

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 June 2017

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

Decision (including any steps ordered)

1. The complainant has requested information relating to the provision of a temporary school at 38A Eastcourt Road, Watford. The DfE responded to the request releasing some information but refusing to disclose other information citing sections 40 and 43 of the FOIA.
2. The Commissioner's decision is that the DfE has correctly applied sections 40 and 43 of the FOIA to the remaining withheld information. She therefore does not require any further action to be taken.

Request and response

3. On 28 May 2016, the complainant wrote to the DfE and requested information in the following terms:

"Separately to the above 'business as usual questions', I am also now making a request for recorded information under section 1 of the Freedom of Information Act 2000 for all information that the Department holds which evidences that it carried out due diligence in the offering and/or in the provision of offering of the temporary school at 38A Estcourt Road Watford and that it did not merely rely on a false asbestos survey by an unlicensed and non-UKAS-accredited asbestos agent (R9) instructed by the landlord of these premises, this agent having failed even to send asbestos samples for laboratory testing.

I should also please like details of why this information is considered by

you to be commercially sensitive. Precisely whose commercial interests are allegedly likely to be prejudiced and why?"

4. The DfE responded. It released some information but refused to disclose other information citing sections 40 and 43 of the FOIA.
5. The complainant requested an internal review on 6 July 2016.
6. The DfE carried out an internal review and notified the complainant of its findings on 7 September 2016. It released further information to the complainant but still remained of the opinion that section 40 and 43 applied to some of the requested information.

Scope of the case

7. The complainant contacted the Commissioner on 26 October 2016 to complain about the way his request for information had been handled. He stated that he believes the DfE must hold more information to that identified and that he disagrees with the application of the exemptions cited.
8. During the Commissioner's investigation further information was disclosed to the complainant. The remainder of this notice will focus on the remaining withheld information and the DfE's application of section 40 and 43 of the FOIA. It will also consider whether the DfE holds any further recorded information to that already identified.

Reasons for decision

Is any further recorded information held?

9. The Commissioner asked the DfE to carry out further searches to ensure that all relevant recorded information had been identified falling within the scope of the complainant's request.
10. The DfE responded. It confirmed that fresh searches of all records in the scope of the complainant's request have been carried out. It explained that the fresh searches were carried out by the Free School Project Manager and the current Free School Project Director of all email accounts, email archives, electronic project files, the project files held in the team's electronic shared areas and record management systems using the following search terms:
 - a) 'Estcourt Road';

- b) 'Watford and St John's Primary School';
 - c) 'Watford'; and
 - d) 'Temporary site'.
11. The DfE confirmed that it is satisfied that it holds no further recorded information falling within the scope of the complainant's request.
12. The Commissioner wrote to the complainant on 2 May 2017 to inform him of the DfE's further submissions. Although he raised further concerns about the request these did not relate to this element of it. The Commissioner is therefore satisfied now having instructed fresh searches to be undertaken that, on the balance of probabilities, the DfE does not hold any further recorded information falling within the scope of the complainant's request.

Section 40 – personal data

13. Section 40 of the FOIA states that a public authority may refuse to disclose information if it constitutes the personal data of a third party and the disclosure of that information would breach any of the data protection principles outlined in the Data Protection Act (DPA).
14. Personal data is defined as:
- ...“data which relate to a living individual who can be identified-
- (a) from those data, or
 - (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
- And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual...”
15. The Commissioner considers the first data protection principle is most relevant in this case. The first data protection principle states -
- “Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -
- (a) at least one of the conditions in Schedule 2 is met, and
 - (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.”

16. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

Is the requested information personal data?

17. To clarify, the names of junior members of staff and a private individual have been withheld under section 40 of the FOIA.
18. The name of an individual is quite obviously information from which that individual can be easily identified. The Commissioner is therefore satisfied that the withheld information constitutes the personal data of a number of third parties.

Would disclosure be unfair?

19. In relation to the private individual the DfE stated that this person has explicitly requested that their name is not released into the public domain. For this reason, it considers that it would be unfair to disclose it and therefore in breach of the first data protection principle.
20. The Commissioner considers any objections to disclosure should be carefully considered. However, just because an individual objects does not automatically mean that disclosure would be unfair and therefore in breach of the first data protection principle outlined in the DPA. The individual's objections must be reasonable based on the particular circumstances of a case.
21. In this case, the Commissioner notes that this private individual is merely named within the withheld information as having *some* connection to the temporary site for the school. It is reasonable to assume that this individual would hold no expectation that their personal data would be disclosed into the public domain in relation to the site or this request. She is therefore satisfied that the individual's objections to disclosure are reasonable and based on their understanding of the use of their personal data. If disclosure were ordered it would cause this individual distress and upset and would constitute an unwarranted intrusion into their private life.
22. The Commissioner also notes that this individual holds no public accountability for the decisions made by the DfE in this matter, as they

are a private individual within the local community. She is therefore of the view that there is little legitimate public interest in the disclosure of their name in response to this request particularly when you take into account the distress and upset disclosure would cause and the explicit objections of the individual concerned.

23. Turning now to the junior members of staff, the DfE confirmed that these individuals hold junior roles within the department and do not hold roles of a public facing nature. It is therefore of the opinion that disclosure would be unfair and would cause these individuals distress and upset. The DfE explained that it has a clear policy in place concerning the disclosure of personal data of staff and there is a clear distinction between levels of seniority within the department. It confirmed that it accepted members of staff with sufficient seniority or roles of a public facing nature should expect their personal data to be disclosed on request in relation to their public role. However, it did not agree that junior members of staff's personal data should be released and this therefore is the clear expectation that these staff members hold.
24. The Commissioner accepts that the members of staff concerned held junior roles within the DfE at the time of the request. Considering the policy the DfE operates as detailed above, she accepts that these individuals would hold the reasonable expectation that their personal data would remain confidential and private even in a work related context. The Commissioner agrees these individuals do not hold roles of sufficient seniority or public facing roles which would generally warrant the transparency and openness the FOIA provides. The Commissioner is of the view that junior members of staff carry out more routine administrative tasks within an organisation and do not make important high level decisions which will affect the general public. More senior members of staff have these responsibilities and so should expect more public scrutiny and accountability.
25. For the reasons explained above, the Commissioner is satisfied that disclosure would be unfair and in breach of the first data protection principle.
26. The Commissioner accepts that there is a legitimate public interest in the disclosure of information relating to the provision of schools and education and that there is a legitimate interest in knowing who makes important decisions on behalf of the public and why. However, the Commissioner considers these interests are already met by the information that has already been disclosed and the personal data of senior staff. She does not consider the disclosure of the personal data of junior staff, considering the roles and tasks they generally undertake, would assist the public in understanding more clearly why certain

decisions about this temporary site were made. She also considers that disclosure would cause the data subjects distress and upset and there is no overwhelming legitimate public interest in this case that would override that.

Section 43 – commercial interests

27. For the Commissioner to agree that section 43 of the FOIA applies, a public authority must demonstrate that disclosure of the information would or would be likely to prejudice the commercial interests of the public authority itself or a third party.
28. The exemption is also subject to the public interest test. So, in addition to demonstrating that disclosure would or would be likely to prejudice the commercial interests of the public authority or a third party, it must consider the arguments for and against disclosure and demonstrate that the public interest rests in maintaining the exemption.
29. The remaining withheld information is cost information – pricing of the project and breakdown of these costs. The DfE has confirmed that disclosure at the time of the request would have been likely to prejudice its own commercial interests. It stated that it was still in a tendering exercise for construction works at this time and disclosure would have revealed the detailed costings of the project to those parties interested in bidding for the work. The information could have been used by those wishing to compete for the work to the detriment of the DfE. It argued that those contractors wishing to bid could have tailored their bids accordingly, submitting bids to reflect the aspirations of the DfE rather than what they would have bid had they not had access to this information. This could have led to contractors submitting higher bids when compared to what they would have submitted had they not known the DfE's detailed costings upfront.
30. The DfE stated that it also felt disclosure would be likely to prejudice future tendering exercises as contractors may, on viewing this breakdown of costs, submit bids higher than they had initially intended but below the DfE's previous costings. It explained further that when it is engaging with the market to negotiate with such contractors it is seeking the best possible value for money. If contractors learn that the DfE has allowed a higher price for similar construction work, then contractors will be likely to see this as an opportunity to increase their proposed prices or renegotiate previously agreed prices. Given the ongoing strength and competitiveness of the contractor market, the DfE states it is increasingly seeing contractors seeking to increase their prices for agreed work. The DfE confirmed that this puts the Free Schools group in a very difficult position, as the options are to either

accept the increase in costs or restart the tendering exercise which could delay project delivery and incur unnecessary inflationary costs.

31. The DfE advised that both options obviously have an impact on the public purse and the value for money it seeks when taking forward such projects. To delay the delivery of such projects would also be likely to have a negative impact on the schools, teachers, parents and pupils involved.
32. The DfE stated that it is concerned that if the detailed costs had been placed in the public domain at the time of the request this would have provided contractors selected for projects in the Hertfordshire and Watford area with an indication of what the DfE considered might be reasonable capital costs. This would have influenced their behaviours and enabled them to use this information as a basis for negotiating increased costs with the DfE.
33. The Commissioner notes the circumstances at the time of the request. In particular that the DfE was still in a tendering exercise for the construction of this project and waiting for bids from interested contractors. She accepts that had this information been disclosed at the time of the request it would have revealed to those interested in bidding for the work the breakdown of costs put together by the DfE upfront. This would have allowed those interested in the work to tailor their bids accordingly potentially offering a less competitive deal to the DfE than it would have presented had it not known the DfE's costings upfront. Therefore disclosure at the time of the request would have been likely to prejudice the DfE's commercial interests and hindered the DfE from being able to secure the best possible deal for the general public.
34. The Commissioner also accepts that disclosure would have enabled those contractors which had already secured a deal with the DfE for similar projects to review the terms and conditions agreed and price and potentially commence renegotiations with the DfE for more money. As the DfE has stated, such situations occur often and it puts the DfE in a difficult position. It either has to retender wasting the public resources already diverted to the initial agreement and suffer the consequences of delays or agree to the revised terms in order to keep the project on track. Either option is not a positive one for the DfE, its commercial interests and limited resources.
35. For the above reasons the Commissioner is satisfied that section 43 of the FOIA applies in this case. She will therefore now go on to consider the public interest test.
36. The DfE stated that it recognised the public interest in accountability and transparency in relation to its commercial activities and the expenditure

of public funds. It confirmed that it understood members of the public would wish to satisfy themselves that public money is being spent appropriately and wisely. It argued that it also accepted there was a strong public interest in costs associated with Free Schools and the public understanding more clearly how such costs are dealt with.

37. However, the DfE advised that it felt there were stronger public interest arguments in favour of maintaining the exemption. It explained that the withheld information would be considered as part of its current, and possibly future, negotiations to secure temporary Free School sites and contractors to develop them. Disclosure of its breakdown of costs would be likely to weaken its negotiating position and its ability to secure the best possible deal for the public. It stated that this would not be in the interests of the wider public.
38. At the time of the request the DfE was still in negotiations with contractors for the development of the site. Disclosure would have directly affected the bids offered, could potentially have led to costs increasing and the taxpayer not getting full value for money. Again the DfE stated that such consequences were not in the interests of the wider public.
39. The Commissioner has considered the arguments for and against disclosure. She accepts that disclosure would promote openness and transparency and enable members of the public to understand more closely how this particular project was to be funded. She also acknowledges the public interest in Free Schools, in the expenditure of public funds and ensuring that value for money is achieved. The Commissioner considers the public needs to see information held by the DfE in relation to these projects to do that.
40. However, the Commissioner considers the circumstances at the time of the request tip the public interest in favour of maintaining this exemption. The DfE confirmed that at the time of the request it was still in a tendering exercise for the construction work that was required. If the information had been disclosed at this time it would have revealed to prospective contractors the DfE's own costings for the project and therefore the public funds earmarked for the project in question. This would have enabled those interested in doing the construction work to tailor their bids accordingly and potentially led to less favourable terms being offered to the DfE. If this had occurred the DfE would not have been able to achieve value for money and this would not have been in the interests of the wider public.
41. The DfE also stated that the information would have been useful to contractors carrying out similar projects in the surrounding areas or future projects. Private firms would be able to work out with some

accuracy how the DfE will cost similar projects and allow them to tailor their bids accordingly. The Commissioner also notes that the DfE has stated that it is seeing an increase in existing contractors upping their prices making the DfE's position even more difficult. The withheld information (if disclosed) may lead to existing contractors challenging the DfE for more funds knowing how it had priced up this particular project. This would then leave the DfE with two options both of which have a negative impact upon the projects underway and ultimately the general public. The DfE would have to either retender or accept the existing contractor's bid for more money. Such consequences are not in the public interest.

Right of appeal

42. 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

43. 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.
44. 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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