

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 July 2018

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the 'Trojan Horse' case. The DfE disclosed the number of teachers and governors that have faced conduct panel hearings but refused to disclose the legal costs incurred under section 36(2)(c) and 43 of the FOIA. It also refused to disclose details of any claims for compensation, damages and losses under section 43 of the FOIA.
2. The Commissioner's decision is that section 36(2)(c) of the FOIA is engaged, but the public interest in favour of maintaining this exemption is outweighed by the public interest in favour of disclosure. With regards to section 43 of the FOIA, the Commissioner's decision is that this exemption is not engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information to the complainant.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 13 April 2017, the complainant wrote to the DfE and requested information in the following terms:
 - “- How many teachers have faced professional conduct panel hearings in connection with the so-called “Trojan Horse” allegations in Birmingham? I believe the following individuals faced such NCTL hearings but would appreciate clarification: [names redacted]

 - How many former or current school governors have faced hearings in connection with the so-called “Trojan Horse” allegations in Birmingham? I believe [name redacted] was barred from the being involved in the management of schools but would appreciate clarification.

 - How much have the aforementioned professional conduct panel hearings/action against former or current school governors cost to pursue? Please provide a breakdown of those costs – costs of barristers, which barristers and when payments covered/costs of solicitors, which solicitors and when payments covered/any other external advice or court fees/disbursements – please itemise your spending

 - Have you been asked to pay compensation/damages/special damages/loss of earnings or similar or to reimburse court costs on behalf of any teachers/current or former governors following the aforementioned hearings? If so, how large was the claim, how many claimants and how much have you paid to how many claimants to date? Please again provide a breakdown”
6. On 30 May 2017 the complainant amended his request to anonymise the legal firms referred to in element 3 of his request.
6. The DfE responded on 10 July 2017. In respect of the first element of the request, it confirmed that 14 teachers faced Professional Conduct Panels in connection with the Trojan Horse allegation and those referenced in the request are included in this figure. For element 2, the DfE advised that it had so far barred one individual from involvement in the management of independent schools. In relation to element 3, the DfE applied section 36(2)(c) of the FOIA and concerning element 4, it applied section 43.
7. The complainant requested an internal review on 19 July 2017.

8. The DfE carried out an internal review and notified the complainant of its findings on 6 October 2017. It confirmed that it upheld its previous application of the exemptions cited.

Scope of the case

9. The complainant contacted the Commissioner on 12 October 2017 to complain about the way his request for information had been handled. He stated that the DfE's argument is illogical and the balance of the public interest falls in favour of disclosing the information requested. He does not agree that disclosure would be likely to prejudice the effective conduct of public affairs or that disclosure would be likely to prejudice the commercial interests of the DfE.
10. The Commissioner considers the scope of this investigation to be to determine whether section 36(2)(c) and 43 of the FOIA has been applied appropriately to elements 3 and 4 of the request.
11. The DfE has said that the majority of its arguments in support of each exemption are confidential and not suitable for public disclosure. Therefore on this occasion the Commissioner has decided to record these in a Confidential Annex.

Reasons for decision

Section 36 of the FOIA

12. This exemption has been applied to element 3 of the request and the complainant's request to receive the costs incurred by the DfE in the pursuance of these cases.
13. 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.

14. 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 2 July 2017.
15. 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.
16. As stated in paragraph 11, the Commissioner is unable to discuss the DfE's arguments and why she has reached the decision that she has, as this information is confidential. However, she can confirm that she has decided that the qualified person's opinion that section 36(2)(c) of the FOIA is engaged is a reasonable opinion to hold.
17. The Commissioner therefore proceeded to consider the public interest test. Again the Commissioner is unable to include the DfE's arguments and her analysis of them in this notice, as they are confidential. But she is able to say that in this case she reached the decision that the public interest in favour of maintaining the exemption is outweighed by the public interest in favour of disclosure.

Section 43 of the FOIA

18. This exemption was applied to both elements 3 and 4 of the request; the complainant's request to know the costs incurred and the details of any claim for compensation, damages or losses.
19. Section 43 of the FOIA states that information is exempt from disclosure if its disclosure would or would be likely to prejudice the commercial interests of the DfE or a third party. In this case the DfE has argued that disclosure of the withheld information would be likely to damage the commercial interests of the DfE.
20. Similarly, the Commissioner is unable to include the DfE's arguments in support of this exemption in this notice or her analysis of them. However, she is able to confirm that she has decided that the exemption is not engaged. The Commissioner considers the DfE has failed to demonstrate that the withheld information would be likely to prejudice its commercial interests.

21. As the Commissioner does not consider the exemption is engaged, there is no requirement to go on to consider the public interest test.
22. The Commissioner requires the remaining withheld information to be disclosed.

Procedural matters

23. Section 10 of the FOIA requires a public authority to respond to requests for information promptly and in any event no later than 20 working days from receipt. In this case the request was made on 13 April 2017. However the DfE did not respond until 10 July 2018. The Commissioner therefore finds the DfE in breach of section 10 of the FOIA.

Other matters

24. The section 45 code of practice recommends that public authorities carry out requests for an internal review as soon as possible and in any event no later than 20 working days from receipt. A further 20 working days are permitted in particularly complex or voluminous cases.
25. The Commissioner notes that the internal review was requested on 19 July 2017 yet the process was not completed and the complainant notified of the outcome until 6 October 2017. The Commissioner would therefore like to remind the DfE of the importance of the section 45 code of practice and the need to complete internal reviews within the timeframes recommended.

Right of appeal

26. 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

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.

27. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF