

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 25 March 2013

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

Decision (including any steps ordered)

1. The complainant has requested correspondence and notes relating to the Secretary of State for Education's visit to the Yesodey Hatorah Senior Girls School. The Department for Education (DfE) disclosed some information in response to the request but withheld other information on the basis of section 40(2) and 36(2)(b)(i). Following an internal review, the DfE released some of the information previously withheld but also identified more information within the scope of the request that it considered should be withheld on the basis of section 40(2) and 36(2)(b)(i).
2. The Commissioner's decision is that section 36 is engaged and after considering the public interest arguments the DfE has correctly withheld the outstanding two pieces of information.
3. The Commissioner does not require the public authority to take any steps.

Request and response

4. On 8 February 2012, the complainant wrote to the DfE and requested information in the following terms:

"Can you please provide copies of correspondence, communications and notes etc. relating to the visit of the Secretary of State for Education Mr Michael Gove to the Yesodey Hatorah Senior Girls School on 3 February 2012."

5. The DfE responded on 13 March 2012 and disclosed some information to the complainant. This information included questions submitted by pupils to the Secretary of State, press cuttings, emails about arrangements for the visit, statistics and information about the School and the local area provided to the Secretary of State prior to his visit and details from the School's Ofsted report. The DfE stated there was further information identified within the scope of the request that was being withheld on the basis of section 40(2) and 36(2)(b)(i) as the documents related to media advice and school performance data.
6. Following an internal review the DfE wrote to the complainant on 1 June 2012. It stated that, after a reassessment, some of the information previously withheld could now be released. This information was much of the information previously withheld under section 40(2) and the content of some emails previously withheld under section 36(2)(b)(i). The DfE also explained it had identified further information within the scope of the request that had not previously been considered and, after consulting with the qualified person, had concluded this information was exempt on the basis of section 36(2)(b)(i).

Scope of the case

7. The complainant contacted the Commissioner on 18 July 2012 to complain about the way his request for information had been handled. In particular the complainant raised the following points:
 - That if the withheld information relates to 'media advice and school performance' neither of these subjects warrant withholding advice about them;
 - It is not the Secretary of State's role to give advice to individual schools and the public should be able to see information on any discussions on these issues; and
 - School performance data is critical to parents' decisions on the choice of school for their children and discussions should be made public.
8. During the course of the Commissioner's investigation the complainant agreed to withdraw the part of his complaint about the application of section 40(2) to withhold the names of officials and staff at the School.
9. The remaining withheld information was identified as being:

- i. An internal DfE email dated 31 January containing one paragraph relating to the visit to the School. The remainder of the email consists of information on other school visits which is outside the scope of this request;
 - ii. An internal DfE email dated 2 February containing pre-emptive 'lines to take' on certain issues considered likely to arise during the visit;
 - iii. An internal DfE email dated 31 January containing information about the schools the Secretary of State was visiting. As with (i) the majority of this email is out of the scope of the request as it relates to other schools being visited by the Secretary of State;
 - iv. Information on issues with the school including a summary of events already reported in the media and figures from Ofsted reports;
 - v. Handwritten notes taken by the Private Secretary during a discussion between the Secretary of State and the Head Teacher of the School. This was the information identified during the internal review.
10. The Commissioner on investigating this complaint decided that the information identified in (i) and (iii) as being outside the scope of the request was indeed not covered as the request was specifically for correspondence, communications and notes relating to Mr Gove's visit to Yesodey Hatorah School. The DfE then agreed to disclose the relevant information within the scope of the request in (i), (iii) and (iv) as set out above.
11. The Commissioner therefore considers the scope of his investigation for the purposes of this decision notice to be to determine if the section 36(2)(b)(i) exemption cited by the DfE provides a valid basis for refusing to disclose the remaining information, namely (ii) and (v) as listed.

Reasons for decision

12. Section 36(2) of the FOIA states that

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information –

(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."

13. The exemptions listed in section 36(2) are qualified exemptions so are subject to the public interest test. However, before considering the public interest the Commissioner must first consider whether any of the exemptions are engaged.

14. For any of the exemptions listed in section 36(2) to apply the qualified person for the public authority must give their reasonable opinion that the exemption is engaged. The qualified person in this case is the Parliamentary Under Secretary of State for Schools, Lord Hill. The DfE has provided the Commissioner with evidence to demonstrate that his opinion was sought and provided both when initially considering the request and when further information was identified at the internal review stage. The Commissioner has next gone on to consider whether the opinion of the qualified person was a reasonable one.

15. The Commissioner has recently issued guidance on section 36 of the FOIA. It states the following: *"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."*¹

¹ Information Commissioner's section 36 FOIA guidance, http://www.ico.gov.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/section_36_prejudice_to_effective_conduct_of_public_affairs.ashx, November 2011, page 6.

16. In order to determine whether any of the subsections of 36(2) is engaged the Commissioner will consider:
- whether the prejudice claimed relates to the specific subsection of section 36(2) that the DfE is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.

Document (ii): the internal email

17. The internal email dated 2 February which is being withheld by the DfE on the basis of section 36(2)(b)(i) contains several different pieces of advice and information given to the Secretary of State in advance of his visit to the School. The information relating to the School visit constitutes only a small proportion of the information in the email, the majority of the email contains briefings on unrelated issues which might potentially be of note on the day of the visit despite being unrelated to education issues. The Commissioner considers this information to be still within the scope of the request as it is contained within correspondence on the visit and forms part of the briefing to the Secretary of State on issues which might arise during his visit.
18. As such the Commissioner has considered whether the disclosure of this email would be likely to inhibit the free and frank provision of advice by staff at the DfE.
19. The DfE has primarily argued that disclosure would have a 'chilling effect' on the future provision of advice by officials, particularly junior officials. This argument is made as the email includes a frank and open briefing on issues which the Secretary of State might need to be aware of in addition to some information about the School itself. It is important that officials are able to provide information such as this to Ministers without concern that it will be disclosed, as this may affect the candour of the communications between officials and Ministers and the effectiveness of future briefings.
20. The DfE has provided sufficient evidence to illustrate that the qualified person was provided with an email and attached documents explaining that he was required to form a reasonable opinion in relation to the application of section 36(2) of the FOIA to the information in this case. It is clear that, having reviewed this information, the qualified person formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank provision of advice.

21. For the reasons outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Therefore, he considers that section 36(2)(b)(i) is engaged. He has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the withheld information.

The public interest test

22. The DfE acknowledged the public interest in openness and transparency and in understanding how decisions are made. More specifically in the case of the information in question, disclosure may increase transparency and accountability in Ministers and public officials leading to increased trust in governmental processes. The Commissioner accepts the general public interest argument that disclosure would increase transparency but does not consider that, taking into account the content of the withheld information, there would be any increase in accountability in officials from disclosure in this case.
23. The Commissioner is also aware there has been some reporting on the School in both the local and national media² and as such there is likely to be some public interest in any information on the School being disclosed. However, when considering the specific content of the email in this case the Commissioner does not consider that this argument should carry much weight as the information does not reveal anything significant about the School or on issues which are not already in the public domain.
24. The Commissioner has also taken into account the fact that the information that has already been disclosed by the DfE in this case satisfies much of the genuine public interest in this case. The information disclosed provides some background to the visit of the Secretary of State to the School and the information he was provided with to brief him on pertinent issues with the School and the local area. The Commissioner does not consider that disclosing the email would provide any useful additional information and would be likely to generate the "chilling effect" suggested by the DfE, given the remaining contents.
25. The DfE has argued that disclosure of this email would suggest to officials that they were not free to give candid advice to Ministers in the future without the fear it may later be disclosable. The DfE has then further argued that this could have an impact on the quality of future advice.

² <http://www.independent.co.uk/news/education/education-news/jewish-pupils-boycott-exam-in-shylock-protest-790021.html>

26. The Commissioner will generally consider "chilling effect" arguments in relation to section 36(2) but the amount of weight he apportions to these arguments is dependent on how speculative the arguments are. In this case the information provided to the Secretary of State in the email would have been unlikely to have been used to inform any decisions and was instead intended to be a briefing on potential issues which may arise.
27. The Commissioner will usually acknowledge chilling effect arguments where it can be shown that disclosure of the withheld information is likely to affect the frankness and candour of future advice.
28. In this case the email contains other information intended to brief the Secretary of State on other issues not necessarily linked directly to the visit but more to the timing of the visit. Whilst the chilling effect argument is speculative and has not been supported in this case with any examples, the Commissioner considers it would be wrong to dismiss the argument entirely, given the nature of the advice in the email and in particular the fact that much of the information is unrelated to the Secretary of State's own activity on the day. If there was any danger of a chilling effect occurring from disclosure and future briefings being less open this might affect the level of information provided to Ministers and their general preparedness for handling government business. Therefore, the Commissioner accepts this argument in this case but because of its speculative nature does not afford it much weight.
29. When making a judgement about the weight of the public authority's public interest arguments, the Commissioner will consider the severity, extent and frequency of any potential prejudicial effect. Having accepted that section 36(2)(b)(i) is engaged the Commissioner recognises that the prejudice would be likely to occur and this inevitably adds some weight to the public interest in favour of maintaining the exemption.
30. In this case the Commissioner is mindful that the public interest arguments are finely balanced. Whilst the disclosure of the information might contribute to a greater public understanding of the sources of advice and the briefings that are provided to Ministers the Commissioner does not consider this to be a substantial benefit in this case. The Commissioner also acknowledges the arguments in favour of withholding the information are not particularly strong.
31. However, the Commissioner accepts that there is some inbuilt weight in favour of maintaining the exemption which is accepted

once the exemption is engaged. This combined with the weight attributed to the chilling effect argument in this case outweighs the minimal public interest in disclosure that is apparent when considering the nature and content of the withheld information.

32. The Commissioner is therefore satisfied the DfE has correctly balanced the public interest arguments in this case to withhold the email (referred to here as document (ii)), as the public interest in maintaining the exemption outweighs that in disclosure.

Document (v): the handwritten notes

33. Having looked at the withheld information contained in document (v) the Commissioner considers the information consists of notes and observations taken by the Private Secretary on the key points of the discussion between the Secretary of State and the Head Teacher. The DfE has stated that this note was not used to write up minutes at a later date and in any event there was no expectation by either of the parties involved in the discussion that an official note would be taken.
34. The DfE argues that the discussion did not take place in a public forum and there was no expectation of details being disclosed. Had there been any indication that notes on the discussion might be put into the public domain this might have resulted in less free and frank expression between the parties.
35. The Commissioner has reviewed the content of the notes and accepts that they are a handwritten record of the meeting and, based on the content do not appear to have been made with the intention they would form part of any formal minutes in the future. The Commissioner has previously considered "raw notes" in the context of section 36(2)(b)³ and accepts that notes made for personal use only to act as a reminder of a meeting or to prompt actions needed following a meeting can be considered in the same way as "aide memoire notes" such as in the case of *Evans v ICO and the Ministry of Defence*⁴. In this case the Commissioner found that disclosure of notes taken during a meeting would be likely to prejudice the effective conduct of public affairs and to make those taking notes in meetings more selective about what they record,

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<http://www.ico.gov.uk/foikb/FOIPolicyPublicInterestTestforrawnotesandaidememoirnotes.htm>

⁴ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i73/Evans.pdf>

particularly where the notes taken are not formal meeting notes but aide memoire notes. Such is the case here.

36. The DfE has provided sufficient evidence to illustrate that the qualified person was provided with information explaining that he was required to form a reasonable opinion in relation to the application of section 36(2) of the FOIA to the information withheld by the DfE in this case. It is clear that, having reviewed this information, the qualified person formed the opinion that the disclosure of the withheld information would be likely to inhibit the free and frank provision of advice.
37. For the reasons outlined above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one. Therefore, he considers that section 36(2)(b)(i) is engaged. He has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

The public interest test

38. As with document (ii) the Commissioner and the DfE both recognise the general public interest in openness and transparency inherent in the FOIA. In this case the withheld information is a handwritten note which seems to have been made with the intention to serve as a reminder of the meeting between the Secretary of State and the Head Teacher of the School. The Commissioner would accept that there is some public interest in the disclosure of information of this sort as it enhances transparency and accountability.
39. The Commissioner has considered the severity, extent and frequency of prejudice to the effective conduct of public affairs. Again, as with document (ii) the Commissioner, having accepted that section 36(2)(b)(i) is engaged, recognises that the prejudice that is likely to occur inevitably adds weight to the public interest in favour of maintaining the exemption.
40. The DfE argues that there may be a chilling effect should the handwritten notes be disclosed, particularly as the notes were not intended to form part of any formal record and the meeting did not take place in a public forum. Having viewed the notes and based on the information supplied by the DfE, the Commissioner understands that the meeting was an informal meeting between the Secretary of State and the Head Teacher during the course of the visit. There were no official minutes of this meeting in much the same way as there is no official note of the visit as a whole. The notes themselves do appear to be taken by the Private Secretary with the intention of acting as a reminder of the discussion and as a prompt

and would not have been written with any expectation they would be disclosed.

41. Added to this is the potential chilling effect of disclosing raw notes which were not written with the intention of forming part of an official record or being disclosed. The DfE has argued that disclosure would have an inhibitory effect because the notes are raw notes but the Commissioner also has to consider the content of the notes rather than simply accepting the chilling effect argument based on the form of the notes. In this case the notes appear to have been made as an aide memoire for the Private Secretary and were not intended to be used, or were in fact used, to feed into any deliberations or policy work.
42. The Commissioner therefore accepts there is a likelihood that disclosure would have an inhibitory effect on officials taking such notes in the future. In turn he accepts this would be likely to inhibit the free and frank provision of advice as, although aide memoires such as the one considered in this case are not written for the purpose of producing formal notes or informing policy decisions, they act as a reminder to the author and can be used to inform the advice that may be given in the future.
43. In this case the handwritten note is in parts illegible and uses abbreviations and short notes which may be of little relevance to anyone without the contextual awareness of the discussion to support the note. This would support the public interest in maintaining the exemption and is supported by the Tribunal's comments at paragraph 39 of the *Evans* decision.
44. Having taken into account all the public interest factors as outlined above, the Commissioner considers that as with document (ii) the arguments are finely balanced. Whilst there does not appear to be any compelling public interest in disclosure other than to increase transparency and provide the only contemporaneous recorded information from the meeting, the Commissioner considers there are more substantial arguments in favour of withholding the information particularly given the chilling effect which might arise from disclosure in a case such as this.
45. The Commissioner is therefore satisfied that the document (referred to as document (v)) has been correctly withheld as the public interest in maintaining the exemption outweighs that in disclosure.

Right of appeal

46. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

47. 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.
48. 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

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