

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 July 2023

Public Authority: Office for Standards in Education, Children's Services and Skills (Ofsted)

Address: Clive House
70 Petty France
London SW1H 9EX

Decision (including any steps ordered)

1. The Commissioner's decision is that at the time it was submitted, the request for the evidence base associated with a school inspection was exempt from disclosure under section 33(1) of FOIA, which concerns audit functions.
2. It's not necessary for Ofsted to take any corrective steps.

Background

3. In their submission to the Commissioner, the complainant has provided a background to the request, summarised below.
4. Ofsted inspected Queen Emma Primary School in October 2022 and it was given an 'Inadequate' overall grade. In its previous inspection in 2017 it had been rated 'Good'.
5. The Executive Headteacher and the Governing Body were concerned about the conduct of the Lead Inspector and the judgement the inspection team came to under their direction.

Request and response

6. The applicant had made the following information request to Ofsted on 13 November 2022:

“all written evidence and evidence of telephone discussions, ‘the evidence base’ taken at the last Section 5 inspection of Queen Emma Primary School, Gunhild Way, Cambridge, CB1 8QY. This inspection took place on 19th and 20th October 2022. Please provide to the fullest extent possible under the provisions of the aforementioned Act.’
7. Ofsted had refused that request under section 33 of FOIA as the inspection wasn’t complete at that point.
8. The applicant had made the following information request to Ofsted on 8 March 2023:

“...following the publication of [redacted] report this week, I would like to re-request the same information please.”
9. Ofsted’s final position in its internal review of 12 May 2023 was that the requested information remained exempt from disclosure under section 33 of FOIA.
10. On behalf of the applicant, in May 2023 the complainant submitted a complaint to the Commissioner about Ofsted’s refusal.
11. The complainant then advised the Commissioner in June 2023 that Ofsted had set aside the original inspection report associated with the request and intends to carry out a fresh inspection of Queen Emma Primary School.
12. Ofsted confirmed to the Commissioner, however, that its section 33 position remains essentially the same as that described in its internal review. It said that although the inspection type will be slightly different, it still fully meets the criteria of an audit function.
13. Ofsted also went on to say that, at this point, there’s a strong case to say that the prejudice from disclosure remains (and indeed may be considered stronger). This is because of the overwhelming public interest in ensuring the new inspection occurs without the significant interference that disclosing the previous evidence base would bring.
14. Ofsted reiterated that none of that should impact on it reverting to its usual position of disclosure to the public once the inspection processes are complete and if requests are made in those circumstances.

15. Since it was not possible to resolve the complaint informally through Ofsted being content to disclose the information due to the passage of time/change in circumstances, the case will conclude through a formal decision.
16. To confirm, as is usual the Commissioner will consider the circumstances at the time of the request ie at 8 March 2023.

Reasons for decision

17. This reasoning covers Ofsted's reliance on section 33 of FOIA to withhold the requested information.
18. Section 33 of FOIA concerns a public authority's audit functions.
19. Section 33(1) states that this section applies to any public authority which has functions in relation to (a) the audit of the accounts of other public authorities, or (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.
20. Section 33(2) states that information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).
21. The Commissioner accepts that Ofsted has audit functions because it investigates how effectively and efficiently other public authorities (schools, colleges and children's services) are using their resources.
22. In its initial refusal of the request, Ofsted confirmed that it believed the information remained exempt from disclosure under section 33 of FOIA. This was because the final judgement of its inspection of the school in question had been that the school was inadequate. Ofsted considered that disclosing the evidence base to the public would prejudice its audit functions.
23. Ofsted went on to say:

"Our inspection of Queen Emma Primary School found the school to be providing an inadequate quality of education, and that the school requires significant improvement because it is performing significantly less well than it might in all the circumstances reasonably be expected to perform, as set out in section 44 of the Education Act 2005. As a result the school will be subject to monitoring by Ofsted, as detailed in our inspection handbook and school monitoring handbook.

We consider that making inspection evidence available to the public, while this process is ongoing, has the potential to harm any future inspection activity that may be necessary. This is because disclosure is likely to draw focus on previous inspection events rather than on improvements and changes that need to be made. Consequently, we are satisfied the evidence is currently exempt from disclosure under section 33 of the Act.”

24. In its internal review response, Ofsted addressed the points the complainant (not the applicant) had put to it in their request for a review. This included rebutting the complainant’s argument that monitoring isn’t part of the inspection process and therefore section 33 wasn’t engaged.

25. Ofsted’s internal reviewer then said:

“In my view, the anticipated monitoring inspection activity is likely to be prejudiced by disclosure of the information requested at this time. It is self-evident, from even a cursory examination of published media concerning the inspection, that there is now an expectation in the school community that evidence will be used in an attempt to undermine the inspection findings.

If this ‘prior’ evidence is introduced to the school community shortly before a new set of inspectors arrive, this is likely to disrupt any planned inspection and the achievement of the aims of the monitoring process. Where the previous inspection judgement is being disputed, disclosure of its evidence can act as a cause of renewed aggravation in that community. The school will come under pressure to confront the new inspectors with the fine detail of that evidence and to challenge them about it. In my view, the focus of the monitoring inspection in these circumstances is at risk of being shifted backwards to the previous inspection, rather than towards future improvement. A reversion towards previous areas of dispute would also increase the likelihood of a monitoring inspection being a confrontational rather than a constructive engagement. If a constructive relationship cannot be established, a school is less likely to be receptive to inspectors where they highlight continuing areas for improvement.”

26. Ofsted confirmed that in its view, the anticipated monitoring inspection activity **would be likely to be prejudiced** [Commissioner’s emphasis] by disclosing the information requested at that time. It said that it was self-evident, from even a cursory examination of published media concerning the inspection, that there was at that point an expectation in the school community that the evidence would be used to try to undermine the inspection findings.

27. Ofsted's section 33 reasoning concluded:

"If this 'prior' evidence is introduced to the school community shortly before a new set of inspectors arrive, this is likely to disrupt any planned inspection and the achievement of the aims of the monitoring process. Where the previous inspection judgement is being disputed, disclosure of its evidence can act as a cause of renewed aggravation in that community. The school will come under pressure to confront the new inspectors with the fine detail of that evidence and to challenge them about it. In my view, the focus of the monitoring inspection in these circumstances is at risk of being shifted backwards to the previous inspection, rather than towards future improvement. A reversion towards previous areas of dispute would also increase the likelihood of a monitoring inspection being a confrontational rather than a constructive engagement. If a constructive relationship cannot be established, a school is less likely to be receptive to inspectors where they highlight continuing areas for improvement."

28. The complainant has provided the Commissioner with a detailed submission. As well as the background to the request, this includes discussion about Ofsted's grounds for not disclosing the information, what evidence is being sought and why, and FOIA's underlying rationale.
29. The complainant also discusses whether Ofsted's entitled to rely on section 33. The Commissioner doesn't intend to engage with all the arguments for disclosure that the complainant presented. However, the complainant said that central to Ofsted's case and to their challenge is the question of whether or not a monitoring process counts as part of the original inspection. The complainant considers that Ofsted is misinterpreting the law in this regard, and that "monitoring, even though carried out by inspectors and, **clearly, also part of the auditing of a school's work** [Commissioner's emphasis], is not the same as inspection." The complainant goes on to argue this point at length.
30. However, section 33 of FOIA concerns a public authority's **audit** functions, not its investigative functions specifically. The complainant has accepted above that Ofsted's monitoring of a school is part of its auditing role.

31. For that reason, the reasons that Ofsted gave in its correspondence to the applicant and complainant, and in line with his previous decisions in similar cases (such as recent cases IC-196631-R4G5¹ and IC-228068-S1D5²), the Commissioner is satisfied that Ofsted was entitled to apply section 33 of FOIA to the requested information. This is because, at the time of the request, disclosure would have been likely to prejudice Ofsted's ability to exercise its audit functions.
32. To summarise those reasons:
- Ofsted is a public body with audit functions
 - At the time of the request Ofsted had identified a need for ongoing monitoring of the school
 - Ongoing monitoring as the result of an inspection falls within Ofsted's audit functions
 - Disclosing the inspection evidence base would be likely to frustrate ongoing monitoring by shifting focus backwards to the inspection rather than forward to monitoring and improvement.
 - Disclosure would be likely to harm and disrupt Ofsted's ability to carry out its inspection functions if the underlying evidence were disclosed prior to it concluding its monitoring of the school.
33. The Commissioner appreciates that the situation changed in June 2023 and Ofsted is now going to carry out a fresh inspection of Queen Emma Primary School. However, as he has noted, he must consider the circumstance as they were at the time of the request. The Commissioner's decision is that section 33 of FOIA was engaged at that point, and he has therefore gone on to consider the associated public interest test.

¹ <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4024990/ic-196631-r4g5.pdf>

² <https://ico.org.uk/media/action-weve-taken/decision-notice/2023/4025433/ic-228068-s1d5.pdf>

Public interest test

34. In its correspondence to the applicant and complainant, Ofsted presented the following arguments for withholding the information:

- Schools found to be failing to provide an acceptable standard of education should be monitored, through inspection, to ensure they are making improvements. Disclosing the evidence base could disrupt future inspection activity. Disclosing information that has the potential to harm that process would clearly not be in the public interest.
- There is a general public interest in inspections, including disclosing inspection evidence and other material related to an inspection, as this can establish the thoroughness of the inspection process. The Commissioner has acknowledged in similar cases that Ofsted generally discloses much of this information if further inspection is unlikely. But that is not the case with this request, as Ofsted has found that this school still requires significant improvement which entails further monitoring inspections.
- Ofsted must be able to carry out its ongoing monitoring of the school and must protect its inspectors' ability to evaluate the ongoing performance of the school freely, frankly and robustly without fearing intrusion by the public or the school.

35. In their submission to the Commissioner the complainant has presented the following arguments for disclosure:

- Ofsted reports are public documents and interest in them isn't simply confined to those associated with individual schools.
- The public interest in Queen Emma School is intense and on a national scale, as it has been covered by national media (BBC Breakfast, BBC Radio 4 Today.)
- Queen Emma School's legal challenge to Ofsted is one of at least three that Ofsted currently faces, including one brought by the Fair Judgement Campaign and another brought by the National Association of Head Teachers. The Queen Emma School case is a national test case and so contradicts Ofsted's argument that the inspection evidence base isn't interesting to anyone beyond the school.
- It's important that Ofsted is transparent and is held to account by the public. Publishing the evidence base would have no different impact in terms of stakeholders' reaction than if sufficient

information were provided in inspection reports to enable a full understanding of the basis for the conclusions Ofsted reached.

- A “climate of anger” is now directed at Ofsted since the suicide of Ruth Perry. “Revelations from schools reveal terrible levels of pain, distress, and both physical and mental collapse among dedicated, professional teachers caused by Ofsted. Ofsted bears a heavy responsibility for the emotional fallout of its work.”

36. Ofsted acknowledged that there is a public interest in ensuring that schools are inspected and reported on, and that the process of inspection is fair and transparent.

The balance of the public interest

37. The Commissioner accepts that stakeholders were concerned about the inspection of Queen Emma Primary School that Ofsted carried out in October 2022. He also acknowledges the wider interest in Ofsted’s work generally, at the time of the request, resulting from Ruth Perry’s suicide.

38. However, the timing of the request is key to the Commissioner’s decision. At the time of the request Ofsted intended to monitor the school and, as such, the situation was live and Ofsted’s audit processes were ongoing. Concluding a monitoring process efficiently and effectively is integral to Ofsted’s functions and it’s in a school’s interest that Ofsted’s auditing reaches a robust outcome as swiftly as possible. On balance therefore, the Commissioner is satisfied that the public interest in disclosure is outweighed by the public interest in maintaining the exemption in this case.

39. As Ofsted has noted, once an inspection process is complete, its usual position is to disclose related information on request.

Right of appeal

40. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

41. 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.
42. 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

Cressida Woodall
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