

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 December 2013

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

Decision (including any steps ordered)

1. The complainant made a freedom of information request to the Department for Education (DfE) for any emails sent from the private accounts of the Secretary of State and three of his special advisers which concern official government business and which refer to the Building Schools for the Future Programme and the Sandwell Local Authority Area. The DfE initially informed the complainant that it did not hold any information falling within the scope of the request. However, during the course of his investigation the Commissioner found that two emails identified by the DfE would fall within the scope of the request. The DfE then sought to withhold this information by relying on the exemptions in section 36 (prejudice to effective conduct of public affairs), section 40(2) (personal information) and section 42 (legal professional privilege). The Commissioner has considered whether this information should be withheld and found that the information is exempt under section 36(2)(b)(i) and (ii) and that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner requires no steps to be taken.

Request and response

2. On 13 August 2012 the complainant made a freedom of information request to the Department for Education (DfE) for emails on the private accounts of the Secretary of State Michael Gove and 3 named special advisers that concern official government business and which:

"refer to the Building Schools for the Future Programme and the Sandwell Local Authority area. This would include any reference to Sandwell, Sandwell Metropolitan Borough Council or Sandwell Council since 6 May 2010."

3. The DfE failed to respond to the request until 15 January 2013 when it confirmed that it held no information falling within the scope of the request.

Scope of the case

4. The complainant originally contacted the Commissioner in January 2013 to complain that he had not received a response to his request. It appears that when he originally submitted his complaint he had not received the response from the DfE informing him that the requested information was not held. Once the complainant received the response he asked the Commissioner to consider whether the DfE was correct to say it held no information falling within the scope of his request.
5. Given the delay the complainant had already experienced the Commissioner decided to exercise his discretion and consider the complaint in the absence of an internal review.

Reasons for decision

Section 1 – Information not held

6. The complainant does not accept that the DfE holds no information falling within the scope of the request. Therefore the Commissioner asked the DfE to outline what steps it took to search for any information falling within the scope of the request. The Commissioner also asked the DfE to confirm whether it had searched any private email accounts for relevant information or if it asked the individuals concerned to search their own email accounts.
7. In response to the Commissioner the DfE said that it was aware that the Secretary of State and his special advisors do on occasion use private email for government business (for example, because they were out of the office or experiencing IT difficulties) but that if they do they copy in their Departmental account or, in the case of the Secretary of State, his Principal Private Secretary (PPS)'s departmental email account. It explained that this ensures that the information is held on the departmental systems and can be located as necessary.

8. The DfE referred to the Commissioner's guidance on *Official information held in private email accounts* where he sets out his view on searches of private emails accounts.¹ In this guidance the Commissioner suggests that a public authority would need to ask an individual to search their account for relevant information "where a public authority has decided that a relevant individual's personal email account may include information which falls within the scope of the request and which is not held elsewhere on the public authority's own systems". As any information on a private email account would also have been copied to the departmental system the DfE said that it had decided that it did not need to ask any individuals to search private email accounts.
9. The Commissioner is satisfied that the DfE was correct in not searching private email accounts given the processes it describes above. The Commissioner is clear that it is not for the applicant to direct the public authority to where it ought to search for requested information. It is the responsibility of the public authority to decide how best to search for requested information based on its understanding of where information is likely to be held. The Commissioner is clear that the circumstances in which it will be appropriate to search an individual's private email accounts will be rare and only where there are reasonable grounds to believe that official information is held on the account and is not also available elsewhere.
10. The DfE also considered where within its own systems the requested information might be held and explained that the most likely recipients of emails from the Secretary of State's private account would have been his PPS (for the reasons outlined above) or his special advisers. Therefore, the DfE said that it commissioned searches of the email accounts of these individuals.
11. As regards any emails sent from the private accounts of the other individuals (who were all special advisers) the DfE explained that the most likely recipient of such emails would have been the official government accounts of the advisers (for the reasons outlined above). The DfE carried out searches of the accounts of two of the named individuals but for a third individual this was not possible as the account

¹http://www.ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/official_information_held_in_private_email_accounts.ashx

had been deleted due to the fact that the individual had left the department and the account had not been used for some time.

12. The DfE further explained that in searching for any emails it used the search term 'Sandwell' in conjunction with the name of the Secretary of State and his special advisers' email accounts.
13. The DfE had responded to the complainant's request by informing him that it held no information falling within the scope of the request. However, it explained to the Commissioner that in searching for any relevant information it had identified an email sent from the Secretary of State's private email account which mentioned Sandwell. The DfE said that it had considered that this email was outside of the scope of the request because FOIA provides a right of access to information not to documents and that in order for a request to be valid the request must describe the information for example by reference to a topic or policy area.
14. However, the DfE said that rather than reject the request because it sought the disclosure of documents, it had tried to construe the request as a request for information. Given that the complainant had specified what topics he was interested in, the DfE said that it had interpreted the request as being for information about Sandwell Borough Council's involvement in the BSF programme. Interpreting the request in this way the information was, it said, outside the scope of the request because the email was not about Sandwell Borough Council's involvement in the BSF programme.
15. The Commissioner's view is that the DfE was correct to treat this as a valid freedom of information request. The Commissioner has always been clear that requests for documents should be interpreted as requests for information contained within those documents. Indeed many requests for information can only be expressed by reference to a particular document – for instance a particular report or letter which an applicant knows to exist.
16. In this case the complainant clearly said that he wanted to see emails from the Secretary of State which refer to the Building Schools for the Future Programme and "Sandwell, Sandwell Metropolitan Borough Council or Sandwell Council". The request was very broad and so any reference to Building Schools for the Future and Sandwell, however detailed, is sufficient to bring the email within the scope of the request. The Commissioner found that the email identified by the DfE fell within this description.

17. The Commissioner also found that a further email held by the DfE would fall within the scope of the request. This had been identified by the DfE as part of a separate investigation involving the same complainant and a request for very similar information. The DfE had also discounted this email as it was felt to fall outside the scope of the request. Again, the Commissioner has found that it was within scope and should have been identified at the time the request was received.
18. The Commissioner has found that these two emails fell within the scope of the request. However, during the course of the investigation the DfE said that if the Commissioner were to disagree with its conclusion and find that the emails were in scope it would seek to withhold the information under the section 36, section 40(2) and section 42 exemptions. The Commissioner has first considered whether the exemptions in section 36 apply to this request.

Section 36 – Prejudice to effective conduct of public affairs etc

19. Section 36(2) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure-
 - (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.
20. In this case the DfE has said that it considers that the information is exempt under section 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
21. For the exemption to be engaged the proper qualified person for the public authority must have given his opinion on the application of the exemption. In this case the DfE has provided confirmation that Lord Nash, Parliamentary Under Secretary of State for Schools gave his opinion on the application of the exemption on 19 September 2013. FOIA requires that for government departments the qualified person is a Minister of the Crown and therefore the Commissioner is satisfied that the DfE obtained the opinion of the proper qualified person.
22. In order to determine whether the exemption is engaged the Commissioner must then go on to 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.
23. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' 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."*
24. It is important to note that when considering whether section 36 is engaged the Commissioner is making a decision not on whether he agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
25. Having reviewed all of the information placed before the qualified person the Commissioner is satisfied that the information included the relevant arguments. He was provided with a copy of the withheld information and a submission prepared by his officials, allowing him to form a reasonable opinion on the likely effect of disclosure of the information.
26. The withheld information in this case consists of two emails (the first of which is in fact a larger chain of emails of which the Commissioner found that only two were subject to the Act). In this case the Commissioner is limited in what he can say about the subject of the emails and the reasons why the exemptions have been applied for fear of revealing the withheld information.
27. The qualified person considers that the exemptions in sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) are engaged because disclosure would lead to officials being more constrained in how they provide advice to ministers. Disclosure would also lead to officials being more guarded in the way they discussed relevant issues. This would make it harder for ministers to react swiftly to events and would be less useful to ministers.
28. Having considered the arguments the Commissioner has found that the prejudice envisaged by the DfE relates more to the exemptions at section 36(2)(b)(i) and (ii) rather than section 36(2)(c) and that

therefore it is appropriate to concentrate on those limbs of the exemption which protect the ability to provide advice and engage in a free and frank exchange of views, in the first instance.

29. The Commissioner has reviewed the withheld information which he has found to be a candid discussion of issues arising from the BSF programme. The information is informal in nature and the DfE has described it as having been sent on an ad-hoc basis. In the Commissioner's view if this kind of information was disclosed it would be reasonable to conclude that disclosure would lead to the officials being more inhibited in how they provide advice to ministers and how they exchange views. This is because government officials would be more reluctant to provide this kind of candid advice if they felt it would be disclosed because it could be construed as being about issues that ministers and their officials saw as more sensitive or difficult. In reaching this view the Commissioner is also mindful of the fact that the information was still relatively recent at the time of the request and the issue of the BSF programme was still a politically sensitive subject.
30. Having taken all the circumstances into account the Commissioner is satisfied that the opinion given was reasonable and that the exemptions in section 36(2)(b)(i) and (ii) are engaged.

Public interest test

31. Section 36 is a qualified exemption and therefore the Commissioner has carried out a public interest test, balancing the public interest in maintaining the exemption against the public interest in disclosure.

Public interest arguments in favour of disclosure

32. Building Schools for the Future was the previous government's investment programme for secondary school buildings in England. When the present government came into power the programme was cancelled and many of the schools which were intended to be revamped had their plans stopped. A list of projects to be cancelled or taken forward was published which contained a number of mistakes. Schools in the Sandwell Council area were mistakenly included on an initial list of approved projects but which were subsequently cancelled.
33. The Commissioner appreciates that this was a high profile media issue. He considers that there is a public interest in disclosure of the withheld information in this case to the extent that it would help to increase public understanding of the DfE's handling of this issue.

34. For its part the DfE said that it considered that there was a legitimate public interest in understanding where mistakes arose and in the department being held publicly accountable for its decisions.

Public interest arguments in favour of maintaining the exemption

35. In favour of maintaining the exemption the DfE argued that there was a strong public interest in officials being able to engage in free and frank discussions about important issues. It argues that such discussions should be fully and properly recorded, particularly where high-profile or sensitive information is concerned.
36. Confidentiality is necessary for ministers and officials to develop strategies for presenting government policies. Underlying this confidentiality is the constitutional convention that ministers are accountable for the decisions they take, rather than those who provided them with the advice that informed their decision.
37. The DfE also said that it considers that it is not in the public interest to divert valuable resources within government to preparing advice to Ministers which is both more cumbersome and less candid than could otherwise be the case.

Balance of the public interest arguments

38. The Commissioner accepts that there is a public interest in disclosure insofar as this would promote greater transparency and accountability on actions and decisions taken by the government. However, the Commissioner considers that the public interest has already been largely met because the issue has already been aired in front of the House of Commons Education Committee and in the House itself, as well as in the media. This has greatly reduced the public interest in disclosure and having reviewed the withheld information the Commissioner has found that there is very little if anything in the emails that would add to public understanding on this issue.
39. As regards the public interest in maintaining the exemption the Commissioner considers that there is an important public interest in officials being able to provide advice to ministers and discuss issues freely and frankly. Any inhibition would damage the quality of advice and deliberation and lead to poorer decision making. As the DfE explained "confidentiality ensures that the intricacies and sensitivities of policies can be explained clearly and frankly to ministers" without fear of disclosure.

40. The Commissioner's view is that it is the public interest for ministers to be able to discuss effectively with officials how best to promote and explain government actions and decisions. Taking this into account and given the limited public interest in disclosure the Commissioner has decided that, having given due weight to the opinion of the qualified person, the public interest in maintaining the exemption outweighs the public interest in disclosure.

Other exemptions

41. The Commissioner has decided that the information is exempt under section 36(2)(b)(i) and (ii) and the public interest favours maintaining the exemption. Therefore it is not necessary to go on to consider the other exemptions relied on by the DfE.

Right of appeal

42. 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

43. 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.
44. 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
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