

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2016

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

Decision (including any steps ordered)

1. The complainant requested from the Department for Education a list of all schools in Norfolk, Suffolk and Cambridgeshire that applied for funding from the priority school building programme 2 (PSBP2) and for each school how much money they requested, and a short summary of why they wanted the money. The Department for Education provided the complainant with a list of the schools that were successful in securing PSBP2 funding together with a summary of what they wanted it for but withheld the details for the unsuccessful schools under sections 36(2)(b)(i) and 36(2)(c) of the FOIA. In relation to the amount of money requested, the Department for Education stated that this information was held in a recorded format.
2. The Commissioner's decision is that Department for Education has incorrectly applied Sections 36(2)(b)(i) and 36(2)(c) of the FOIA.
3. The Commissioner requires the Department for Education to take the following steps to ensure compliance with the legislation.
 - Disclose a list of the schools that were unsuccessful in securing (PSBP2) funding together with a summary of what they wanted it for.
4. 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.

Background

5. The Priority School Building Programme (PSBP) was introduced by the Government in 2010/2011 to address the needs of the schools most in need of urgent repair.
6. Through the programme, 260 schools will be rebuilt or have their condition needs met by Education Funding Agency (EFA). The first school was opened in May 2014.
7. In May 2012 it was confirmed by the Secretary of State that there were [261 successful applications for the PSBP](#)¹ out of 580 eligible applications.
8. The second phase of the Priority School Building Programme (PSBP2) was announced in May 2014 in order to undertake rebuilding and refurbishment projects in schools with buildings in the very worst condition in England.
9. In February 2015 the Department for Education published the names of the 277 schools² that had been successful in having all or some of their buildings rebuilt or their significant condition needs met through PSBP2 together with together with the details of the methodology it used to select the successful schools³.
10. The DfE has pointed out that it also provides a long term capital settlement in order to address the condition of the school estate and the majority of this funding is allocated directly to those who are responsible for maintaining school buildings⁴ so that they can determine priorities at

1

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/276240/psbp_-_schools_prioritised_for_the_programme.pdf

2

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401701/PSBP2_List_of_schools_for_publication.pdf

3

https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401689/PSBP2_Methodology.pdf

⁴ Bodies responsible for school estates and maintenance include local authorities, Academy Trusts, Dioceses and Voluntary Aided Bodies

a local level. PSBP2 is not intended to replace the wider efforts to support responsible bodies to address the condition needs of their estates. Instead it will run alongside in order to address individual projects that are of such a significant scale that it would be difficult to pay for them through regular maintenance allocations. The limited nature of the programme was made clear to responsible bodies in the information to applicants on the DfE's website.

Request and response

11. On 16 February 2015 the complainant wrote to the Department for Education (DfE) and requested information in the following terms:

"Please provide a list of all schools in Norfolk, Suffolk and Cambridgeshire that applied for funding from the priority school building programme 2 (PSBP2). For each school, please include how much money they requested, and a short summary of why they wanted the money."

12. The DfE responded on 13 March 2015 and disclosed a list of the school's that were successful in obtaining PSBP2 funding but not a summary of the reasons why they wanted the money. It also stated it did not hold any recorded information regarding how much the schools wanted as this was not a requirement of the PSBP2 application process. With regard to the schools that were unsuccessful in their application for PSBP2 funding, the DfE said it was withholding this information under sections 36(2)(c) and 36(2)(b)(i) of the FOIA.
13. On 16 March 2015 the complainant requested an internal review.
14. The DfE provided the complainant with an interim response on 17 April 2015 in which it disclosed a short summary of the reasons why the successful schools had requested funding. In relation to the rest of the requested information concerning the unsuccessful schools, it said that it aimed to complete its internal review by 14 May 2015.
15. Following an internal review the DfE wrote to the complainant on or about 24 April 2015. It stated it was upholding its decision to withhold the list of unsuccessful schools and the reasons for their funding applications under sections 36(2)(c) and 36(2)(b)(i) of the FOIA.

Scope of the case

16. The complainant contacted the Commissioner on 10 June 2015 to complain about the way his request for information had been handled.

In particular, he said he disputed the DfE's decision to withhold the list of unsuccessful schools and the reasons for their PSBP2 application.

17. The Commissioner contacted the complainant on 10 July 2015 to clarify the scope of his complaint.
18. The complainant responded on 17 August 2015. He said he was satisfied with the DfE's explanation that it did not hold any recorded information in relation to the amount requested by the schools that had submitted PSBP2 applications. However, he added he was not satisfied with the DfE's decision to withhold the list of unsuccessful schools and the reasons for their PSBP2 applications under sections 36(2)(c) and 36(2)(b)(i) of the FOIA.
19. The scope of the Commissioner's investigation is therefore limited to the DfE's application of sections 36(2)(c) and 36(2)(b)(i) of the FOIA.

Chronology

20. On 19 August 2015 the Commissioner contacted the DfE and requested a copy of the withheld information together with a copy of the qualified person's opinion and invited it to reconsider its application of section 36(2) of the FOIA.
21. The DfE responded on 17 September 2015. It provided the Commissioner with the information he had requested (with the exception of a summary of the reasons why the unsuccessful schools had requested PSBP2 funding) and confirmed that it was upholding its application of section 36(2) of the FOIA.
22. The Commissioner wrote to the DfE again on 21 September 2015 and reminded it to send him a summary of reasons given by unsuccessful applicants.
23. After a further exchange of emails with the DfE it provided the Commissioner with the outstanding information on 24 November 2015.

Reasons for decision

The exemptions

24. The DfE has sought to withhold the requested information under sections 36(2)(c) and 36(2)(b)(i) of the FOIA. The Commissioner will now deal with each exemption in turn.

Section 36(2)(c) – Prejudice the effective conduct of public affairs and Section 36(2)(b)(i) – inhibit free and frank provision of advice

25. The DfE has applied sections 36(2)(c) and 36(2)(b)(i) to the withheld information.

26. Section 36(2)(c) provides that;

“Information to which this section applies is exempt information if, 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.”

27. Section 36(2)(b)(i) provides that;

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act –

...(b)(i) would or would be likely to inhibit the free and frank provision of advice

28. In order to determine whether sections 36(2)(c) and 36(2)(b)(i) has been correctly applied the Commissioner has:

- (i) ascertained who the qualified person was for the public authority;
- (ii) established that an opinion was given;
- (iii) ascertained when the opinion was given; and
- (iv) considered whether the opinion given was reasonable.

The engagement of section 36

29. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. In this case the DfE confirmed that the opinion was given by the Minister in charge of Academies and Free Schools, Lord Patrick Nash. The Commissioner is satisfied that he was an appropriate qualified person for these purposes.

30. In support of the application of section 36, the DfE has provided the Commissioner with a copy of the submissions to the qualified person, which identifies the information to which it is suggested that sections

36(2)(c) and 36(2)(b)(i) should be applied, and copy of the qualified person's opinion.

31. The Commissioner notes that the qualified person's opinion was sought on 5 March 2015 with further arguments being submitted on 22 April 2015. The Minister provided his opinion that section 36 was engaged on 23 April 2015 as he believed that disclosure of the withheld information would be likely to have the effects set out in sections 36(2)(c) and 36(2)(b)(i) of the FOIA. It appears he accepted that sections 36(2)(c) and 36(2)(b)(i) were engaged was engaged in relation to the unsuccessful PSBP2 funding applicants for the reasons set out in the submission, namely;

- (i) Disclosing the names of the unsuccessful schools and/or the reasons for their applications could discourage schools from applying for funding in the future. This would prejudice the effective conduct of public affairs by stifling innovation and any possible embarrassment or failure on those who were unsuccessful in their applications and
- (ii) It may set a precedent for some and encourage a 'cut and paste' approach to future applicants who would be doing so on false pretences.
- (iii) Also, disclosure of the unsuccessful schools might inhibit or prejudice schools in seeking support, either within the programme or outside of it, simply because they were not prioritised for PSBP2.

32. The DfE has applied sections 36(2)(c) and 36(2)(b)(i) of the FOIA to all of the withheld information and has provided the Commissioner with additional arguments in respect of its position.

33. The DfE has advanced a number of arguments in support of its application of section 36(2). These are summarised below;

Discourage applications for future funding or support

34. The DfE has argued that disclosing the names of the unsuccessful schools could discourage them (or the 'responsible bodies'⁵ on their behalf) from re-applying for PSBP funding in the future. The complainant

⁵ The responsible bodies include local authorities, academy trusts, dioceses and voluntary aided bodies.

does not accept this argument. He believes it would be extremely unlikely that a school would decide not to re-apply for funding in the future to carry out badly needed repairs or rebuilding because its identity had already been disclosed following its initial application.

35. The DfE has also suggested that disclosing the names of the unsuccessful schools might inhibit or prejudice schools from seeking support because they were not prioritised for PSBP2. The complainant does not accept this argument. He points out that each individual school already knows whether or not it was prioritised so that effect (if it does exist) already exists now, irrespective of whether it might be made public at some stage in the future.

Precedent for applications to be made on false pretences

36. The DfE has also argued that disclosing the names of the unsuccessful schools may set a precedent for some and encourage a 'cut and paste' approach to future applicants who would be doing so on false pretences.

Reputational impact on unsuccessful schools

37. The DfE has argued that there could be a reputational impact on the schools that were unsuccessful if their funding application. The DfE has pointed out that the PSBP2 was not intended to replace wider efforts to support those responsible for schools to address the condition needs of their estates. Instead, it was designed to address individual projects of such significant scale that it would be difficult to pay for them through regular maintenance allocations. The DfE has argued that the reputational effect would be twofold. Firstly, parents may decide that they do not want to send their children to a school if they know that the responsible body has deemed it to have serious potential condition issues that they are unable to tackle with routine funding allocations. This could lead to falling school rolls and less sustainable schools. Secondly, teachers may decide to leave a school which appears to be unsustainable or struggling and it may be difficult to recruit replacements. This would impact on the education of students in those schools.

Relationships between the various responsible bodies and their schools

38. The DfE has stated it is important to recognise that it is the organisations responsible for the maintenance of schools (i.e local authorities, academy trusts, dioceses and voluntary aided bodies) who have submitted 'expressions of interest' for PSBP2 on behalf of their schools and not the schools themselves. The PSBP guidance makes it clear that the responsible bodies should only prioritise the schools with the worst buildings. The DfE has pointed out that these responsible

bodies have to make difficult decisions locally about which schools to include in their expressions of interest and may not have been transparent about which schools they were putting forward. The DfE therefore believes disclosing a list of the unsuccessful schools could be embarrassing for the responsible bodies and impede the relationships with their schools as they may have chosen to apply on behalf of some and not others. The DfE believes the list of unsuccessful schools would not be a definite list of all the schools in the area requiring maintenance and the omissions could cause as much an issue as those that were put forward. This could lead to a loss of trust between schools and their responsible bodies which could exacerbate local relationships and complicate future funding-related conversations.

39. The DfE accepts that some of the responsible bodies were disappointed and may have shared the unsuccessful status of individual schools with the schools themselves and subsequently generated local media interest.⁶ However, the DfE has pointed out that this was their decision to do so and may have been done for local reasons that the DfE were not party to.
40. The Commissioner has made the DfE aware that certain local authorities have published information on their websites of the schools for which they have registered 'expressions of interest' for PSBP2 funding.⁷
41. The DfE also believes that there would be a reputational risk for the responsible bodies as it opens them up to difficult discussions regarding their ability to maintain their school estate.
42. The DfE has also pointed out that given the diversity of the responsible body type there is risk that the information regarding the unsuccessful schools could be used incorrectly and generate miscommunication.

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<http://craigwhittakermp.co.uk/todmorden-high-pupils-message-to-pm-over-crumbling-school-is-come-and-see-for-yourself-while-mp-turns-up-the-heat-too-todmorden-news/>

http://www.thetelegraphandargus.co.uk/news/11781883_Betrayal_as_eight_Bradford_schools_snubbed_for_rebuild_cash/

<http://www.cllandrewwallis.co.uk/cornwall-gets-three-schools-funded-from-the-priority-school-build-programme/>

http://www.eveningnews24.co.uk/news/education/another_blow_for_the_hewett_as_government_rejects_funding_bid_for_crumbling_buildings_1_3949753

⁷ For example, see Derby City Council–Council Cabinet–16 July 2014

The qualified person's opinion

43. The Commissioner notes that his guidance on section 36 makes clear that:

"The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion." (para. 21)

44. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.
45. Having perused the withheld information and considered the submissions put to the qualified person, the qualified person's opinion and having taken into account the DfE's additional arguments, the Commissioner considers that the opinion of the qualified person is a reasonable one in respect of the application of sections 36(2)(b)(i) and 36(2)(c) of the FOIA.
46. As section 36(2) of the FOIA is a qualified exemption, it is subject to a public interest test. The Commissioner therefore went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

Public interest test

47. The Commissioner notes that the qualified person's opinion was that disclosure of the withheld information "would" or "would be likely to" have the effects set out in section 36(2). As the DfE and its qualified person have not specified which limb of section 36 is applicable, the Commissioner has assumed that test to be applied in this case is the lower one, that disclosure "would be likely to" have the effects set out in section 36(2).
48. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified

person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice."

49. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so
"...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant."
50. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely prejudice to the effective conduct of public affairs.

Public interest arguments against disclosure

51. The DfE has argued that there is a public interest in ensuring that unsuccessful schools (or the responsible bodies on their behalf) are not discouraged from re-applying for funding in the future as this would have the effect of missing potential opportunities for improvement and stifle future innovation. The complainant does not believe that unsuccessful schools would be discouraged from re-applying for funding in the future simply because their initial application was unsuccessful. He believes that they would be keen to secure appropriate funding to ensure the necessary work was carried out as soon as possible.
52. The DfE has also argued that there is a public interest in ensuring that schools are not inhibited or prejudiced from seeking support and advice because they were not prioritised for PSBP2.
53. The DfE has further argued there is a public interest in preventing or limiting reputational damage being caused to unsuccessful schools or responsible bodies which it believes would occur if the withheld information was disclosed for the reasons mentioned above.
54. The DfE has also argued there is a public interest in ensuring that any disclosures under the FOIA do not adversely affect or prejudice the working relationships that exist between the various responsible bodies and their schools for the reasons stated above.

55. The DfE has finally argued that there is a public interest in not disclosing the withheld information as it may give a misleading and distorted picture of the types of schools (e.g. primary and secondary) and their locations, requiring urgent rebuilding and refurbishment. For example, disclosure of the withheld information might give a misleading picture that a certain geographical area had a particular problem with a certain type of school. The information might also be misleading as it would not take into account all of the information supplied by schools and responsible bodies in their PSBP2 applications.

Public interest arguments in favour of disclosure

56. The DfE recognises there is a public interest in transparency and accountability so that the public can understand the basis upon which decisions that affect them are taken. The DfE considers that this may lead to an improved standard of public debate and improved trust in decisions taken. The DfE believes that this interest is satisfied by the information it already publishes on its website regarding PSBP2 which includes information and guidance for applicants and the names of the successful schools.⁸

57. The complainant believes there is a public interest, especially in relation to pupils, parents and teachers, to know which schools have been identified by the relevant responsible body as being in such a condition as to warrant an application being submitted for PSBP2 funding. This includes not only the schools that are subsequently successful but also those that are unsuccessful. This would allow pupils, parents and teachers to make informed decisions and assist the schools in their efforts to secure the funding which is required to improve their buildings.

58. There is a general public interest in respect of openness and transparency in knowing which schools and which areas are the subject of PSBP2 funding applications.⁹

59. There is also a public interest in knowing whether the schools that did not receive PSBP2 funding were in government held constituencies compared with those that were.

⁸ <https://www.gov.uk/government/publications/priority-school-building-programme-2-psbp2>

⁹ <http://schoolsweek.co.uk/mp-wants-to-know-whos-top-of-the-rubble-pile/>

60. There is also a public interest in knowing the types of schools (primary or secondary) and their geographical locations which have been earmarked by the responsible bodies for PSBP2 funding to see whether there are any particular trends. The complainant believes there is a public interest in knowing whether there is a problem with particular types of schools in poor condition or schools within a certain area requiring urgent rebuilding or refurbishment.

Balance of the public interest arguments

61. The Commissioner has considered the public interest arguments for and against disclosure as described above and believes they are finely balanced.

62. The Commissioner recognises there is a public interest in any disclosure of information which might discourage or inhibit unsuccessful schools from re-applying for PSBP2 funding in the future and also any disclosure which might result reputational damage to unsuccessful schools and their respective responsible bodies.

63. The Commissioner also accepts there is a public interest in preventing disclosure of information which might give a false or misleading picture that a particular type of school and/or a particular area had an issue with urgent rebuilding or refurbishment requirements.

64. However, the Commissioner believes these interests are not sufficient to outweigh those of pupils, parents, teachers, responsible bodies and politicians in knowing which schools required urgent rebuilding or refurbishment and the reasons why.

65. The Commissioner notes that the identity of some of the unsuccessful schools is already in the public domain and has seen the interest and debate this has generated in the media.

66. Although the arguments are finely balanced the Commissioner finds that those in favour of maintaining the exemption under section 36(2) of the FOIA are outweighed by those in favour of disclosure.

67. According the Commissioner orders that the withheld information should be disclosed.

Right of appeal

68. 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

69. 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.
70. 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

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SK9 5AF