

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 December 2015

Public Authority: Department for Education
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Education ("DfE") relating to guidance from the DfE to Ofsted regarding the changes to 'British values' in schools. The DfE refused to disclose the requested information, citing section 36(2) of FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the DfE has correctly applied section 36(2)(b)(ii) of the FOIA in this case and that the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information.
3. Therefore, the Commissioner requires no steps to be taken.

Request and response

4. On 17 December 2014, the complainant wrote to the DfE and requested information in the following terms:

"Please would you tell me what guidance, circulars, communications or information has been sent by the Department for Education to Ofsted personnel in relation to the changes to spiritual, moral, social and cultural development of pupils arising from the changes to 'British values' which took effect in September 2014. Please provide copies of any such guidance, circulars, communications or information. My request relates to both maintained schools and independent schools."

5. The DfE responded on 6 February 2015, stating that responding to the complainant's request would exceed the cost limit under section 12 of FOIA. It offered the complainant the opportunity to refine his request or narrow its scope. The complainant then did so on 10 February 2015. The DfE replied on 20 March 2015 stating that it was refusing to disclose the requested information, citing section 35(1)(a) of FOIA as a basis for non-disclosure. The complainant sought an internal review of the DfE's decision on 18 May 2015.
6. Following an internal review the DfE wrote to the complainant on 16 June 2015. It stated that it did not hold part of the requested information (instructions to OFSTED) but did hold information which constituted advice to Ofsted ("the withheld information"). It refused to disclose that information, citing section 36(2) of FOIA as a basis for non-disclosure.

Scope of the case

7. The complainant contacted the Commissioner on 26 June 2015 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DfE has correctly applied section 36(2) of FOIA to the withheld information.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

9. Section 36(2) of FOIA provides that:-

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the FOIA-

(b) would, or would be likely to, inhibit –

- (i) the free and frank provision of advice, or
- (ii) the free and frank exchange of views for the purposes of deliberation

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

The engagement of section 36

10. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
11. The DfE confirmed that the opinion in relation to the application of section 36(2) was given by the Minister. The Commissioner is satisfied that this was the appropriate qualified person under FOIA.
12. The DfE also confirmed to the Commissioner the dates on which the qualified person's opinion was sought and given. It also confirmed that he was provided with all records within the scope of the complainant's request and with full submissions regarding the application of section 36(2), including arguments for and against its application.
13. The qualified person was of the opinion that section 36(2) was engaged as the prejudice in that section would be likely to occur should the withheld information be disclosed. This would be likely to occur for the following reasons:-
 - Documentation relating to school inspection, including the inspection framework and handbook, is the responsibility of Her Majesty's Chief Inspector, but must take account of government policy. Ofsted routinely shares early drafts of its documentation to enable officials from both departments to check factual accuracy and to exchange views on content. This engagement occurs on the basis of a relationship of trust and co-operation between the parties, and leads to a higher quality product.
 - Ofsted values a collaborative approach during the development stage, which helps to ensure that the documents have the greatest impact in terms of supporting effective school accountability and improvement. The documents cover all the areas that inspectors assess when they visit schools. The precise wording and coverage of the documents has implications for a wide range of DfE policy areas, and a significant impact on the inspection of schools.
 - The inclusion of a specific focus on schools' promotion of fundamental British values represented a change to the existing inspection arrangements and it was important that Ofsted officials were fully aware of government policy in the area. The

withheld information shows a DfE official drawing Ofsted's attention to the fact that Ministers would want to see further strengthening of the draft text, drawing Ofsted's attention to other guidance for the purposes of consistency and making drafting suggestions to strengthen the handbook. If officials felt these deliberations would enter the public domain, they would be less likely to enter into exchanges both in terms of offering advice and debating views. Less effective engagement between the two departments during the development of the inspection documentation would be likely to affect the accuracy and quality of the documents.

- If the handbook were less specific about the inspection of fundamental British values, this in turn would be likely to prejudice the effective conduct of public affairs by rendering the inspection process less effective. This could lead to more unreliable or inconsistent information about schools' promotion of fundamental British values in schools, and greater uncertainty in schools about what is expected of them. It could damage public confidence in the inspection process itself and the accountability of schools for values developed in the pupils attending them.
 - Furthermore, disclosure could damage the relationship between the departments, which is important in maintaining and developing the inspection process and ensuring public confidence in it. This damage could also prejudice the effective conduct of public affairs.
14. The Commissioner notes that his guidance on section 36 makes clear that:
- "The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion."* (para. 21)
15. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.

16. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to conclude that section 36(2) applied to it.
17. The qualified person's opinion was that all three limbs of section 36(2) applied to the withheld information. The Commissioner is of the view that section 36(2)(b)(ii) applies to the withheld information in its entirety. He has not therefore considered the application of other limbs of this exemption.
18. As section 36 is a qualified exemption, it is necessary to consider the public interest test. Section 2(2)(b) of the Act states that a public authority may refuse to disclose information requested if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
19. The Tribunal in *Guardian & Brooke*¹ indicated the distinction between the consideration of the public interest under section 36 and the consideration of the public interest under the other qualified exemptions contained within FOIA.

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice."

20. The Commissioner agrees with the view of the Tribunal as set out above. The fact that it is "not for the Commissioner to form an independent view..." does not prevent him from considering the severity, extent and frequency of any prejudice or inhibition which might occur when he is assessing the public interest. Whilst the Commissioner can and should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should also consider the severity, extent and frequency of the likely prejudice or inhibition which would be likely to be caused by

¹ EA/2006/0011 and EA/2006/2013

disclosure of the information withheld under section 36 and any relevant subsections.

Public interest arguments in favour of disclosing the withheld information

21. The DfE acknowledged that there are several factors which favour disclosure, including openness and transparency in relation to the DfE's role and accountability to the public.
22. The DfE considers that there is a strong public interest in the public having the ability to understand the basis on which decisions which may affect them are taken. The DfE considers that disclosure of the withheld information may inform public debate and lead to improved trust in those decisions.

Public interest arguments in favour of maintaining the exemption

23. The DfE has informed the Commissioner that it considers a robust and fair decision-making system to be of paramount importance. Such a system relies on considering all points of view before reaching a reasoned conclusion. To do this, all parties should be able to speak freely and frankly, to challenge, to ensure that issues are debated widely and that decisions are based on broad and balanced evidence. DfE Ministers and officials do not control the content of inspection documents – that is the responsibility of the Chief Inspector. For that reason, it is essential that officials from both departments have a clear understanding of the position of those setting policy direction in deciding what to include. If there is a risk that sensitive discussions may be opened up to public scrutiny, officials may be less likely to enter openly into the decision making process, resulting in a reduction in quality of the final decision.
24. The DfE also considers that good government depends on good decision-making and this needs to be based on the best advice available and a full consideration of the options. The exchanges contain advice provided to Ofsted about the government's policy on British values and Ministerial reaction to the existing version of the draft. The published *Framework* needs to be based on a clear understanding of the issues underpinning government policy on the promotion of British values in schools. This was the reason for sharing drafts between Ofsted and DfE and exchanging advice on the operation of the policy area on a confidential basis early in the drafting process. If such comments were to be released, it is likely that advice provided to Ofsted could be less candid in future and decision making could be

impaired.

Balance of the public interest arguments

25. The Commissioner considers that there is a strong public interest in openness and transparency and in furthering public understanding of the process of discussion which leads ultimately to decision-making within public authorities such as the DfE. Disclosure of the withheld information may increase public trust and confidence in the DfE and its decision-making processes.
26. Whilst there are strong arguments in favour of disclosing the withheld information, the Commissioner considers that there is a strong public interest in the DfE being able to discuss issues freely and frankly and to be able to have the space to consider all issues and make informed decisions. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision.
27. The Commissioner considers that, as it is extremely important to allow public authorities such as the DfE the space in which to deliberate issues such as British values in schools on a confidential basis, to ensure completely free and frank deliberations, in this case the public interest in favour of disclosure of the withheld information is outweighed by the public interest in maintaining the exemption contained at section 36(2)(b)(ii) of FOIA.

Right of appeal

28. 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

29. 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.
30. 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

Deirdre Collins
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