

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 May 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Education (DfE) is entitled to rely on the FOIA exemptions under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to withhold some of the requested information about a review of a school. Section 36 concerns prejudice to the effective conduct of public affairs.
2. It's not necessary for DfE to take any corrective steps.

Background

3. DfE has provided a background and context to the request. It concerns a school that was judged inadequate as a maintained school and then again as an academy, after converting to academy status.
4. The sponsoring trust, with the local authority's agreement, temporarily closed the school as a result of the issues Ofsted identified.
5. The school re-opened with a new leadership team and additional support, at trust level, from another academy trust. Significant improvements were made, and a monitoring inspection reported that new leaders had acted quickly to address Ofsted's concerns.
6. DfE and the Education and Skills Funding Agency have jointly reviewed this case and compiled a lessons learned document.

Request and response

7. The complainant made the following information request to DfE on 3 August 2023:

“1. A copy of a review that DfE has undertaken of what happened at [redacted] (which received an inadequate Ofsted rating in January 2022).”

8. DfE disclosed the review report it holds, having first redacted some information in it. DfE’s final position is that the redacted information is exempt under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA.

Reasons for decision

9. DfE has disclosed the majority of the information in the requested review but has redacted some parts. This reasoning focusses on DfE’s application of section 36 of FOIA to the redacted information.

Section 36 – prejudice to the effective conduct of public affairs

10. Under section 36(2)(b)(i) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank provision of advice.
11. Under section 36(2)(b)(ii) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank exchange of views.
12. Under section 36(2)(c) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
13. All three exemptions at section 36(2) can only be engaged on the basis of the reasonable opinion of a qualified person. The qualified person (QP) in this case was Baroness Barran MBE, Parliamentary Under Secretary of State for DfE. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5)(a) of FOIA.
14. DfE has provided the Commissioner with a copy of its submission to the QP about the request. This shows that the QP gave their opinion on 15 September 2023. From the submission the Commissioner accepts that the QP gave their opinion that the exemptions were engaged, and that

they gave their opinion at an appropriate time ie in advance of DfE's response to the request on 25 October 2023.

15. The QP was provided with a copy of the request, the background and context and an explanation of all three section 36 exemptions and why DfE considered they were engaged.
16. Regarding section 36(2)(b)(i) and the provision of advice, it was noted that strategic meetings with trusts are only effective when all parties feel able to have open and honest conversations, including being honest about failings. The QP was advised that fear of the content these conversations being published may lead to future meetings being more restrained, and issues not being mentioned. It was considered that this would ultimately affect DfE's ability to make good evidence-based decisions and ensure the best services are delivered to the public.
17. Regarding section 36(2)(b)(ii) and the exchange of views, the QP was advised that, although Ofsted is duty bound to share complaints with DfE, releasing the detail of those complaints (which is provided to the department under a data-sharing agreement) could have a negative impact on both DfE's relationship with Ofsted and its willingness to provide sufficient detail in written communication in future. This risked, in turn, preventing DfE from having all the information it needs to make a decision about intervention action with schools or trusts.
18. Regarding section 36(2)(c) and otherwise prejudicing the conduct of public affairs, the QP was advised that disclosing the redacted information could lead to a whistleblower being identified. As a result, future whistleblowers could be discouraged from sharing information as the integrity of the process has been damaged. Not receiving information through this process could impede DfE's ability to act quickly when there are issues in schools and trusts. It was also noted that some of the redacted information was gleaned from a School Resource Management Advisor Report (SRMA), which are only shared between the trust and DfE. The QP was advised that releasing this information risked trusts being less candid with SRMAs in the future and could impact on how SRMAs themselves share written information with DfE. The consequence of this could be that DfE has less insight into the governance and financial operation of trusts on which to base decisions.
19. The QP's signed opinion confirms that they considered that disclosing the information "would be likely to" cause the prejudice envisioned under the three exemptions, rather than "would" cause this prejudice. The Commissioner will accept that the lower level is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring

20. It's important to note that 'reasonableness' in relation to the QP's opinion isn't 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's a reasonable opinion, and not necessarily the most reasonable opinion.
21. The Commissioner considers that the QP had sufficient information to enable them to make a decision on the matter, in this case. Based on the submission to the QP, the Commissioner accepts that the QP's opinion about withholding the redacted information under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA was a reasonable one.
22. The Commissioner finds that disclosing the information would be likely to inhibit strategic meetings with trusts to discuss schools, damage Ofsted's relationship with DfE, deter trusts from being frank with their SRMAs and deter future whistleblowers. (SRMAs are accredited sector experts that provide peer-to-peer advice to schools and academy trusts on using revenue and capital resources to deliver the best possible educational outcomes for pupils.)
23. DfE was therefore entitled to apply section 36(2) to the redacted information. The Commissioner has gone on to consider the public interest tests associated with these exemptions.

Public interest test

Public interest in disclosing the information

24. In their request for an internal review the complainant said that they believed that a local safeguarding report that they'd received contained the same information as some of that redacted from the report. They said that the safeguarding report wasn't redacted and that it was fairly easy to match up what had been redacted as the wording is exactly the same in some places. The complainant raised the same points in their complaint to the Commissioner.
25. The Commissioner doesn't know whether the complainant received the safeguarding report under FOIA, or through another route.
26. Regarding all three section 36(2) exemptions, in its submission to the Commissioner DfE has acknowledged that releasing the information could enhance scrutiny of its handling of allegations made or its whistleblowing processes and procedures, or both, and how it works with key stakeholders. DfE also confirmed that there's a public interest in how effectively the department takes action where serious allegations are made or incidents are identified.

Public interest in maintaining the exemptions

27. Regarding section 36(2)(b)(i), in its submission to the Commissioner, DfE has presented the following arguments:

- “The department relies on information provided within such lessons learned documents to help make informed and evidence based decisions around whether improvements into how our whistleblowing processes and our handling of allegations/incidents are required.
- The provision of advice, and the level of sensitive detail shared for these types of deliberations, need to remain confidential to ensure they are handled sensitively and all evidence and options can be considered during the drafting and assessment process of such lessons learned documents, so that we can put forward the strongest possible recommendations to senior officials if we deem improvements are required.
- If the department is required to disclose this information, it would be likely to prejudice the department’s ability to deal effectively with the clear and candid provision of advice and recommendations during the iterative process, and delivery of fully evidenced and considered lessons learned documents. This could hinder the department’s ability to fully consider a range of important issues when considering the handling and associated processes, where allegations are made or incidents identified, with key partners being less likely to candidly engage with the department going forward.
- It is essential that the department and its officials can provide such clear and honest advice to each other and to senior officials, when addressing whether there is a need to improve how such allegations are considered or incidents are handled, so that an evidence based approach can be taken to help deliver any improvements necessary. To unnecessarily jeopardise this could lead to improvements not being considered or implemented, thus potentially leading to lessons not being learned, and the avoidable repetition of processes that should have been improved.”

28. Regarding section 36(2)(b)(ii), in its submission to the Commissioner, DfE has presented the following arguments:

- “DfE officials and key stakeholders must have confidence that they can share professional views with one another and senior officials, and that there is an opportunity to understand and, where appropriate, challenge each other’s assumptions etc. as part of a process of assessment, deliberation and decision

making. The withheld information contains some frank comments regarding the named school in relation to their safeguarding procedures and processes.

- This is in the context of the department requiring candid information to be provided during any such lessons learned exercises and the recording of these exercises, to allow senior officials to be able to come to an informed conclusion regarding whether improvements need to be made around the handling of such incidents. If the department is required to put this information into the public domain, officials would be likely to be inhibited from providing such free and frank views and recommendations, for the purposes of deliberation, in such documents. This, in turn, would have a negative impact on the department's ability to discuss and consider such advice and opinion before making informed decisions as to whether improvements are required, in this instance to the handling of whistleblower allegations around safeguarding.
- Disclosure of the information outlined above would be likely to remove the space within which the DfE, particularly its officials and their senior colleagues, are able to discuss the evidence and detail put to them by key stakeholders and partners. Officials would also be more likely to dilute their views/opinions and any associated advice, should they fear this would make it into the public domain, with the possibility of jeopardising the relationships they and the department have with key organisations and delivery partners, both existing and future..."

29. Of relevance to section 36(2)(c), in its submission to the Commissioner, DfE has presented the following arguments:

- "The department relies on information provided by officials and key stakeholders/partners when considering incidents and whether lessons can be learned, and improvements made, to their handling. These types of deliberations need to remain confidential to ensure they are handled sensitively and effectively, and so that all views, opinions and stances can be considered, and the relevant evidence can be gathered.
- Officials must have confidence that they can share and discuss such lessons learned, so as to provide a fully considered and evidence based conclusion, which can lead to appropriate action being taken to improve our processes where required. This also allows officials to discuss and consider the findings and evidence associated with such lessons learned exercises in confidence, also ensuring that named schools are not open to scrutiny or accusations without evidence to support any allegations made. If

the department is required to put this information into the public domain, officials would be likely to be inhibited from providing free and frank exchange of views to resolve any issues raised around the handling of such allegations or incidents. This in turn would have a negative impact on the department's ability to conduct public affairs effectively when dealing with potential safeguarding issues.

- Disclosure of the information requested would be likely to prejudice the effective conduct of public affairs in the future, as it would remove the space within which officials able to freely and frankly discuss the evidence needed to learn lessons from such situations. It would therefore make it more difficult for the department to work collaboratively with its stakeholders and partners when undertaking such an exercise.
- The information presented by officials and key stakeholders/partners also contains reference to the specific allegations made against named schools. To release this information would be likely to be detrimental to the department's relationships with such organisations/partners, as the withheld information sets out the intelligence and evidence supplied by key partners. Officials need space to develop their thinking, carry out candid assessments, and explore options and potential implications when considering any intelligence and evidence provided. If the granular detail associated with this type of free and frank discussion were to be in the public domain, this would also be likely to reduce the effectiveness of advice given to senior officials in the future.
- Officials and key stakeholders/partners must have confidence that they can share their professional views when requested, for the inclusion in such lessons learned exercises and documents, and that there is an opportunity to understand and, where appropriate, challenge assessments and assumptions presented by them. If the department is required to put this information into the public domain, officials would be likely to be inhibited from providing this level of free and frank exchange of views for the purposes of deliberation, which in turn would have a negative impact on the department's ability to conduct public affairs effectively.
- Disclosure of 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 key stakeholders/partners can present their advice and evidence-based opinions and options relating to allegations made or incidents raised, freely and frankly. It would make it more

difficult for the department to work collaboratively and cohesively with the relevant parties to ensure that we can effectively consider, share and record what, if any, lessons have been learned and whether further action is required.

- If the department is required to disclose the requested information, it would be likely to prejudice the department's ability to effectively investigate and reflect on whether lessons can be learned and improvements are required. This could lead to the department being unable to fully and candidly present its analysis, evidence, and findings, or be harmful to the frank detail provided and exchanged between departmental and partner officials. This is even more relevant in this case, given that officials were clearly under the impression that the withheld information was being discussed and handled in confidence, hence the forthrightness in the advice/commentary provided and the detail around the allegations being made against named schools..."

Balance of the public interest

30. The Commissioner has found that disclosing the information being withheld under section 36(2)(b) and 36(2)(c) would be likely to prejudice the effective conduct of public affairs.
31. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
32. The QP in this case was the Parliamentary Under Secretary of State for DfE; as such they had the requisite knowledge of how DfE works and the consequences of any disclosure. Their opinion that the envisioned prejudice would be likely to happen therefore carries weight, though less than if they'd considered the prejudice would happen.
33. The Commissioner has next considered the timing of the request. In respect of section 36(2)(b), the public interest in being able to provide advice and exchange views about an issue freely and frankly will be greater if the issue is ongoing and live at the time of a request.
34. The review of the particular school in this case had been completed and therefore was not, itself, a 'live' issue. However, the envisioned prejudice is focussed on 1) similar strategic meetings with trusts in the future and parties' willingness to be open and frank in these meetings, 2) trusts continuing to be willing to be frank with their SRMAs and 3) DfE's ongoing relationship with Ofsted.

35. In respect of section 36(2)(c), the envisioned prejudice is focussed on whistleblowers being inhibited in the future, which is also therefore an ongoing concern.
36. The Commissioner has also considered the severity, extent and frequency of the envisioned prejudice or inhibition.
37. Regarding severity, the consequences of DfE making decisions about steps to take with a school or college, based on advice that isn't frank, without everyone's candid views and without all the necessary facts would be grave. And it would be harmful too, for students for example, if people – ie potential whistleblowers - weren't prepared to raise concerns they have about a school or college out of fear that they might be identified.
38. Regarding the extent and frequency, as noted, strategic meetings of the type that occurred in this case, discussions between trusts and their SRMAs will be necessary in the future, and DfE's relationship with Ofsted is ongoing. Somebody considering whistle blowing about a particular issue is also very likely to continue to occur in the future.
39. The Commissioner has balanced the above factors with the public interest in being fully transparent by disclosing the redacted information. The Commissioner considers that the disclosed information satisfactorily addresses the public interest in transparency about this particular school. He notes that the complainant also has a copy of the associated safeguarding report though it isn't clear whether that was disclosed under FOIA. Disclosure under FOIA is effectively disclosure to the wider world and so the consequence of disclosing information under FOIA is potentially more significant.
40. The Commissioner is satisfied that there's greater public interest in DfE having the confidence to have full and frank discussions with trusts, so that DfE's decision-making is robust. There's also greater public interest in DfE having a good working relationship with Ofsted and in trusts being willing to have frank conversations with their SRMAs. Finally, the Commissioner considers that there's greater public interest in protecting the whistleblower in this case and in ensuring others are prepared to speak up about any concerns they may have about a school or college in the future.
41. On balance therefore, the Commissioner accepts that the public interest favours maintaining the section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) exemptions.
42. In summary, the Commissioner has found that the redacted information engages the exemptions under sections 36(2), and the public interest favours withholding the information under these exemptions.

Right of appeal

43. 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

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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