

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

### **Decision notice**

**Date:** 25 April 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 is a law firm acting on behalf of its client. On behalf of its client, the complainant requested information about SCL Security Ltd's apprenticeship training. The Education and Skills Funding Agency (ESFA) withheld the information under section 36(2)(b)(ii) and section 36(2)(c) of FOIA, which concern the effective conduct of public affairs.
2. ESFA is a government executive agency that is sponsored by the Department for Education (DfE) and has no separate legal basis other than that which comes from DfE. ESFA corresponded with the complainant but, in the circumstances, the Commissioner is satisfied that the complainant's correspondence was, in effect, with DfE. DfE has dealt with the complaint to the Commissioner.
3. DfE subsequently advised the Commissioner that it is also relying on section 40(2) and section 41(1) to withhold the information. These exemptions concern personal information and information provided in confidence, respectively. DfE advised that in the event that the Commissioner finds these exemptions are not engaged, it may consider the suitability of other exemptions.
4. The Commissioner's decision is as follows:
  - DfE is entitled to withhold the requested information under section 36(2)(c) of FOIA and the public interest favours maintaining the exemption. Section 41(1) of FOIA is also engaged as the information was provided to DfE in confidence.
5. The Commissioner does not require DfE to take any corrective steps.

## Request and response

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6. On 10 January 2021 the complainant wrote to the Education and Skills Funding Agency (ESFA) and requested information in the following terms:

“Requested information

Copies of all information and documentation the Educations Skills Funding Agency (“the ESFA”), formerly known as the Skills Funding Agency (“SFA”), received between 1 October 2016 and 31 December 2018 in relation to the irregular and fraudulent behaviour of SCL Security Limited (“SCL”) regarding the delivery of apprenticeships on behalf of the ESFA/SFA.

The information and documentation requested, includes, but is not limited to, the information and documentation reported by FE Week to have been passed to the ESFA/SFA in early 2017 by Workforce Staffing Ltd (formerly e-Response) or any of its employees or agents.”

7. On 9 April 2021 ESFA responded. It withheld the requested information under section 36(2)(b)(ii) and section 36(2)(c) of FOIA.
8. ESFA provided an internal review on 17 June 2021. It upheld its response.

## Scope of the case

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9. The complainant contacted the Commissioner on 22 July 2021 to complain about the way their request for information had been handled.
10. In its submission to the Commissioner, DfE confirmed that it is also relying on section 40(2) and section 41(1) to withhold the information. It advised that if the Commissioner found that these exemptions were not engaged it would consider the suitability of other exemptions. On 21 April 2022 the Commissioner advised DfE to communicate its new position to the complainant if it had not already done so.
11. The Commissioner’s investigation has focussed on whether DfE is entitled to withhold the requested information under sections 36(2)(c) and 41(1) of FOIA in the first instance, and the balance of the public interest with regard to the former exemption. If necessary, he will also consider DfE’s reliance on section 36(2)(b)(ii) and section 40(2).

## Reasons for decision

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**Section 36 – prejudice to effective conduct of public affairs**

12. Section 36 of the FOIA is an exemption that differs from all other prejudice exemptions in that, in most cases, the judgement about prejudice must be made by the legally authorised, qualified person for that public authority.
13. 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.
14. DfE has provided the Commissioner with a copy of the information it is withholding.

**Section 36(2)(c) – otherwise prejudice the conduct of public affairs**

15. Section 36(2)(c) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
16. To determine, first, whether DfE correctly applied the exemption under section 36(2)(c), the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
17. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
18. In this case, the QP was Gillian Keegan, then the Parliamentary Under-Secretary of State for Apprenticeships and Skills. The Commissioner is satisfied that, under sub-section 36(5)(a) of FOIA, Gillian Keegan was the appropriate QP.
19. DfE has provided the Commissioner with the submissions it sent to the Minister, seeking her opinion with regard to its proposed approach to the complainant's request. An email from the Minister's Private Secretary dated 16 March 2021 shows that the Minister confirmed that, in her opinion, disclosing the withheld information would be likely to have the effect set out under section 36(2)(c). The Commissioner is therefore satisfied that an opinion was given by the QP.

20. The request was submitted on 10 January 2021. The Minister's opinion is dated 16 March 2021, pre-dating ESFA's response to the request of 9 April 2021. As such, the Commissioner is satisfied that the opinion was given at an appropriate time.
21. The Commissioner has gone on to consider whether that opinion is reasonable. He is aware that in their request for an internal review the complainant put forward reasons why section 36(2)(c) could not be applied, ie why the QP's opinion could not be reasonable. However, it is important to note that 'reasonableness' 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.
22. 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, he must find that the exemption is engaged.
23. The QP's opinion in this case is that the prejudice envisioned under section 36(2)(c) would be likely to occur if DfE disclosed the withheld information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
24. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in public authority's interests to provide him 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.
25. In the submission it provided to the Minister, DfE provided: a background to, and copy of, the request, a description of the section 36(2)(c) exemption, reasoning as to why the information should be withheld under the exemption and a recommendation. Of relevance to section 36(2)(c), DfE's reasoning included the impact that placing the withheld information into the public domain would have on the likelihood of the public reporting allegations of suspected fraud and/or financial irregularity in the future. DfE also noted that disclosure could provide an insight into how alleged fraud could be carried out.
26. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the section 36(2)(c) exemption in order to form an opinion on the matter of whether reliance on that exemption with regard to the requested information was appropriate.

27. The Commissioner has noted the evidence at paragraph 25 and, since he is satisfied that the remaining points at paragraph 17 have also been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that DfE can rely on section 36(2)(c) to withhold the information. The Commissioner will go on to consider the public interest test associated with the exemption.

### **Public interest test**

#### **Public interest in disclosing the information**

28. DfE has presented the following arguments:

- Considerations for disclosure add up to an argument that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.
- There is a general public interest in disclosure of information to the public, to demonstrate the openness and transparency of government.
- There is significant public and media interest in the appropriate use of public funding and in safeguarding learners' education.

29. The complainant has not presented distinct public interest arguments for the information's disclosure in their request for an internal review or their correspondence to the Commissioner.

#### **Public interest in withholding the information**

30. DfE has presented the following arguments of relevance to section 36(2)(c):

- DfE relies on information provided by complainants and whistle-blowers to help make informed decisions on the appropriate course of action to take, or advice to give, on issues such as financial mismanagement and potential fraud. These types of communications and subsequent deliberations need to remain confidential to ensure they are handled sensitively. All evidence and options need to be considered so that DfE can ascertain the veracity of allegations being made.
- If DfE is required to disclose this information, it would be likely to prejudice its ability to deal effectively with the sort of issues highlighted within any current or future complaint/whistle-blowing instances. This could hinder DfE's ability to fully consider a range of important issues, from maladministration, irregular use of

public funding or fraud. This is because the officials, and those making such allegations, would be less likely to engage candidly with DfE going forward. This could lead to DfE being unable to decide effectively whether issues flagged, or allegations made, require a full and formal investigation and/or further action.

- This withheld information constitutes 'intelligence' provided by complainants/whistle-blowers in confidence, to assist DfE in its considerations. DfE is concerned that should such information be released into the public domain it would be likely to inhibit or deter complainants/whistle-blowers from sharing such information in the future. As there is no obligation for complainants/whistle-blowers to come forward with their concerns, releasing such information is likely to lead to them not wishing to openly discuss their concerns with the department. Complainants and whistle-blowers are likely to be unwilling to fully inform and engage with DfE for fear of release. This could in turn delay DfE being able to act appropriately and effectively when trying to safeguard public funding.
- Releasing details or information provided to DfE within the withheld information could lead to individuals or stakeholders against whom allegations are being made being identified. There is a real and significant risk that such individuals/parties may not be willing to assist as fully and forthrightly currently, or in the future. It is likely that such disclosure could dilute the information DfE receives, and which officials and stakeholders share via such channels. It could also deter people coming forward with concerns and so would be likely to prejudice the effective conduct of public affairs.
- The purpose of such channels is to provide officials with information relating to potential financial malpractice or fraud. Such communications are designed only to be shared between complainants/whistle-blowers and departmental officials/key stakeholders/partners including the police, and not put into the public domain. To release such information may be seen as helping to 'name and shame' contracted providers or individuals, with whom DfE is working to consider whether allegations made have foundation. Such a perception of potential 'naming and shaming' is likely to prevent complainants/whistle-blowers from coming forward with concerns. This could leave fraud not being uncovered or investigated, leading to the undetected misuse of limited public funding. This cannot be in the public interest.
- Disclosing the information would be likely to prejudice the effective conduct of public affairs now and in the future. It would remove the safe space within which officials are able to consider

allegations made, and subsequently propose any appropriate action/investigations required.

### **Balance of the public interest**

31. In their request for a review, the complainant argued that section 36(2)(c) could not be applied to the requested information. They argued that ESFA had not provided any evidence that the likelihood of the public reporting allegations of suspected fraud and/or financial regularity in the future would be impacted if the information was placed in the public domain. The complainant said that ESFA had failed to consider how likely it is that public will be deterred from reporting such allegations. They considered that there are a number of circumstances where the public will not be deterred in making disclosures, particularly if the party making the disclosure would not suffer any consequences as a result of the disclosure.
32. The complainant went on to argue that any negative impact through disclosure would be negligible. This is because, they said, the underlying issue that the information relates to took place a number of years ago and it relates to an entity that is now defunct.
33. DfE has referred to the Commissioner's separate decision in IC-44037-F3N5<sup>1</sup>. In that case, the requested information also contained allegations around possible financial misconduct sent to DfE by whistleblower(s). The Commissioner concluded that the public interest favoured maintaining the section 36(2)(c) exemption because the investigation associated with the information was still 'live'.
34. The Commissioner understands that, in the current case, the matter associated with the request was live at the time of the request and remains live to date. He has noted the complainant's arguments but agrees with DfE that the public interest favours maintaining the exemption. As with the separate case, this is because of the nature of the information being withheld, the circumstances in which DfE obtained the information and that the associated issues were live at the time of the request. In the Commissioner's view, at the time of the request there was greater public interest in DfE being able to conduct its affairs effectively and efficiently, without the distraction likely to be generated through disclosing the information. In addition, the public interest in complainants being willing to bring concerns to DfE and to assist DfE in

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618911/ic-44037-f3n5.pdf>

its investigations is greater than the public interest in DfE being fully transparent and disclosing the requested information in this case.

35. The Commissioner has found that section 36(2)(c) is engaged and the balance of the public interest favours maintaining this exemption. However, he has gone on to consider DfE's reliance on section 41.

### **Section 41 – information provided in confidence**

36. Section 41(1) of FOIA provides that information is exempt if, under subsection (a) the public authority obtained it from any other person and, under subsection (b), disclosure would constitute a breach of confidence actionable by that person or any other person. This exemption is absolute and therefore not subject to a public interest test, as such.

### **Was the information obtained from another person?**

37. Having reviewed the withheld information, the Commissioner is satisfied that DfE obtained it from another person.

### **Would disclosure constitute an actionable breach of confidence?**

38. In considering whether disclosing the information constitutes an actionable breach of confidence the Commissioner considers the following:
- whether the information has the necessary quality of confidence
  - whether the information was imparted in circumstances importing an obligation of confidence; and
  - whether disclosure would be an unauthorised use of the information to the detriment of the confider.
39. **Necessary quality of confidence:** The Commissioner considers that information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. The Commissioner is satisfied in this case that the requested information does have the necessary quality of confidence. First, the matter it concerns – funding for apprenticeship training - is certainly more than trivial. With regard to accessibility, in its submission DfE says that "the detail within the reporting and investigative processes are not publicly available".
40. In their request for an internal review, the complainant says that some of the requested information was passed to a particular online newspaper. However, given ESFA's policy on whistle-blowing and its duty of confidence towards whistle-blowers, discussed below, the



Commissioner considers that the disputed information will not be accessible beyond a very small group of interested parties.

41. **Circumstances importing an obligation of confidence:** The disputed information can be categorised as having been obtained from 'whistle-blowers'. In its submission, DfE has provided the Commissioner with a link to where ESFA's procedures around whistle-blowing are published. This guidance highlights ESFA's duty of confidence not only to the whistle-blower, but to any identifiable individual against whom allegations are being made. The Commissioner is satisfied that the information being withheld was obtained in circumstances which give rise to a duty of confidence.
42. **Detriment to the confider:** DfE says that releasing the withheld information would jeopardise the duty of confidence that it has to complainants/whistle-blowers and others. This includes individuals against whom allegations are being made, as complaint/whistle-blowing information may lead to individuals being identified. If a provider had a suspicion that an individual had raised concerns about them, releasing information stating that the department had received information from a complainant/whistle-blower could lead to individuals being accused (rightly or wrongly) of being the complainant/whistle-blower. This in itself would go against ESFA's commitment to a duty of confidentiality when dealing with complaint/whistle-blowing incidents.
43. The Commissioner accepts DfE's reasoning and is satisfied that disclosure would have a detrimental impact on the confiders in this case.

#### **Is there a public interest defence for disclosure?**

44. As has been noted, section 41 of FOIA is an absolute exemption and therefore not subject to the public interest test. However, the common law duty of confidence contains an inherent public interest test. This test assumes that information should be withheld unless the public interest in disclosure outweighs the public interest in maintaining the duty of confidence (and is the reverse of that normally applied under FOIA).
45. The Commissioner appreciates that the requested information is of interest to the complainant and their client. However, as has been noted in the discussion of section 36, in their correspondence with ESFA and with the Commissioner the complainant has not put forward any wider public interest arguments for disclosure.
46. DfE says it is mindful of the general public interest in openness and accountability. It recognises that there is significant interest in issues such as actual and potential financial irregularities and fraud.

47. DfE is concerned that, should it have to release this information, complainants/whistle-blowers could potentially be deterred from raising serious issues, for fear of being identified and/or subsequently victimised. Serious issues may therefore not come to light, or may take longer to come to light, and that the detail provided could be watered down. DfE acknowledges that this would not make it impossible to investigate future allegations. However any such dilution or reticence from complainants/whistle-blowers to come forward would mean it is likely to protract the process, delay final investigations being made and appropriate solutions being agreed and delivered.
48. Having considered the matter, the Commissioner has decided that such public interest as there is in the withheld information is not outweighed by the public interest in maintaining trust between confider and confidant. Complainants and whistle-blowers must be willing to report serious concerns to DfE so that they can be considered and investigated. Associated with this, complainants and whistle-blowers must also be confident that confidential information that they provide to DfE will not be disclosed to the wider world as a result of a FOIA request.
49. DfE is considering particular concerns about a training provider that were brought to its attention. The Commissioner considers that is sufficient to address the public interest in those concerns. As such, DfE would not have a public interest defence for breaching the duty of confidence it has with whistle-blowers.
50. The Commissioner has considered all the circumstances of this case and the information being withheld under section 41(1) of FOIA. He has concluded that there is stronger public interest in maintaining the obligation of confidence than in disclosing the information. Therefore, the Commissioner's decision is that DfE is also entitled to withhold the requested information under section 41(1) of FOIA.
51. Since the Commissioner has found that the information can be withheld under section 36(2)(c) and section 41(1), it has not been necessary for him to consider the other exemptions DfE has applied.

## **Right of appeal**

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52. 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)

53. 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.
54. 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**

**Cressida Woodall**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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