

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 May 2017

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

Decision (including any steps ordered)

1. The complainant made a request to the Education Funding Agency (EFA), an executive agency of the Department for Education (DfE), for a copy of an internal audit report carried out on Collective Spirit Multi Academy Trust.
2. The DfE refused the complainant's request, citing the exemptions under sections 36(2)(b)(ii) (free and frank exchange of views), 36(2)(c) (otherwise prejudice effective conduct of public affairs) and 33 (audit functions) of the FOIA.
3. The Commissioner's decision is that section 36(2)(b)(ii) is engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in withholding the requested information. Accordingly she has not gone on to consider sections 36(2)(c) or 33.
4. The Commissioner does not require the DfE to take any steps as a result of this decision notice.

Request and response

5. On 29 September 2016 the complainant wrote to the DfE and requested information in the following terms:

"Please can you disclose the internal auditing report that was carried out on collective spirit multi academy trust recently which run Manchester creative studio in Manchester and collective spirit school in Oldham."

6. The DfE acknowledged receipt of the request on 19 October 2016 and responded on 7 November 2016. It confirmed that it holds the requested information, however refused to disclose it citing section 36(2)(b)(ii) and 36(2)(c) of the FOIA. The DfE apologised to the complainant for the delay in responding.
7. On 6 December 2016 the complainant requested an internal review of the DfE's decision to refuse her request.
8. Following an internal review the DfE wrote to the complainant on 13 December 2016 upholding its application of sections 36(2)(b)(ii) and 36(2)(c). The DfE also applied a further exemption under section 33(1)(a) of the FOIA.

Scope of the case

9. The complainant contacted the Commissioner on 21 December 2016 to complain about the way her request for information had been handled and asked the Commissioner to encourage the DfE to provide the requested information.
10. The Commissioner considers that the scope of the case is whether the exemptions under sections 36(2)(b)(ii), 36(2)(c) and 33(1)(a) of the FOIA were applied correctly by the DfE.

Reasons for decision

Section 36 – effective conduct of public affairs

11. The Commissioner has firstly considered the DfE's application of section 36(2)(ii) of the FOIA.
12. Section 36(2)(b)(ii) states that:

2) Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

(b) would, or would be likely to, inhibit-

(ii) the free and frank exchange of views for the purposes of deliberation.
13. Sections 36(2)(b)(ii) can only be engaged if, in the reasonable opinion of the qualified person, disclosure would, or would be likely to, result in

any of the effects set out. In order to determine whether section 36(2)(b)(ii) has been correctly applied the Commissioner has:

- (i) ascertained who the qualified person was for the public authority;
- (ii) established that an opinion was given;
- (iii) ascertained when the opinion was given; and
- (iv) considered whether the opinion given was reasonable.

Engagement of section 36

14. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. In this case the DfE confirmed that the opinion was given by Caroline Dinenage, Parliamentary Under Secretary for State for Women, Equalities and Early Years. The Commissioner is satisfied that she was an appropriate qualified person for these purposes.
15. In support of the application of section 36, the DfE has provided the Commissioner with a copy of the submissions to the qualified person, which identifies the information to which it is suggested that sections 36(2)(b)(ii) and 36(2)(c) should be applied, and copy of the qualified person's opinion.
16. The DfE confirmed to the Commissioner that the withheld information consists of an internal report entitled "FS50660873 MCS-CSFS-Final-Fact-Finding-Report". The Commissioner has been provided with a copy of the withheld report.
17. The Commissioner notes that the qualified person's opinion was sought on 28 October 2016. The Minister provided her opinion that section 36 was engaged on 31 October 2016, as she believed that disclosure of the withheld information would be likely to have the effect set out in section 36(2)(b)(ii) of the FOIA. It appears she accepted that section 36(2)(b)(ii) was engaged in relation to the report for the reasons set out in the submission, namely:
 - (i) Academy trusts and the EFA need a safe space to work to ensure that full and frank discussions, investigations and deliberations can take place to achieve the best outcome. Release of fact-finding reports could stifle open and honest relationships between trusts and impact on the willingness of trusts to openly discuss concerns with the EFA if there were concerns that each step of the process may be published. Making fact-finding reviews publicly available may therefore be likely to prejudice the effective conduct of public affairs by

impacting on the EFA's ability to carry out its statutory duties in the future.

[REDACTED]

- (iii) Whilst there may be some advantage in releasing this information as openness about due process may lead to increased trust and engagement between members of the public and government, all trusts are required to publish documents to allow the public access to information about their management. These include annual audited accounts, governor's minutes, policies and pupil premium statements. This legal requirement is intended to enable transparency and public scrutiny of the use of public funds. Trust accounts for 2013/14 and 2014/15 are in the public domain and available through Companies House.

[REDACTED]

- 18. The DfE has applied sections 36(2)(b)(ii) to the entirety of the report and has provided the Commissioner with additional arguments in respect of its position which are summarised below.
- 19. The DfE maintains that academy trusts and the DfE need a safe space in which to work and to deliberate allegations, issues and potential next steps to ensure that full and frank discussions, investigations and

deliberations can take place to achieve the best outcome for trusts and their schools.

20. Release of fact-finding reports would be likely to stifle the open and honest relationship developed between trusts and the department, and could impact the willingness of trusts to openly discuss issues with the department if there were concerns that each step of the process may be published.



22. The Commissioner notes that her guidance on section 36 makes it clear that:

"The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion." (para. 21)

23. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then she will regard it as a reasonable opinion for the purposes of section 36.
24. The qualified person can only apply the exemption on the basis that the inhibition to the free and frank exchange of views either 'would' occur or would only be 'likely' to occur. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the

qualified person considers it is more likely than not that the inhibition would occur.

25. In the qualified person's opinion, she stated that disclosure 'would likely' inhibit the matters set out in section 36(2)(b)(ii).
26. Having perused the withheld information and considered the submissions put to the qualified person, the qualified person's opinion, and having taken into account the DfE's additional arguments, the Commissioner considers that the opinion of the qualified person is a reasonable one in respect of the application of sections 36(2)(b)(ii) of the FOIA. This is because the Commissioner agrees that it is likely that disclosure of the report would have a negative impact on the relationship between the DfE and trusts, in that trusts could lose confidence that information divulged in the course of fact-finding processes would remain confidential, particularly in circumstances where the allegations made are unfounded and no formal investigation ensues. This in turn would have the likely effect of preventing openness and honesty in future deliberations.

Public Interest Test

27. As section 36(2) of the FOIA is a qualified exemption, it is subject to a public interest test. The Commissioner therefore went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.
28. As section 36 is a qualified exemption it is subject to the public interest test. Having accepted the opinion of the qualified person that inhibition would likely result from disclosure of the information, the Commissioner must then consider whether, in all the circumstances of the case, the public interest in maintaining either of the exemptions outweighs the public interest in disclosing the information.
29. When considering complaints about the application of section 36, where the Commissioner finds that the qualified person's opinion is reasonable, she will consider the weight of that opinion in applying the public interest test.

Public interest arguments in favour of disclosure of the information

30. The DfE concedes that more openness about process and delivery may lead to greater accountability, an improved standard of public debate and improved trust.

31. It agrees that there is a general public interest in disclosure of information to the public to demonstrate the openness and transparency of government.
32. The DfE also agrees that the requester is likely to find it helpful to be able to see the full picture of this case and understand how that process was completed. The requester is also likely to find it helpful to see the decision making process in this particular case and understand the reasons for the delay in actions by the bodies involved.

Public interest arguments in favour of maintaining the exemption

33. The DfE states that it relies upon information provided to it by officials to help make informed decisions in order to determine the appropriate level of action to take against academy trusts. These types of deliberations need to remain confidential to ensure they are handled sensitively.
34. The DfE is of the opinion that disclosure of this information would be likely to prejudice the department's ability to deal effectively with allegations of this nature and its ability to investigate potential financial irregularities and non-compliance in the future, as the officials and the trusts in question would be less likely to candidly engage in such exchanges going forward, which could lead to the department being unable to decide whether the allegations made require a full and formal investigation.
35. Trusts and officials must have confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge allegations. The DfE is of the view that disclosure of this information into the public domain would be likely to inhibit the trust and officials from providing free and frank exchange of views for the purpose of deliberation. The trust in particular would also be less likely to co-operate in this way going forward and the department would be less sighted on any immediate progress the trust is making.
36. The DfE has explained that this internal report includes information that could identify specific individuals at the trust and schools in question. It is concerned that should such information be released into the public domain it would be likely to inhibit the free, frank and honest advice within such reports, as officials may be less candid with their views in the future.
37. The DfE is further concerned that should details around the specific issue/complaint behind a fact-finding report be released, leading to the possibility that individuals could be identified, there is a potential that individuals may not be willing to assist in such situations in the future. It

is likely that such disclosure could dilute the advice the DfE receives from officials; it could also deter people coming forward with concerns and thus would be likely to inhibit free and frank discussion for the purposes of deliberation.

38. Given the allegations in this case were unfounded, and no further action was taken regarding the trust or the identifiable individuals, the DfE also believes that release of this information could potentially lead to reputational damage of those individuals. The DfE has referred the Commissioner to a previous Decision Notice (FS50579856) relating to the DfE, published on 7 September 2015, in which the Commissioner found the following in relation to the release of such information into the public domain, even where there is found to be no foundation to the allegations made:

"It could also damage their professional reputation and future careers. If information is published by NCTL this is only when a referral proceeds to a conduct panel hearing and the matter is concluded this way. The Commissioner considers such publications are for a specific purpose and take place in a controlled environment. Disclosure under the FOIA is essentially disclosure to the world at large and once the information is released in this way there is little control over how it is used and for how long. Such consequences would again cause any teacher referred to the NCTL distress and personal damage and would be unfair and in clear breach of the first data protection principle. This would be even more so in cases where malicious and unfounded allegations are raised against teachers."

The withheld internal report, and other reports of this kind, have a specific purpose and also take place in a controlled environment, so the DfE believes that the same argument applies to this case.

39. It is the DfE's position that disclosure of this information would be likely to inhibit free and frank discussion, as it would remove the space within which officials are able to discuss options and delivery freely and frankly. It would also make it more difficult for the DfE to work collaboratively and cohesively with trusts to deliver its core business of ensuring trusts adhere to the AFH, are providing the taxpayer with value for money and working effectively with those trusts which fail to do so.
40. The DfE is the regulatory body for academies and has responsibilities to ensure trusts meet the financial, procurement and recruitment standards, as set out in the AFH, which is publicly available. In all cases to date the DfE advises that these internal reports are not published. However, should an internal report lead to the decision that a formal investigation is necessary the result of any formal investigation is published.

41. The DfE believes that there would only be limited public interest in the information in question as it relates only to that specific trust and how that specific allegation was investigated and handled.
42. The DfE has referred the Commissioner to a previous decision (FS506049310) published on 26 May 2016. The DfE maintains that this case is comparable as the previous decision dealt with the inspection of independent schools and the need for officials involved to have space to share candid and forthright views to allow such inspections to be effective, which the DfE believes is similar to the process it undertakes when performing fact-finding exercises to produce internal reports. The Commissioner notes that in the previous case she upheld the DfE's decision to withhold information peripheral to an emergency inspection report, which had been published.
43. The DfE concluded that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure.

Balance of the public interest arguments

44. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.
45. When attributing weight to the 'chilling effect' arguments ie. that disclosure of information would inhibit free and frank provision of advice and discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making, the Commissioner recognises that civil servants are expected to be robust and impartial when providing advice.
46. The Commissioner considers that they should not be easily deterred from expressing their views by the possibility of any future disclosure. However, she also considers that chilling effect arguments cannot be dismissed out of hand. In this case, she accepts the DfE should be able to hold free and frank discussions which include exchange of views for the purpose of deliberation, in order to enable strategic decisions to be made.
47. With regard to the DfE's 'thinking space' argument, the Commissioner considers that there is a need for any public authority to have a safe space in which to develop ideas or make decisions.

48. The Commissioner accepts the general principle that the disclosure of information can aid transparency and accountability. However, she does not consider that this aim would be met or enhanced by disclosure of the withheld information.
49. The Commissioner appreciates that the requester might have valid reasons for accessing the information which are founded on genuine concerns, but in her view these are more in the nature of a personal or private interest. In considering where the balance of the public interest lies the Commissioner does not take into account the motivation of requesters except where this reflects a broader public interest.
50. In this instance, the Commissioner considers that the broader public interest lies in the effectiveness of the fact-finding or investigative process by the DfE when monitoring the trusts it regulates. She considers that this process will be less effective if the DfE does not receive honest and candid views from individuals involved with or connected to the fact-finding process. In this case she considers that the likely prejudice to this process is significant because of the detrimental effect of individuals being less forthright in their views and/or having concerns that information provided by them, or evidence of discussions, could be disclosed. She also notes that any formal reports produced by the DfE following fact-finding exercises are published, and in her view the publication of such reports is sufficient to meet the public interest in transparency and accountability. She does not consider that the wider public interest will be better served by release of this internal report.



Conclusion

52. Taking all of the above into account, the Commissioner is satisfied that section 36(2)(ii) has been applied appropriately in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure. As a result the Commissioner has not gone onto consider the DfE's application of sections 36(2)(c) or 33 of the FOIA.

Other matters

53. Section 10(1) of FOIA states that

"subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

54. The Commissioner notes that the request was made on 29 September 2016 and received by the DfE on 30 September 2017. The DfE issued its response on 7 November 2016, outside of the 20 working days from the date that the request was received.
55. The Commissioner is therefore satisfied that the DfE did not comply with the requirements of section 10(1) when responding to this request.

Right of appeal

56. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

57. 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.
58. 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

Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF