

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 November 2012

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

Decision (including any steps ordered)

1. The complainant has requested two impact assessments for Free Schools, Saxmundham and Beccles. The Department for Education (DfE) refused to disclose this information under section 36(2)(b)(i) and 36(2)(c) of the Freedom of Information Act (FOIA).
2. The Commissioner's decision is that the DfE has correctly applied section 36(2)(b)(i) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 27 June 2012, the complainant wrote to the DfE and requested information in the following terms:

"In light of your refusal to agree to my initial FOI request, I will restrict it to the two impact assessments, for Saxmundham and Beccles."
5. The DfE responded on 19 July 2012. It refused to disclose the withheld information and applied section 36(2)(b)(i) and section 36(2)(c) FOIA.
6. Following an internal review the DfE wrote to the complainant on 10 August 2012. It upheld its original decision.

Scope of the case

7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DfE were correct to apply section 36(2)(b)(i) or section 36(2)(c) FOIA in this case.

Reasons for decision

9. Section 36 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 this Act-

(2)(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, or

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

10. The DfE has applied all subsection 36(2)(b)(i) and 36(2)(c) to the withheld information. The Commissioner has considered section 36(2)(b)(i) first.
11. Information may be withheld under section 36(2)(b)(i) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank provision of advice. It was stated in the Tribunal decision of *Guardian Newspapers Ltd & Heather Brooke v the Information Commissioner & the BBC* (EA/2006/0011 & EA/2006/0013) that:

“On the wording of section 36(2)(c) we have no doubt that in order to satisfy the statutory wording the substance of the opinion must be objectively reasonable... (paragraph 60).

On the weight to be given to the process of reaching a reasonable opinion, the Tribunal further noted that, “...in order to satisfy the subsection the opinion must be both reasonable in substance and reasonably arrived at...” (paragraph 64) “...can it really be said that the intention of Parliament was that an opinion reached, for example, by

the toss of a coin, or on the basis of unreasoned prejudice, or without consideration of relevant matters, should qualify as 'the reasonable opinion of a qualified person' under section 36 merely because the conclusion happened to be objectively reasonable?"

12. In determining whether section 36(2)(b)(i) was correctly engaged by the DfE the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was objectively reasonable and reasonably arrived at.
13. The DfE has explained that, Tim Loughton MP is the qualified person in this case and his opinion was obtained on 18 July 2012. The DfE has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable the opinion to be reached.
14. The following submissions were put to the qualified person in relation to the application of section 36(2)(b)(i):
 - Information within the impact assessments allow Ministers and Officials space to develop their thinking and explore available options in relation to whether a Funding Agreement should be signed by Ministers. By releasing this information, there could be a future negative impact on the Free Schools programme in that Ministers may not consequently then have the full facts and reasoning from officials to enable them to make sound and well informed decisions.
 - Disclosing the information requested would work directly against providing free and frank advice because it would inhibit Ministers and officials from exploring ideas/options due to fear that information might be disclosed at an early stage before decisions are taken on whether to proceed.
15. The qualified person's response agrees that section 36(2)(b)(i) is engaged. The qualified person's opinion is that the prejudice in this case would be likely to occur.

16. The Commissioner considers that impact assessments relating to free schools must be frank and candid. It is a very sensitive area and if the requested information were disclosed the frankness and candour of advice given in this area would be likely to be diminished.
17. The Commissioner therefore accepts that it was reasonable to conclude that disclosure of the requested information would or would be likely to inhibit the free and frank provision of advice.
18. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(i) was correctly engaged.
19. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
20. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b) of FOIA, the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

1. EA/2006/0011 & EA/2006/0013

Public interest arguments in favour of disclosing the requested information

21. The DfE acknowledged that there is a public interest in openness and transparency, and that release of this information could have the effect of raising confidence in government decision making.

Public interest arguments in favour of maintaining the exemption

22. The DfE argued that Officials need to be able to provide free and frank advice in relation to Free School proposals. By not being able to give free and frank advice, there is a risk of poor decisions being made as not all options are considered. It said that it is clearly in the public interest for Ministers to have a clear and full picture when making decisions which affect the educational opportunities for the students in the area.
23. The DfE provided further public interest arguments in support of maintaining the exemption which are contained in the Confidential Annex to this Notice.

Balance of the public interest

24. The Commissioner considers that there is a public interest in openness and transparency. He considers that the issue of free schools is a fairly controversial one and therefore there is a strong public interest in disclosure of information which would enable the public to better understand government decision making in this area.
25. The Commissioner also considers that there is a very strong public interest in Officials being able to provide Ministers with open and candid advice based upon all available information to enable decisions to be made in relation to Free Schools. The Commissioner is aware that the Free Schools in question have now opened and therefore the prejudice claimed to the openness and candour of advice may be reduced. However taking into account the DfE's arguments in the confidential annex to this Notice, the Commissioner considers that any reduction in the prejudice would be minimal and therefore he still gives significant weight to this public interest argument.
26. On balance the Commissioner considers that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
27. As the Commissioner is satisfied that the DfE has correctly applied section 36(b)(i) to all the withheld information he has not gone on to

consider the application of the other exemptions contained within section 36.

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

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

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

Pamela Clements
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