

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 14 January 2019

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

### **Decision (including any steps ordered)**

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1. The complainant has requested Key Stage 1 (KS1) assessment data broken down to school level. The Department for Education (DfE) disclosed the KS1 data at Local Authority level but refused to provide this at school level on the basis of section 36(2)(c) of the FOIA.
2. The Commissioner's decision is that the DfE has correctly applied the provisions of section 36(2)(c) and that the public interest favours maintaining the exemption. She requires no steps to be taken by the DfE.

### **Request and response**

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3. On 8 October 2017, the complainant wrote to the Department for Education (DfE) and requested information in the following terms:  
  
*"As per previous years and requests, please can I have a dataset in excel communicating the KS1 attainment breakdown for Northumberland schools for 2016/17 academic year. In similar format containing equivalent info."*
4. The DfE responded on 8 December 2017 attaching the KS1 assessment information at local authority level without school identifiers. The DfE confirmed it held information on KS1 teacher assessments at institution level with school identifiers but considered this exempt from disclosure on the basis of section 36(2)(c) of the FOIA.

5. The complainant requested an internal review on 8 December 2017 on the basis that the response was outside the 20 working day timescale and it was in the public interest to understand school performance for KS1. The complainant argued that if Ofsted used this information to understand school performance then parents had a right to also see this in a timely manner to inform their choices.
6. Following an internal review the DfE wrote to the complainant on 10 January 2018. It upheld its decision to withhold the requested information on the basis of section 36(2)(c) of the FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 3 April 2018 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 applied the exemption from disclosure at section 36(2)(c) and, if so, where the balance of the public interest lies.

### **Reasons for decision**

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#### **Section 36 – prejudice to the conduct of public affairs**

9. Section 36(2) of FOIA states that information is exempt if its disclosure would,
  - (2)(b) would be likely to inhibit –
    - (i) the free and frank provision of advice, or
    - (ii) the free and frank exchange of views for the purpose of deliberation, or
  - (2)(c) would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs.
10. Section 36(2) is unique in that it depends on the reasonable opinion of the qualified person in order to be engaged.
11. When considering the application of section 36 the Commissioner will:
  - Establish that an opinion was given;
  - Ascertain who was the qualified person;

- Ascertain when the opinion was given;
  - Consider whether the opinion was reasonable.
12. For government departments any minister of the crown may act as the qualified person. In this case, Nick Gibb, the Minister of State for School Standards provided his opinion on 13 March 2017. The Commissioner has seen evidence that the qualified person was provided with submissions both in support of disclosure and withholding the requested information.
  13. The qualified person can engage section 36(2) on the basis that the prejudice 'would' occur or, the lower threshold that the prejudice is only 'likely' to occur. The Commissioner interprets the record of the qualified person's opinion as being that the prejudice would be likely to occur. The DfE has confirmed that this is also their understanding.
  14. It is now necessary to consider whether the qualified person's opinion was a reasonable one. When considering reasonableness the Commissioner relies on the Oxford English Dictionary definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person can hold.
  15. In order to understand the opinion it is important to understand some of the background to the request. In previous years the DfE did release school-level KS1 teacher assessment data with school identifiers. For the 2016 school year the DfE had only released the KS1 assessment data without school identifiers. The DfE has explained that KS1 assessment data is used to provide schools and parents with a starting point for measuring the progress that pupils make from KS1 to KS2 in comparison with other pupils nationally. It is not intended to be used as outcome data for schools or local authorities to compare themselves against other areas.
  16. At the end of KS1 pupils take national curriculum tests which are internally marked by teachers and used to produce teacher assessments. State-funded schools are required to report KS1 teacher assessments to their Local Authority (LA) annually and these results are passed by the LA to the DfE. Changes were made to the KS1 assessment process in 2016 and assessments are now based on the new national curriculum and the new tests for KS1 were introduced using scaled scores.

17. Whilst the Commissioner notes that the withheld information was previously disclosed she must consider only the circumstances in this case and not any previous disclosures made, she will only consider whether the 2016 school-level assessment data should be disclosed.
18. The qualified person's opinion was based on arguments presented by the DfE in favour of engaging the exemption. Broadly speaking the opinion is based on the argument that the KS1 attainment data is not intended to be used as outcome data for the schools and LA's to compare themselves and disclosing the information would directly, or indirectly, increase the pressure on pupils and schools to perform 'better' and would likely cause a negative reaction.
19. The Commissioner considers this to be a reasonable opinion and accepts the exemption is engaged.

*Public interest test*

20. Section 36 is subject to the public interest test as set out in section 2 of the FOIA. Its application means that although the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
21. When considering the public interest in favour of maintaining section 36 the Commissioner will give some weight to the opinion of the qualified person. This means that the Commissioner accepts that it is more probable than not that there would be some prejudice to the conduct of public affairs. However under the public interest test the Commissioner will go on to consider the severity, extent and frequency of that prejudice before weighing that against the value in disclosing the information.
22. The main impact of the prejudice to the DfE's functions would be in its relationships with bodies such as the National Association of Head Teachers (NAHT). It is argued that there are risks with providing school-level KS1 data including school identifiers as this could be seen as the DfE approving greater public scrutiny of this data, putting further pressure on schools. There have been concerns raised about the current assessment and accountability system; the NAHT assessment Review Group had already expressed concerns about the end of KS1 statutory assessments<sup>1</sup>. The DfE argued that disclosing the school identifiers

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<sup>1</sup> <https://www.naht.org.uk/news-and-opinion/news/curriculum-and-assessment-news/assessment-review-group-publishes-report-on-the-future-of-assessment/>

would cause a negative reaction, increase the pressure on schools and lead to further backlash. It considered the consequence of this would be to damage its relationship with teaching unions.

23. As well as the prejudicial impact disclosure would be likely to have on relationships and cooperation with the teaching sector, it is argued the risk that release could lead to a boycott of tests/teacher assessment at KS1 could lead to further significant issues for the DfE. Such a boycott would be likely to have an impact on its ability to calculate progress scores, which in turn would affect the information needed to support the inspection and accountability system.
24. The Commissioner accepts that there has been controversy over the changes to primary assessment in 2016<sup>2</sup> and that this has led to this more cautious approach from the DfE to disclosing school-level KS1 data. The question is whether this more cautious approach is warranted to avoid any prejudice to the ability of the DfE to carry out its functions.
25. It seems clear to the Commissioner from publicly sources that there has been criticism of the KS1 assessment tests and criteria. This has come from various sources but there has been outspoken criticism from various teaching unions and much of this has been focused on the undue pressure put on schools and pupils by the assessment criteria. It therefore stands to reason that disclosing information that is likely to increase the scrutiny schools are under and the pressure to perform would have an impact on the relationships the DfE has with a number of groups. The impact this would have on its ability to carry out its functions is difficult to quantify but it is always the case that government departments and public bodies can function more effectively with good working relationships with organisations who are influential in the sector they operate in.
26. This is especially true where there is a reliance on the voluntary flow of information and the DfE made it clear that school level results for KS1 are not published in its guidance<sup>3</sup>. This guidance also states that schools are required to report pupil level results to their LA who will pass this to the DfE. Undermining this commitment to not publish data passed to the

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<sup>2</sup> <https://www.tes.com/news/nut-calls-sats-be-suspended-after-widespread-criticism-new-assessment-system>

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/641037/SFR43\\_2017\\_Qualityandmethodology.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/641037/SFR43_2017_Qualityandmethodology.pdf)

DfE in this way would likely cause issues with the DfE's relationships with LA's and teaching unions, disrupting the voluntary flow of information and effecting the DfE's ability to effectively carry out its functions of assessing the current attainment data and effectively administering accountability policy.

27. The Commissioner, as set out above, accepts there is a very real possibility of damage to its relationships with various bodies and that therefore the extent and severity of the prejudice is more than just speculative.
28. The Commissioner will now consider the public interest in favour of disclosure.
29. The DfE acknowledges disclosure would promote transparency in government departments, supporting researchers in their work and enabling in-depth analysis from full data sets. It also accepts that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate and improved trust.
30. The complainant disputes the argument that there was other publicly available information that could be used by parents to assess primary school performance such as KS2 data. She argued that for First Schools which are prevalent in certain areas of the UK children are only educated up to Year 4 and therefore KS2 results are not available to assist parents in making choices. As such the KS1 information was important to understand the performance of First Schools as KS1 information measures attainment levels by subject.
31. The Commissioner acknowledges that parents want to have sufficient information available to be able to make informed decisions about schools. Whilst Ofsted reports may not always be current they do provide a good overview for parents of the standards at a school, similarly the KS2 data can be an informative tool. The Commissioner has to consider whether in the case of First Schools there is a sufficient public interest in the disclosure of additional school-level KS1 data to inform parental decisions to outweigh the public interest in maintaining the exemption.
32. It is clear to the Commissioner that the more information is publicly available on school performance, the more informed the decisions made by parents can be. In the case of most schools the information already publicly available provides a broad overview of a schools performance without the addition of the KS1 information. For First Schools, the fact that pupils are not assessed at KS2 does mean there is less information available on their performance. Whilst the Commissioner has found it

difficult to find an exact figure for the number of three-tier schools in the UK, a 2016 Hansard debate suggested there were less than 200 middle schools left in the UK<sup>4</sup>. There are likely to be more first schools (as school sizes are smaller than middles schools) but this is still a very small percentage of the overall number of schools in the UK.

33. The Commissioner has accepted there would be a risk to the DfE in disclosing the school-level information, in terms of damaging its relationships with other parties, but it should also not be understated that disclosure is likely to put the schools under scrutiny and pressure to perform and compete and this is not the intention of the assessment data. There is clearly a very strong public interest in ensuring that the DfE can function effectively, assess current attainment data and effectively administer accountability policy. The Commissioner does not think there is sufficient public interest in disclosing the school-level data which may be of some interest in relation to the relatively small number of first schools but is not the sole measure that can be used to assess a school's performance.
34. The Commissioner therefore finds that on balance the public interest in maintaining the exemption outweighs the public interest in disclosure. The DfE is entitled to rely on the exemption provided by section 36(2)(c).

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<sup>4</sup> <https://hansard.parliament.uk/commons/2016-03-16/debates/16031635000002/Three-TierEducation>

## Right of appeal

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35. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. 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**