

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 January 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 a report into the performance of the Interim Executive Board (IEB) of a named school. The Department for Education (DfE) disclosed some information but refused to disclose the report in its entirety under the exemptions provided by section 36(2)(c) – otherwise prejudice the conduct of public affairs, and s40(2) – third party personal data.
2. The Commissioner's decision is that the DfE is entitled to rely on section 36(2)(c) to withhold the information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. The complainant's solicitors wrote to the Education and Skills Funding Agency, an executive agency of the DfE, regarding a report of the investigation into the IEB of Alfreton Grange Arts College and requested information of the following description:

"1 a copy of the Report, whether by way of the provision of

1.1 an un-redacted copy of the Report, or

1.2 a redacted copy of the Report (such redactions being reasonable and solely having taken place in order to protect the identity of those individuals named in the Report)."

5. As the DfE is the public authority ultimately responsible for handling this request, the notice will refer to the DfE as the public authority.
6. On 14 February 2018 the DfE responded. It confirmed the information was held but said that it was exempt under section 43 - commercial interests. The DfE went on to explain that section 43 is a qualified exemption and that further time was required to consider the public interest test. On 19 April 2018 the DfE wrote to the complainant again and stated that the information was exempt under section 36(2)(c) - otherwise prejudice the conduct of public affairs, section 40 - personal information, and section 43 - prejudice to commercial interests.
7. The complainant requested an internal review on 1 June 2018. The DfE sent the outcome of the internal review on 29 June 2018. It disclosed some information from the report, but continued to withhold the remainder under the same exemptions, i.e. sections 36, 40 and 43.
8. During the course of the Commissioner's investigation the DfE withdrew its reliance on section 43 - prejudice to commercial interests.

Scope of the case

9. The complainant contacted the Commissioner on 12 July 2018 to complain about the way his request for information had been handled.

The Commissioner considers that the matter to be decided is whether any of the information withheld from the report is exempt under sections 36(2)(c) - otherwise prejudice the conduct of public affairs, or section 40(2) - third party personal data. The Commissioner will start by considering section 36 as it has been applied to all the withheld information.

Reasons for decision

Section 36(2)(c) – otherwise prejudice the conduct of public affairs

10. So far as is relevant, section 36 of the FOIA states that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the FOIA -

(b) 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, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. In this case the DfE is relying on subsection (c) and has applied the exemption to all the information captured by the request. The inclusion of the words “otherwise prejudice” in this subsection means that it cannot be applied to a prejudice that would be covered by another exemption. In line with the Commissioner’s guidance, prejudice to the effective conduct of public affairs refers to an adverse effect on the public authority’s ability to offer an effective public service or to meet its wider objectives or purpose.
12. The DfE had received a complaint about the IEB which had been constituted by the Secretary of State for Education to replace the board of governors previously responsible for Alfreton Grange Arts College. From the information released by the DfE at the internal review stage it is known that the purpose of the investigation was to use the IEB at Alfreton Grange as a case study so that lessons could be learnt about how public funds should be controlled through IEBs appointed by the Secretary of State.
13. By way of a brief background, IEBs can be put in place by the Secretary of State to replace a school’s existing board of governors in order to provide a school with a fresh start when, for example, the school has been put into special measures. In such circumstances they can be facilitate underperforming schools to convert to academy status. Alfreton Grange had been put into special measures.
14. The Commissioner understands that the DfE is concerned that disclosing the report would hamper its ability to conduct such reviews in the future and to produce candid reports of their findings. This is because the DfE needs to have the trust of those involved in order for them to cooperate fully with this sort of investigation. The relationship of trust between the DfE and IEB members would be undermined if information gained from confidential interviews was later disclosed to the public. Furthermore, the DfE is concerned about the possible impact this could have on current and future IEB members. The DfE considers suitably qualified individuals could be deterred from becoming members if there was a chance that any reports into complaints, which on occasions could be critical of an individual’s performance, could be disclosed. Given the fact that IEB members are drawn from the ranks of educational professionals there is always the potential for any criticism to have an impact of their

professional career. It should be noted that IEB members do not receive any remuneration for their work.

15. It is these prejudicial impacts, the ability to undertake 'lessons learnt' investigations and the disincentive for individuals to join IEBs, that the DfE wishes to prevent by applying section 36(2)(c). Both these consequences would undermine the effectiveness of IEBs as one of the steps used by the DfE to improve the standards in schools judged to be underperforming. The Commissioner accepts that these are matters not addressed by other exemptions and that therefore section 36(2)(c) is the appropriate exemption to apply.
16. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the DfE, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
17. For government departments any Minister can act as the qualified person. The DfE has provided the Commissioner with a copy of a submission made to one of its Ministers, Lord Agnew, the Under Secretary of State for the School System. That submission included a brief background to the circumstances giving rise to the investigation and the DfE's grounds for considering disclosure of the report would be prejudicial. It is also clear that the Minister was provided with a copy of the report itself.
18. The DfE has also provided the Commissioner with a copy of a signed response from the Minister stating that in his opinion, disclosing the information would be likely to have the alleged prejudice to the conduct of public affairs. That opinion was given on 16 April 2018.
19. In light of the above it is clear that the first three bullet points set out in paragraph 17 have been satisfied. The remaining issue is whether the opinion provided was a reasonable one.
20. When considering whether the opinion was reasonable the Commissioner has followed the approach set out in her guidance. The most relevant definition of 'reasonable' in the Shorter Oxford English

Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd then it is reasonable.

21. This is not to say that it is the only reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that no reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the most reasonable opinion that could be held; it only has to be a reasonable opinion.
22. Applying this to the Minister's opinion, the Commissioner recognises that he was provided with the material they would have needed to make an informed decision as to the potential consequences of disclosing the report.
23. Furthermore, the Commissioner has viewed the report herself. She notes the nature of the issues that it addresses, the fact that it identifies a number of individuals, not just from the IEB, but from other organisations too, on occasions it quotes from the interviews they provided and comments on the roles of a number of individuals. The Commissioner also notes the very candid manner in which the report presents its findings and the lessons which can be learnt. In light of this the Commissioner is satisfied that the Minister's opinion is certainly not an unreasonable one to hold. The Commissioner finds the exemption is engaged.

Public interest test

24. Section 36(2)(c) is qualified by the public interest test as set out in section 2(2) of the FOIA. This means that even though the exemption is engaged, it is necessary to consider whether the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. Only if it does, can the exemption be relied on.
25. The complainant has a particular involvement with the school, it was their concerns which lead to the investigation and subsequent report. The complainant had an expectation that they would receive a copy of the report. The Commissioner recognises the particular interests of the complainant. It is important to remember however that a disclosure under the FOIA is considered to be a disclosure to the world at large. Therefore the public interest test will take account of the value in placing the report in the public domain and balance that against any harm that would result from doing so, rather than simply the consequences of providing the report to the complainant.

26. The DfE recognises that there is a general public interest in disclosure of information to the public in order to demonstrate openness and transparency of government. It also accepts there is an argument that more openness about the process and delivery of its work may lead to greater accountability, an improved standard of public debate and improved trust.
27. The Commissioner considers these pro-disclosure arguments can be developed further. Although it is inappropriate to discuss the nature of the concerns that gave rise to the investigation, or the contents of the report in any great detail, the Commissioner is prepared to say they were serious issues. From the information that has already been released at the internal review stage, it is known that the focus of the review was around the themes of accountabilities, communications and management of resources. As such disclosing the report would release information on the performance of this particular IEB and the other agencies and parties involved, and there is a public interest in the local community served by the school better understanding how competently these bodies tackled the problems faced by the school. As mentioned the report deals with the 'management of resources' and this inevitably has an impact on the spending of public money. There is clearly a wider public interest in disclosing information which demonstrates whether public money has been spent effectively.
28. Education is a very important area of government policy. Therefore there is a public interest in releasing information on the effectiveness of the steps that the DfE can take to improve poorly performing schools. There is also a public interest in releasing information which shows the extent to which the DfE is able to learn appropriate lessons from its experience of using IEBs and so improve the effectiveness of its interventions in the future.
29. Given the nature of the allegations behind the investigation, the findings of the report and the value in, particularly local people, understanding the steps taken to improve standards at the school and how effective the different agencies, including the DfE itself, were in tackling the problems of the school, there is a significant public interest in disclosing the requested information.
30. The Commissioner will now look at the public interest in favour of maintaining the exemption. When determining whether the exemption is engaged the Commissioner is only required to consider whether the qualified person's opinion is reasonable. It is not necessary for her to agree with that opinion. However having found that the opinion is reasonable, that opinion will give weight to the arguments that disclosing the information would have a prejudicial effect. In looking at the public interest in favour of maintaining the exemption the

Commissioner will consider the severity, extent and frequency of that prejudice.

31. As set out in paragraph 16 DfE has two main concerns, firstly the impact the disclosure would have on its ability to undertake similar investigations in the future and, secondly, the potential for individuals to be deterred from joining IEBs. Looking at the impact on the DfE's ability to undertake investigations of this nature in the future, the Commissioner notes that the stated purpose of the report was to determine what, if any, lessons needed to be learnt from the experience of the IEB responsible for Alfreton Grange. The DfE has explained that the ability of these investigations to get to the bottom of any issue of concern, depends on there being trust between itself and the other parties to the investigation. Without such trust those parties would not be prepared to share their full and honest opinions on the matters under review, or their role in those matters. The DfE does not claim that those of the calibre to be invited on to IEBs, or professionals from other agencies, would refuse to cooperate with such investigations, but any reticence to be completely full and frank would be prejudicial.
32. The DfE has not said that the interviews were undertaken under any explicit assurance of confidentiality. However, the Commissioner can understand that, in the circumstances, the parties would have an expectation of confidentiality. It is noted that the complainant has said that they had an expectation that the report would be shared with them, but it is clear that this was not the intention of the DfE which considers the report to be an internal document only, intended to provide the DfE with recommendations on if and how its oversight of IEBs needed to be improved. Even if the parties had some expectation that the report would be shared amongst themselves, the Commissioner is prepared to accept that no party would have expected the report to be placed in the public domain, even though there is an increasing expectation that individuals should be more accountable for their performance within public authorities. In light of this, and taking account of the actual information within the report, the Commissioner recognises that disclosing the information would erode the trust of the parties involved.
33. Although things have moved on since the request was made and Alfreton Grange converted to an academy in September 2016, disclosing the report would send the signal to members of other IEBs that they would not be able to rely on information or opinions expressed which they might be asked to share with the DfE to remain confidential, should they be involved in similar investigations. The DfE has advised the Commissioner that it works closely with IEBs across the country and this increases the potential frequency and extent of the impact of any loss of trust.

34. Having viewed the report the Commissioner is satisfied that its main purpose is, as stated, to identify any lessons that needed to be learnt. It is important that the DfE is able to remedy any issues with how it constitutes IEBs and the advice and guidance it provides to them in order for them to operate effectively. The Commissioner accepts that it is important that the DfE is able to identify how the process can be improved for the future. Such investigations would also, inevitably, consider the validity of the complaint that initiated them. It is important that the DfE is able to quickly examine such matters as it is always possible that an investigation could reveal serious failings which require urgent action. Therefore as well as undermining the ability to produce 'lessons' learnt' reports, its disclosure would potentially prejudice DfE's ability to identify and resolve serious problems. This increases the severity of the prejudice which the DfE believes would be the likely result from disclosing the report and damaging its relations with IEBs.
35. As previously stated the report is presented in a very candid manner. This adds to the force of its findings. The DfE has argued that this increases its effectiveness and helps ensure any recommendations are acted upon in a timely manner. This forthright style is more appropriate for internal documents. The Commissioner accepts that had the report been produced with one eye to its potential disclosure, it is likely to have been less direct. However she is cautious of concluding that this would have diluted its force, or lead to a more casual approach in implementing any recommendations. In reality the significance of any report would be well understood within relevant policy areas of the department.
36. DfE has also argued that disclosing the report would erode the safe space required for it to work, to deliberate issues and to consider the next steps that need to be taken. The Commissioner does not fully accept this argument. By the time the request was made the investigation had obviously been concluded and the report had been produced. From the submission made by the DfE as part of this investigation, it appears any recommendations have been implemented and the DfE has advised the Commissioner that the arrangements to which the report relates have now ended. Therefore had the request been made whilst the investigation was ongoing, the report's recommendations were still being implemented, or the DfE still needed to maintain a working relationship with this particular IEB, the Commissioner may have afforded this argument some weight. However in the circumstances that she understands to have existed at the time of the request, the Commissioner considers that the need for safe space had largely passed.
37. Nevertheless the Commissioner does accept the DfE's arguments that disclosing the report to the world at large would be against the expectations of those involved and would have eroded the trust in the

relationship between itself, the members of the Alfreton Grange IEB and other existing and future IEBs. This would prejudice the ability of DfE to carry out investigations of this nature in the future. That prejudice would be relatively severe and potentially extensive.

38. The DfE also argues that the this erosion of trust between itself and IEBs would not just impact on its ability to conduct reviews of this nature, but would also taint its relationship with IEBs more generally and so have a wider impact on the DfE's ability to improve standards within poorly performing schools.
39. The second major concern raised by the DfE is the detrimental impact disclosing the report would have on the willingness of individuals to become a member of an IEB. The DfE has argued that it needs to be able to attract talented professionals to join IEBs. Such individuals would be deterred from participating if they thought reports could be published that were critical of an IEB's performance, or contain criticism of an individual's performance.
40. From the submission provided by the DfE it is understood that IEB members do not receive any remuneration or allowance for taking on the responsibilities of governing a school. It may however be that as their appointment could be seen as recognition of their expertise within the education sector, the appointment carries some prestige which benefits their career, or provides an opportunity to demonstrate their abilities. However it would appear there is no financial reward. This will have an impact on the incentive individuals have for accepting a role as an IEB member and mean that any disadvantage to becoming a member will carry, relatively more weight. Therefore there is some strength in the argument that the potential for a report to be published following the investigation of a complaint, which could be critical and so damage professional reputations, would deter some from accepting places on an IEB. The Commissioner accepts that this would be likely to have a significant impact on the ability of the DfE to recruit individuals with the right qualities on to an IEB. This in turn would undermine the effectiveness of IEBs and hinder the ability of the DfE to use IEBs to improve standards at underperforming schools.
41. The DfE has also argued that publishing such reports would deter those contracted by IEBs to provide educational services to the schools from tendering for such work in the future. The Commissioner is far less convinced by this argument. The Commissioner does not accept that those who tender for lucrative public contracts would easily be deterred from doing so.
42. In balancing the competing public interest factors for disclosure against those in favour of withholding the report the Commissioner has taken account of the value in airing the actual information contained in the

report given the nature of the complaint that initiated it. She has also given weight to the public interest in allowing the local community to be better understand how the school was managed during a challenging period and the wider public interest in understanding how the DfE oversees IEBs and the process it adopts for identifying and resolving any problems that arise. However, there is a weighty public interest in preserving the ability of the DfE to conduct investigations which are capable of quickly assessing the validity of any complaint it receives about IEBs so that such matters can be dealt with effectively and ensuring that any relevant lessons are learnt. This is particularly true where the scope of an investigation includes the management of resources, which has implications for how well public money is spent. To disclose the report would undermine that objective. Disclosure would also be likely to have some impact on the willingness of individuals to act as IEB members. The consequence of disclosing this information would therefore undermine the DfE's core business of improving educational standards and ensuring public money is spent wisely when pursuing that objective.

43. In light of the above the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure. The DfE is entitled to rely on section 36(2)(c) to withhold the requested report. As section 36 has been applied to all the withheld information there is no need for the Commissioner to on to consider the exemption provided by section 40(2) – third party personal data. The Commissioner does not require the DfE to take any further action in this matter.

Right of appeal

44. 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

45. 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.
46. 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

Rob Mechan
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