

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 27 September 2017

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

#### Decision (including any steps ordered)

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1. The complainant has requested briefings sent to directors relating to the inspection of a number of independent schools prior to the inspection of those schools by Ofsted. The Department for Education (DfE) refused the request under the exemptions provided by sections 31 – law enforcement, 36 – prejudice to the conduct of public affairs and section 40 – personal information.
2. The Commissioner's decision is that the DfE is not entitled to rely on the exemptions provided by section 31 and 36. However it is entitled to withhold the names and direct contact details of junior officials under section 40(2).
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the briefing note and email exchange identified by the department as falling within the scope of the request, apart from the personal data of junior officials.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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5. On 8 February 2017 the complainant made two separate requests. The first was for:

"Copies of official briefings sent to directors within the last six months regarding Ofsted's recent decision to send Her Majesty's Inspectors to inspect The Kings House School, Windsor on 18<sup>th</sup> October 2016."

6. The second was for:

"Copies of official briefings sent to directors within the last six months regarding Ofsted's recent decision to send Her Majesty's Inspectors to inspect The King's House School, Windsor as part of inspections carried on 18 October 2016 at 10 schools following the 'Accelerated Christian Education' curriculum."

7. On 3 March 2017 the DfE responded. It refused to provide the requested information. The DfE cited the following exemptions provided via section 31(1)(g) as the basis for doing so:

- 31(2)(a) Disclosure of the information would or would be likely to prejudice the exercise by any public authority of its functions for the purpose of ascertaining whether any person has failed to comply with the law,
- 31(2)(c) Disclosure of the information would or would be likely to prejudice the exercise by any public authority of its functions for the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise.

8. The complainant requested an internal review on 14 March 2017. The DfE sent her the outcome of its internal review on 12 April 2017. It upheld the original application of section 31 and also referred to the possibility of applying further exemptions. The DfE went on to apply s36 - prejudice to the effective conduct of public affairs. In particular it applied:

- 36(2)(b) That in the opinion of the qualified person, the disclosure of the information 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.

- 36(2)(c) That in the opinion of the qualified person, the disclosure of the information would otherwise, or would be likely to otherwise prejudice the conduct of the public authority.

## Scope of the case

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9. The complainant contacted the Commissioner on 25 April 2017 to complain about the way her request for information had been handled. She referred the Commissioner to the letter she sent to the DfE asking it to conduct an internal review. In that letter she argued that the inspections lacked objectivity and that Ofsted and the DfE were pursuing a political agenda by targeting the independent schools because of their distinctly Christian ethos.
10. The DfE has identified one briefing note and a follow up email exchange as being captured by the request. The Commissioner understands that the exemptions provided by sections 31 have been applied to the requested information in its entirety. Only two of the cited exemptions provided by section 36 have been applied to the briefing note, but all three have been applied to the email exchange. Section 40 has only been applied to the names and contact details of junior officials. The Commissioner considers that the matter to be decided is whether any of the exemptions provided by sections 31 or 36 can be relied on to withhold the requested information. For completeness the Commissioner will consider the application of section 40(2) to the names of junior officials.
11. As will become apparent due to the nature of the exemptions cited there is some overlap between the DfE's grounds for applying them. The Commissioner will start by looking at department's application of section 31(2)(a).

## Reasons for decision

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### **Section 31(2)(a) law enforcement – compliance with the law**

12. Section 31 protects information which would prejudice a wide range of law enforcement activities if it was disclosed. Section 31(1) starts by listing a number of different law enforcement activities, and then, at paragraph (g), provides that information is exempt if its disclosure would prejudice one of the functions introduced by subsection 31(2), including, at 31(2)(a), ascertaining whether any person has failed to comply with the law. The relevant provisions are set out below.
13. Section 31(1) of FOIA states that:

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

Section 31(2)

(a) the purpose of ascertaining whether any person has failed to comply with the law.

14. There is no suggestion that the requested information would be exempt under section 30, which, in broad terms, protects information relating to criminal investigations and proceedings. Therefore section 31 is available to the DfE.
15. The exemption can be engaged on the basis that the alleged prejudice either would occur, or the lower threshold, i.e. that the prejudice would only be likely to occur. In this case the DfE is relying on the lower threshold.
16. Therefore section 31(2)(a) will be engaged if disclosing the requested information would be likely to prejudice a public authority's ability to ascertain whether any person has failed to comply with the law. In this context a 'person' would include a body such as one of the independent schools referred to in the request. The DfE has applied the exemption on the basis that the disclosure would be likely to prejudice its own ability to ascertain whether the law has been complied with. It has explained that the Secretary of State has powers derived from sections 94(1) and (2) and 166(6) of the Education and Skills Act 2008 to establish standards for independent schools. These standards are set out in The Education (Independent School Standards) Regulations 2014. Furthermore the Secretary of State has powers to instruct Ofsted to carry out inspections to ensure those standards are being adhered to and to then report its findings back to the department. DfE has explained that where schools are not meeting the required standards its independent education and boarding team, as the regulatory body, can take action. The Commissioner is satisfied that this process is means of establishing whether independent schools are complying with the law and is therefore a relevant function for the purposes of subsection 31(2)(a).
17. Having established that section 31(2)(a) has been applied to protect an appropriate function the Commissioner will now consider whether the department has demonstrated that some causal relationship exists between the disclosure of the information being withheld and the alleged prejudice. Furthermore, the resultant prejudice which is alleged must be real, actual, or of substance.

18. In broad terms the DfE has argued that the withheld information discusses different approaches to ensuring the independent schools were meeting the required standards and reflects the subsequent decisions on the most effective course of action to take. The department considers it important that it has safe space in which to investigate whether these standards are being met.
19. The Commissioner accepts this argument in principle. However she finds that in this particular case the scope for the disclosure to undermine the department's ability to establish whether standards are being met is much reduced due to the date of the request. The request was made after the inspections were carried out and their findings made public by publication of the subsequent reports on Ofsted's website. Therefore, although some of the schools are still subject to ongoing regulatory action as a result of the inspections, the decisions on how best to establish whether the required standards were being met had already been taken and implemented by the time of the request. The need for safe space had to a large extent passed.
20. However although the decisions as to what action was required had already been taken the DfE maintains that it is still important to protect the information that fed in to those decisions. The department has argued that it is important that it is free to fully set out what its concerns are during internal discussions. The inspections could well find that these concerns were unfounded. If the details of those concerns were later released it would harm the reputation of the schools and therefore relations between the schools and the department. The Commissioner accepts there is a risk that relationships between the DfE and schools could be damaged in this way. This could result in schools being less cooperative with the DfE and Ofsted in the future, so hindering the DfE's functions.
21. The DfE has raised a broader concern i.e. that disclosing the requested information would have a negative effect on the candour of internal discussions about particular schools. The Commissioner accepts that in principle there is a risk of officials being more guarded in the advice they offered and the arguments they presented in favour of a particular course of action, if they considered it likely that such advice would be disclosed at a later date. However this will depend on the actual information to be disclosed; if it is only anodyne, then officials would not be put off offering advice as fully as before.
22. Looking at the actual information which is the subject of this request, much of the actual briefing document is unremarkable and its disclosure is therefore less likely to lead to officials shying away from providing robust advice to their senior colleagues when asked to do so. There are elements in the email exchange that may be more sensitive and so more likely to cause a 'chilling effect'. The Commissioner notes that the time

between the creation of the information and the request was as short as five months and therefore these discussions may still be fresh in the memory of some of those concerned. This increases the potential for there to be a chilling effect if it proved necessary to discuss the same issues again.

23. The Commissioner has also carried out very basic internet searches and discovered that the inspection of the schools was widely reported in the national and professional press. The existence of some controversy over the matters to which a request relates does increase the risk that officials would have concerns over the disclosure of their advice. Having regard for the actual information under consideration, the fact that the advice was relatively fresh and the media interest, the Commissioner finds that there are grounds for finding there could be a chilling effect on the candour of advice if the requested information was released.
24. In light of the above the Commissioner finds there are sufficient grounds for accepting the exemption is engaged on the lower threshold that the prejudice would be likely to occur.

### **Public interest test**

25. The public interest test is set out in section 2(2) of FOIA. Even if an exemption is found to be engaged the information can only be withheld if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosure. In effect this involves weighing up the extent of the harm that would be caused by disclosing the information and balancing this against the value in its disclosure.
26. Given the similarity in the grounds for applying section 31(2)(a) and (c) the DfE has relied on identical public interest arguments for the two exemptions.
27. In favour of maintaining the exemption the DfE has argued that disclosing the information would prejudice the candour of discussions between the department and the inspectorates. The Commissioner considers the link between the candour of internal advice and subsequent discussions with an inspectorate such as Ofsted to be convoluted. However it is conceivable that officials would become wary of discussing the issues generally. The Commissioner also accepts that, if the candour of the internal advice provided was reduced, the subsequent decisions would be weaker, which in turn could impact on quality of the discussions held with the inspectorates. However in respect of the majority of the information she does not accept its disclosure would lead to as significant a loss in candour as the DfE suggests.

28. The DfE has also argued that the disclosure of this information could encourage requests for information on schools which were to be the subject of a 'no notice' inspection, i.e. where the school may receive no, or only a day's, notice of a planned inspection. The Commissioner fully accepts that if information was released prior to Ofsted carrying out a 'no notice' inspection there could be significant harm done to the regulatory process. However every request has to be considered on its merits and in light of the actual circumstances that exist at the time the request was made. In this case although the inspections were carried out at short notice, they had all been concluded several months before the request was received. It does not follow that the disclosure of this information would signal that requests relating to 'no notice' inspections that were yet to take place, should be released in response to future requests. Therefore the Commissioner gives no weight to this argument.
29. The DfE argues that the public interest in protecting its function of ascertaining whether the statutory standards are being complied with is strengthened because these functions concern the standard of education received by children. The Commissioner recognises the importance of the DfE's statutory role in maintaining standards, but again does not consider the impact of disclosing much of the information would be particularly severe.
30. Having said all that, the Commissioner does acknowledge that some of the discussions captured by the email exchange are more sensitive. Revealing this information may damage relations between the schools and the department which could lead to delays in resolving issues. This would not be in the interests of the pupils. However any deterioration in relations has to be considered in relation to the strength of the relations at the time of the request. The Commissioner considers it likely that relations would already have been strained by the time the request was made. That is not to say that disclosure would not make it harder to foster better relations in the future.
31. However, the Commissioner considers that the very fact that these exchanges are more revealing also, potentially, increases the public interest in their disclosure.
32. Finally the DfE has argued that disclosure would be detrimental to its relationship with other independent schools and with Ofsted as they would be more cautious of sharing information with the DfE. In particular it argues that schools may be less cooperative when working with the department in the future. The strength of this argument is reduced however since the actual information captured by this request does not include that provided by third parties. It is therefore not clear that third parties would draw the conclusions suggested by the department. Nevertheless the potential for schools to react this way cannot be ruled out.

33. These arguments now have to be weighed against the public interest factors in favour of disclosure.
34. The DfE has recognised that there is a public interest in releasing information which would enhance scrutiny of its decision making and investigative processes and therefore transparency and accountability.
35. The complainant has provided a copy of the lengthy submission she provided to the DfE when seeking an internal review. In it she explains why she believes the public interest test in respect of all the exemptions favours disclosure. In broad terms she argues that the inspections were carried out due to a bias against, what she described as, the Biblically-based curriculum of the schools. The complainant says that previously the schools were rated as 'good' or 'outstanding', and questions how and why the October 2016 inspections could find the same schools were failing, some being graded inadequate, others as requiring improvement. It is also claimed that the inspector at one school was overheard on his mobile phone making comments that could be interpreted as suggesting the inspection team were deliberately seeking to mark the school down. The Commissioner does not give any weight to alleged remarks overheard during a phone call, as without knowing the full context in which it was made it is not possible to determine whether it was indicative of any bias against the schools. The Commissioner does however recognise the schools share one common characteristic in that they all followed the Accelerated Christian Education curriculum and the fact that these schools were subject to inspections at short notice, over one week, clearly suggests that a conscious decision was taken to carry out the inspections in a coordinated manner. This and the fact that they were all subsequently down-graded as a result of those inspections, naturally raises questions as to the trigger for those inspections and whether those inspections were following a particular agenda that might affect their objectivity.
36. The Commissioner understands that following a fundamental Christian curriculum does not in itself conflict with the standards set by the DfE for independent schools. The complainant also argues that parents have a legal right to educate their children in accordance with their own religious beliefs. The Commissioner has no grounds to think the complainant is wrong in this assertion.
37. Therefore the Commissioner considers there is a strong public interest in understanding the reasons for carrying out the inspections and whether there was any risk to the objectivity of those inspections. The Commissioner is in no way suggesting that the inspections were flawed, it is simply that there is a public interest in better understanding the circumstances in which these schools became the focus of the department's attention.



38. The public interest test is finely balanced. There are grounds for considering the disclosure of the more sensitive information could have a noticeable impact on the candour of internal discussions around the need to inspect a particular school or group of schools. However there is also a public interest in transparency so that the public can be reassured as to the reasons for focussing inspections on the schools in question. The Commissioner finds that the balance favours disclosure, i.e. that the public interest in favour of maintaining the exemption does not outweigh the public interest in favour of disclosure. The DfE is not entitled to rely on section 31(2)(a) to withhold the information.

**Section 31(2)(c) law enforcement – regulatory action**

39. Section 31(1) of FOIA states that:

“Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2).

Section 31(2)

(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,”

40. The Commissioner is satisfied that the requested information would not be exempt under section 30 and therefore section 31 is available to the DfE.
41. As before, the exemption has been engaged on the basis that the alleged prejudice would only be likely to occur.
42. Therefore section 31(2)(c) will only be engaged if disclosing the requested information would be likely to prejudice a public authority's regulatory function. The DfE has applied the exemption on the basis that the disclosure would be likely to prejudice its own regulatory functions. It referred to the same statutory provisions relied on when applying section 31(2)(a). It has powers to set standards for independent schools and can require Ofsted to inspect such schools and report back. Where standards are not being met the DfE's independent education and boarding team, as the regulatory body, can take regulatory action. The Commissioner is satisfied that this process is a form of regulatory action described by sub-section (2)(c).

43. The Commissioner will now consider whether the department has demonstrated that this function will be prejudiced by the disclosure of the requested information.
44. The DfE has explained that the briefing document and subsequent email exchange took place prior to it briefing Ofsted. The Commissioner therefore understands the documents to be entirely internal documents. This is borne out by an inspection of the actual information. The DfE has argued that releasing the information would be likely to have an impact on how candid officials are in future when advising ministerial offices on proposed inspections. This in turn would dilute the advice that was provided.
45. As before, the Commissioner accepts the principle that there is a risk of officials being more guarded in the advice they offered if they suspected it likely that their advice would be disclosed in the future. However this will depend on the nature of the actual information to be disclosed
46. The DfE has also drawn the Commissioner's attention to another decision notice (FS50645822) which supported the DfE's application of section 31(2)(c). That notice relates to a request for information which included reports from external bodies together with complaints and allegations which may have triggered the inspection of a school. That notice accepted, in that in the circumstances of that case, there was a risk disclosure would discourage third parties submitting their concerns to the DfE and so frustrate the department's ability to identify and investigate these concerns. However such arguments are of far less relevance to the current case which deals solely with the internal documents discussing the rationale for requesting inspections.
47. The Commissioner has already found that much of the actual briefing document is unremarkable and its disclosure is therefore less likely to lead to officials shying away from providing robust advice to their senior colleagues when asked to do so. There are however elements in the email exchange that may be more sensitive and so more likely to cause the chilling effect argued by the DfE.
48. The Commissioner has also established that these inspections attracted wide media attention. This interest increases the potential for officials to be more cautious when advising on, or debating similar issues in the future. Having regard for the actual information under consideration, the fact that the advice was relatively fresh and the controversy surrounding the inspection of the schools, the Commissioner finds that there are just sufficient grounds for accepting exemption is engaged on the lower threshold that the prejudice would be likely to occur. Again it is necessary to consider the public interest before deciding whether the exemption can be relied on.

### **Public interest test**

49. The public interest test, as set out in section 2(2) of FOIA, provides that information can only be withheld if, in the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. This test balances the harm caused by disclosure against the value in its disclosure.
50. In favour of maintaining the exemption the DfE has argued that disclosing the information would prejudice any regulatory action it takes and discussions between the department and the inspectorates. The Commissioner considers the link between the candour of internal advice and subsequent discussions with an inspectorate to be convoluted. However, as before, she accepts that the disclosure of any internal debate could also make officials more wary of discussing these issues with third parties. But in respect of the majority of the information she does not accept its disclosure would lead to as significant a loss in candour as is suggested by the DfE.
51. The DfE has also argued that the disclosure of this information could lead to information being requested on schools which were to be subject of a 'no notice' inspection. As before, the Commissioner gives no weight to this argument.
52. The DfE argues that the public interest in protecting its regulatory function is strengthened because these functions concern the standard of education received by children. As before, the Commissioner recognises the importance of the DfE's regulatory role, but again does not consider the impact of disclosing much of the information would be particularly severe.
53. However the Commissioner does acknowledge that some of the discussion captured by the email exchange is more sensitive, but this also increases the public interest in its disclosure.
54. Finally the DfE has argued that disclosure would be detrimental to its relationship with other independent schools and with Ofsted as they would be more cautious of sharing information with the DfE and in particular schools may be less cooperative when working with the department in the future. The Commissioner has already explained that it is therefore not clear that third parties would necessarily draw the conclusions which the department suspects. But the potential for schools to react this way cannot be ruled out.
55. These arguments now have to be weighed against the public interest factors in favour of disclosure.

56. The DfE has recognised that there is a public interest in releasing information which would enhance scrutiny of its decision making and investigative processes and therefore transparency and accountability.
57. The Commissioner has again had regard for the complainant's submission at the internal review stage. The Commissioner recognises the schools share one common characteristic in that they all followed the Accelerated Christian Education curriculum and the fact that these schools were are subject to inspections at short notice, over one week, clearly suggests that a conscious decision was taken to carry out the inspections in a coordinated manner. This and the fact that they were all subsequently down-graded as a result of those inspections, raises legitimate questions as to the trigger for those inspections and whether those inspections were following a particular agenda that might affect their objectivity.
58. The Commissioner considers there is a strong public interest in understanding the impetus for carrying out the inspections and whether there was any risk to the objectivity of those inspections. The Commissioner again stresses that this in no way suggests that the inspections were not conducted in line with best practice, it is simply that there is a public interest in better understanding the circumstances in which these schools became the focus of the department's attention.
59. The public interest test is finely balanced. There are grounds for considering the disclosure of the more sensitive information could have a noticeable impact on the candour of internal discussions around the need to inspect a particular school or collection of schools. However there is also a public interest in transparency so that the public can be reassured as to the reasons for focussing inspections on the schools in question. The Commissioner finds that the balance favours disclosure, i.e. that the public interest in favour of maintaining the exemption does not outweigh the public interest in favour of disclosure. The DfE is not entitled to rely on section 31(2)(c) to withhold the information.

### **Section 36 – prejudice to the conduct of public affairs**

60. So far as is relevant, section 36(2) provides that information is exempt if, in the reasonable opinion of the qualified person, its disclosure
  - (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 purpose of deliberation.
  - (c) would, otherwise prejudice, or would be likely to otherwise prejudice, the effective conduct of public affairs.

61. All three of these exemptions have been applied to the exchange of emails, but only (b)(i) and (c) have been applied to the briefing document.
62. Section 36 is unique in that its application depends on the qualified person being of the opinion that the inhibition or prejudice envisaged would, or would be likely to occur. In determining whether the exemption is engaged 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.
63. For the purposes of a government department any minister can act as the qualified person. The DfE has provided the Commissioner with a copy of the submission that it put to its minister when seeking their opinion. That submission gave grounds for applying the exemptions and included a copy of the requested information. The Commissioner is satisfied that the minister gave her opinion that the exemptions were engaged on 2 May 2017. The first three requirements of the test set out above are met. It is now necessary to consider whether that opinion was a reasonable one in respect of each exemption.
64. When considering reasonableness the Commissioner relies on the Oxford English Dictionary's definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person could hold.
65. The exemption can be engaged on the basis that the inhibition or prejudice either 'would' or 'would be likely' to occur. It is clear from DfE's submission to the Commissioner that the qualified person considers the inhibition and prejudice envisaged 'would be likely' to occur.
- (i) inhibition to the free and frank provision of advice.**
66. Therefore the Commissioner will start by considering whether it is reasonable for the qualified person to hold the opinion that disclosing the briefing note and the exchange of emails would be likely to inhibit the free and frank provision of advice.

67. The briefing document sets out the background to the inspections, explains alternative approaches that have been considered in respect of the regulation of these independent schools and then proposes a particular course of action. The Commissioner is satisfied that, collectively, this consists of advice on the best way forward. The email exchange also contains advice on the best way forward.
68. The DfE argues that it is important that the department and its officials can provide candid advice when addressing issues or problems relating to the delivery of departmental policies or issues regarding the standards at particular schools. It believes that to release the requested information would deter officials from providing such candid advice in the future.
69. Having looked at the withheld information the Commissioner notes that in providing the advice it was necessary to set out weaknesses in alternative approaches and highlights the main issues of concern to the department. The Commissioner also recognises that there is some controversy around the curriculum adopted by the schools in question and this may increase the sensitivity of officials to the release of the information. The Commissioner also notes that the exemption has been applied on the basis that the inhibition is only likely to occur. Taking these factors into account and her earlier findings regarding the potential for the disclosure of this information to cause a chilling effect, the Commissioner finds that it cannot be said that the minister's opinion is an unreasonable one; the exemption is engaged.

### **The public interest test**

70. As with section 31, section 36 is subject to the public interest test. Information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure.
71. When considering the public interest in favour of maintaining the exemption the Commissioner will give due weight to the opinion of the government minister that the inhibition is likely to occur. However she will reach her own view on the severity, extent and frequency of that inhibition.
72. In favour of maintaining the exemption the DfE has argued that good government depends on good decision making and that this needs to be based on the best advice available and a full consideration of the options. Inhibiting the candour of that advice would prejudice that decision making process.
73. The Commissioner recognises that in the circumstances of the request, i.e. the fact that the advice was only provided relatively recently and the heightened sensitivity of some of the information as a result in the

media interest, there could be a inhibition to the candour of future advice. As there is still some ongoing regulatory action taking place as a result of the inspections, it is likely that the same set of officials would have cause to discuss and advise on these matters again, even if this was simply a process of taking stock of the effectiveness of the action that had been taken. So in the short term at least the chilling effect may be felt relatively frequently. However the Commissioner considers this effect would be short lived and would be confined to the discussion of concerns around those schools and closely related issues such as the matters relating to other faith schools. Importantly however, as explained when considering the impact of the alleged chilling effect to the application of the section 31 exemptions, she does not accept that this effect would be very severe. This is due to the actual nature of the information captured by the request.

74. When looking at the public interest in favour of disclosure the DfE has naturally acknowledged the value in access to information to demonstrate the openness and transparency of government. In addition it recognised that more openness about the process and delivery of government may lead to greater accountability, an improved standard of public debate and improved trust.
75. To these factors the Commissioner adds those arguments in favour of disclosure which have already been discussed in relation to section 31. These are the public interest in understanding the reasons for carrying out the inspections and whether there was any risk to the objectivity of those inspections.
76. The Commissioner concludes that the public interest in maintaining the exemption does not outweigh the public interest in favour of disclosure. The Commissioner finds that the DfE is not entitled to rely on section 36(2)(b)(i) to withhold the information.

**(ii) inhibition to the free and frank exchange of views for the purpose of deliberation**

77. This limb of section 36 has only been applied to the exchange of emails
78. The Commissioner has already established that the minister gave their opinion on the likely effects of disclosing the information on 2 May 2017. It is now necessary to consider whether it was reasonable for her consider that disclosing the information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
79. The DfE has identified specific information within the exchange of emails as examples of the sort of free and frank exchange of views it has applied the exemption to. Having studied that information the Commissioner finds one of the examples cited has more of the characteristics of advice that an exchange of views. The other example

is arguable more of an explanation of the background to DfE's approach to regulating the schools in question. Nevertheless the Commissioner is prepared to accept that the distinction between advice and the expression of a view is not always clear cut. In this particular case she accepts that explaining the background to the matters in hand and airing an opinion on a particular approach can be seen as expressions of view. The Commissioner also recognises that given the issues under discussion and the media interest in them, it is not unreasonable for the qualified person to hold the opinion that disclosing this information would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. The exemption is engaged.

### **Public interest test**

80. Having found the exemption is engaged the Commissioner will look at the frequency, extent and severity of the inhibition. In doing so she will give due weight the opinion of the qualified person.
81. The DfE has stressed the need for officials to be able to share views with one another so that they get a full picture of the challenges presented by any given issue. It has highlighted the pressure caused by the media interest. The Commissioner also notes the short time frame in which the exchanges occurred and the tight deadlines in which officials were required to provide their input to senior colleagues. She accepts that it would be difficult to provide these contributions if officials felt the need to carefully censor the information they provided for fear it could be disclosed in the near future.
82. She also recognises that one of the pieces of information contains an explanation of a particular approach that had been rejected. This information could easily have been omitted from the official's contribution if they thought it might be released. The Commissioner accepts this information is helpful to decision makers and that information which is volunteered in this way is particularly vulnerable to the chilling effect.
83. Nevertheless the Commissioner finds that the effect is likely to be short lived and restricted to debate of issues around these particular schools and perhaps closely related subjects. Furthermore she also considers that officials would not be as easily deterred from providing their seniors colleagues with full and frank opinions when required. Having examined the actual information in question the Commissioner is not convinced that any inhibition would be particularly severe.
84. The DfE has also argued the disclosure would have a wider effect than just inhibiting just the exchange of views within the department. It has suggested that it may lead Ofsted being less co-operative with the DfE in the future, presumably because Ofsted officials would also be cautious



of sharing their views with the department for fear of disclosure. This would impact on its ability to maintain an oversight of whether a particular problem was recurring. This in turn would prejudice the department's ability to develop appropriate policies. The Commissioner is sceptical of this argument. The department has also suggested the inhibition would limit its ability to develop guidance and has referred to a previous case in support of these arguments. As already stated, having looked at the information which the Commissioner understands the exemption has been applied to, she is not persuaded the impact of its disclosure would be as great as the DfE has suggested. In respect of the previous decision notice referred to by the department (FS50587396) the Commissioner finds that it relates to information of a different character. Although the request in that case was to do with a related subject, it specifically targeted advice to, and discussions with, Ofsted on that subject. It is therefore likely that it would have captured Ofsted's input into the department's process for developing and implementing policy. In reaching her decision in this current case the Commissioner has emphasised the importance of considering the actual information that has been requested and the fact that it is limited to fairly brief, internal communications.

85. The public interest arguments in favour of disclosure are the same as those already discussed. The Commissioner finds the public interest test is particularly finely balanced in respect of this exemption, but again concludes that it favours disclosing the information. The Commissioner finds that the DfE is not entitled to rely on section 36(2)(b)(ii) to withhold the email exchange .

**(c) otherwise prejudice the conduct of public affairs**

86. This exemption has been applied to both the briefing note and the exchange of emails.
87. The Commissioner is satisfied that a government minister gave her opinion that the disclosure of the requested would be likely to prejudice the conduct of public affairs on 2 May 2017. The Commissioner will now consider whether that opinion was a reasonable one.
88. In line with her guidance, based on decisions by the Information Tribunal, the Commissioner considers that section 36(2)(c) is intended to apply to cases not covered by another specific exemption. So, if section 36(2)(c) is used in conjunction with other exemptions, the prejudice envisaged must be different to that covered by the other exemptions. Furthermore, the fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b).

89. Having looked at the DfE's submission to the Commissioner as well as the submission that it provided to the qualified person, the Commissioner finds that its grounds for applying 36(2)(c) restate the arguments used when engaging the other exemptions; in broad terms, that the disclosure would reduce the candour of advice and views which in turn would prejudice its ability to carry out its regulatory function of ascertaining whether the independent schools were meeting statutory standards. Some of those arguments have been developed further and where this has happened the Commissioner has considered them under the relevant exemption. For example, arguments that disclosing the department's concerns before they were investigated could damage the reputation of the schools has been considered under section 31(2)(a). As the qualified person's opinion is based on arguments which relate to the application of other exemptions, the Commissioner finds their opinion is not reasonable. The exemption provided by section 36(2)(c) is not engaged.

### **Section 40(2) personal information**

90. So far as is relevant, section 40(2) states that information is exempt if it is the personal data of someone other than the applicant and its disclosure to the public would breach any of the data protection principles contained in the Data Protection Act 1998 (DPA).

91. In particular the department has argued that disclosing the names and contact details of junior officials contained in information captured by the request would breach the first data protection principle. These details are contained in the exchange of emails. The first principle states that the processing of personal data (which includes its disclosure) shall be fair and lawful and that personal data shall not be processed unless at least one of the conditions set out in Schedule 2 of the DPA can be satisfied.

92. The DfE has argued that to disclose the details of junior officials, i.e. those below the grade of deputy director, would be unfair.

93. 'Fairness' is a difficult concept to define. It involves consideration of:

- The possible consequences of disclosure to the individual.
- The reasonable expectations of the individual regarding how their personal data will be used.
- The legitimate interests in the public having access to the information and the balance between these and the rights and freedoms of the particular individual.

Often these factors are interrelated.

94. The DfE has said that the junior officials would have a reasonable expectation that, due to their less public facing role, their personal information will not be disclosed into the public domain. The department therefore concludes that to disclose the information in the face of such expectations would be unfair.
95. The Commissioner considers that the expectations of these officials would, in part, be shaped by the provisions of the Freedom of Information Act. There should be recognition amongst public servants that some information about their working life could be disclosed in response to a request. This will however depend on the particular circumstances.
96. The Commissioner accepts that these officials do not have a public facing, or high profile role and that this would lead them to believe that in the normal course of events their names and contact details would not be placed in the public domain. The Commissioner does not consider that there are any particularly unusual circumstances to this case which would alter that expectation.
97. There are no obvious reasons to believe that disclosing their association with the issues to which the request relates would have any particularly detrimental consequences. However nor would disclosing their names and contact details add anything to one's understanding of the information. Therefore on balance the Commissioner finds that the disclosure would be unfair and so breach the first principle of the DPA. Section 40(2) is engaged. The DfE is entitled to withhold the names and contact details of junior staff.
98. It should be noted that although the exemption is engaged in respect of these details, the business areas in which these junior officials work should be disclosed. The inclusion of such information is necessary to help the reader make sense of the exchanges.

## Right of appeal

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99. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

100. 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.

101. 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  
Senior Case Officer  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**