

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 April 2015

Public Authority: The Office for Standards in Education,
Children's Services and Skills

Address: Aviation House
125 Kingsway
London
WC2B 6SE

Decision (including any steps ordered)

1. The complainant has requested the disclosure of the date the Office for Standards in Education, Children's Services and Skills (Ofsted) received a nursery's application recording a change in its registration. Ofsted considered this information was exempt information under the 'commercial interests' (section 43(2)) exemption in FOIA and found that on balance the public interest favoured maintaining the exemption. The Commissioner's decision is that section 43(2) of FOIA is not engaged and therefore the requested information should be provided.
2. 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

3. On 19 September 2014 the complainant wrote to Ofsted and requested the following information:
 1. *Regarding [a named nursery] which shows as "closed" on your website: The date the nursery was "closed" (or de-registered) in Ofsted's records and the reason.*

2. *Regarding [a named nursery]: The date the application to register was received (I can see on the website the registration was effective from 13th August 2014, I want to know how long before that the process began).*
4. Ofsted responded on 14 October 2014. Ofsted agreed to the disclosure of the date that the nursery specified in request 1 ceased being active but withheld the registration date for the nursery cited in request 2 on the basis that the 'commercial interests' (section 43(2)) exemption applied. The exemption is qualified by the public interest test and Ofsted found that in the circumstances the public interest in maintaining the exemption outweighed the public interest in disclosure.
5. The complainant wrote to Ofsted on 17 October 2014 and asked it to carry out an internal review into its decision to refuse compliance with request 2. A separate request for information was also made by the complainant, although this does not concern the present notice. The internal review was completed and the outcome provided by Ofsted on 10 November 2014. The reviewer upheld the original position taken by Ofsted with respect to the request.

Scope of the case

6. The complainant contacted the Commissioner on 24 November 2014 to complain about Ofsted's decision to refuse the disclosure of the registration application date for the nursery specified in request 2.
7. Ofsted has informed the Commissioner that it is only seeking to rely on the 'commercial interests' (section 43(2)) exemption in FOIA as the basis for withholding the requested information. The Commissioner's view on Ofsted's reliance on the exemption is set out in the remainder of this notice.

Reasons for decision

Section 43(2) – commercial interests

8. Section 43(2) of FOIA states that information is exempt information if its disclosure under the legislation would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). A commercial interest relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services.

9. The section 43(2) exemption is prejudice-based. In the view of the Commissioner and differently constituted Information Tribunals, this requires a public authority to demonstrate that a three-stage test is met.
10. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable interest described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure, with a public authority able to demonstrate that either disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. Section 43 is also qualified by the public interest test. Accordingly, even if it is found that the exemption applies to the requested information, a public authority must consider whether on balance the public interest favoured disclosure.
11. Ofsted has argued in this case that it is the commercial interests of the nursery specified in the request that are stake with regard to the disclosure of the requested information. In terms of the nursery's commercial interests, the Commissioner has been informed of the damage that the release of the information could do its business reputation and the confidence that parents have in its ability to operate effectively and safely. This, in turn, may discourage parents from using the nursery's services – an effect that if it occurred would harm the nursery's commercial activities. The Commissioner accepts that the prejudice cited by Ofsted is applicable to the exemption. His next step is therefore to consider whether a link has been established between the information that has actually been requested and the commercial interests of the nursery.
12. Where a public authority claims that it is the commercial interests of a third party that should be considered, the Commissioner will not take into account speculative arguments regarding the nature and severity of any prejudice. Rather, any arguments for the exemption of section 43(2) must have originated from the third party in question. This approach reflects the one adopted by the Information Tribunal in *Derry City Council v Information Commissioner* (EA/2006/0014, 11 December 2006)¹.
13. Upon being informed of the Commissioner's involvement, Ofsted has explained that it invited the nursery to provide further clarification of its

¹ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i69/Derry.pdf>

concerns regarding disclosure. Ofsted has confirmed that the information provided by the nursery forms the basis of its response to the Commissioner, with extracts of the nursery's response and other evidence also being supplied for the benefit of the Commissioner. The Commissioner is satisfied that the concerns referred to by Ofsted accurately reflect the concerns of the nursery. The Commissioner has therefore gone on to consider the substance of the prejudice claimed in respect of the nursery's commercial interests.

14. The Commissioner accepts that damage to an organisation's reputation in a commercial sphere, and the confidence that stakeholders and prospective customers have in that organisation, may be legitimate factors in terms of demonstrating a prejudice to a party's commercial interests. This is acknowledged by the Commissioner in his guidance² on the operation of section 43(2) of FOIA.

There may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers, suppliers or investors may have in a company. It may be that releasing such information has a significant impact on revenue or threatens its ability to obtain supplies or secure finance. In these circumstances the commercial interest exemption may be engaged. However it should be noted there is no exemption for embarrassment, only where there is a real risk of such harm being caused could the exemption be engaged.

15. According to Ofsted, the nursery in question believes it is currently subject to a dedicated campaign designed to damage its commercial reputation. The nursery considers the requested information could be used in the furtherance of this campaign, as it is directly linked to an issue that has already been the focus of some dispute.
16. The point of dispute was that a change in the nursery's company name was not promptly updated in the Ofsted registration. This has led to allegations that there was a period of time during the crossover that the nursery was not properly insured; something the nursery vigorously contests.
17. Ofsted has confirmed it is common knowledge that the nursery initially failed to notify it of changes to its registration; being highlighted in a

² https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

report produced by Ofsted into a complaint made against the nursery. However, it is argued that disclosure of the date of registration would fuel further attempts to discredit the nursery and potentially lead to claims against the organisation. Although the nursery considers that these claims would be groundless, they believe that simply by being repeated the allegations would cast a shadow on the business. Furthermore, there is an inherent difficulty – including issues of cost – associated with the comprehensive rebuttal of allegations of this nature.

18. The Commissioner accepts that the nursery has genuine concerns about what it sees as a co-ordinated campaign against it. Reflecting these concerns, the Commissioner understands why the nursery would be anxious about the disclosure of any information relating to a point of dispute. However, the Commissioner also considers that it does not automatically follow that the disclosure of any item of information about the nursery will be harmful to its commercial interests. The role of the Commissioner is therefore to decide whether a real link can be made between the information that has *actually* been requested and the prejudice being claimed.
19. Having reviewed the arguments initially made by Ofsted on behalf of the nursery, the Commissioner informed Ofsted of his preliminary view that the arguments as presented did not appear to satisfy the second and third conditions of the prejudice test; namely, that there is a causal link between the disclosure and the prejudice claimed *and* the risk of prejudice occurring is real and significant. This was based on two principal observations.
20. Firstly, it was far from certain that an administrative issue which now firmly belonged in the past would deter parents from using the nursery's services in the future. Secondly, it was not clear that the disclosure of the registration date could be used as a platform from which to generate further allegations against the nursery. In other words, it was not evident how provision of the registration date could create a greater degree of uncertainty about whether the nursery's insurance was invalidated during the period when the registration details had not been updated. The fact remained that Ofsted's report had already identified an issue with the registration of the nursery.
21. Ofsted, in response, has argued strongly against both of these points. Ofsted highlighted that parents will use a range of information to decide where to send their child to nursery. In this instance the requested information is from the same time period as the latest inspection report, so may be afforded considerable weight in a parent's decision-making.
22. Ofsted has clarified that it is not claiming that the administrative matter in itself would deter parents from using the nursery's services. Rather,

based on past behaviours, Ofsted considers it is reasonable to conclude that the requested information would be used to unfairly damage the nursery's reputation. In turn, this would place the nursery at a serious disadvantage to its competitors, which are unlikely to be encumbered by a similar negative campaign.

23. Overall, Ofsted considers that the Commissioner's initial findings underestimated the strength of the campaign against the nursery and the damage that could be caused through disclosure. Indeed, Ofsted considers that to deny a link exists between disclosure and the prejudice would be perverse. This is particularly true, in Ofsted's view, because of the risk that the information could be used to support a claim made against the nursery on the insurance issue.
24. FOIA is applicant and motive blind. As previous decisions of the Commissioner have stressed, and being guided by the Tribunal's findings at paragraph 80 of its decision in *S v Information Commissioner and the General Register Office (EA/2006/0030, 9 May 2007)*³, there is no provision for the public authority to look at from whom the application has come, the merits of the application or the purpose for which it is to be used. However, the Commissioner also agrees with Ofsted that FOIA does not limit a public authority to consider information that has been requested in isolation from all else. Indeed, the nature and severity of any prejudice may only emerge when the context in which the request was made is taken into account.
25. From the evidence provided, and as stated, the Commissioner appreciates the reasons why the nursery would be concerned about any disclosure. However, it is not disputed that the nursery had already attracted negative attention. The Commissioner considers there is insufficient evidence to find that the requested information could be used in a way that would further harm the nursery. In forming this view, the Commissioner placed weight on the fact that it was already common knowledge the nursery had failed to notify Ofsted of changes to its registration, albeit the precise details of this failure had not been made public.
26. Whilst the Commissioner does not rule out the possibility that the campaign against the nursery is having a destabilising effect, in his opinion it has not been demonstrated that the disclosure would extend, or add to, the harm that the nursery had already experienced. On this basis, the Commissioner has decided that the second and third stages of

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i147/S.pdf>

the prejudice-test are not satisfied, with the result that section 43(2) is not engaged. Accordingly, the Commissioner has not been required to consider the public interest test.

Right of appeal

27. 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@hmcts.gsi.gov.uk

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

28. 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.
29. 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

Gerrard Tracey
Principal Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF