

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 May 2021

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

Decision (including any steps ordered)

1. The Education and Skills Funding Agency (ESFA) is an executive agency of the government that is sponsored by the Department for Education (DfE). ESFA corresponded with the complainant but, in the circumstances, the Commissioner is satisfied that the complainant's correspondence was, in effect, with DfE.
2. The complainant requested correspondence DfE holds about a decision to place a student in a particular school. DfE withheld all of the information under FOIA sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs), section 40(2) (personal data) and section 41(1) (information provided in confidence).
3. The Commissioner's decision is as follows:
 - Part of the information that DfE is withholding is exempt from disclosure under section 36(2)(c) of the FOIA and the public interest favours maintaining this exemption.
 - The remaining information is information provided in confidence and therefore exempt from disclosure under section 41(1) of the FOIA.
4. The Commissioner does not require DfE to take any remedial steps.

Request and response

5. On 9 January 2020 the complainant wrote to DfE on behalf of a school and requested information in the following terms:

“...I would like to see the correspondence that the Local Authority provided, please. The inaccuracy of their initial submission has left me feeling concerned that their latter ones may have been similarly misleading. I want to be reassured that the decision has been made with you being fully abreast of the facts. I remain confused and disappointed with the decision that has been made and want to know as much as possible about how this conclusion was drawn.”
6. DfE responded on 6 February 2020. It withheld the information the complainant had requested under section 40(2) and section 41(1) of the FOIA.
7. The complainant requested an internal review on 10 March 2020. With regard to the section 41 exemption that DfE is relying on, the complainant argued that “original correspondence” the local authority had had with DfE did not attract confidentiality and that any further information it provided at DfE’s request should therefore not attract confidentiality. The complainant further argued that if the local authority had explicitly stated that the information was given in confidence, that would not mean that it should necessarily remain confidential. Finally, the complainant said that they wished to satisfy themselves that the information the local authority provided to DfE was factual. If it was factual, the complainant said, they failed to see how there would be an explicit or implied obligation of confidentiality, given the relevance of this information to the school.
8. Following an internal review DfE wrote to the complainant on 9 July 2020. It maintained its reliance on section 40(2) and section 41(1) and at this point confirmed that it considered the information also engaged section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA, with the public interest favouring maintaining these exemptions.
9. The Commissioner will address here a matter that the complainant has raised with her about DfE’s late reliance on exemptions. Ideally, a public authority will have identified any relevant exemptions at the point of its initial response to a request. However, the purpose of the internal review process is for a public authority to reconsider its response to an information request. As a result of this process an authority may sometimes confirm that it is relying on a different or an additional exemption. The authority is entitled to do this, and the Commissioner has no concerns about that approach.

Scope of the case

10. The complainant contacted the Commissioner on 28 July 2020 to complain about the way their request for information had been handled.
11. The Commissioner will consider whether DfE can withhold the requested information under the exemptions it has cited, and the balance of the public interest, where appropriate.

Background

12. In its submission to the Commissioner, DfE has provided the following background and context to the request. In cases where a child has special educational needs (SEN) and an education, health and care plan (EHCP), local authorities (LAs), in conjunction with the child's parents and the advice of SEN advisors, may direct that a child attends the school/academy that is deemed best suited to their needs.
13. In certain instances, this can lead to disputes between LAs, parents and academies on the admission of pupils due, for example, to the need to make adaptations to premises and/or provision of equipment. Where there are areas of dispute DfE, on behalf of the Secretary of State, has the power to assess the LA's proposal to ensure they have made their assessment properly and can then direct an academy to admit a pupil, if it is in the child's best interests.
14. ESFA's role in these instances is to assess the reasonableness of the LA naming the academy in an EHCP, by determining whether they have followed the due processes. Where the LA intends to name an academy in an EHCP, it must consult with the academy and consider any comments. If disagreements are not resolved at local level, under section 496 of the Education Act 1996, complaints can be made to the Secretary of State for Education. The Secretary of State cannot intervene whilst consultation is ongoing. Following this consultation, the ESFA will review such cases if disagreements remain. The ESFA, on the Secretary of State's behalf, can then direct the academy to admit the child, or will ask the LA to reconsult or reconsider, if the ESFA was not content that processes were followed properly.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

15. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
16. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

Section 36(2)(c)

17. Section 36(2)(c) of the FOIA says that information held by a public authority is exempt information if, in the reasonable opinion of a qualified person, disclosing the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
18. DfE has provided the Commissioner with a copy of the information its section 36 submission to its Qualified Person (QP) indicates it is withholding under the section 36(2)(c) exemption. Having viewed the information, the Commissioner is satisfied that it falls within scope of the request, which is for correspondence DfE received from the local authority.
19. To determine, first, whether DfE correctly applied the exemption under section 36(2)(c), the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
20. In this case, the QP at the time of the request was Elizabeth Berridge, the Parliamentary Under-Secretary of State for the School System. Sub-section 36(5)(a) of the FOIA says that in relation to information held by a government department in the charge of a Minister of the Crown, any

Minister of the Crown is the QP. As such, the Commissioner is satisfied that the QP in this case is appropriate.

21. DfE has provided the Commissioner with the submissions it sent to the Minister, seeking her opinion with regard to its approach to the complainant's request. The Annex 1 document provided evidences the Minister confirming that, in her opinion, disclosing the information in question would be likely to have the effect set out under section 36(2)(c). The Commissioner is therefore satisfied that an opinion was given by the QP.
22. The request was submitted on 9 January 2020. The Minister's opinion is dated 8 July 2020, pre-dating DfE's internal review of 9 July 2020 when it first sought to rely on the section 36 exemptions. As such, the Commissioner is satisfied that the opinion was given at an appropriate time.
23. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
24. The QP'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 QP's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in public authority's interests to provide her with all the evidence and argument 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 all the section 36(2) exemptions, public interest arguments for and against disclosing the information and a recommendation. Relevant to section 36(2)(c), the Minister is provided with the following advice:

- Disclosing the information would put into the public domain the detail of DfE's concerns and discussions with relevant parties, including highly sensitive information. It is essential in such cases for DfE to have a 'safe space' in which to share such detail without fear of release.
 - Releasing this information would be likely to potentially damage the relationship and trust between DfE teams and the work that they have to undertake each year with local authorities. Such an outcome would make it very difficult to continue to pursue cooperative action in this case, or with other parties when these cases arise [in the future].
 - Disclosure would be likely to undermine both DfE's position as a neutral third party and the role it has to make an informed assessment of the local authority's decision. Effectively, this would require DfE to "publicly arbitrate" between the two parties.
 - It could also create the potential for authorities to take action that is not in the best interest of the child but avoids the need to work through DfE, out of fear that DfE will not make a fair assessment that accounts for the views of all the parties involved.
 - Disclosure would undermine the process of looking after children with SEN and making sure they attend schools that best suit their needs. DfE acting as an arbiter between local authorities and schools effectively undermines that process and takes away from the primacy of the local authority's decision. Withholding the information ensures that DfE can undertake its own role properly and that the responsibility of local authorities is not undermined in this and other similar cases.
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 section 36(2)(c) with regard to the information in question was appropriate.
28. The Commissioner has noted the evidence at paragraph 26 and, since she is satisfied that the remaining points at paragraph 19 have also been addressed, she must accept, having also reviewed the withheld information, that the QP's opinion about the information is one a reasonable person might hold. She therefore finds that DfE can rely on section 36(2)(c) to withhold the information to which it has applied this exemption. The Commissioner will go on to consider the public interest test associated with the exemption.

Public interest test

Public interest in disclosing the information

29. DfE considers that arguments for disclosure add up to an argument that more openness about the process may lead to greater accountability, an improved standard of public debate, and improved trust. It acknowledges that there is a general public interest in disclosing information to the public, to demonstrate that government is open and transparent.
30. In their complaint letter to the Commissioner, sent on 28 July 2020, the complainant says they accept that in some instances private discussions may be appropriate between DfE and local authorities, in their day to day business. However, in this case, the complainant says, DfE was reviewing a consultation process between the local authority and the school to determine if the local authority had acted reasonably in naming the school on a pupil's Education and Health Care Plan.
31. The complainant does not accept that the DfE should be entitled to rely on an exemption which keeps part of this decision-making process confidential and allows undisclosed discussions to take place with one of the parties to inform the outcome. The complainant considers that as a result of DfE's decision, this school has been required to use public funds to facilitate the education of a pupil. In the complainant's view it must be in the public interest for the process of determining how public funds are allocated and used in this way to be open and accountable.

Public interest in maintaining the exemption

32. DfE has put forward a number of arguments, with the following being most relevant to the section 36(2)(c) exemption:
 - DfE relies on information provided by key external partners, such as local authorities and school officials, as well as DfE officials, to help make informed decisions on the appropriate level of action to take when determining a suitable setting for a child with SEN. These types of deliberations need to remain confidential to ensure they are handled sensitively and appropriately.
 - If DfE is required to disclose the requested information, it would be likely to prejudice DfE's ability to deal effectively with such issues at the local authority and school level, as well as any future issues or concerns surrounding the placement of children with SEN. This could hinder DfE's ability to decide the best school setting quickly and effectively for such children in the future. The officials and external partners in question, as well as the children and parents involved, would be less likely to candidly engage in

such exchanges, particularly where sensitive, personal information surrounding the child and family has been shared. This could lead to DfE being unable to quickly decide on an appropriate setting for such children, and lead to children being out of education for longer than necessary. This would not be in the public interest and would certainly not be in the interest of the children and the parents involved.

- Releasing this information could potentially damage the relationship and trust between DfE and the local authority, as well as raise questions of confidentiality and trust with other local authorities. If this were the case, it would make it difficult to continue to pursue cooperative action in this case, or with other parties when such cases arise.
- Disclosure would also undermine the process for looking after children with SEN. Local authorities have responsibility for ensuring children have an effective ECHP and attend a school that best meets their specific needs. If DfE were, wrongly, to be seen as acting as an arbiter between the authority and the school, it would effectively undermine the assessment and decision-making process DfE has a key role in. It would take away from the primacy of the local authority's decision. Withholding this information not only ensures that DfE can undertake its own role effectively, but that the responsibility of local authorities is not undermined in this and other similar cases.
- Disclosing the information would be likely to prejudice the effective conduct of public affairs in the future, as it would remove the space within which officials and external parties are able to discuss options and issues freely and frankly. It would make it more difficult for DfE to work collaboratively and cohesively with schools and local authorities to ensure children are placed in the best setting possible.

Balance of the public interest

33. The Commissioner agrees with DfE that there is greater public interest in DfE being able to maintain an appropriate, cooperative and frank working relationship with the local authority in this case, and local authorities generally in cases where the placement of a child with SEN is being considered. These cases involve children with SEN who need to be placed in the educational setting that best meets their needs as soon as possible. The relationships between the parties involved, and the process of resolving disputes efficiently and robustly would be undermined if the withheld information were to be released, for the reasons DfE has given. The Commissioner is therefore satisfied that the

balance of the public interest favours withholding the information that DfE is withholding under section 36(2)(c). Because she finds the information engages section 36(2)(c), it has not been necessary for the Commissioner to consider DfE's application of the section 36(2)(b) exemptions to the information.

Section 41 – information provided in confidence

34. Section 41(1) provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.
35. In this case, DfE is withholding under section 41(1) the remaining information falling within scope of the request. Again, DfE has provided the Commissioner with this information and she has reviewed it.

Was the information obtained from another person?

36. DfE has confirmed to the Commissioner that all of the information was obtained by DfE from the local authority. As such, DfE obtained this information from another person. The Commissioner has reviewed the information and is satisfied DfE obtained it from another person and that the condition under section 41(1)(a) has been met.

Would disclosure constitute an actionable breach of confidence?

37. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
 - whether the information has the necessary quality of confidence
 - whether the information was imparted in circumstances importing an obligation of confidence; and
 - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
38. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial.
39. The Commissioner agrees with the position DfE states in its submission; namely that the information being withheld under section 41 is more than trivial because it concerns a specific student's education. DfE has told the Commissioner that the information is not publicly available or otherwise accessible and was only disseminated to a limited number of

recipients. In DfE's view, with which the Commissioner agrees, the information therefore has the quality of confidence.

40. **Circumstances importing an obligation of confidence:** This limb is concerned with the circumstances in which the confider of information passed the information on. The confider may have attached specific conditions to any subsequent use or disclosure of the information (for example in the form a contractual term or the wording of a letter). Alternatively, the confider may not have set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances (for example information a client confides to their counsellor).
41. The second of these appears to be more relevant here. In its submission, DfE says it is clear that schools and local authorities need to be able to provide details relating to any disputed placement of children with SEN in confidence. Given that the information was provided by the parties involved in confidence, DfE says it therefore has a duty of confidence to those involved in such disputed placements. Releasing the information would breach that confidence. DfE has also told the Commissioner that following contact from DfE, the local authority confirmed that it *did* expect its correspondence with DfE about the case to be treated in confidence when the local authority shared it.
42. The Commissioner has noted the complainant's arguments about the confidentiality or otherwise of the information, in their request for an internal review. However, given the nature of the withheld information and the sensitivity of the circumstances, the Commissioner is satisfied that the other person – the local authority – would reasonably expect that the information it provided to DfE would remain private and would not be disclosed to the world at large in response to a request made under the FOIA. The Commissioner therefore considers that the information being withheld was imparted in circumstances which gave rise to a duty of confidence.
43. **Detriment to the confider (or any other person):** In its submission DfE discusses the process by which it may become involved in a dispute and that contacts to it are made in confidence. DfE says that if local authorities believe that details about disputes in which DfE has been asked to be involved could become public they may consider not raising concerns with DfE. This in turn, DfE says, would be likely to prolong any such situations, limit the detail of the information provided and hinder DfE's ability to gain confidential insight into the issues raised.
44. The Commissioner must focus on the specifics of the case, that is whether disclosure would cause detriment to the local authority in question in this case – the confider - or any other associated person. She is satisfied that disclosure would have a detrimental impact on the

confider and another person in this case – the student concerned and their family, and to DfE itself. The student and their family are likely to be extremely distressed if their personal data and sensitive and private information about their circumstances was put into the public domain. And the local authority may be less inclined to approach DfE, or may be less frank with DfE, about this matter and similar matters in the future. The Commissioner agrees with DfE that this may also hinder its ability to gain confidential insight into issues raised, frustrate decision-making processes and prolong such disputes being resolved.

Is there a public interest defence for disclosure?

45. As has been noted, section 41 of the FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under the FOIA).
46. DfE argues that the greater public interest must lie in maintaining its ability to properly undertake its role in assessing requests to direct a child with SEN. DfE says it must also be able to receive candid and sensitive advice and undertake free and frank discussions around it with the relevant parties. Withholding this correspondence ensures that DfE's consideration of SEN admissions and its ability to make informed and fair decisions on the evidence available is not compromised.
47. The Commissioner appreciates why the complainant in this case has an interest in the information that DfE is withholding. However, the information is specific to a particular set of local circumstances and the complainant has not made a compelling case in there being any wider public interest in disclosing the information. As such, the Commissioner does not consider the complainant's interest outweighs the public interest in maintaining the duty of confidence in this case. She has concluded that there is a much stronger public interest in maintaining the obligation of confidence than in disclosing the information.
48. The Commissioner is therefore satisfied that the condition under section 41(1)(b) has also been met and that disclosure would constitute a breach of confidence actionable by the confider or another person.
49. Having considered all the circumstances of this case and the information being withheld under section 41(1), the Commissioner has decided that DfE is entitled to withhold that information under section 41(1) of the FOIA.

Right of appeal

50. 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@justice.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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