RESOURCES

Safe Schools Alliance UK

FOI requests to schools

Top tip!

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Contents

- Overview 3
- FOI grounds 3
- More information and documentation
  - Confidentiality 4
  - Trade Secrets 4
  - Commercial Value 5
  - Copyright 5
  - The Public Interest 5-6
  - Withholding Parts of Documents 6-7

Overview

Parents can use the FOI (Freedom of Information) process to request to see PSHE (Personal, Social and Health Education) or RSE (Relationships and Sex Education / Relationships and Sexuality Education in Wales) materials that will be used in staff and pupil training. They can also ask how much money the school spent on the programme or resources.

If a school is using a third-party provider for RSE or PSHE, it can be difficult for parents to access information about the content of their resources. Safe Schools Alliance are frequently contacted by parents who have requested this information from the school, only to be told that they are not allowed to disclose it. We cover a wide range of possible objections, and suggested responses, in our section called How to Talk to Schools About Their Resources.

If schools are not receptive to this approach, parents do have a right to use the FOI process to request this information. They also have a right of appeal if it is not provided, as required by s.17(7) of the Freedom of Information Act (FOIA). All authorities should have an appeals procedure in place to conform to FOIA Section 45 Code of Practice guidelines, and parents also have a right to apply to the Information Commissioner if they are not satisfied with the school's response.

The FOI Act covers any recorded information that is held by a public authority in England, Wales and Northern Ireland, and by UK-wide public authorities based in Scotland. Information held by Scottish public authorities is covered by Scotland's own Freedom of Information (Scotland) Act 2002.

We have written this guide to help parents in understanding how the FOI process works, and to enable parents to use it if a more collaborative approach with the school does not work.

FOI grounds

Parents have the right to request copies of the materials sent to the school on the following grounds:

1. Any confidentiality provision in the contractual agreement between the school and the provider comes second to FOI requests.
2. There can be no trade secrets that need protecting when the general ethos of the provider is transparent.
3. There is no apparent commercial loss to the provider.
4. Copyright laws should not prevent relevant information from being disclosed.
5. The public interest test is satisfied: it is a public good to understand the ethos behind materials informing a Trust or school approach.

And with the proviso that

6. Sections of the document deemed sensitive may be redacted

More information and documentation

1. **Confidentiality**

   The Ministry of Justice's Freedom of Information Guidance: Section 43, Commercial Interests states:

   "Under the terms of the Freedom of Information Act the decision as to whether to withhold or disclose the information is ultimately a matter for the public body, regardless of whether the information was originally supplied by a third party and the fact that a disclosure would be in breach of contract cannot be determinative of the legal obligations under the Act (as there is no absolute exemption provided for this)." (p.9)

   Therefore, given that disclosure is a matter for the school, the opinion of the provider cannot be the deciding factor. The fact that the school signed a contract agreeing to confidentiality cannot dictate the outcome of an FOI asking to see the materials requested.

   The legal blog by the law firm Paris Smith says that contractual agreements are superseded by obligations under the Freedom of Information Act "unless an exemption can be relied upon."

   In practice this means that regardless of any agreement between the provider and the school, an FOI request will have to be answered, unless there is a relevant exemption. Section 43 does not provide an 'absolute exemption' under the Freedom of Information Act, information about which can be found on page 4 of the ICO's document The Public Interest Test.

2. **Trade Secrets**

   The ICO's guidance advises organisations to "obtain independent advice as to whether, in any particular case, the information you are asked to disclose is a trade secret." Schools should not simply consult with the provider in order to establish this.

   There is no definitive definition of a trade secret. However, Lansing Linde Ltd. v Kerr (1991) 1 WLR 251) says that:

   - it must be information used in a trade or business
   - it is information which, if disclosed to a competitor, would be liable to cause real (or significant) harm to the owner of the secret
   - the owner must limit the dissemination of the information, or at least, not encourage or permit widespread publication.

   Many PSHE providers' "information" is a set of ideological perspectives. These perspectives are not unique and are shared by other organisations working in the equalities sector. It can be argued that the only "harm" the provider is seeking to avoid is the harm that would arise when their contestable resources are made public.

   Writing about Information Rights, Bindmans Solicitors advise that:

   "anyone confronted with a blanket or unjustified reliance on section 43(2) should press the public authority to give reasons for its stance by reference to clear evidence. Where the public authority falls short in this respect, there may, again, be grounds for pursuing the matter with the Information Commissioner".

More information and documentation (continued)

3. Commercial Value

A school may refuse to share a provider's resources on the grounds of Section 43 of the Freedom of Information Act, which provides exemptions for trade secrets and commercially sensitive information.

However, it is not in the public interest for a school to simply accept a provider's contention that the Section 43 exemption applies, especially when doing so enables the provider to evade scrutiny.

The Information Commissioner's Office (ICO) guidance states that:

"a simple assertion by an individual or body that there would be prejudice to his or its interests is not sufficient (*John Connor Press Associates Limited v The Information Commissioner* (EA/2005/0005) (25 January 2006). The assertion must be supported by reasoned argument, and where practicable by empirical evidence."

ICO guidance says that in order to claim a commercial exemption an organisation must be able to:

- identify a negative consequence of the disclosure (or confirmation/denial), and this negative consequence must be significant (more than trivial);
- show a link between the disclosure (or confirmation/denial) and the negative consequences, showing how one would cause the other; and
- there must be at least a real possibility of the negative consequences happening, even if it can't say it is more likely than not.

4. Copyright

The provider might assert that the school's decision to disclose would be a breach of copyright. However, according to the Information Commissioner's Office's document Intellectual Property Rights and Disclosure under the FOI:

"[c]opyright does not prevent information being disclosed under the Freedom of Information Act" (p.6).

This means that the school should disregard concerns about breaching confidentiality if those concerns are related to copyright.

5. The Public Interest

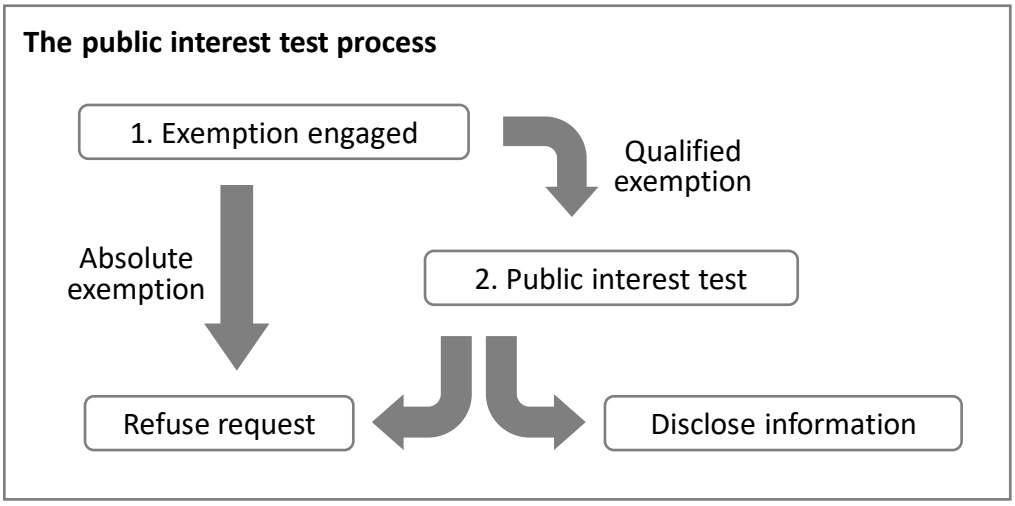
The Public Interest test from the Information Commissioner's Office says the authority (the school) is required to:

"consider the balance of public interest in deciding whether to withhold the information; these are known as 'qualified' exemptions." (p.4)

The diagram on the next pages shows the public interest test process.

More information and documentation (continued)

5. The Public Interest (continued)



The public interest means "in the public good" (p.2). It is unquestionably in the public good for parents to know what their children are being taught, why, and the pedagogy and ideology behind it. Understanding the rationale of any public policy is beneficial for everyone because understanding engenders trust. Scrutiny – via FOI if need be – and openness should be encouraged. This reasoning is supported by the Information Tribunal case Hogan, where the point was made, at paragraph 60, that:

"While the public interest considerations against disclosure are narrowly conceived, the public interest considerations in favour of disclosure are broad-ranging and operate at different levels of abstraction from the subject matter of the exemption." (p.11)

It is therefore in the public interest to disclose the information requested if there is an interest in furthering debate on the issue. Indeed, the guidance for the public interest test states:

"If a particular policy decision has a widespread or significant impact on the public, for example changes to the education system, there is a public interest in furthering debate on the issue. So, this can represent an additional public interest argument for disclosure." (p.12)

A provider's resources can be examples of areas that represent significant changes in the direction of RSE education and, as such, the materials it supplies to schools should be made available to obtain the fullest picture, thereby fulfilling the ICO's guidance on the Public Interest, as detailed on page 14.

6. Withholding Parts of Documents

A provider may attempt to place a blanket exemption over its training materials on the grounds that certain parts are confidential e.g. names of trainers

However the ICO guidance The right to recorded information and requests for documents says that it is legitimate to redact parts of documents in order to fulfil FOIs:

"you can disclose some sections of a document but not others, or you may be able to release documents after having removed certain names, figures or other sensitive details"

More information and documentation (continued)

6. Withholding Parts of Documents (continued)

The guidance quotes Lord Falconer of Thoroton:

"the right of access attaches to the content of documents or records rather than to the documents or records themselves. When a document contains a mixture of disclosable and non-disclosable information, the disclosable information must be communicated to the applicant." (House of Lords, Hansard 17 October 2000 at column 931)."

And;

"It follows that you cannot withhold the entire contents of a document because it contains some information that is exempt. You still have a duty to communicate all the disclosable information in the document to the requester."

Bindmans Solicitors also writes about blanket assertions that:

"Entities [e.g., the provider] concerned about disclosure should, at the very outset of their dealings with public authorities [e.g., schools], consider precisely how disclosure of their commercially sensitive information could lead to prejudice to their (or others') commercial interests. That potential prejudice should be flagged to the public authority in writing, giving sound reasons / justification for those assertions (both the Commissioner and the information tribunals are particularly unsympathetic to any form of blanket assertion to avoid disclosure"