

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 August 2016

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

Decision (including any steps ordered)

1. The complainant has submitted two requests to the Department for Education (DfE): (1) for the period May 2013 to May 2014 copies of correspondence between Chris Wormald and representatives of Marshall Wace LLP, including Paul Marshall, and, or ARK and, (2), details of a specific meeting attended by Chris Marshall at Marshall Wace LLP. The DfE has provided some of the information covered by the scope of the requests but has withheld the remaining records under various limbs of the 'prejudice to the effective conduct of public affairs' (sections 36(2)(b)(i)(ii) and 36(2)(c)) exemptions to disclosure in FOIA. It also considers that parts of the requested material is covered by the 'commercial interests' (section 43(2)) and 'third party personal data' (section 40(2)) exemptions. The Commissioner has found that the exemptions in section 36(2) are engaged and that, in all the circumstances, the public interest in disclosure is outweighed by the public interest in withholding the requested information. She does not therefore require any steps to be taken as a result of this notice.

Request and response

2. On 13 July 2015, the complainant wrote to the DfE and requested information in the following terms:
 1. *Between May 2013 and May 2014, all electronic correspondence between Chris Wormald and representatives of Marshall Wace LLP, including Paul Marshall, and/or ARK (and/or its subsidiaries).*

2. *All details of a meeting held on 5 August 2013, attended by Chris Wormald, at Marshall Wace LLP. Please include: a list of attendees (if it is not possible to release individual names, please release a list of organisations attending), as well as any agenda, handouts and/or minutes.*
3. On 10 August 2015 the DfE contacted the complainant and confirmed it held the information that had been requested. It considered however that this engaged the 'commercial interests' (section 43(2)) exemption to disclosure in FOIA. The DfE explained that FOIA permits a public authority to extend the statutory 20 working day period for responding where a qualified exemption applies and the authority requires additional time for exercising the public interest test. The DfE anticipated providing its full response by 9 September 2016.
4. On 24 September 2015 the DfE wrote to the complainant and thanked her for her patience while it considered the public interest test. The DfE stated that it was endeavouring to get a substantive response to the complainant shortly.
5. The DfE formally responded to the requests on 3 November 2015. The DfE provided some of the requested information held but refused to disclose the remainder under FOIA, citing the 'prejudice to the effective conduct of public affairs' (sections 36(2)(b) and (c)) and the 'commercial interests' (section 43(2)) exemptions as the basis for withholding the information.
6. The complainant asked the DfE on 24 November 2015 to reconsider its decision to withhold information covered by her requests, pointing to the strong public interest in favour of disclosure. The complainant also highlighted the possible omission of a spreadsheet referred to in the documents that had been received.
7. The DfE carried out an internal review accordingly, the outcome of which was provided to the complainant on 17 December 2015. The reviewer upheld the original application of the exemptions in sections 36(2) and section 43(2) and further clarified that the aforementioned spreadsheet was covered by section 36(2)(b)(i) of FOIA.

Scope of the case

8. The complainant contacted the Commissioner to complain about the DfE's decision to withhold information she had requested on 13 July 2015.

9. The DfE has maintained that it correctly relied on the exemptions in section 36(2)(b) and (c) and section 43(2) of FOIA. It has also asserted during the Commissioner's investigation that elements of the personal data of third parties featured in the withheld information would be protected by regulation 13(1) by way of regulation 12(3) of the EIR.
10. With regard to the scope of the requested information, the DfE has advised that in relation to request 1 a search has been carried out of the Permanent Secretary's shared inbox, the diary inbox and his personal email account. The information identified forms the bulk of the withheld information, although the DfE has clarified that it has not discovered any emails between Chris Wormald and ARK aside from Paul Marshall. With regard to request 2, the DfE has explained that as part of the Transparency Agenda it proactively publishes data on meetings between the Permanent Secretary and external organisations. Accordingly, the 'Data Meeting at Marshall Wace LLP' that Chris Wormald attended in August 2013 was already in the public domain. Some associated documentation has been disclosed but the DfE has continued to withhold a spreadsheet captured by the request.
11. The Commissioner's analysis of the DfE's position under the legislation follows in the body of this notice.

Reasons for decision

Background

12. The complainant has requested information recording the engagement between Chris Wormald, the then Permanent Secretary for the DfE, and Paul Marshall or other organisations connected to him. To quote the Government's website¹:

Sir Paul Marshall is chairman and chief investment officer of Marshall Wace LLP, one of Europe's leading hedge fund groups. He is also a founding trustee of ARK, the children's charity, and chairman of ARK schools; chairman and trustee of the Education Policy Institute, an independent research institute focusing on educational outcomes; co-author of 'Aiming Higher: a better future for England's schools' (2006); author of 'Tackling Educational Inequality' (2007); and editor of 'The Tail: How England's Schools

¹ <https://www.gov.uk/government/people/paul-marshall>

Fail One Child in Five – and What Can be Done’ (2013). Sir Paul received a knighthood for services to education and philanthropy in 2016. Sir Paul was previously [2013 to 2016] lead non-executive board member at the Department for Education.

13. The involvement of non-executive board members (NEBMs) is covered in the Code of good practice 2011: Corporate governance in central government departments². With regard to the composition of departmental boards, the Code of Practice states that the ‘Boards will be balanced, with roughly equal number of Ministers, senior civil servants, and non-executives from outside government. They will be chaired by the Secretary of State and meet on at least a quarterly basis’ (page 5). It continues by saying that policy ‘will be decided by Ministers alone, with advice from officials. Boards will give advice and support on the operational implications and effectiveness of policy proposals, focusing on getting policy translated into results. They will operate according to recognised precepts of good corporate governance in business...’
14. The Code of Practice describes the roles and responsibilities of Lead NEBMs and NEBMs as follows:

*Each Board will have a **Lead Non-Executive Board Member**, who will meet regularly with other Non-Executive Board Members to ensure their views are understood and that the Secretary of State is made aware of any concerns (including through ensuring that the non-execs meet alone with the Secretary of State from time to time). The Lead Non-Executive Board Member will support the Secretary of State in his or her role as Chair of the Board and liaise with the Government-wide Lead Non-Executive Board Member.*

***Non-Executive Board Members**, appointed by the Secretary of State, will be experts from outside Government. They will come primarily from the commercial private sector, with experience of managing complex organisations. In order to achieve representative Boards with broad-based experience, Departments will aim as far as possible to ensure that there are at least one non-executive member with substantial experience in the public and/or not-for-profit sectors, in addition to members with strong commercial expertise. Departments should aim to achieve boards which are diverse – for example, ideally they should include at*

²https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/220645/corporate_governance_good_practice_july2011.pdf

least one female non-executive board member. These considerations will also be kept in mind when planning for succession.

They will exercise their role through influence and advice, supporting as well as challenging the executive. They will advise on performance (including agreeing key performance indicators), operational issues (including the operational/delivery implications of policy proposals), and on the effective management of the Department. They will also provide support, guidance and challenge on the progress and implementation of the operational business plan, and in relation to recruiting, appraising and ensuring appropriate succession planning of senior executives.

Section 36 – prejudice to the effective conduct of public affairs

15. The DfE considers that one or more of the exemptions in sections 36(2)(b) and (c) cover all of the withheld documents. These provisions state that information is exempt information if, in the reasonable opinion of a qualified person, disclosure under the legislation:
 - (b) would, or would be likely to, inhibit –
 - (i) the free and frank provision of advice,
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
16. Unlike other exemptions in FOIA, a public authority considering whether to apply any limb of section 36(2) is required to consult an appropriate qualified person. The legislation further necessitates the qualified person had the reasonable opinion that the harm referenced in the relevant exemption would, or would be likely to, arise through disclosure. It follows from this that in order to find that the exemption is engaged the Commissioner must not only be satisfied a qualified person gave an opinion but also that the opinion was reasonable in the circumstances.
17. The DfE has confirmed that it consulted with Minister Sam Gyimah MP, the then Parliamentary Under Secretary of State at the DfE, about the requested information. He gave his opinion on 25 September 2015.
18. The Commissioner is satisfied that the individual contacted by the DfE meets the definition of a 'qualified person' set out at section 36(5) by virtue of being a Minister of the Crown. Furthermore, the Commissioner has been provided with a copy of a record signed by the qualified person

that certified his position. Accepting therefore that a qualified person had given his opinion with regard to the application of the exemptions, it is incumbent on the Commissioner to consider next whether the opinion was reasonable in the circumstances.

19. In preparation for obtaining the view of the qualified person, the DfE provided him with submissions that gave some background to the request, outlined the use of the exemptions in section 36 and why it was considered they applied in this case, and set out the recommended position. As stated, for an exemption in section 36(2) to be engaged it is not sufficient that a qualified person has given an opinion; instead, that opinion must be reasonable. The test to be applied is not whether the opinion is the most reasonable opinion but only whether it is an opinion that a reasonable person could hold. In other words, an opinion will only be unreasonable if it is an opinion that *no* reasonable person could hold.
20. For each limb of sections 36(2)(b) and (c) there are two possible alternatives upon which the application of an exemption can be hung depending on the qualified person's views on the likelihood of the prejudice occurring. Firstly, the lower threshold which states that disclosure 'would be likely to' have an inhibitive or a prejudicial effect or, secondly, the higher threshold which stipulates that disclosure 'would' be prejudicial or inhibiting. 'Would' means that the likelihood is more probable than not. 'Would be likely', on the other hand, refers to a lower level of probability than 'would' but still requires that the likelihood is significant. Establishing the appropriate level of likelihood is not only important for engaging the exemption but also because it has an effect on the balance of the public interest test.
21. The record of the qualified person's opinion agreeing to the application of the exemptions in section 36(2) refers both to 'would' and 'would be likely'. The recommendation put before the qualified person however only makes reference to the 'would be likely' threshold and the DfE has confirmed that this was the basis upon which the qualified person had provided his view.
22. The Commissioner will consider all relevant factors when assessing whether the opinion was reasonable, including the nature of the information and the timing of the request, and whether the prejudice relates to the specific subsection of section 36(2) that is being claimed.
23. With regard to sections 36(2)(b)(i) and (ii), it is understood that it is the process which may be inhibited rather than what is necessarily contained within the requested information itself. The vital question is whether disclosure could inhibit the process of providing advice or exchanging views in the future. Section 36(2)(c), on the other hand, refers to the prejudice that may *otherwise* occur through the release of

the requested information. If section 36(2)(c) is used in conjunction with any other exemption in section 36(2), the prejudice envisaged must be different to that covered by the other exemption. In previous cases the Information Tribunal has found that the exemption may potentially apply to circumstances where disclosure could disrupt a public authority's ability to offer an effective public service.

24. She summarises below the arguments that had been advanced in relation to each of the exemptions, to which the qualified person had effectively subscribed.

Section 36(2)(b)(i)

- It is important that the Permanent Secretary is able to receive high quality advice from a NEBM to make sound decisions relating to performance and delivery.
- NEBMs and the Permanent Secretary need to have the confidence to ask for advice without fearing that those requests will be released into the public domain.
- It is essential that Ministers are able to commission advice on a range of issues without worrying about the public presentation of these commissions.
- Officials in policy teams and in private offices need to be feel confident giving frank advice on sensitive topics.

Section 36(2)(b)(ii)

- NEBMs are an important way that Departments can gain independent challenge and an external perspective.
- NEBMs must be able to feel they are able to critique ways of working in the Department without fearing those criticisms will be released to the public. This enables them to show public support for the work of the Department whilst contributing to continuous improvement.
- If information of the kind requested were to be released, it could discourage NEBMs from giving their honest opinions and advice to the Permanent Secretary. This would reduce their value to the Department and have a negative impact on the quality of the Department's work.
- Leading on from the above point, it is important equally that the Permanent Secretary is confident in asking for advice from NEBMs

and uses them as a tool to improve the workings of the Department.

Section 36(2)(c)

- Where the records do not contain advice, it is still vital that the NEBMs are able to ask questions about the Department. If email exchanges are routinely released, NEBMs would feel inhibited in their ability to use email to communicate with the Department. This would have an impact on the NEBMs understanding of Departmental affairs and the context in which Board decisions are made.
 - NEBMs are only able to offer a relatively small portion of their time to the Department. If they are discouraged from using email communication it is unrealistic to expect that the Department will receive the same quality and quantity of input from them.
 - Owing to the 'challenge' role that NEBMs provide, it is important that there is a trusting working relationship between NEBMs and the Department, including the Permanent Secretary. Releasing this information which was sent to the Department without expectation that it would be made public, could undermine the trust that has been built up.
25. The Commissioner is satisfied that the qualified person's arguments not only correspond with the activity described in each of the exemptions but also correspond with the withheld information itself. With regard to sections 36(2)(b)(i) and (ii), the Commissioner considers it is reasonable for the qualified person to accept that there is a real risk that disclosure could deter officials and the NEBMs from being as forthright with their views. This reflects the status of the high-level input that NEBMs will have on important strategic decisions. In respect of the application of section 36(2)(c), the Commissioner has found that it is not unreasonable for the qualified person to consider it was a significant possibility that disclosure would affect the willingness of NEBMs to engage in detailed correspondence with officials at the DfE. The inhibiting effect of disclosure would be likely, in turn, to weaken the effective working relationship between the NEBMs and the Department.
26. In summary, the Commissioner has found that the qualified person has given an opinion endorsing the application of each of the exemptions cited in section 36(2) and, furthermore, that the opinion in each case was reasonable. Having found that the exemptions are therefore engaged, the Commissioner must go on to assess the public interest test.

The public interest test

27. The test to be applied in respect of the public interest test is whether on balance the public interest in disclosure outweighs the public interest in maintaining the exemption. When considering where the balance of the public interest lies, the Commissioner considers that the qualified person's opinion should be afforded a degree of weight befitting his or her senior position. The Commissioner will make up her own mind, however, on the severity of that prejudice.
28. The Commissioner has found it appropriate for the purposes of this notice to consider together the public interest test related to the exemptions.

The public interest in disclosure

29. The public interest in disclosure will always attract some weight simply by virtue of the inherent importance of transparency and accountability. This weight will generally increase the closer the requested information is to proposals of, or decisions made by, a public authority in relation to issues of strategic or operational importance.
30. In her arguments for disclosure, the complainant has highlighted that the role of NEBMs is to provide departments with effective challenge to improve the running of Government. In the complainant's view, there is a strong public interest in understanding whether board members are providing useful advice that serves the public's interests. She also suggests that NEBMs willing to provide advice should equally be willing to stand by this advice in the event that it was made public.
31. The DfE, for its part, has accepted that more openness about process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.

Public interest in withholding the requested information

32. In many ways the arguments advanced by the DfE reiterate and develop the concerns expressed about disclosure that were set out in the submissions presented to the qualified person.
33. In summary, the DfE 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. If exchanges of the sort requested were to be released, in the DfE's view it is likely that the advice and, or challenge provided by NEBMs could be less candid in future, less robust in effect and decision making could be impaired as a result.

Balance of the public interest

34. Emerging from the DfE's arguments is the significance it has placed on the risk of a 'chilling effect' occurring through disclosure. Broadly speaking, the claim of a 'chilling effect' is directly concerned with the argued loss of frankness and candour in advice which, it is supposed, would lead to poorer quality advice and less well formulated policy and decisions.
35. In finding that the exemptions are engaged, particularly with respect to sections 36(2)(b)(i) and (ii), the Commissioner has accepted that disclosure would be likely to have a prejudicial effect on the exchange of ideas and views. The importance of this claim is put into focus when it is recalled that NEBMs are expected to exercise their role *through influence and advice, supporting as well as challenging the executive*.
36. It is plainly in the public interest for a Government department, such as the DfE, to have processes in place to improve the quality of decision making. The inclusion of voices which are outside of the Government and the civil service, represented by the NEBMs, is considered to be beneficial because it should help prevent insularity in terms of the views put forward in relation to education options and proposals.
37. The Commissioner would also accept however that there is a strong case for disclosure. As might be expected, the records cover a wide range of education issues, including discussions relating to strategy and governance. The importance of the education agenda cannot be overstated and, as highlighted by the complainant, it is in the public interest to know that the NEBM system of oversight is working well. In particular, the public will want to know that the executive is being challenged, as well as supported, in terms of its decision-making.
38. The Commissioner also notes that at the date of the request all of the records would have been over a year old. The Commissioner acknowledges that the correlation between the timing of a request and the severity of any chilling effect will not be uniform but will be dependent on the contents of the withheld information and the situation at the time of the request. The Commissioner explores the operation of the chilling effect in her guidance by saying the following:

49. Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It

will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.

50. Whether it is reasonable to think that a chilling effect would occur would depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.

39. In the Commissioner's view, the age of the records is an important factor. From her inspection of the withheld information, she considers that not all of the issues would still have been the subject of discussion at the point at which the request was made. The Commissioner also considers that the policy and strategy proposals that were still being debated are likely to have shifted and developed in the intervening time. The consequence of this, in the Commissioner's opinion, is that the severity of the chilling effect would be weaker than if the request had been made immediately after the period stated in the request.
40. The Commissioner has taken this into account when deciding where the public interest lies. In this respect, the Commissioner has found that the respective strength of the arguments for and against disclosure is finely balanced. She has ultimately concluded however that the public interest favours withholding the requested information on the basis of two principal considerations.
41. Firstly, the Commissioner recognises that the role of NEBMs is not to formulate, or make the final decisions on, DfE policy but to challenge linear ways of thinking and offer independent guidance. The public is legitimately entitled to ask 'Is the DfE making sound decisions?' In the Commissioner's view though, the public interest in accountability and transparency will be at its strongest where the information refers directly to the decision making process and the decision makers.
42. Secondly, the Commissioner considers significant the fact that both Paul Marshall and Chris Wormald remained in their positions at the time the request was made. It therefore follows that there continued to be a working relationship with the Department and with each other. The Commissioner accepts the DfE's argument that Paul Marshall's role will be at its most effective where he feels able to provide candid advice. In the opinion of the qualified person, it is precisely this that would be put at risk as a result of the release of the information and the reason the Commissioner has concluded that the public interest in disclosure is outweighed by the public interest in maintaining the exemptions.
43. In light of her findings on the exemptions cited in section 36(2), which have been applied to the entirety of the withheld information, the

Reference: FS50614712



Commissioner has not been required to consider the DfE's applications of sections 40(2) and 43(2) of FOIA to parts of the material.

Right of appeal

44. 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

45. 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.
46. 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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