

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2022

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 from the Department for Education ("DfE") regarding an investigation into an academy trust. The DfE firstly refused to disclose the information, citing section 22 of FOIA. Following discussions with the Commissioner, and internal policy discussions, it changed its position and instead relied upon sections 31 and 36 of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that DfE has correctly applied section 36(2)(c) of FOIA to the requested information. As the Commissioner considers that this applies to the entirety of the requested information, he has not gone on to consider whether DfE was correct to apply section 31 of FOIA.
3. Therefore the Commissioner requires no steps to be taken by the public authority.

Background to the request

4. Lilac Sky Schools Trust ("LSST") was established in 2011. It had nine primary schools across Kent and East Sussex that were successfully transferred to four new trusts on 1 January 2017.
5. In February 2016, the Education Funding Agency (EFA) undertook a review at LSST, which highlighted a number of irregularities around finance and governance. Given the scale of the findings, the EFA

converted the review into a formal investigation in April 2016. In September 2017, LSST was dissolved, and the trust was struck off at Companies House.

Request and response

6. On 12 April 2021 the complainant made the following request for information under FOIA:

"Please can I have a copy of the Lilac Sky academy trust investigation report. Should you plan to refuse the release because you intend to publish the report - please provide me with correspondence that shows a settled intention to publish the report, and with a date it will be published."
7. DfE responded on 5 May 2021, stating that it held an investigation report but the investigation was not yet complete. DfE applied section 22 of FOIA to the requested information, stating that it intended to publish the final report once the investigation had concluded, but was unable to provide further details or an estimated date for publication. It provided a link to the page where it usually publishes such reports, and stated that the complainant would be able to find it there once it was published.
8. DfE provided a response on 26 May 2021 to the complainant's request for internal review, in which it maintained its original position.
9. The Commissioner wrote to the DfE on 11 April 2022 asking if things had moved on, as some time had passed since the original request. DfE responded to the Commissioner on 16 May 2022 stating that it had reconsidered its position and was now withdrawing its reliance upon section 22 of FOIA and instead applying sections 31 and 36 of FOIA to the requested information. It had made the complainant aware of this change of position and stated the reasons for this. It had also provided full submissions to the Commissioner as to the reasons for the change.

Scope of the case

10. The complainant contacted the Commissioner on 11 August 2021 to complain about the way their request for information had been handled when section 22 of FOIA was applied. The Commissioner also contacted the complainant regarding the change of position and the complainant confirmed they wished the Commissioner to continue his investigation.

11. The Commissioner has considered DfE's handling of the request and in particular its application of the specified FOIA exemptions.
12. For the avoidance of doubt, the complainant confirmed that their request was for whichever version of the investigation report was held by DfE at the time of the request and DfE confirmed to the Commissioner that they had interpreted it that way rather than as a request for the complete report, which would not have been held by DfE at the time of the request as the investigation was still ongoing.

Reasons for decision

Section 36 – Prejudice to the Effective Conduct of Public Affairs

13. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
14. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
 - (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.
15. Section 36 is a unique exemption under FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether

there are public interest considerations which might outweigh any prejudice.

Who is the Qualified Person and have they given an opinion?

16. The DfE states that the Qualified Person is Baroness Diana Barran, Parliamentary Under Secretary of State (Minister for the School System).
17. The DfE has provided the Commissioner with the signed opinion of the Qualified Person dated 26 May 2022. The Commissioner is therefore satisfied that the Qualified Person gave an opinion on that date.

What was the opinion and was it reasonable?

18. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is not a high one.
19. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
20. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
21. Particularly in relation to section 36(2)(c), the case law on this particular limb of the exemption makes clear that the prejudice must be some form of harm not envisaged by any other limb.
22. The opinion provided by the Qualified Person states that: "I confirm that, in my reasonable opinion as a qualified person, disclosure of the information under the Freedom of Information Act 2000 would be likely to have the effect set out in section 36(2)(c) of that Act".
23. Therefore it is the opinion of the Qualified Person that disclosure of the requested information would be likely to cause prejudice to the effective conduct of public affairs and such prejudice would be different from that envisaged by any of the other limbs of section 36.

How did the Qualified Person form this opinion?

24. The Qualified Person's opinion in this case is that the prejudice envisioned under section 36(2)(c) would be likely to occur if DfE

disclosed the withheld information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.

25. In order for the Qualified Person's opinion to be reasonable, it must be clear as to precisely how the prejudice may arise. In his published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide him with all the evidence and arguments 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.
26. In the submission it provided to the Minister, DfE provided: a background to, and copy of, the request, a description of the section 36(2)(c) exemption, reasoning as to why the information should be withheld under the exemption and a recommendation. Of relevance to section 36(2)(c), DfE's reasoning included the impact that placing the requested information into the public domain would have on the investigation process.
27. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the section 36(2)(c) exemption in order to form an opinion on the matter of whether reliance on that exemption with regard to the requested information was appropriate.
28. DfE has also stated that:

"As currently drafted the report is incomplete and requires revision of key facts, release at this point could open the Secretary of State for Education to potential legal action. The process and consideration of potential sanction against individuals involved in the trust is not as yet complete. Release of the draft report at this point could prejudice this. We believe that it is legitimate to argue that disclosing the withheld information could have the potential to prejudice any regulatory or legal action that may be undertaken, and thus prejudice the effective conduct of public affairs."
29. Having viewed both the requested information and DfE's submissions the Commissioner concurs with the above analysis and is satisfied from the submissions provided to the Qualified Person and the requested information itself that the opinion of the Qualified Person is a reasonable opinion.
30. The Commissioner is therefore satisfied that the exemption is engaged and has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information:

31. DfE accepts that there is a strong public interest in transparency and accountability in public authorities, especially when it comes to the use of public funds. Disclosure of the requested information could enhance scrutiny of DfE's investigations into alleged mismanagement and potential misuse of public funding, and therefore provide such transparency and accountability.
32. DfE also accepts that there is a public interest in how effectively the department takes action against individuals they believe to have acted inappropriately when managing trusts and the associated public funding, which would be informed by disclosure of the requested information.

Public interest arguments in favour of maintaining the exemption

33. DfE states that it relies on information provided by officials when investigating allegations of mismanagement and the misuse of public funds. There is a need for this to remain confidential to ensure the matters are handled sensitively and effectively, and so that all views, opinions and stances can be considered, and the relevant evidence can be gathered.
34. If DfE were required to disclose the requested information, it would be likely to prejudice its ability to effectively investigate and take appropriate actions where issues surrounding mismanagement and/or the misuse of public funding have been identified. This could lead to DfE being unable to fully and candidly present its analysis, evidence and findings, set against risks.
35. Disclosure of the information requested would be likely to prejudice the effective conduct of public affairs in the future, as it would make it more difficult for DfE to work collaboratively when investigating cases and delivering appropriate actions/sanctions.

The Commissioner's conclusion

36. The Commissioner will always accord significant weight to transparency and accountability in public authorities, particularly when it comes to the use of, or in this case alleged misuse of, public funds. The Commissioner considers that it would be in the public interest for the public to be fully informed of how DfE is handling such important and sensitive issues.
37. However, it is precisely because these issues are so important and sensitive that DfE considers that disclosure of these would be likely to cause prejudice to the investigation. The Commissioner has regard for the timing of the investigation, which was ongoing at the time of the request and is still live.
38. The Commissioner considers, and DfE understands, that it would be unlikely that disclosure in this instance would completely deter officials from providing their views/opinions in relation to draft investigative reports. However, they are likely to be concerned that the investigative and sanction process may be at risk if this draft report, which is currently undergoing further fact checking and evidence collection to ensure DfE has all the necessary evidence to substantiate the findings within the report, was disclosed into the public domain. This may result in any advice or opinion given being less open and honest in the future which would be likely to prejudice DfE's ability to investigate such issues and then take appropriate actions to resolve them, and therefore prejudice the effective conduct of departmental and public affairs, which would not be in the public interest.
39. The purpose of the withheld report is to provide ministers and senior officials with advice and detail to resolve the mismanagement of Lilac Sky and the associated misappropriation of public funding. The draft report, with its commentary and actions outlined in the comments of enforcement officials, is designed to only be shared between departmental officials and ministers, and not put into the public domain. Such information, if disclosed, could be used by opposed parties to further prolong and delay an effective conclusion to what has become a protracted issue. The Commissioner accepts that this cannot be in the public interest.
40. DfE has informed the Commissioner that the factual findings of the draft report do not currently include the stronger evidence and would therefore give an erroneous view of the investigation, which could open the matter up to legal challenge. This would also clearly not be in the public interest.

41. The Commissioner, having balanced the public interest factors in favour of maintaining the exemption against those in favour of disclosure and, having considered the requested information and DfE's submissions, concludes that, in all the circumstances of the case, the public interest is in favour of maintaining the exemption as set out in section 36(2)(c) of FOIA.
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42. As the Commissioner considers that section 36(2)(c) of FOIA is applicable to the entirety of the requested information, he has not gone on to consider DfE's application of section 31.

Right of appeal

43. 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

44. 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.
45. 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

Deirdre Collins
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