

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 1 July 2022

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

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of correspondence exchanged with the London Borough of Sutton. The Department for Education ("the DfE") disclosed some information but relied on section 36 (prejudice to the effective conduct of public affairs) and section 40 of FOIA (third party personal data) to withhold the remainder.
2. The Commissioner's decision is that the DfE is entitled to rely on section 36(2)(b)(ii) of FOIA to withhold the remaining information and that the balance of the public interest favours maintaining the exception.
3. The Commissioner does not require further steps.

#### **Request and response**

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4. On 1 June 2021 the complaint requested information in the following terms:

"Email correspondence between DfE officers Debbie Orton and/or Andre Imich and Sutton Local Authority officers (including but not limited to Nick Ireland and Fiona Phelps) from 1 March 2021 until 30 April 2021."

5. On 15 July 2021, the DfE responded. It provided some information within the scope of the request but refused to provide the remainder. It relied on section 36 and section 40 of FOIA as its basis for doing so.
6. The complainant requested an internal review on 16 July 2021. The DfE sent the outcome of its internal review on 11 August 2021. It upheld its original position.

## **Scope of the case**

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7. The complainant contacted the Commissioner on 15 August 2021 to complain about the way her request for information had been handled.
8. On receipt of the DfE's submission and the withheld information, the Commissioner wrote to the complainant on 6 June 2022 to explain that the DfE was relying on section 36(2)(b)(i) of FOIA to withhold the name of a particular public authority that was mentioned in one of the disclosed emails. Having been advised by the Commissioner that the name of the public authority in question was incidental, the complainant agreed to exclude this material from the scope of the investigation. She also confirmed that she did not wish to contest the DfE's reliance on section 40(2) to withhold information. In a further correspondence, she agreed to exclude a draft document, caught by the request because it had been attached to one of the emails, from the scope of her complaint.
9. On the same day, the Commissioner also wrote to the DfE in respect of one particular document that had been withheld. He explained to the DfE that, in his view, the document was unlikely to engage section 36(2)(b)(ii) of FOIA and that, whilst section 36(2)(c) might be engaged, the balance of the public interest was likely to favour disclosing the majority of the document. He therefore suggested that the DfE should disclose this information.
10. The DfE disclosed the information on 28 June 2022, but redacted some sections which it considered to be third party personal data.
11. The Commissioner considers that the scope of this complaint is to determine whether the DfE was entitled to rely on any of the limbs of section 36 to withhold the remaining information.

## Background

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12. In March 2018, a joint letter from the CQC (Care Quality Commission) and Ofsted raised “significant concerns” about Special Educational Needs (SEN) services in the London Borough of Sutton following an inspection in January of that year. Ofsted followed that with a Written Statement of Action and declared that the services were “failing” and “not fit for purpose”.
13. Since then, the Borough has made progress, to the point where it was commended by the DfE,<sup>1</sup> however there remains concern amongst some parents that SEN services in the area are still not as good as they should be.
14. The DfE explained to the Commissioner that former minister Vicky Ford MP had met with a local campaign group to discuss some of the ongoing concerns. The minister agreed to look into the concerns raised and DfE officials met with officials from the London Borough of Sutton on 20 March 2021.

## Reasons for decision

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### Section 36 – Prejudice to the Effective Conduct of Public Affairs

15. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
16. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
  - “(a) would, or would be likely to, prejudice—
    - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
    - (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
    - (iii) the work of the Cabinet of the Welsh Assembly Government.

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<sup>1</sup> <https://www.yourlocalguardian.co.uk/news/18624620.vicky-ford-praises-sutton-improving-send-services/>

- (b) 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, or
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
  - (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
  - (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words 'in the reasonable opinion of a qualified person'."
17. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide his own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure himself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

### **Who is the Qualified Person and have they given an opinion?**

18. The DfE provided the Commissioner a copy of a submission that had been presented to Vicky Ford MP setting out a case for applying three limbs of the section 36 exemption. The document also includes Ms Ford's signature with a date of 28 June 2021.
19. In June 2021, Ms Ford was the Parliamentary Under Secretary of State for Children and Families at the DfE. As such, Ms Ford was a Minister of the Crown and therefore able to act as the Qualified Person for the purposes of the exemption.
20. In signing and dating the submission, the Commissioner is satisfied that Ms Ford gave an opinion and that she did so on 28 June 2021.

### **What was the Qualified Person's opinion and was it reasonable?**

21. The remaining information being withheld comprises of partial email trails between the DfE and the London Borough of Sutton. The DfE has disclosed some of the emails but withheld the remainder. There are also some small sections of the letter, referred to in paragraph 9, which was attached to one of the emails in scope.
22. In her opinion, the Qualified Person was of the view that disclosure of the remaining withheld information would have a chilling effect on the ability of officials at the DfE and London Borough of Sutton to discuss matters candidly. She noted that there were ongoing complaints and a prospect of litigation at the time of the request. Therefore disclosure of the information would make officials more reticent and less forthright in their views – leading to poorer overall decision-making.
23. The DfE argued that the parties involved had an implicit understanding that the email exchanges were confidential and that eroding this “safe space” would make other authorities more reticent to discuss sensitive matters with the DfE in future.
24. The Commissioner accepts that it is neither absurd nor irrational to consider that disclosure of the contents of the emails might make officials less willing to discuss matters openly and candidly – although he does not consider that this is more likely than not to occur. He therefore accepts that section 36(2)(b)(ii) is engaged in respect of the remaining information to which the DfE has applied it, but only at the lower bar that disclosure “would be likely to” cause prejudice.

### **Public interest test**

25. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
26. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
27. As a general rule, the Commissioner expects civil servants and local government officials to be robust. They should not easily be dissuaded from giving candid and frank opinions or from challenging prevailing orthodoxies. However, there are some circumstances in which officials may be justified in being reticent if they believe that their views will shortly become public knowledge.

28. There is a strong public interest in understanding how well any local educational authority is doing at discharging its functions in relation to SEN services. That public interest is strengthened, in this case, by the previously-identified issues with the London Borough of Sutton's provision.
29. The DfE identified in its submission that some of the information being withheld had been obtained by (or could have been obtained by) the Secretary of State for Education, exercising his powers under Section 29 of the Education Act 1996. Therefore the Commissioner recognises that, at least to some extent, this is information that the DfE could have required to be provided.
30. However, the Commissioner also notes that, at the time of the request, the DfE was busy considering the next steps to be taken following a complaint. He therefore accepts that, in these particular circumstances, officials were discussing a matter which remained "live" at the time of the request. Therefore they did need a safe space in which to discuss and deliberate matters before deciding on a way forward.
31. Whilst aware of the powers granted to the Secretary of State by the Education Act, the Commissioner still recognises that it is not always desirable for any public authority to have to rely constantly on its formal powers in order to acquire information.
32. Finally, having considered the remaining information being withheld in this case, the Commissioner notes that it is particular to a specific issue at a single school. In the Commissioner's view, this issue is so specific as to limit its relevance to wider public debate. Concerned parents would learn very little about the London Borough of Sutton's overall approach to SEN provision from this particular information and therefore the Commissioner has to consider that the public interest in such information is not particularly strong. The DfE has disclosed most of the rest of the email chains which are broader in scope. The public interest in such emails is much higher.
33. The Commissioner is therefore satisfied that the balance of the public interest favours withholding the information.

#### **Section 40 – personal information**

34. As it was not originally clear that the DfE intended to apply section 40(2) of FOIA to the remaining sections of the letter, the Commissioner has briefly considered whether it was entitled to do so.
35. The information in question refers to specific pupils. The Commissioner considers that those individuals with particular knowledge of the

situation would be able to identify the pupils in question. The information is therefore their personal data.

36. In the absence of consent, personal data can only be disclosed under FOIA if it is necessary for the purposes of pursuing a legitimate interest. The Commissioner accepts that disclosure would be necessary in order to promote transparency and accountability – as well as the following of proper procedure.
37. However, in the circumstances of this case, the Commissioner is satisfied that the rights of the data subjects outweigh the legitimate interest. The UK GDPR places particular emphasis on the importance of protecting the rights of children and, in the circumstances of this case, the Commissioner considers that the data subjects would have a reasonable expectation that their personal data would not be disclosed to the world at large. Disclosure would therefore be unlawful and thus section 40(2) of FOIA is engaged.

## Right of appeal

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38. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

39. 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.
40. 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 .....**

**Roger Cawthorne**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**