

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 December 2019

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a meeting that took place on 12 February 2014 between Councillor Sir Albert Bore and the then Secretary of State Michael Gove to discuss the 'Trojan Horse' letter. The Department for Education (DfE) refused to disclose the requested information citing sections 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA. It also stated that it wished to rely on section 41 of the FOIA for two of these documents.
2. During the Commissioner's investigation two documents were disclosed to the complainant in response to a very similar request he made to Birmingham City Council (BCC). The third document is the notes taken by the DfE of the meeting, which the DfE maintains is still exempt from disclosure under section 36(2)(b)(i) and (ii) and 36(2)(c).
3. The Commissioner has considered these notes and with the exception of the small amount of information quoted in the Confidential Annex she has decided that the DfE is entitled to rely on section 36(2)(b)(i) and (ii) of the FOIA and that the public interest rests in maintaining this exemption.
4. In relation to the small amount of information contained in the Confidential Annex, the Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose this information to the complainant.

5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

6. On 14 December 2018, the complainant wrote to the DfE and requested information in the following terms:

"On 7 February 2014, Councillor Sir Albert Bore of the Birmingham City Council (and/or officers representing him) emailed the Secretary of State for Education at the time, Michael Gove, (and/or Mr. Gove's representatives) two attachments. The file names of the attachments are:

3059rjh - Michael Gove

Anon letter briefing to SOS 7 2 14

I am requesting those attachments. I am also requesting minutes from the meeting for which those attachments were sent in preparation: that being a meeting between Councillor Bore and Secretary of State Gove that took place on 12 February 2014 to discuss the "Trojan Horse letter" in Birmingham."

7. The DfE responded on 16 January 2019. It refused to disclose the requested information citing sections 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA. It also applied section 41 of the FOIA to the two named attachments in the request.
8. The complainant requested an internal review on 4 March 2019.
9. The DfE carried out an internal review and notified the complainant of its findings on 1 April 2019. It upheld its initial decision.

Scope of the case

10. The complainant contacted the Commissioner on 11 April 2019 to complain about the way his request for information had been handled. He disagrees with the application of the exemptions cited and believes the information should be disclosed.

11. During the Commissioner's investigation into this request, BCC disclosed two of the documents the DfE had sought to withhold to the complainant (the two named attachments in the request to which both section 36 and 41 of the FOIA has been applied). This was in response to the Commissioner's decision notice of 9 October 2019 which considered a request made to BCC relating to the same meeting, which can be accessed here:

<https://ico.org.uk/media/action-weve-taken/decision-notice/2019/2615984/fs50805864.pdf>

This notice will therefore only address the remaining withheld information, which is the minutes of the meeting in question as recorded by the DfE. The DfE has sought to rely on sections 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA and the Commissioner will now go on to consider these.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

12. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
 - (b) would, or would be likely to, prejudice-
 - (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 DfE confirmed that the qualified person for the purposes of section 36 of the FOIA is the Minister Lord Agnew. He considered the request and the withheld information and authorised the application of section 36(2)(b)(i) and (ii) and 36(2)(c) of the FOIA in this case.
14. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that

the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

15. Addressing section 36(2)(b)(i) first, the DfE advised that the qualified person considered the remaining withheld information contains the exchange of free and frank views for the purposes of providing advice. It referred to a specific extract within the remaining withheld information to highlight this point. It argued that it is important that key stakeholders, ministers, the DfE and its officials can provide and record such candid advice when addressing issues or problems relating to critical issues such as potential extremism. It stated that it is the qualified person's opinion that disclosure would be likely to deter officials from providing such free and frank advice in the future, or recording it in such a forthright manner, which could hinder the delivery of clear and decisive action when faced with such issues. The DfE said that the notes of the meeting were only circulated to key DfE officials to provide clarity on the Secretary of State's views, position and as a basis of advice from the Secretary of State as to how he wished the DfE and BCC to proceed with this issue. It commented that given the severity of the issue in hand, such clear advice on his position and the way forward was critical as to how the DfE pursued this allegation.
16. The DfE confirmed that such clear provision of advice is vital to the delivery of effective problem resolution. It stated that it is essential that ministers and all officials contributing to such meetings are clear as to what is needed, what is recommended and what is expected by the Secretary of State and the DfE. It argued that if this were to be affected through the provision of less forthright advice, there could be confusion and/or delay in the future, which would disadvantage all parties involved.
17. With regards to section 36(2)(b)(ii), the DfE explained that the officials involved in the meeting were of the impression that their views and the issues raised were provided in confidence for the purposes of deliberation. Again it refers to a specific extract in the meeting minutes to highlight this point.
18. It stated that it is the qualified person's opinion that although the Secretary of State would be unlikely to have been deterred in giving his opinion, DfE officials may have recorded this in a less candid or forthright manner if they believed that this information would make it into the public domain. Again it refers to the fact that the minutes were only circulated to a limited number of key DfE officials so that they could be clear on the issue and the Secretary of State's views, opinions and preferred way forward. It stated that to reduce the clarity of this and potentially cause confusion would not be in the public interest.

19. With regards to section 36(2)(c), the DfE said that it is the qualified person's opinion that disclosure would be likely to prejudice the safe space required by local authorities and the DfE to work and to deliberate issues, concerns and potential next steps, to ensure that full and frank discussions, investigations and deliberations can take place to achieve the best outcome for trusts, their schools, their pupils and the broader community. It stated that this is obviously the situation with such sensitive and serious issues and allegations as those raised during the 'Trojan Horse' investigations.
20. It stated that its stakeholders and external officials must be able to communicate freely and frankly with the DfE when urgent issues such as this arise. The DfE must have access to the views, opinions, background information and context provided by such stakeholders to enable it to be effective in its delivery and in its resolution of issues. The DfE said that without the safe space in which stakeholders can provide this information, it would be likely to be unsighted in vital information and detail, information which it is reliant on professionals providing in the relevant field to enable it to act in an informed, measured and appropriate manner.
21. It argued that it is also vital that DfE officials can candidly record and share the outcomes of sensitive ministerial meetings, providing frank and focused notes, actions and information to relevant officials across the DfE. It stated that it is important that these notes are as clear and unambiguous as possible, so that officials fully understand what is expected of them, the next steps required, and the actions they need to undertake.
22. With regards to section 32(2)(b)(i) and (ii), the Commissioner considers it is a reasonable opinion to hold that disclosure would be likely to prejudice the free and frank provision of advice and views for the purposes of deliberation. She accepts that often sensitive and complex issues are discussed and that such issues require detailed discussion and deliberation. While the Commissioner agrees that the Secretary of State and senior officials would not be deterred from providing their views and advice, she believes it is reasonable to say that disclosure would be likely to lead to such views and advice being recorded in a less candid and frank manner in the future. The Commissioner accepts that accurate and reflective records of such discussions need to be taken to ensure the most appropriate way forward is decided and swiftly. If officials were deterred from recording the views and advice provided and the discussions that took place in a candid and frank manner this could impact negatively on how the issue under discussion is addressed. For these reasons, she is satisfied that section 36(2)(b)(i) and (ii) are engaged.

23. Turning now to section 36(2)(c) for this subsection to also apply, the prejudice envisaged must be different to that covered by any other exemption. The fact that section 36(2)(c) uses the phrase "otherwise prejudice" means that it relates to prejudice not covered by section 36(2)(a) or (b). The First-tier Tribunal made this point in the hearing of *Evans v Information Commissioner and the Ministry of Defence* (EA/2006/0064, 26 October 2007).
24. The Commissioner recognises that there is a need for public authorities to have a safe space in which to develop ideas or make decisions. If the disclosure of information would or would be likely to prejudice this, she accepts this may be an argument for engaging section 36(2)(c).
25. However, the safe space argument can also apply to section 36(2)(b) if disclosure would or would be likely to prevent or hinder the free and frank exchange of views or provision of advice.
26. Having read the qualified person's opinion and the submissions received from the DfE the Commissioner does not consider the arguments presented with regards to safe space are sufficiently different to those that would come under section 36(2)(b) to warrant the application of section 36(2)(c). The arguments presented relate to the need for safe space to enable its stakeholders and external officials to communicate with it freely and frankly when urgent and sensitive issues such as this arise. These are more fitting to section 36(2)(b). For section 36(2)(c) to also apply the DfE would have to provide arguments which suggested that the prejudice is different – for example disclosure would interfere with or distract from the issue at hand in another way or would prejudice or undermine the decision itself rather than the frankness of the discussions specifically.
27. For the above reasons, the Commissioner is not satisfied that section 36(2)(c) of the FOIA applies to this request. As stated above, however, she is satisfied that section 36(2)(b)(i) and (ii) are engaged and will therefore now go on to consider the public interest test.

Public interest test

28. The DfE stated that disclosure would promote openness and transparency and improve public debate and trust. It also stated that there is a clear public interest in the 'Trojan Horse' case and in the public understanding more clearly how such issues are addressed.
29. However, it considers there are stronger public interest arguments in favour of maintaining the exemption. It stated that it is essential that stakeholders and officials are able to provide free and frank professional views and advice swiftly, particularly when sensitive, urgent and

complex issues arise. If disclosure took place it would be likely to result in future advice and views being less candid and frank, especially in relation to the recording of those views and advice. It argued that such inhibition is not in the public interest.

30. It stated that when confronted with reasonable and believable evidence of extremism within schools, it must be allowed to act quickly and rigorously as possible to investigate such allegations and to determine whether the risk or threat reported is real. It argued that it cannot risk confusion regarding its approach or delays in resolving such issues as a result of diluted advice or notes of key meetings taken. The DfE states that such potential risks are not in the public interest especially at a time of heightened national security.
31. The Commissioner considers the public interest test considerations under section 36 of the FOIA require her to consider the extent, severity and frequency of the inhibitions claimed by the public authority.
32. The Commissioner acknowledges the public interest in openness, transparency and accountability. She considers disclosure would aid public debate and assist members of the public in understanding more clearly how such matters are addressed.
33. She also acknowledges the significant public interest in the 'Trojan Horse' case and the sensitive issues it dealt with and notes that even several years on from the event it still attracts considerable press coverage. Members of the public are interested to know what happened, how the matter was handled and whether the most appropriate and swift action was taken. The Commissioner accepts that the DfE and other connected parties should be held to account for the decisions they made.
34. However, with the exception of the small amount of information detailed in the attached Confidential Annex, she considers in this case that there are weighty public interests arguments in favour of maintaining the exemption, which outweigh the public interest in disclosure.
35. Dealing with the small amount of information detailed in the Confidential Annex first, the Commissioner is of the view that this is very similar to information recently disclosed by BCC in relation to a very similar request. Therefore, she does not consider it is possible to argue that disclosure of this specific information would be likely to have the effects described to the extent, frequency or severity the DfE has claimed. She considers this information should be disclosed.
36. Addressing the remaining elements of the withheld information, these are the DfE's own notes of the meeting that took place. While BCC has

disclosed their version it is acknowledged that the DfE's version is different in terms of content, frankness and its specific views on the issues discussed.

37. The Commissioner is of the view that while senior officials will not be deterred from providing their advice and views in a candid and frank manner in future, disclosure would be likely to result in a diluted, potentially less clear record of those views, discussions and advice being taken. Notes and records of discussions play a key part in the decision making process. They therefore need to be accurate and a true reflection of what was discussed to ensure that the most appropriate and effective action is taken and swiftly. She considers that this is a real risk which could have fairly extensive consequences.
38. The Commissioner considers it is the public interest to maintain senior officials' ability to speak openly, freely and frankly on such topics and issues and there to be accurate and reflective recording of those views to ensure that the most appropriate action is taken. She considers this is particularly relevant when matters such as extremism and the possible infiltration of this into our schools is under discussion. While there are compelling and strong public interest arguments in favour of disclosure here, she considers on this occasion that the public interest rests in maintaining the exemption for these reasons.
39. She also notes that there is already a significant amount of information in the public domain relating to this case. She considers this goes a considerable way to meeting the public interest arguments identified in favour of disclosure.

Right of appeal

40. 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@justice.gov.uk

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

41. 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.
42. 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

Samantha Coward
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF