

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2020

Public Authority: Office for Standards in Education, Children's Services and Skills (Ofsted)

Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested the Unique Reference Number (URN) of a particular care home. The Office for Standards in Education, Children's Services and Skills ("Ofsted") refused to provide the information as it considered that the particular information requested fell outside the scope of the FOIA.
2. The Commissioner's decision is that the requested information is held by Ofsted for the purposes of functions exercisable by Her Majesty's Chief Inspector of Education, Children's Services and Skills. As such, the information is derogated and section 1(1) of the FOIA does not require Ofsted to comply with the request.
3. The Commissioner does not require further steps.

Request and response

4. On 18 June 2020, the complainant wrote to Ofsted and requested information in the following terms:

"I am writing to you Ofsted for the updated URN no for [redacted]. Please could you send me the current URN reference to access the reports associated to this care home."

5. Ofsted responded on 22 June 2020. It stated that it considered that the information was held in connection with its functions under the Care Standards Act 2000 and was thus outside the scope of the FOIA.
6. The complainant wrote back to Ofsted and noted that similar information had previously been provided. There then followed an exchange of correspondence in which Ofsted reiterated its position that the information was exempt from the FOIA and in which the complainant argued that Ofsted had previously been willing to provide the same information. Ofsted also refused to allow the complainant access to the information outside of the FOIA.
7. On 16 July 2020, the complainant sought a formal internal review of Ofsted's response. Ofsted completed its internal review on 17 July 2020. It upheld its position that it could not provide the information.

Scope of the case

8. The complainant contacted the Commissioner on 13 August 2020 to complain about the way his request for information had been handled.
9. Having considered the correspondence, the Commissioner wrote to the complainant on 3 September 2020 to set out her preliminary view that requested information would be "derogated" and thus fall outside the scope of the FOIA. It is not her role to determine whether information should be provided outside of the FOIA.
10. The complainant disagreed with the Commissioner's view, noting that similar information had previously been provided to him. He pointed out that the Commissioner had dealt with a similar complaint in 2013.
11. The Commissioner no longer has the records from the previous complaint. She can only comment on the particular circumstances of the current complaint. Given that the complainant has clearly disagreed with her informal view, the Commissioner now considers it appropriate to set out her formal view in a decision notice.
12. The House of Lords in *Sugar v BBC* [2009] UKHL 9 confirmed that the Commissioner has the jurisdiction to issue a decision notice to confirm whether or not the information is caught by the derogation. The Commissioner's analysis will now focus on the derogation.
13. As the Commissioner considered that the matters involved are straightforward, she did not seek a detailed submission from Ofsted – but did ask it whether it had anything to add to its previous position.

Ofsted had not responded at the date of this notice and the Commissioner was unwilling to delay the decision any further.

14. The Commissioner considers that the scope of this decision notice is to determine whether the requested information falls within the scope of the FOIA or whether it is derogated.

Reasons for decision

15. Whilst most public authorities are covered by the FOIA in respect of the entirety of the information they hold, some organisations (such as Ofsted and the BBC) are only partially covered by the legislation. These organisations are only obliged to consider for disclosure information which is either: held in connection with specific functions of the organisations or held for purposes *other than* specific functions of the organisation.
16. In the case of Ofsted, its specific entry in schedule 1 of the FOIA (modified by the Education and Inspections Act 2006) states that the organisation is a public authority (and hence covered by the FOIA):

*"in respect of information held for purposes **other than** those of the functions exercisable by Her Majesty's Chief Inspector of Education, Children's Services and Skills by virtue of section 5(1)(a)(iii) of the Care Standards Act 2000."* [emphasis added]
17. Section 5 of the Care Standards Act 2000 was modified extensively by the Health and Social Care Act 2008 and the specific citation in schedule 1 of the FOIA has not been updated to reflect this. Prior to 2008, the text of section 5(1)(a)(iii) of the Care Standards Act 2000 established Her Majesty's Chief Inspector of Education, Children's Services and Skills as the registration authority for children's homes, residential family centres, fostering agencies, voluntary adoption agencies and adoption support agencies in England. The most recent text of the legislation has differently-numbered clauses but section 5(1)(a) still defines Her Majesty's Chief Inspector of Education, Children's Services and Skills as the registration authority for the bodies specified in section 5(1A). Those bodies being:
 - (a) *children's homes in England,*
 - (b) *residential family centres in England,*
 - (c) *fostering agencies in England or, where the activities of a fostering agency are carried on from two or more branches, the branches in England,*

(d) *voluntary adoption agencies whose principal office is in England, and*

(e) *adoption support agencies in England or, where the activities of an adoption support agency are carried on from two or more branches, the branches in England.*

18. The Commissioner therefore considers that any information Ofsted holds in connection with its function as a registration authority will not be covered by the FOIA.

Is the information held, by Ofsted, in connection with functions exercisable under the Care Standards Act?

19. There is very little existing caselaw in respect of Ofsted's derogation from the FOIA. However, there is a great deal of precedent in respect of the BBC – which has a similar derogation.

20. The scope of the derogation was considered by the Court of Appeal in the case *Sugar v British Broadcasting Corporation and another* [2010] EWCA Civ 715, and later, on appeal, by the Supreme Court (*Sugar (Deceased) v British Broadcasting Corporation* [2012] UKSC 4). The leading judgment in the Court of Appeal case was made by Lord Neuberger of Abbotsbury MR who stated that:

" once it is established that the information sought is held by the BBC for the purposes of journalism, it is effectively exempt from production under FOIA, even if the information is also held by the BBC for other purposes." (paragraph 44), and that "...provided there is a genuine journalistic purpose for which the information is held, it should not be subject to FOIA." (paragraph 46)

21. The Supreme Court endorsed this approach and concluded that if the BBC held the information for the purpose of journalism, art or literature, it would be caught by the derogation even if that was not the predominant purpose for holding the information in question.

22. In order to establish whether the information was held for a derogated purpose, the Supreme Court indicated that there should be a sufficiently direct link between at least one of the purposes for which the BBC held the information (ignoring any negligible purposes) and the fulfilment of one of the derogated purposes. This is the test that the Commissioner will apply to the situation with Ofsted.

23. If a sufficiently direct link is established between the purposes for which Ofsted holds the information and its function as a registration authority for children's homes – the information will not be subject to FOIA.

24. In this particular case, the request seeks a unique reference number for a specific children's care home. The Commissioner considers that part of Ofsted's function as a registrar of children's homes would be to assign a unique reference number to each care home that it registered. That number would not be chosen by the care home, it would be assigned by Ofsted using some pre-determined criteria for allocating reference numbers. The information will therefore be held by Ofsted – at least in part – in connection with its function as a registrar.
25. It may well be that Ofsted also holds the information for other purposes as well – such as its function in inspecting the care homes – but this does not mean that it does not also hold the information for the purpose of registering the care homes.
26. The Commissioner is therefore satisfied that Ofsted holds this information for the purposes of the functions it exercises on behalf of Her Majesty's Chief Inspector of Education, Children's Services and Skills as the registration authority for children's care homes. As such this information is subject to a specific derogation from the FOIA and thus Ofsted is not obliged to disclose it.

Right of appeal

27. 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

28. 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.
29. 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

Phillip Angell
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF