# Freedom of Information Act 2000 (FOIA)

# Decision notice

**Date:** **18 December 2017**

**Public Authority:** **The Department for Education**
**Address:** **Sanctuary Buildings**
**Level 3, 20 Great Smith Street**
**London**
**SW1P 3BT**

## Decision (including any steps ordered)

1. The complainant requested a copy of the markers' guidance for marking the 2016 and 2017 KS2 Sats from the Standards and Testing Agency (STA). As an executive agency of the Department for Education (the DfE), the STA does not constitute a public authority for the purposes of FOIA and so this notice is issued to its parent Department, the DfE.

2. The Commissioner is satisfied that section 36(2)(c) – prejudice to the conduct of public affairs is engaged and the public interest favours maintaining the exemption. The Commissioner does not require the public authority to take any action.

## Request and response

3. On 20 July 2017 the complainant requested the following information:

   '*Please can you send me copies of all the markers' guidance for marking the 2016 and 2017 KS2 Sats in all three subjects of reading, maths, and spelling, punctuation and grammar*.

4. On 9 August 2017 the DfE responded that the information was being withheld under section 36(2)(c) (prejudice to the effective conduct of public affairs).

5. The complainant requested an internal review on 9 August. The DfE sent her the outcome of its internal review on 6 September upholding the decision.

## Scope of the case

6. The complainant contacted the Commissioner on 6 September 2017 to complain about the way her request for information had been handled.

7. The Commissioner therefore considers the focus of the investigation to be whether the DfE was entitled to rely upon the exemption at section 36 to withhold the information and, if so whether the public interest favours maintaining thee exemption.

## Background

8. The complainant explained that the STA publishes mark schemes after the key stage 2 exams have been taken in May which show how papers are marked and these are used by schools to prepare appeals against inaccurate marking.

9. However, in July it came to light that there is further guidance for markers which is not published:

   https://www.tes.com/news/school-news/breaking-news/satsshambles-heads-demand-publication-secret-marking-guidance

10. Some teachers thought some answers had been wrongly marked according to the official mark scheme - while the further guidance appeared to show that the papers were correctly marked.

## Reasons for decision

### Section 36 – prejudice to the conduct of public affairs

11. Section 36(2) of FOIA states that information is exempt 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 purpose of deliberation, or

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

12. As section 36(2)(c) is worded specifically as "would otherwise prejudice", it is the Commissioner's opinion that if a public authority is

claiming reliance on section 36(2)(c) of the FOIA the prejudice claimed must be different to that which would fall in section 36(2)(b)(i) and (ii).

13. The Commissioner considers section 36(2)(c) of the FOIA is concerned with the effects of making the information public. It can refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. She considers the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may also refer to the disruptive effects of disclosure, for example, the diversion of resources managing the effect of disclosure.

14. The Commissioner will first consider if section 36(2)(c) has been cited correctly by the DfE.

15. 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. To determine 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.

16. At the time of the request, the qualified person for the DfE was the Minister, Lord Nash. The DfE has provided the Commissioner with evidence that the qualified person's opinion was sought and that the qualified person did provide his opinion on 28 July 2017 that the information in question was exempt under section 36(2)(c).

17. The Commissioner is therefore satisfied that the qualified person did provide his opinion that the information in question was exempt under section 36(2)(c).

18. The exemption can be engaged on the basis that the prejudice to public affairs either 'would' or would be 'likely' to occur. In this case the DfE has applied the exemption on the basis that disclosing the information in question would be 'likely' to prejudice the conduct of public affairs. This is taken to mean that the qualified person considers the likelihood of the inhibition occurring to be more than a hypothetical possibility; that there is a real and significant risk, even if that risk is less than 50%.

19. The Commissioner now needs to consider whether this opinion is 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 is reasonable or, in other words, it is an opinion that a reasonable person could hold. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.

20. The DfE has stated that it is the qualified person's opinion that disclosure of the requested information in this case would be likely to prejudice the effective conduct of public affairs for a number of reasons.

21. The marker training materials (MTMs) were developed by the STA's KS2 external marking service supplier to support the delivery of training for markers and as additional reference material when the recruited markers were marking the 2016 and 2017 KS2 tests:

    '*They ensure markers have a clear understanding of the published mark schemes and can consistently and accurately apply the correct marks to pupils' responses. The materials are based on the published mark schemes and include … correct and incorrect pupil responses…to ensure markers fully understand which responses are creditworthy, which are not, and why.*

    *They were not designed to support teaching in the classroom.*

    *…Releasing this information could actively endanger policy intention as it could result in schools teaching to the test. Publishing the guidance has the risk of teachers giving lessons to pupils on how to complete the specific questions rather than focusing on teaching the national curriculum.'*

22. The Commissioner is satisfied that it is reasonable for the qualified person to have concerns over the release of this information.

23. For these reasons, the Commissioner finds that the exemption provided by section 36(2)(c) is engaged in respect of all the information to which it has been applied.

**Public interest test**

24. Section 36 is subject to the public interest test as set out in section 2 of the Act. This means that although the exemption is engaged, the information can only be withheld if in all the circumstances of the case the harm that disclosing the information would be likely to be caused is greater than the public interest in its disclosure.

25. The Commissioner's approach to the competing public interest arguments in this case draws heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)[1]. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion the Commissioner must give weight to that opinion as an important piece of evidence in her assessment of the balance of the public interest.

26. Although the Commissioner has accepted the qualified person's opinion to be a reasonable one in respect of the information now under consideration, and therefore will give some weight to that opinion, she will reach her own view on the severity, extent and frequency of that inhibition to the decision making process occurring.

**Public interest arguments in favour of disclosure**

27. The complainant has argued that '*the markers' guidance is used to judge schools, but the schools do not know what it is. This seems fundamentally unfair*' and it is in the public interest to release the information to uphold '*the public's faith in the fairness and reliability of the exam system'*.

28. The DfE stated that it is committed to being transparent and open: '*the department 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'.*

29. The DfE also stated that '*it could be considered that releasing this information would present the STA with the opportunity to provide context about how the materials are developed, and how markers use them to ensure that the KS2 tests are marked rigorously, consistently, objectively and fairly…Release could also show marking in a positive light, as markers are required to adopt a positive approach to marking pupils' tests and award marks where acceptable answers are given.'*

30. The Commissioner accepts that there are public interest arguments in favour of disclosure. There is a public interest in openness and transparency and in understanding the marking decisions more clearly.

**Public interest arguments in favour of maintaining the exemption**

31. The DfE considered the following arguments in favour of maintaining the exemption:

[1] EA/2006/0011; EA/2006/0013

- The DfE is committed to providing the best quality education possible to all pupils: improving literacy and numeracy for all, stretching the most able pupils and supporting low attainers.

- Publishing the marking training materials (the MTM) is likely to endanger the policy intention behind the revised national curriculum, i.e. the 2014 curriculum providing a high-level description of what should be taught, but deliberately having less prescription around how to teach the curriculum in schools, leaving discretion for teachers.

- The MTM exemplify responses published in the KS2 mark schemes, providing further clarity on which answers are acceptable.

- Release of the 2016 and 2017 MTM, as produced for markers, is likely to adversely influence classroom practice, resulting in teachers teaching how to provide acceptable responses to test questions, rather than teaching the wider curriculum.

- The MTM were not designed with the intention of publishing them… They are used to support face-to-face marker training, where markers are given the opportunity to discuss the subject.

- The DfE considers there to be a real risk that if the 2016 and/or 2017 materials are released, the subject experts and contractors who develop the MTM will be more cautious about providing robust and expansive marking guidance. This would put the consistency and objectivity of the quality of marking at real risk.

- The DfE also believe that disclosure of this material into the public domain would be likely to add to teacher/school workload, as teachers…could be required by their school's leadership to continually refer to the MTM and plan their lessons to teach to the test (rather than to teach the curriculum in full).

- The scale of the materials developed to ensure that markers can apply the published mark schemes consistently and accurately is significant, with the full guidance covering over 1,700 pages and slides.

- Markers are only trained to mark for one subject and for one item type (1, 2 or 3). As teachers at KS2 teach all three subjects, they would need to review all of the materials in order to understand how to apply the mark scheme to a far greater depth than they need to be able to teach the curriculum. This would significantly increase their workload.

32. The Commissioner has viewed a small but representative sample of the 17 guides of the 2017 KS2 MTM (50mb). It is clear that the materials detail possible permutations of what might be accepted as correct or incorrect pupil responses for each question. One example is the listing of acceptable and unacceptable presentation of answers involving time (p14 of the Mathematics Marking Guidance, Marker Type 1)

33. The Commissioner understands the concern of the DfE that disclosure would be likely to compromise the policy intention of the revised national curriculum.

**Balancing the public interest arguments**

34. The Commissioner has considered both the complainant's and the DfE's public interest arguments.

35. The Commissioner accepts that the qualified person acknowledged the strong public interest in openness and transparency and she notes that the published mark schemes in May support this transparency.

36. However, the Commissioner understands that the very detailed MTM were designed to support the face to face training of the recruited markers to be consistent. The MTM provide possible examples of correct and incorrect answers and were not designed to support teaching in the classroom or intended to be published. The Commissioner understands the concern of the DfE that disclosure could lead to teachers using the MTM resulting in teachers teaching how to provide acceptable responses to test questions, rather than teaching the wider curriculum and this would endanger the policy intention behind the revised national curriculum.

37. In light of the above the Commissioner finds that although there is a significant and important public interest in the public understanding how the KS2 exams are marked, there is a greater public interest in allowing the DfE to retain the detailed MTMs as training materials for the markers.

38. The Commissioner finds that the DfE is entitled to withhold this information under section 36(2)(c).

**Right of appeal**

39. 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

40. 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.

41. 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 .....**

**Pamela Clements**
**Group Manager**
**Information Commissioner's Office**
**Wycliffe House**
**Water Lane**
**Wilmslow**
**Cheshire**
**SK9 5AF**