

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 27 July 2021

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

Decision (including any steps ordered)

1. The complainant requested information from the Department for Education ("the DfE") about a report prepared by a School Resource Management Advisor, recommending potential savings at a particular school. The DfE provided some redacted information and withheld other information in its entirety, citing all three limbs of the exemption at section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs.
2. The Commissioner's decision is that while the exemption at section 36(2)(b)(ii) is engaged, the balance of the public interest favours the disclosure of the information.
3. The Commissioner requires the DfE to take the following step to ensure compliance with the legislation.
 - Subject to the redaction of personal data, as described in this notice, disclose the information to the complainant
4. The DfE must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 10 November 2019, the complainant wrote to the DfE to request information of the following description:

"Please provide me with information relating to the School Resource Management Advisor (SRMA) Report prepared by [name redacted]... in May 2019 on Kings Heath Primary School, Valentine Road, Kings Heath, Birmingham, B14 7AJ. This report was delivered to the school at 16:02 on 4th November via email... I request as follows: (numbers added for ease of reference)

- 1) all versions of the report with comments, amendments and tracked changes;*
 - 2) all email correspondence regarding the SRMA visits to KHPS;*
 - 3) all correspondence relating to this report between the Department for Education, Birmingham Local Authority, the Education and Skills Funding Agency and the SRMA;*
 - 4) all meeting notes relevant to the SRMA process for KHPS;*
 - 5) transcripts of any telephone conversations/notes of those conversations where this report was discussed; and*
 - 6) all copies of supporting data used in compilation of the report."*
6. On 23 December 2019, the DfE responded and advised that it was intending to apply a qualified exemption to the information, and that it required more time to consider the public interest test. On 7 February 2020, it issued a further response, as follows:
- It stated that no information relating to points 4-6 of the request was held;
 - It withheld the information requested at point 1 in its entirety under section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs;
 - It provided some information relating to points 2 and 3, but stated that some of the information had been redacted under section 36(2);
 - It explained that, where correspondence was being provided, personal data had been redacted under section 40(2) – third party personal data.

7. Following an internal review, the DfE wrote to the complainant on 16 March 2020. It upheld its position.

Scope of the case

8. The complainant contacted the Commissioner on 4 May 2020 to complain about the way his request for information had been handled. He wished the Commissioner to consider whether the information that had been withheld under section 36(2) of the FOIA, should be disclosed.
9. This notice considers whether the information withheld under section 36(2) was done so correctly.

Background to the request

10. The Commissioner is aware that funding issues at certain Birmingham primary schools, which received media attention during 2019, are relevant to this matter. During that year, certain schools began operating a 4.5 day week for pupils, with some of the schools saying that this was necessary in order to save money.
11. The Commissioner also understands that the Education and Skills Funding Agency ("the ESFA") (a government agency sponsored by the DfE) can award contracts to certain independent organisations to provide a range of school support, including the provision of School Resource Management Advisors ("SRMAs"). In this case, an SRMA was deployed to Kings Heath Primary School, Birmingham ("the school") in May 2019. This was one of the schools which was affected by funding issues and which was proposing to operate a 4.5 day week.
12. Following a visit to the school in early May 2019, the SRMA prepared a draft report. This initial draft was discussed with the school at a meeting in mid-May 2019, at which point some revisions were agreed.
13. A period of time then elapsed, during which the school made some enquiries as to the progress of the report. On 4 November 2019, the school was provided with what was described in the covering letter as "*the final school resource management adviser (SRMA) report*". The Commissioner understands that, as is normal practice, this was forwarded to the school by its local authority; that is, Birmingham City Council ("the LA").
14. The complainant explained to the Commissioner that the final report was "*considerably altered in tone and content and included numerous errors*

and inaccuracies not present in the [May] draft” and that the purpose of the request was “to determine what changes had been made to the report on our school, by whom and for what reasons”.

Reasons for decision

Section 36(2) – prejudice to the effective conduct of public affairs

15. Section 36(2) of the FOIA states that that information is exempt from disclosure under the FOIA if, in the reasonable opinion of a “qualified person”, disclosure of the information:
 - (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.
16. Section 36(2) therefore needs to be engaged in a different way from other qualified exemptions under the FOIA. In order to engage section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person as to whether inhibition or prejudice relevant to the subsection(s) cited would be at least likely to occur, as a result of disclosure of the information in question.
17. Section 36(5)(a) of the FOIA states that any Minister of the Crown is entitled to act as the qualified person in respect of a government department. The DfE confirmed that the request was considered by Lord Agnew, who was a Minister at the time. It provided the Commissioner with a copy of the submissions provided to Lord Agnew for his consideration.
18. Having reviewed the submissions presented to Lord Agnew, the Commissioner notes that the DfE invited him to agree with its reasoning that *“disclosure of [the information] under the Act would be likely to prevent future, free and frank discussions between School Resource Management Advisers (SRMA), local authorities and ESFA”.*
19. Specifically, the DfE invited Lord Agnew to consider that *“it is important for the process of effective decision-making and maintaining valuable working relationships that ESFA, local authorities (LAs) and SRMAs are*

able to have frank, honest discussions to understand issues and have oversight of the maintained school sector”.

20. The DfE considered that the release of the information may be detrimental to the working relationships between the relevant bodies, leading to *“less informed decisions/support by the department”*, and may also affect the public perception of the role of an SRMA, leading to what is commonly referred to as a “chilling effect” on the frankness of future discussions.
21. Lord Agnew considered this reasoning, and on 19 December 2019 signed to say that he agreed that, in his opinion, disclosure would be likely to prejudice the effective conduct of public affairs.
22. The Commissioner notes that, while the DfE referred to all three limbs of the exemption in the heading to its submissions to Lord Agnew, the reasoning provided to him (and set out above) relates only to section 36(2)(b)(ii): prejudice to the free and frank exchange of views for the purposes of deliberation.
23. While the DfE covered the other limbs of the section 36(2) exemption in its correspondence with the Commissioner, since this reasoning was not reflected in the submissions to Lord Agnew, the Commissioner has disregarded it. Lord Agnew was not invited to consider reasoning which related to the provision of advice, nor to disclosure being otherwise prejudicial to the effective conduct of public affairs. The Commissioner has therefore considered whether the exemption is engaged; that is, whether the opinion is reasonable, with regard to section 36(2)(b)(ii) only.
24. In order to make a finding as to whether any of the subsections of section 36(2) are engaged, the Commissioner must consider whether the qualified person’s opinion was a “reasonable” opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. The Commissioner only needs to satisfy herself that the opinion was reasonable; in other words, that it was an opinion that a reasonable person could hold.
25. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:
 - Whether the inhibition envisaged by the qualified person relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection, the opinion is unlikely to be reasonable.

- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue requiring the free and frank exchange of views.
 - The qualified person's knowledge of, or involvement in, the issue.
26. Regarding the nature of the information and the timing of the request, having reviewed the withheld information, the Commissioner notes that the information concerns draft versions of, and correspondence relating to, a report which had been submitted in what was taken by all parties to be its final form to the school, just before the request was made. She also notes that, around the same time as the request was made, the school returned to the SRMA and the DfE to query some of the findings in the report.
27. She notes that the correspondence and draft versions do contain information that comprises an exchange of views.
28. The Commissioner is also satisfied that Lord Agnew was provided with background information about the relevant matters, as well as a description of the type of information being withheld.
29. The Commissioner notes that Lord Agnew is relying on the view that disclosure of the information "would be likely" to inhibit the relevant matters. This is a lower level of probability than "would", but one which is still significant. The Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), stated:
- "We interpret the expression "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*
30. With this view in mind, the Commissioner has considered the opinion of the qualified person in this case. She is satisfied that it was reasonable for him to hold the opinion that inhibition would be likely to occur to the free and frank exchange of views for the purposes of deliberation, if the information were disclosed.
31. She is therefore satisfied that the exemption at section 36(2)(b)(ii) is engaged.
32. Since the qualified person was not provided with reasoning that related to the other limbs of section 36(2), she does not find that these limbs are engaged.
33. The Commissioner has gone on to consider the balance of the public interest test in relation to section 36(2)(b)(ii).

The public interest test

34. Having accepted that the qualified person's opinion was reasonable; that is, his opinion that inhibition to the free and frank exchange of views would be likely to result from disclosure, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the qualified person.
35. Having found that the qualified person's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the DfE to carry out its work. As to how much weight this should carry in the balance of the public interest, the question here is what the severity, extent and frequency would be of the inhibition identified by the qualified person.

The complainant's view

36. The complainant considers that it is a matter of considerable public interest to understand how this matter was handled by the DfE, including how the final version of the report was arrived at, since this would shed light on the independence of the SRMA in their case.
37. He explained that the school had received a draft report in May 2019, and was provided with the opportunity to comment at that point. The governing body was therefore surprised by the changes that were present in the final version sent to them in November 2019. In complaining to the Commissioner, the complainant stated: "*It seemed clear that the supposedly independent report had been subject to significant interference in the intervening six months. We submitted the FOI request to determine what changes had been made to the report on our school, by whom and for what reasons*".
38. The complainant commented that the final report contained some inaccuracies (this was, subsequently, acknowledged by senior staff at the ESFA), as well as "*significant changes*"; however, the school had not been provided with the opportunity to comment on any revised drafts or on the final version.
39. The complainant has pointed out that information¹² published by the UK government highlights the independence of SRMAs. However in his view,

¹ <https://www.gov.uk/government/news/support-schools-to-maximise-their-resources-and-budgets>

the changes to the report were unlikely to have been arrived at independently by the SRMA in this case.

The DfE's position

40. The DfE's position is that the balance of the public interest lies in the exemption being maintained. Its arguments centre on the need for open, candid discussion between the DfE, the ESFA, the LA and the SRMA, and the risk that these discussions would be less candid in future if it were the case that the contents of emails and/or comments on draft reports were known to be likely to make their way into the public domain.
41. The DfE stated: *"It is... essential that officials and SRMAs are allowed the safe space in which to share and deliberate comments, questions, views, and opinions, before coming to an agreed consensus and a final draft of such reports."*
42. The DfE also stated that officials need a *"free space"* in which to exchange frank views and challenge findings, before a report is finalised. It acknowledged that it did not consider that SRMAs and officials would cease to provide honest and professional views, if the information was published; however, its concern was that individuals in future may only express diluted or less clear views, and may be more guarded in exchanges. The DfE considers that this, in turn, may lead to confusion and delays. It stated: *"a lack of clear and candid internal approach could lead to confusion and/or key actions not being undertaken as quickly and effectively as they should be"*.
43. The DfE also commented that matters relating to how a particular school is spending public money can be a sensitive matter, and that discussions around this need to take place in confidence.
44. The DfE explained that, for the SRMA process to be effective, it *"relies on information provided by external stakeholders (in this case SRMAs and LAs) and officials to help make informed decisions in order to determine the appropriate course of action to take, or advice to give"* to schools on relevant issues.
45. It is concerned that *"both [the] DfE and LA, and the schools in question, would be less likely to candidly engage in such visits, and any ensuing*

² <https://www.gov.uk/government/news/esfa-extends-schools-resource-management-adviser-pilot>

frank exchanges, going forward” and also expressed the concern that SRMAs would be less likely to put forward candid views and suggestions in cases where, for example, it may be making an *“unpopular recommendation”*. In addition, in some cases, an SRMA’s early drafts may require clarification or correction, and the DfE fears that SRMAs may be unwilling to participate in the process if these early drafts, marked with corrections and comments, were publicly scrutinised.

46. Finally, the DfE considers that additional weight is added in favour of the exemption being maintained since it regards this matter as a live issue. It explained that, while it was preparing its response to the complainant’s request for information, it was made aware by the school of what it has referred to as a *“calculation error”* in the benchmarking data. It therefore agreed to a further visit to the school by the SRMA. Due to the national Covid-19 outbreak, this additional visit was significantly delayed. The DfE argued that these circumstances meant that the issue of the report was a live issue.

The balance of the public interest

47. It is the Commissioner’s well-established approach, in line with the spirit of the FOIA, that there is always a public interest in how a public authority conducts its business and reaches decisions that have an impact on the public.
48. The Commissioner has also considered the specific circumstances of this case, and, more generally, the deployment of SRMAs by the ESFA. She considers that being able to scrutinise the role and powers of an SRMA, stated in government publications to be an independent expert, is a matter of public interest. In her view, there is a public interest in being able to scrutinise the process of the revisions to the report that occurred in this case.
49. She also notes the high-profile background to the SRMA visit in this case, which concerned one of the Birmingham schools proposing to offer a 4.5 day week to pupils, and notes that the school’s funding was a matter of considerable interest to the wider community.
50. As explained previously, in cases where any or all of the exemptions at section 36(2) have been cited, it is for the Commissioner to consider the severity, extent and frequency of the inhibition and prejudice that the qualified person has identified as being likely to occur.
51. The Commissioner understands that the SRMA pilot scheme, which took place in 2018, was regarded by the government as a success. The government therefore moved to roll the programme out more widely, with the stated aim of helping schools to achieve “excellent school

resource management". The Commissioner understands that 72 schools were visited by SRMAs during the pilot, and these visits were reported by the government to have identified £35million of potential savings. The scheme was therefore continued during 2019, including the visit to the school, and the Commissioner understands that the government was hoping to continue to roll the scheme out further, prior to the national Covid-19 outbreak.

52. Considering the severity, extent and frequency of the envisaged inhibition, the Commissioner accepts that disclosure of the withheld information may cause some chilling effect on future discussions between relevant organisations about SRMA support, and that their involvement with schools may again become more frequent as schools return to "normal" in the future.
53. However, the Commissioner does not consider that the envisaged inhibition would be particularly severe, if the withheld information were disclosed in this case. She has reached this view based on her understanding of the requirements and expectations around SRMA visits to schools in general, and after reviewing the withheld information in this case, including a consideration of the respective positions of the school and LA.
54. After considering these relevant factors, the Commissioner does not consider that the chilling effect on the relevant organisations (the DfE, the ESFA, SRMAs, schools and local authorities) would be severe; that is, that they would dilute their exchanges to such an extent that they ceased to do an effective job in finding solutions for schools. She also notes that the qualified person envisaged only that inhibition "would be likely" to occur: the lower threshold. For this reason, the Commissioner is satisfied that, while the opinion of the qualified person carries some weight as a factor in the public interest balance in favour of maintenance of the exemption, the limited severity, extent and frequency of the outcome predicted by the QP limits that weight.
55. Having reviewed the withheld information, the Commissioner is satisfied that it reveals substantive detail about the background to, and the DfE and ESFA's handling of, the revisions to the report. In addition, the information would add to existing public knowledge of matters not only affecting this school, but about the role of SRMAs, and the process following on from an SRMA visit, in general.
56. The Commissioner is aware that there was media interest in the recommendations made to schools taking part in the SRMA pilot, and in particular, about the potential savings that were identified and recommended following SRMA visits to schools, including in whether they had in fact been actioned. Some schools also reported concerns

about the level of expertise of some SRMAs, and the Commissioner considers that there is a strong public interest in a better understanding of this important type of support being offered to schools.

57. In the circumstances of this case, the Commissioner considers that what would be learned through the content of the information is a very weighty factor in favour of disclosure. She is, therefore, satisfied that the public interest in maintaining the exemption in this case is outweighed by the public interest in disclosure.

The Commissioner's decision

58. The Commissioner is satisfied in this case that the balance of the public interest favours the disclosure of the information.
59. The DfE is therefore ordered to disclose the withheld information to the complainant, subject to the paragraphs which follow.
60. The Commissioner notes that the withheld information includes some personal data. Specifically, it includes names of the various individual correspondents, and their email addresses and other contact details, including telephone numbers.
61. The names of certain other individuals, including students at the school, are also included within some of the draft reports.
62. The Commissioner is satisfied that this information identifies and relates to living individuals, and therefore comprises personal data within the definition of personal data at section 3(2) of the DPA. She is also satisfied that it would not be lawful to disclose this information.
63. The Commissioner instructs the DfE that, prior to disclosing the information, all personal data should be redacted.

Right of appeal

64. 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

65. 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.
66. 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

Ben Tomes
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF