

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 April 2020

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

Decision (including any steps ordered)

1. The complainant has requested a list of schools and trusts receiving loans or grants from the Education and Skills Funding Agency (ESFA) along with the amount of any financial assistance and terms of any repayment. The request was refused under section 36(2)(c) of the FOIA.
2. The Commissioner's decision is that the public authority has correctly applied the section 36(2)(c) exemption and that the public interest favours maintaining the exemption and withholding the requested information.

Request and response

3. The Education and Skills Funding Agency (ESFA) is an executive agency of the government that is sponsored by the Department for Education (DfE). ESFA went on to correspond with the complainant but, in the circumstances, the Commissioner is satisfied that the complainant's correspondence was, in effect, with the DfE.
4. On 8 April 2019 the complainant made a request to the ESFA in the following terms:

"I should be grateful if you could give me the details of academy trusts receiving advances to enable them to achieve financial stability in financial year 2018/19:

1 Total amount

2 Names of trusts receiving these loans

3 Amount of each loan

4 Conditions of repayment (eg repayment deadline, interest)

I should be grateful if you could let me have details of non-repayable grants to academy trusts to stabilise their finances in the financial year 2018/19:

1 Total amount

2 Names of trusts

3 Amounts which each trust received"

5. The ESFA responded on 9 May 2019. It confirmed it held the requested information about trusts in receipt of loans and grants but considered the information should be withheld under section 36(2)(c) of the FOIA.
6. The complainant asked for an internal review of this decision on 10 May 2019. The complainant stated that the ESFA had published details of loans provided to academy trusts in 2016/17 and again in 2017/18 and therefore there was a precedent for releasing this information.
7. The ESFA conducted an internal review and responded on 29 May 2019. It maintained its original position and stated that historical release of the information is not a factor as requests are considered in the circumstances at the time they are made. The ESFA went on to explain that Financial Notices to Improve are available to the public and provide transparency where trusts are under formal intervention about the work the ESFA is engaged in with them.

Scope of the case

8. The complainant contacted the Commissioner on 30 May 2019 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld information within the scope of the request on the basis of section 36(2)(c) of the FOIA.

Reasons for decision

Section 36 – otherwise prejudice the conduct of public affairs

10. Section 36 of the FOIA states that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the FOIA -

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

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

11. In this case the DfE is relying on subsection (c) and has applied the exemption to all the information captured by the request. The inclusion of the words "otherwise prejudice" in this subsection means that it cannot be applied to a prejudice that would be covered by another exemption. In line with the Commissioner's guidance, prejudice to the effective conduct of public affairs refers to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose.

12. As background to the request the DfE has explained the financial performance and stability of academies and academy trusts is a key enabler of the DfE's prime objective – the education of young people. Poor financial health of academies or their trusts will lead to a reduced ability to produce this outcome. When a deficit arises academy trusts must be in a position to know at an early point in the financial cycle and have options available to allow the trust to return to balance and have recovery plans to get back on track. Late notification of a deficit may lead to emergency recovery actions detrimental to the prime objective.

13. The academies financial handbook (AFH) requires trusts to produce a three-year budget and to balance for the current year. In some cases trusts may strategically choose to set a deficit if they have reserves in order to invest in specific improvement needs. However, where there is a risk of a cumulative deficit or sustained deficits a plan must be developed to get the academy back on a financially sustainable basis.

14. Academy trusts with such deficits are subject to ESFA intervention and the extent of the intervention will depend on how robust the deficit recovery plan is. The DfE will in very specific instances provide deficit recovery funding and this can take several forms.

15. In some cases if trusts are unable to show sufficient progress then further ESFA intervention may be necessary and can lead to the issuing

of a Financial Notice to Improve (FNtI). A FNtI will state the proposed deficit funding the trust will receive and the broader underlying financial and governance concerns the trust needs to address. FNtI's are published online¹.

16. On the issue of transparency; as well as FNtI's, trusts that have deficit funding should also list the amount within their liabilities in their annual accounts which are available on their websites and published at Companies House.
17. The Commissioner understands the DfE is concerned that disclosing the requested information would have the potential to prejudice its engagement with trusts on the issue of deficits and financial stability as well as the ongoing working relationship with trusts by undermining the safe space the DfE has with them to discuss sensitive issues and work towards recovery.
18. The DfE points out that the information in scope does not take into account the reasons why the trusts listed have required funding from the DfE and the reasons for this are numerous and well-considered. Added to this is the fact the information requested is very recent and will include information on some trusts that are still working towards recovery whilst other trusts may be in the opposite situation and be in a much better financial position now than at the time funding was provided.
19. All of this increases the likelihood that disclosure would have a prejudicial impact on the DfE's relationship with the trusts it works with as disclosure of the requested information will lead to assumptions being made about the position of the trusts when there are a variety of reasons for deficit funding.
20. In addition to this the DfE has stated that financial recovery is often linked to increasing pupil numbers and there is a potential that disclosure of deficit funding information for the current or recent years could lead to a trust's recovery stalling as parents become concerned (whether rightly or wrongly) and send their child to other schools and trusts. Releasing the names of the trusts and the amount of funding they have received will draw public attention to those cases leading to pressure being placed on trusts or the ESFA by interested parties such as parents. This may lead to pressure to resolve issues quickly or take an approach that might not be the best value for money or have the

¹ <https://www.gov.uk/government/collections/academies-financial-notices-to-improve>

best outcome for pupils; all of which then impacts on the DfE's ability to achieve its core aims.

21. The Commissioner accepts that these are matters not addressed by other exemptions and that therefore section 36(2)(c) is the appropriate exemption to apply.
22. Section 36 is unique in that its application depends on the opinion of the qualified person that the inhibition envisaged would, or would be likely to occur. In determining whether the exemption was correctly engaged by the DfE, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
 - Ascertain who the qualified person is,
 - Establish that they gave an opinion,
 - Ascertain when the opinion was given, and
 - Consider whether the opinion was reasonable.
23. For government departments any Minister can act as the qualified person. The DfE has provided the Commissioner with a copy of a submission made to one of its Ministers, Lord Agnew, the Under Secretary of State for the School System. That submission included a brief background to the circumstances and the DfE's grounds for considering disclosure of the information would be prejudicial.
24. The DfE has also provided the Commissioner with a copy of a signed response from the Minister stating that in his opinion, disclosing the information would be likely to have the alleged prejudice to the conduct of public affairs. That opinion was given on 7 May 2019.
25. When considering whether the opinion was reasonable the Commissioner has followed the approach set out in her guidance. The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is: "in accordance with reason; not irrational or absurd". If the opinion is in accordance with reason and not irrational or absurd then it is reasonable.
26. This is not to say that it is the only reasonable opinion that could be held on the subject. 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.

27. Applying this to the Minister's opinion, the Commissioner recognises that he was provided with the material he would have needed to make an informed decision as to the potential consequences of disclosing the report.
28. In light of this the Commissioner is satisfied that the Minister's opinion is certainly not an unreasonable one to hold. The Commissioner finds the exemption is engaged.

Public interest arguments in favour of disclosure

29. The DfE recognises the public interest in promoting transparency in government departments and, in this case, which trusts within the sector the DfE has provided with public funding in the form of deficit funding.
30. The DfE also acknowledges that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate and improved confidence in the work of the department and the accountability of academy trusts when it comes to management of public funds. The DfE accepts there is a public interest in publishing where it has provided deficit funding to trusts to demonstrate that trusts are accountable to the public for managing their funding and providing value for money. Parents will want to make informed decisions about whether to send their child to a particular school and there is a public interest in knowing whether a trust requires deficit funding.
31. The complainant argues that the DfE used to provide this information so could see no reason why it should now be withheld. The complainant also did not consider the published FNTI provided the detail she was seeking and nor did annual accounts that do not necessarily state if a trust is receiving a loan or grant. The DfE has countered this argument by stating it has previously provided deficit funding data when requested but only when the information is historic, reflected in the trust's published accounts and the risks that might come from disclosure are no longer of concern.

Public interest arguments in favour of maintaining the exemption

32. The DfE states it is committed to ensuring the best value for money is achieved in delivering its key policies, including the delivery of the academies programme. Given that funding to the sector is limited and finite, it is essential the DfE can quickly and robustly work with and, where necessary, challenge trusts where funding deficits are identified.

33. Presenting the deficit funding provided to these trusts could potentially sour the DfE's relationships and discussions with those trusts or with others the DfE works with or engages with. This could result in objective and managed discussions with trusts about resolving deficit positions becoming a perceived 'naming and shaming' exercise in the public domain.
34. The DfE argues if it was to release this information, trusts could be the focus of unnecessary, and at times unwarranted, interest from the press and/or parents of existing or prospective students, who will in turn challenge them on the financial position outlined in the withheld information, thus placing unnecessary pressure on trusts to explain what may be a historic and/or unresolved financial issues.
35. The DfE also points out that the start of a trust's recovery is a pivotal period and it is key that the local community remains on side to ensure attendance does not drop, leading to increased financial problems. Publishing the data has the potential to bring undue attention to the school's financial difficulties and potentially turn parents away from what may otherwise be an improving school, hampering recovery further. Additionally it may make it more difficult for schools to recruit staff, diluting the quality of teaching and education in the trusts identified.
36. The DfE is also concerned that disclosing and categorising trusts in this way could sour relations between the DfE and senior leaders within the trusts who believe they were engaging with the DfE in confidence. Any reduction of trust would be likely to inhibit further discussions.
37. Further to all of this; the DfE has again pointed out there are a number of mechanisms already in place to allow for transparency around deficits and financial aid such as the publication of FNtI and annual accounts.

Balance of the public interest

38. It is important to remember that a disclosure under the FOIA is considered to be a disclosure to the world at large. Therefore the public interest test will take account of the value in placing the withheld information in the public domain and balance that against any harm that would result from doing so.
39. The Commissioner considers there is clearly a wider public interest in disclosing information which demonstrates whether public money has been spent effectively and trusts are financially performing effectively.
40. Education is a very important area of government policy. Therefore there is a public interest in releasing information on the effectiveness of the steps that the DfE can take to assist trusts and in releasing information which shows how well trusts have managed their finances

and can continue to function and provide education to local communities.

41. When determining whether the exemption is engaged the Commissioner is only required to consider whether the qualified person's opinion is reasonable. It is not necessary for her to agree with that opinion. However having found that the opinion is reasonable, that opinion will give weight to the arguments that disclosing the information would have a prejudicial effect. In looking at the public interest in favour of maintaining the exemption the Commissioner will consider the severity, extent and frequency of that prejudice.
42. The DfE has indicated that the discussions it has with trusts around deficit funding are undertaken with an expectation of confidentiality. As the DfE points out, the grants or loans provided to trusts seeking deficit funding are often an initial step in getting a trust on a road to recovery and disrupting that process at an early stage is likely to have a detrimental impact on the trust's ability to achieve financial stability or recovery by drawing undue attention and have the consequential impact of affecting pupil numbers and staff recruitment.
43. The Commissioner is prepared to accept that the trusts and schools would not have expected the receipt of funding to be placed in the public domain, even though there is an increasing expectation that trusts should be held accountable for their spending. In light of this, the Commissioner recognises that disclosing the information would erode the trust between the DfE and the schools and trusts it has been or will be in discussions with.
44. It is important that the DfE is able to have discussions with trusts about their financial position in an open and honest manner in order to provide the most appropriate assistance and ensure they are able to continue to operate effectively.
45. DfE has also argued that disclosing the information would erode the safe space required for it to work, to deliberate issues and to consider the next steps that need to be taken. Whilst at the time of the request discussions had already taken place and deficit funding granted, this is not the end of the discussions and the DfE's action as there may be further steps taken if things do not improve. The DfE therefore needs to maintain a working relationship with the trusts to whom deficit funding has been given and the Commissioner therefore considers there is still a need for a safe space and weight must be attributed to this argument.
46. In balancing the competing public interest factors for disclosure against those in favour of withholding the report the Commissioner has given weight to the public interest in allowing the local community and parents

to better understand whether trusts and schools in the area are receiving deficit funding to make informed decisions about where pupils can receive the best education. As well as this is the public interest in openness and transparency and understanding how public money is being spent.

47. However, there is a weighty public interest in preserving the ability of the DfE to be able to discuss with trusts what funding they require and to be open and frank about any financial issues which may arise. This is particularly weighty as this involves the spending of public money. To disclose the requested information would undermine the DfE's ability to engage with trusts and to aid them in recovery which is ultimately the goal to ensure that local communities have trusts and schools able to operate to the best of their ability in providing high quality education.
48. The consequence of disclosing this information would therefore undermine the DfE's core business of improving educational standards and ensuring public money is spent wisely when pursuing that objective.
49. In light of the above the Commissioner finds that the public interest in maintaining the exemption outweighs the public interest in disclosure. The DfE is entitled to rely on section 36(2)(c) to withhold the requested information. The Commissioner does not require the DfE to take any further action in this matter.

Right of appeal

50. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

51. 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.
52. 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

Jill Hulley
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