

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 31 July 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Education (DfE) incorrectly applied section 36(2)(c) of FOIA (prejudice to the conduct of public affairs) to the withheld local authority level information about appeals to the Secretary of State about Education and Health Care plans. However, the information is exempt under section 40(2) of FOIA as it can be categorised as personal data and disclosing this information would be unlawful.
2. It's not necessary for DfE to take any corrective steps.

Background and context

3. DfE has provided the following background and context. The request in this case concerns disputes between local authorities (LAs) and academies, specifically how many academies have appealed to the Secretary of State (SoS) after being named in an Education and Health Care (EHC) plan, and the outcomes of those requests [for an SoS direction].
4. Requests for an SoS direction about naming a school in an EHC plan can be received from either schools or LAs.
5. Requests for SoS involvement in such disputes are relatively rare, and only occur when localised processes haven't offered a solution fit for

both parties, ie the academy and the LA. Due to this, the number of requests the department receives are particularly low.

6. When such requests for SoS involvement are made, DfE will consider whether the LA has acted unreasonably in exercising its functions under the Children and Families 2014 Act and/or discharged its duties under the 2014 Act.
7. Although the number of instances is low, these disputes have a significant impact on individual children, young people, and their families. The potential outcome of an SoS direction is to direct an academy to admit the child or young person to the academy or not to direct an academy to admit that child or young person. Either way, the impact on the individuals and the child or young person in question is significant. Therefore, DfE says, any information about this subject matter, where individuals may also be identifiable, should be treated with the upmost sensitivity.

Request and response

8. The complainant had made the following information request to DfE on 1 November 2023:

“...I'd like to follow up on an FOI request response that I have received, reference 2023-0022186. The response states that the data is held centrally for academies. In that case please can I request that data for the following just for academies: 1. Since 2019, by year, a list of schools (including their URN) that have appealed to the secretary of state over being named in an education, health and care plan and the outcome of the appeal.”
9. DfE refused that request (its reference 2023-0027042) citing section 36(2)(c) of FOIA.
10. On 10 November 2023, the complainant submitted the following request to DfE:

“Thank you for the response on 2023-0027042. Please can I request a local authority breakdown of the figures for each year please?”
11. In its response to this request, of 24 January 2024, DfE provided anonymised local authority information, refusing to provide the local authority names under section 36(2)(c) of FOIA. At internal review DfE also applied section 40(2) of FOIA to the information it's withholding.

12. Regarding the information DfE disclosed, the table headings under which DfE provided figures for the years 2019 to 2022 and 1 January to 25 September 2023 are:
- 'Not minded to direct,' which is where the LA hasn't adhered to the Children and Families Act 2014 or has acted unreasonably
 - 'Minded to direct,' which occurs where the SoS's view is that the LA has followed the correct procedure in naming an academy within an EHC plan and that the naming of the academy is reasonable
 - 'Withdrawal,' which is when either the LA or the academy withdraws from the process. This can occur where a parent or carer decides they no longer want to pursue a place at an academy or when an academy takes the child on roll prior to an SoS direction
 - 'Referred to LA,' which occurs where the SoS has been asked to provide direction prior to an EHC plan being finalised. The SoS isn't in a position to provide a direction until the final plan has been issued
 - 'No decision' and, for 2023, 'Live case'
13. DfE didn't name any LA, but in each table assigned a number to each LA.

Reasons for decision

14. This reasoning covers DfE's application of sections 36(2)(c) or 40(2) of FOIA, or both, to the information it's withholding.

Section 36 – prejudice the effective conduct of public affairs

15. Under section 36(2)(c) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
16. Section 36(4) says that, in relation to statistical information, section 36(2) shall have effect with the omission of the words "in the reasonable opinion of a qualified person."
17. DfE has disclosed tables that list anonymised "local authorities and the outcomes, by year, that academies have requested a direction from the

Secretary of State following being named in an Education Health and Care plan.” The figures have been disclosed and the information that’s being withheld is the names of the local authorities. The Commissioner doesn’t consider that the local authorities’ names can be categorised as statistical information. As such, he’s taken account of the qualified person’s opinion.

18. The qualified person (QP) in this case was David Johnston OBE, former Parliamentary Under Secretary of State for DfE. The Commissioner is satisfied that this individual was authorised as the QP under section 36(5)(a) of FOIA.
19. DfE has provided the Commissioner with a copy of its submission to the QP about the request. This shows that the QP gave their opinion on 18 December 2023. From the submission the Commissioner accepts that the QP gave their opinion that the exemption was engaged, and that they gave their opinion at an appropriate time ie in advance of DfE’s response to the request on 24 January 2024.
20. The QP was provided with a copy of the request, the background and context, an explanation of the section 36(2)(c) exemption, arguments for why the exemption was engaged, and counter arguments.
21. The QP was advised that disclosing the withheld information could otherwise prejudice the effective conduct of public affairs in the following ways:
 - Disclosing the local authority names risked individuals being identified. Staff in academies and LA officers would have had input into creating each individual EHC plan and the process of attempting to place the child in an educational setting. Parents would also know the outcome of the SoS decision. Where there’s a withdrawn outcome, it’s likely that the school the child eventually attended will also know that they had an unsuccessful appeal to the SoS. That’s because this may form part of the fresh consultation period that has to be undertaken with the new school.
 - Within the data set there are occasions where DfE has considered small numbers of complaints for specific LAs. As the numbers of complaints are low, parents, staff in academies and LA officers would be able to identify the children and academies involved if DfE were to make the information available.
 - Releasing the names of the LAs may affect DfE’s ability to consider requests for SoS direction on naming a school in an EHC plan. Academies would be able to self-identify themselves from the information released and be unwilling to engage with the

department or provide the level and breadth of information necessary for effective decision making to place.

- Disclosure may undermine public confidence in that LA and highlight failings if it's viewed as not following processes in line with legislation.
 - Many of the requests DfE receives from academies are submitted from legal firms acting on behalf of the academy. Therefore, there was a risk that releasing the information may result in legal challenge from the academies. This risk was based on the assumption that academies are willing to use resources to instruct legal representative for individual cases in this area, and therefore there was a risk that DfE's decision to release the information could be challenged.
22. The arguments against disclosure concerned being open and transparent, increasing confidence in the [appeal] process, helping parents to make decisions, highlighting specific LA non-compliance with the Children and Families Act 2014 and raising awareness of the option for academies and LAs to make a direction request to the SoS.
 23. The QP's signed opinion confirms that they considered that disclosing the information would be likely to cause the prejudice envisioned under the exemption, rather than "would" cause this prejudice.
 24. The Commissioner will accept that the lower level is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring
 25. In their complaint to the Commissioner the complainant says they don't understand why it would be prejudicial to disclose the information they've requested. They say that other information about local authority appeals gets published such as levels of first-tier tribunal EHC plan complaints against councils. (The Commissioner has reviewed the First-tier Tribunal (Special Educational Needs and Disability) website¹ and hasn't been able to find information of the type that the complainant has described from a proportionate search of that site.)
 26. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the

¹ <https://www.gov.uk/courts-tribunals/first-tier-tribunal-special-educational-needs-and-disability>

opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.

27. The Commissioner considers that the QP had sufficient information to enable them to make a decision on the matter, in this case. Based on the submission to the QP, the Commissioner accepts that the QP's opinion about withholding the information under section 36(2)(c) of FOIA was a reasonable one.
28. The Commissioner accepts that disclosing the information would be likely to lead to LAs being less willing to engage with DfE openly, making disputes more difficult to resolve. It could also undermine public confidence in particular LAs viewed as not having discharged their functions appropriately. In addition, disclosure could lead to individuals being identified (although section 40(2) of FOIA covers that eventuality) and lead to legal challenges from academies who provided the data behind the disclosed information. DfE was therefore entitled to apply section 36(2)(c) to the redacted information. The Commissioner has gone on to consider the public interest test associated with this exemption.

Public interest test

29. In their complaint to the Commissioner, the complainant has noted that the academies' appeals about taking pupils with an EHC plan are little known about in the sector. They say that DfE doesn't publish figures on how many requests it has had, nor the outcomes. A lack of transparency risks the public not understanding how these decisions are made in their local authority area.
30. DfE has provided a national breakdown, the complainant says, and they had only asked for local authority-level at this stage to understand whereabouts in the country these appeal requests and directions were being made; there's currently no information in the public domain about that. They argue that the information should be made public, in order to understand how inclusive a school system is.
31. With regard to identifying individuals [which is more relevant to section 40] the complainant says that they recognise that naming an academy trust (if that trust has more than one school in a local area, or if it's a small trust) could lead to someone being identified. But they don't understand how that could be the case at a local authority level where there are many children.

32. In its submission to the Commissioner, DfE has recognised that disclosing the information would promote transparency and, in this instance, transparency about the outcomes of EHC plan disputes concerning named LAs.
33. DfE says it's also taken into account that considerations for disclosure add up to an argument 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 the department undertakes to resolve such disputes between LAs and academies.
34. Disclosure could possibly increase transparency and raise awareness of the option available to both academies and LAs to make a direction request to the SoS. SoS directions are not often requested and by providing the information it may encourage more LAs and academies to seek SoS direction if required.
35. DfE has provided the following arguments against disclosure:
 - It's committed to ensuring that the best outcomes and education provision is provided to all children, including those with an EHC plan. Where academies and LAs can't agree on the placement of a child with such a plan, and they have exhausted all local processes to resolve this, it's essential that all parties concerned can fully engage, within a 'safe space,' to ensure that the best solution is found for the child in question.
 - Ultimately, disclosing the requested information has the potential to prejudice DfE's engagement with the sector. It would turn the matter into a potentially emotive discussion undertaken in the public domain. This would taint DfE's relations with the LAs, individuals and the schools involved, with whom it's trying to work closely to resolve such placement issues.
 - If DfE can't work effectively with trusts, their academies and the LAs involved this could prolong the time taken for placement issues to be resolved. This would lead to the children involved being without a secured placement. They would therefore be out of a suitable education setting, and out of education longer than necessary, which can't be in the public interest.
 - DfE has also discussed the risk of individuals involved being identified if the information were disclosed. This level of individual exposure would be likely to deter individuals, professionals and otherwise, from fully engaging in the process. This would potentially delay the resolution process and prevent a child finding a suitable placement as quickly and effectively as possible. To

unnecessarily prolong the process, and potentially extend the time in which a child isn't in an appropriate educational setting, wouldn't be in the public interest, nor in the interest of anyone concerned, particularly the child and their family/carers.

- DfE's role in these engagements is to support schools to fulfil their legislative duties. DfE publicises information about the role of the School Complaints Compliance Unit (SCCU) in its Best Practice Advice for Academies. But it doesn't publish any outcome information, nor does it comment publicly on its findings, or instances where its involvement, up to and including intervention, has been appropriate. This is due to the arguments and reasoning set-out above and, importantly, the risk of individuals concerned being identified.
- The SCCU only shares information externally with complainants, schools (when it relates to themselves) and, when appropriate for the exercise of their statutory functions, LAs, and Ofsted. Responding to this request may therefore prejudice the handling of these and future issues if the detailed information was shared more widely.
- To do so may adversely affect DfE's ability to consider requests for an SoS direction regarding the naming of a school in an EHC plan. This is because the relevant parties may be unwilling to fully engage with the department or provide the level and breadth of information necessary for effective decision making to take place, for fear of being identified and the associated public exposure.
- DfE says it's worth noting that requests for an SoS direction regarding the naming of a school in an EHC plan can be received from either schools or LAs. LAs would be likely to be unwilling to engage candidly and constructively with DfE or provide the level and breadth of information necessary. This is because disclosure may also cause reputational damage to, and reduce public confidence in, an LA. It would clearly not be in the public interest to reduce public confidence in LAs unnecessarily and/or to deter LAs from working closely with DfE to resolve issues around placements.
- Releasing this information may also directly impair DfE's ability to ensure that schools adhere to legislative requirements in this area. This is because academies would be less likely to work with DfE fully and openly, meaning DfE would be less likely to be able to ascertain whether the schools are indeed meeting their legislative obligations. This would not be in the interest of the school, the LA, DfE or, most significantly, any pupils and their parents where any

schools not meeting their requirements will have a direct, and negative impact on the placement and education of these children.

- DfE says it's also concerned that disclosing the information could be used to create an unofficial league table of LAs seeking intervention from the DfE. Such tables are likely to be perceived negatively, and out of context. This would be likely to deter LAs from engaging with the DfE, and damage relationships between the DfE and stakeholders. In turn, this would potentially lead to reputational damage to LAs and schools involved, and lead to LAs and schools changing behaviour in utilising the process.
 - Finally, DfE says it's of the utmost importance that it can find the best solutions for all involved in such disputes, particularly the children with EHC plans. DfE considers that this is of significantly greater public interest than the releasing a range of figures associated, without context, to specific LAs.
36. The Commissioner has found that disclosing the information being withheld under section 36(2)(c) would be likely to otherwise prejudice the effective conduct of public affairs.
37. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition. In this case, he has taken account of the concerns DfE has about individuals being identified, and potential legal challenges, but he has focussed on the remaining concerns that DfE has identified.
38. The QP in this case was the Parliamentary Under Secretary of State for DfE; as such they had the requisite knowledge of how DfE works and the consequences of any disclosure. Their opinion that the envisioned prejudice would be likely to happen therefore carries weight, though less than if they'd considered the prejudice would happen.
39. The Commissioner has next considered the timing of the request. In respect of section 36(2)(c), the envisioned prejudice that the Commissioner is considering is associated with ongoing and future concerns: DfE's relationship with LAs, trusts and schools, future disputes being frustrated, reputational damage to LAs and schools.
40. The Commissioner has also considered the severity, extent and frequency of the envisioned prejudice or inhibition.

41. Regarding severity, the consequences of the above concerns being realised could be serious, for LAs and schools but also for children and their families and carers, for the reasons DfE has explained.
42. Finally, regarding the extent and frequency, as noted, disputes and appeals about EHC plans are very likely to happen in the future albeit, as DfE has noted, they're rare.
43. However, DfE's arguments assume that all the parties only engage in the Direction process because it's a confidential process. The Commissioner doesn't consider that to be a reasonable assumption. Academies will engage because they need to protect their own interests; either through not admitting a child they can't offer a suitable education for, or in ensuring that a child they think they can educate is admitted and brings with them their elevated per-pupil funding allowance.
44. On the other side of the equation, the LA has a duty to find a suitable place for every child. If it's confident in the place it has chosen, it seems unlikely that it would seek to plead "no contest" to an appeal by an academy, simply to avoid exposure – that would require it to find alternative arrangements for the pupil. Equally, if the LA thinks the placement is unsuitable it's difficult to believe that a LA would rather place a vulnerable child at an unsuitable institution, merely to avoid being seen to have contested it.
45. It's the case that the complainant or others may use the data to create league tables. However, if particular LAs have high appeal numbers, there's a public interest in understanding why that is. Equally, if the numbers are low, there could be a public interest here too – does the LA have better relationships or is it failing to challenge unsuitable placements?
46. It may also be the case that the more concerned the parties are about transparency, the more incentive they may have to resolve the matter themselves, reducing the likelihood of the matter needing to be referred to the SoS.
47. The Commissioner has balanced the harms DfE envisions from disclosing the information with the above factors for disclosure, including the factors provided by the complainant. He doesn't find DfE's arguments to be compelling and considers that, on balance, there's greater public interest in there being more transparency about the volume of appeals in local authority areas and the appeal decisions being made. The Commissioner therefore finds, on balance, that the public interest favours disclosing the information.

48. To summarise, the Commissioner has found that the withheld information engages the exemption under section 36(2)(c) of FOIA but that the public interest favours disclosing the information. He's therefore gone on to consider DfE's application of section 40(2) to the same information.

Section 40 – personal data

49. Under section 40(2) information is exempt information if it's the personal data of another individual and disclosure would contravene one of the data protection principles. The most relevant principle is under Article 5(1)(a) of the UK General Data Protection Regulation (UK GDPR). This states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”

50. The Commissioner has first considered whether the information being withheld in this case can be categorised as personal data.
51. Personal data is defined as information that relates to a living individual and from which they can be identified. The information in question here is the names of LAs that have appealed to the SoS after being named in a child or young person's EHC plan, and the outcomes of those appeals for an SoS direction.
52. In their complaint to the Commissioner, the complainant said that they understood why section 40 could be applied to the name of an academy trust (which they'd requested from DfE originally) but they didn't understand how data at a local authority level, which would involve many children, could lead to a specific child being identified.
53. In its submission to the Commissioner, DfE said that the risk of individuals being identified was real, if the names of the LAs were disclosed. This was because, it said, staff in academies alongside LA officers will have had input into creating each individual EHC plan, and the process of attempting to place the child in an educational setting. The parents will also know the outcome of the SoS decision, even though DfE doesn't have contact with them directly through this process. Where there's a withdrawn outcome, DfE said it's highly likely that the school that the child eventually attended will also know that they had an unsuccessful appeal to the SoS. This is because it may form part of the fresh consultation period that has to be undertaken with the new school.
54. DfE went on to say that within the dataset there are frequent occasions where it has considered small numbers of complaints for specific LAs. As

the numbers of complaints are low, parents, staff in academies and local authority officers will be able to identify the children and academies involved if DfE were to make the information available. DfE says this is also the case with "the wider public," if they combined the names "with information they may already have in their possession."

55. DfE referred to the table for one of the years that's in scope of the request - 2023. In this table, DfE said, all bar two of the LAs listed have only a single case that was under consideration. Combined with other information or knowledge possessed by the complainant or another person, such as those involved in attempting to place the child in an educational setting, or the wider general public, DfE said it would be possible to identify an individual child, or the child's family, or both, if the information was released. For example, if the complainant [or another person] had information about a named child having a case referred in 2023 in relation to a specific LA, releasing a single figure linked to that LA would confirm this.
56. The complainant has said that they accept that section 40(2) could be applied to the names of academies – ie that specific individuals could be identified from this information. LAs of course cover a large area but most of the 'Total' numbers involved are very small and the majority are '1'.
57. Where the 'Total' figure is '1' the Commissioner accepts that naming the LAs associated with this number could lead to specific individuals being identified. This is because combining the confirmation that a certain LA received one referral with information that may already be known, for example by those in the relevant educational setting, or by family or neighbours, would identify a specific individual. Disclosing the figure '1' in combination with remaining information that's been disclosed would also confirm the outcome of the referral for that individual.
58. In the circumstances of this case, the Commissioner is satisfied that the majority of the withheld information – the names of local authority areas where the 'Total' number of appeals is '1' - could be used to identify specific individuals – the 'data subjects.'
59. The Commissioner is also satisfied that that information relates to the data subjects because it concerns their schooling.
60. Therefore, in the instances where the disclosed 'Total' figure is '1' although the withheld information is the names of LAs, these names therefore fall within the definition of 'personal data' in section 3(2) of the DPA.

61. However, in some instances the 'Total' number of appeals against certain LAs is more than '1'. It was less clear to the Commissioner how specific individuals could be identified if the names of these LA were disclosed. He asked DfE for more explanation about that and to explain what it had meant by "the wider public" in its submission.
62. In a further submission on 24 July 2024, DfE referred back to its original submission (paragraphs 53 and 54 of this notice). It said that these paragraphs still apply where the figures are low, although the risk decreases as the figure rises. DfE says that if a parent saw those figures, they would be able to self-identify where they sit on the table, as would the LA officers and staff in academies. When the data is broken down by year, the highest number of complaints for a specific LA is '5'. Therefore, DfE said, it continues to believe it may be possible for individuals to be identified when the totals are low ie '5' and less.
63. Regarding "wider public," DfE explained that when an EHC plan is finalised, the school has a duty to admit the pupil. This is irrespective of whether the school challenges the placement with the SoS. The pupil's personal details will be shared with staff at the school to place the child on roll and arrange the appropriate provision set out in the EHC plan. Therefore, staff at the school named in the plan will have sight of the pupil's information and the detail set out within the EHC plan.
64. DfE goes on to say that an EHC plan is a legally binding document which requires input from many professionals within the sector including Speech and Language Therapy, Child and Adolescent Mental Health, Early Years SEN Team, Occupational Therapy, Physiotherapy Early Years Teams, Community Paediatrics, Educational Psychology, Sensory Teams, Social Services, Integrated Behaviour Support Service and many more dependent on the child's needs. These individuals may be aware that there has been difficulty with the school accepting the child once [the school is] named in the EHC plan and they may be able to identify the child through the combination of this information and the release of the figures. DfE considers releasing this information into the public domain remains a significant risk to the identification of the pupils involved.
65. On the basis of DfE's further explanation, the Commissioner accepts that in instances where the 'Total' figure is more than '1', naming the LAs could also lead to specific individuals being identified. This is because numbers between '2' and '5' are still very small. Again, combining the confirmation that a certain LA received referrals, with information that may already be known, for example by those in the relevant educational setting, or by family, carries with it a credible risk of specific individuals being identified. Where the 'Total' figure is between '2' and '5' disclosure, in combination with remaining information that's been

disclosed, would also confirm the outcome of the referral for those individuals.

66. Therefore, in those instances the Commissioner considers that these LA names also fall within the definition of 'personal data' in section 3(2) of the DPA.
67. The Commissioner has found that all the withheld information can be categorised as personal data. He's gone on to consider the second element of the test, namely whether disclosing the personal data would contravene any of the data protection principles. This involves considering three 'tests': the legitimate interest test, the necessity test, and the balancing test.
68. Regarding legitimate interest, the complainant has an interest in EHC plan appeals and that's a legitimate interest for them to have. There's also a legitimate interest in a public authority such as DfE demonstrating it's open and transparent.
69. Regarding necessity, to address these interests, it would be necessary to disclose the personal data of the data subjects.
70. Finally, the balancing test; the Commissioner must balance the public interest in disclosing the information against the data subjects' rights and freedoms.
71. As discussed in the section 36 analysis, there is a public interest in disclosing the information. Disclosing it would shed light on which LAs have high appeal numbers or are insufficiently challenging of academies. The complainant has said that there's currently little known about appeals by academies about taking pupils with an EHC plan and there's a public interest in understanding how LAs make these decisions.
72. However, the information concerns individuals – children and young people - in a private capacity and the issues involved are sensitive, because they concern the placing of a child or young person in a suitable education setting. The Commissioner considers that they'd reasonably expect that their personal data wouldn't be disclosed to the world at large under FOIA and so disclosing it would therefore cause those individuals harm or distress.
73. Based on the above factors, the Commissioner considers that there's insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. He considers that the information DfE has disclosed satisfactorily addresses the public interest in transparency. The Commissioner therefore finds that disclosing the withheld information would be unlawful as it would contravene the data protection principle set out under Article 5(1)(a) of the UK GDPR.

Right of appeal

74. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

75. 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.
76. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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