

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 August 2012

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

Decision (including any steps ordered)

1. The complainant requested from the Department for Education ("DfE") all correspondence about the Tottenham Palestinian Literature Festival, including communications to the Secretary of State which may have prompted him to intervene in relation to schools participation in workshops organised as part of the festival and his responses to those communications. The DfE withheld some of the requested information under sections 36 and 40(2). The Commissioner's decision is that the DfE has correctly applied section 36 to the withheld information. The Commissioner does not therefore require the DfE to take any further steps to ensure compliance with the legislation.

Request and response

2. On 3 November 2011, the complainant wrote to the DfE and requested the following information:

"...all official correspondence on the Tottenham Palestinian Literary Festival – in particular, communications to the Secretary of State drawing his attention to this event which may have prompted him to intervene as he did – and his responses to such communications."
3. The Tottenham Palestine Literature Festival is an arts festival which was set up with the stated aim of "talking, listening, debating and learning about Palestine through the prism of books, songs, films and photography". As part of the festival, workshops were offered to schools in the area.

4. Following concerns being raised with him, the Secretary of State for Education wrote to schools that he understood might be participating in the workshops. He reminded them of their duty under section 407 of the Education Act to ensure that, where political issues are brought to the attention of pupils, they are offered a balanced presentation of opposing views. He asked that the schools either withdraw from the workshops or assure him that pupils would be given a balanced presentation of views about the conflict in Israel.
5. The DfE responded to the complainant's request on 28 November 2011. It disclosed some information but withheld the remainder under section 36(2)(b)(i) and (ii) and (2)(c).
6. Following an internal review the DfE wrote to the complainant on 17 February 2012. It confirmed its original decision. It also informed him that, since it issued its refusal notice, some additional documents had been identified which fell within the scope of his request. However, it believed that these documents were also exempt under section 36(2)(b)(i) and (ii) and (2)(c). It also informed him that it believed that some of the withheld information was third party data which was exempt from disclosure under section 40(2).

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled, in particular the DfE's refusal to disclose all of the information that he had requested.
8. During the course of the Commissioner's investigation the DfE disclosed additional information to the complainant. The complainant confirmed that he wished to challenge the DfE application of sections 36 and 40(2) to the remainder of the information that it withheld with the exception of the withholding of the name of a junior civil servant under section 40(2). This name was redacted from the information that he received from the DfE during the Commissioner's investigation.
9. The Commissioner considered whether the DfE had correctly applied sections 36 and 40(2) to the information that had not been disclosed to the complainant by the time that he had concluded his investigation.

Reasons for decision

Section 36 – Prejudice to the effective conduct of public affairs

10. The DfE applied section 36(2)(b)(i) and (ii) and (2)(c) to the withheld information.

11. Section 36(2)(b) and (c) 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 this Act -

...(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.

12. In order to determine whether section 36 has been correctly applied the Commissioner has:

- (i) ascertained who the qualified person is for the public authority;
- (ii) established that an opinion was given;
- (iii) ascertained when the opinion was given; and
- (iv) considered whether the opinion given was reasonable.

The engagement of section 36

13. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. In this case the opinion was given by the Minister of State for Schools. The Commissioner is satisfied that he was an appropriate qualified person for these purposes.

14. In support of the application of section 36, the DfE has provided the Commissioner with a copy of the submissions to the qualified person, which identifies the information to which it is suggested that section 36 should be applied, and copy of the qualified person's opinion.

15. The Minister provided an opinion that section 36 was engaged on 28 November 2011 and, in relation to some additional information falling within the scope of the request subsequently identified by the DfE, on 12 February 2012. In his view, disclosure of the information detailed in Annex B and C to the submission would be likely to prejudice the free and frank provision of advice (section 36(2)(b)(i)), would be likely to prejudice the free and frank exchange of views for the purpose of deliberation (section 36(2)(b)(ii)) and would be likely to otherwise prejudice the effective conduct of public affairs (section 36(2)(c)).
16. In relation to section 36(2)(b)(i), the Minister accepted the argument in the submission that it was central to this exemption that Ministers and officials were allowed space to develop their thinking and explore available options, including with relevant stakeholders and partners. It was important for the process of effective government and therefore in the public interest that officials were then able to provide free and frank advice to Ministers. Disclosing the withheld information would work directly against this, inhibiting Ministers and officials from exploring (sometimes controversial) ideas/options due to fear that information might be disclosed at an early stage before decisions are taken on whether to proceed. If organisations thought that the content of discussions with the department would be publicly disclosed, this might deter them from raising their concerns.
17. In relation to section 36(2)(b)(ii), the Minister accepted the argument in the submission that disclosure would make it more likely that individuals and organisations would be unwilling to provide their opinions/concerns in future. This would inhibit free and frank discussion between the Department and third parties. Equally, officials might also be inhibited from discussing sensitive issues like those contained in the emails that had been withheld with a consequent negative impact on the quality of advice provided to Ministers.
18. In relation to section 36(2)(c), the Minister accepted the argument in the submission that disclosure of the withheld information would be likely to prejudice the effective conduct of public affairs by discouraging individuals/organisations from approaching the Department about concerns that they may have over children being exposed to unbalanced or extreme views about political conflicts. This in turn would reduce the Department's capacity to identify and prevent extremist groups from gaining control of state or independent schools.
19. Secondly, since the withheld emails contained officials' frank views and assessment of individuals and organisations involved in the festival, with a view to informing what action the Department should take in response, release could potentially inflame community tensions in the local area and beyond.

20. After reviewing the content of the withheld information to which this section had been applied, the Commissioner initially considered whether it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) applied to all of the information withheld under section 36. He accepts that disclosure of the information to which section 36 has been applied would reveal free and frank discussions between civil servants and with third parties. He therefore accepts that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) applied to all of the withheld.
21. The Commissioner also accepts that the opinion of the qualified person, that the disclosure of this information would be likely to lead to officials and third parties being less free and frank in the exchange of such views for the purpose of deliberations in future, is a reasonable one. The Commissioner consequently concludes that section 36(2)(b)(ii) is engaged in relation to all of the information withheld under section 36. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information

Public interest test

22. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

'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 s 36(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 judgement without forming a view on the likelihood of inhibition or prejudice'.

23. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so "...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant." Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner

can and should consider the severity, extent and frequency of inhibition to the free and frank exchange of views for the purposes of deliberation.

Public interest arguments in favour of disclosing the requested information

24. The Commissioner believes that there is a strong public interest in transparency and accountability and in increasing the understanding of how government works. Disclosure of the withheld information may assist the public in gaining a better understanding of decision making process within government. It would also provide the public with more information about the considerations that informed the decision that was taken.
25. These public interests arguments are likely to be stronger where, as in this case, a decision taken by government relates to an issue which is a controversial and sensitive one and one in relation to which people hold strong and opposing views.
26. The complainant argued that there were increasing public concern over the influence financial donors were having on a range of government policies. A lack of transparency about the connection between donors and policy making fatally undermined public trust in the political system. It was therefore legitimate to seek evidence that financial donors were not being allowed to unduly influence government policy.
27. The complainant went on to state that he found it hard to believe that the Secretary of State had time to concern himself with a minor literary festival and that it should consequently attract the attention of the DfE's Preventing Extremism Unit. He believed that there was evidence from House of Commons' Register of Members' Interests that the Secretary of State had received a donation from a Zionist organisation. Consequently he was of the view that it was in the public interest for information to be disclosed that would allow the public to determine whether such donors were unduly influencing government policy in this area.

Public interest arguments in favour of maintaining the exemption

28. The Commissioner initially notes that the reasonable opinion of the qualified person was that disclosure of the withheld information would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. The consequences of the opinion is that it is accepted that there is a plausible causal link between the disclosure of the withheld information and the inhibition to the free and frank exchange of views and that there is a real possibility that the circumstances giving rise to this inhibiting effect could occur. The Commissioner has taken

this into account in assessing the public interest arguments in favour of maintaining the exemption.

29. The DfE argued that if the information were to be disclosed, this would place in the public domain free and frank discussions amongst civil servants and between civil servants and third parties. These discussions related to the need for schools to ensure that, in the context of the situation in the Middle East, their pupils were provided with a balanced presentation of opposing views and the dangers that this might not happen in relation to workshops for children connected to the Tottenham Palestinian Literary Festival.
30. As has been acknowledged, this could lead to officials and third parties being less free and frank in their future discussions on this and related issues and officials being less free and frank in discussions between themselves and in their deliberations. The result of this could be that problems may not be candidly described and may not therefore be properly addressed. This would not be in the public interest as it would have a negative impact upon the development of government policy in this area.
31. The DfE believed that it was particularly important that advice provided to Ministers should be as clear and frank as possible when a topic is controversial and, as in this case, where the parties hold such strong and opposing views and where the rights of children are affected. It is therefore in the public interest that officials should not feel inhibited in their discussions of the issues as this could lead to poorer advice and less well formulated policy and decisions.

Balance of the public interest arguments

32. In considering where the balance of the public interest lies, the Commissioner is mindful of the public interest arguments in favour of disclosure that have been identified. However, he notes that the withheld information contains very frank exchanges of views amongst officials at the DfE and between officials at the DfE and a third party that raised concerns about this issue. He believes that there is a strong public interest in officials at the DfE being able to discuss issues in this area freely and frankly, amongst themselves and with third parties, to ensure the effective development of government policy. The Commissioner also notes that the withheld information is a record of discussions that took place just prior to the request being made. Consequently, at the time of the request the issues being considered were still sensitive and subject to considerable public discussion and debate.

33. Having considered the severity, extent and frequency of inhibition to the free and frank exchange of views for the purposes of deliberation which disclosure of the withheld information might pose, the Commissioner considers that there is a real risk that disclosure of the withheld information might affect the openness and candour in relation to future exchanges of views in this area. As a result the Commissioner considers that the public interest in withholding the information outweighs the public interest in disclosure and that the DfE was correct to withhold it on the basis of section 36(2)(b)(ii).
34. As the Commissioner has found that the withheld information is exempt from disclosure under section 36, he has not gone on to consider the DfE's application of section 40(2) to some of that information.

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: 0300 1234504

Fax: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

Rachael Cragg
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF