

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 15 June 2016

**Public Authority:** The Office for Standards in Education, Children's Services and Skills

**Address:** 7<sup>th</sup> Floor  
Aviation House  
125 Kingsway  
London  
WC2B 6SE

#### **Decision (including any steps ordered)**

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1. The complainant requested from the Office for Standards in Education, Children's Services and Skills ("Ofsted") information about the inspection of a training organisation. Ofsted disclosed some information to the complainant on the basis that it was his personal data. It applied section 40(1) to this information. It refused to provide the remaining information, citing the exemptions in sections 31 and 33.
2. The Commissioner's decision is that Ofsted has correctly applied section 40(1) to the information that it has already disclosed to the complainant and that it has correctly applied section 31 to the remaining information. He therefore does not require it to take any further steps to ensure compliance with the legislation.

#### **Request and response**

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3. On 10 August 2015 the complainant wrote to Ofsted and made reference to meetings held by Ofsted's inspection team in relation to its inspection of the Cadcentre (UK) Ltd, a training organisation, in 2015. He stated that:

*"It would be helpful to have sight of the minutes of these meetings."*

4. Ofsted responded on 3 September 2015. It refused to provide the requested information. It cited the exemption in section 31 (law enforcement) as its basis for not doing so.
5. The complainant requested an internal review on 24 September 2015. Ofsted sent him the outcome of its internal review on 22 October 2015. It upheld its original position and also applied the exemption in section 40(1) (personal data).

### **Scope of the case**

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6. The complainant contacted the Commissioner on 30 October 2015 to complain about the way his request for information had been handled, specifically that Ofsted had refused to disclose the information that he had requested.
7. During the course of the Commissioner's investigation, Ofsted also sought to rely on the exemption in section 33 (audit functions).
8. The Commissioner considered whether Ofsted was entitled to rely on the exemptions it had cited, sections 31, 33 and 40(1), as a basis for withholding the requested information.

### **Reasons for decision**

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9. The Commissioner notes that Ofsted disclosed some information to the complainant following his request on the basis that it was his personal data. It has applied section 40(1) to this information. The Commissioner is satisfied that this exemption has been correctly applied to the information that is the complainant's personal data, which has already been disclosed to him.
10. The Commissioner therefore considered whether any information which has not been disclosed to the complainant, and to which section 40(1) has not been applied, is exempt from disclosure under sections 31 or 33, the other exemptions cited by Ofsted.

### **Section 31 – Law enforcement**

11. Ofsted argued that the withheld information, minutes of the meetings held with the inspection team and the nominee from the Cadcentre (UK) Ltd during the inspection in July 2015, was exempt from disclosure under section 31 of FOIA. It specifically relied on section 31(1)(g) and (2)(c)

12. Section 31(1)(g) provides that:

*"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-*

*.....*

*(g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2)"*

13. Section 31(2) goes on to provide that:

*"The purposes referred to in subsection (1)(g) to (i) are-*

*(a) the purpose of ascertaining whether any person has failed to comply with the law,*

*(b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,*

*(c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise..."*

## **The engagement of section 31**

### **Ofsted's arguments**

14. In relation to its functions that would have been likely to be prejudiced by disclosure of the withheld information, Ofsted explained that Her Majesty's Chief Inspector ("HMCI") is required in Chapter 3 of the Education and Inspections Act 2006 to inspect training of the type relevant to this request. This requires that:

*"(a) The Chief Inspector must conduct— (a) inspections of such education or training to which this Chapter applies as may be specified by the Secretary of State, and (...)*

*(3) On completing an inspection under this section, the Chief Inspector must make a written report on it.*

*(4) The report—*

*(a) must state whether the Chief Inspector considers the education or training inspected to be of a quality adequate to meet the reasonable needs of those receiving it, and*

*(b) may deal with such other matters as he considers relevant.*

*(7) The Chief Inspector must arrange for the report to be published in such manner as he considers appropriate."*

15. Ofsted went on to argue that it was not only its own functions that would have been likely to be prejudiced by the release of the requested information at the time of the request. It explained that the Skills Funding Agency ("SFA") has powers to take regulatory action to intervene and remove funding where Further Education providers are failing in certain categories. This was set out in their published guidance *Approach to Intervention (Nov 13)*. It believed that the following section was of specific relevance to this case:

*"The triggers for formal intervention are (...) notification to the college or training organisation from Ofsted of an inadequate grade at inspection*

*(...)*

*Any training organisation holding a contract for services from the Agency can expect us to terminate their contract if they trigger formal intervention. Only in very exceptional circumstances will we consider permitting such a training organisation to attempt recovery and only where we consider that such action better serves the needs of learners."*

16. Ofsted explained that the SFA was established in the Apprenticeships, Skills Children & Learning Act 2009 (part 4). This legislation gave the SFA the role of determining funding resources for training providers. In particular it gave the SFA the power to determine where *"Financial resources provided by the Chief Executive may be provided subject to conditions"*. These are specified further as *"operational conditions"*.
17. The Commissioner was informed that an Ofsted inspection grade of 'inadequate' is one such operational condition, which would lead to formal intervention, including a termination of contract and of further funding. Ofsted's view was that the SFA's function of considering such formal intervention, which happened swiftly in response to the publication of an inspection report, would be likely to be prejudiced at the time of the request, made, as it was, prior to both publication of the report and the SFA's decision.
18. In relation to the issue of why disclosure of the information would be likely to prejudice the functions it had identified, Ofsted explained that the subject of the request was an inspection that resulted in such an inadequate grade, the request for information was made prior to the inspection report being published and formalisation of the inadequate

grade. It therefore believed that the disclosure of the information at the requested time would have pre-empted the issuing of the inadequate grade by Ofsted and thereafter directly coincided with the SFA consideration of their formal intervention on this matter. The use of formal intervention by the SFA was directly reliant on Ofsted's inspection outcome in this case.

19. Ofsted contended that, given that the provider was also directly challenging (by way of attempting to discredit) its inspection outcome at the time of the request (10 August 2015), it was evident the disclosed information would have been used both to undermine Ofsted's judgement, and to interfere in the proper consideration of intervention by the SFA, in line with their published policy. Specifically, if the information had been disclosed at that point it could be used as the basis to pre-judge Ofsted's decision, to approach the SFA and make prior representations to them in advance of Ofsted's decision (eg to discredit the Ofsted inspectors before their report was published), or to take legal action to delay or frustrate the issuing of Ofsted's and then the SFA's related decisions. It explained that none of these matters follow the published and expected processes governing intervention.

### **The complainant's arguments**

20. The complainant argued in relation to Ofsted's application of section 31 that Ofsted itself placed the inspection report in the public domain on 14 August 2015 and that the report clearly stated that the grade awarded to the Cadcentre (UK) Ltd as a result of the inspection was "inadequate". The complainant informed the Commissioner that it was already in the public domain that a private training provider that received a classification of "inadequate" would have its service contract terminated by the SFA unless exceptional circumstances applied.
21. The complainant pointed to a previous Decision Notice of the Commissioner under reference number FS505323355 in which it was stated that

*"For section 31(1)(g) to be engaged via section 31(2)(c) a public authority has to have a specific function in respect of ascertaining whether regulatory action is required. There would then have to be a risk of that function being harmed if the information was disclosed."*

22. In light of the circumstances that he had already outlined, regarding the "inadequate" grade that had been made public and the inevitable outcome of the service contract being terminated by the SFA, the complainant did not accept that disclosure of the requested information would in any way harm a regulatory function. He believed that the

ultimate outcome of the grade being maintained was already in the public domain.

23. The complainant also queried whether the termination of a service contract was a "regulatory action" within the meaning of section 31.

### **The Commissioner's view**

#### **(i) Applicable interest within the exemption**

24. The Commissioner initially considered whether the prejudice claimed by Ofsted is relevant to section 31, in particular whether disclosure of the withheld information would be likely to prejudice the SFA's exercise of its function in relation to determining funding for training providers. He notes that the complainant had queried whether the termination of a training provider's contract by the SFA constituted regulatory action for the purposes of section 31.
25. The Commissioner notes that the SFA has been given authority under the Apprenticeships, Skills Children & Learning Act 2009 to determine funding resources for training providers, which includes the power to withdraw funding. When exercise its power to withdraw funding, the Commissioner believes that the SFA is taking regulatory action under the Act. He is therefore satisfied that the potential prejudice that Ofsted has identified relates to an applicable interest within the terms of section 31.

#### **(ii) The nature of the prejudice**

26. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance", that is that it is not trivial and whether there was a causal link between disclosure and the prejudice claimed. The Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and that there is the relevant causal link.

#### **(iii) The likelihood of prejudice**

27. Ofsted argued that the disclosure of the information withheld under section 31 would be likely to prejudice the SFA's exercise of its function in relation to determining funding for training providers. In the case of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*, the Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that "*the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk.*" (para 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

28. Ofsted confirmed to the Commissioner that it had consulted with the SFA and that the arguments that it had provided in relation to section 31 reflected the SFA's concerns as to the prejudice that would have been likely to have occurred had the information been released at the time that the request was made. It provided the Commissioner with copies of its correspondence with the SFA.
29. When considering the possibility of prejudice resulting from disclosure, the Commissioner considers the circumstances which existed at the time of the request. He therefore accepts that at that time the SFA had not made a formal decision as to whether to end its funding of the training provided by Cadcentre (UK) Ltd. The complainant has argued that in light of the inadequate grading for the training offered by Cadcentre (UK) Ltd, it was inevitable that its contract would be ended by the SFA and so no harm would be caused to its regulatory function by the disclosure of the withheld information. However, the Commissioner notes that it is not inevitable that the SFA would end a training contract in such circumstances. It has a discretion to decide whether to do so, albeit that its guidance suggests that it would only allow a training organisation to attempt to recover in very exceptional circumstances.
30. The Commissioner accepts that the disclosure of the withheld information, containing a lot of detailed information about the meetings held by Ofsted's inspection team, would have been likely to have led to individuals opposed to the Cadcentre (UK) Ltd's funding being withdrawn using aspects of this evidence to seek to influence the SFA's decision making process. The consequence of this would likely to have been that Ofsted and the SFA would have had to use resources to respond to questions and issues that were raised as a consequence of the disclosure of the information. In the SFA's case, this would have prejudiced its function by distracting it from its duties, delaying the decision making process in relation to the funding of the Cadcentre (UK) Ltd and reducing the time available for it to make regulatory decisions.
31. The Commissioner is therefore satisfied that disclosure of the withheld information at the time that the request was made would have been likely to have prejudiced the exercise of the SFA's function of ascertaining whether circumstances existed which justified regulatory action. Having determined that section 31 was engaged at the time of the request, as it is a qualified exemption, the Commissioner went on to consider the public interest.

### **The public interest test**

32. The public interest test under the Act requires the Commissioner to consider whether, in all the circumstances of the case, the public



interest in maintaining the exemption outweighs the public interest in disclosure.

### **Ofsted's arguments**

33. Ofsted informed the Commissioner that it had carefully considered the level of transparency that would be offered through disclosure of the withheld information, as well as any enhancement it might provide to public understanding of both its approaches to inspection and the fine detail about the provider's performance. However, it believed that transparency was already met to a greater extent by Ofsted's eventual publication of the report following the inspection which enabled its decisions to be known and fully scrutinised against the evidence. It also provided a secure foundation for any resulting regulatory action by SFA. Ofsted noted that the request predated the report's publication and contended that the isolated disclosure of this information at that time would have provided a misleading view of the inspectors' eventual findings and caused confusion to students and staff of the provider. It was of the view that it was very likely such disclosure would have disrupted the processes of deciding regulatory action.
34. Ofsted argued that there was a strong public interest in avoiding external interference or prejudice to the regulatory process, in this case swift and effective intervention in failing education providers and preventing a waste of public funds. It believed that such interference and prejudice would be likely to arise from the evidence entering the public domain at the time of the request. It was of the view that public funds may have been wasted and many students may have continued to receive poor educational provision, if intervention had been delayed or prevented through the disclosure of the information at the time of the request.
35. Ofsted concluded that the public interest arguments in favour of maintaining the exemption were, in its view, strong enough to significantly outweigh those in favour of disclosure, especially given that the inspection report had not been published at the time of the request.

### **The complainant's arguments**

36. The complainant argued that there were compelling public interest reasons why the information he had requested should be disclosed. He believed that disclosure would enable the public at large to evaluate the effectiveness of the inspection regime.
37. The complainant also argued that disclosure would have enabled Cadcentre (UK) Ltd to have evaluated whether there were reasonable grounds for sustaining its objection to the inspection report. This would



in turn have enhanced public confidence in the inspection process itself and the appeals procedure. Indeed, it was vitally important where public office/functions were concerned, that all parties to a process were seen to operate on an equal and open footing. He argued that information legislation should not be seen as a barrier to justice.

38. In relation to the above argument, the Commissioner notes that, when considering the disclosure of information under FOIA, any such disclosures are in effect to the world at large and not merely to an individual requester. He therefore has to take care, when assessing the public interest in the disclosure of information, to assess whether disclosure would serve a wider public interest rather than whether it would serve the private interests of the requester. In this case, he has to consider how the public might benefit from the disclosure of the withheld information as opposed to how this might solely benefit the complainant. However, the Commissioner does accept that there would be some public interest in the disclosure of the withheld information to provide some degree of insight into the processes followed by Ofsted in its inspection process.
39. Finally, the complainant also argued that should Cadcentre (UK) Ltd's service agreement with the SFA be terminated, it was reasonably foreseeable that there would be a negative impact on employment and also that users of its services who were entirely satisfied with their training offering, would lose the benefit of those services. In light of these considerations, the complainant was of the view that the requested information should have been disclosed at the time of the original request.

### **The Commissioner's view**

40. Where issues arise in relation to the quality of provision afforded by a training provider, the Commissioner considers that it is in the public interest that there should not be unnecessary delays in relation to decisions over whether public funding should be continued. Any delays are likely to adversely impact on individuals who may be affected by such decisions, particularly people undergoing training who may need to seek alternative providers for their training. Delays would also adversely impact on the efficient use of public funding in this area. The Commissioner considers that it is likely that the disclosure of the withheld information would have led to such delays.
41. The Commissioner notes the public interest arguments put forward by the complainant in favour of disclosure. However, he has determined that the public interest arguments in favour of disclosure are outweighed by the public interest arguments in withholding the relevant information.

He has therefore decided that Ofsted correctly applied section 31 to the withheld information.

42. As the Commissioner has determined that Ofsted correctly applied section 31 to the withheld information, he has not proceeded to consider its application of section 33 to the same information.

## Right of appeal

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43. 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)

44. 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.
45. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
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