

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 28 June 2019

Public Authority: Peterborough Diocese Education Trust

Address: Bouverie Court
The Lakes
Bedford Road
Northampton NN4 7YD

Decision (including any steps ordered)

1. The complainant has requested reports associated with a named primary school. Peterborough Diocese Education Trust ('the Trust') said it did not hold some of the requested information and has withheld other information – a Safeguarding audit report - under section 36(2)(b) and 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that the Trust can rely on section 36(2)(c) to withhold the disputed information, and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require the Trust to take any remedial steps.

Request and response

4. On 19 July 2018, the complainant wrote to the Trust and requested information in the following terms:

"I would like to request some information under the Freedom of Information Act. PDET recently undertook a two day baseline review of [Redacted] and a governance review. There has also been a recent safeguarding audit. I would like to request the results of the baseline review, the governance review and the safeguarding audit please."

5. The Trust responded on 24 September 2018. It said it had not yet completed the Teaching and Learning review report and that it had not yet received the Governance review report. The Trust confirmed that it holds the Safeguarding audit report and that this is exempt under section 36 of the FOIA as releasing this audit would prejudice the effective conduct of the Trust's affairs.
6. The complainant requested a review on 24 September 2018. He asked the Trust to send him the two review reports when the Trust had received them. He queried the Trust's reliance on section 36 with regard to the Safeguarding audit report.
7. The Trust provided a review with regard to the Safeguarding audit on 29 September 2018. It indicated that it maintained its position that this information is exempt from disclosure under section 36.

Scope of the case

8. The complainant contacted the Commissioner on 29 September 2018 to complain about the way his request for information had been handled. He subsequently confirmed to the Commissioner that the focus of his complaint is the Safeguarding audit only and that he intends to submit a new request for the Teaching and Learning and Governance review reports.
9. The Commissioner's investigation has therefore focussed on the Trust's reliance on section 36(2)(b) and 36(2)(c) to withhold the Safeguarding audit report that the complainant has requested.

Reasons for decision

Section 36 – prejudice to effective conduct of public affairs

10. In its submission to the Commissioner the Trust has confirmed that it is withholding the audit report under section 36(2)(b)(i) and (ii) and section 36(2)(c).
11. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure

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.

12. The Commissioner considers that section 36(2)(b)(i) and (ii) concern processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosing the Safeguarding audit, at the time of the request and in the future could inhibit the process of providing free and frank advice or the free and frank exchange of views for the purposes of deliberation.
13. Section 36(2)(c) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would, or would be likely otherwise to prejudice the effective conduct of public affairs.
14. Section 36(2)(c) is concerned with the effects of making the disputed information public. Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
15. Importantly, if section 36(2)(c) is used in conjunction with any another exemption, as in this case, the prejudice envisaged must be different to that covered by the other exemption. 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). This means that information may be exempt under both 36(2)(b) and (c) but the prejudice claimed under (c) must be different to that claimed under (b).
16. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
17. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person (QP) considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

18. To determine, first, whether the Trust correctly applied the exemption, the Commissioner is required to consider the QP's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - ascertain who was the QP or persons
 - establish that an opinion was given by the QP
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
19. The QP in this case was Margaret Holman, the Trust's Chair of Directors. As the highest decision making body of the Trust, the Commissioner is satisfied that the QP in this case is appropriate.
20. The Trust has provided the Commissioner with the submission it provided to the QP. Ms Holman's name is at part 2 of the form but her signature is not at part 14, nor is her name printed again at that part. The Commissioner queried this with the Trust. It confirmed that the QP submission was discussed with, and signed by, Margaret Homan before its Directors meeting on 18 September 2018 and that the version of the submission it has provided to the Commissioner is the electronic version of the form, and not a scan of the signed form. On the basis of this explanation, the Commissioner is satisfied that the opinion was given by Ms Holman as the QP.
21. In its submission to the Commissioner the Trust has advised that the QP's opinion was sought on 18 August 2018 and the date concluding the submission is 18 September 2018. The dates are after the date of the request and in advance of the Trust's response to the complainant of 24 September 2018.
22. The opinion given by the QP was that the Safeguarding audit engaged section 36(2)(b)(i) and (ii) and section 36(2)(c). With regard to section 36(2)(b)(i) the QP considered that prejudice would be likely to occur as free and frank advice to Directors could not be provided if this advice is likely to end up in the public domain. She considered that the information is likely to include information that could identify individuals, and information that could put children at risk.
23. With regard to the 36(2)(b)(ii) the QP considered that prejudice would be likely to occur as people interviewed during the due diligence process would be unlikely to be entirely candid if they felt that their comments are going to be in the public domain.
24. With regard to 36(2)(c) the QP considered that prejudice would be likely to occur as Trust Directors must be able to rely on the information given to them in the due diligence process without any concern that

information provided, consulted or relied on may be compromised by being revealed at a later date. Due to the sensitive nature of safeguarding information it is likely that findings would be 'softened' in a report if the information is going to end up in the public domain.

25. The Commissioner has considered whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the *most* reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
26. With regard to the section 36 exemptions, the qualified person's opinion in this case is that prejudice *would be likely* to occur if the withheld information was to be disclosed, rather than *would* occur. 'Would be likely to occur' imposes a less strong evidential burden than the higher threshold of 'would occur'.
27. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
28. In the submission that the Trust provided to the QP, the Trust provided a description of the requested information, arguments to support a position that prejudice would or would be likely to occur and counter arguments to this position. The Commissioner is satisfied that the QP had sufficient appropriate information in order to form an opinion on the matter of whether section 36(2)(b)(i) and (ii), and section 36(2)(c), were engaged.
29. The Commissioner has considered the factors at paragraph 18 and, since she is satisfied that these factors have been addressed, she must accept that the QP's opinion is one a reasonable person might hold. She therefore finds that the Safeguarding audit report engages section 36(2)(b)(i) and (ii), and section 36(2)(c). She has gone on to consider the public interest test.

Public interest test

Public interest in disclosing the information

30. In his complaint to the Commissioner the complainant has told her that Ofsted has not inspected the school that is the subject of the request since February 2011. He says that once it becomes an academy (and officially a brand new school), it will be exempt from inspection until at least its third year. Therefore it could be 2022 (or even later) before Ofsted again inspects the school.
31. The complainant has argued that the recent Safeguarding audit (and the Teaching and Learning and Governance reviews) that the Trust carried out (with the help of independent Ofsted inspectors) is the only information regarding the current performance of the school. He considers that it is vital that they are made publicly available. This is so that current and prospective parents would have a true picture as to the school's performance.

Public interest in maintaining the exemption

32. In its submission to the QP, the Trust said that the Safeguarding audit report was produced as part of its due diligence process. Officers use the report to give advice to Directors and Directors must be able to use the advice and information gathered from the report to make a decision about the level of risk they accept if the school joins a multi academy trust. The report must be thorough and the people interviewed must be able to be honest, open and entirely candid. There are occasions where individuals could be identified and there are instances where putting safeguarding information in the public domain could put children at risk.
33. The QP and Trust consider that free and frank advice to Directors could not be provided if this advice is likely to end up in the public domain. In the Trust's view people interviewed during the due diligence process would be unlikely to be entirely candid if they felt that their comments are going to be in the public domain. The public interest argument here is that a Safeguarding audit of the school must be robust and thorough and this can be best achieved in those participating in the audit feeling confident that views and information they share will not be put into the public domain.

Balance of the public interest

34. In finding that the above exemptions are engaged, the Commissioner has already accepted the QP's opinion (that disclosing the information would be likely to result in the prejudice set out in the exemptions) is a

reasonable opinion to hold. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any prejudice that would or might occur. In order to determine this, the Commissioner has considered both the nature of the requested information and the timing of the request.

35. In her published guidance on section 36 the Commissioner discusses the so called 'chilling effect'. Chilling effect arguments operate at various levels. If the issue in question is still live at the time a related request is submitted, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
36. Whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
37. The Trust has provided the Commissioner with a copy of the Safeguarding audit report. The report is not dated but it records that the review of the school that informed the report was carried out on 6 June 2018. The report must therefore have been completed between 6 June 2018 and the date of the request on 19 July 2018. As such it was still relatively 'fresh' but had been completed at the point of the request.
38. The Safeguarding audit report lists the people with whom discussions were had (by job title), what was reviewed, actions the school must take to meet statutory safeguarding requirements, and a series of actions the school should and could take to fulfil best practice. In the Commissioner's view, albeit the report concerns safeguarding matters, there is nothing especially sensitive about the information in the report. The people associated with the school who were interviewed are those that one might expect to have been approached. The four bulleted actions the audit report advises the school it must take concern training and administrative measures which, in the Commissioner's view, do not appear to be especially serious. The remaining, longer series of actions are actions the school is advised it should or could take, not that it *must* take. Finally, the Safeguarding audit had been completed at the time of the request.
39. With regard to sections 36(2)(b)(i) and 36(2)(b)(ii), given the broad nature of the report, that it is not especially sensitive and the fact that the review and associated report had been completed at the time of the

request, the Commissioner is not persuaded that disclosing this Safeguarding audit at that time would inhibit members of staff from engaging candidly in such a review in the future; it would not dissuade them from providing advice or exchanging views about safeguarding matters at the school, with those carrying out the review and writing the resulting report. As such the Commissioner does not consider the prejudice envisioned under these sections would be severe or would outweigh general the public interest in disclosure. She has gone on to consider section 36(2)(c).

40. As has been discussed, section 36(2)(c) is concerned with the effects of making the disputed information public. Prejudice to the effective conduct of public affairs here could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. It may also refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure.
41. In the QP's opinion – which the Commissioner has accepted as reasonable – the Trust's Directors must be confident that safeguarding information it receives as part of the due diligence process is clear and robust. The QP considered that, due to the 'sensitive' nature of safeguarding information, it is likely that findings would be 'softened' in a report, by those producing the report, if it was felt that the information was going to end up in the public domain. By 'softened' the Commissioner understands the QP to mean made less clear and less specific, in order not to release any particular safeguarding information about the school to the wider world (which might increase the risk to its students). As far as the Commissioner is aware the level of specificity in the Safeguarding audit report in this case is not present in Ofsted reports generally. The Commissioner understands that Ofsted reports simply state whether or not a school's safeguarding procedures meet current government requirements.
42. In addition, although the Safeguarding audit had been completed at the time of the request, the two other reviews associated with the 'due diligence' process – the Teaching and Learning review and Governance review – had not. The Trust has explained that its due diligence process is designed to give it a range of information about a school before it joins the Trust. It includes a review of HR, finance, site condition and compliance, safeguarding, governance and education provision. Essentially, it enables the Trust's Directors to fully understand the extent of any liabilities they could be taking on by bringing the school into the Trust. It says that a multi academy trust would be extremely unwise not to conduct a thorough due diligence process before agreeing to allow a school to join. The process is intended to be an honest and frank assessment of anything that could impact on the Trust in the

immediate and long term future. At the time of the request, therefore, the wider due diligence process was still ongoing; the Trust had received – and was considering – the audit report but had not received the two associated reports.

43. The complainant has expressed an interest in this information because of the length of time the school may go without an Ofsted report; but he has not brought to the Commissioner's attention any specific concerns about the school's safeguarding procedures. Such concerns may have lent more weight to disclosing the audit.
44. In the Commissioner's view however, such wider public interest as there is in the Safeguarding audit is not outweighed by what the Commissioner considers to be the greater public interest in the Trust having all the information it needs, clearly expressed, in order for it (and the school) to ensure the school is safe for its students. There is also greater public interest in the Trust (and the school) being able to focus on addressing the findings in the audit report – and in the associated reports once completed – rather than having to divert resources into fielding any questions from parents or others, about the Safeguarding audit report. The Commissioner therefore finds that the public interest lies with maintaining the exemption under section 36(2)(c) on this occasion.

Right of appeal

45. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

46. 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.
47. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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