

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2024

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

Decision (including any steps ordered)

1. The complainant has requested details of the local authorities that applied to transfer funds from their schools block funding and the application each one submitted. The above public authority ("the public authority") provided most of the information, but withheld the applications themselves, relying on section 36 of FOIA (prejudice to effective conduct of public affairs) in order to do so.
2. The Commissioner's decision is that only some of the information engages section 36 and, where this is the case, the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose a copy of each submission along with any supporting documents. The public authority should make appropriate redactions to protect personal information.
4. The public authority must take these steps within 30 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

5. On 8 January 2024 the complainant requested information of the following description:

“I would like to request the following information under the Freedom of Information Act:

 1. How many disapplication requests were received from councils to transfer funding from their schools’ block, for 2021-22, 2022-23, 2023-24 and (if available yet) 2024-25.
 2. For a list of the councils who submitted requests
 3. For a list of the councils who got permissions
 4. What they were applying to move
 5. How much they were proposing to move (both per cent and actual sum please)
 6. The full application for each of the councils”
6. On 14 March 2024, the DfE responded. It provided information within the scope of parts 1-5 of the request but relied on section 36 of FOIA to withhold the remainder. It upheld its original position following an internal review.

Background

7. The public authority explained to the Commissioner that the Dedicated Schools Grant (DSG) is a ring-fenced specific grant that it pays to local authorities to support their schools’ budgets. Funding is allocated through four funding blocks: the schools block; the high-needs block; the early years block; and the central school services block. The 2023-24 DSG conditions of grant permit local authorities to transfer 0.50% or below of their schools block funding, subject to consultation with their maintained schools and academies and with the consent of their schools’ forum. Where the schools’ forum does not agree, or the transfer is above 0.50%, the local authority must apply to the Secretary of State to disapply the conditions of grant.
8. Due to escalating costs on high-needs, there are over two thirds of local authorities now with deficit budgets. The local flexibility to transfer funding from schools to high-needs recognises both that the local differences in supply and demand for high-needs provision and drives high-needs costs for local authorities because a placement in a special school costs significantly more than in mainstream or resourced provision.

Reasons for decision

9. Section 36 of FOIA allows a public authority to withhold information if its disclosure would inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, or would otherwise prejudice the effective conduct of public affairs.
10. Where information **is not** statistical, in order to engage the exemption, a very senior person within the public authority, designated as "the qualified person" must provide an opinion stating that disclosure would, or would be likely to, have one or more of the above effects.
11. Where information **is** statistical, the qualified person does not need to provide an opinion, but the public authority must still be able to demonstrate why the harm would occur.

Is the information statistical?

12. The Commissioner has not viewed every application. He simply asked the public authority to provide a sample, so that he could understand the type of information being withheld and the form in which it was presented.
13. Based on the sample, the Commissioner can see that the majority of the information comprises of various tables setting out how each local authority currently allocates its budget. It also shows forecasts demonstrating the effect that a transfer of funds would have.
14. In the Commissioner's view, all this information is statistical. It is a series of facts presented as figures.
15. Some of the applications are accompanied by commentary or supporting documents. The Commissioner accepts that this is not statistical information and he will deal with this separately.
16. In relation to the information that is statistical, the Commissioner is not persuaded that disclosing this information would harm the free and frank provision of advice or the free and frank exchange of views.
17. Facts are not views nor opinions. Nor do facts represent advice. When each local authority provides this information to the public authority it is not attempting to suggest a course of action or a policy idea, but to lay out the appropriate facts before the public authority – which will then consider the matter and reach a decision.

18. Nor does this represent a process of deliberation. Each local authority makes its application and provides the supporting evidence. It is then for the public authority to decide whether to allow flexibility or not.
19. There may be a process of deliberation within the public authority and this is likely to be based on the facts each local authority provides, but this information reveals nothing about what that deliberation actually involves.
20. In respect of any other prejudice that might be caused to the effective conduct of public affairs, the public authority has noted that it needs to maintain a relationship of trust with the various local authorities and that disclosure could damage this. This is not just a hypothetical concern, it has drawn the Commissioner's attention to one particular local authority whose level of cooperation decreased in response to an earlier disclosure of similar information.
21. In the Commissioner's view, any organisation (and particularly another public authority) should be fully aware that the information it provides to the public authority will be subject to FOIA and might be disclosable in future. The public authority should take care to avoid giving blanket assurances of confidentiality to those it does business with.
22. The public authority has provided some evidence of a relationship which has been damaged in the past. However, only one local authority appears to have taken exception and the public authority should have sufficiently robust measures in place to deal with that particular organisation. It would certainly be unacceptable if children in that area were to suffer because of their local authority's attitude towards transparency.
23. In the Commissioner's view, the public authority has not demonstrated that there a significant chance of the envisaged prejudiced occurring. Because the information is statistical, the Commissioner is not obliged to have regard to the opinion of the qualified person.
24. Consequently, no part of the exemption is engaged in respect of the statistical information and it must therefore be disclosed.

Non-statistical information

25. Where the information is not statistical information, the public authority must seek the opinion of its qualified person in order to engage the exemption.
26. In this case, the qualified person was the Rt Hon Damian Hinds MP who was, at that time, the minister of state for schools. Mr Hinds signed a

copy of the submission provided to him indicating that he agreed with it and was content to adopt the opinion as his own.

27. On the copy of the document provided to the Commissioner it is not clear whether the opinion was dated 6 or 16 February 2024, but nothing turns on this. The Commissioner is satisfied that Mr Hinds was entitled to act as the qualified person and that he gave his opinion on or before 16 February 2024.
28. The qualified person's opinion set out similar arguments to those outlined above: namely that disclosure would harm the free and frank provision of advice, the free and frank exchange of views and would otherwise prejudice the effective conduct of public affairs.
29. For the same reasons as set out in paragraphs 16 to 19, the Commissioner cannot accept that the parts of the qualified person's opinion that relate to the free and frank provision of advice or the free and frank exchange of views are reasonable. This is because the information does not constitute advice nor any exchange of views. It is therefore irrational to claim in the circumstances of this case that information which does not form part of either process would be capable of harming those process if disclosed.
30. Turning to whether disclosure would otherwise harm the effective conduct of public affairs, the Commissioner accepts that this element of the qualified person's opinion **is** reasonable. Whilst the arguments are the same as set out in paragraph 20 the Commissioner has had regard to two points.
31. Firstly, unlike with statistical information, here the Commissioner is required to have regard to the opinion of the qualified person and to afford it a wide margin of appreciation. The opinion does not necessarily have to be one with which the Commissioner agrees, it simply needs to be one a reasonable person could hold. In this respect, the opinion is not irrational and the Commissioner can see nothing else that would render it unreasonable.
32. Secondly, the nature of the withheld information is different. Where the information is not statistical, it is more subjective and based on what that particular local authority believes may happen in the future. To that extent, the Commissioner accepts that it is not unreasonable to suppose that local authorities may reduce their co-operation in future if this information is disclosed (not least because one has already done so) and this is sufficient to engage section 36(2)(c) of FOIA.

Public interest test

33. Information which may otherwise prejudice the effective conduct of public affairs must still be disclosed unless the balance of the public interest favours maintaining the exemption.
34. Given that the qualified person has formed a reasonable opinion that harm would be likely to occur, there will always be a public interest in ensuring that this does not happen. The weight that should be given to such an argument will depend on likelihood of harm and its severity.
35. For the reasons already given elsewhere, the Commissioner is not persuaded that chance of harm is significant – even with less factual information. Many of the comments in each local authority's assessments are likely to mirror comments made in other budgetary documents that local authority publishes the assessments also make reference to the macroeconomic outlook – which is common knowledge..
36. The Commissioner is satisfied that the public authority can take appropriate steps to deal with local authorities who may fail to provide adequate information in future.
37. Moreover, the Commissioner considers there to be a strong public interest in disclosure.
38. The flexibility to transfer funds seems to have been intended as a measure for occasional use. However the information disclosed by the public authority indicates that some local authorities are repeatedly asking for permission to move funds around. This may suggest that these local authorities are not being adequately funded for their needs, or that they are mis-managing their funds, or both, or neither. However, either way there is a strong public interest in understanding why this practice appears to be increasing and why some local authorities seem in greater need of funding flexibility than others.
39. Disclosure of the individual submissions would allow the public to delve deeper into this matter and, where necessary, hold either the public authority or the individual local authorities (or both) to account for the decisions they have made.
40. The Commissioner is therefore satisfied that, where the exemption is engaged, the balance of the public interest favours disclosure.

Right of appeal

41. 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

42. 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.
43. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF