognise that its disclosure could disrupt the work of the RSC and make it more difficult to resolve issues facing the academy. Therefore it is conceivable that officials would be more guarded when they have to address such issues in the future for fear that that advice could also be disclosed.
31. In respect of the extent of the inhibition, disclosure of the withheld information is likely to lead to less candid advice in HTB papers. As these are a key part of the RSCs' decision making process the extent of the harm caused by the disclosure would be significant. It may also have a wider impact in making officials more cautious when giving advice

generally, albeit any such impact would be less profound. Given that the DfE describe the input of HTBs as being key to the work of the RSCs, the impact caused by any watering down of the advice that they receive, and therefore the advice they give their RSC, is likely to be experienced on a frequent basis. That negative impact may be most pronounced where the issue under consideration is the same as that in this case. The Commissioner considers it likely that the similar issues would feature regularly in the decisions faced by RSCs.

32. DfE argues that it is essential that officials can provide advice on a range of issues without worrying about the public presentation of these discussions. Furthermore, it argues, good government depends on good decision making and this needs to be based on the best advice available and a full consideration of the options. It is clear from the nature of the commentary contained in the withheld information that the officials providing it would not have expected it to be made public. The DfE concludes that this demonstrates officials currently feel able to provide free and frank advice and it again emphasised that to disclose this information is likely to result in future advice being less candid, especially when discussing any controversial, sensitive, or high profile issues.
33. The Information Commissioner notes that there appears to be a degree of urgency and a need to determine the request from the academy to reduce the number of admissions as soon as possible. This being so, the need for candour and to be able to present the relevant arguments swiftly without concerns over disclosure are increased.
34. In light of the above the Information Commissioner considers there is a strong public interest in withholding the majority of the withheld information. However there are two sections of the withheld information which are less obviously sensitive in terms of the impact that disclosure would have on the candour of advice, one of which is at the head of the report and relates to its contents generally, the other concerns the financial health of the academy. The public interest in maintaining the exemption in respect of these two sections is weaker.
35. The DfE has presented some, limited, arguments in favour of disclosure. It has recognised that there are always general public interest arguments in favour of disclosing information to the public to demonstrate openness and transparency of government. It has also taken account of the argument that more openness about the decision making process to which the information relates, and the delivery of services by the RSC, may lead to greater accountability, improved standards of public debate and improved trust.

36. In its refusal notice the DfE also acknowledged that there is a public interest in ensuring that there is an effective oversight of expenditure of public funds within the academy and free school system.
37. The complainant has developed the public interest arguments in favour of disclosure further. She contends that it is very much in the interest of the taxpaying public to know why the RSC granted a reduction in the planned admissions numbers for a recently opened school. The public are entitled, she argues, to understand all the points that were considered when making that decision. When seeking an internal review, the complainant emphasised her concerns over the need to scrutinise how public money had been spent. In broad terms, she argued that a large amount of money had been spent refurbishing the temporary buildings that housed the school, but despite this the school was still unable to accommodate the planned number of pupils.
38. In balancing the public interest for and against disclosure the Information Commissioner has had regard for the fact that the exemption has been applied on the basis that the inhibition is only likely to occur. However even allowing for this the Information Commissioner considers that disclosing the majority of the information would have a significant impact on the ability of officials to provide clear advice which fully conveys the importance of the issues which need to be considered in a timely manner. There is a clear public interest in avoiding this adverse effect. Although disclosing the information would allow the public to better understand the decision to allow a reduction in admissions, the majority of it focusses on one specific factor and much of the surrounding detail has already been disclosed. Therefore in respect of the majority of the information the Information Commissioner finds that the public interest favours maintaining the exemption.
39. However the Information Commissioner is not satisfied that disclosing the information from the two sections referred to in paragraph 34 would have the same level of inhibition. This is the information from the head of the paper and the information in respect of the financial health of the academy. This information will be identified more precisely in a confidential annex provided solely to the DfE. The Information Commissioner considers this information to be more factual than the other withheld information. In its submission the DfE explained that officials would not avoid providing advice, but its concern was how frankly such advice would be presented. As there is less scope for how this particular information can be presented, the Information Commissioner finds that any inhibition to the provision of such advice would be very much reduced. Therefore the Information Commissioner finds that in respect of this information the public interest arguments in favour of disclosure are sufficient to outweigh the harm that may be caused.

40. The DfE is not entitled to rely on section 36(2)(b)(i) to withhold this information. However before deciding whether this information can be disclosed, the Information Commissioner must consider whether it can be withheld under section 36(2)(c).
41. **Section 36(2)(c) – otherwise prejudice the conduct of public affairs**
42. The exemption has been applied to the same information as section 36(2)(b)(i). However, having found that the majority of that information can be withheld under 36(2)(b)(i) the Information Commissioner only needs to consider the application of section 36(2)(c) in respect of the residual information. This is the information from the head of the paper and the information relating to the financial health of the academy.
43. The Information Commissioner has already established that in respect of this information the first three bullet points set out in paragraph 13 have been satisfied. It has also been established that the exemption provided by section 36(2)(c) has been applied on the basis that the alleged prejudice would only be likely to occur. The Information Commissioner will now go on to look at whether the qualified person's opinion was reasonable and, if so, whether the exemption can be maintained in the public interest.
44. The exemption provided by section 36(2)(c) protects from disclosure information that would be likely to 'otherwise' prejudice the conduct of public affairs. The use of the word 'otherwise' is important, it means the purpose of the exemption is to protect information that, if released, would cause some prejudice not safeguarded against by the other provisions of section 36, or any other exemption. The arguments presented by the DfE however focus to a large extent on the potential for the disclosure to inhibit free and frank advice or discussions, albeit DfE goes on to explain how this may impact on the decision making process. These are matters already covered by the provisions of section 36(2)(b). It is therefore not reasonable to use the same grounds for applying section 36(2)(c).
45. The DfE does raise one fresh ground for its application of section 36(2)(c) however. In broad terms it concerns the need to maintain the confidence of the third parties which the DfE works with and to develop relationships with such parties.
46. The Information Commissioner is not satisfied that these grounds relate to the particular pieces of information under consideration. Therefore the Commissioner does not accept that the opinion is a reasonable one. Based on the arguments presented by the DfE the Information Commissioner finds that the exemption provided by section 36(2)(c) is

not engaged in respect of this information. The DfE is therefore required to disclose the information, which is identified in the confidential annex.

Section 10 - time for compliance

47. Section 10 of the FOIA provides that a public authority is required to respond to a request for information within twenty working days of it being received.
48. The request was received on 5 March 2018 but not responded to until 25 May 2018. This is around three times longer than is permitted.
49. DfE has clearly breached section 10 of the FOIA.
50. The Information Commissioner monitors compliance with section 10 and this late response will be recorded as part of the intelligence which informs decisions in respect of whether and when enforcement action is appropriate.

Other matters

51. Although not forming part of the formal decision notice, the Information Commissioner uses this 'Other matters' section to note issues that have arisen as part of the investigation.
52. The complainant sought an internal review on 28 May 2018 but did not receive a response until 21 August 2018. This was sixty working days later. Although there is no statutory time limit for providing an internal review, the Information Commissioner has issued guidance to the effect that most reviews should be completed within twenty working days and would expect no review to take longer than forty working days. The DfE's response clearly does not comply with that guidance.

Right of appeal

53. 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

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

54. 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.
55. 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

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