

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 28 September 2009

Public Authority: Ofsted
Address: Alexandra House
33 Kingsway
London
WC2B 6SE

Summary

The complainant made a request under the Freedom of Information Act 2000 (the "Act") to Ofsted for a copy of the version of the Self-Evaluation Form (SEF) that was used to inform the Ofsted inspection team for the inspection carried out at Shortlanesend CP School (the "School") on 21 November 2006. Ofsted refused to disclose the requested information upon reliance on the exemptions contained at sections 33, 40(2) and 41 of the Act. The Commissioner considers that Ofsted correctly applied the exemption contained at section 41 of the Act to withhold the requested information. As the Commissioner found that section 41 of the Act was correctly engaged he did not go on to consider Ofsted's application of section 33 or 40(2) of the Act.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made a request on 7 February 2007 to Ofsted. The complainant asked Ofsted to provide the following information:-

"Could you please supply me with a copy of the version of the Self-Evaluation Form that was used to inform the Ofsted Inspection Team for the following inspection:

Shortlanesend CP School (unique ref. 111862)

Inspection number 278797
Date 21/11/2006"

3. On 23 February 2007 Ofsted responded to the complainant's request for information. Ofsted confirmed that it did hold the requested information. Ofsted explained that the completion of the SEFs by a head teacher is completely voluntary and is submitted prior to an inspection to a secure area of the Ofsted website. It explained that the SEF may contain references or opinions relating to departments or classes where it may be possible to identify individuals and is therefore submitted to Ofsted with the expectation that the information contained within the SEF will be treated in confidence. It explained that publication of the requested information could represent an actionable breach of confidence. It therefore concluded that the exemption contained at section 41 of the Act prevented disclosure.
4. As the complainant was dissatisfied with the response he had received, on 26 February 2007 he asked Ofsted to carry out an internal review.
5. On 23 March 2007 Ofsted wrote to the complainant with the result of the internal review it had carried out. Ofsted upheld its application of the exemption contained at section 41 of the Act. It also suggested that the exemption contained at section 33 of the Act would also be applicable but as it had upheld its application of section 41 did not go into any further detail in relation to section 33 at that stage.

The Investigation

Scope of the case

6. As the complainant was dissatisfied with the result of the internal review carried out by Ofsted he made a formal complaint to the Commissioner.
7. During the course of the Commissioner's investigation the complainant confirmed that it was solely Part A of the SEF he wished to obtain which contains the head teacher's self assessment of the School. The Commissioner has not therefore considered Parts B and C of the SEF any further.
8. The Commissioner has therefore considered whether or not Ofsted dealt with the request for Part A of the SEF in accordance with the Act.

Chronology

9. On 29 October 2008 the Commissioner wrote to Ofsted to ask for further arguments in support of its application of section 41 and 33 to withhold the requested information.

10. On 9 December 2008 Ofsted responded to the Commissioner. It provided further arguments in support of its application of the exemptions contained at sections 33 and 41 of the Act. It also applied the exemption contained at section 40(2) of the Act to some of the withheld information and provided arguments in support of this.

Analysis

Exemptions

Section 41

11. Information is exempt under section 41 if it was obtained by a public authority from another person and the disclosure of the information outside of the Act would constitute an actionable breach of confidence.
12. The requested information in question, is part A of a particular SEF, which was completed by the head teacher of the School to identify her perception of the School's strengths and weaknesses to feed into the process of the Ofsted Inspection in November 2006.
13. There are two components to section 41, firstly the information must have been obtained by the public authority from another person and secondly disclosure of the information would have to give rise to an actionable breach of confidence. A person may be an individual, a company, a public authority or any other legal entity.

Was the information obtained by Ofsted from another person?

14. Ofsted has stated that the SEF was obtained by it from the School. It has explained that the SEF was completed by the head teacher of the School prior to the Ofsted inspection in November 2006 to allow the head teacher to put forward her perception of the School's strengths and weaknesses. It has clarified that the information belongs to the School although it is held by Ofsted.
15. The Commissioner is satisfied that the SEF was provided to Ofsted by the School and consequently falls within the definition of information obtained by a public authority as contemplated by section 41.

Would disclosure give rise to an actionable breach of confidence?

16. When considering whether or not a breach of confidence is itself actionable in this case, the Commissioner has decided that it is appropriate to follow the test set out by Megarry J in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 and cited by the Information Tribunal in *Bluck v the Information Commissioner & Epsom St. Helier*

University NHS Trust (EA/2006/0090). Megarry J stated that:

'...three elements are normally required, if apart from contract, a case of breach of confidence is to succeed. First, the information itself must have the necessary quality of confidence about it. Secondly, that information must have been imparted in circumstances importing an obligation of confidence. Thirdly, there must be an unauthorised use of the information to the detriment of the party communicating it...'

17. The Commissioner will therefore consider whether these three factors can be met in this case in order to determine whether disclosure would give rise to an actionable breach of confidence.

Does the information itself have the necessary quality of confidence about it?

18. Information will have the necessary quality of confidence if it is not trivial and otherwise accessible, in other words if it is not already in the public domain. According to Megarry J in *Coco v Clark*, "however confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge."
19. Bearing in mind the contents of the SEF and the context in which the SEF was produced and provided to Ofsted, the Commissioner is satisfied that the information possesses the necessary quality of confidence, as he is satisfied that it is not information which is already in the public domain nor is it trivial. Whilst the Commissioner acknowledges that Part A of the SEF may contain some factual information which, if considered in isolation, could be said to be in the public domain, he believes that it is significant that this factual information is only present in the context of the head teacher's opinion about the strengths and weaknesses of the School. In the Commissioner's view the factual information in part A of the SEF is used to support or justify the opinion given and is thus intrinsically linked to that opinion. The Commissioner accepts that the head teacher's opinion of the School and the choice of evidence used to support that opinion, as communicated to Ofsted via part A of the SEF, are not already in the public domain. The Commissioner therefore considers that Part A of the SEF does attract the necessary quality of confidence.
20. Furthermore the Commissioner considers that even if the SEF had been seen by the head teacher's secretary or the deputy head this would not negate the quality of confidence as per the Tribunal decision in *S v the Information Commissioner and General Register Office EA/2006/0030*. The Commissioner considers that information can retain the quality of confidence in circumstances where it is disclosed to a limited audience.

Was the information imparted in circumstances importing an obligation of confidence?

21. Ofsted has explained that its website states that “Access to the [SEF] data is restricted via the secure password system and any data entered will remain confidential to the School”. Ofsted clarified that the content of this webpage (and the assurance it contains) had been accessible since SEFs were first established and therefore predates the creation of the particular SEF in question. Furthermore in a letter dated 15 March 2007 from the head teacher of the School to Ofsted it was stated that, “The information I provided to the lead inspector in the SEF was provided in confidence...and disclosure would be breaching this confidence to the LI [lead inspector]...as the author of this document I would have written it in a different way in the knowledge it would [be disclosed].” Ofsted clarified that when the head teacher submits the SEF online an assurance is again given that data will remain confidential. Ofsted provided a link to the assurance of confidentiality it provides on its webpage as quoted above:-

<http://www.ofsted.gov.uk/Ofsted-home/Forms-and-guidance/Browse-all-by/Education-and-skills/Schools/Self-evaluation-and-the-SEF>

22. Ofsted explained that it is satisfied that it is necessary for the effective performance of its functions to provide Schools with this express assurance that the SEF will be held in confidence. It explained that this was because submission of the SEF is voluntary and contains information which belongs to the School which is an important factor in the inspection process.
23. The Commissioner considers that Ofsted expressly provided the School with an assurance that the information would be held in confidence so that it would be able to carry out its functions efficiently. The Commissioner therefore considers that the SEF was imparted to Ofsted by the School in circumstances that imported an obligation of confidence.

Would unauthorised use of the SEF cause detriment of the School?

24. The third element of the test of confidence involves the likely detriment to the confider if the confidence is breached. In some cases, for example involving the personal information of individuals acting in their private capacities, there is no need to prove the element of detriment. Indeed the Information Tribunal in *Bluck v the Information Commissioner and Epsom and St Helier University NHS Trust* EA/2006/0090 has taken the view that the loss of privacy is a sufficient detriment in itself.
25. However in this case the withheld information is not personal information provided in a personal capacity. In such cases the Commissioner considers that there would have to be a detrimental

impact to the interests of the confider for the breach of confidence to be actionable, and therefore for section 41 to be engaged.

26. Ofsted has argued that disclosure of the SEF may adversely affect relationships with and between staff and parents of the School. It explained that it may not be appropriate for a head teacher of a school to share information with staff and parents in the way that it is appropriate to share information with Ofsted.
27. The Commissioner is satisfied that disclosing the SEF would have been likely to have a prejudicial impact upon the relationship between the head teacher of the School and the staff, pupils and parents of the School which would be to the detriment of the School. This is because the SEF contains the head teacher's perceptions of both the School's strengths and weaknesses. Whilst the SEF is anonymous, in that particular members of staff or pupils are not specifically mentioned, the Commissioner has been made aware that the School is relatively small and therefore local knowledge may enable individuals connected to the School to identify pupils or teachers from the SEF who may be linked to areas of weakness as perceived by the head teacher. Furthermore the maintenance of good relationships between the head teacher, staff, pupils and parents is extremely important to the efficient running of the School. The Commissioner considers that even if some of the contents of Part A of the SEF were contained within Ofsted's final report they would not be identified as the head teacher's opinion and therefore would not have the same potential to undermine relationships within the School and with parents and thus cause detriment to the School.

Would the public authority have a defence to a breach of confidence claim because the public interest in disclosure would outweigh the public interest in maintaining the duty of confidentiality?

28. Although section 41 is an absolute exemption, the law of confidence does contain its own inbuilt public interest in that one defence to an action for breach of confidence is that the disclosure is in the public interest. The Commissioner therefore also considered whether the public authority could rely on a public interest defence so that a breach of confidence in the event of disclosure would not be actionable.
29. Ofsted has explained to the Commissioner that there is a public interest in school inspections and in particular a head teacher's input into this process through the SEF, being open and transparent. However it suggested that this would be outweighed by the public interest in ensuring that Ofsted receives a robust and candid assessment of the head teacher's perception of a schools performance as this is a vital tool in assisting Ofsted to perform its functions in relation to school improvement.
30. The Commissioner considers that there is a significant public interest in preserving the flow of information between schools and Ofsted to

enable it to carry out its functions in raising the standards of schools through the inspection process. Ofsted has explained that the SEF is a vital part of this process and as it is voluntary, if the confidence was undermined, schools may be less candid in their approach. The Commissioner considers that as the SEF is an important factor in the inspection process, detriment to this part of the process may undermine Ofsted's functions which would not be in the public interest.

31. Furthermore from a general point of view, the Commissioner considers that there is a public interest in preserving the principle of confidentiality which is essentially based on the trust between the confider and the confidant. Disclosing the requested information could discourage people from confiding in public authorities as they would not be certain that confidential obligations would be respected.
32. The Commissioner agrees with Ofsted that there is a public interest in the openness and transparency of Ofsted inspections and the SEF, if completed, forms part of the information used by Ofsted in an inspection. The Commissioner is aware that the Ofsted report for November 2006 is completed and is publicly available. The published report takes into account all factors relevant to the inspection including the SEF and states the conclusions reached. This opens up the final report to public scrutiny. However, the Commissioner considers that as the actual information in question is not already in the public domain there remains a public interest in disclosure of the SEF in order to provide the fullest possible picture. The Commissioner does not therefore accept that the public interest in the transparency of Ofsted inspections is fully met by the publication of final inspection reports.
33. Due to the strong public interest in the free flow of information between schools and Ofsted to enable it to perform effectively, the Commissioner is not persuaded that in the circumstances of this case, the public interest arguments in favour of releasing part A of the SEF outweigh the public interest in maintaining the obligation of confidentiality owed by the public authority.
34. The Commissioner therefore finds that disclosure of the information contained in the SEF would have constituted an actionable breach of confidence.
35. As the Commissioner consider that the exemption contained at section 41 was correctly engaged in this case he has not gone on to consider Ofsted's application of section 40(2) or section 33.

The Decision

36. The Commissioner's decision is that Ofsted correctly applied section 41 in order to withhold the requested information.

Steps Required

37. The Commissioner requires no steps to be taken.

Other matters

38. The Commissioner notes that the public authority provides an assurance on its website that all data provided via a SEF will remain confidential to the submitting school. The Commissioner would comment that, of itself, such an assurance is not sufficient to guarantee that submitted data will never be disclosed under the Act, and that all elements of the test considered in paragraphs 11 to 35 of this notice will need to be satisfied in order for information to be validly withheld.

Right of Appeal

39. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

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.

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 28th day of September 2009

Signed

**Lisa Adshead
Senior FOI Policy Manager**

**Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Information provided in confidence.

Section 41(1) provides that –
“Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

Section 41(2) provides that –
“The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

Audit functions.

Section 33(1) provides that –
“This section applies to any public authority which has functions in relation to-

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

Section 33(2) provides that –
“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).”

Section 33(3) provides that –
“The duty to confirm or deny does not arise in relation to a public authority to which this section applies if, or to the extent that, compliance with section 1(1)(a) 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).”

Personal information.

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 40(3) provides that –

“The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.”

Section 40(4) provides that –

“The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).”

Section 40(5) provides that –

“The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the

- confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
- (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

“In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded.”

Section 40(7) provides that –

In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;
"data subject" has the same meaning as in section 1(1) of that Act;
"personal data" has the same meaning as in section 1(1) of that Act.