

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 September 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 information relating to a myth-busting document produced by the Department for Education (the DfE). The DfE disclosed some emails but refused some information under section 40(2). The remaining correspondence held by the DfE was withheld under section 36(2)(b)(ii) and 36(2)(c).
2. The Commissioner's decision is that the DfE has correctly applied the provisions of section 36(2)(b)(ii) to the correspondence and the public interest favours withholding the information. The Commissioner also finds section 40(2) is engaged in relation to the information withheld from the emails and this has been correctly withheld.

Request and response

3. On 19 October 2018 the complainant made a request to the DfE in the following terms:

"1) Please provide a copy of the equality impact assessment completed in respect of the Children's Social Care statutory guidance myth busting document published by the Department for Education (attached with this request).

2) Please provide copies of correspondence between local authorities and the Chief Social Worker for Children and Families, and any other officials within the Department, in connection with the Children's Social

Care statutory guidance myth busting document published by the Department for Education.

3) Please state the date of publication of the Children's Social Care statutory guidance myth busting document.

4) Please state the date or dates agreement from Department for Education lawyers was sought on the content of the Children's Social Care statutory guidance myth busting document, and by whom.

5) Please state the date or dates agreement was provided by Department for Education lawyers on the content of the Children's Social Care statutory guidance myth busting document."

4. The DfE responded on 23 November 2018. It stated no equality impact assessment for the myth busting document was held and no correspondence between the Chief Social Worker and local authorities existed. The DfE provided some of the dates asked for in the request and provided two items of correspondence between DfE officials and local authorities relating to the myth busting document and redacted some information on the basis of section 40(2) of the FOIA. For the remaining correspondence between DfE officials and local authorities the DfE withheld the information on the basis of section 36(2) of the FOIA.
5. The complainant asked for an internal review of this decision on 26 November 2018. The complainant specifically asked the DfE to reconsider the decision to withhold names under section 40(2) from the two emails disclosed and the decision to withhold all of the other correspondence under section 36(2). The complainant also argued that the date given by the DfE was not the date asked for and reiterated it was the date agreement from DfE lawyers was sought and provided on the content of the myth busting documents that had been requested.
6. The DfE conducted an internal review and responded on 21 December 2018. The DfE provided dates for the agreement being requested and provided by its lawyers. However, the DfE upheld its decision to withhold information from the disclosed emails on the basis of section 40(2) and the remaining correspondence on the basis of section 36(2)(b) and (c).

Scope of the case

7. The complainant contacted the Commissioner on 10 January 2019 to complain about the way her request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld names from the disclosed

emails under section 40(2) and has correctly withheld the other correspondence under sections 36(2)(b) and (c).

Background

9. In 2016 the DfE planned to seek a new 'Power to Innovate' through the Children and Social Work Bill to test with some local authorities where legislation, regulation and guidance may be getting in the way of excellent practice. The Government did not proceed with this but made it clear it intended to do everything possible within the existing legislative framework to promote innovation and new approaches in this area.
10. In the last two year the Partners in Practice (PIP) local authorities identified a number of issues in statutory guidance where they felt greater clarity was needed. This led to the publication of the myth-busting document in June 2018 which was written to clarify what the DfE believed was possible within current legislation and statutory guidance.
11. Following publication of the document there were calls from over 50 voluntary organisations, academics and social work experts for it to be withdrawn. Minister Zahawi explained that no legislation or statutory guidance had changed and the guidance was intended to clarify what was possible.
12. The document was withdrawn and removed from the DfE's website on 20 March 2019 following a Judicial Review.

Reasons for decision

Section 36 – effective conduct of public affairs

13. 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.
14. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

15. In its submission the DfE has confirmed it considers disclosing the information would be likely to prejudice the free and frank exchange of views for the purposes of deliberation (36(2)(b)(ii)) and the effective conduct of public affairs (36(2)(c)).
16. 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.
17. 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 section 36 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.
18. The qualified person in this case was Nadhim Zahawi MP, the Children's Minister. 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.
19. The 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 and the submission evidences that the Minister confirmed his opinion was that the prejudice argued was likely to occur. The Commissioner is therefore satisfied that an opinion was given by the qualified person.
20. 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.

21. The qualified person's opinion in this case is that the prejudice envisioned under section 36(2) would be likely to occur if the DfE disclosed the withheld information.
22. 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.
23. In the submission it provided to the Minister, DfE provided a background to the request, the request, arguments for and against relying on section 36 and public interest arguments relevant to the exemption.
24. The arguments presented by the DfE to the Minister in relation to section 36(2)(b)(ii) focused on the fact that stakeholders and officials involved in the email exchanges would have been under the impression their views and the issues raised were provided in confidence.
25. In light of the decision to withdraw the document the DfE argued that it would be unfair to those external partners that had previously contributed to or initially supported the guidance to disclose the information. This information, if published, could potentially damage the professional reputation of some key stakeholders and deter them from engaging fully with the DfE in the future where their views and professional contribution would be valuable.
26. The DfE pointed to specific paragraphs in various emails which demonstrated the frankness of the views shared and argued that given the negative response from others in the sector to the document it was reasonable to conclude that disclosing the information would be likely to impact on the frankness of future exchanges.
27. The DfE also highlighted important feedback it received on the document which it considered valuable in developing guidance and associated policies. The DfE considered the process of receiving feedback vital to departmental discussion and deliberation and a process which must be undertaken openly and freely without fear of it being put in the public domain.
28. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the exemption at section 36(2)(b)(ii) in order to form an opinion on the matter.
29. The Commissioner therefore must accept that the qualified person's opinion is one a reasonable person might hold. She therefore finds that

DfE can rely on section 36(2)(b)(ii) to withhold the remaining correspondence.

30. The next step is to consider the balance of the public interest. Having accepted that the opinion of the qualified person - that prejudice would be likely to result - was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the qualified person.

Public interest in disclosing the information

31. The DfE's submission to the Minister references the public interest in disclosure of information that may lead to greater openness about the process and delivery of work which in turn may lead to greater accountability and an improved standard of public debate.
32. In its submission to the Commissioner the DfE has again acknowledged the argument that more openness about its processes and how it produces guidance may lead to greater accountability, an improved standard of public debate, and improved trust. It says there is a general public interest in disclosing information to the public, to demonstrate the openness and transparency of government.

Public interest in maintaining the exemption

33. The DfE argues that an open, honest and fair process by which professionals and officials can discuss and test areas such as departmental guidance relies on considering all points of view before reaching a reasoned conclusion. To do this all parties should be able to speak freely and frankly and be able to challenge to ensure that issues are debated widely and that decisions on such publications are based on broad and balanced evidence. If there is a risk that sensitive discussions may be opened up to public scrutiny, departmental officials and key stakeholders may be less likely to enter openly into such discussions, resulting in a reduction in quality of the final publication or change to policy.
34. The DfE considers that officials and stakeholders must have confidence they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge issues presented to them. If the DfE is required to put this information into the public domain it argues officials and stakeholders would be likely to be inhibited from providing free and frank exchange of views, which in turn would have a negative impact on the DfE's ability to fully engage with external professional stakeholders to effectively deliver policies based on

the expertise, input and challenge of such key partners. The DfE does not consider this risk to be any less significant for future collaborative working, even though the guidance has now been withdrawn.

35. The DfE has also referred to the 'safe space' argument – that disclosing the information would be likely to remove the space within which officials and external professionals are able to discuss options freely and frankly. This would limit the department's ability to develop the delivery of its policies and priorities where required.

Balance of the public interest

36. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm DfE's ability to carry out its work. As to how much weight this should carry in the balance of the public interest, the question here is what the severity, extent and frequency would be of the prejudice identified by the qualified person.
37. As covered above, the Commissioner has accepted that the qualified person's opinion is reasonable. While it might be towards the lower end of the scale, that disclosing the requested information is held *would be likely to cause the prejudice under section 36(2)(b)(ii) is*, in the Commissioner's opinion, a credible position. The Commissioner is of the view that the severity, extent and frequency of the prejudice identified by the qualified person would be moderate. This means that the weight that the qualified opinion carries as a public interest factor in this case is less than would be the case were the likely severity, extent and frequency of the identified prejudice greater, but does nonetheless carry some weight.
38. The Commissioner must also recognise the importance of DfE's work and weigh avoiding prejudice to that work in the balance of the public interest. Clearly it is public interest that DfE is able to do the work that it does and to develop guidance and provide advice.
39. In addition to the general public interest in public authorities being open and transparent, the Commissioner recognises there is some public interest in disclosing correspondence between the DfE and local authorities, stakeholders and officials on the subject of the myth-busting document.
40. It seems apparent to the Commissioner that this document caused some controversy and at the time of the request the document was still 'live' and had not been withdrawn. The correspondence therefore was advice and opinions from stakeholders and external experts that fed into the production of the myth-busting document. Whilst this document had

been published so it could be argued that the correspondence was not as likely to have the inhibitory effect envisioned by the DfE, the document was still live, the calls for the document to be withdrawn were ongoing and the judicial review had yet to be submitted.

41. Although the DfE acknowledges that disclosing the correspondence would be unlikely to completely deter officials and key stakeholders from providing their view, there is a risk that their professional reputations may be damaged if such exchanges went into the public domain given the opposition to the document at the time of the request. This may lead to advice or opinions given being less open and honest and such diluted advice and opinions would be likely to prejudice the information provided to the DfE and reduce its effectiveness.
42. Whilst there are arguments in favour of disclosing the withheld information, the Commissioner considers that there is a strong public interest in the DfE being able to discuss issues freely and frankly and to be able to have space to consider all issues and make informed decisions. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision.
43. As such the Commissioner considers that there is a stronger public interest in ensuring that DfE is able to engage freely and frankly with stakeholders and officials to develop guidance and policy, particularly taking into account the timing of the request in this case. In light of this the Commissioner has concluded that the public interest favours maintaining the exemption at section 36(2)(b)(ii) and the correspondence should be withheld.

Section 40 – personal information

44. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
45. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

46. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
47. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

48. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
51. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
52. In this case the information withheld under section 40(2) is the names and contact information of individuals redacted from the emails that were disclosed. These individuals were junior members of staff and were the individuals who requested legal clearance for the document and the individuals who were sent the innovation programme newsletter.
53. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to these individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
54. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
55. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

56. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

57. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

58. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

59. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

60. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"².

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

61. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
62. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

63. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
64. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
65. The complainant has not specifically stated the reasons for wanting to know the names of the individuals concerned. However, the Commissioner considers there may be legitimate interests in knowing who was involved in seeking legal clearance for the myth-busting document and who received information that was used to inform the final documents. There is a legitimate interest in knowing who was involved so that they can be held to account.

Is disclosure necessary?

66. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
67. The Commissioner is satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

68. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
69. In considering this balancing test, the Commissioner has taken into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
70. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
71. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
72. The DfE considers that junior officials are in less public facing roles and therefore have a lesser expectation that their information will be placed in the public domain. Although the information is related to the individuals professional life and not their private life the DfE considers there would be harm to the individuals if their names and contact information were disclosed due to their less public roles, a greater expectation of privacy and are likely to be placed under scrutiny for their roles in the production of the myth-busting document.
73. The Commissioner notes it is not generally the DfE's policy to make public the names of junior officials. She therefore accepts that the expectation from these individuals will be that their identity will remain private unless they consent to disclosure.
74. With regards to the seniority of the individuals, it is acknowledged that the more senior positions in a public authority should expect more transparency and accountability. However, the Commissioner is satisfied

that junior officials are generally not decision makers and do not perform public facing roles.

75. Whilst the risk of harm or distress to the individuals is not high there is likely to be scrutiny placed on their role in the production of the document should their names be disclosed and this may have the effect of causing some distress. Based on this and the above factors, the Commissioner has therefore determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosure of the information would not be lawful.
76. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

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

Jill Hulley
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF