

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 7 June 2018

Public Authority: Ofsted
Address: Aviation House
125 Kingsway
London
WC2B 6SE

Decision (including any steps ordered)

1. The complainant has requested information relating to any safeguarding complaints or concerns raised with Ofsted about Elland Academy. Ofsted responded to the request refusing to disclose the requested information under section 33(1)(b) of the FOIA.
2. The Commissioner's decision is that Ofsted has correctly applied section 33(1)(b) of the FOIA to the request and the public interest in favour of disclosure is outweighed by the public interest in maintaining the exemption.
3. The Commissioner does not require any further action to be taken.

Request and response

4. On 21 November 2017, the complainant wrote to Ofsted and requested information in the following terms:

"1. Since 01/01/2014 how many safeguarding complaints/concerns have Ofsted received against the Elland Academy located at 118 Gelderd Road, Leeds LS12 6DQ?

2. What dates did Ofsted receive the safeguarding complaints/concerns?

3. What action did Ofsted take in response to each safeguarding complaint/concern?

4. Please provide a copy of all Ofsted documents e.g. emails, letters & investigation reports etc. completed in response to each safeguarding complaint/concern?
5. What action did Ofsted take against the Elland Academy in response to each safeguarding complaint/concern??"
5. Ofsted responded on 23 November 2017. It confirmed that it holds recorded information falling within the scope of the request but considers it is exempt from disclosure under section 33 of the FOIA.
6. The complainant requested an internal review on 23 November 2017.
7. Ofsted carried out an internal review and notified the complainant of its findings on 18 December 2017. It upheld its previous application of section 33 of the FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 28 December 2017 to complain about the way his request for information had been handled. He disagrees with the application of section 33 of the FOIA and believes it is in the public interest to disclose the requested information in order to protect current and future students and staff at the academy.
9. The Commissioner understood from the correspondence received that the complainant remained dissatisfied with question 4 of the request. She therefore wrote to the complainant on 24 April 2018 to outline the intended scope of her investigation and to ask the complainant to contact her if he wished to dispute its scope. The Commissioner received no further correspondence from the complainant and so therefore her investigation has focussed on the application of section 33 of the FOIA to question 4 of the request.

Reasons for decision

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.
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 is to establish whether Ofsted has the audit functions described in section 33(1)(b) of the FOIA. The Commissioner's guidance on section 33 acknowledges that the expression "economy, efficiency and effectiveness" is not clearly defined. Nevertheless, the Commissioner considers 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. Her guidance can be accessed via this link:

<https://ico.org.uk/media/for-organisations/documents/1210/public-audit-functions-s33-foi-guidance.pdf>

13. Ofsted has said that it holds schools to account for how effectively they use the public funds at their disposal via its inspection reports. It therefore considers the inspection work it carries out falls within the definition of an audit function as set out in section 33(1) of the FOIA. It has an obligation under section 5 of the Education Act 2005 to inspect academy free schools and produce a report on how well those schools discharge their own functions. 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. It explained that 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)"

14. 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 complaint, including bringing forward an inspection or placing the complaint 'on file' to inform a future inspection.
15. The Commissioner is satisfied 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. She now needs to consider whether disclosure of the requested information would or would be likely to prejudice the functions performed by Ofsted.
16. The Commissioner considers that prejudice in the context of section 33 of the FOIA may take different forms. One scenario is that premature disclosure could affect the behaviour of the organisation being audited. Another is a more general prejudice to audit functions where, for example, disclosure was about specific audit techniques that were not

already known to the public. A further scenario is where disclosure would or would be likely to discourage cooperation with the auditor in the future thereby prejudicing the audit function.

17. Ofsted explained that its risk assessment of such schools forms part of the decision-making determining the timing of inspections and other visits to schools (including deciding whether schools which would otherwise be exempt from inspection require an inspection). The risk assessment process is integral to the effective management of Ofsted's audit function. Information received by Ofsted about schools, whether through the complaints process or other routes is used to make decisions about which school to inspect and when.
18. It stated that those individuals who provide information about schools to Ofsted expect that the information will be used to inform Ofsted's inspection work. They have no reason to expect that Ofsted will share this information publicly. Ofsted confirmed that if they thought it would share their information more widely, many individuals would be likely to be reluctant to contact Ofsted with such information in the future. The contents of the requested information contain sufficient detail to enable those in the school community to potentially identify the source of the concerns and any individuals involved. It commented that even if the information directly identifying individuals was removed, it still remains likely that in many cases those within the school community may speculate regarding the sources of any concerns, based on their timing and nature or any contextual information provided.
19. Ofsted went on to say that its risk assessment process, as part of the overall inspection of school, would be less effective, if those with concerns or other information regarding the running of the school did not share it for fear of, or uncertainty about, whether their anonymity would be compromised. It advised that such information could not then be taken into account for inspection planning and Ofsted would be likely to miss opportunities to inspect and observe issues in schools whilst they were occurring.
20. Ofsted also confirmed that it considers the requested information would disclose the number of complaints about the school and in relation to a specific category (safeguarding). Members of the wider school community may exploit such information in an effort to artificially influence the decision-making regarding the timing of an inspection. Additionally, it argued that the knowledge of the existence of a complaint or complaints may lead members of the public to anticipate the timing of future inspections. This would be likely to lead to schools being presented in an artificial light, either due to the schools preparing in advance for the inspectors' arrival or by third parties encouraging campaigns or further complaints against a school. It commented that

this would be likely to harm Ofsted's audit function through distortion of the risk assessment process and the subsequent drain on resources as a result.

21. The Commissioner accepts that information gained voluntarily from individuals and via its complaints process is used in inspection planning to guide the issues and areas to be looked at in an inspection and which schools will be inspected. It is a valuable source of information and the majority of individuals that raise their concerns in this way will expect the information to inform Ofsted's audit functions, to be shared for these specific purposes only and to not make its way into the public domain. She accepts that the disclosure of the requested information would therefore be likely to jeopardise the future flow of this information and discourage those that would have otherwise volunteered information from doing so, so freely, candidly and honestly. Such consequences would be likely to have a prejudicial knock on effect on the effectiveness of Ofsted's audit function and its ability to inspect any potential concerns or issues within a school, if required, as they are happening.
22. Additionally, the Commissioner can see how knowledge of the number of complaints and their contents would be likely to influence schools behaviour. A school may look at the number of complaints and/or the specific concerns raised and reach a judgement on whether it is likely to have an inspection in the near future. If the school considers it is likely, they could then prepare in advance for the inspectors' arrival. This would present an artificial insight into the real running of the school and prevent Ofsted from viewing any concerns or matters raised as they are occurring and in their true form. The Commissioner accepts that this would be likely to distort the risk assessment process and prejudice Ofsted's ability to audit and inspect schools efficiently and effectively.
23. The Commissioner is a little sceptical to accept that disclosure of the requested information would be likely to encourage campaigns and further complaints against the school. The Commissioner is of the opinion that the majority of those that do raise concerns, will do so as they have genuine and real concerns about the school, its staff or their children's education. She believes that complaints and campaigns purely designed to influence the timing of an inspection or out of malice are fairly infrequent and Ofsted's assessment procedures should be effective in spotting these and establishing which complaints have merit and which will or will not have any bearing on a future inspection.
24. Nonetheless, for the reasons explained in paragraphs 21 and 22 above, the Commissioner is satisfied that disclosure would be likely to prejudice Ofsted's audit function and therefore that section 33(1)(b) is engaged. The Commissioner will therefore go on to consider the public interest test.

25. Ofsted stated that there is a definite public interest in the effective appraisal of schools through inspection. The disclosure of any information which would be likely to decrease the effectiveness of Ofsted's inspection function is clearly not in the public interest.
26. It argued that there is a clear public interest in ensuring the welfare of children and young people. A refusal to publicly disclose the requested information does not mean that Ofsted does not act on safeguarding information received. It stated that it does and any information received by Ofsted which raises concerns about safeguarding is referred to the relevant local authority to take forward as appropriate. Ofsted argued, in this way, young people are safeguarded and the public interest is satisfied.
27. Ofsted concluded by saying that it considers the public interest lies in withholding the requested information and maintaining the application of the exemption.
28. The Commissioner acknowledges the public interest in accountability and transparency and notes that information on the performance of schools, any issues they face and how these are being addressed is of great public interest to local school communities and parents of prospective, current and future students. She also accepts that there is a public interest in knowing how Ofsted carries out its inspection of schools and ensuring that this function is performed fairly and thoroughly across the board. Additionally, there is a public interest in knowing how complaints and concerns raised with it are addressed and how such matters influence any action that may or may not be taken.
29. However, in this case, the Commissioner considers there are stronger public interest arguments in favour of maintaining the exemption. She has accepted earlier in this notice that disclosure would be likely to deter people volunteering information on a confidential basis in the future, which would hinder Ofsted's ability to effectively plan the timing and content of its inspections. Such consequences are not in the public interest, as this would be likely to result in less effective and efficient inspections in the future and hinder Ofsted's ability to plan an inspection around any concerns or matter raised (if indeed such action is warranted from the concerns raised), as they are taking place so it is able to assess more accurately and truthfully the performance and management of the school.
30. The Commissioner also accepted earlier in the notice that disclosure would be likely to influence the behaviour of the school(s) concerned, particularly if they considered the volume of concerns or complaints raised and/or their contents may prompt an Ofsted inspection. The school would prepare for the inspection resulting in an artificial insight

into its performance and any real concerns or matters that are taking place. Again this is not in the public interest. Instead it is in the public interest to maintain the integrity and thoroughness of the inspection process and the ability of Ofsted to see a truer and more reflective presentation of a school as it is operating.

31. Ofsted already proactively discloses information on school performance through a defined process. The Commissioner considers this goes some way to meeting the public interest in Ofsted being transparent about the information it uses to inform inspections.
32. The Commissioner also considers it is important to highlight (as Ofsted has done in its internal review response to the complainant) that Ofsted is not the regulator of schools and does not have an overview of all complaints made to or about a particular school. Therefore, even if the requested information was disclosed it would not reveal how many actual concerns or complaints about safeguarding have been made; only those referred to Ofsted to assist with its inspections function. It is also not responsible for resolving any such concerns or complaints. The purpose of Ofsted's legal powers when considering complaints about schools is to determine if there is a need to inspect the school. Ofsted is also not a safeguarding agency. Any safeguarding concerns received by Ofsted are passed to the relevant local authority for investigation.

Other matters

33. The Commissioner notes that some of the requested information constitutes the personal data of the complainant. She does not know if a subject access request was processed under the Data Protection Act 1998 (now superseded by the Data Protection Act 2018) at the same time as this FOIA request. If it was not, it would be appropriate for Ofsted to approach the complainant to see whether he wishes one to be considered. If a subject access request has not been processed and the complainant would like one to be processed, Ofsted should consider this under the Data Protection Act 2018.

Right of appeal

34. 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

35. 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.
36. 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
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