

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 November 2013

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

Decision (including any steps ordered)

1. The complainant has requested information relating to [named company] and its provision of IT services to schools. The Department for Education (DfE) refused to provide the requested information under section 40(2), 41 and 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the DfE has correctly applied section 41 FOIA to the withheld information.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 25 October 2012, the complainant wrote to the DfE and requested information in the following terms:
 - "1. Copies of all complaints (including informal letters/emails containing criticisms) that you have received since 1 September 2011 relating to [named company] and its provision of IT services to schools.
 2. All information received since 1 September 2011 which concerns the invoking of penalty clauses in contracts held by [named company] for the provision of IT services to schools."

5. The DfE responded on 5 February 2013. It confirmed that it held information that fell within the scope of part 1 of the request but said this was exempt from disclosure under section 41 and 43(2) FOIA.
6. The complainant requested an internal review on 13 March 2013. The DfE sent the outcome of its internal review on 24 April 2013. It upheld its original position but also applied section 40(2) FOIA.

Scope of the case

7. The complainant contacted the Commissioner on 17 January 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DfE was correct to withhold the requested information under section 40(2), 41 and 43(2) FOIA.

Reasons for decision

Section 41

9. Section 41(1) is an absolute exemption under the FOIA and provides that information is exempt from disclosure if it was obtained by the public authority holding it from any other person (including another public authority) and the disclosure of the information to the public by the public authority would constitute an actionable breach of confidence.
10. Therefore, in order for the exemption to be engaged, the relevant information must meet the following two criteria:

Was the information obtained by the public authority from a third party?
Would the disclosure of the information constitute an actionable breach of confidence?
11. The DfE has applied the section 41 exemption to all of the withheld information.
12. In this case the withheld information is emails from staff from Free Schools who are reporting back to [named company] on outstanding snags from site installation and responses with a plan of action to

address the issues raised. This was provided to the Education Funding Agency (EFA), which is part of the DfE, by these third parties to keep them informed of events. This is therefore information which was provided to the DfE by a third party. However, for the exemption to be engaged disclosure of the withheld information must also constitute an actionable breach of confidence. In the Commissioner's view a breach will be actionable if:

- i. The information has the necessary quality of confidence.
(Information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial; information which is of importance to the confider should not be considered trivial.)
 - ii. The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself, and/or the relationship between the parties.)
 - iii. Unauthorised disclosure would cause a specific detriment to either the party which provided it or any other party.
13. The DfE explained that it works hard at building relationships with contractors such as [named company] and also with the schools. It endeavours to have an open and approachable relationship with these third parties, one in which they feel they can openly consult and raise objections or concerns. The DfE considers that the release of such correspondence would be detrimental to the work of [named company]. It went on to explain that [named company] have a reasonable expectation to address formal complaints following their internal processes and points of escalation. It said that the withheld information is informal emails containing concerns, all of which were resolved to every party's satisfaction. The DfE does not consider that there is any wider benefit by publication of the withheld information and disclosure would be likely to cause damage to the reputation of [named company] and in turn the related school and the DfE.
14. The DfE went on to explain that it believes that disclosure in these circumstances would expose the DfE to risk of legal action, in particular being in breach of the common law of confidence. It said that the information is neither trivial and is not otherwise in the public domain. The DfE reiterated that the information was shared with it in circumstances that created an implied obligation of confidence, given the nature of the information and the relationship between the parties. The DfE is of the view that a reasonable person in the place of the

recipient of these emails would have considered that the information had been provided to them in confidence.

15. After viewing the withheld information and taking into account the submissions made by the DfE, the Commissioner considers that the information withheld is not trivial and is not publicly available. It has said that disclosure of information about any concerns raised about that company would be likely to impact the company's ability to participate competitively in this commercial activity. This is not considered trivial information to the third parties involved in the correspondence.
16. The DfE has argued that there was an implied duty of confidence in this case. After viewing the withheld information and again taking into account the submissions made by the DfE, the Commissioner does consider that there was an implied duty of confidence in this case. The DfE has an open and transparent relationship with contractors such as [named company] and with the schools so that when issues occur they can be dealt with openly and effectively. Furthermore the DfE has explained that contractors such as [named company] do have an expectation that it will have space to deal with informal concerns raised with its service internally in the first instance. In this case the DfE has confirmed that the issues raised were resolved between the parties. Due to the nature of the withheld information and the relationship between the DfE and the third parties involved in this case, the Commissioner does consider that the withheld information was provided to the DfE under an implied duty of confidence.
17. The DfE has argued that it may be subject to legal action if it were to disclose the withheld information. It has also argued that [named company] would be likely to suffer a commercial detriment if the withheld information were disclosed. The DfE said that if the request had involved numerous IT providers the prejudice or damage may not be so detrimental. However it said that release would be likely to have disproportionate impact upon [named company] with disclosure unfairly prejudging them commercially. The Commissioner considers that the release of information which contains issues raised with one particular IT service provider would have a detrimental effect on that particular company.
18. Finally the Commissioner has considered whether the DfE could rely on a public interest defence so that a breach of confidence would not be actionable. After viewing the withheld information and taking into account the fact the concerns were dealt with internally by [named company] to all party's satisfaction, he does not consider that there is an exceptional public interest in disclosure which would override the duty of confidence in this case.

19. The Commissioner therefore considers that section 41 FOIA was correctly applied to the withheld information in this case. He has not therefore gone on to consider the application of the other exemptions.

Right of appeal

20. 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

21. 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.
22. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF