

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 December 2015

Public Authority: Ofsted
Address: 7th floor
Aviation House
London
WC2B 6SE

Decision (including any steps ordered)

1. The complainant requested inspection notes and emails concerning an Ofsted school inspection.
2. The Commissioner's decision is that Ofsted is entitled to rely on the exemption from disclosure at s31(1)(g).
3. He requires no steps to be taken.

Request and response

4. On 29 and 30 April 2015 the complainant requested the following information regarding an Ofsted inspection of Ely College:
*"(i) The observation, inspection and evidence notes for each of the inspectors.
(ii) The observation, inspection and evidence notes for the lead inspector.
(iii) The minutes for any internal meetings between the inspection team.
(iv) All handwritten notes from any of the inspection team pertaining to the visit or any decisions made.
(v) All preparatory notes pertaining to the inspection.
(vi) Records of emails between Serco inspection team, OFSTED and the DfE pertaining to the Ely College inspection in March 2015."*
5. On 1 June Ofsted informed the complainant that the inspection was carried out in February 2015. It said it held no emails between Ofsted and the DfE regarding the inspection. The remainder of the requested

information was exempted under s31(1)(g) for the purpose specified at s31(2)(c) FOIA.

6. On 3 June the complainant requested an internal review. On 1 July Ofsted informed the complainant that its internal review had found one email between Ofsted and DfE to be held. Part of the email was exempt under s31(1)(g) for the purpose at (2)(c) and the rest was considered to be out of scope. The review upheld the s31 exemption in respect of the remainder of the request.
7. Ofsted maintained that should the exemption at s31 no longer apply in the future, personal data within the information would remain exempt from disclosure under s40 FOIA.

Background

8. Ely College is a school for pupils aged 11 to 18. The 2015 Ofsted inspection placed it into special measures. A school that requires special measures is one which is failing to give pupils an acceptable standard of education and where its leaders, managers or governors have not demonstrated that they have the capacity to secure the necessary improvement. Such schools are subject to monitoring by Ofsted inspectors.
9. The Education Act 2005 provides that schools can be placed into special measures by the Chief Inspector. The Department for Education (DfE) is permitted to take regulatory action against a school if Ofsted finds the school to be failing. The Academies Act 2010 requires an academy to enter into an agreement with the Secretary of State for Education under which they give undertakings regarding the carrying on of the school. The funding agreement between the Secretary of State and the academy can be terminated if the terms of the agreement are not met.

Scope of the case

10. The complainant contacted the Commissioner on 6 July to complain about the way his request for information had been handled.
11. The Commissioner has reviewed the withheld information. He has determined that part of a single email held between Ofsted and the DfE is out of scope. This decision notice addresses Ofsted's reasons for withholding the requested information under s31(1)(g) for the purpose specified at s31(2)(c) FOIA.

Reasons for decision

12. Section 31(1)(g) states that information which is not exempt under s30 is exempt if its disclosure under FOIA would, or would be likely to, prejudice the exercise by any public authority of its functions for any of the purposes specified in subsection (2). The purpose specified at subsection (2)(c) is that of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.
13. Ofsted applied the exemption on the basis of prejudice relating to the exercise of a regulatory function by the DfE. Where the interests of a third party are under consideration, the Commissioner is unable to accept arguments that do not originate from the third party itself. Accordingly he asked Ofsted to provide him with the DfE's written corroboration that the stated prejudice to the exercise of its functions would be likely to result if the exemption was not applied. Ofsted provided this corroboration.
14. A regulatory function of the DfE is to take action against a school if an Ofsted inspection has found it to be failing. As referenced above, such action can include withdrawal of funding to the school. Information from Ofsted's inspection and subsequent monitoring reports is required by the DfE whilst considering such regulatory action.
15. Failing schools remain in special measures until such time as they receive a re-inspection with an improved outcome. At the time of the request no monitoring inspections had yet taken place since the initial inspection and so regulatory action by the DfE was still a possibility. Ofsted considered that the placing of inspection evidence into the public domain whilst action by the DfE remained a possibility would be likely to prejudice the regulatory process. This is because public disclosure of the information was likely to provoke a range of local reactions. Individuals opposed to action being taken against the school or its governing body would be likely to use selected aspects of evidence to cast doubt on the decision to place it in special measures. Equally, those opposed to the school's leadership would be likely to use other parts of the evidence to put pressure on the DfE to make harsher interventions than it otherwise would.
16. In these circumstances the expected lobbying from concerned parents, staff and other interest groups would require the DfE to move resources away from making intervention decisions in order to deal with the questions and issues arising from disclosure of the information. This would prejudice the function of the DfE by distracting it from its duties

and reducing the time available for it to make the necessary regulatory decisions.

17. In the view of Ofsted and the DfE the priority must be for the school to secure the necessary improvement as set out in the inspection report and not be distracted by the minutiae of raw evidence used to form the basis of the report.
18. In light of the argument submitted by Ofsted and corroborated by the DfE the Commissioner is satisfied that release of the information would be likely to prejudice the exercise of the DfE's function of ascertaining whether circumstances exist or may arise that would justify regulatory action. Accordingly he finds the exemption at s31(1)(g) to be engaged.

Public interest test

19. The s31 exemption is subject to the public interest test whereby information can only be withheld if the public interest in maintaining the exemption outweighs that of disclosure.
20. In favour of disclosure Ofsted submitted that it would afford transparency to Ofsted's inspection decisions. However, transparency is already met to a large extent by Ofsted's publication of reports following an inspection and this enables its decisions to be scrutinised. The report from the inspection in question was published in March 2015. It explains why each judgement was reached. A further report was published in June 2015 and this served to update the position. Both reports are made publicly available on Ofsted's website.
21. In favour of maintaining the exemption Ofsted submitted that there is a strong public interest in avoiding external interference or prejudice to the regulatory process. It considered that such interference and prejudice would be likely to arise from the evidence entering the public domain at that time.
22. Where a school is considered to be failing, the Commissioner considers it to be in the public interest that delays to necessary improvements do not further affect the education and wellbeing of pupils. He considers that disclosure of the information would be likely to have this negative effect.
23. He considers that there is a strong public interest in the efficient use of DfE resources which he considers would be negatively impacted if the information is disclosed.
24. In the Commissioner's view the public interest arguments in favour of maintaining the exemption are powerful. While it can be argued that disclosure of the underlying evidence would assist the interests of

transparency, there is a greater public interest in ensuring that regulatory actions are taken without external interference or prejudice to that process.

25. He has concluded that in all the circumstances of the case the public interest favours maintenance of the exemption. The requested information should therefore be withheld.
26. As the information is exempt under s31 FOIA the Commissioner has not proceeded to consider the exemption submitted by Ofsted at s40.

Right of appeal

27. 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

28. 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.
29. 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

Rachael Cragg
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