

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2014

Public Authority: Her Majesty's Chief Inspector for Education and Training in Wales (Estyn)

Address: Anchor Court
Keen Road
Cardiff
CF24 5JW

Decision (including any steps ordered)

1. The complainant requested copies of all documentation relating to an inspection at a particular school. Estyn refused the request under section 22 of the FOIA. In its internal review response Estyn stated that it considered the information requested to be exempt under sections 22, 33, 36 and 40(2) of the FOIA. The Commissioner's decision is that Estyn has correctly applied section 33 to the withheld information. The Commissioner does not require any steps to be taken.

Request and response

2. On 17 October 2013, the complainant wrote to Estyn and requested information in the following terms:

"Under the freedom of information act, I request copies of all documentation relating to the Estyn inspection undertaken at Ysgol Tryfan, Bangor week commencing 6th October 2013".

Examples of documents include, but are not limited to, forms filled in by Estyn inspectors during and following interviews with teachers (including the management team) notes (written or typed) made during and following Estyn inspectors observing lessons during the week of the inspection".

3. Estyn responded on 22 October 2013 and stated that the inspection report was exempt under section 22 of the FOIA as it proposed to

publish it on 10 December 2013. Estyn also stated that the request "could encompass some additional information which may not be included in the report". Estyn stated that once the report was published the complainant would be able to review the information contained in it to determine whether he required any further information.

4. The complainant requested an internal review of Estyn's handling of the request. He raised concerns about the application of section 22, and the advice given to him about awaiting publication of the report before considering whether he required any further information. He pointed out that the request was for all documentation relating to the inspection, and not just limited to the inspection report itself.
5. Estyn provided the outcome of its internal review on 10 December 2013. It upheld its decision that the inspection report was exempt under section 22 of the FOIA. In relation to the other information requested (observation forms, evidence forms, input judgement forms and reporting judgement form), collectively referred to as 'inspection documents', Estyn stated that the information was exempt under sections 33, 36 and 40 of the FOIA.

Scope of the case

6. The complainant contacted the Commissioner on 5 March 2014 to complain about the way his request for information had been handled.
7. In his complaint to the Commissioner, the complainant did not indicate which part(s) of Estyn's response he was dissatisfied with. However, as the inspection report which was withheld under section 22 was published at the time of Estyn's internal review (10 December 2013), the Commissioner confirmed that, unless he heard from the complainant to the contrary, the scope of his investigation would be to determine whether Estyn should disclose the information it had withheld under sections 33, 36 and 40 of the FOIA.

Reasons for decision

Section 33 – audit functions

8. Estyn has applied section 33 to all of the withheld information. Section 33 of the FOIA 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.

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 (a) or (b) above.

9. Estyn provided some background information about the school inspection arrangements that commenced in September 2010 and the type of information that is collated during inspections. Estyn conducts a core inspection for all schools in Wales on a six year inspection cycle. Reporting Inspectors are responsible for the conduct and management of the inspection and for the inspection report itself. They are assisted by team inspectors and each inspection team also has a peer inspector. All completed inspection reports are published on Estyn's website.
10. Since September 2010, Estyn has used an electronic system for managing many aspects of an inspection, called the 'Virtual Inspection Room' (VIR). It is a web based system that allows schools to upload information to the inspectorate and to download guidance from the inspectorate about the process. It is also Estyn's electronic system for collecting, collating and recording inspection findings.
11. During inspections, inspectors use judgement forms (JFs), session observation forms (SOFs) and evaluation forms (EFs) to record their findings and judgements. These contain information on their observations of learning activities, discussions with pupils, interviews with staff, leaders and managers, scrutiny of school documentation, performance inspection and samples of pupils' work. Collectively, this set of information is referred to as 'inspection documents' and it is this information, together with drafts of the final, published inspection report, which Estyn has withheld under section 33.
12. During the course of the Commissioner's investigation, Estyn advised that some documents falling within the scope of the request had been destroyed in line with its normal retention policy. These documents comprise handwritten EFs and SOFs written by the inspection team during the course of the inspection. However, Estyn confirmed that, whilst the handwritten forms had been destroyed, the information contained within the forms had been retained as it is contained within the electronic input JFs completed by each member of the inspection team.

13. Estyn confirmed that it is relying in the first instance on the "would" prejudice limb of section 33(1)(b) and on the "would be likely" prejudice limb, in the alternative.
14. Estyn explained that it has a duty to produce timely and detailed inspection reports for all schools in Wales. Estyn considers that the timing of the request to be an important point in this case. The request was made on 17 October 2013, and related to an inspection which had concluded a matter of days before the request. At the time of the request, the inspector was still reaching a view on the inspection and formulating the content of the inspection report, which was published on 10 December 2013. Estyn considers it to be vital to its functions that inspectors have a safe space in which to formulate their views free from public scrutiny. It also considers that the need for a safe space extends also to the period after an inspection report has been published, when the school and stakeholders are digesting its contents. Estyn considers that public scrutiny of the inspection documents, which are not intended for the public would intrude on this safe space.
15. Estyn is of the view that premature disclosure of the withheld information would inhibit the frankness and exchanges in the early stages of the inspection process. This in turn would weaken the quality of reports and could also lead to delay, as inspectors would have to take further time and care in recording their views and deliberations to ensure that every comment can withstand public scrutiny.
16. Estyn has explained its quality assurance procedures, and confirmed that, until the quality assurance has been completed, the conclusions of the report are not tested and verified. It considers that disclosing earlier views and conclusions could cause significant difficulties particular in cases where early findings and markings are moderated and changed.
17. Estyn explained that the guidance it issues to inspectors indicates that they "should be aware that requests for disclosure of information may be made for details contained in inspection evidence, letters and emails. All information (written or electronic should be recorded in a way that is fit for the public domain". This alerts inspectors to the fact that requests may be received for information they record so that, for example, they do not express themselves in embarrassing or unsuitable ways. However, the guidance does not suggest that such documentation would automatically be disclosed and Estyn is of the view that inspectors would expect it to ensure, as far as possible, that a safe space is preserved for their work. Again, Estyn considers the timing of the request to be a key issue in this case as nothing in any of the guidance issued gives any indication that such information is likely to be suitable for disclosure prior to or immediately after the inspection reports are published. In addition, the guidance is aimed at inspectors only and it is issued to

schools, pupils or other stakeholders involved in the inspection process. These individuals and groups therefore have no prior warning nor have they been given any expectation that the information they provide may be disclosed to the public. Estyn's guidance does not include any information suggesting that inspectors should advise or alert interviewees to the fact that that they cannot expect any evidence they provide to remain confidential and/or that it could be subject to a request for disclosure.

18. The Commissioner is satisfied that school inspections and the issues inspectors are required to consider during such inspections constitute a function falling within section 33(1)(b) of the FOIA. This follows the decision reached by the First-tier Tribunal in the hearing of OFSTED v Information Commissioner EA/2009/0121¹ in which the disclosure of school inspection evidence was considered.
19. The Commissioner now needs to consider whether disclosure of the withheld information would or would be likely to prejudice Estyn's ability to carry out this audit function. In order for a prejudice based exemption, such as section 33, to be engaged the Commissioner believes that three criteria must be met:
 - Firstly, the actual harm which the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e., disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold of "would be likely", the Commissioner believes that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the

¹ http://www.informationtribunal.gov.uk/DBFiles/Decision/i713/EA-2009-0121_Decision_2012-02-20.pdf

higher threshold of "would prejudice", in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.

20. The Commissioner is satisfied that Estyn has identified a prejudicial outcome which is inherent in the audit exemption. Estyn is concerned that disclosure would impact on the safe space required to formulate and complete inspection reports and that stakeholders would be unable to engage freely and frankly during the inspection process. This would undermine and have a prejudicial impact on the inspection process.
21. The Commissioner does not consider the prejudicial outcome described to be insignificant or trivial. Estyn is examining the effectiveness of schools including the quality of education within schools and whether educational standards are being achieved. If it is unable to carry out this activity effectively, such an outcome is not insignificant nor is it trivial. The second step of the prejudice test is therefore satisfied.
22. As Estyn has claimed in the first instance that disclosure would prejudice its audit functions, the Commissioner will first consider the higher threshold of "would" in this case.
23. Whilst the Commissioner notes that the school inspection process is based on statute and does not rely on acquiescence he accepts that it would no doubt be easier to inspect a fully co-operative school. He also considers that an inspection is likely to be most effective when Estyn is able to engage in a free and frank exchange of views with the school being inspected within the context of an open and effective relationship. The Commissioner considers that informal methods of information gathering and research such as interviews are very important to the inspection process. The Commissioner notes that, whilst inspectors are made aware that requests may be received for information they record, there does not appear to be any provision to alert interviewees of the possibility of disclosure. Therefore he considers it is reasonable to conclude that Estyn's audit functions would be highly likely to be prejudiced if schools were to become more reluctant to engage in the inspection process.
24. The Commissioner has considered how closely the published inspection report relates to the inspection documents and to what extent the withheld information has been disclosed through publication of the report. A large proportion of the inspection documents are essentially a means to record the immediate observations of the inspectors and are used as an aid to complete the inspection report. They are not a "rough" version of the published report and include a lot of information that is not referenced in the published report. The Commissioner also notes

that, at the time of the request, the final inspection report had not been published.

25. The Commissioner notes that, the Registered Inspector is responsible for collating all inspection team members' comments and observations and their input JFs into a Reporting Judgement Form (Reporting JF). He will rationalise the text and comments made by the inspection team and evaluate judgements against the text and evidence base to ensure that judgements recorded are reasonable and appropriate. Once this stage of the process is complete, independent quality assurance work is carried out by Estyn. Until this stage, no independent assessment or evaluation of the evidence collated is undertaken. Once the quality assurance process is complete, the Reporting JF then becomes a draft report which is sent to the school to correct any factual inaccuracies. It is only at this stage that the school has any opportunity to comment on the report. The Commissioner accepts that there is a possibility that throughout this process, judgements could be amended or altered and early disclosure of the information, prior to publication of the final inspection report, would prejudice Estyn's audit process.
26. In reaching a view on the likelihood of prejudice the Commissioner considers the timing of the request to be a highly significant factor in this case. The inspection took place during the week commencing 6 October 2013 and the request was submitted shortly after, on 17 October 2013. At the time of the request, the inspector was still reaching a view on the school and formulating the content of the inspection report, which was published on 10 December 2013.
27. Taking account of the particular circumstances of this case, the Commissioner is satisfied that disclosure of the inspection documents, at the time of the request, would prejudice Estyn's audit functions in relation to the inspection at Ysgol Tryfan. He therefore considers that section 33(2) is engaged in this case. As the exemption is engaged in this case the Commissioner will now go on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

28. Estyn recognises that there is a public interest in increasing the transparency of public authorities. Disclosure of the information requested in this case would increase this transparency by placing more information about the inspection in the public domain. However, Estyn is of the view that this argument is reduced to some extent given the substantial volume of information concerning school inspections that is

already in the public domain, and in particular, published inspection reports which contain a significant amount of information contained within inspection documents.

29. Estyn also accepts that disclosure of inspection documents could assist the public in scrutinising the processes and mechanisms designed to ensure the quality of inspections. However, Estyn pointed out that there is already a mechanism in place to allow interested parties to challenge the quality of inspection reports. In addition, Estyn has an internal moderation process in place to ensure that the judgements are consistent and appropriate. Estyn considers that this mechanism would itself be jeopardised if the inspection documents were placed in the public domain. Estyn therefore considers that the weight attributable to this public interest factor is reduced to some extent.

Public interest arguments in favour of maintaining the exemption

30. Estyn has put forward the following detailed arguments in favour of maintaining the exemption at section 33.
- There is a public interest in having clear, transparent and unambiguous conclusions following the inspection of a school to ensure that schools and members of the public are able to identify the quality and standards of education in schools and improvements required. Inspection documents could contain judgements which conflict with those in the published inspection report and this would lead to ambiguity, uncertainty and confusion as to the standards and quality of provision of education at the school in question.
 - Disclosure could lead to complaints raised based on the information, comments and judgements contained in inspection documents. This would have the effect of diverting Estyn's resources away from its core function of inspecting the quality and standards of education and training providers in Wales, to investigating and responding to complaints.
 - Disclosure would be likely to have a prejudicial impact on Estyn's relationship with schools. A school would not be aware of the potential for preliminary information about it to be placed in the public domain and disclosure would damage relationships with schools and affect their level of co-operation with Estyn.
 - Disclosure would be likely to result in inspectors suppressing and/or toning down initial judgements for fear of criticism. The inhibition caused to the free and frank recording of judgments would lead to less candid and robust inspections. This presents a

risk that “extreme” judgements would be toned down resulting in poorly performing schools being given average judgements and high performing schools not being given the good judgments they deserve. More “average” judgments being made would not be in the public interest and would be detrimental to Estyn carrying out effective inspections and weaken the quality and accuracy of inspection reports.

- It is essential that inspectors follow due process and procedure and are not deterred from recording judgments within inspection documents. Disclosure could lead to inspectors’ judgments not being recorded, the consequence of which would be that information would be forgotten and/or lost and ultimately not being considered as part of the inspection process. The quality of a final inspection report depends in part on the provision of as much information as possible in as frank a manner as possible from inspectors. In addition, if inspectors became inhibited and less frank in completion of documentation, the ability to audit the inspection report and trace back how judgements were arrived at would not be possible. This would make the process of investigating complaints about the findings of an inspection report more difficult, and the process of moderation of an inspection report problematic.
- Disclosure poses the risk that inspectors would take more time and caution in writing EFs, SOFs, input JFs and the reporting JF, which are intended to be swiftly produced records. This would impede the timeliness, cost-effectiveness and efficiency of the inspection process and result in delays in publication of the final inspection report. Estyn considers there is a significant public interest in producing timely inspection reports in accordance with statutory or agreed deadlines.
- There is a strong public interest inherent in maintaining the exemption in light of the importance of internal consideration of the information prior to public release as all judgements are provisional until the process is completed.

Balance of the public interest test

31. The issue of the quality and standard of education within schools is a matter of significant public interest. The Commissioner considers that there is a public interest in the transparency of school inspections carried out by Estyn. Disclosure of inspection documents would further public understanding of the inspection process generally and the basis on which judgments for individual schools have been made.

32. The Commissioner agrees that it would not aid the timebound nature of school inspections to make public information under consideration during the inspection. While public debate may well add useful insight, it is important that Estyn is allowed to carry out its work in private without the distraction of debating the matter in public.
33. The Commissioner accepts Estyn's assertion that the withheld information informed the final judgments contained within the published report. The Commissioner notes Estyn's comments about requiring a safe space in order to protect the efficacy of the inspection process, particularly in light of the fact that all judgements are provisional until the process is complete and the relevant checks and balances and quality assurance have been carried out.
34. The Commissioner notes that the inspection of the school in this case was clearly ongoing at the time of the request. The final inspection report was not published until around seven weeks after the request was made. He considers that this fact adds significant weight to the public interest in maintaining the section 33 exemption in this case. With this in mind, the Commissioner is of the view that, at the time of the request, there was a compelling public interest in allowing the inspection process to be carried out in private.
35. On balance and taking into account all the circumstances of this case, the Commissioner considers that the public interest in favour of maintaining the exemption outweighs the public interest arguments in favour of disclosure.
36. As the Commissioner considers that subsection 33(2) is engaged for all of the withheld information in this case, he has not gone on to consider Estyn's application of sections 36 and 40(2) to the information.

Right of appeal

37. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

38. 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.
39. 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF