

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 January 2023

Public Authority: Education Authority Northern Ireland
Address: 40 Academy Street
Belfast
BT1 2NQ

Decision (including any steps ordered)

1. The complainant requested information regarding the use of the interactive learning application "SeeSaw" in primary schools. Education Authority Northern Ireland ("EANI") confirmed that some information was not held and withheld other information under section 36(2)(b) (prejudice to effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that, in relation to parts 1-5 of the request, EANI confirmed that the information was not held and complied with section 1(1)(a) and that in relation to part 6 of the request, it was entitled to rely on section 36(2)(b) to withhold the information.
3. The Commissioner does not require EANI to take any steps.

Request and response

4. On 31 August 2022, the complainant made the following request for information to Education Authority Northern Ireland ("EANI"):

"1. Whether the Education Authority has issued any overall guidance, specific guidance or bespoke guidance/advice to specific primary schools on the use of the "SeeSaw" application. a. If so, provide copies of the above.

2. Whether the Education Authority has issued any overall data protection guidance, specific data protection guidance or bespoke data protection guidance/advice to specific primary schools on the use of the "SeeSaw" application a. If so, provide copies of the above.

3. Confirmation whether the Education Authority has provided guidance (overall or specific) or bespoke guidance/advice to primary schools on need for appropriate safeguards in relation to the transfer of data to the United States of America in relation to the use of the "SeeSaw" application. a. If so, provide copies of the above.

4. Confirmation whether the Education Authority has completed a data protection impact assessment (DPIA) for the use of the "SeeSaw" application. a. If so, please provide a copy of the DPIA

5. Confirmation whether the Education Authority has assisted or provided guidance/advice in any way to primary schools with instigation, review or completion of a DPIA for the use of the "SeeSaw" application. a. If so, please provide a copy of the DPIAs

6. Please provide copies of any emails, documents, memos, notes or other documents relating to "SeeSaw" produced or held by the Information Governance Team/Unit within the Education Authority from 25 May 2018 to present. This includes but is not limited to the Head of Information Governance, Information Governance Manager, Information Governance Officer and any other related staff within the team.

5. EANI's final position is that it does not hold the information in parts 1-5 of the request and that the information in part 6 of the request is exempt under section 36(2)(b) (prejudice to the effective conduct of public affairs).

Reasons for decision

6. The complainant has argued that, in relation to request parts 1-5, EANI failed to confirm or deny whether it holds relevant information and that, in relation to request part 6, it wrongly withheld the information under section 36(2)(b).
7. The reasoning below sets out the Commissioner's conclusions in relation to these matters.

Section 1 – duty to confirm or deny

8. Section 1(1) of the FOIA states:

“Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.”

9. The duty provided by section 1(1)(a) is commonly referred to as the duty “to confirm or deny” whether requested information is held.

10. EANI's initial response to the request of 6 October 2022 stated:

“Section 1(1)(a) of FOIA requires the Education Authority (EA) to inform a requester whether it holds the information specified in their request. I write to confirm, by virtue of Section 1(1)(a) of the Freedom of Information Act, that the EA does not hold information relating to Questions 1 to 5 of your request.”

11. EANI's response went on to say that:

“...the use of the SeeSaw learning service is not provided by EA or supported on any EA platform.”

12. Having considered the available evidence the Commissioner is satisfied that EANI's response confirms that the information in parts 1-5 of the request is not held.

13. In light of the above the Commissioner has concluded that EANI complied with section 1(1)(a) of the FOIA.

Section 36 – Prejudice to the effective conduct of public affairs

14. Section 36 of FOIA states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, prejudice the effective conduct of public affairs.
15. EANI has applied sections 36(2)(b) to withhold the information requested in part 6 of the request, namely, correspondence/information relating to SeeSaw.
16. EANI has explained that its Information Governance team (IG) provides support, advice and guidance to schools and to its own staff in relation to data protection and the FOIA. The withheld information falls within this category and EANI considers that disclosing the information would be likely to undermine the quality and nature of this dialogue in the future.
17. EANI has confirmed that, whilst the learning application “SeeSaw” (“SeeSaw”) is not provided by EANI nor is it supported on any EANI platform, schools are free to use it and it receives queries from schools in this regard. EANI considers that an outcome of disclosure could be that schools become reluctant to seek specialist advice, which could lead to increased risks of non-compliance with their data protection obligations with respect to the processing of personal data and breaches of the data protection principles.
18. In addition to suggesting that disclosure would result in a “chilling effect”, namely that disclosure would be likely to result in parties being reluctant to seek EANI’s advice and expertise, EANI has also argued that disclosure would invade the safe space needed in the formulation and provision of such advice.
19. EANI has argued that disclosure would inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation.
20. EANI considers that, where the IG team are asked to provide advice to either a school or another service, it is expected that there is protection for free and frank provision of advice to allow a safe space for both parties. Any proposed disclosure of such advice, EANI has argued, is likely to inhibit the free and frank provision of such advice and that section 36(2)(b) will apply in such cases.
21. The Commissioner has considered the relevant evidence and, he is satisfied that the designated qualified person in this case (the Chief Executive) provided an opinion regarding the inhibition referred to in

section 36(2)(b) and that the qualified person had an adequate level of knowledge of the issue.

22. The Commissioner is also satisfied that in the circumstances, it was reasonable for the qualified person to conclude that disclosure would be likely to pose a real and significant risk to the provision of advice and the free and frank exchange of views between EANI and the recipients of advice.
23. The Commissioner is satisfied that the opinion given by the qualified person that inhibition relevant to sections 36(2)(b)(i) and (ii) would occur as result of disclosure of the withheld information was reasonable, and so finds that the exemption at section 36(2)(b) was correctly applied.

Public interest test

24. Section 36 of FOIA is a qualified exemption, meaning that the Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption contained at section 36(2)(b) outweighs the public interest in disclosing the information.
25. EANI has acknowledged that there is a clear public interest in public authorities being as open and transparent as possible, so as to increase accountability and inform public debate.
26. The complainant has argued that there is a large public interest in understanding the guidance and advice that EANI has provided to schools regarding the protection of personal data, particularly in relation to concerns about SeeSaw.
27. The complainant has also argued that, whilst the information could have attracted a safe space during the course of considering the use of the SeeSaw a number of years ago, time has moved on and this protection is no longer required.
28. In relation to the public interest in maintaining the exemption, EANI has argued that there is a compelling public interest in preserving the safe space in which staff can deliberate issues and provide effective advice. EANI considers that it is important for staff to be able to have confidential dialogue and to exchange views freely and frankly. EANI has argued that advice provided and received must be detailed and candid if it is to be of value and for this to occur, staff must be free of any inhibitions that might interfere with their ability to offer comprehensive input based on free and frank discussion.

29. EANI has argued that disclosing the information might mean that sensitive issues may no longer be raised by schools or within EANI for fear that information might be disclosed and exposed to public comment. EANI considers that schools, in particular, need to feel that they can seek advice in a safe space and be open about the specifics of issues they are dealing with. Disclosure, EANI argues, would undermine the quality and nature of this dialogue, lead to a failure to seek advice and potentially result in increased risk of data breaches.
30. In considering where the balance of the public interest lies the Commissioner is mindful of the general interest in matters relating to primary school education and the protection of personal data. He also acknowledges the complainant's specific concerns around SeeSaw.
31. The Commissioner also appreciates that the exemption is designed to protect the integrity of and effectiveness of public authority decision making. He recognises that disclosing information which relates to advice given in a confidential context will facilitate further enquiries about actions taken in specific cases putting a burden on resources and potentially reducing effectiveness. Whilst openness is the essence of transparency and accountability such considerations need to be set against the public interest in allowing advice to be formulated and given in a way which does not inhibit its effectiveness.
32. The complainant has argued that there is no further need for a safe space as the decision in relation to SeeSaw has been taken, the Commissioner considers that this is not the case as the withheld information relates to ongoing requests for advice. The Commissioner, therefore, considers that the need for a safe space identified by the Qualified Person in this case remains.
33. The Commissioner appreciates that there are valid public interest grounds for requesting the information, namely, to ascertain whether EANI is providing effective advice and making proper decisions in relation to the handling of personal data in the context of primary schools and interactive learning applications. However, in this case, the Commissioner considers that disclosing the information would be likely to result in damage to EANI's effectiveness in these very respects, potentially causing damage to the public interest identified.
34. Having considered the relevant factors the Commissioner is satisfied that, in this case, the public interest favours maintaining the exemption. It follows that his decision is that EANI was entitled to rely on section 36(2)(b) to refuse the request.

Right of appeal

35. 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

36. 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.

37. 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

Christopher Williams
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF