

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 19 October 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the Spires Langton Girls' Grammar School (SLGGS) proposed academy conversion. The DfE provided some information but redacted some information under sections 21, 22, 36(2)(b)(ii) and (i), 36(2)(c), 40(2) and 41(1) FOIA.
2. During the course of the Commissioner's investigation the DfE withdrew its application of section 21, 22 and 41(1) FOIA.
3. The Commissioner's decision is that the DfE correctly applied sections 40(2), 36(2)(b)(i) and (ii) FOIA to the withheld information.
4. The Commissioner requires no steps to be taken.

Request and response

5. On 13 September 2016 the complainant requested information of the following description:

"copies of all correspondence and/or records between any member of the Governing Bodies of the Spires Academy Langton Girls' Grammar School and the DfE relating to the SLGGS proposed Academy Conversion between 1st Jan 2015 and 12th September 2016".

6. On 8 November 2016 the DfE responded. It provided the complainant with some information but withheld or redacted some information under sections 21, 22, 36, 40 and 41 FOIA.
7. The complainant requested an internal review on 10 December 2016 in relation to the DfE's application of section 36 and also as he wanted clarification in relation to some of the redacted information he had been provided with. The DfE sent the outcome of its internal review on 23 January 2017. It provided him with clarification in relation to the redacted information it had provided him with, it withdrew the application of section 40 to some information, it also withdrew its application of section 36 to some information which it provided to the complainant but with some redactions made under section 40 and 36 FOIA. It upheld its original application of section 36 to some information

Background

8. This request relates to the previous intention of SLGGS to convert to academy status.
9. A Head Teacher Board meeting took place on 3 March 2016, where the Regional Schools Commissioner (RSC) for the South East and South London gave approval for SLGGS to convert to academy status and form a Multi Academy Trust (MAT) with Spires Academy. SLGGS and Spires Academy have maintained a close relationship over a number of years, with the Head Teacher of SLGGS acting as Executive Head Teacher of Spires for one day a week. They sought to formalise this arrangement through the formation of a MAT, which would govern both schools.
10. However, when the school announced its intention to form a MAT with Spires Academy, there was an active campaign undertaken by parents of children at the grammar school and others, resulting in an influx of correspondence and FOIA requests to the DfE.
11. As a result of this campaign, the Governing Body at SLGGS voted to withdraw their application to:
 - convert to become an academy; and
 - become the approved sponsor for Spires Academy.

Scope of the case

12. The complainant contacted the Commissioner on 22 February 2017 to complain about the way his request for information had been handled.
13. The Commissioner has considered whether the DfE has applied sections 40(2), 36(2)(b)(i) and (ii) and 36(2)(c) FOIA correctly to the withheld information in this case.

Reasons for decision

Section 36(2)(b)(i) and (ii) and (2)(c)

14. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

would or would be likely to inhibit;

(2)(b)(i) the 'free and frank provision of advice;

(2)(b)(ii) the free and frank exchange of views for the purposes of deliberation.

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

15. The DfE has applied section 36(2)(b)(i) and (ii) and (2)(c) to various redactions throughout the information falling within the scope of the request.
16. In determining whether the exemptions were correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.

17. The DfE explained that the qualified person is Minister Dineage. The qualified person's opinion was originally provided 10 October 2016 and then again on 24 June 2017 as further information was located. The qualified person's opinion was that section 36(2)(b)(i) and (ii) and 36(2)(c) are applicable in this case. It explained that the qualified person had access to all relevant material including the withheld information. A copy of the submissions put to the qualified person along with the qualified person's opinions were provided to the Commissioner.
18. The Commissioner will consider the application of section 36(2)(b)(i) and (ii) in the first instance as section 36(2)(c) has been applied to the same information to which these exemptions have been applied. It will only therefore be relevant to consider the application of section 36(2)(c) if the Commissioner does not find sections 36(2)(b)(i) or (ii) to be engaged.
19. The DfE explained that some of the withheld information contains the free and frank provision of advice (section 36(2)(b)(i)). It identified where this exemption applied and provided the Commissioner with examples contained within the confidential annex attached to this Notice. It argued that it is important that the DfE and its officials can provide such candid advice when addressing issues or problems relating to the delivery of departmental policy. It believes that to release such information would be likely to deter officials from providing such free and frank advice in the future, which could hinder the effective delivery of key departmental policies, such as the academies programme.
20. The DfE explained that some of the withheld information contains free and frank exchanges of views for the purpose of deliberation (section 36(2)(b)(ii)). Again it identified where this exemption applied and provided the Commissioner with examples contained within the confidential annex attached to this Notice.
21. The DfE explained that the Head Teacher, school governors and DfE officials involved in the email exchanges were of the impression that their views and the issues raised were provided in confidence.
22. The DfE argued that the language and sentiments expressed are very candid, and there was no expectation that these exchanges would be released into the public domain. To release the sensitive un-redacted information would breach the confidence of the teachers and governors involved. This could lead to teachers and governors being less willing to provide their free and frank views when liaising with the DfE in the future. The DfE relies on the views and opinions of external professionals and stakeholders to ensure it can understand the specific local context, so as to be able to help address any issues or problems

raised. To deter teachers and governors from providing their views for fear that they will go into the public domain would lead to the DfE being unable to fully understand this context and thus lead to it being less effective in its role.

23. It went on that as well as enabling the DfE to understand the local context of its schools, including any issues or challenges they face, such candid exchanges are also important for good government, by enabling government to develop policy and structures which enable the delivery of effective schools. The DfE is able to gain an oversight into the types of governance issues arising in individual schools and identify where changes or guidance may be needed as a system, rather than individual school, level. If the DfE has a less clear understanding of the volume or magnitude of such issues, it could miss an opportunity to provide handling guidance or other support in time to avoid future issues for other schools.
24. The DfE confirmed that it is the qualified person's opinion that the prejudice claimed would be likely to occur.
25. Whilst the qualified person's opinion was not sought or provided in relation to all of the information withheld under section 36 until the Commissioner's investigation had commenced, after viewing the contents of the qualified person's opinion the Commissioner is satisfied that it was based upon the circumstances at the time the request was made in September 2016. The Commissioner considers that the withheld information dates back to May/June 2016, the time when SLGGS decided to withdraw its application and the request was made fairly recently after this decision to withdraw was taken. Based upon this, the Commissioner does consider that the opinion of the qualified person is reasonable and therefore considers that section 36(2)(b)(i) and (ii) were correctly engaged.
26. As the Commissioner has decided that section 36(2)(b)(i) and (ii) are engaged, she has gone on to consider whether the public interest in maintaining the exemptions outweighs the public interest in disclosing the information.

Public interest arguments in favour of disclosing the requested information

27. The DfE provided the following public interest arguments in favour of disclosure:
 - The DfE has taken into account that considerations for disclosure add up to an argument that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.

- There is a general public interest in disclosure of information to the public, to demonstrate the openness and transparency of government.

Public interest arguments in favour of maintaining the exemption

28. The DfE provided the following public interest arguments in favour of maintaining the exemption:

- Good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of the options. These emails contain advice from the RSC's office to the school on the state of the academy conversion proposal and handling issues. If such exchanges were to be released, it is likely that advice from RSCs and/or challenge provided by teachers and governors would be less candid in future, less robust in effect and decision-making could be impaired.
- It said that it is clear from the emails withheld, that the Head Teacher and governors feel able to provide free and frank views due to the fact these exchanges were not intended to go into the public domain. However, should such emails be publicised the likely result is that future advice given by teachers and governors, as well as any issues and concerns raised, would be less open and honest, especially when discussing some particularly sensitive, and at times personal issues.
- Teachers, governors and officials must have confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge issues presented to them. These exchanges contain some very frank comments and reference heated disputes between individuals. This is in the context of managing a discussion about a school's future. The situation was already tense, and required urgent resolution and careful consideration of handling issues. It was imperative that those involved in decisions about the schools' future fully and clearly understood the questions at issue. If the DfE is required to put this information into the public domain, teachers, governors and officials would be likely to be inhibited from providing free and frank exchange of views, which in turn would have a negative impact on its ability to resolve issues at local level. Disclosure of the information outlined above would be likely to remove the space within which officials, teachers and governors are able to discuss options and delivery freely and frankly. These key partners would also be less likely to co-operate in this way going forward, and the department would be less sighted on any issues relating to the policies it is delivering. It would also limit the DfE's ability to develop its guidance and policies.

- There is also the added possible implication that the publication of this information may lead to a misunderstanding by the recipients and wider public about the academy conversion process which could lead to fewer academy applications from other good/outstanding schools. It is already aware that this case has had a negative impact on other nearby schools who had previously been considering conversion.
- The DfE believes that the reasoning behind the balance of public interest arguments and the department's decision to withhold this information is the same as that which was accepted by the Information Commissioner in decision notice (Ref: FS50587396), as outlined below:

"25. The Commissioner considers that there is a strong public interest in openness and transparency and in further public understanding of the process of discussion which leads ultimately to decision-making within public authorities such as the DfE. Disclosure of the withheld information may increase public trust and confidence in the DfE and its decision-making process.

26. Whilst there are strong arguments in favour of disclosing the withheld information, the Commissioner considers that there is a strong public interest in the DfE being able to discuss issues freely and frankly and to be able to have space to consider all issues and make informed decisions. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision."

Balance of the public interest arguments

29. The withheld information contains advice provided or free and frank views exchanged between the Head Teacher, school governors and DfE officials. The proposal relating to the academy conversion was clearly contentious and the redacted information reflects this sensitivity. This therefore demonstrates a very strong public interest in understanding the reasoning behind decisions reached relating to this matter. The greater understanding disclosure may provide is of significant importance to the families directly affected within the area and linked to the Schools.
30. Turning now to the case for withholding the information, the arguments for maintaining the exemption focus on the fact that disclosure would be likely to prejudice the provision of advice and the free and frank exchange of views, should this issue be considered again in the future by the School but also in relation to other schools, should information be disclosed. The DfE has argued that it is aware that the issues encountered in this case have already had a negative

impact on other nearby schools that were considering conversion. If information were to be disclosed relating to advice provided or the free and frank discussions between key stakeholders in this case, this may impact the frankness and candour and provision of advice in nearby schools considering the prospect. Given the fact that the redacted information relates to the time when discussions were most heated, leading up to and just after the withdrawal of the application, and given the request was made only 3 months after this, it would have been likely to impact other local schools considering a similar proposition.

31. The Commissioner has weighed these arguments and acknowledges there is a strong public interest in disclosure of information which would promote openness and transparency in relation to this matter which is clearly controversial and of significant relevance for the families and individuals affected by the decision as well as broader relevance in terms of how this government policy is operating in practice. The Commissioner recognises that disclosing any information which sheds light on the process will be in the public interest in this case.
32. Balanced against that the Commissioner has to accept there is significant weight to the argument that disclosure is likely to undermine the provision of advice or free and frank exchange of views should this proposition be considered again by the School in the future but more importantly by other school's (particularly in the local area) that may also have been considering the prospect of conversion around the time of the request. This is particularly so given the timing of the request, fairly recently after the School made the decision to withdraw its application.
33. The Commissioner therefore considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption in this case in this case.

Section 40(2)

34. Section 40(2) FOIA provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in section 40(3)(a)(ii) is satisfied.
35. One of the conditions, listed in section 40(3)(a)(ii), is where the disclosure of the information to any member of the public would contravene any of the principles of the DPA.
36. The Commissioner has first considered whether the withheld information would constitute the personal data of third parties.

37. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:

- from that data,
- or from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.

38. In this instance the withheld information is the personal details (e.g. name, email, address, phone number) of departmental officials below the grade of Deputy Director (DD) and governors.

39. The Commissioner does consider that this is information from which the data subjects would be identifiable and therefore does constitute personal data.

40. The Commissioner has gone on to consider whether the disclosure of this information would be in breach of the first principle of the DPA. The first principle requires, amongst other things, that the processing of personal data is fair and lawful. The Commissioner has initially considered whether the disclosure would be fair.

41. The DfE considers that this case bears similarities to a Decision Notice sent to the Department of Health (DoH) on 1 June 2016 (FS50604583) in relation to the rationale used by the DoH to withhold the personal information of more junior members of staff and such staff's expectations around release of their personal information. The full DN can be seen via the following link:

<https://search.ico.org.uk/ico/search/decisionnotice?keywords=FS50604583>

42. In that case, the Commissioner concluded that the DoH had applied section 40(2) appropriately for the following reasons:

"The Commissioner considers that more junior officials and less senior members of other bodies, such as the AoMRC, would not have had any reasonable expectation their names and presence at these meetings would be disclosed into the public domain. The Commissioner cannot be certain but it is likely that more junior individuals are less likely to be in public roles so would have a lesser expectation of their names being disclosed."

43. The DfE said that the case is the same for junior staff within the DfE and the governors involved in the email exchanges, in that they have a reasonable expectation that, due to their less public facing roles, their personal information will not be disclosed into the public domain.

44. The Commissioner is there satisfied that these individuals would have a reasonable expectation of privacy with regard to their personal

information and that their names would not be released into the public domain.

45. The Commissioner has therefore gone on to consider whether any of the Schedule 2 conditions can be met, in particular whether there is a legitimate public interest in disclosure which would outweigh the rights of the data subjects.
46. The Commissioner considers that there is a wider public interest in transparency and accountability however the majority of the requested information has been disclosed with limited redactions under section 36(2)(b)(i) and (ii) and 40(2) FOIA. The information disclosed is extremely meaningful and gives the public a detailed understanding of the issues surrounding the then proposed conversion. The redacted names would provide very little more, given the junior and non-public facing roles of those individuals.
47. After considering the nature of the withheld information, the fact that the majority of the requested information has been provided and the reasonable expectations of the data subjects, the Commissioner considers that disclosure under FOIA would be unfair and in breach of the first principle of the DPA. She considers that any legitimate public interest would not outweigh the rights of the data subjects in this case.
48. Therefore the Commissioner's decision is that section 40(2) FOIA is engaged and provides an exemption from disclosure of the redacted information.

Right of appeal

49. 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

50. 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.
51. 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

Gemma Garvey
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