

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 October 2016

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested information from the Department for Education (DfE) relating to the proposal of the Weald of Kent Grammar School (Weald of Kent) for the development of an annexe in Sevenoaks. The complaint to the Commissioner concerns the DfE's refusal to comply with two requests. The Commissioner has initially had to decide how the requests under consideration should be interpreted and has found that they only cover the business information submitted to the DfE by the Weald of Kent. The DfE considered that this fell within the 'prejudice to the effective conduct of public affairs' exemption to disclosure in section 36(2)(c) of FOIA. The Commissioner has determined the exemption is engaged but concluded that on balance the public interest favours disclosure. She therefore requires the DfE to disclose the requested information.
2. The public authority 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.

#### **Request and response**

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3. The complainant originally contacted the DfE on 23 October 2015 and made three requests, two of which asked for the separate application forms that were submitted by the Weald of Kent for the proposed construction of an annexe. The Commissioner is aware that there was a

difference of opinion on the way that the requests should have been interpreted – an issue that has been considered elsewhere by the Commissioner. What is pertinent to the present case however is the fact that the complainant decided to make a revised version of the requests on 26 November 2015. These requests, which form the focus of the decision notice, asked for information in the following terms:

1. *The proposal that was submitted by the Weald of Kent Grammar School in Tonbridge, Kent, for the proposal for an annexe that has been recently approved.*
2. *The proposal that was submitted by the Weald of Kent Grammar School, in Tonbridge, Kent, in 2013 for the proposal for a mixed sex annexe.*
3. *All correspondence, including email correspondence, in 2015 between the Department for Education (ministers, officials and special advisers) and any of the 163 grammar school, regarding their possible expansion on to a new site.*
4. The DfE replied to the complainant on 24 December 2015. It explained that it had interpreted 'proposal' to refer to the business case, additional information and advice relating to the submissions, and confirmed the DfE held information that had been requested. The DfE further advised that it considered the 'prejudice to the effect conduct of public affairs' (section 36) exemption to disclosure in FOIA applied and stated that it required an extra 20 working days, in addition to the statutory time period for responding, in which to consider the public interest test. The DfE updated the complainant on 21 January 2016.
5. The DfE's provided its substantive response to the requests on 3 February 2016. It clarified that requests 1 and 2 engaged sections 36(2)(b) and (c) of FOIA and also claimed that some of this information was covered by the 'legal professional privilege' (section 42) and 'third party personal data' (section 40(2)) exemptions. The exemptions in section 36(2) and 42 are qualified by the public interest test and the DfE found that on balance the public interest favoured withholding the information. With regard to request 3, the DfE explained that it had estimated that the cost of confirming whether it held the requested information would exceed the appropriate costs limit in section 12 of FOIA.
6. The complainant wrote to the DfE on 8 February 2016 and asked it to reconsider its handling of the requests. This triggered the DfE's internal review process and the outcome provided on 7 March 2016 upheld the DfE's original position.

## Scope of the case

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7. The complainant has contacted the Commissioner to complain about the way her requests for information had been handled by the DfE.
8. With regard to the scope of the complaint, the complainant has informed the Commissioner that she did not wish to pursue the DfE's response to request 3. The Commissioner's determination therefore only refers to the DfE's refusal to disclose the information covered by 1 and 2 of the requests made on 26 November 2015.
9. The DfE has maintained that the position taken in respect of these requests at the initial response stage, and upheld in the internal review, was correct. The Commissioner's analysis of this position follows in the body of the decision notice.

## Reasons for decision

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### Background

10. Grammar schools are state secondary schools that select their pupils by means of an examination. In 1965 the government at the time ordered local education authorities to start phasing out grammar schools and secondary moderns, and replace them with a comprehensive system. In 1998, Labour's School Standards and Framework Act forbade the establishment of any new all-selective schools. The BBC reported in October 2015<sup>1</sup> that in the UK there were about 163 grammar schools in England and a further 69 grammar schools in Northern Ireland.
11. Weald of Kent is a Grammar School in Tonbridge. In 2013 it said that it was consulting on the viability of setting up a six-form entry annexe on a separate site in Sevenoaks. The original proposal was for a new co-educational annexe but this was rejected by Michael Gove, the then Secretary of State for Education, in 2013. Weald of Kent subsequently submitted a revised single-sex proposal in November 2014.
12. The DfE has explained that the law currently prohibits the establishment of new selective schools. However, existing selective maintained schools may expand but the powers to do so, or to vary academy arrangements to enable the expansion of a selective academy, may not be exercised if

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<sup>1</sup> <http://www.bbc.co.uk/news/education-34538222>

either the purpose or the consequence of doing so is in effect to establish a new selective school (section 99 of the School Standards and Framework Act 1998, section 39 Education and Inspections Act 2006 and sections 1A and 6 of the Academies Act 2010).

13. On 15 October 2015 Nicky Morgan, Secretary of State for Education, wrote to the Weald of Kent and confirmed that its application had been approved on the basis that the proposal represented a genuine expansion<sup>2</sup>. In the previously cited article, the BBC explained that the decision was significant, saying:

*Not only will it be the first selective grammar school to open in England for more than 50 years, it is also the first test of the 1998 legislation introduced by Labour that barred any new school from adopting selective admissions.*

*Weald of Kent Grammar School, in Tonbridge, has side-stepped this law by expanding to another site nine miles away in Sevenoaks.*

14. The annexe is due to open in September 2017. At the time the complaint was made, the Commissioner understands there was a possibility of a legal challenge being made to the decision to approve the proposal. The Commissioner's determination must however return to the circumstances as they were presented at the time the request was made.

### **Information subject to the request**

15. A decision of the Commissioner on whether the legislation has been applied correctly must initially establish what information should be considered as falling within scope based on the specific terms of a request.
16. In the Overview to her guidance 'Interpreting and clarifying requests'<sup>3</sup>, the Commissioner says that public authorities should interpret information requests objectively. They must, she explains, avoid reading into the request any meanings that are not clear from the wording. The Commissioner continues by stating that the authority must answer based on what the requester has actually asked for, and not on what it

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<sup>2</sup>[https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/469513/15\\_1014DECISION\\_LETTER\\_OCTOBER\\_15\\_REDACTED\\_Version.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/469513/15_1014DECISION_LETTER_OCTOBER_15_REDACTED_Version.pdf)

<sup>3</sup> <https://ico.org.uk/media/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

thinks they would like, should have asked for or would be of most use to them.

17. At the request of the Commissioner, the DfE has provided her with copies of the withheld information and submissions supporting its position under the legislation. On inspection, it became apparent to the Commissioner that the withheld bundle included information that did not obviously fall under the scope of the request. This was because it contained information, including advice, produced by the DfE itself and not only the proposal information that was submitted 'by the Weald of Kent', which was the way in which the requests were framed. The Commissioner has therefore asked the DfE to explain how it had interpreted the requests.
18. In response, the DfE said it had informed the complainant at the outset that it had interpreted the use of the term 'proposal' in the requests to refer to the business case, additional information and advice regarding each case. The DfE further clarified its position by saying:

*[...] we were aware that [the complainant] was disappointed by the response to her first request. Because of this we were seeking to be as helpful as possible in setting out information held in which she might be interested, and confirming that we would take all that forward if she wanted us to. We also think that it is worth noting that [the complainant] did not challenge the interpretation outlined in the attached letter and the Department responded within the scope described. Due to these points we believe that it was appropriate for the Department to adopt the interpretation of the request that it did.*

19. The Commissioner welcomes the DfE's attempt to help the complainant by adopting a wide interpretation of the request. Notwithstanding this, the Commissioner considers that, objectively speaking, the interpretation does not correspond with the way in which the requests were expressed. Critically, for both requests 1 and 2 the complainant specifically and clearly asks to be provided with the relevant proposal information that was submitted by the Weald of Kent. This is not ambiguous. Furthermore, it is the view of the Commissioner that there is nothing in the requests themselves - for example, the inclusion of any vague or indeterminate terms - which would indicate that they should be given a wider interpretation. The fact that the complainant did not dispute the DfE's interpretation does not in and of itself demonstrate that the interpretation was the correct one for the purposes of the legislation.
20. From her review of the supporting correspondence, the Commissioner has also not seen any evidence to substantiate the view that it was

reasonable to assume the request encompassed information which went beyond what had actually been asked for. In saying this, as illustrated by the Chronology section of this notice the Commissioner is aware that the complainant had previously argued the DfE's reading of the first version of the requests, which had used the term 'application form' rather than 'proposal', was overly restrictive. However, the Commissioner considers that this dispute did not alter the natural meaning of the requests with regard to the inclusion of 'submitted by the Weald of Kent'.

21. In light of this finding, the Commissioner is content that her decision should only focus on the proposal information that the DfE received from the Weald of Kent. For clarity, the Commissioner considers this would include a telephone note in the withheld material provided (reference 6 in the index of documents listed by the DfE) on the basis that it contains information 'submitted' by the Weald of Kent about the proposed development. The DfE has relied on section 36(2)(c) of FOIA as the basis for withholding each of these records.

### **Section 36(2) – prejudice to the effective conduct of public affairs**

22. Section 36(2) of FOIA provides that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:
  - (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 purposes of deliberation, or
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs
23. The DfE has applied section 36(2)(c) of FOIA to the records that the Commissioner has determined are caught by the scope of requests 1 and 2.
24. Unlike other exemptions in FOIA, an exemption in section 36(2) can only be applied where a public authority has consulted with a qualified person, as defined in the legislation, and it is the qualified person's opinion that the harm stated in the exemption would, or would be likely to, arise through disclosure. The Commissioner will only accept that a limb in section 36(2) is engaged where she is satisfied that a qualified person gave an opinion on the likelihood of the prejudice cited in the exemption occurring and, furthermore, that the opinion was reasonable in the circumstances. This means that the qualified person must have

reasonably concluded there is a link between disclosure and a real and significant risk of the prejudice that the relevant exemption is designed to protect against.

25. With regard to section 36(2)(c), the legislation does not define what is meant by the use of the term 'otherwise'. The prejudice must though be different to the prejudice covered by the other exemptions in section 36(2). The First-tier Tribunal (Information Rights) in *McIntyre v Information Commissioner and the Ministry of Defence* (EA/2007/0068, 4 February 2008)<sup>4</sup> found that the exemption may apply in a situation where disclosure would harm an authority's ability to offer an effective public service or meet its wider objectives due to the disruption caused by placing information in the public domain.

*The opinion of the qualified person*

26. The DfE has advised that the individual consulted about the requests in his capacity as a qualified person was the Parliamentary Under Secretary of State for the Department. The DfE had received a number of information requests relating to the plans of the Weald of Kent and the Secretary of State was contacted on two occasions – 9 December 2015 and 26 January 2016 – to ensure that his opinion on the application of an exemption in section 36(2) covered the full scope of information that had been requested. To evidence this, a copy of the signed and dated statements endorsing the use of the exemption has been provided to the Commissioner. The Commissioner is satisfied that, as a Minister, the person consulted about the requests falls within the definition of a qualified person set out by section 36(5) of FOIA. She has therefore next had to consider whether the qualified person's opinion with regard to section 36(2)(c) was reasonable in the circumstances.
27. When deciding on the reasonableness of the qualified person's opinion, the test to be applied is whether the opinion is one that a reasonable person *could* hold and not whether it is the *most* reasonable opinion. The critical consideration is that the opinion not only links to the factors described in the exemption but also to the information to which the exemption has been applied.
28. In seeking the advice of the qualified person, the DfE prepared submissions that provided some context to the issue to which the requested information relates, explained the operation of the section 36(2) exemptions cited and gave an overall recommendation that

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<sup>4</sup> <http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i99/McIntyre.pdf>

supported the application of the exemptions. By agreeing to the application of section 36(2)(c), the qualified person effectively subscribed to the arguments included in the submissions, including the acceptance that *it would be likely* the prejudice described in section 36(2)(c) would occur through the release of the information. While the level of prejudice designated by 'would be likely' is lower than the alternative threshold 'would' prejudice, it nevertheless still requires there to be a real and significant risk of the prejudice occurring.

29. The submissions were in essence the same on each occasion that the qualified person was consulted. Both made reference to section 36(2)(c) and to the exemptions in section 36(2)(b) which were applied to other documents relating to the Weald of Kent. The arguments presented are sequential, inasmuch as they begin by referring to the risk that disclosure could inhibit the requesting and giving of frank advice (section 36(2)(b)(i)) and constrain the exchange of views by the involved parties (section 36(2)(b)(ii)) before addressing the application of section 36(2)(c) of FOIA. With regard to this exemption, it was argued that without the engagement from academies referred to previously, the DfE's ability to consider requests for expansion based on a frank assessment of the case would be inhibited.
30. The Commissioner is satisfied that the argument advanced in relation to section 36(2)(c) is one that relates to the activity described by the exemption. Furthermore, the Commissioner considers the opinion that the disclosure of the proposal information could harm the DfE's capacity to interrogate any future requests made by a school for expansion is one that a reasonable person could hold. The Commissioner has therefore found that section 36(2)(c) of FOIA is engaged.
31. Each of the exemptions in section 36(2) is a qualified exemption, which means they are subject to the public interest test. The Commissioner's analysis of the application of this test follows below.

### **The balance of the public interest**

32. The public interest test is separate from the qualified person's opinion. Befitting the status of the qualified person, however, his or her opinion should be afforded some weight when exercising this test. That being said, the Commissioner will form her own view on the severity, extent and frequency of the prejudicial or inhibitive effects being claimed when determining whether the public interest favours disclosure.

### **Public interest arguments in favour of disclosure**

33. The DfE has acknowledged that the Weald of Kent's plan is a high profile, novel and contentious case that had attracted media attention

before the first business case was received in July 2013. It recognises that transparency may help reassure members of the public who oppose the return of academic selection that this is an appropriate expansion. The DfE further explained that the disclosure would also show the community that expansion did not change the nature of the school they were consulted on.

34. A separate effect highlighted by the DfE also refers to other groups and trusts now considering exploring similar plans. The DfE imagined that these groups would do their exploration by speculating on the details of this case and the circumstances of the Weald of Kent's expansion may help guide the groups' thinking and potentially benefit them greatly.

### **Public interest arguments in favour of maintaining the exemption**

35. The DfE's submissions to the Commissioner have for the greater part focused on the immediate inhibitory effect of disclosure on the free exchange of views and advice, activities that do not directly concern the application of section 36(2)(c). The DfE has however also cited the strong views expressed in public against the decision. In its view, release of the information could result in a negative media focus on the school, their current chair of governors and perhaps even the officials and advisers involved.
36. The DfE has argued that, given the amount of media interest that the case had already attracted, the public interest may be better served by minimising the public attention on the Weald of Kent while it works to deliver the approved expansion. To do otherwise risks diverting the Weald of Kent's attention away from its core business, which is to deliver high quality education and outcomes to improve the life chances of its pupils.
37. With regard to the need for transparency in this area, the DfE explains that guidance on what information is required to make a decision is in the public domain and it asserts that this is sufficient for the public to understand how such decisions which might affect them are made. It would therefore not be appropriate in the circumstances to disclose the business submission information, the effect of which would likely hamper the future exchange of information and advice containing this and future significant change proposals. Such an outcome could, in turn, act as a deterrent for good and outstanding schools that were considering expanding.

### **Balance of the public interest**

38. The grammar school system continues to divide opinion. At the heart of the issue is the extent to which the selection process is truly meritocratic and whether the system helps or hinders social mobility.
39. In November 2013 the Sutton Trust, an education think-tank, published a report 'Poor Grammar – Entry into Grammar Schools for disadvantaged pupils in England'<sup>5</sup> which summarised the findings of research data on the operation of grammar schools. The Sutton Trust's report was not designed to argue the merits or otherwise of the continued role of grammar schools but to evaluate how the system was working. This found that the system was not as open as it should be and recommended a fairer testing process that would not disadvantage pupils from low and middle income backgrounds.
40. There is a clearly a significant public interest in the information in this case, which corresponds with the ongoing debates on the use of grammar schools. To the objectors, the Weald of Kent proposals represent an attempt to bypass the existing ban on the building of new grammar schools – an assertion rejected by the Weald of Kent and ultimately by the DfE itself.
41. The Commissioner recognises that the decision to accept the proposal did not necessarily indicate a change in national policy towards grammar schools. Rather, it was the DfE's view that the proposal represented a genuine expansion and not a new school. Nevertheless, it is evident that the interpretation was controversial and there is a strong argument which says that the public should be able to see the submissions presented to the DfE for the principal reasons that it would help elucidate why the extension was required and how the proposal complied with the law.
42. In the view of the Commissioner, a critical factor in this case relates to the timing of the request. Importantly, this came after the announcement that the Weald of Kent's proposal for the annexe had been accepted. As such, the process of analysis concerning the legality of the scheme had been completed and with it the essential space required for the development of the DfE's decision-making. This would strengthen the case for disclosure. Two points should be made in respect of this finding, however.

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<sup>5</sup> <http://www.suttontrust.com/wp-content/uploads/2013/11/poorgrammarreport-2.pdf>

43. Firstly, the DfE has argued that at the time of the request the expansion had yet to be effected through changes to the academy's funding arrangement. The Weald of Kent was also consulting on changes to its admission arrangements arising from the acceptance of the proposal. The suggestion is therefore that considerations relating to the project remained 'live'. Secondly, reports in the media suggested that the DfE's decision might be the subject of a legal challenge. In the view of the Commissioner, neither of these points would significantly weigh against disclosure. With regard to the DfE's argument, the Commissioner considers that this refers to the technical implementation of the proposal - the next stage in the process - rather than to the fundamental question of whether the extension should be approved. In relation to the possibility of a legal challenge which would need to be defended by the DfE, the Commissioner understands that this was only speculation at that time. In any event, she does not consider that the disclosure of the Weald of Kent's proposal information would prevent the DfE from mounting a defence to the legal challenge.
44. What emerges therefore is the strength of the public interest arguments for disclosure. The Commissioner has though considered whether the other arguments presented by the DfE would swing the balance of the public interest towards maintaining the exemption. In the view of the Commissioner, they do not.
45. With regard to the argument of the qualified person, the Commissioner will as stated afford his opinion some weight when considering the balance of the public interest. In this case the Commissioner has accepted as reasonable the claim that disclosure could have the wider effect of deterring schools from applying to expand or otherwise inhibit the level of engagement from schools that had submitted a proposal. She does not, however, consider that the nature of the prejudice would be particularly severe in the circumstances. This is for three reasons.
46. First, an organisation would only look to expand where it is assumed there are strong operational reasons for doing so and the Commissioner considers that they would not be so easily deterred from making an application where this is the case. Second, an educational establishment should expect that any decisions which will have a profound effect on the way it functions will attract a significant level of scrutiny. Third, the Commissioner would envisage that a proposal document submitted by a school would normally only contain a factual explanation of the reasons why the expansion was required, which in and of itself is unlikely to be controversial or particularly sensitive. Nevertheless, each information request must be treated on its own merits and an exemption in FOIA may be applicable where information is genuinely confidential.

47. The DfE has also argued that it would not be in the interests of the Weald of Kent to divert its resources away from delivering the expansion towards handling the increase in public and media attention that is likely to arise as a result of disclosure. The Commissioner accepts that this argument does have some merit. She considers however that the Weald of Kent will have entered into the process knowing that the application, if approved, was likely to be controversial and therefore that it would be required to deal with a greater degree of scrutiny than would be the case with development projects of a different nature. In any event, the Commissioner considers that the argument ultimately suffers in comparison with the strong case for disclosure.
48. The Commissioner has therefore concluded that in all the circumstances the public interest in disclosure outweighs the public interest in favour of maintaining the exemption.

## Right of appeal

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49. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

50. 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.
51. 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 .....**

**Alun Johnson**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**