

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 April 2019

Public Authority: Department of Education Northern Ireland

Address: eti@education-ni.gov.uk

Decision (including any steps ordered)

1. The complainant has requested information from the Department of Education Northern Ireland (the DENI) relating to an inspection carried out of Killowen Primary School, Rostrevor. The DENI disclosed some of the requested information, which consisted of the complainant's personal data, however it refused to disclose the remainder (the withheld information) citing section 33, of the FOIA as a basis for non-disclosure.
2. The Commissioner's decision is that the DENI has correctly applied section 33 of the FOIA to the majority of the withheld information, however there is one part of the withheld information to which it has been incorrectly applied as this constitutes the complainant's own personal data and as such falls under section 40(1) of the FOIA. The DENI has agreed to deal with that part of the withheld information under data protection legislation.
3. Therefore the Commissioner requires no steps to be taken.

Request and response

4. On 14 June 2017 the complainant wrote to the DENI requesting information in the following terms:-

Minutes of the following:-

- (1) Meeting on 13 October 2015 between Mrs P McCrum RI, Chair Fr Kearns and Governor Mrs D Leonard.
 - (2) Any meetings on 16 November 2015 with Mrs M Mason DI, Mrs A Clarke and Governor Mrs M Hudson.
 - (3) Meeting on 12 November 2015 (date uncertain) with Mrs M Mason DI, Acting Principal Mrs A Clarke and (possibly) Associate Principal Mr J Campbell / new Chair Mr T McCusker.
5. The DENI responded to the complainant on 4 July 2017, stating that it did not hold the requested information. The complainant sought an internal review of the DENI's handling of his FOI request, on 4 July 2017. The reviewer stated that the DENI, although it does not hold formal minutes of the above meetings, holds inspectors' handwritten contemporaneous notes taken during the meetings held on 13 October 2015 and 16 November 2015, as these meetings were carried out as part of the inspection process, which the DENI considers to be within the scope of the complainant's request even though they are not formal minutes. The reviewer stated that the DENI was refusing to disclose those notes to the complainant, citing section 33 of the FOIA (public audit functions) as a basis for non-disclosure.

Scope of the case

6. The complainant first contacted the Commissioner on 8 August 2017 to complain about the way his request for information had been handled.
7. The Commissioner has considered the DENI's handling of the complainant's request and its application of section 33 to the withheld information.

Reasons for decision

Section 33 – Audit functions

8. Section 33(1) of the FOIA states that:-

“This section applies to any public authority that has functions in relation to -

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

9. Section 33(2) says that information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1).

10. Section 33 is a qualified exemption which means the public authority must apply the public interest test to the withheld information.

11. The DENI has stated that the information requested in parts 1 and 2 of the complainant’s request, which it does hold, is exempt from disclosure under the exemption set out in section 33(1)(b) of the FOIA by virtue of section 33(2).

12. Section 33(1) must be read in conjunction with section 33(2) of FOIA. This provides that information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1). As is the case for all prejudice based exemptions, a public authority must decide on the likelihood of the prejudice occurring – either prejudice ‘would’ occur (a more than 50% chance) or ‘would be likely’ to occur (less than a 50% chance but nevertheless a real and significant risk). The exemption is also qualified by the public interest test.

13. The first step when considering the application of the exemption is to establish whether the DENI has the audit functions described in section 33(1)(b). In the Commissioner’s guidance on section 33 she notes that the expression “economy, efficiency and effectiveness” is not clearly defined. Nevertheless, she considered that it will encompass information about inspections of the use of resources such as staff and premises, as well as the standard of services provided by the authority being audited.

14. The Education and Training Inspectorate (ETI) derives its legal powers from Articles 102 and 102A of the Education and Libraries (Northern Ireland) Order 1986. That Order provides that inspectors have a duty to monitor, inspect and report on educational standards achieved in a school, the nature, scope and effect of advisory and support services, and any other aspect of the establishment, such as the management, staffing, equipment and other resources, including whether the financial resources made available to the school are managed effectively.
15. In her guidance, the Commissioner considered that prejudice in the context of section 33 may take different forms. One possibility is that a premature disclosure could affect the behaviour of the organisation being audited. Alternatively, a public authority could point to a more general prejudice to audit functions where, for example, disclosure was about specific audit techniques that were not already known to the public. Finally, the Commissioner recognised that there may be occasions when an authority might wish to argue that disclosure would, or would be likely to, discourage cooperation with the auditor in the future, thus prejudicing the audit function.
16. The DENI has argued that the main function of the ETI is to inspect and report on all education and training provision, with a particular emphasis on statutory provision. The ETI provides each of the key departments with evidence-based policy advice, evaluates the effectiveness and impact of key policies in practice and, via the biennial Chief Inspector's report, makes evaluative comment on the quality of education being provided system-wide including strengths and areas for improvement. In addition to the more familiar institutional inspection function, ETI also conducts a wide range of inspection evaluations, which provide an opportunity to focus on an aspect of education and/or training in greater depth. The DENI has stated that, as both of these functions – accurate reporting and evaluation of the quality of educational provision in an organisation - rely on inspection evidence, they would be prejudiced by the disclosure of the information that was withheld under section 33 of the FOIA.
17. The DENI has further argued that the purpose of the ETI from an audit point of view is to make evidence-based judgements. It considers that the audit function cannot properly operate if its proper findings can be readily undermined or called into question by the release of earlier

reporting that does not accurately represent the ETI's fully developed views.

Threshold of likelihood

18. The DENI has stated that it is relying on the higher threshold of 'would' in this case, meaning that it considers that there would be a strong likelihood of prejudice occurring should the withheld information be released.
19. The DENI has argued that disclosure of the withheld information would prejudice the ETI's exercise of the functions set out in section 33(1)(b) of the FOIA in the following ways:-
 - a) If it was felt that a precedent was being set for disclosure of information such as inspectors' contemporaneous notes, it would inhibit the free and frank recording by inspectors of evaluations; would lead to less candid and robust inspections; would result in more average evaluations being made; and would hamper decision making.
 - b) Inspectors would take more time and caution over the recording of their notes, which in turn would reduce the amount of information recorded and diminish the inspection evidence base, resulting in delaying the timely production of inspection reports within agreed deadlines.
 - c) The ETI's audit function to make evidence-based evaluations would not properly operate if findings could be readily undermined or called into question by the disclosure of earlier reporting that does not accurately represent the ETI's fully developed view and evaluation, i.e. the final holistic reported evaluations of the quality of provision within an organisation.
20. The Commissioner considers that the ETI's audit function can only be effective where honest and candid views are received from individuals involved with, or connected to, the running of a school. She accepts that an individual would be less forthright with their views if they believed that any information provided could be disclosed in the form of contemporaneous notes or any other material which records the views and opinions of such individuals.
21. The Commissioner does not generally accord much weight to the argument that fear of early disclosure would result in poorer record-keeping. The EIT inspectors have a statutory duty to carry out inspections and record their findings and should do so in a timely

manner. That statutory duty carries with it an obligation of professionalism and they can be expected to know that their records fall within the ambit of the FOIA. However, she does accept the need for the ETI to retain some degree of private thinking space while decisions are being made between members of the inspection team and the ETI's senior management in order to discuss the relevant issues openly and frankly, without fear of premature disclosure.

22. Similarly, the Commissioner is satisfied that inspectors would be less forthright if they believed information could be disclosed that showed their evolving thought processes. She accepts the need to retain some degree of private thinking space while decisions are being made and whilst the totality of information is being gathered and analysed. Members of the inspection team and ETI's senior management should be expected to draw on the experience of each other, to discuss issues openly, frankly and robustly without the need to defend views that were not fully formed or that they no longer hold. This flow of information would be jeopardised by disclosure. The Commissioner is also satisfied that it would undermine the authority of the final report which will have been arrived at following a process of development.
23. The Commissioner considers that the ETI's effectiveness will be dependent on the ability of those in the inspection team to share information, freely and frankly exchange views and deliberations and to be as candid and robust as possible in their evidence. The Commissioner considers that it is this flow of information that would be jeopardised by disclosure of the withheld information. Therefore, the Commissioner is satisfied there is a strong likelihood of prejudice occurring, which equates to more than a 50% chance. She has therefore decided that section 33(1)(b) by virtue of section 33(2) is engaged and has now gone on to consider the public interest factors in favour of disclosure and those in favour of maintaining the above exemption.
24. The Commissioner considers that the ETI's effectiveness will be dependent on the ability of those in the inspection team to share information, freely and frankly exchange views and deliberations and to be as candid and robust as possible in their evidence. The Commissioner considers that it is this flow of information that would be jeopardised by disclosure of the withheld information. Therefore, the Commissioner is satisfied there is a strong likelihood of prejudice occurring, which equates to more than a 50% chance. She has therefore decided that section 33(1)(b) by virtue of section 33(2) is engaged and has now gone on to consider the public interest factors in favour of disclosure and those in favour of maintaining the above exemption.

Public interest factors in favour of disclosure

25. The DENI accepts that there is a public interest in openness and transparency on the part of public authorities so that they may be accountable to the public for the decisions they take. It also accepts that disclosure of the information may promote public understanding of the issues concerned and allow individuals to better understand the ETI's decisions and the decision-making process.

Public interest factors in favour of maintaining the exemption

26. The DENI has informed the Commissioner that inspection evidence recorded by an individual inspector often covers only part of the evaluation of an aspect of the organisation's provision. This inspection evidence, in turn, informs emerging and summary evaluations of the associated aspects of the organisation's provision and could be subject to misrepresentation when taken in isolation.
27. The DENI has also stated that the publicly published inspection report is the formal or official record of the inspection. Inspectors will often write several versions of a report, or sections of a report, as they build up to the final version. Disclosure of contemporaneous notes made by an inspector could lead to the public coming to an erroneous conclusion about the findings in the final report.
28. The purpose of the ETI from an audit point of view is, as stated, to make evidence-based evaluations. This audit function cannot properly operate if findings can be readily undermined or called into question due to earlier reporting of draft or unfinished evaluations. The DENI argues that disclosure of the raw material would undermine the final report as it would invite others to form their own view from notes which the DENI is satisfied are not the complete evidence, being by their nature a synopsis/aide memoire to assist in the process of reaching a collective view. Drafts undermine the considered concluded view by diluting the final position and highlighting areas of nuance and fine judgment. In short, final conclusions can be undermined by relying upon records of incomplete thinking.

Balance of public interest factors

29. The Commissioner accepts that there is a powerful case for finding that the public interest favours disclosure. This reflects the value that society places on schools and the education they provide and, flowing from this, the importance of effective oversight of the education sector.
30. The withheld information relates to the way in which decisions are guided by a body tasked with regulating and improving standards in schools. It is vital that the public can and does have trust in the ability of the ETI to carry out fair and thorough inspections of schools.
31. Just as the public will expect a publicly-funded body to be transparent and accountable, there will also be occasions when a public authority will need room to carry out its functions. The Commissioner, as stated above, will generally not be convinced by arguments that refer to the possibility of poorer record-keeping as a result of disclosure. However, she does accept that the nature of the ETI's role means that it may sometimes need space away from external scrutiny in order to operate effectively. For example, an individual considering passing on confidential information on a voluntary basis will want some reassurance that sensitive information received by the public authority can be kept secure. Accordingly, a balance must be struck between these competing interests.
32. The Commissioner also considers important the realisation that a report may go through many stages before it is finalised. This in itself is not unusual nor is there evidence in the information in question that indicates the findings were subject to outside pressure. While the Commissioner accepts that the public would have a natural expectation that information relating to the inspection of schools would be made available, she considers this expectation is satisfied by the DENI's routine publication of inspection reports. In her view, the public interest in promoting accountability is less strong where the information is incomplete and therefore does not represent a public authority's final considered position.
33. The Commissioner has therefore determined that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption.

Right of appeal

34. 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

35. 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.
36. 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

Deirdre Collins

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