

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 23 January 2019

**Public Authority:** Office for Standards in Education (Ofsted)

**Address:** Piccadilly Gate  
Store Street  
Manchester M1 2WD

#### Decision (including any steps ordered)

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1. The complainant has requested information associated with a grading that Ofsted gave to a particular nursery. Ofsted has withheld the information under section 31(1)(g) of the FOIA (law enforcement) and considers the public interest favours maintaining this exemption.
2. The Commissioner's decision is as follows:
  - The requested information is exempt from disclosure under section 31(1)(g) and the public interest favours maintaining the exemption.
3. The Commissioner does not require Ofsted to take any remedial steps.

#### Request and response

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4. In relation to an inspection of a nursery that Ofsted had carried out on 13 June 2018, on 26 June 2018 the complainant wrote to Ofsted and requested information in the following terms:

*"...evidence from the inspector's case file to support her conclusion and reasoning for the grading."*

5. Ofsted responded on 5 July 2018. It first explained that the FOIA is concerned with disclosing information to the general public and that it does not take account of who the requester is or the reasons why information is being requested. This meant that the complainant had no greater entitlement to the requested information than any other member of the public.
6. Ofsted went on to confirm that it holds the information the complainant has requested and considered the information – which it categorised as 'the toolkit' – to be exempt under section 31 of the FOIA.
7. Ofsted explained that section 31(1)(g) applies to information when its disclosure would be likely to harm a public authority's functions associated with the decision to take regulatory action. It said that as the findings of Early Years inspections are used to determine whether or not regulatory action is required pursuant to Ofsted's powers under Chapter 5 of the Childcare Act 2006 and associated regulations, its function is of a type covered by section 31(1)(g).
8. Ofsted said that, in this case, although the physical inspection of the nursery in question had taken place, the report setting out Ofsted's findings had not been published and the inspection remained subject to challenge through Ofsted's complaints process.
9. It explained that during the period prior to publication of the report, and when complaints or concerns about inspections can be raised, there is a possibility that changes may be made to the overall outcomes of its inspection reports. Ofsted said it considered that it is important that any public release of the inspection evidence is done in the context of regulatory action and a report outcome that is not subject to the possibility of change. This is to ensure that there is no resulting confusion which may undermine Ofsted's judgement of the standards of care and education at the setting. Ofsted said it considered that disclosing to the public any of the evidence during the period in which a challenge may be made, or before any such challenge is resolved, would prejudice its regulatory inspection function. It therefore confirmed that the information the complainant has requested was, at that point, exempt from disclosure under section 31(1)(g) of the FOIA.
10. Ofsted noted that, as a qualified exemption, section 31 is subject to the public interest test. It acknowledged that there is an argument that there is a public interest in disclosing the information as this would underline the thoroughness and rigour of the inspection process by

demonstrating what evidence is recorded and subsequently considered during the inspections, prior to the report being written. As explained above, however, Ofsted considered that disclosing the information, to the public, at that time, could seriously undermine the inspection process.

11. Ofsted said that there is a very clear public interest in ensuring that providers are effectively appraised and regulated through inspection; that the published results of this activity are authoritative and accurate and that effective action is taken to address any weaknesses found. It said that it considered that any disclosure of information, to the public, which undermines the authority of the regulatory inspection process would therefore be contrary to the public interest.
12. Ofsted's conclusion therefore, based on balancing the arguments, was that the public interest was in favour of withholding the information at that time. Consequently Ofsted would not disclose the requested information in response to the complainant's request.
13. Ofsted told the complainant that once the conditions for section 31 no longer apply, information from the toolkit may be disclosable through the FOIA subject to personal data being removed.
14. Ofsted provided a review on 2 August 2018. It explained that its role in relation to the nursery in question is, as the regulator, to establish whether the requirements of the *Statutory Framework for the Early Years Foundation Stage* and the requirements for registration on the *Childcare Register* are being met, and also to make a decision on whether the setting and the registered individual remain suitable for registration.
15. Ofsted said that at section 68 of the Childcare Act 2006 it has the power to cancel or suspend a childcare provider's registration (in other words impose regulatory action) if, among other things, a provider has:  
  
*"2(c) failed to comply with a requirement imposed on him by regulations..."*
16. At section 40 of the same Act, childcare providers have the following duty:  
  
*"Duty to implement Early Years Foundation Stage  
2) An early years provider to whom this section applies— .  
(a) must secure that the early years provision meets the learning and development requirements, and.  
(b) must comply with the welfare requirements."*

17. Ofsted said it can therefore take a range of regulatory actions if childcare providers do not implement any aspect of the Early Years Foundation Stage (EYFS).
18. It went on to say that the findings of an inspection, and specifically the inspection evidence, are an important component of decision-making about enforcement action. The inspection report formally records and communicates to the public what the provider must do to ensure compliance with the requirements of the EYFS.
19. Ofsted again explained that, at the time of the complainant's request for information, the inspection had taken place, however the report had not yet been finalised and published. In addition, the complainant was challenging the report through Ofsted's complaints process. Ofsted said the complainant was, however, aware of both the outcome of the inspection and the actions in the draft report explaining what the complainant needed to do to meet the requirements of the EYFS. Ofsted confirmed that as such actions are necessary, regulatory action was being considered. This made section 31(1)(g) of the FOIA directly applicable in those circumstances.
20. Ofsted said it considered it would be entirely inappropriate to make the inspection evidence available to the public prior to the publication of the report and without the essential context that a finalised inspection report would provide. It noted that while the complainant was aware of the content of the report, this was not yet publicly available information.
21. Ofsted considered that disclosing evidence, whilst enforcement action was being considered, would essentially pre-empt the formal findings of the report and the taking of steps to address these.
22. Ofsted then provided an example. It said that, if the evidence was provided to members of the public at that time they would be likely to raise issues with the nursery staff, and/or Ofsted, based on their interpretation of parts of the raw evidence, as there was no report to guide them through, for example, the weight given by the inspector to specific information. Ofsted said that any public confusion would be likely to encourage the staff to divert more of their time (and Ofsted resources) from addressing the regulatory requirements, in favour of discussing the evidence with parents/carers and the wider public. Ofsted considered this was strong evidence of prejudice to the process of determining regulatory action.
23. Ofsted's review then addressed the public interest arguments. It acknowledged that the public interest favours transparency in its decision making and how inspection judgements are reached. Ofsted said to this end it publishes a report following the inspection of a

childcare setting, such as a nursery, so that its decisions can be scrutinised. Ofsted said providers are able to challenge inspection judgements, and the conduct of inspectors, through its complaints process and elsewhere. Ofsted also publishes an inspection handbook, which explains how inspections are carried out and what inspectors look for when determining inspection outcomes.

24. Ofsted noted the complainant's circumstances – which the Commissioner does not intend to detail in this notice - but advised that the FOIA is concerned with disclosure to the public at large and that it has more appropriate routes for those seeking more information regarding decisions that have been made about a nursery.
25. Finally, Ofsted noted its wider correspondence with the complainant – which again the Commissioner does not intend to detail here – which indicated to it that the complainant was unlikely to want the requested information to be put into the public domain at the time of the request.

### **Scope of the case**

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26. The complainant contacted the Commissioner on 20 August 2018 to complain about the way their request for information had been handled.
27. The Commissioner's preliminary assessment of the complaint, which she communicated to the complainant, was that Ofsted could rely on section 31(1)(g) to withhold the disputed information, and that the public interest favoured maintaining the exemption. The complainant disagreed and preferred to conclude the case formally through a decision notice.
28. The Commissioner's investigation has focussed on whether, at the time of the request, Ofsted could rely on section 31(1)(g) to withhold the information the complainant has requested, and the balance of the public interest.

### **Reasons for decision**

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#### **Section 31 – law enforcement**

29. Under subsection 31(1)(g) information is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any public authority of its functions for any of the purposes specified in subsection 31(2).

30. Subsection 31(2)(c) is the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist, or may arise.
31. The Commissioner considers Ofsted's response to the complainant and its internal review response to have been exemplary in their detail and clarity, and timeliness. As such she did not consider it necessary to approach Ofsted for a separate submission to her and she has based her decision on its correspondence with the complainant. Had any questions or queries emerged during her considerations, the Commissioner would of course, have sought responses from Ofsted to these. On request, Ofsted did send the Commissioner a copy of the information it is withholding, and she has reviewed this.
32. To engage the exemption a public authority must:
  - demonstrate that it has been entrusted with a function to fulfil this regulatory purpose
  - confirm that the function has been specifically designed to fulfil that purpose; and
  - explain how the disclosure would or would be likely to prejudice that function.
33. Ofsted advised the complainant that its role is to establish whether the requirements of the Statutory Framework for the Early Years Foundation Stage and the requirements for registration on the Childcare Register are being met, and also to make a decision on whether the setting and the registered provider remain suitable for registration. Ofsted said that under the Childcare Act 2006 it has the power to cancel or suspend a childcare provider's registration; that is, to impose regulatory action. Ofsted's findings from Early Years inspections are used to determine whether or not regulatory action is required pursuant to its powers under Chapter 5 of the Childcare Act and associated regulations.
34. The Commissioner is satisfied the Childcare Act 2006 provides Ofsted with a range of functions in respect of Early Years provision. These include inspecting Early Years providers to determine whether regulatory action is necessary. She is therefore satisfied that the first and second of the conditions at paragraph 32 has been met.
35. In its correspondence to the complainant, Ofsted explained the nature of the prejudice that it considered would occur if it released the information the complainant has requested; that is, the notes and evidence gathered by the inspector who inspected the nursery in question. Its explanation and example is at paragraphs 20 - 22.

36. Section 31(1)(g) can be engaged on the basis that disclosing the information either 'would' prejudice Ofsted's regulatory functions, or that disclosure would only be 'likely' to prejudice those functions. From its correspondence to the complainant Ofsted appears to have applied the exemption on the basis of the higher threshold of prejudice, ie that disclosure 'would' prejudice its regulatory functions. The Commissioner tends to disagree that Ofsted can be that certain that public confusion would arise if it disclosed the disputed information (which would prejudice its function as a regulator). The Commissioner considers that disclosure would, instead, be likely to prejudice Ofsted's regulatory function. Nevertheless this still means that there is a real and significant risk that the prejudice would occur if the requested information was released.
37. The Commissioner is satisfied that the third of the conditions at paragraph 32 has been met. She accepts that disclosure would be likely to prejudice Ofsted's function as a regulator because it would pre-empt the release of the final inspection report which would be likely to cause public confusion, distracting the nursery and Ofsted from addressing any regulatory requirements.
38. Since all the conditions are met, the Commissioner finds that, at the time the request for it was submitted, the information engaged the exemption under subsection 31(1)(g). She has gone on to consider the public interest arguments. Even though the section 31 exemption is engaged, the information might still be released if there is sufficient public interest to justify doing so.

#### Public interest arguments

39. The Commissioner considers that Ofsted provided the complainant with a robust public interest test. Its arguments are summarised at paragraphs 10 – 12 and paragraphs 23 – 25. Ofsted recognised that there was a public interest in its decision-making being transparent but noted that this interest is served through the publication of the final inspection report, its complaints process and through the publication of Ofsted's inspection handbook. Ofsted's position is that there is a greater public interest in Ofsted being able to carry out its regulatory activity smoothly and effectively. The Commissioner agrees with this argument and she is satisfied that, in this case, the public interest favours maintaining the section 31(1)(g) exemption.
40. The Commissioner has noted the complainant's concerns about Ofsted's position. It appears unclear to the complainant what regulatory action was still on-going with regard to the nursery. They have noted that any setting (nursery) is subject to an inspection within one year for the 'Requires Improvement' grading (which the nursery received) and within

three to four years for the 'Outstanding' and 'Good' gradings. If the Commissioner understands correctly, it appears to the complainant that any setting would, effectively, therefore be subject to regulatory activity all the time, and would therefore never be able to have associated information released to them under the FOIA.

41. As discussed in this notice, the Commissioner is satisfied that Ofsted's regulatory activity was still ongoing at the time of the complainant's request: Ofsted's inspection report was still in draft format and the report's draft findings were still subject to challenge through its complaints process.
42. Second, the Commissioner notes that Ofsted advised the complainant that once the conditions for section 31 no longer apply, information from the toolkit in question may be disclosable through the FOIA subject to personal data being removed. Ofsted therefore considers that it is not the case that information associated with inspections and its regulatory activity would never be eligible for release.



## Right of appeal

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43. 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)

44. 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.
45. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

## Signed

**Pamela Clements**  
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**Information Commissioner's Office**  
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