

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 September 2017

**Public Authority:** Office for Standards in Education  
**Address:** Aviation House  
125 Kingsway  
London  
WC2B 6SE

#### Decision (including any steps ordered)

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1. The complainant has requested information on the number of complaints and the nature of those complaints made against a number of named schools. The Office for Standards in Education ("Ofsted") confirmed that it held information but refused to provide this on basis of section 33(2) of the FOIA.
2. The Commissioner's decision is that Ofsted has correctly applied the provisions of section 33 and the balance of the public interest lies in maintaining the exemption. She therefore requires no steps to be taken.

#### Request and response

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3. The complainant initially made a request to Ofsted on 26 July 2016. The request was in the following terms:

*"Please can you tell me how many complaints there have been in the last 4 years (unsubstantiated as well as substantiated) for the following schools: -*

*Worthing High  
Bohunt School Worthing  
St. Andrew's School, Worthing  
Durrington High*

*Please state what the complaints were about (eg. Bullying)."*

4. Ofsted initially refused to confirm or deny if it held any relevant information by virtue of the exclusion at section 33(3) of the FOIA. The Commissioner consequently issued a decision notice<sup>1</sup> rejecting this and requiring Ofsted to consider the request again without reliance on section 33(3).
5. Ofsted provided its new response on 11 May 2017 and confirmed it held information for three of the four schools but not for St. Andrew's High School for Boys. For the information held – the number of complaints and the nature of the complaints – Ofsted considered the information exempt from disclosure under section 33(2) of the FOIA.
6. The complainant was dissatisfied with the decision of Ofsted and as the request had been considered previously the Commissioner accepted the complaint for investigation without an internal review.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 11 May 2017 to complain about the way her request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if Ofsted has correctly applied the provisions of section 33(2) to refuse to provide the information it holds.

### **Reasons for decision**

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9. Ofsted considers that all of the requested information engages section 33(1)(b) of FOIA by virtue of section 33(2).
10. Section 33(1)(b) states that the exemption applies to any public authority which has functions in relation to the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.

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<sup>1</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2013943/fs50647262.pdf>

11. Section 33(1) should be read in conjunction with section 33(2) of the FOIA. This provides that information 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).
12. The first step when considering the application of the exemption is to establish whether Ofsted has the audit functions described in section 33(1)(b). In the Commissioner's guidance on section 33<sup>2</sup> she notes that the expression "economy, efficiency and effectiveness" is not clearly defined. Nevertheless, she considered that it would encompass information about inspections of the use of resources such as staff and premises, as well as the standard of services provided by the authority being audited.
13. Ofsted has explained that through its inspection reports it holds schools to account for how effectively they use the public funds at their disposal. Ofsted therefore considers its inspection work falls within the definition of an audit function as set out in section 33(1). Ofsted points to the Commissioner's earlier decision notice, specifically paragraphs 14-16 in which the Commissioner summarised:

*"14. Ofsted explained that it has an obligation under section 5 of the Education Act 2005 to inspect maintained schools and produce a report on how well those schools discharge their own functions. Ofsted further explained that with regard to those inspections, it is also required to operate a complaints function so that parents of children at schools can make a complaint that may lead to an inspection.*

*15. Ofsted explained that this requires that such complaints may be considered:*

*"(...) for the purpose of determining, in the light of the complaint (...) when to carry out an inspection under section 5 (insofar as the timing of such an inspection is within his discretion)"*

*16. To support this Ofsted stated that its audit function is required by statute to incorporate the process of parents making complaints about schools. This process also initiates an investigation by Ofsted, the purpose of which is to determine what steps to take in response to the*

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<sup>2</sup>[http://ico.org.uk/for\\_organisations/guidance\\_index/~/\\_media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/public-audit-functions-s33-foi-guidance.pdf](http://ico.org.uk/for_organisations/guidance_index/~/_media/documents/library/Freedom_of_Information/Detailed_specialist_guides/public-audit-functions-s33-foi-guidance.pdf)

*complaint, including bringing forward an inspection or placing the complaint 'on file' to inform a future inspection."*

14. The Commissioner accepts in this case, as in the earlier case, that this demonstrates that Ofsted has a relevant audit function in relation to the examination of the economy, efficiency and effectiveness of how public authorities use their resources through its inspection powers from the Education Act 2005. The Commissioner's next step is therefore to consider whether disclosure of the information in this case would, or would be likely to, have a prejudicial effect on the functions performed by Ofsted.
15. In her guidance, the Commissioner considers that prejudice in the context of section 33 may take different forms. One possibility is that premature disclosure could affect the behaviour of the organisation being audited. Alternatively, a public authority could point to a more general prejudice to audit functions where, for example, disclosure was about specific audit techniques that were not already known to the public. Finally, the Commissioner recognised there may be occasions when a public authority might argue that disclosure would, or would be likely to, discourage cooperation with the auditor in the future thus prejudicing the audit function.
16. Ofsted has explained that information it receives about schools is used to make decision on which schools to inspect and when. Therefore the risk assessment process is integral to the audit function as it informs decision making about the timing of inspections and other visits to schools and the topic of the complaint influences the issues assessed by inspectors. Ofsted makes the point that parents and other parties who share information and make complaints about schools do so with the expectation that the information will only be used by Ofsted and shared with relevant school leadership teams.
17. Ofsted has also explained that the number of complaints for any school is often very low and if it were to indicate the type of complaint received for a particular school it would reveal something about the unique circumstances of each complaint received. In school communities, it argues, this may be sufficient to attribute a complaint made to Ofsted with a single family who have known issues with the school on that subject. It is this possible scenario which Ofsted considers is harmful to the audit function and in explaining this it points to paragraph 24 of the Commissioner's guidance which states there are occasions when:

*"public authorities carrying out audits and inspections within the definition of s.33 receive valuable information from others which helps them to carry out those functions ... an authority might wish to argue*

*that disclosure of the information would discourage co-operation with the auditor in the future, thus prejudicing the audit function."*

18. The Commissioner considers that Ofsted's audit function can only be effective where honest and candid views are received from individuals involved with or connected to schools. She accepts that an individual might be less willing to utilise Ofsted's complaints facility if they believed that details of their complaint would be made public. In terms of the numbers of complaints for each school, the Commissioner does give merit to the argument that as numbers are often very low this could in itself lead to the identification of the person or family who had made the complaint if they are known by the school community to have an issue with the school.
19. The Commissioner considers that Ofsted's effectiveness will frequently be dependent on information voluntarily provided by individuals. The Commissioner considers it is this flow of information that would be jeopardized by disclosure. Information gained voluntarily in this way is used in inspection planning to not only guide the issues and areas to be looked at in an inspection but also to determine which schools will be inspected. Disruption to this may undermine Ofsted's effectiveness in inspections.
20. Ofsted has also argued that revealing how many complaints have been made about a school could be misleading as schools may take volumes of complaints as an indicator that an inspection might be imminent. Ofsted puts in place many steps to ensure that inspections take place with as little notice as possible and consider that disclosing the number of complaints it has received about a school may jeopardise this as it could be viewed as a measure of likelihood of inspection. Ofsted has pointed out that the number of complaints will not necessarily be directly relevant to the likelihood of inspection as the complaints may be found to have no substance but at the same time it is equally possible a high number of complaints (or higher than that for other schools) may infer issues which warrant an inspection.
21. The Commissioner accepts this argument. Whilst she does not consider the likelihood of this prejudice to Ofsted's audit functions to be particularly high; she does recognise that the disclosure of any information which might put schools on 'high alert' at the prospect of an inspection would be likely to prejudice Ofsted's audit functions. It is crucial to inspectors that they are able to see the school in its true state and not when a school has had significance time to anticipate and prepare for an inspection.

22. On this analysis the Commissioner is satisfied there is a reasonable likelihood of prejudice occurring and she has therefore decided that section 33(1)(b) by virtue of section 33(2) is engaged.

23. The Commissioner's next step is to consider the public interest test.

*Public interest arguments in favour of disclosure*

24. Ofsted recognises the general public interest in information about schools and their performance. Although it considers it meets this by publishing inspection reports which thoroughly detail inspection findings including areas of concern.

*Public interest arguments in favour of maintaining the exemption*

25. Ofsted argues there is a clear public interest in ensuring that schools are effectively appraised through inspection. It considers that disclosure of complaints information about particular schools will lead to a general decrease in the willingness of parents and other members of the public providing vital information which assists with Ofsted's audits of schools. If Ofsted is less well-informed about the performance of schools or schools are more likely to anticipate inspections this will reduce the quality of inspections which would not be in the public interest.

26. Ofsted argues the public interest in maintaining the exemption is further enhanced when there are also issues of family privacy and confidentiality. There is a need to insulate children from dispute between their parents and their schools. Parents trust Ofsted to sensitively manage the information provided in complaints and it argues it is therefore strongly in the public interest for that trust not to be eroded by disclosure of information.

27. As well as publishing inspection reports to provide information to the public on school performance; Ofsted also states that it publishes statistics recording the view of parents about schools. If any matter impacts the performance of the school inspectors are required to explain this in the report. Ofsted therefore argues there is an effective process in place already to ensure issues concerned with the focus of complaints can be brought to the attention of the public after they have been verified by inspectors.

*The balance of the public interest*

28. The Commissioner accepts that there is some weight in favour of disclosing the information held. Information on school performance and issues facing schools will be of great interest to local school communities and parents of prospective, current and future students.

29. It is important that the public can and does have trust in the ability of Ofsted to carry out fair and thorough inspections of schools. Disclosing any information which is used by Ofsted to inform decisions on future inspections could be argued to be in the public interest. The Commissioner does consider Ofsted's counter argument to this – that it proactively discloses information on school performance already through a defined process – does have some merit and goes some way to meeting the public interest in Ofsted being transparent about the information it uses to inform inspections.
30. The Commissioner agrees with Ofsted that disclosing the number and nature of any complaints received will shed little light on issues at the schools as it will not indicate whether the complainants were substantiated or were in fact used to inform decisions about inspections. This is an important point when assessing the public interest as the value of the information to the public is not of a sufficient level to justify disclosure in the face of the prejudice the Commissioner has accepted would arise.
31. Just as the public will expect a publicly-funded body to be transparent and accountable, there will also be occasions when a public authority will need room to carry out its functions. The Commissioner does accept that the nature of Ofsted's role means that it may sometimes need space away from external scrutiny in order to operate effectively. An individual considering passing on confidential information on a voluntary basis will want some reassurance that sensitive information received by the public authority can be kept secure. The Commissioner therefore considers disclosure may deter people volunteering information on a confidential basis. Whilst it is difficult to speculate how likely this affect will be it is a possibility and the Commissioner must add some weight to this argument as it would not be in the public interest if Ofsted's functions were impeded.
32. Taking all of these arguments into account and the fact there does not appear to be a compelling argument for disclosure in this case the Commissioner has determined that in all the circumstances the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption and Ofsted has correctly withheld the information in this case.
33. The Commissioner has taken this view as she does accept that Ofsted are transparent in providing information on school performance but do so in a balanced way so as not to interfere with the inspection process and carrying out its functions. The real possibility of disclosing the information in this case and it impacting on Ofsted's ability to assure members of the public or teachers that it can keep information confidential and thus potentially reduce the likelihood of voluntary

information outweighs any value there might be in the information which the Commissioner has already argued is low.

34. As the Commissioner has concluded that Ofsted has correctly withheld the requested information she requires no steps to be taken.



## Right of appeal

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35. 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](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

36. 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.
37. 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** .....

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**