

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 December 2019

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

Decision (including any steps ordered)

1. The complainant has requested information on Lilac Sky Schools Academy Trust, specifically minutes, invoices, expenses and other documents associated with the trust. The Department for Education refused the request on the basis of section 14 as it considered complying with the request would be burdensome due to the need to consider a number of exemptions including various subsections of section 31, section 36 and section 40.
2. The Commissioner's decision is that the DfE has correctly applied section 14(1) to refuse the request. She therefore does not require the DfE to take any steps.

Request and response

3. On 12 October 2018 the complainant made a request to the Department for Education (DfE) about Lilac Sky Schools Academy Trust in the following terms:
 - 1) *"Can you confirm to me whether board minutes and associated documents have been retained by the DfE?"*
 - 2) *Can you confirm if other documents – such as invoices for expenses and invoices for contracted work – have been retained?"*
 - 3) *Please can you provide me with the all the minutes for board meetings held by the trust.*

4) *Please can you provide me with all the documents associated with the board minutes of the trust."*

4. The DfE responded on 7 December 2018 and confirmed it held some of the requested information but stated it was being withheld on the basis of section 40, 31 and 36 of the FOIA.
5. The complainant requested an internal review on 4 January 2019. He asked the DfE to confirm which exemptions had been applied to what information and also stated that points 1 and 2 simply required yes or no answers that had not been given. The complainant also disputed the use of section 40 as it would be acceptable for minutes to be released with personal data redacted.
6. The DfE conducted an internal review and responded on 15 March 2019. It confirmed for points 1 and 2 that it held some board minutes and associated documents and invoices. The DfE upheld its decision to withhold the information it held on the basis of section 40, 31 and 36 but also sought to apply a new exemption (section 14) as it considered due to the quantity of information in scope there would be an unreasonable burden on the DfE in responding.

Scope of the case

7. The complainant contacted the Commissioner following the internal review on 18 March 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld information within the scope of the request on the basis of any of the cited exemptions – sections 14, 40, 31 or 36.

Reasons for decision

Section 14 – vexatious requests

9. This is an unusual case: obviously in most scenarios a public authority would seek to argue that a request was too burdensome to comply with before commencing significant work on it. Nevertheless, the Tribunal has made it clear that public authorities can raise a new exemption, including section 14, either before the Commissioner or the Tribunal. Moreover, from a practical point of view, the fact that the DfE has already considered parts of the request means that it is in a position to

provide a more detailed estimate of allegedly potentially burdensome activities involved in fulfilling the request than might have otherwise been the case.

10. Section 14(1) provides that a public authority is not obliged to comply with a request that is vexatious. In this case the DfE cited section 14(1) on the basis of the burden that it believes the request would impose upon it.
11. Ordinarily, where the concern of a public authority is about the burden of a request, the relevant provision of the FOIA would be section 12(1). This section provides that a public authority is not obliged to comply with requests where the cost of doing so would exceed a limit. However, a public authority cannot claim section 12 for the cost and effort associated with considering exemptions or redacting exempt information, which was the concern of the DfE in this case.
12. A public authority may apply section 14(1) where it can make a case that the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation. This can include time spent on considering exemptions and making redactions.
13. However, the Commissioner considers there to be a high threshold for refusing a request on such grounds. This means that a public authority is most likely to have a viable case where:
 - The requester has asked for a substantial volume of information **and**
 - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the ICO **and**
 - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.
14. The Commissioner has considered the representations from the DfE to understand to what extent the request would impose a burden.
15. As context to the request the DfE has explained that Lilac Sky Schools Academy Trust (the trust) was established in 2011. It had nine primary schools across Kent and East Sussex that were successfully transferred to four new trusts on 1 January 2017. LSSAT dissolved in September 2017.
16. In February 2016, a Multi Academy Trust (MAT) review identified a number of concerns around governance and compliance at LSSAT and the Education and Skills Funding Agency (ESFA) commissioned a formal investigation into the trust which concluded in May 2016. The ESFA (an

agency of the DfE) has been taking forward actions in light of the findings in the initial case. The DfE has stated that it aims to publish a report on the issue once any action is complete.

17. In terms of the request, the complainant has asked for all the minutes for the board meetings held by the trust and all the documents associated with the board minutes of the trust. The DfE has explained it is the responsibility of the trustees to retain documents after a trust has dissolved in accordance with the Companies Act. The DfE (and ESFA) does not have any legal duty to retain these records. During the investigations, the ESFA agreed arrangements to retain certain documents that could potentially be used as evidence in the investigation. The minutes of board meetings and all other documents within the scope of this request were amongst this evidence.
18. The DfE has explained that due to the complexity of this request several meetings took place to discuss how to respond, the DfE states that this request required more discussion than is usual which is reflective of the reasons why it has considered the request vexatious due to the burden in responding.
19. The DfE has explained that as investigations are still 'live' it is very difficult to ascertain what information in the scope of the request is still relevant or of evidential importance to the investigation until the case is actually closed and the report published. Information that may appear anodyne could be of specific and vital evidential importance as part of the investigation. The DfE has provided the Commissioner with examples of evidence that on face value does not appear to be significant but it has explained how this could be vital to the investigation and the Commissioner accepts that this is a difficult determination and one that requires careful consideration by knowledgeable individuals.
20. The DfE has been able to broadly establish the exemptions likely to apply to various pieces of information within the scope of the request but it argues that there is still substantial work to do; each piece of information would need to be reanalysed by the investigative team and others, possibly including lawyers, to determine if it is relevant and could be key evidence in relation to the investigations and the broader case and if so what exemptions, if any, might apply.
21. The DfE has also explained that the investigative team itself has limited resources with individuals involved in several investigations at any one time. The DfE states that adding to the burden of the investigative team of re-examining each individual piece of information in scope whilst investigations are ongoing and still live would unnecessarily prolong the

investigation of the case and delay the publication of the final report. It would also divert limited resources away from their key role.

22. The DfE has explained that it is highly likely the information in scope would engage exemptions in Part II of the FOIA. These included section 40, section 31 and section 36.
23. On section 31, the DfE has explained that it has statutory responsibility for ensuring the academies and their trusts meet statutory standards set out in the Academies Financial Handbook. This includes a responsibility to investigate potential or suspected malpractice. The DfE uses the functions listed at sections 31(2)(a), (b), (c) and (d).
24. Section 31(2)(a) relates to the importance of a public authority having the power to make a formal decision to take some action. The DfE considers this exemption to be relevant as the investigation has not concluded and disclosing relevant information would be likely to prejudice its exercising of functions for the purposes of ascertaining whether any person has failed to comply with the law. Whilst it would seem that this exemption could have been applied on a 'blanket basis' to withhold a significant amount of the information due to its nature; the Commissioner accepts that there would be considerable work required by the DfE to establish if the information was still relevant to the live investigation before this exemption could be considered.
25. Section 31(2)(b) relates to 'improper conduct' and the DfE argues in light of the concerns raised related to potential financial misconduct outside of the guidelines supplied in the Academies Financial Handbook, much of the withheld information will engage this exemption. Similarly section 31(2)(d) would be engaged as it relates to the function of ascertaining a person's fitness or competence to manage companies or undertake a profession and some of the information does relate to determining if a person is fit to perform a senior role.
26. Disclosure of the requested information that includes details of the investigation, specifically the parts of it related to ascertaining a person's fitness or competence to perform a role and whether improper conduct has occurred would be likely, in the Commissioner's view to prejudice the investigation. She accepts, therefore, that it was reasonable for the DfE to take steps relating to this exemption prior to complying with the request.
27. The DfE also considers that section 36(2)(b)(ii) is a relevant exemption to be considered in relation to the withheld information. The DfE has explained that key stakeholders have provided views for the purposes of deliberation and these were provided with the expectation of confidence. By way of an example, the DfE has provided the Commissioner with

examples of information within the scope of the request that demonstrate the views given and the circumstances in which the views were given which show an expectation of confidence.

28. The Commissioner has viewed various samples of information provided by the DfE to demonstrate the different types of information and how the exemptions might apply. The Commissioner accepts complying with the request would necessitate the DfE reviewing all of the information to firstly determine if it is still relevant to the investigation and then to determine which of the exemptions might be engaged. This work would be substantial and given the limited resources available in the relevant business area to review this information the Commissioner accepts there would be a significant burden on the DfE due to the tasks involved in ascertaining what information is still relevant and engages the various exemption.
29. The Commissioner has considered if section 12 could have been applied as an alternative but she notes that there is no suggestion from the public authority that it cannot readily identify the information; rather that once the information has been identified it will need to be considered for its relevance as this may determine the exemption that would be engaged. The Commissioner does not think the process of gathering the requested information would be overly time consuming and therefore section 12 would not have been appropriate to consider.
30. In conclusion, all information requests impose some burden and public authorities have to accept that in order to comply with their FOIA obligations. However, in some cases the burden imposed by a request will be disproportionate to its value.
31. In the Commissioner's view the subject matter of the requested material understandably necessitates a detailed and considered review of the material. The Commissioner also accepts that the sensitive nature of the requested material means that there are inherent practical complexities in terms of analysing the information with a view to its disclosure, both in terms of the limited number of staff actually able to do so and practicalities of actually doing so. The Commissioner would also point out that the decision to refuse the request under section 14 has not been taken lightly by the DfE and it has stressed it remains committed to disclosing a final report of its findings when the investigation has reached its conclusion and that part of the reason for considering section 14 is due to the diversion of resources from the investigation to respond, thus delaying the final report.
32. In reaching this finding, the Commissioner is not seeking to dismiss the public interest arguments advanced by the complainant. She recognises there is a public interest in disclosure of information which would shed

light on this topic. That being said, the Commissioner accepts that the DfE would be required to carry out actions relating to sections 31 and 36 for the information it holds. She also accepts that these actions would impose an oppressive and disproportionate burden upon the DfE. Therefore, the Commissioner's decision is that the request was vexatious under section 14(1) of the FOIA and the DfE was not obliged to comply with it.

Right of appeal

33. 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

34. 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.
35. 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

Jill Hulley
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