

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 18 June 2019

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

#### **Decision (including any steps ordered)**

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1. The complainant has requested the Department for Education (DfE) to disclose a copy of its assets register. The DfE refused to comply with the request citing section 14(1) of the FOIA.
2. The Commissioner's decision is that the DfE is not entitled to rely on section 14(1) of the FOIA.
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation.
  - Disclose the requested information to the complainant or issue a fresh response under the FOIA which does not rely on section 14(1).
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.

## Request and response

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5. On 2 July 2018, the complainant wrote to the DfE and requested information in the following terms:
  - 1) Please provide me a copy of your authority's latest information asset register.
  - 2) Please provide me a list of all cost codes used by your authority."
6. The DfE responded on 16 July 2018. It refused to comply with the request citing section 14(1) of the FOIA. It stated that this is because it considers some of the information is exempt under sections 35, 40 and 43 of the FOIA and it would place an unreasonable burden on the DfE in terms of time and resources to redact the exempt information. With regards to part 2 it stated that this element of the request lacked serious purpose.
7. The complainant requested an internal review on 16 July 2018.
8. The DfE carried out an internal review and notified the complainant of its findings on 8 August 2018. It upheld its previous application of section 14(1) of the FOIA for the reasons previously given.

## Scope of the case

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9. The complainant contacted the Commissioner on 13 August 2018 to complain about the way his request for information had been handled. With regards to any undue burden as the DfE has alleged, the complainant stated that he provided examples of other departments which had disclosed historic registers and suggested that the DfE may have overestimated the cost of redaction. In respect of the application of section 40(2), the complainant stated that he is happy for all personal data to be redacted regardless of level as he has no interest in knowing which official is responsible for a given dataset. Regarding the applications of section 35 and 43, he stated that he cannot see how these exemptions apply to a list of datasets. A list of datasets is not the same as the asset itself and in the small number of cases where the name of an asset might reflect a new policy under consideration the DfE can easily redact it without causing a significant burden. With regards to the second element of his request, he stated that he strongly refutes this request does not have serious purpose. He confirmed that the information is required (and therefore has purpose) to enable him and other members of the public to understand how financial information is structured in the DfE.

10. The complainant commented that the DfE failed to engage with his points in its internal review response and simply stated again that it could not see a serious purpose rather than explaining why. The complainant also confirmed that he has no interest in knowing which official is responsible for a given dataset, as this did not form part of his original request and he is therefore happy for any personal data to be redacted in full.
11. During the Commissioner's investigation the DfE decided to disclose the information it holds for part 2 of the request to the complainant.
12. The remainder of this notice will therefore address part 1 of the request and whether the DfE is entitled to refuse to comply with it in accordance with section 14(1) of the FOIA.

### **Reasons for decision**

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13. Section 14(1) of the FOIA states that a public authority is not obliged to comply with a request for information if the request is vexatious. There is no public interest test.
14. The term "vexatious" is not defined in the FOIA. The Upper Tribunal (information Rights) considered in some detail the issue of vexatious requests in the case of the Information Commissioner v Devon CC & Dransfield (GIA/3037/2011). The Tribunal commented that vexatious could be defined as the "manifestly unjustified, inappropriate or improper use of a formal procedure". The Tribunal's definition clearly establishes that the concepts of proportionality and justification are relevant to any consideration of whether a request is vexatious.
15. In the Dransfield case, the Upper Tribunal also found it instructive to assess the question of whether a request is truly vexatious by considering four broad issues: (1) the burden imposed by the request (on the public authority and its staff); (2) the motive of the requester; (3) the value or serious purpose of the request and (4) harassment or distress of and to staff.
16. The Upper Tribunal did however also caution that these considerations were not meant to be exhaustive. Rather, it stressed the:
17. "importance of adopting a holistic and broad approach to the determination of whether a request is vexatious or not, emphasising the attributes of manifest unreasonableness, irresponsibility and, especially where there is a previous course of dealings, the lack of proportionality that typically characterise vexatious requests" (paragraph 45).

18. In the Commissioner's view the key question for public authorities to consider when determining if a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
19. The Commissioner has identified a number of "indicators" which may be useful in identifying vexatious requests. These are set out in her published guidance on vexatious requests, which can be accessed via the following link:

<https://ico.org.uk/media/for-organisations/documents/1198/dealing-with-vexatious-requests.pdf>

20. This guidance also explains that a public authority may apply section 14(1) if the amount of time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation. This approach is supported by judgements of the Information Tribunal in the case Independent Police Complaints Commissioner vs The Information Commissioner (EA/2011/0222) and Salford City Council vs ICO and Tiekey Accounts Ltd (EA/2012/0047).
21. In this context it is possible for a public authority to take account of the cost of considering exemptions and redaction. However, it can only do this where:
  - The requester has asked for a substantial volume of information; and
  - The authority has real concerns about potentially exempt information, which it will be able to substantiate if asked to do so by the Commissioner; and
  - Any potentially exempt information cannot easily be isolated because it is scattered throughout the requested material.

22. The Commissioner notes that this is a high test to meet and she would only expect a public authority to use section 14(1) on these grounds in exceptional circumstances and where the time required to review and prepare the information for disclosure would impose a grossly oppressive burden on the organisation.

#### *The DfE's arguments*

23. The DfE advised that there is in the region of 1300 lines and 25 columns on the register which amounts to more than 32,000 cells of information and it considers that some of this information may be exempt from disclosure under sections 35, 40 and 43 of the FOIA. It argued that the process of investigation and redaction would place a considerable

burden on the DfE in terms of time and resources thereby justifying the application of section 14(1) of the FOIA. It went on to say that these exemptions may, and are likely to, apply to some of the information held in the spreadsheet. It believes the process of considering these exemptions and where the public interest lies in each case will take a great deal of time and effort that is disproportionate for the DfE.

24. It explained further that there are cells in the spreadsheet that relate to the formulation of government policy and therefore section 35 is likely to apply. It provide an example to illustrate its point. Similarly, it stated that section 40 will apply to any personal information relating to officials below the level of Deputy Director and section 43 will apply to various cells relating to the DfE's commercial interests. Again for section 43 of the FOIA the DfE provided an example and suggested that a 'good deal' of information would be likely to be exempt. It stated that it is very difficult to estimate the total time it would take to fairly and effectively apply the exemptions cited given the thousands of pieces of information that would need to be investigated. The DfE explained further that because it has cited section 14 due to the disproportionate work that would be involved in compliance it has not yet been through all the information, liaised with relevant teams, identified, located and consulted past officials where they have moved on and undertaken the public interest test.
25. However, it estimated that it would take 25 hours alone to identify and redact the names of officials under section 40 of the FOIA. It would need to consider 13 columns from the register where names of officials are present (column D and E) or where it would be required to check individual cells to ascertain whether the names of officials are present (column H given as a example). It stated that it is not as simple as to remove the two main columns of the register that are there to record the asset owner. There are other columns (column H used as an example) where officials names are recorded within the relevant text and it would need to go through each to redact any additional personal data recorded.
26. It timed how long it would take to copy and paste the official's name into its internal directory and scroll through the returned information to clarify if the official is below the level of Deputy Director or not. It stated that this took just under two seconds per search. However for other columns such as column H where it would need to read the text in the individual cells to see whether the names of officials are present it estimated such a visual check to take five seconds per cell. Over the 13 columns it estimated that it would take 25 hours.
27. The DfE went on to say that the difficulty in isolating exempt information from non-exempt information will be time and expertise needed. In

terms of time it argued that there are thousands of cells of information within the register. It would need to ensure that any information provided is properly considered and protected where appropriate and it stated again that it was of the view that a 'good deal' of information would be caught by sections 35 and 43. With regards to expertise, it stated that while some officials might remain in the existing teams, others who worked on the areas highlighted within the register will have moved to other teams and some will have left the DfE. It would have to spend time identifying the right people to consider the information presented in the specific cells.

28. It confirmed that whilst there is one register, which is managed by the Knowledge and Information Management (KIM) team, there is still a vast number of officials and teams represented within it. It said that the contents of the information held on the register relate to over 350 individual teams within the DfE each of whom have responsibility for their own pieces of information within the register. The KIM team does not and is not expected to have full knowledge of the possible sensitivity of the information held within the register. As a result it would have to contact representatives from all 350+ teams across the DfE (who in turn would have to spend time identifying the right person to deal with it) to consult them and establish an opinion as to what should be exempt. It went on further to say that given that colleagues move across teams as well as out of the DfE entirely, this in itself would be likely to require further discussions within teams as to whether their information is sensitive and should be withheld under an appropriate exemption.
29. The DfE stated that it has estimated that it would take in excess of 25 hours to consider the application of section 40. To consider section 35 and 43 and redact the necessary information it would take many more hours and this would be a clear and significant burden on the DfE and one that would not be in the public interest.
30. With regards to the application of section 35 and 43, the Commissioner wrote back to the DfE and requested that it provides further evidence to demonstrate that the examples provided (or others) would be potentially exempt information. She reminded the DfE (as outlined in paragraph 21 above) that it is required to substantiate and demonstrate that the requested information contains potentially exempt information for section 14 to apply based on cost and burden.
31. The DfE responded highlighting specific cells within the register and explaining why it considers the exemptions apply. As the submissions discuss the withheld information itself, the Commissioner has decided to use a confidential annex to analyse these submissions and explain her decision. For obvious reasons this annex cannot be shared with the complainant or the public; it can only be shared with the DfE.

*The Commissioner's decision*

32. The Commissioner is satisfied that the complainant has asked for a substantial volume of information. As the DfE has said, the register contains 1300 lines, 25 columns and a total of 32,000 cells. She is also satisfied that *if* the DfE can substantiate that it contains potentially exempt information, that such information will be scattered throughout the register i.e. there is no easier way of isolating this other than reviewing each and every line. This is however with the exception of a good proportion of the personal data included in the register. The Commissioner notes that there are specified columns in the register for the majority of personal data to be recorded. The complainant has confirmed that he is happy for all personal data (whether senior or below) to be removed. For these specified columns, they can simply be removed. This cannot however be said for the small amount of personal data that is scattered throughout the remainder of the register.
33. She will now consider if the withheld information contains potentially exempt information and consider the DfE's application of sections 35 and 43 first. The Commissioner will then go on to consider section 40(2).
34. The Commissioner is of the opinion that considering section 14(1) should only be applied on this basis in the most exceptional of cases, the public authority must be able to substantiate that the withheld information contains potentially exempt information. The Commissioner considers the most effective way of doing this is to provide specific examples of exempt information.
35. She has considered the examples provided by the DfE in relation to section 35 and 43 and has decided that they do not sufficiently demonstrate that these exemptions would apply and therefore the withheld information contains potentially exempt information. The confidential annex addresses each example and why the Commissioner has reached this view. As stated previously, it is not possible to include this information in the main body of this notice. To do so would be disclose some of the withheld information.
36. The DfE provided a further five examples of what it regarded as potentially exempt information. It again used these to highlight that it is the process of investigation, the volume of information and the potential engagement of numerous teams across the DfE that is the issue.
37. Again the Commissioner is not satisfied that these examples demonstrate that the withheld information contains potentially exempt information. She also notes for these five examples no actual exemption(s) has been claimed.

38. This therefore leaves section 40(2) and whether this is enough to warrant the application of section 14(1) of the FOIA on the basis of grossly oppressive burden.
39. As said previously, the complainant is satisfied to have all personal data removed regardless of seniority. This therefore eliminates the need to check each individual official to establish their level of seniority before determining whether their name should be redacted or not. A good proportion of the personal data is also contained in specified columns (those specifically included to record the asset holder, the relevant contact or official responsibility for it) in the register which could easily be removed.
40. The Commissioner does not consider that it would place a grossly oppressive burden on the DfE to go through the remaining columns to redact the personal data.
41. The DfE provided an estimate of 25 hours to investigate and remove the personal data not suitable for disclosure. As much can be removed because it is contained in specified columns, it will clearly take less than 25 hours to consider the remaining cells in the register. There is also no need to review the seniority of those names left, as the complainant is satisfied for all personal data to be removed.
42. Taking the request as worded (and to therefore include personal data and what would be involved in redacting it), the Commissioner does not consider 25 hours to be a grossly oppressive burden. The cost limit for section 12 of the FOIA for the DfE is 24 hours. This is considered a reasonable cut off point for what constitutes a reasonable request in terms of cost and what does not (the cost of determining if the information is held, locating, retrieving and extracting the information; not the cost of redaction or the consideration of exemptions). An additional hour is not grossly oppressive in terms of burden.
43. For the above reasons the Commissioner is not satisfied that the DfE has demonstrated in this case that section 14(1) of the FOIA applies.



## Right of appeal

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44. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. 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**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**