

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 July 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to financial and governance issues at Wakefield City Academies Trust. The Department for Education (DfE) refused the request under sections 36 – prejudice to the conduct of public affairs, 40(2) - third party personal information and 43 – commercial interests.
2. The Commissioner's decision is that the Department for Education is entitled to rely on section 36 to withhold the information.
3. The Commissioner does not require the public authority to take any further action in this matter.

Request and response

4. On 7 November 2016 the complainant requested information of the following description:

"Please supply me with any written reports by the EFA or DfE into financial or other governance matters at Wakefield City Academies Trust since September 2015. This should include, but not be limited to:

- the full findings of the report/review, including any actions agreed/undertaken by the Trust
- a list and description of any instances where the review found that financial management or governance did not meet the

required rules/standards, including the requirements of the Financial Handbook

- a description of any instances of non-compliance at the Trust which led to the review.”
5. On 27 January 2017 the DfE responded. It confirmed it held information falling within the scope of the request but refused to provide that information citing the following exemptions as the basis for doing so:
- Section 36(2)(c) – prejudice to the conduct of public affairs
 - Section 40(2) – third party personal information
 - Section 43 – commercial interests
6. The complainant requested an internal review on the same day i.e. 27 January 2017. The DfE sent him the outcome of the internal review on 14 February 2017. It upheld the original decision.

Scope of the case

7. The complainant contacted the Commissioner 28 February 2017 to complain about the way his request for information had been handled.
8. The Commissioner considers the matter to be decided is whether any of the exemptions can be relied on to refuse the request.

Background

9. As part of the DfE’s routine assurance plan it undertakes visits to academy trusts to assess their financial management and governance arrangements. This plan includes a number of multi-academy trust reviews and involves visits, designed to assess compliance with Academies Financial Handbook. The DfE undertook such a review of the Wakefield City Academies Trust (WCAT) during 2015. Although not routinely published, the DfE disclosed the 2015 report in response to an earlier request from the same complainant. The request seeks any information on any reviews produced since then.

Reasons for decision

Section 36 – prejudice to the conduct of public affairs

10. So far as is relevant, section 36(2) of FOIA states that information 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, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
11. In this case the DfE is relying on subsection (c) and has applied the exemption to all the information captured by the request. The inclusion of the words "otherwise prejudice" in this subsection means that it cannot be applied to a prejudice that would be covered by another exemption. In line with the Commissioner's guidance, prejudice to the effective conduct of public affairs refers to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. This can extend to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
12. In broad terms, the DfE has argued that disclosing the information would prejudice its ability to examine the financial management and governance of academy trusts and to consider what, if any, steps a trust should be recommended to take. In particular, disclosing the information at the time of the request would prejudice its ability to carry out these functions in respect of WCAT. The Commissioner is satisfied that this alleged prejudice to the conduct of public affairs is not covered by other exemptions.
13. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the DfE, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
- Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
14. For government departments any Minister can act as the qualified person. The DfE has provided the Commissioner with a copy of a submission made to one of its Ministers, together with a signed response

from the Minister stating that in their opinion disclosing the information would be likely to have the alleged prejudice to the conduct of public affairs. That opinion was given on 16 January 2017.

15. When considering whether the opinion was reasonable the Commissioner has followed the approach set out in her guidance. The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd then it is reasonable.
16. This is not to say that it is the only reasonable opinion that could be held on the subject. 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.
17. Applying this to the Minister's opinion the Commissioner notes that submission put to the Minister explains the context in which the request was made and the Department's concerns over its disclosure. It also includes some limited arguments in favour of disclosure. Although it does not appear that the Minister was provided with a copy of the actual information, the Commissioner is satisfied that the submission provided an adequate briefing to the Minister, on which they could reach an informed opinion as to the consequences of its disclosure.
18. Furthermore having viewed the information herself the Commissioner finds that the Minister's opinion can certainly not be characterised as unreasonable. Due to the sensitive nature of the withheld information the Commissioner cannot go into any great details as to the qualified person's reasons for considering its disclosure would undermine the ability of the DfE to review the financial management and governance of WCAT. However she is satisfied that at the time of the request the issues it addresses were still live and consideration was still being given as to best way of proceeding. Any review of an academy's financial management and governance is likely to be more robust with cooperation of the body being examined and this in turn requires an element of trust between the parties involved. The Commissioner is satisfied that it is reasonable to believe that disclosing the requested information would hamper the development of such relations. The DfE has also argued that in such situations it is important that the DfE is afforded safe space to, not only formulate its findings, but also to provide the academy with the opportunity to respond to the findings and implement any changes that may be required. Safe space is also needed in which the DfE can consider the effectiveness of any steps being taken

by the academy in question. The requested information relates to part of a process which was ongoing at the time of the request, and still is. It is also not unreasonable to take the view that disclosing the requested information would signal to other academy trusts that were they to be subject to a similar review in the future, information about that process could be released too and this would have a chilling effect on their cooperation with any investigation. The Commissioner is therefore satisfied that the qualified person's opinion was reasonable and that the exemption is engaged.

19. However before deciding whether the DfE is entitled to refuse the request it is necessary to consider the public interest test.

Public interest test

20. Section 36(2)(c) is qualified by the public interest test as set out in section 2(2) of the FOIA. This means that even though the exemption is engaged, it is necessary to consider whether the public interest in favour of maintaining the exemption outweighs the public interest in disclosure. Only if it does, can the exemption be relied on.
21. The DfE recognises that there is a general public interest in disclosure of information to the public to demonstrate openness and transparency of government. It also accepts there is an argument that more openness about the process and delivery of its work may lead to greater accountability, an improved standard of public debate and improved trust.
22. The Commissioner finds this rather underestimates the public interest in disclosure. Government policy in respect of education affects a great many members of society. There is a genuine, ongoing public debate on the issue generally and also, specifically, on the role academies play in delivering high educational standard and value for money.
23. WCAT runs twenty one schools in its area and so its performance impacts on a large number of students and staff. These individuals have an interest in understanding the detail within the withheld information.
24. The com will now look at the public interest in favour of maintaining the exemption. When determining whether the exemption is engaged the Commissioner is only required to consider whether the qualified person's opinion is a reasonable. It is not necessary for her to agree with that opinion. However having found that the opinion is reasonable that opinion will give some weight to the arguments that disclosing the information would have a prejudicial effect. In looking at the public interest in favour of maintaining the exemption the Commissioner will consider the severity, extent and frequency of that prejudice.

25. From its submission the Commissioner understands the DfE to have five main concerns, firstly, that disclosing the requested information would erode the safe space needed in which to investigate management and governance issues. Secondly, disclosure would undermine its working relationship with WCAT which is necessary to ensure full and frank discussion of the issues. Thirdly, disclosure could prompt changes in behaviour that in themselves could jeopardise resolving some of the issues faced. Fourthly, disclosure could attract the attention of the media and others which would distract resources away from actually dealing with the issues, and, finally, as a result of these consequences, disclosure could deter the cooperation of other academies in future reviews through fear that information relating to those reviews would also be released.
26. The Commissioner accepts that DfE is still in the process of resolving the issues highlighted by the review, and certainly was at the time of the request. A degree of confidentiality is required to allow the DfE to fully evaluate the options available to it and to consider the best way forward. To disclose information would inevitably lead to speculation by all interested parties, including pupils, parents, teachers and the wider community. Erroneous conclusions could be drawn and the DfE could find itself being asked to explain, defend or comment on positions that may not accurately reflect the eventual outcome. The Commissioner accepts that the DfE is entitled to safe space in which decide how best to resolve the issues faced by WCAT. To have disclosed the information at the time of the request would have severely prejudiced its ability to properly consider the adequacy of the financial management and governance of WCAT and determine an appropriate course of action.
27. The Commissioner recognises the importance of DfE establishing and developing relations with staff of WCAT. Releasing the requested information would impact on the open and candid dialogue with the academy, necessary to obtain a full picture of the issues faced by WCAT. This again would have a severe effect on the ability of the DfE to carry its functions in respect to evaluating the performance of WCAT.
28. It is also clear from the DfE's submission that the request was made at a time of change for WCAT and if the requested information was disclosed whilst sensitive issues effecting the future of WCAT were still being debated it could change the behaviour of some of those with an interest in the academy to the detriment of the academy. This impact could be significant.
29. The Commissioner recognises that disclosing the information would generate media interest and would likely lead to enquiries from parents. As well as eroding the safe space required for decision making, this may absorb the time of officers and staff from both the DfE and WCAT and so divert attention from the main task of dealing with the issues of financial

management and governance. However the Commissioner does not consider the severity of this problem would be particularly severe.

30. The Commissioner finds that the severity and extent of the prejudice to the DfE's ability to continue with its review WCAT's performance would be significant if the information was released; particularly in respect of the erosion of safe space and damage to the working relations with WCAT. As the review process was, and still is, ongoing, the damage to working relations could continue for some time into the future.
31. The Commissioner considers that the disclosure of the information in these circumstances would have some detrimental impact on the willingness of other academies to cooperate with similar review processes in the future. Although this impact would not be any way near as significant as the impact on the DfE's work with WCAT, there would be some chilling effect on cooperation with future reviews. Even though the impact on individual future reviews maybe limited, because these reviews are carried out on a regular basis, the prejudice would be frequent.
32. On the face of it there are strong public interest arguments in favour of maintaining the exemption and withholding the information. However the Commissioner is also aware that a draft of a report captured by the request was leaked sometime in November 2016. The Commissioner does not know the exact date of the leak, but the earliest press coverage of the report that she has identified on the internet are dated 5 November 2016; two days before the request was made. Although the articles based on the leaked report disclose some of the financial management and governance issues of concern to the DfE and report on the number of areas in which WCAT performance fails to comply with Academies Financial Handbook, the articles only provide limited details on particular headlines findings contained in the draft report. It is significant that the report that was leaked was a draft rather than the final version. It is also significant that neither the DfE nor the Commissioner was able to locate a full version of the draft report on the internet. Therefore it appears that the information available via the leak is confined to that contained in the press articles. On this basis the Commissioner considers that to a large extent the arguments made in favour of maintaining the exemption still stand, particularly in respect of the need to preserve safe space and prevent any adverse changes in behaviour by parties with an interest in WCAT. The fact that the draft report was leaked rather than disclosed by the DfE is also important. The leaking of the draft would have a very much reduced impact on the working relationship between the DfE and WCAT and to the chilling effect on the willingness of other academies to engage with similar review processes.

33. When balancing the public interest arguments in favour of maintaining the exemption against those in favour of disclosure the Commissioner has therefore still given significant weight to the loss of safe space and the undermining of trust between the department and WCAT required for an open and candid dialogue between the two. The fact that the review process was still ongoing at the time of the request is important to weight afforded these points. The Commissioner considers the DfE has underestimated the public interest in disclosing the information, in particular the extent to which the information would inform the debate on academies. Nevertheless, the Commissioner finds that the public interest factors in favour of preserving the ability of the DfE to investigate and resolve the issues affecting WCAT outweigh those in favour of disclosure.
34. The Commissioner therefore finds that the DfE can rely on section 36(2)(c) to withhold the requested information. Since the exemption has been applied to the all the information captured by the request there is no need to go on to look at the application of the other exemptions cited. The Commissioner does not require the DfE to take any further action in this matter.

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: 0870 739 5836
Email: GRC@hmcts.gsi.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

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

Rob Mehan
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