

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 November 2022

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

Decision (including any steps ordered)

1. The complainant requested from the Department for Education (DfE) information relating to major incidents at the DfE. The DfE provided the complainant with some of the information requested but applied section 31(1)(a) (law enforcement) of FOIA to the withheld information.
2. The Commissioner's decision is that the DfE was entitled to rely on section 31(1)(a) to the withheld information. Also, the public interest in maintaining the exception outweighs the public interest in disclosure. The Commissioner does not require the DfE to take any steps as a result of this decision.

Request and response

3. On 22 October 2021 the complainant wrote to the DfE and requested information in the following terms:

"Please can you tell me how many 'major incidents' there have been at the department over the past three years (academic years 2020-21,19-20,18-19 would be great, financial if not). Please break down per year. Please include details that describe each of the incidents."

4. On 17 December 2021 the DfE responded and provided the complainant with a breakdown of the Major Incidents by academic year. However, the DfE withheld information concerning the detail of major incidents, under section 31(1)(a) (the prevention or detection of crime) of FOIA.
5. On 7 January 2022 the complainant asked the DfE for an internal review. He said he does not believe that giving basic details of the cases would warrant the exemption which the DfE applied.
6. On 4 February 2022 the DfE provided its internal review response and maintained its original position to withheld information under section 31(1)(a) of FOIA.
7. During the Commissioner's investigation, the complainant decided to revise his request and asked for information to include details for only certain academic years:

"details that describe each of the incidents for the academic year 2020/21 when the Department had 34 Major Incidents."
8. The following analysis focuses on whether the DfE was entitled to apply section 31(1)(a) of FOIA to the revised request.

Reasons for decision

Section 31 – law enforcement

9. Section 31(1)(a) of FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice -

(a) the prevention or detection of crime,"
10. The DfE confirmed that it had provided the complainant with some information relating to his request, this was the number of major incidents that took place over the requested time period. With regard to the specific detail relating to the types of major incidents that took place, the DfE said that to release this information would be likely to leave the department vulnerable to crime, particularly cyber and security attacks.

11. The DfE explained that disclosure of this information could potentially reveal vulnerabilities to its online systems/processes and security. This, it said, could possibly lead to an increased risk in cyber-attacks and disruptions to the systems and services it uses to deliver policies. Therefore, having a negative impact on the general public, school sector relying on such systems/services, e.g. schools contacting the DfE in relation to emergency funding. The DfE further explained there is a potential risk that criminals would possibly be able to find weaknesses in its systems and access sensitive personal data. This includes internal DfE officials and external individuals e.g. teacher and children's data.
12. The DfE said the release of the detail associated with the major incidents could provide valuable information to those wishing to circumvent its security systems, "meaning that we would fail in our duty to help prevent criminal activity. This in turn would fail in our duty to assist those services providing us with law enforcement." The DfE considers that releasing the withheld information would be likely to prejudice its ability to exercise its functions for the purpose of preventing and detecting crime. The DfE said disclosure could also lead to officials modifying or being less candid in their future recording of such incidents, if disclosure of such information was a possibility, for fear that release could expose weaknesses to its systems that could be utilised by malicious parties.
13. The DfE stated how essential it is that officials are allowed to have this safe space to clearly record and share internally highly detailed descriptions of major incidents. It said withholding the requested information also allows experts to resolve and fix major incidents quickly and effectively, and to look at actions to prevent them from reoccurring. The DfE considers "to dilute the detail of these reports on incidents would be likely to delay resolution, and hinder protection and detection, due to concern that this detail could make it into the public domain and then be used nefariously by malicious parties."
14. The DfE considers to put this level of detail, and the sharing of intelligence between experts at risk, may result in criminal activity going unnoticed or taking longer than necessary for cyber-attacks and major incidents to be uncovered, assessed, investigated and resolved. It explained that such delays have the potential to have a significant negative impact on the DfE and individuals whose person data it holds.
15. The DfE referred to a previous decision notice where the Commissioner found in favour of the application of section 31(1)(a) of FOIA by a public authority. The DfE considers that the decision notice resembles this case, as the request is also for details relating to the nature of 'attacks' or 'breaches' that took place.

16. The Commissioner considers that in the responses from the DfE it has satisfied all three stages of the prejudice test set out on Hogan and therefore accepts that section 31(1)(a) is engaged. He finds that the chance of prejudice being suffered from disclosure of the requested information is more than a hypothetical possibility; it is a real and significant risk.

Public interest test

17. Section 31(1) is a qualified exemption and is therefore subject to the public interest test set out in section 2(2)(b) of FOIA. The Commissioner has considered whether in all the circumstances of this case, the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

Public interest arguments in favour of disclosure

18. The DfE recognises that disclosure of the information could enhance scrutiny of its ability to detect and prevent crime. In this instance, information related to major incidents, therefore providing transparency and accountability. The DfE said that there is a strong public interest in how effectively it safeguards personal data it holds, and how it addresses potential risks to this data being unlawfully accessed.

Public interest argument in favour of maintaining the exemption

19. The DfE argued that disclosure has the potential to prejudice its ability to prevent and detect crime committed by malicious parties. That is by accessing its systems through system weaknesses to the systems the DfE has in place, to hold personal data or deliver its policies.
20. The DfE considered a strong public interest in effectively maintaining accurate records of the detail relating to major incidents. This is to ascertain whether there are weaknesses in its systems that need to be addressed, and to ensure detailed and accurate records are kept to prevent future major incidents including security breaches reoccurring.
21. The DfE also considered a strong public interest in ensuring that its systems are secure and safe in order to prevent inappropriate access to personal data or to systems/services that could be disrupted, having a negative impact on individuals and system users. Disclosure could make this easier and lead to an increase in the number of major incidents occurring which the DfE argued would not be in the public interest.
22. The DfE concluded its argument by stating that disclosing information into the public domain which could make it easier for criminal parties to unlawfully access such data, would be irresponsible and not in the public interest.

Balance of the public interest arguments

23. The Commissioner acknowledges there is a strong public interest in reassurance, and that a public authority has appropriate measures to mitigate potential cybercrime. The Commissioner considers disclosure of the withheld information would reduce this level of reassurance, this is because malicious parties could access the DfE's systems through system weaknesses and/or cyber-attacks. It is in the public interest to ensure secure and safe systems are in place to prevent an increase in the number of major incidents occurring.
24. Having considered the arguments on the balance of the public interest test, the Commissioner concludes that the public interest in maintaining the exemption outweighs disclosing the withheld information in this case.

The Commissioner's position

25. The Commissioner is satisfied that disclosure of the withheld information would be likely to prejudice the prevention or detection of crime. Therefore, section 31(1)(a) of FOIA is engaged and the DfE was entitled to rely upon this exemption.

Right of appeal

26. 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

27. 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.
28. 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

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