

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 January 2014

Public Authority: Office for Standards in Education (Ofsted)
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has made a request for information including the training material used by Inspection Service Providers (ISPs) to train their additional inspectors. Ofsted provided links to published information which it believed answered part of his request together with explanations of its relationship with the ISPs. However it refused to provide the actual training material used by ISPs on the basis that it did not hold that material.
2. The Commissioner's decision is that this training material is held by the ISPs on behalf of Ofsted and therefore, in accordance with section 3(2)(b), is held by Ofsted for the purposes of FOIA.
3. Some additional inspectors also attend the training courses that Ofsted runs for its own staff. The training material used for such courses is clearly held by Ofsted and also falls within the scope of the request.
4. By failing to provide the information which is held by the ISPs on behalf of Ofsted and that which is directly held by Ofsted it is in breach of section 1(1)(b).
5. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Communicate the information to the complainant or issue him with a refusal notice explaining its grounds for refusing his request in accordance with section 17.

- The information in question is identified in a confidential annex which has only been provided to Ofsted.
6. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

7. On 29 May 2012, the complainant wrote to Ofsted and requested information in the following terms:
- a. "Can you provide whatever information OFSTED holds concerning the course contents, syllabuses, assessment and validation of the education and training of additional inspectors in all educational sectors in England and Wales?"
 - b. Can you provide whatever information OFSTED holds concerning the monitoring, management and measurement of the performances of Inspection Service Providers and registered inspectors during actual and after inspection of all education sectors in England and Wales?
 - c. Can you provide whatever information OFSTED holds concerning the analysis, evaluation to be conducted by additional inspectors on the planning, ingredients, structure, and teaching methodologies of 'Good, Satisfactory' and 'unsatisfactory' lesson in all education sectors in England and Wales?
 - d. Can you provide whatever information OFSTED holds concerning the expected analysis and evaluation to be carried out by additional inspectors on the quality of teaching, including the effects of teaching on learning and achievement in all education sectors in England and Wales?
 - e. Can you provide whatever information OFSTED holds concerning the expected analysis and evaluation to be conducted by additional inspectors in order to determine 'how well learners achieve and enjoy their learning?'"
8. The request was accompanied by a covering email which clarified the scope of the request;

"My research is not particularly interested in information about the 'level

of qualifications and training additional inspectors' are 'expected to have'. My research is interested as follows: who, exactly, is responsible for educating and training additional inspectors? What do whoever is responsible for educating and training additional inspectors actually teach to additional inspectors when they are being educated and trained? In other word, what are the course contents and syllabuses which trainee additional inspectors must learn and master? How is the education and training of additional inspectors assessed and who carries out the assessment? How is the education and training of additional inspectors validated, quality controlled and assured- and by whom?"

9. Ofsted responded on 28 June 2012. It stated that it did not hold the information requested in part a. of the request. In respect of the remaining elements of the request Ofsted provided links to published documents which it believed answered his questions.
10. The complainant submitted a request for an internal review on 7 July 2012. Unfortunately this was not, initially, recognised as such. Although Ofsted did later commence an internal review, due to delays in the process the Commissioner exercised his discretion to commence his investigation before the completion of that review.

Scope of the case

11. The complainant contacted the Commissioner on 31 January 2013 to complain about the way his request for information had been handled.
12. It became apparent that there had been some confusion over what exactly the complainant was seeking. This was in part because the complainant had originally phrased his requests as academic research questions. Therefore the Commissioner contacted him and asked the complainant to clarify precisely what information he was still trying to obtain. During a telephone conversation on 31 May 2013 the complainant confirmed that the information he was still seeking consisted of the actual course materials that were used to train additional inspectors. This is the information which Ofsted had told him was not held, ie the information requested in part a. of his request.
13. Ofsted has explained to the Commissioner that the ISPs are responsible for training up their additional inspectors and as such any training materials they use are held by the ISPs entirely for their own purposes and are not held by them on behalf of Ofsted. It follows that Ofsted believes it does not hold the information captured by part a. of the request.

14. The Commissioner considers that the issue which needs to be decided is whether the ISPs hold the requested information on behalf of Ofsted. This issue will be considered under section 3(2)(b) of FOIA.
15. Following email and telephone exchanges with Ofsted the Commissioner understands that Ofsted produces its own training packages for its own inspectors (Her Majesty's Inspectors). A number of additional inspectors are invited to Ofsted's training events and they then develop training materials for their respective ISPs based on the Ofsted training. The Commissioner considers that this training material also falls into the scope of the request. This issue will be considered under section 1.

Reasons for decision

Section 3(2)(b)

16. Section 3(2)(b) of FOIA states that for the purposes of FOIA information is held by a public authority if it is held by another person on behalf of the authority.
17. Ofsted has explained that it contracts with private sector companies, known as Inspection Service Providers (ISPs), which, as the name suggests, carry out inspections on behalf of Ofsted. To deliver these services the ISPs employ, what are referred to as, additional inspectors. The additional inspectors supplement the pool of inspectors and lead inspectors that Ofsted deploys to conduct inspections. They can work alongside Ofsted's own HM Inspectors. There are three companies which provide these inspection services.
18. Ofsted considers that contractually each ISP takes sole responsibility for training its additional inspectors. Whilst Ofsted obviously has an interest in whether the ISPs are delivering on their contracts, ie whether the additional inspectors are carrying out the inspections properly, Ofsted argues that it is not interested in how the ISPs are able to provide additional inspectors of the necessary quality to do so. The ISPs create the necessary training material and deliver that training to their staff. Ofsted does not consider that it has any control over how the ISPs provide that training. How an ISP solves the problem of fielding appropriately trained additional inspectors, at a competitive price, is the concern of the ISP. Therefore Ofsted is of the view that from both a contractual and a practical view, it does not hold any training material used by the ISPs.
19. Furthermore Ofsted has explained that the contract was purposely drafted in such a way as to make the ISPs responsible for ensuring that additional inspectors were adequately trained. If Ofsted itself was

responsible for training additional inspectors this would undermine Ofsted's ability to hold the ISPs responsible for the standard of inspections, ie if an ISP's performance was below standard, and Ofsted was responsible for the training, the ISP may try and blame the poor performance by its inspectors on the quality of the training.

20. In order to determine whether Ofsted does hold the training material the Commissioner has examined the template contract used for engaging the ISPs. The Commissioner has also been provided with copies of the actual training material used by the ISPs. This was provided to the Commissioner after he used his powers under section 51 to serve an information notice on Ofsted. In responding to the information notice Ofsted has explained that the ISPs had provided it with the training material as an act of good will and that their willingness to do so should not be taken as an indication that Ofsted does hold this information.
21. The Commissioner's decision that the training material is held by Ofsted is based on the terms of the template contract. In considering the contract the Commissioner has considered three issues; the actual services being provided, the extent to which the information held by the ISPs is held for the sole purpose of delivering those services and whether Ofsted has a right of access to that information. Before going into the details of the contract it will be useful to explain in broad terms why the Commissioner considers that the information is held by the ISPs on behalf of Ofsted.
22. In respect of the first issue the Commissioner considers that where a public authority outsources its services, the closer that service is to the public authority's core functions, the more likely it is that information relating to the delivery of that service will be held on behalf of the public authority. In this case it is the inspection of schools that is being outsourced. This is clearly a core function of Ofsted.
23. In respect of the second point, having examined the contract, the Commissioner is satisfied that the contract requires the additional inspectors to be properly trained and equipped with specific skills in order to do their job. It is clear from the contract that the ISPs were expected to provide training and to participate in the continual development of that training. Furthermore the ISP's were expected to harmonise the training so that the training provided by one ISP was recognised by other ISPs.
24. Finally the Commissioner is satisfied that the contract contains a clause which allows Ofsted access to the records of all the ISPs' activities relating to their performance of the contract.

25. It is for these reasons that the Commissioner is satisfied that the training material used by the ISPs is held by them on behalf of Ofsted. The Commissioner will now set out his analysis of the second and third issues.

The ISPs' contractual obligation to provide trained staff.

26. Schedule 6 of the contract sets out the competencies and skills that inspectors and lead inspectors must have. The list of competencies and skills form annex 1 of that schedule. In accordance with clause 6.5 of the main contract, under the heading 'Quality of personnel', the ISP has to ensure that its additional inspectors have the appropriate skills and competencies detailed in schedule 6.

27. This is reiterated in schedule 5 which is headed 'Service Specification' and sets out what the ISP is expected to provide under the contract. Under 'Principal requirements', clause 1.1(d)(i) the ISP must ensure additional inspectors meet or exceed the required competencies as set out in Schedule 6. The need for this to be achieved through training is made clearer in schedule 2 which states at paragraph 3.1,

"The Contractor will identify and deploy Additional Inspectors to carry out inspections; recruiting and **training** as necessary, and ensuring that such inspectors are competent, trained and assessed in accordance with Schedule 6" (emphasis added)

28. Then at paragraph 3.2 of Schedule 2 it states that,

"Additional Inspectors must be trained to deliver the new frameworks as appropriate. Ofsted will work with the Contractor to train a sufficient group of Additional Inspectors on a "train the trainer" basis in order to deliver the new frameworks.

29. It is clear that in order to deliver the inspections services, ISPs are required to have appropriately skilled staff. Those skills are prescribed in Schedule 6. It is clear that the ISPs are obliged under the contract to provide the necessary training to equip its inspectors with those skills.

30. Although the training is actually delivered by each ISP individually, it is apparent from other clauses in the contract that the training is 'harmonised', or standardised, so that the training provided by one ISP is recognised by other ISPs. This increases the mobility of the pool of additional inspectors allowing them to move from one ISP to another if they wish. This promotes the retention of quality staff. This 'harmonisation' is facilitated, in part, by clause 2.8(e)(ii) which requires ISPS to 'benchmark' the work force against other inspection providers. The issue is also dealt with in Schedule 7 of the contract.

31. In order to develop common approaches, structure and standards to the training, a Strategic Training Group has been established. The role of this group together with the ISP's obligation to participate in that group, is set out in paragraph 2.2 of schedule 7. Schedule 7 provides that this group will take forward issues on the quality and consistency of the training, how the training will be recognised across the different ISPs and the development of common accreditation for additional inspectors.
32. The Commissioner has also considered the minutes of the Strategic Steering Group dated 9 July 2013 in order to better understand how the group operates in practice. Without knowing who the individual attendees represent, it is difficult to know exactly which organisations were taking the lead in the different issues discussed. Nevertheless the Commissioner is satisfied that the minutes reveal that Ofsted shares material with the ISPs and there are a number of joint training events being run. The minutes give the impression that Ofsted exerts a degree of control over the training provided by the ISPs.
33. The provision of joint training, which seems more common in specialist areas of inspection work, is facilitated by clause 2.8 (d)(iv) of the main contract which requires ISPs to open training up to all inspectors as appropriate.
34. Further evidence of the contractual obligation of ISPs to provide training for its workforce, and how Ofsted exerts influence over that training, is provided by schedule 5 - 'Service Specification'. Under paragraph 1.1(g)(iv) the ISP is required to provide additional inspectors with appropriate and effective professional development in line with schedule 7. Schedule 7 provides further details of what professional development should consist of. At paragraph 1.1(d) Ofsted states its intention to ensure additional inspectors have the same standards of professional skills as its own staff. At paragraph 1.2 Ofsted requires the ISP to develop in partnership with Ofsted and other ISPs, training and professional development for inspectors. Again the training relates to the competencies set out in schedule 6 and refers to the 'badging' of training so that it can be recognised by all ISPs.
35. The Commissioner considers that the contents of schedule 7 make it clear that Ofsted expects training to be provided and has a means of influencing and controlling that training through the Strategic Steering Group, even if the training materials are developed by the ISPs and it is they who actually deliver it.
36. The Commissioner is satisfied from the terms of the template contract that ISPs are expected to train its workforce in order to provide a pool of competent and appropriately skilled additional inspectors. This is an integral part of the contract. Ofsted has a vested interest in having

access to this pool of appropriately trained additional inspectors to ensure it can carry out its statutory duties. To this end there needs to be coordination and structure to this training which Ofsted oversees through the Strategic Steering Group. Therefore not only is the training a requirement of the contract, Ofsted influences the content of that training and in practice, exerts some degree of control over it. This strongly suggests to the Commissioner that the training materials used are held on behalf of Ofsted. He has therefore gone on to consider whether Ofsted has a right of access to this information.

Ofsted's right of access to the training material used by the ISPs

37. Under clause 15.1(a) of the main contract the ISP is required to maintain a complete and accurate set of records relating to all activities relating to its performance of the contract. The Commissioner considers that the training an ISP delivers to its workforce is clearly an activity that relates to its performance under the contract.
38. Clause 15.6 then requires the ISP to,

"... promptly provide Ofsted with such information, relating to this Agreement and the provision of the Services, as Ofsted may from time to time reasonably request."
39. The Commissioner is satisfied that this clause provides Ofsted with a right of access to the training materials which the ISPs use to deliver the training.
40. Furthermore, clause 12.1 obliges the ISP to comply with what are described as the 'security requirements' set out in Schedule 11. Paragraph 2.1 of Schedule 11 states that the ISP shall comply with UK legislation including FOIA. The Commissioner considers this means that the ISP would understand that any information they held on behalf of Ofsted was covered by FOIA.
41. In light of these provisions, and in particular clause 15.6, the Commissioner is satisfied that Ofsted does have a right of access to the training material held by the ISPs.
42. Although a public authority's right of access to information held by a third party does not in itself mean that information is held by the third party on behalf of the public authority, when taken with the other provisions of the contract, the Commissioner is satisfied that the training materials are held by the ISPs on behalf of Ofsted. The training material is used to deliver the training which is an integral requirement of the contract. That training is influenced by Ofsted and Ofsted certainly oversees the broad, strategic development of that training. One of the contracts aims is to create and retain a pool of well-trained inspectors.

All this taken together with Ofsted's rights of access to this material leads the Commissioner to conclude that the information is held by Ofsted under section 3(2)(b) of FOIA.

43. Ofsted are required to communicate this information to the complainant in accordance with section 1 or serve a refusal notice under section 17 explaining its grounds for refusing the request.

Section 1 – duty to communicate Ofsted's own training materials.

44. Section 1 provides that upon receipt of a request a public authority is obliged to communicate the information falling within the scope of the request to the applicant.
45. In addition to the training material used by the ISPs to train their own staff it became apparent during the course of the Commissioner investigation that Ofsted also invites some additional inspectors to attend the training courses that Ofsted provides for its own HM Inspectors. This is done as part of the 'train the trainer' programme referred to in paragraph 28 of this notice. The additional inspectors attend the training event to help them develop their own training packages.
46. The Commissioner is satisfied that this material falls within the scope of the request. If the 'train the trainer' programme was concerned with imparting the actual skills required to deliver training, the Commissioner would take a different view. However the objective of these training events is to equip inspectors with the necessary inspection skills. As such the events directly provide inspection training for the additional inspectors attending them. Furthermore, the course contents are also very likely to be closely reflected in the training material then delivered to other additional inspectors.
47. Ofsted has provided the Commissioner with copies of the training material that it currently holds from the training events which it ran from September 2011 to June 2012 and which it has identified as being held at the time of the request. The Commissioner understands that Ofsted delivers its training through a series of conferences and meetings with a bespoke presentation and related material being created for each event.
48. Ofsted has informed the Commissioner that it has a retention policy which requires all materials used at such conferences to be destroyed after a year. This explains the limited amount of material that Ofsted holds directly and which falls within the scope of the request.
49. The Commissioner finds that by failing to provide this information in response to the request Ofsted has breached section 1(1)(b) of the Act.

Ofsted are now required to communicate this information or issue a refusal notice explaining its grounds under section 17.

Other matters

50. During the course of the investigation, when gathering the information from the ISPs, Ofsted explained to the Commissioner that it believed that the cost of complying with the request would exceed the appropriate limit. The appropriate limit is an amount set out in regulations made under the Act. If the cost of locating and retrieving the requested information exceeds that limit, a public authority is not required to provide the information. The Commissioner has not made any finding on this point but recognises it as a possibility. However the Commissioner considers that it is important to first determine what information is potentially available to the complainant ie what information Ofsted holds falling within the scope of the request.
51. If a public authority refuses a request under section 12 it is obliged to provide the applicant with advice and assistance in order to help them refine their request so that it can be dealt with within the cost limit. It is necessary to understand the breadth of the information held in order to give appropriate advice and assistance. Only then can the public authority have a meaningful dialogue with the applicant as to which elements from the entire body of information held, he is most interested in and would want to refocus a refined request on.
52. Therefore if Ofsted does wish to apply section 12 to the request the Commissioner would expect Ofsted to make the complainant aware of the whole range of information that the Commissioner considers Ofsted holds and which falls within the scope of the request.
53. In respect of the training material used by Ofsted itself when delivering its own training the Commissioner has the following comments. Ofsted has questioned whether all this information falls within the scope of the request. The request is concerned with the provision of training of inspectors in **all educational sectors**. The Commissioner has considered the information which Ofsted has provided him with. Some of the training courses do not relate to the inspection of what might commonly be understood to be an 'educational sector', for example Children's Centres. However the scope of the request is broad. If Ofsted do consider refusing the request under section 12, the Commissioner would expect Ofsted to take the opportunity provided by the requirement to provide advice and assistance to clarify whether the complainant is interested in the inspection of such establishments.

54. Finally, having looked at the information provided by Ofsted, he recognises that some of the material contains personal data, for example lists of delegates attending courses. Ofsted has correctly highlighted that such information may be exempt under section 40 FOIA. Section 40 provides that information is exempt and should not be disclosed if that disclosure would breach any of the principles of the Data Protection Act 1998 (DPA). In complying with this decision notice and deciding whether to apply exemptions to the information it holds, the Commissioner would expect Ofsted to have regard for its obligations under the DPA.

Right of appeal

55. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

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

56. 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.
57. 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

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