

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 3 July 2018

Public Authority: Department for Education (DfE)

Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information relating to financial and governance issues at Wakefield City Academies Trust (WCAT). The DfE responded to the request by refusing to disclose the requested information under sections 36, 40 and 43 of the FOIA.
2. The Commissioner's decision is that the DfE is entitled to rely on section 36 of the FOIA to withhold the requested information. She therefore does not require any further action to be taken.

Request and response

3. On 15 September 2017, the complainant wrote to the DfE and requested information in the following terms:

"Please supply me with any written reports by the EFA or DfE into financial or other governance matters at Wakefield City Academies Trust since September 2015.

This should include, but not be limited to:

-The full findings of the report/ review, including any actions agreed/undertaken by the Trust.

-A list and description of any instances where the review found that financial management or governance did not meet the required rules/standards, including the requirements of the Financial Handbook.

-A description of any instances of non-compliance at the Trust which led to the review.

This request is similar to my previous request of November 7, 2016 (your ref 2016-0051461). I'm now widening the scope of the request to documents held up until the date of this new request."

4. The DfE responded on 13 October 2017, refusing to disclose the requested information under sections 36, 40 and 43 of the FOIA.
5. The complainant requested an internal review on 23 October 2017.
6. The DfE carried out an internal review and notified the complainant of its findings on 17 November 2017. It confirmed that it remained of the opinion that sections 36, 40 and 43 of the FOIA applied to the request.

Scope of the case

7. The complainant contacted the Commissioner on 28 November 2017 to complain about the way his request for information had been handled. He stated that he disagrees with the application of the exemptions cited and his request follows a high profile controversy over how the organisation was being run. He therefore believes the public interest in disclosure overrides any public interest in maintaining the application of these exemptions.
8. The Commissioner will first consider the application of section 36 of the FOIA. She will only go on to consider sections 40 and 43 of the FOIA if she finds that section 36 does not apply.

Background

9. As part of the DfE's routine assurance plan, it undertakes visits to academy trusts to assess their financial management and governance arrangements. This plan includes a number of multi-academy trust reviews, which involve visits, designed to assess compliance with the Academies Financial Handbook (AFH). The DfE undertook such a review of Wakefield City Academies Trust (WCAT) between June and September 2015 and made a follow up visit in July 2016, to check progress by the trust in implementing its recommendations.

10. WCAT had 21 open academies (7 secondary and 14 primary) in two Regional Schools Commissioner (RSC) areas – 11 in Lancashire and West Yorkshire (LWY) and 10 in East Midlands and Humber (EMH). The trust's 2016 performance results were disappointing. Discussions were held with members of the trust about its future who ultimately passed a resolution that closure of the trust was in the best interests of the academies and their pupils.
11. The Commissioner understands that on 8 September 2017 WCAT itself announced that the trust would close. On 10 October 2017 the DfE then announced that all schools would be formally rebrokered and a departmental spokesman said:

"We have provisionally identified preferred new trusts for each of the 21 academies in the Wakefield City Academies Trust. Our priority has been to identify new trusts and to minimise uncertainty for schools and pupils. There is now an opportunity for interested parties to submit views to the department before final decisions are taken."

Therefore at the time of the request it was known that the trust would close. By the time the DfE responded on 13 October 2017 it was also known that all of the 21 schools would be rebrokered and provisionally new trusts had been identified for each. As a decision on what to do had only just been made, the process of rebrokering the schools was in the very early initial stages at the time of the request.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

12. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (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.
13. The DfE confirmed that the qualified person for the purposes of section 36 of the FOIA received a detailed submission setting out the request,

the nature of the withheld information and the arguments for and against disclosure. The Minister authorised the use of section 36(2)(c) of the FOIA in this case on 8 October 2017.

14. The Commissioner now needs to consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
15. The DfE confirmed that the complainant has requested the information on three previous occasions and, as outlined in his current request, his previous complaint was considered by the Commissioner and a decision notice issued on 24 July 2017 upholding its application of section 36(2)(c) of the FOIA. The notice can be accessed via this link:

<https://ico.org.uk/media/action-weve-taken/decision-notice/2017/2014549/fs50670089.pdf>
16. It acknowledges, as the complainant does, that time has indeed moved on since his last request. However, the circumstances by which the DfE took the decision to withhold the requested information remains the same, as this case continues to be 'live' and 'ongoing' with some schools still to be fully rebrokered.
17. At the time of the request it had only just been announced that all schools would be rebrokered. The process of rebrokering had therefore only just got underway. The DfE argued that as part of a strong and effective working relationship, academy trusts and the DfE need a safe space in which to work and to deliberate issues, concerns and potential next steps, to ensure that full and frank discussions, investigations and deliberations can take place to achieve the best outcome for trusts, their schools, their pupils and the broader community. If the DfE was required to put the requested information into the public domain at a time when matters are 'live', 'ongoing' and potentially sensitive it would be likely to inhibit the rebrokering process, which in turn would have a negative impact on the DfE's ability to conduct public affairs effectively. It argued that 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 issues or allegations presented to them. If the DfE was obliged to disclose the requested information at such an early, key and sensitive stage in the process it would be likely to deter other trusts from co-operating in this way going forward and the DfE would be less sighted on any immediate progress trusts are making.

18. It stated that should details around the specific issues behind a fact-finding report be released, leading to the possibility that individuals could be identified, there is 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 it receives from officials, it could also deter people coming forward with concerns and therefore would be likely to prejudice the effective conduct of public affairs.
19. The DfE went on to say that disclosure 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 and delivery freely and frankly. It would make it more difficult for the DfE to work collaboratively and cohesively with trusts to deliver its core business, and ensure that trusts adhere to the AFH, so providing the taxpayer with value for money and working effectively with those trusts that fail to do so.
20. The Commissioner has reviewed the withheld information, considered the circumstances at the time of the request and she is satisfied that the qualified person's opinion that section 36(2)(c) of the FOIA is engaged is a reasonable opinion to hold. Although time had moved on from when the complainant had made his last request, the circumstances at the time of this request were such that the rebrokering of all the schools concerned had only just been formally announced and the process begun. Issues were still very much 'live' and 'ongoing' and it is reasonable to hold the opinion that disclosure of the requested information at this stage would have been likely to hinder the rebrokering process and the discussions and negotiations that were required with the trust itself and the new trusts provisionally earmarked for taking over. She accepts that the DfE and the trust itself required the safe space to work through this process and reach the most beneficial and favourable outcome for each school and disclosure at the time of the request would have been likely to have eroded the safe space that was required. Additionally, the Commissioner accepts that if the requested information was disclosed at such a crucial and sensitive stage in the process it would be likely to deter other trusts and those who may wish to raise concerns from engaging freely and frankly with the DfE in the future.
21. As the Commissioner is satisfied that section 36(2)(c) of the FOIA is engaged, she now needs to go on to consider the public interest test.

Public interest test

22. The DfE stated that it has taken into account that disclosure would lead to greater accountability, an improved standard of public debate and improved trust. It also advised that it recognised that time had since passed from the complainant's previous request and considered whether the situation had changed significantly enough to allow the release of this information without there being a negative impact on the schools and pupils involved.
23. However, in this case it remains of the opinion that the public interest still rests in maintaining the application of this exemption. It stated that it relies on information provided by officials to help make informed decisions in order to determine the appropriate level of action to take to support academy trusts and their associated schools. These types of deliberations need to remain confidential to ensure they are handled sensitively.
24. It went on to say that trusts and officials must have the confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge issues or allegations presented to them. If the DfE is required to put this information into the public domain, the trusts and officials would be likely to be inhibited from providing free and frank exchange of views for the purposes of deliberation, which in turn would have a negative impact on the department's ability to conduct public affairs effectively. It stated that trusts would be less likely to co-operate in this way going forward and the DfE would be less sighted on any immediate progress trusts are making.
25. The DfE confirmed that should details around the specific issues behind a fact-finding report be released, leading to the possibility that individuals could be identified, there is 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 it receives from officials, it could deter people from coming forward with concerns and therefore would be likely to prejudice the effective conduct of public affairs.
26. Disclosure would be likely to remove the safe space within which officials are able to discuss options and delivery freely and frankly. It would make it difficult for the DfE to work collaboratively and cohesively with trusts to deliver its core business, and ensure that trusts adhere to the AFH, so providing the taxpayer with value for money and working effectively with those that fail to do so. It stated that such consequences are not in the interests of the public and so the application of the exemption should be maintained.

27. The public interest test considerations under section 36 of the FOIA require the Commissioner to consider the extent, severity and frequency of the inhibitions claimed.
28. She accepts that there are strong public interest arguments in favour of disclosure. Disclosure would promote openness, transparency and accountability and enable concerned members of the public to understand more fully exactly what actions are being taken in relation to WCAT and the schools that require rebrokering. She acknowledges that such situations are unsettling and inevitably raise important concerns about the education of pupils within the schools concerned. WCAT ran 21 schools in its area, so its performance impacts on a large number of students and staff as does what action is being taken by the DfE and the trust itself at the time of the request and now to rebroker the schools.
29. However, based on the circumstances at the time of the request the Commissioner considers the public interest arguments in favour of maintaining the exemption are stronger. As discussed previously, it had only just been announced that all 21 schools would be rebrokered at the time of the request and the DfE and WCAT were working together to secure new trusts for the school and a smooth transition from one to the next. It required the safe space in order to carry that out and a degree of confidentiality. The DfE also required the full co-operation of WCAT and the new trusts and an open and candid dialogue between the various parties. Disclosure at the time of the request would have severely prejudiced the DfE's ability to carry out that function and eroded the safe space that is required to rebroker the schools efficiently and effectively.
30. The Commissioner also considers that disclosure of the requested information would also have had some detrimental impact on the willingness of other academies to cooperate with similar review processes in the future. Although she considers this would not have been as severe as the detriment that would be caused to the ongoing working relationship and cooperation of WCAT, she believes there would have been some chilling effect on the cooperation of other academies subject to future reviews. The Commissioner understands that such reviews take place regularly, so the ongoing prejudice however limited would be frequent.
31. The Commissioner accepts that there are compelling arguments in favour of disclosure in this case. However, overall she considers the public interest rests in favour of preserving the ability of the DfE to resolve the issues affecting WCAT and its schools in the most efficient and effective way possible. Due to the circumstances at the time of the request, she considers the prejudice claimed would have been fairly severe and would have had a negative impact on future reviews of

academies. For these reasons she is satisfied that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

32. 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

33. 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.
34. 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

Samantha Coward
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