

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 June 2023

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

Address: 2 Rivergate
Temple Quay
Bristol
BS1 6EH

Decision (including any steps ordered)

1. The complainant requested information about the number of inspectors Ofsted has and their home institution. Ofsted provided some information but withheld other information under section 36(2)(c) (prejudice to the effective conduct of public affairs) and section 40(2) (personal data) of the FOIA. During the course of the Commissioner's investigation Ofsted also sought to apply section 33 (audit) to the withheld information.
2. The Commissioner's decision is that Ofsted is not entitled to rely on sections 40, 36 or 33 of the FOIA.
3. The Commissioner requires Ofsted to take the following steps to ensure compliance with the legislation.
 - Disclose the withheld information – a list of the home institutes of its inspectors.
4. Ofsted must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 28 October 2022, the complainant wrote to Ofsted and requested information in the following terms:
 - “1. How many additional inspectors do you Ofsted have?
 2. How many are serving/non-serving?
 3. Of those serving, please provide the home institution you have for them.”
6. Ofsted responded on 24 November 2022 and provided information relating to parts 1 and 2 of the request, but withheld information relating to part 3 of the request under section 36(4) of the FOIA as it was considered statistical information and disclosure would be likely to otherwise prejudice the effective conduct of public affairs.
7. Following an internal review Ofsted wrote to the complainant on 19 January 2023. It stated that it considered the information held relevant to part 3 of the request to be exempt under sections 36(2)(c) and 40(2) of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 3 February 2023 to complain about the way their request for information had been handled. Specifically, the complainant asked the Commissioner to consider Ofsted’s refusal to provide the remaining information held relevant to their request.
9. During the course of the Commissioner’s investigation, Ofsted confirmed that it also considered section 33 of the FOIA to apply to the withheld information, for the same reasons as it had applied section 36(2)(c).
10. The scope of the Commissioner’s investigation is to determine whether Ofsted should disclose the remaining information held relevant to the request, namely the home institution of its serving inspectors.

Reasons for decision

Section 40 – personal data

11. Section 40(2) provides an exemption for information that is the personal data of an individual other than the requester and where the disclosure of that personal data would be in breach of any of the data protection principles.
12. Section 3(2) of the Data Protection Act 2018 defines personal data as:
“any information relating to an identified or identifiable living individual.”
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. In this case, Ofsted has withheld the home institute of its serving inspectors (OIs). Ofsted acknowledges that the list itself does not contain the names of any inspectors. However, it confirmed that an inspector is related to each entry on the withheld information ie there is one inspector for each home institute. Ofsted advises that only a very small number of staff in an educational institute are eligible to carry out inspection work. As such, Ofsted contends that “the process for identifying each OI from the requested list can be quite straightforward, using publicly available information (such as school websites and a list of OIs¹ published on its website)”. In light of this Ofsted contends the information is personal data.
15. On face value the Commissioner notes that the withheld information is not personal data – it is simply a list of home institutes. In its initial response to the request, Ofsted explained that the ‘home institution’ is a loosely defined term which is not suitable as a basis for analysis or for accurately comparing the employers of OIs. This is because, when providing information to Ofsted, inspectors may choose to put down the name of the school in which they work, their local authority, the diocese, the university, the name of one academy if they work for a multi-academy trust, or the trust itself. In addition, Ofsted also advised that there are a number of common school names on the list which, in isolation, would not allow for identification of a specific school without any further information, such as the address of the school. In addition, in its initial response to the request, Ofsted advised that, in several cases the data field had not been completed.

¹ <https://www.gov.uk/government/publications/ofsted-inspectors-list>

16. The Commissioner has viewed the withheld information and undertaken some simple cross referencing and research to try to identify individuals from the withheld information. In a number of cases the Commissioner was able to identify an OI on the published list and cross reference it with their home institute as shown on the withheld information. However, in other cases, this was not possible.
17. The Commissioner undertook some simple internet searches using just the names of OIs on Ofsted's published list (without any reference to the withheld information). He was able to easily locate the educational institute where the inspector worked from school websites and other publicly available information such as the Gov.uk and the Good Schools Guide websites.
18. As set out in paragraph 15 of this notice, Ofsted has acknowledged the limitations of using the withheld information to correctly identify the home institution of its inspectors. Ofsted has not explained how these particular entries would allow identification of individuals. In light of this, whilst the Commissioner accepts that it is possible to identify some individuals by cross referencing the withheld information with other publicly available information, he does not consider that this would apply to all of the withheld information and therefore it would not all constitute personal data.
19. In relation to the entries on the withheld information where identification of individuals would not be possible, the Commissioner finds that section 40(2) is not engaged as the information does not constitute personal data.
20. As the Commissioner accepts that some of the withheld information constitutes personal data he has gone on to consider whether disclosure would breach any of the data protection principles. The Commissioner has focussed on principle (a), which states:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".
21. In the case of an FOIA request, personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
22. When considering whether the disclosure of personal information would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals whose personal information it is.

23. The complainant contends that there is a legitimate interest in disclosure of the types of institute that Ofsted inspectors work in, to identify whether those institutes have an advantage over schools that don't have an inspector in post. The complainant referred to a media article² about this point to reinforce their view that transparency around the issue is important. The Commissioner considers that the complainant is pursuing a legitimate interest in accessing information regarding the home institutes of Ofsted inspectors. The Commissioner also considers that disclosure of the withheld information is necessary to meet that interest.

Ofsted's position

24. Ofsted advised that it took into account a number of factors when considering whether its inspectors would have a reasonable expectation that details of their home institute would be disclosed into the public domain, as detailed below:

- "OIs normally have **senior roles** outside of Ofsted, which are also public facing
- OI's names **are published** in inspection reports.
- This information is **collected for administrative purposes**. OIs provide their employer's details to Ofsted in order to ensure that inspection fees are paid to the correct body and to assist the process of checking for conflicts of interest
- Ofsted already takes steps to **prevent conflicts of interest** arising before scheduling inspectors
- Ofsted's privacy notice for contractors does **not** say that details of their employment relationships will be published
- Ofsted's conflict of interest policy requires: "OIs must only use the 'Ofsted Inspector' title while undertaking work on Ofsted's behalf. The title 'Ofsted Inspector' must **not** be used in any other context".
- Ofsted's Code of Conduct requires that inspectors: "use their title (such as (...) Ofsted Inspector) **only** in relation to their work for Ofsted"
- For Ofsted's employed inspectors (HMIs) Ofsted does not provide details of past employers in their pen portraits."

² <https://schoolsweek.co.uk/leaders-urge-ofsted-to-share-inspection-training-guides/>

25. Ofsted accepts that its inspectors would expect some level of transparency into their inspection work, for example by including their name on inspection reports. Ofsted also accepts that in many cases, inspectors "know that the public may be already able to work out who their employer is, but this happens when they have chosen to have their details separately published on a school website".
26. Ofsted argues that inspectors are strongly discouraged from associating their inspection role with any other public facing role or activities, including linking it to their work in schools or other consultancy work. Ofsted is of the view that, in light of this, it would be inconsistent for it to then disclose information which links their current or past employment relationship to their Ofsted role.
27. Ofsted considers that the withheld information would reveal personal information about its inspectors as it would allow their employment relationship to be "revealed and linked to them individually". Whilst Ofsted accepts that inspectors normally have senior roles outside their inspection work, it considers that the information to be relevant to their personal circumstances and therefore deserves protection. In reaching this view, Ofsted made the following representations:
 - "...who an OI's employer is may reflect personal and private circumstances. For example, a senior teacher may have their wages paid by an academy trust, a local authority or another school and this might not be known publicly. These facts and, and the reasons underlying them, are likely to be considered as private affairs."
 - "Ofsted will receive complaints about OIs' inspection work and their conduct. Unfortunately, the process of complaint can sometimes become personalised, with individual inspectors being subject to unfounded allegations or persistent, unwarranted criticism for doing their job. It is not unusual for complainants to look for and then utilise personal information about an OI to sustain an unfounded complaint about them. We know this, because Ofsted also receives FOI requests from complainants, targeted specifically at individual OIs and their backgrounds. We also know that the employers of OIs can be targeted in order to exert pressure on an OI to stop working with Ofsted".
28. In summary Ofsted is of the view that its inspectors would have a reasonable expectation that details of their home institute would not be put into the public domain and that disclosure of the withheld information would be used to "unnecessarily target individual inspectors". As such, it considers disclosure to be unfair.

The Commissioner's position

29. In terms of the expectations of the individuals, the Commissioner does not consider that disclosure of a list of the home institute of inspectors would affect Ofsted's conflict of interest policy or its Code of Conduct as it does not relate to individuals using their title of Ofsted Inspector in connection with any other role or activity. The Commissioner notes that Ofsted has accepted that as its inspectors occupy senior public facing roles outside Ofsted they would expect some level of transparency into their inspection work.
30. The Commissioner is not persuaded that disclosure of the withheld information would reveal information about inspectors' personal and private circumstances, above what is already publicly available. The Commissioner does not understand the relevance of Ofsted's representations concerning whether or not it is known if the wages of a senior teacher are paid by an academy trust, a local authority or another school. For example, disclosure would not reveal the salary or financial status of any of the individuals in question.
31. As stated earlier in this notice, the Commissioner has undertaken simple internet searches on a sample of the withheld information just using the list of inspectors which Ofsted publishes and he was able to locate the home institute of inspectors in many cases. Ofsted has already accepted this to be the case. In light of this the Commissioner considers that disclosure of the withheld information would not reveal anything about the individuals in question above that which is already publicly available. The Commissioner does not, therefore, consider that disclosure of the withheld information is likely to cause any significant distress to the individuals in question.
32. Having taken into account all the circumstances of this case, and having considered the reasonable expectations of the individuals concerned and the potential consequences of disclosure, the Commissioner is satisfied that there is sufficient legitimate interest in disclosure of the information requested in this case to outweigh the data subjects' fundamental rights and freedoms. There is therefore an Article 6 basis for processing this personal data and it would thus be lawful.
33. Even though it has been demonstrated that disclosure of the requested information under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
34. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

35. The requirement for transparency is met because as a public authority, Ofsted is subject to the FOIA.
36. The Commissioner has therefore determined that Ofsted was not correct to apply section 40(2) to the request.
37. As Ofsted has also applied sections 36(2)(c) and 33 to the withheld information the Commissioner has gone on to consider its application of these exemptions exemption.

Section 36 – prejudice to the effective conduct of public affairs

38. 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.
 - (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'.
39. Ofsted has applied section 36(2)(c) by virtue of section 36(4) to the withheld information, comprising the home institution of its OIs. Ofsted advise that the information in question is collected from inspectors as it asks them for their 'current employer'. Within Ofsted, current employers are also referred to as the 'home institute' of an inspector. Amongst other things the information is used by Ofsted to pay fees to the correct

institution and for checking for any potential conflicts of interest when arranging inspections.

40. Ofsted acknowledges that the withheld information does not directly name OIs, however, it advised that each home institute entry on the list refers to an individual inspector. Ofsted argues that, if disclosed, the information could be used to "inform analysis of the proportion of inspectors employed by types of institutions". Ofsted referred to an earlier request it had received from the complainant where they asked for a breakdown of whether inspectors came from academies or maintained schools. This request was refused under section 12 (appropriate limit) of the FOIA as the cost of complying with it would exceed the appropriate limit.

41. Ofsted considers a list of the home institutes of its OIs constitutes 'raw data' that could be used for statistical analysis. Ofsted advised that as a result of the earlier request for information from the complainant referred to above it has a reasonable indication that the withheld information, if disclosed, would:

"likely to be used to attempt to work out the proportion of OIs (Ofsted Inspectors) who work in academies or maintained schools". Ofsted suspect that this might be undertaken through "combining the names of the educational institute provided with publicly available information, to speculate which category each school was in. The results could then be added-up to help produce proportions or percentages of the total number of OIs in each school. Any such activity would represent a mathematical operation using the raw data and, because this is a possible use of the requested information, it qualifies it as 'statistical information'".

42. Section 36 is an unusual exemption in that, in most cases, the exemption will be engaged or not engaged based on the reasonable opinion of a particular person within the organisation: the Qualified Person. However, section 36(4) allows a public authority to engage the exemption without seeking the view of the Qualified Person – if the information in question is statistical information.

43. FOIA does not define "statistical information". However, the Ministry of Justice does have a definition, which originated from the Office for National Statistics, which says that statistical information:

"will usually be founded upon the outcomes of mathematical operations performed on a sample of observations or some other factual information. The scientific study of facts and other observations allows descriptive approximations, estimates, summaries, projections, descriptions of relationships between observations, or outcomes of mathematical models, etc to be derived.

A distinguishing feature of statistical information is that it is founded to at least some degree on accepted scientific or mathematical principles. Statistical information is therefore distinguished by being:

- (i) derived from some recorded or repeatable methodology, and
- (ii) qualified by some explicit or implied measures of quality, integrity and relevance.

This should not imply that the term 'statistical information' only applies to where standards of methodology and relevant measures are particularly high. What distinguishes statistical information is that the limitations of methodology, and the relevant measures of quality etc, allow for a rational assessment of the validity of the information used as an informed background to the formulation and development of government policy."

44. The Commissioner does not consider that a list of the home institutes (employers) of OIs can be fairly categorised as statistical information. The information is not founded on the outcome of any mathematical operation or some other factual information. The information has been collected by Ofsted for the purposes of paying fees to the correct institution and for checking for any potential conflicts of interest in arranging inspections. It has not been collected for the purpose of any analysis, interpretation, explanation or presentation of any data. Whilst it may be possible to identify the 'status' of some individual entries on the withheld information, ie whether it is an academy or maintained school, through cross referencing it with other publicly available information, the Commissioner does not accept that this means the withheld information is statistical information.
45. In summary the Commissioner has concluded that the withheld information does not constitute statistical information and consequently Ofsted cannot engage any limb of section 36 without the opinion of its qualified person. As such, the Commissioner's decision is that section 36 is not engaged.

Section 33 - Audit

46. Section 33 states that:

- (1) This section applies to any public authority which has functions in relation to—

[...] (b) the examination of the economy, efficiency, and effectiveness with which other public authorities use their resources in discharging their functions.

- (2) Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority's functions in relation to any of the matters referred to in subsection (1).
47. The Commissioner accepts that Ofsted has audit functions because it investigates how effectively and efficiently other public authorities (schools, colleges and children's services) are using their resources.
48. Ofsted applied section 33(2) to the withheld information during the Commissioner's investigation. It stated that it considered section 33 to apply for the same reasons as it submitted in relation to its application of section 36 - that disclosure would be likely to prejudice the overall inspection process.
49. Ofsted's arguments in relation to section 36(2)(c) are that disclosure of the withheld information could be used by motivated individuals to target the home institutes (employers) of its inspectors and discourage serving practitioners from carrying out inspection work. Ofsted explained that:
- "There is recent evidence online of attempts to disrupt Ofsted's work, including campaigns targeted at reducing the availability of serving practitioners to be used as inspectors. To date these campaigns have not had the means to directly target OIs' employers. The creation and disclosure of the list you have requested would assist such campaigning and allow for a small number of motivated individuals to place unwarranted pressure on OIs' employers".
50. Ofsted contends that any efforts to discourage individuals from carrying out inspection work (by targeting their employers) would cause disruption and discomfort to schools and their staff. In addition, Ofsted argues that any impact on the number of available OIs would have a significant effect on its capacity to conduct inspection work, and as such it would have an adverse effect on its ability to offer an effective public service.
51. The withheld information in this case, ie a list of the home institutes of OIs does not constitute information that relates to any specific inspection/audit or audit processes and methodologies. It has been provided to Ofsted by inspectors to allow it to pay fees to the correct institute and to check for any potential conflicts of interest.
52. As stated earlier in this notice, Ofsted already publishes a list of OIs on its website. The Commissioner has undertaken some simple internet searches using this list and was able to easily locate the educational institute where the inspector worked in a number of cases. As such, the Commissioner considers that any motivated individual would already be

able to target at least some of the home institutes of OIs based on information already in the public domain. The Commissioner has not been provided with any evidence that any such targeting has taken place to date.

53. In addition, the Commissioner notes Ofsted's comments as set out in paragraph 15 of this notice that, as well as the educational institution they work at, inspectors may choose to provide other information in respect of their home institution, such as their local authority. The Commissioner also notes that the withheld information includes some 'common' school names which would not, in itself, allow an individual to identify a specific school from the withheld information without further information such as the address of the school. In relation to these entries on the withheld information, the Commissioner considers that it would be very difficult for any motivated individual to target the institutes in question.
54. In light of the above and the limited representations Ofsted has submitted in relation to its application of section 33, the Commissioner does not consider that Ofsted has demonstrated that disclosure of the withheld information would, or would be likely to, prejudice the exercise of any of its audit functions.
55. The Commissioner's decision is, therefore, that section 33 is not engaged in relation to the withheld information.

Right of appeal

56. 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

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

57. 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.
58. 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

Joanne Edwards
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF