



**First-tier Tribunal  
(General Regulatory Chamber)  
Information Rights**

**Appeal Reference: EA/2019/0036**

**Heard at the Newcastle upon Tyne Magistrates Court**

**On 10 September 2019**

**Representation:**

**Appellant: In person**

**First Respondent: Did not appear**

**Second Respondent: Mr Fortt (Counsel)**

**Before**

**JUDGE BUCKLEY**

**JEAN NELSON**

**PAUL TAYLOR**

**Between**

**COLETTE LAND**

Appellant

**and**

**THE INFORMATION COMMISSIONER**

First Respondent

**DEPARTMENT FOR EDUCATION**

Second Respondent

**DECISION**

1. For the reasons set out below the appeal is dismissed.

## REASONS

### **Introduction**

1. This is an appeal against the Commissioner's decision notice FS50735914 of 14 January 2019 which held that the Department for Education (DfE) correctly applied s 36(2)(c) of the Freedom of Information Act (FOIA) and that the balance of public interest favours maintaining the exemption.
2. We have read and taken account of a closed and an open bundle of documents and written submissions from the parties. We heard oral submissions from the DfE and the Appellant and we heard evidence from:
  - 2.1. Rebekah Edgar, acting Deputy Director for Education Data Division in the Data Directorate in the DfE. That division is responsible for publication of the KS1 assessment data in National Statistics and has responsibility for processing requests for information relating to KS1 data;
  - 2.2. James Bowen, the NAHT's Director of Policy;
  - 2.3. Miguel Goncalves, Head of the Schools Unit at the DfE at the relevant time.
3. I allowed the DfE's application to adduce a witness statement from Miguel Goncalves, because there was a good explanation for the delay and the Appellant was not prejudiced by the delay. I also permitted a number of additional documents to be added to the bundle.

### **Request and response**

4. This appeal concerns a request made on 8 October 2017 by Colette Land for the following information.

As per previous years and requests, please can I have a dataset in excel communicating the KS1 attainment breakdown for Northumberland schools for 2016/2017 academic year. In similar format containing equivalent info.
5. On 23 October 2017 the DfE made a submission to Nick Gibb, the Minister of State for School Standards and the qualified person under s 36(2) FOIA. Although the submission is dated 14 July 2017 we accept the DfE's evidence explaining that this was an error and that the submission was made on 23 October. The submission recommended that, subject to a public interest test, the information requested should be exempt from disclosure because, in the Minister's reasonable opinion, disclosure of it under the Act would be likely to prejudice the effective conduct of public affairs. The Minister signed the attached declaration on 7 December 2017.
6. The DfE responded on 8 December 2017, providing the KS1 assessment information at local authority level without school identifiers. It confirmed that it

held the information at institution level but that it was withholding it under s 36(2)(c) on the basis that, in the opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. The DfE stated that the public interest balance favoured withholding the information because the data could be used in isolation to judge schools' performance in ways that were not intended.

7. Ms Land emailed the DfE on 8 December, stating that she was not satisfied with the response because it was outside FOI timescales, and it is in the public interest to understand school performance for KS1.
8. In response to this email the DfE conducted an internal review on 10 January 2018, upholding its original decision and providing more detailed reasoning.
9. Ms Land referred the matter to the Commissioner on 3 April 2018. During the Commissioner's investigation the DfE provided a copy of the opinion of the qualified person, namely Nick Gibb, the Minister of State for School Standards.

### **Decision Notice**

10. In a decision notice dated 14 January 2019 the Commissioner decided that s 36(2) had been correctly applied and that the public interest favoured maintaining the exemption.
11. She concluded that the Minister's opinion that prejudice would be likely to occur was reasonable, primarily because it was based on the argument that the KS1 attainment data is not intended to be used as outcome data and that disclosing the information would increase the pressure on pupils and schools and would be likely to cause a negative reaction. S 36(2) was therefore engaged.
12. The Commissioner then considered whether the public interest favoured maintaining the exemption. She accepted that controversy over changes to primary assessment in 2016 has led to a more cautious approach from the DfE in disclosing school-level data. She agreed that disclosing information that is likely to increase the scrutiny and pressure to perform on schools is likely to impact on the relationships the DfE has with a number of groups. Government departments can function more effectively with good working relationships with influential organisations in the relevant sector, particularly where there is reliance on the voluntary flow of information. There has been a commitment by the DfE not to publish the data, and undermining this commitment is likely to affect the DfE's ability to effectively carry out its functions of assessing current data and administering accountability policy. On this basis she concluded that there was a very real possibility of damage to relationships and the extent and severity of the prejudice was more than just speculative.

13. Looking at the public interest in favour of disclosure, she acknowledged that parents want sufficient information to make informed decisions and that in the case of first schools there is less information available on their performance. She found that the very strong public interest in ensuring that the DfE can function effectively, assess current attainment data and effectively administer accountability policy outweighed the public interest in disclosure, which related to a small number of schools and where school-level data was not the sole measure that can be used to assess a school's performance.

## **Appeal**

14. The Grounds of Appeal are, in summary:
  - 14.1. The opinion of the qualified person is not reasonable.
  - 14.2. In the specific circumstances of the case the public interest favours disclosure.
15. Not a reasonable opinion.
  - 15.1. The opinion was provided before the date of the request and was a response to a different, broader request.
  - 15.2. The opinion does not take account of the fact that request is limited to schools in Northumberland.
  - 15.3. It is incorrect to state that the data is not used as 'outcome data'. It is used as outcome data by Local Authorities and forms part of the Ofsted assessment.
  - 15.4. The opinion is not reasonable given that the same information was released in previous years without the stated effect.
16. The public interest favours disclosure
  - 16.1. The DfE should have considered disclosing some school information, for example where particularly limited information is available on a school.
  - 16.2. The documentation produced by the DfE does not support the argument that KS1 data should not be disclosed.
  - 16.3. The supply and publication of KS1 data in previous years has not had the asserted adverse effect.
  - 16.4. Union concerns about pressure on teachers are not evidenced and should not in any event outweigh the interests of parents.
  - 16.5. The request relates only to Northumberland schools of which a high proportion are first schools. The public interest should be assessed in relation to Northumberland and not nationally.
  - 16.6. Where a recent Ofsted inspection has not taken place, the public interest in disclosure increases.
  - 16.7. The underperformance of schools in the north compared to the south should be taken into account.
  - 16.8. The importance of early years education should be taken into account.

## **The Commissioner's response**

17. The Commissioner effectively relies on the findings and reasoning in the Decision Notice.

## **Response of the DfE (the Second Respondent)**

18. The qualified person's opinion is reasonable and should be given weight because he is in a good position to make judgments about the effect on relationships with other organisations.
19. The DfE provided schools with an assurance of confidentiality that was not provided in the past, in order to maintain relationships with and cooperation from the teaching sector and unions. Disclosure carries a risk of boycott, with an impact on the DfE's ability to hold schools to account. The KS1 data is a baseline not a measure of performance. School performance assessments are publicly available for all schools and intended to inform parental choice. The fact that Ofsted reports may be more than a year old is not a basis for asserting that they cannot be relied upon as current indicators of performance.

## **Factual findings**

20. These findings are based on the witness evidence and documentation in the bundle.

## ***KS1 data - background***

21. The national curriculum was introduced in 1988. In 1990 national curriculum tests were first introduced for pupils at the end of key stage 1 ('KS1') in year 2. In 1994 national curriculum tests were introduced for pupils at the end of key stage 2 ('KS2') in year 6. The tests are referred to as SATS.
22. At the end of KS1 pupils take national curriculum tests in reading and mathematics. They are marked within each school and used along with other evidence to arrive at KS1 teacher assessments. Writing and science are assessed by teachers without a national test. State-funded schools have to report their KS1 teacher assessments to the Local Authority who pass it to the DfE.
23. The raw data from the KS1 teacher assessments can then be analysed at different levels including pupil level, school level, Local Authority level, national level etc
24. The primary purpose of the KS1 assessment is to give the DfE the baseline data for measuring the progress that pupils make from KS1 to KS2, not as a tool for assessing the performance of schools. This is clear from the Government consultation document 'Primary Assessment in England'.

25. Unlike KS2 assessment data, the proportions of pupils achieving the expected standard at KS1 are only published at national and local authority level, not at school level.
26. School level KS2 assessment data is published and is widely used as a performance measure. There are concerns within the teaching profession that this causes stress and increased workload for teachers and pressure on individual pupils: 'the result of not hitting the mark in the latest annual round of primary tests or public examinations, has been shown to be a major driver of stress and anxiety, which is far from conducive to improvement.'
27. Although the KS1 data is not intended to assess performance of schools, the DfE makes pupil level data and school level data available to Ofsted, Local Authorities, MATs (multi-academy trusts), Dioceses and Regional School Commissioners. The data can then be taken into account by these bodies, along with other information, when considering school performance. If a problem was highlighted by school level data in Ofsted's annual risk assessment, for example if there was a large drop compared to previous years, this might trigger Ofsted to investigate the issue.
28. It is also used at a pupil-level by schools to assess a pupil's individual progress and performance, to inform teaching and to report to parents. Schools can use it to provide comparative information to parents about attainment of other pupils of the same age at the school. Schools are allowed but not required to share their data with other schools. Some schools choose to publish their own school-level data. Schools can use the DfE's 'Analyse School Performance' to see how they compare to the published national, regional or local breakdowns.
29. Unlike KS2 data, KS1 data is not a public accountability measure for schools, so the data collection is not designed to produce robust school-level measures. The data does not undergo the same level of quality assurance and validation processes as KS2 data.
30. Between 2012 and 2016, Ofsted published KS1 data at school level. Ofsted stopped publishing school level data in 2016. Before 2016 the DfE, whilst not publishing school level data, would provide it in response to information requests, on the basis that it was already in the public domain.
31. In 2016 new assessments were introduced at KS1 and KS2 based on the revised national curriculum introduced in 2014. This led to strains on the DfE's relationship with the sector. Many teachers were very upset and angry about these changes, because SATS (primarily through the publication of KS2 data) were used to judge their schools' performance making KS2 assessments in particular a very high stakes assessment. Relationships with the teaching unions, including NAHT (the union representing a large number of head teacher and other leaders in schools), became delicate. In 2016 there was a motion at the

NAHT annual conference to explore all options up to and including potential industrial action. Boycotting was a real possibility, but discussion led to a breakthrough with DfE and so members were asked whether to vote for a boycott or continue the conversation with DfE and they decided on the latter.

32. Since the change in Ofsted and since the new assessments, school level data is no longer released in response to information requests. The Appellant was provided with school level data before the new assessments had been introduced consistently with the DfE's policy. She was also provided with school level data in 2016. We accept the evidence of Mr Goncalves to the effect that this was done in error because he was not aware of the policy decision, nor of the DfE's public statements below.
33. The fact that school level data is not published has been stated publicly in a number of documents. For example, the DfE document entitled 'Attainment in primary schools in England: Quality and methodology information' and dated 1 September 2016 states:

School level information for the end of primary school is published in the primary school performance tables. School level results for key stage 1 and phonics are not published. (P126 of the bundle).
34. Further, the DfE publishes a 'statement of intent' setting out what data will be published which does not include KS1 school level data.
35. In 2017 the government carried out a Primary Assessment consultation, as part of which they put forward a proposal for moving the baseline assessment to the reception year. During the consultation concerns were raised about pressure on schools if this were used as an outcome measure. The government response reassured the sector that the numerical data would not be publicly available.
36. For the majority of pupils nationally, KS1 and KS2 assessments take place at the same primary school which provides education from reception to year 6. The published school level KS2 data, which uses KS1 data as a baseline, enables an assessment to be made of progress at that particular school. A minority of children are educated in a three tier system. They attend a first school from reception to year 3, a middle school from year 4 to year 7 and then a high school. For these children only the KS1 assessment takes place at the first school. The published KS2 data is therefore less informative, because the baseline and the outcome relate to different schools. There are also some separate infant (reception to year 2) and junior (year 3 to year 6) schools where the same issues arise because only the KS1 assessment takes place in the infant school.
37. Although we were not provided with first hand evidence of the exact numbers, it is not in dispute there are only a small number of local authorities that still operate a three-tier system and that in Northumberland there is a relatively high

proportion of schools in the three-tier system. Separate infant schools are more common across the country than schools in the three-tier system.

38. The KS2 data is not the only means available for parents to assess a school's performance. For example, parents can read the Ofsted reports, visit the school, speak to teachers, view examples of current work, talk to parents with children at the school and view the information on the school's website. These sources of information are still available to parents looking at first schools. In outstanding schools, the Ofsted report can be of some vintage and of less assistance. In first schools, particularly where there is no recent Ofsted report, there is a lack of information on a school's performance because there is no KS2 data. We recognise that KS1 school level data does provide some information about the performance of the pupils which parents might find of interest. However, it is of limited assistance in assessing performance of the school, as opposed to performance of the pupils. The data is not as robust as KS2 data. The assessment is not designed to inform parental choice. It is intended as a baseline and is of limited use without the outcome data to enable progress to be assessed. It will assist the school to understand where pupils are in relation to the national standards so that they can plan teaching for the next year, and will assist an individual parent to know where their child is in relation to national standards. It is of little assistance to parents as an indicator of a school's performance.
39. The Government is aware of the specific issue of the lack of information and accountability for first and middle schools and it was raised and considered by the Government as part of its 2017 Primary Assessment Consultation<sup>1</sup>, where it was noted that there was a lack of information and accountability in first schools. As a result, a further, informal, consultation followed on the future arrangements for infant, first and middle schools. The government took into account representations from the sector and concluded that the arrangements should remain the same for first and middle schools as for other schools and that only Ofsted information would be published on first schools. This was a considered policy position reached after a wider formal and then a smaller informal consultation.

*Evidence on the effect of releasing the information at the time of the request.*

40. James Bowen gave evidence on the impact that a decision to release the school level data would have. We make the following findings on the basis of his evidence and the evidence of Rebekah Edgar.
41. KS1 data is focussed entirely on attainment rather than progress by pupils. It is widely accepted that it does not accurately capture the excellent work of many schools serving disadvantaged communities or those serving pupils with low

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<sup>1</sup> <https://www.gov.uk/government/consultations/primary-assessment-in-england>



prior attainment. For example, if a school had a big influx of non-English speaking pupils this would be likely to affect the SATS results in that year.

42. Comparing the KS1 data between schools is of limited use and may lead to inaccurate conclusions being drawn. If one school achieves 10% higher in reading assessments it may say more about the prior attainment of children attending that school rather than about the quality of education.
43. If the data was released at school level nationally, this would almost certainly lead to the return of 'league tables' published in the media.
44. In 2016 when the SATS changed significantly, all the parties in the sector were aware that the published KS2 results would drop by a percentage as a result. The government worked hard to put out a lot of information saying that the results could not be compared with the previous year, but it was still reported in the local press in comparison to the previous year's results.
45. Mr Bowen was asked if he would assess the risk of a boycott as real if information had been released in response to the request in 2017. He gave evidence that although the relationship was in a much better place in 2019, it was a delicate relationship in 2017 and disclosure would have caused serious damage to DfE's relationship with head-teachers and the NAHT. He agreed with paragraph 35 of Rebekah Edgar's statement, which states:

...there remains an underlying risk of boycott to KS1 and KS2 data tests and assessments...any perceived breach of trust around the uses of KS1 assessment data could dramatically increase the risk of a boycott being called...at the very least we anticipate that this would cause serious damage to our relationships with head-teachers and the NAHT.
46. He stated that releasing the information would have had a very negative effect in 2017, because they were attempting to lower the stakes around the assessments, and releasing the KS1 school level data would have made the stakes higher. It would have caused some significant issues and 'it is fair to say it would have increased the risk of a boycott'.

## **Legal framework**

47. Under s 1(1)(a) FOIA any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether or not it holds information of the description specified in the request.
48. The relevant parts of section 36 provide that information is exempt if:
  - (2) ...in the reasonable opinion of a qualified person, disclosure of the information under this act -

...
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

...

(5) In subsections (2) and (3) “qualified person” –

(a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown.

...

49. Sections 36(2) is a qualified exemption and therefore if this section is engaged, the tribunal must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing whether the information.
50. According to the Upper Tribunal in **IC v Malnick and ACOBA** [2018] UKUT 72 (AAC), at para 29, ‘although the opinion of the QP is not conclusive as to prejudice (save, by virtue of section 36(7), in relation to the Houses of Parliament), it is to be afforded a measure of respect. As Lloyd Jones LJ held in *Department for Work and Pensions v Information Commissioner* [2016] EWCA Civ 758 (at paragraph 55):

“It is clearly important that appropriate consideration should be given to the opinion of the qualified person at some point in the process of balancing competing public interests under section 36. No doubt the weight which is given to this consideration will reflect the Tribunal’s own assessment of the matters to which the opinion relates.”

## Issues

51. The issues for us to determine are:
- 51.1. Is the opinion of the qualified person reasonable?
- 51.2. Does the balance of public interest favour maintain the exemption in s 36(2)(c)?

### The role of the tribunal

52. The tribunal’s remit is governed by s.58 FOIA. This requires the tribunal to consider whether the decision made by the Commissioner is in accordance with the law or, where the Commissioner’s decision involved exercising discretion, whether she should have exercised it differently. The Tribunal may receive evidence that was not before the Commissioner, and may make different findings of fact from the Commissioner.

## Discussion and conclusions

### *Is the opinion of the qualified person reasonable?*

53. We find that the opinion is reasonable. The purpose of the opinion is to determine whether or not disclosure of the information would or would be likely to prejudice the effective conduct of public affairs. The Minister does not need to

consider the arguments in favour of disclosure because he does not perform the public interest balance. It follows that the fact that he has not considered the arguments in favour of disclosure in this particular case does not, contrary to the appellant's argument, suggest that a blanket approach has been taken.

54. We have accepted the DfE's explanation about the error in the date of the document and therefore find that the opinion was provided at the relevant time.
55. The appellant argues that the Minister was not provided with the full picture. She submits that he was not told that the request was limited to Northumberland schools and that he was not told that information had been released in response to the 2016 request.
56. In our view, the Minister had all the relevant information before him. He was provided with the full text of the request in Annex A. He was informed that 'we have received similar requests in the past from the correspondent and have previously provided the information requested'.
57. It is true that the Minister was not explicitly told that the appellant had been given school level data in response to her 2016 request, but if the Minister had been provided with the full picture, i.e. that this had been provided in error by a member of staff unaware of the change in policy, it would have made no difference to his conclusion.
58. The factors taken into account by the Minister included the risks of a negative reaction from schools, serious damage to relations with the NAHT and a boycott. Looking at these factors, which we consider in more detail below, we find that it was plainly a reasonable opinion that there would be likely to be prejudice to the DfE's ability to effectively administer accountability policy.

### *Public interest balance*

59. The question for us is therefore whether or not, at the time of the response to the request, the public interest in maintaining the exemption outweighs the public interest in disclosing the information as it stood
60. The Appellant argues that the public interest arguments against publishing school level data in general are not applicable in this case, because she is only asking for school level data in Northumberland. We disagree. The reasons behind the government's policy of not publishing KS1 school level data will be relevant to each individual request for KS1 school level data and must be weighed in the balance, as do the particular features of the schools covered by the request.

*The public interest in maintaining the exemption.*

### Data of limited use

61. We accept that KS1 data is of limited use in assessing school performance. That is not its intended use and therefore it does not receive the scrutiny that KS2 data receives. It can be misleading because it is intended to be a baseline. Taken alone it is a measure of attainment rather than progress. It can lead to inaccurate conclusions being drawn about a school.

#### Adverse consequences for schools.

62. We accept the evidence that the publication of school level data nationally would be likely to lead to the publishing of league tables in the media. We infer from this that the publication of school level data in Northumberland would be likely to lead to the publishing of league tables in the local media. Although the data could be accompanied by an explanatory statement, in the light of the evidence of James Bowen in relation to the effectiveness of this in 2016, we accept that an explanatory statement is unlikely to prevent the media from publishing league tables, i.e. that an explanation would not limit the damage caused.
63. We accept that the publication of the KS1 school level data by the DfE in response to this request would increase pressure on schools in Northumberland in particular, raising the stakes for KS1 assessments. Once data is published, it risks altering teachers' perceptions nationwide of the intended purpose of that data.

#### Effect on relationships in the sector

64. Although we place little weight on the simple assertion that releasing the data is out of line with the stated policy of the DfE, we accept that releasing any KS1 school level data could affect relationships within the sector and could undermine the assurances that the DfE has given to the sector that school level data in the new baseline assessment in reception would not be published.
65. We accept that the DfE has stated publicly that KS1 school level data will not be published. On the basis of James Bowen's evidence, we find that this was the clear understanding of schools at the relevant time. At the time of the request there was a delicate relationship between unions and teachers and the DfE because of the 2016 changes to SATS. We accept that disclosing KS1 school level data in this context would have caused serious damage to DfE's relationship with headteachers and the NAHT and other unions, with a real risk of a boycott. We do not accept the claimant's argument that this damage is not likely to be caused by disclosure limited to Northumberland schools. Disclosure is to the world, and if schools and unions were aware that the school level data had been published in one area we find that this would have the stated effect. Further this could undermine the assurances that the DfE has made in relation to the proposed baseline assessment in reception, if schools and unions were aware that, contrary to the DfE's stated policy, KS1 school level data had been released.

66. All these effects, in our view are real risks and relate to the particular exemption relied on, because they impact on the DfE's ability to effectively conduct their role in the education system, in particular in relation to accountability.
67. The appellant argues that the risks are overstated because the release of data has not led to these consequences in the past. When considering the effects of disclosure under FOIA, we consider the effect of disclosure into the public domain. These risks may not have occurred as a result of previous similar disclosures to the appellant, but we have to assess the risks of disclosure to the world at large.

*The public interest in disclosure*

68. We accept that there is a gap in the published information on first schools. Because KS2 tests do not take place at first schools, the performance data published at KS2 is not available for first schools. We accept that, at the time, in the case of an outstanding school an Ofsted inspection might not have taken place for a number of years, making it difficult to assess the school's current performance. We accept that this problem is particularly acute in Northumberland, where a relatively large number of schools are in the three-tier system.
69. We accept that the KS1 school level data would provide some information about a school to parents, which might be of some assistance to them. However, this data is of limited use in assessing a school's performance and might be actively misleading for the reasons set out above. There are also a number of other means by which a parent can find out information about a school and form a view on its performance, as set out earlier.
70. We also give weight to the more general public interest in disclosure, namely the availability of data to researchers, openness, transparency and an improved standard of public debate.

*Weighing the balance*

71. The appellant has put forward some persuasive arguments on the gap in information and the particular impact in Northumberland. If the KS1 school level data were an effective means of assessing a school's performance, these arguments would have weighed very strongly in the balance towards disclosing the information. However, as we have explained above, the KS1 data is of limited use in assessing the performance of a school. Consequently, the fact that the data provides some information about a school in an area where such information is lacking is a factor in favour of disclosure, but it carries modest weight in the balancing exercise.

72. On the other side, we find the DfE's arguments about the effect on the conduct of public affairs to be well founded and supported by the evidence. The real risks of damage to relationships with the sector, of a boycott and an undermining of the basis of the government's future plans are all factors which weigh heavily in the balance. All these risks would impact on the effective conduct of public affairs, and we take account of the Minister's opinion as to the prejudice thereto.
73. Taking all this into account we find that the public interest in maintaining the exemption outweighs the public interest in disclosure.
74. As an observation, the tribunal was impressed with Ms Land's advocacy and notes that she presented her arguments in a persuasive and coherent manner.

Signed Sophie Buckley

Judge of the First-tier Tribunal

Date: 28 September 2019

Promulgated Date: 30 September 2019