

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 May 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 document and correspondence associated with Toby Young's appointment to the Board of the Office for Students. The Department for Education (DfE) has released some information and is withholding other information under sections 36(2)(b)(i), 36(2)(c) (prejudice to the effective conduct of public affairs) and section 40(2)(third person personal data).
2. The Commissioner's decision is as follows:
 - The 'merit document' engages the exemptions under section 36(2)(b)(i) and section 36(2)(c) but the public interest favours its release.
 - DfE is entitled to withhold the information redacted from email correspondence it released under section 40(2), but the merit document does not engage section 40(2).
3. The Commissioner requires DfE to take the following step to ensure compliance with the legislation:
 - Release the merit document identified by the department as falling within the scope of the request.

4. DfE must take this step 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.

Background

5. DfE has provided the Commissioner with a background and context to the request. It has explained that the Office for Students (OfS) is a non-departmental body of the DfE, acting as the regulator and competition authority for the higher education sector in England.
6. The OfS was established by the Higher Education and Research Act 2017, coming into existence on 1 January 2018. It merged the Higher Education Funding Council for England (HEFCE) and the Office for Fair Access (OFFA). The OfS inherited HEFCE's funding responsibilities (aside from those for research which passed to United Kingdom Research and Innovation), and OFFA's responsibility for promoting fair access to higher education.
7. The OfS main areas of work are:
 - helping students to get into and succeed in higher education
 - helping students stay informed
 - making sure that students get a high-quality education that prepares them for the future; and
 - protecting students' interests.
8. The appointment of Toby Young, a journalist and former director of the New Schools Network, to the OfS board in January 2018 proved to be controversial, with questions publicly raised around Mr Young's suitability for the post. This led to extensive media coverage and an online petition protesting his appointment. Mr Young subsequently decided to stand-down from the post shortly after his appointment.
9. In February 2018 Peter Riddell, the Commissioner for Public Appointments, completed and published his investigation into the appointments to the Board of the OfS¹. His report highlighted a number

¹ <https://publicappointmentscommissioner.independent.gov.uk/wp-content/uploads/2018/02/Commissioner-for-Public-Appointments-Investigation-OFS-Final-.pdf>

of areas where principles in the Governance Code were breached or compromised in the appointments to this Board, and the Commissioner provided government departments with suggestions on how due diligence can be improved.

Request and response

10. On 27 February 2018 the complainant wrote to DfE and requested information in the following terms:

"Q1 Please provide a copy of the documents listed in section 23 of the Commissioner for Public Appointment's report into the appointment of Toby Young, described as "a list of the merits of Toby Young".

Q2 Please provide a copy of all emails between 10 Downing Street and The Department of Education referred to in sections 33-37 of the Commissioner for Public Appointment's report into the appointment of Toby Young, concerning the suitability of the candidate for the student experience role on the OFS board."

11. DfE provided a response on 3 May 2018. It confirmed that it holds information relevant to both parts of the request. It released some information falling within the scope of part 2 – email correspondence between DfE and 10 Downing Street from December 2017, with some personal data redacted under section 40(2) of the FOIA. DfE withheld information it holds falling within the scope of part 1. DfE said that the withheld information was also exempt from release under section 40(2) of the FOIA as it is the personal data of third persons.
12. DfE provided an internal review on 30 October 2018. It revised its original response. It said it upheld its original decision not to disclose the information concerned ie that withheld under section 40(2). But DfE said that section 36(2)(b)(i), section 36(2)(c) and section 41 (information provided in confidence) should have also been applied. With regard to the section 36(2) exemptions, DfE said that these exemptions apply to the disclosure of all of the correspondence *"between officials at the DfE and the OfS, regarding the appointment of Toby Young to the board"* [Commissioner's italics]. It said the public interest favoured maintaining this exemption.
13. DfE said the exemption at section 41 applied to "the remainder of the information".
14. The Commissioner notes that part 2 of the request is for correspondence between DfE and 10 Downing Street and DfE's above reference is to

correspondence between DfE and OfS. She raised this with DfE but it has not addressed it; she assumes it is an error.

Scope of the case

15. The complainant contacted the Commissioner on 2 November 2018 to complain about the way his request for information had been handled.
16. The Commissioner notes DfE's internal review response but it has confirmed to her that it is withholding information relevant to part 1 of the request under section 36(2)(b)(i), section 36(2)(c) and section 40(2). It is withholding some information it redacted from the information it released that is relevant to part 2 of the request under section 40(2).
17. DfE has also confirmed that it has withdrawn its reliance on section 41.
18. The Commissioner's investigation has therefore focussed on whether DfE can rely on sections 36(2)(b)(i) or 36(2)(c) and/or section 40(2) of the FOIA to withhold information within the scope of the complainant's request.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

19. DfE has withheld a 'merit document' under section 36(2)(b)(i) and section 36(2)(c). This is the information requested in part 1 of the request. DfE has provided this information to the Commissioner. It comprises a list of Toby Young's merits with regard to his potential membership of the OfS Board.
20. The Commissioner has first considered whether the merit document engages the section 36(2)(b)(i) exemption.

Section 36(2)(b)(i) – would, or would be likely to, inhibit the free and frank provision of advice

21. 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 (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation.

22. 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.
23. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
24. 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 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.
25. The Commissioner considers that section 36(2)(b)(i) concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice for the purposes of deliberation, in this case deliberation associated with the Toby Young's appointment to the Office for Students, and any of DfE's future deliberations.
26. The qualified person in this case was Sam Gyimah, the Minister of State for Universities, Science, Research and Innovation. 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.
27. 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. Annex B of this document evidences the Minister confirming that, in his opinion, disclosing the requested information would be likely to have the effect set out in sections 36(2)(b)(i). The

Commissioner is therefore satisfied that an opinion was given by the qualified person.

28. The date of DfE's submission to the Minister is 3 August 2018. Annex B is not dated but the Commissioner assumes the date when the opinion was given was between 3 August 2018 and the date of the internal review, when DfE confirmed it is relying on section 36(2) - 30 October 2018. As such, she is satisfied that the opinion was given at the appropriate time.
29. 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.
30. With regard to section 36(2)(b)(i), the qualified person's opinion in this case is that prejudice *would be likely* to occur if the withheld information was to be disclosed, rather than *would* occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
31. 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.
32. In the submission it provided to the Minister, DfE provided: both parts of the request, a background to the request, an explanation of the section 36 provision, detail on the information being withheld with regard to part 1 of the request, and suggestions as to why the merit document engages the section 36 exemption; namely the nature of the information and that disclosing it would therefore be likely to inhibit the free and frank provision of advice. Specifically, with regard to the merit document, DfE explained that:
 - This was advice to the Minister, so falls under section 36(2)(b)(i) (free and frank provision of advice).

- If it were released, officials might be unwilling or less willing to provide frank advice in future on the merits or otherwise of candidates for public appointments, affecting Ministers' ability to make good appointments to the OfS Board in particular and other public bodies in general, and thereby potentially inhibiting the effective running of the OfS and other organisations.
33. The Commissioner is satisfied that the Minister had sufficient appropriate information about part 1 of the request in order to form an opinion on the matter of whether section 36(2)(b)(i) was engaged.
34. The Commissioner has considered the point at paragraph 31 and, since she is satisfied that this point has been addressed, she must accept that the qualified person's opinion is one a reasonable person might hold. She therefore finds that the merit document engages section 36(2)(b)(i).
35. However, before considering the public interest test the Commissioner has also considered DfE's reliance on section 36(2)(c) with regard to the merit document.

Section 36(2)(c) – would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs

36. Section 36(2)(c) is concerned with the effects of making the disputed information public. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
37. Importantly, if section 36(2)(c) is used in conjunction with any another exemption, as in this case, the prejudice envisaged must be different to that covered by the other exemption. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b).
38. As with section 36(2)(b)(i), the Commissioner has considered the qualified person's opinion with regard to section 36(2)(c). The qualified person was again Sam Gyimah, and he gave an opinion at the appropriate time through the process discussed in relation to the 36(2)(b)(i) exemption. He agreed with DfE's advice that section 36(2)(c) also applies because the merit document draws on the candidate's own application for the role. It was considered that future

potential candidates might be put off applying (or might be inhibited in what they say in their applications) if they see that information provided on an application form has been subsequently disclosed. This would be likely, it was felt, to affect DfE's ability to make good appointments to the OfS Board in future and potentially to other public bodies in general.

39. In its submission to the Commissioner, with regard to section 36(2)(c) DfE has said that as part of strong and effective practices, departmental officials need a safe space in which to work and to openly deliberate and provide advice on the skills, experience and qualities of individuals applying for key departmental positions. This allows officials the space to ensure that full and frank discussions, investigations and deliberations can take place, to ensure the best candidates are appointed to key departmental positions. DfE says that it is fair to state that the official who drafted this piece of advice believed that that this was to allow internal and confidential discussions, when deliberating Mr Young's suitability.
40. The prejudice DfE envisions under section 36(2)(c) in its submission to the Commissioner above broadly repeats that which it gave with regard to the public interest test for section 36(2)(b)(i) at paragraph 46; both broadly concerned future advice being less candid. As such the Commissioner was minded to consider that the prejudice envisioned under both exemptions was sufficiently distinct.
41. However, the opinion given by the qualified person was slightly different. At the point that DfE briefed the Minister, it was also relying on section 41 to withhold the merit document. It appears to the Commissioner that the advice at paragraph 38 is quite closely related to the section 41 exemption rather than the section 36(2)(c). However, that disclosing the merit document might affect DfE's future ability to make suitable appointments to the OfS Board is not a totally unreasonable opinion to hold and is somewhat distinct from DfE's position in its submission. The Commissioner therefore finds that section 36(2)(c) is engaged as disclosing the merit document would be likely otherwise to prejudice the effective conduct of public affairs.
42. The Commissioner has finally considered the public interest test with regard to both section 36(2)(b)(i) and section 36(2)(c).

Public interest test

Public interest in disclosing the information

43. With regard to both exemptions, in its submission DfE says, first, that it has taken into account that considerations for disclosure add up to an argument that more openness about the process and delivery may lead

to greater accountability, an improved standard of public debate, and improved trust.

44. Second, DfE says there is a clearly interest in the disclosure of information to the public, to demonstrate the openness and transparency of government, particularly where individuals are awarded key departmental roles.
45. The complainant meanwhile has argued that there is a strong public interest in holding public appointments processes to account. He says the process in this case was the subject of clear failings and, as such, the need for public scrutiny outweighs any concern for the safe space of civil service decision making.

Public interest in maintaining the exemptions

46. With regard to section 36(2)(b)(i) DfE argues that it is essential that departmental officials can discuss and provide advice on a range of issues without worrying about the public presentation of these discussions.
47. DfE goes on to argue that good government depends on good decision-making. This needs to be based on the best advice available and a full consideration of the options.
48. Finally, DfE says that it is clear from the information withheld that the official who drafted the 'merits document' felt able to provide free and frank professional views and advice, due to the fact this advice was not intended to go into the public domain. DfE argues that should it make such information public the likely result is that future advice given by officials, as well as any potential issues and concerns raised, or the possible unsuitability of individual applicants to key departmental positions, would be less candid.
49. With regard to section 36(2)(c) DfE says that it relies on information provided by departmental officials to help make informed decisions in order to determine the suitability of individuals applying for key departmental roles and positions. It argues that such advice needs to remain confidential to ensure sensitive and effective handling and to make sure that the best people are awarded such key positions.
50. DfE says that if it is required to disclose the requested information, it would be likely to prejudice its ability to recruit the best people to key departmental roles, in this instance an OfS board member. This could lead to the department being unable to decide whether any issues or concerns raised require full and formal consideration.

51. Again, DfE argues that officials must have confidence that they can share candid views and advice, and that there is an opportunity to understand and, where appropriate, challenge advice presented. It says that if it is required to put the merit document into the public domain, officials would be likely to be inhibited from providing such free and frank advice, which in turn would have a negative impact on the department's ability to conduct public affairs effectively.
52. Finally, DfE says that disclosing the information would be likely to prejudice the effective conduct of public affairs in the future, as it would remove the space within which officials are able to discuss options surrounding the recruitment of individuals to key departmental roles freely and frankly. This would, DfE argues, make it more difficult for it to ensure it had the right people with the right skills, experience, capacity and commitment to take on important departmental roles.

Balance of the public interest

53. In finding that the above exemptions are engaged, the Commissioner has already accepted the qualified person's opinion (that the disclosure of this information is likely to result in the effects set out in the exemptions) is a reasonable opinion to hold. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any prejudice that would or might occur. In order to determine this, the Commissioner has considered both the nature of the requested information and the timing of the request.
54. The Commissioner has reviewed the content of the merit document, which is as Peter Riddell describes in his report; namely, "...a list of the merits of Mr Young and his record on educational reform in relation to the range of skills and experience sought for members of the board". DfE provided the document to Justine Greening, the then Secretary of State for Education, after names of candidates found appointable after interview had been suggested to ministers. In the Commissioner's view there is nothing particularly revelatory or sensitive in this document, given Mr Young's widely publicised and reported background and experience. None of the 'merits' listed in the document would, the Commissioner considers, be unexpected. The most remarkable thing about this document would appear to be that it had not referred to any due diligence checks, a matter that Peter Riddell had already noted in his published report.
55. In her published guidance on section 36 the Commissioner discusses the so called 'chilling effect'. Chilling effect arguments operate at various levels. If the issue in question is still live at the time a related request is submitted, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect

on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.

56. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
57. In this case, it was reported on 1 January 2018 that Toby Young had been appointed to the OfS Board; it was reported on 9 January 2018 that he had resigned from the Board. Peter Riddell's report was published on 26 February 2018 and the complainant submitted his request on 27 February 2018. As such, particular decisions had been made (Toby Young had been appointed, he had decided to resign and Peter Riddell had come to the conclusions outlined in his report). The issue in question – Toby Young's appointment to the OfS Board – was still live at the time of the request in the sense that the report had just been published and was receiving media attention. But decisions had been finalised and the Commissioner has not been advised about any closely related matters that disclosing the merit document would have been likely to affect.
58. The Commissioner is therefore not persuaded that disclosing the merit document would have had a chilling effect on particular discussions – those discussions had concluded and there were no related discussions still ongoing. And, as discussed above, aside from the information possibly being Mr Young's personal data (that matter is discussed under the section 40 analysis), she does not consider the content of the merit document to be particularly sensitive.
59. Nor is she persuaded that any advice DfE provided in the future would be less candid if it was thought that it would be disclosed under the FOIA, or that individuals would be dissuaded from putting themselves forward for appointment to particular roles. Any order to disclose information in this case does not automatically mean disclosure of similar information in all future cases. Should DfE receive similar requests for information in the future it should handle them as it considers appropriate. The Commissioner would consider any complaints subsequently submitted to her individually and on their own merits. She therefore does not agree that in the future, as a result of any disclosure in this case, advice would likely to be compromised or individuals would be likely to be disinclined to seek appointments associated with DfE.

60. On balance, the Commissioner has found that the severity and extent of the prejudice in this case would not be sufficient to justify maintaining the exemption. In forming this view, the Commissioner recognises that there is a strong public interest in public authorities being seen to be operating fairly and transparently. The appointment of Toby Young to the OfS Board fell short expected standards. While Peter Riddell's report does satisfy the public interest in that matter to a large extent, in the Commissioner's view the merit document will shed a little more light on how and why that particular decision came to be made. She therefore finds that the public interest favours disclosing the merit document.

Section 40 – personal data

61. DfE considers that the merit document is also exempt information under section 40(2) and that the information it has redacted from the emails it released is also exempt information under section 40(2).
62. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3) or 40(4) is also satisfied. The Commissioner has therefore first considered whether the information in question can be categorised as personal data.

Is the information the personal data of third persons?

63. The Data Protection Act 1998 (DPA), which was still in force at the time of DfE's response to the complainant but which has now been superseded by the DPA 2018 and General Data Protection Regulation, says that for data to constitute personal data it must relate to a living individual and that individual must be identifiable.
64. The Commissioner is satisfied that both the merit document and the redacted information can be categorised as personal data. The merit document clearly relates to Toby Young; the redacted information - names and contact details - relates to particular individuals. Both Toby Young and the individuals in question can be identified from the information. The Commissioner has gone on to consider whether a condition under section 40(3) or 40(4) has been met.

Is a condition under section 40(3) met?

65. The condition under section 40(3A)a) of the FOIA is that disclosing the information would contravene any of the data protection principles. DfE argues that disclosure would contravene the first data protection principle because it would not be fair to do so.

66. In assessing fairness, the Commissioner considers whether the information relates to the public or private life of the individual; whether the individual has consented to their personal data being released, their reasonable expectations about what will happen to their personal data and the consequence of disclosure on the individual concerned.
67. DfE's submission to the Commissioner does not make a strong case for withholding the merit document under section 40(2). DfE simply says that it should be withheld under section 40(2) because this document is the department's official opinion of the named individual – Toby Young – as a potential member of the OfS Board.
68. The Commissioner is not persuaded by this position. Given Toby Young's profile and the wider circumstances and controversy the Commissioner would have expected DfE to have put forward compelling arguments that releasing the merit document would nonetheless be unfair. But DfE has not addressed any of the factors at paragraph 66 or made a strong case at all. In the absence of such a case, the Commissioner has decided that DfE cannot rely on section 40(2) of the FOIA to withhold the merit document. She has gone on to consider the redacted information.
69. This information forms part of email correspondence between DfE and 10 Downing Street between 22 December 2017 and 24 January 2018. The emails concern the possible appointment of another individual to the OfS Board ie not Toby Young. Some names and contact details have been redacted.
70. In its submission DfE has confirmed that the redacted information is the personal details of government officials below the grade of Deputy Director (DD). DfE says that while the information relates to these junior individuals' working lives rather than their private lives, it considers that officials below the grade of DD would expect such information should be withheld, given that they do not have the same public facing role as that of officials at the level of DD or above.
71. DfE has referenced the Commissioner's decision in FS50604583. This concerned information the Department of Health (DH) withheld under section 40(2). The Commissioner decided that because the information related to more junior members of staff, staff who would likely to have the reasonable expectation that their personal data would not be released, DH had applied section 40(2) appropriately.
72. The Commissioner agrees that in this case the junior officials would be likely to expect that their personal data would not be released to the wider world under the FOIA. However, despite these expectations the withheld information may still be disclosed if there is a compelling public

interest in doing so that outweighs the legitimate interests of the data subjects; that is, the officials concerned in this instance.

73. Clearly, as discussed in the background to the request, there is some public interest associated with the withheld information and notes that the complainant has argued that there is a strong public interest in holding public appointments processes to account. The Commissioner agrees but she considers that Peter Riddell's report, released the day before the complainant submitted his request, performed that function to a large extent. She notes that although the report is critical of ministerial choice and direction with regard to the OfS appointment process, it does not name civil servants (apart from the Permanent Secretary at the DfE). In addition, the emails that have been released do not present new or controversial information. The circumstances of appointments made to the OfS Board are known – from Peter Riddell's report and elsewhere. The short email correspondence in question here simply states that particular ministers and the Prime Minister were content with a particular individual's appointment, along with broader points about the wider appointment process.
74. The body of the emails has been released and the Commissioner does not consider that releasing the names and contact details of the officials who sent the emails would add anything to the debate, now or at the time of the request. As such, this information has limited public interest and not sufficient to override the data subjects' rights and freedoms. Consequently, the Commissioner is satisfied that it would not be fair to release this information.
75. The Commissioner has decided that DfE is correct to withhold the information redacted from the released email correspondence under section 40(2). It is the personal data third persons and a condition under section 40(3) is satisfied because releasing this information would not be fair and would therefore breach the first data protection principle.
76. Because a condition under section 40(3) has been met with regards to this information, it has not been necessary to consider the condition under section 40(4).

Right of appeal

77. 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

78. 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.
79. 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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