

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2024

Public Authority: Education Authority
Address: 1 Hospital Road
Omagh
BT79 0AW

Decision (including any steps ordered)

1. The complainant has requested correspondence between the Education Authority and schools regarding gender identity issues. The Authority provided a link to published information and cited section 36(2)(b) (prejudice to the effective conduct of public affairs) and section 40(2) (personal data) to refuse the remainder.
2. The Commissioner's decision is that the Authority was entitled to rely on the exemptions cited. No steps are required.

Request and response

3. On 25 October 2023 the complainant requested the following information from the Authority:

"Please can you send copies of all generic and specific letters and emails to and from schools and the EA regarding gender identity issues in the past two years?

Please include all general and specific clarification and guidance given to schools, as well as copies of their inquiries."

4. The Authority issued a refusal notice on 22 November 2023. It provided a link to some published information,¹ and withheld other information in
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¹ <https://www.eani.org.uk/school-management/policies-and-guidance/supporting-transgender-young-people>

reliance on the exemptions at section 36(2)(b) and section 40(2) of FOIA.

5. On the same day the complainant confirmed that he was content to exclude information which would identify schools or individuals. However he reiterated his request for the remaining information.
6. The Authority interpreted this as a request for internal review, and provided the outcome of that review on 6 December 2023. At this point the Authority clarified that it did not hold any general guidance or correspondence issued to all schools in the last two years.
7. The Authority clarified that it was relying on sections 36(2)(b)(i) and (ii) of FOIA in respect of the withheld information. The Authority upheld its decision to withhold the information that it held which was relevant to the request, excluding personal data.

Scope of the case

8. The complainant contacted the Commissioner on 8 December 2023 to complain about the way his request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to consider the Authority's reliance on the exemption at section 36(2)(b)(i) and section 36(2)(b)(ii). Since the complainant did not complain about the Authority's reliance on section 40(2), or the published information, the Commissioner has not considered them further.

Reasons for decision

Section 36: prejudice to the effective conduct of public affairs

10. Section 36(2)(b) of FOIA provides that information is exempt if in the reasonable opinion of a qualified person (QP), disclosure of the information 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.
11. Section 36(5) sets out who may act as the QP in relation to a public authority. In the case of Northern Ireland public authorities the public authority itself may act as the QP, or the First Minister and deputy First Minister acting jointly may authorise an officer or employee of the

authority.² If the QP is the public authority itself rather than a specific post, this means the authority's highest decision-making body.

12. The Authority provided the Commissioner with a record of the QP's opinion, which followed the template published as part of the Commissioner's guidance. It confirmed that the opinion was given by the Chief Executive of the Authority on 21 November 2023.
13. The Commissioner has gone on to consider the reasonableness of the QP's opinion regarding the engagement of the exemption. The Commissioner has published guidance on section 36³ which explains that the QP's opinion does not have to be one with which the Commissioner would agree, nor the most reasonable opinion that could be held. The test of reasonableness is not intended to be a high bar, and if the opinion is one that a reasonable person could hold, the Commissioner will find that the exemption is engaged.
14. The Commissioner observes that the submission provided to the QP focuses on public interest considerations, rather than the prejudice test. This is incorrect: the QP's opinion is required in order to decide whether an exemption at section 36 is engaged, rather than where the balance of the public interest lies. However the Commissioner considers that the arguments set out in the submission contain sufficient detail for him to make a decision on the engagement of the exemption.
15. In order to engage section 36, the QP's opinion must identify the likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met:
 - first, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant

² Defined at section 8(1) of the Ministers of the Crown Act 1975 as "the holder of an office in [His] Majesty's Government in the United Kingdom".

³ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-36-prejudice-to-the-effective-conduct-of-public-affairs/>

prejudice which is alleged must be real, actual or of substance;
and,

- thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.
16. In this case the submission provided to the QP emphasised that queries around gender identity will generally be considered sensitive. The submission expressed concern that disclosure of the withheld information, ie details of individual queries and advice given, might mean that schools would not raise such issues for fear that they (the issues) would be made subject to public comment.
 17. The submission also set out that schools need to feel that they can seek advice in a safe space and be open about the specifics of issues they are dealing with. Disclosure would have the potential to undermine the quality and nature of the necessary dialogue, and could lead to a failure to seek advice.
 18. Having reviewed the withheld information the Commissioner accepts that it was reasonable for the QP to conclude that section 36(2)(b)(i) and section 36(2)(b)(ii) applied to it. He observes that the QP did not inspect the withheld information itself, but accepts that the QP would be likely to have the required understanding to form a reasonable opinion from the wording of the request and the submission.
 19. The Commissioner accepts that the QP's opinion is one that a reasonable person could hold. He notes that the QP did not specify the applicable level of prejudice, but is satisfied that the lower level, ie, would be likely to prejudice, applies. Accordingly the Commissioner finds that the exemptions at section 36(2)(b)(i) and section 36(2)(b)(ii) are engaged on the basis of the QP's opinion.
 20. Section 36(2)(b)(i) and section 36(2)(b)(ii) provide qualified exemptions. The fact that prejudice has been identified and accepted is not in itself conclusive evidence that information should be withheld. Rather, the public authority must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.

Public interest in favour of disclosing the withheld information

21. The Authority accepted that there is a clear public interest in public authorities being as open and transparent as possible, so as to increase accountability and inform debate.

22. The complainant did not provide the Authority or the Commissioner with any public interest arguments in favour of disclosure, although he submitted that the matter was of "major public interest". The complainant also accepted that information which could identify individuals or schools could be excluded from disclosure.
23. Having examined the withheld information the Commissioner considers that its disclosure into the public domain would inform the public, albeit to a limited extent, as to how the Authority receives and responds to requests for advice on gender identity issues. It would provide assurance that the Authority refers schools to appropriate guidance such as that referred to at paragraph 4 above.

Public interest in favour of maintaining the exemption

24. The Authority emphasised that its published guidance highlighted the need to make decisions

"...in the best interests of the child, taking account of any risks and the need to protect the child from the negative reaction of others".

25. It maintained that there was a compelling public interest in preserving a safe space in which schools can seek advice on sensitive gender identity issues. It argued that advice sought and received must be detailed and candid if it is to be of value, and that staff must therefore not be inhibited by the threat of disclosure. The Authority argued that disclosure would interfere with its own ability to offer comprehensive input based on free and frank discussion.
26. The Authority also highlighted the need for schools to be able to provide specific details of the case in question, in order to obtain meaningful advice. It noted that the complainant had agreed that identifying information could be excluded, but remained concerned that the disclosure of redacted information into the public domain would be likely to encourage unhelpful speculation. Individuals involved would also be likely to recognise their own circumstances, which would be likely to cause undue stress to all parties but, of most concern, to the young people involved.

Balance of the public interest

27. Section 36(2)(b)(i) and section 36(2)(b)(ii) provide qualified exemptions. The fact that prejudice has been identified and accepted is not in itself conclusive evidence that information should be withheld. Rather, the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemptions outweighs the public interest in disclosure.

28. The Commissioner accepts that there is a legitimate public interest in disclosure of information that would inform the public about the way the Authority approaches gender identity issues. He notes that the Authority has published its guidance on supporting transgender young people, which provides a number of scenarios setting out some of the types of issues which schools may encounter, as well as advice on how best to manage these. The Commissioner considers that this publicly available information is an effective means by which the public can increase awareness and understanding of the Authority's approach. As such he finds that it effectively fulfils the public interest informing and educating the public.
29. When considering the public interest in maintaining the exemptions in respect of the withheld information, the Commissioner has had regard to the content of the information and also the context in which it was produced. The Commissioner recognises that the primary focus of concern must be the young people being supported by schools and the Authority. Schools must be able to seek and obtain advice and guidance to ensure that these young people receive the support they need. In the Commissioner's opinion it follows that the disclosure of information which would make this more difficult would not be in the best interests of the young people affected, or the wider public.
30. The Commissioner acknowledges the complainant's position that identifying information could be redacted. However he is mindful of the fact that each enquiry relates to one or more individuals, including the young person and their family. Having examined the withheld information the Commissioner does not believe it may be effectively redacted whilst allowing meaningful information to be disclosed. The generic information that would remain may already be accessed by the public in the form of the published guidance.
31. In conclusion, the Commissioner finds that there is a strong public interest in maintaining the exemptions at sections 36(2)(b)(i) and (ii), in order to protect the ability of schools to obtain expert advice to support transgender young people. Whilst there is a legitimate and significant public interest in informing the public, the Commissioner is satisfied that this is met by the publication of detailed guidance by the Authority. He therefore finds that the public interest in maintaining the exemptions in this case clearly outweighs the public interest in disclosure of the withheld information.

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: 0203 936 8963
Fax: 0870 739 5836
Email: grc@justice.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.

Sarah O’Cathain
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