

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 8 September 2016

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

Decision (including any steps ordered)

1. The complainant requested from the Education Funding Agency ("EFA") information about the redevelopment of Chagford Primary School ("CPS"). The EFA provided some information but withheld other information under sections 40(2) and 43(2).
2. The Commissioner's decision is that the EFA correctly applied section 43(2) to the information that it withheld, that it complied with section 1, as it holds no further information falling within the scope of complainant's request, and that it complied with section 10(1), by responding promptly to the request. However, she has decided that the EFA breached section 10(3), by taking more than a reasonable time to carry out the public interest test in relation to section 43(2), and breached section 17(1), by failing to state within 20 working days of receipt of the request that it was applying section 40(2) to some information. The Commissioner does not require the EFA to take any further steps to ensure compliance with the legislation.
3. As an executive agency of the Department for Education ("DfE"), the EFA does not constitute a public authority for the purposes of FOIA and so this notice is issued to its parent Department, the DfE.

Request and response

4. The complainant made a number of requests to the EFA in connection with the refurbishment or rebuilding of CPS. This decision relates to his request of 29 September 2015.

5. On 29 September 2015 the complainant requested the following information from the EFA under FOIA:

"1) Further information relating to matters contained in the Feasibility Study for Chagford Primary School:

"1. In relation to the appendix headed "Chagford Refurbishment/Remodelling Option", any quotes or other supporting documents for the temporary accommodation costs of £816,600 and £408,000.

2. In relation to the appendix headed "Chagford Refurbishment/Remodelling Option", any documents detailing how a phased refurbishment could be phased.

3. The cost of asbestos removal when the existing school is demolished.

4. More generally, the total cost of demolishing and removing the existing school.

2) Any correspondence or documents referring to the refurbishment of Chagford school created or received during the period from 1 October 2014 to 31 October 2014 including, but not limited to:

a. meeting notes

b. emails

c. letters

d. reports

e. notes of phone conversations

either internally within the EFA or between the EFA and any third party who is neither an employee of the EFA nor a private individual acting in their capacity as such (for example, other local residents or parents).

3) Internal emails between employees of the EFA created during the period 1 June 2015 to 10 June 2015 which refer to the refurbishment of Chagford School."

6. The EFA responded on 26 October 2015 and informed the complainant that it believed that section 40(2) and 43(2) applied to the information that he had requested but that it needed further time to consider the public interest test. On 1 December 2015, the EFA wrote to the complainant. It provided some information within the scope of the request but refused to provide the remainder. It cited sections 40(2) and 43(2) for withholding this information.
7. On 7 December 2015 the complainant requested an internal review. The EFA provided the outcome of the internal review on 8 January 2016. It

provided some additional information but continued to withhold information under sections 40(2) and 43(2).

Scope of the case

8. The complainant contacted the Commissioner on 10 January 2016 to complain about the way his request for information had been handled.
9. The complainant specifically complained about whether the EFA had correctly applied the exemptions that it had cited, whether it held further information falling within the scope of his complaint that it had not identified, whether a response had been provided “promptly” under section 10(1) and whether it had complied with section 10(3) in extending the time for a response to consider the public interest test.
10. During the course of the Commissioner’s investigation, the complainant confirmed that he was not seeking to obtain personal information contained within the withheld information. The Commissioner therefore did not consider the EFA’s application of the exemption in section 40(2) to the personal data that it had withheld.
11. The Commissioner considered whether the EFA handled the request in accordance with FOIA. She specifically considered:
 - (i) whether it held further information falling within the scope of the complainant’s request that it had not identified;
 - (ii) whether it provided a response to the request “promptly”, as required by section 10(1) of FOIA;
 - (iii) whether it complied with section 10(3) in extending the time for carrying out the public interest test; and
 - (iv) whether it was entitled to rely on the exemption in section 43(2) to withhold information.

Reasons for decision

Exemption

Section 43(2) – Prejudice to commercial interests

12. Section 43(2) provides that information is exempt if its disclosure would or would be likely to prejudice the commercial interests of any person.

The EFA argued that disclosure of the information withheld under section 43(2) would prejudice its own commercial interests.

13. The EFA provided the complainant with the estimated total cost for the rebuilding of CPS. He was also provided with some details as to how this total cost had been calculated which included figures for the building cost, adjustments of the cost for inflation, External Works, Abnormal Costs, fees and ICT infrastructure. However, the EFA withheld a more detailed breakdown of how the Abnormal Costs and External Works figures had been calculated.
14. The Abnormal Costs included the costs for items such as asbestos removal, tree removal and protection, the demolition of the existing school and gas protection measures. The External Works costs included the costs for items such as a new access road, car parking, pavements, a sports field, utilities, drainage and lighting.
15. The Commissioner notes that each of the items contained within the breakdown of Abnormal Costs and External Works figures are calculated on the basis of a specified rate for each square metre required or are a specified amount for the number of items required.
16. The Commissioner further notes that the complainant's request is focussed on the costs involved in demolishing and removing the existing school, the costs for which are contained within the Abnormal Costs section of the EFA's estimate.

Engagement of section 43(2)

17. The Commissioner initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

The EFA's arguments

18. The EFA argued that disclosure of the withheld information would prejudice its own commercial interests. It explained that CPS was to have its significant building condition need met by the Priority School Building Programme ("PSBP"). The school was one of 537 schools that would have buildings refurbished or rebuilt under the programme. The EFA stated that it was delivering the building work by directly negotiating and entering into the design and build contracts for the works required at each of the schools in the PSBP.
19. The EFA explained to the Commissioner that it was using a contractor framework for the procurement of the design and build works for the Devon batch of schools under the PSBP. It informed her that a Feasibility Stage Estimate was produced for the EFA by experts who had experience in this area, to estimate the possible cost of delivering a

particular project. This allowed the EFA to make a decision as to whether the project was potentially viable.

20. The Commissioner was informed by the EFA that, during the procurement process, contractors were given details of the overall Total Capital Cost from the Feasibility Stage Estimate which provided an indication as to the overall cost that a particular project should be delivered within. The EFA confirmed that contractors were not, however, provided with details of the External Works and Abnormal Costs elements of the estimate or the detailed information as how these had been calculated. It also confirmed that the unit costs for the work to be undertaken under these two headings were likely to be standard across projects being undertaken at schools in Devon. It explained that contractors could submit tenders which were below the overall Total Capital Cost figure when competing with other contractors for the contract.
21. Once a particular contractor has been chosen by the EFA to take forward a project, it explained that the next step was for them to submit a planning application for their proposal. There might then be further negotiations between the EFA and the chosen contractor during the planning application process, depending on issues that arose from the planning application or other issues that the contractor might identify. During this period, the contractor might seek to negotiate increases in costs with the EFA for particular work on a proposed project. The EFA stated that once the planning application for a school had been approved, it would then sign a contract with the relevant contractor based on the costs agreed at that point in time.
22. The Commissioner was informed by the EFA that it was concerned that if the detailed figures for the External Works and Abnormal Costs element of the estimate for CPS had been placed in the public domain at the time of the request, this would have provided contractors selected for projects under the PSBP programme in the Devon area, including CPS, with an indication of what the EFA considered might be a reasonable price for the different types of work falling under those headings.
23. The EFA explained that it was concerned that contractors might use the detailed build-up of cost information during both the tender stage of the procurement and also in the later stages of the procurement process, where they might seek to renegotiate previously agreed tender prices which could lead to increased costs and delays in project delivery dates.
24. In relation to the impact of the disclosure of the withheld information in the early stages of the procurement process, the EFA was concerned that this would have an adverse effect on the prices included in the tenders for particular projects. For example, it believed that where

contractors were able to secure deals that were cheaper than the EFA had indicated in its estimate, the contractors would still enter tender prices equal to the EFA's price level, which would not represent best value for the tax payer and that it was also likely that where contractors were unable to secure deals at the EFA's prices, they would seek to negotiate the funding envelope upwards.

25. The EFA explained that it used its detailed build-up of the funding envelope to assess the contractors' tender submissions to determine whether they offered value for money. The contractors' prices for each element of the works were compared with the EFA's detailed build-up and this allowed it to identify areas that needed to be explored with the contractors, for example where a contractor's costs were much lower or much higher than the EFA's costs. This would be explored with the contractor to establish whether they had fully understood the scope of the works required and they would also be asked for quotations from their suppliers to support their costings.
26. The Commissioner was informed by the EFA that it was concerned that if the withheld information had been put in the public domain, it would have resulted in contractors simply entering prices in their tenders for different projects that closely reflected the figures contained in Feasibility Stage Estimate for CPS, rather than prices that the contractors had arrived at through their own calculations. This would then have led to difficulties for the EFA in determining whether tenders that it received for particular projects were a true calculation by contractors of their estimated costs for that project and consequent difficulties in obtaining value for money and identifying where contractors might not have fully understood the scope of the works to be undertaken.
27. As regards the later stages of the tender exercise, the EFA informed the Commissioner that it believed that if the withheld information had been disclosed, this would have made it more difficult for it to refuse to agree to increases in the costs for items falling under the External Works and Abnormal Costs elements of the tenders from contractors who had already been selected to undertake particular projects. It explained that when it released these projects into the market, it was seeking the best possible price from the contractors. In its view, if a contractor learned that the EFA had allowed a higher price for a particular element of work, for example to lay drainage, then the contractor would see this as an opportunity to renegotiate their tender prices in this area.
28. The EFA went on to explain that, given the recovery of the construction market, it was increasingly seeing contractors seeking to renegotiate their tender prices. This puts it in a very difficult position as its options were to either accept the increase in costs or restart the procurement

process, which would delay its projects by 6 to 12 months and incur unnecessary inflationary costs. Both options would obviously have an impact on the public purse and the value for money it was seeking when taking forward such projects. To delay the delivery of such projects would also have a negative impact on the schools, teachers, parents and pupils involved.

29. The EFA confirmed to the Commissioner that, at the time of the request, CPS formed part of the Devon batch of schools which were being procured using its Contractors Framework. It informed her that a contractor had successfully tendered and secured the Devon batch of schools in April 2015. The contractor had been issued with the feasibility study for the school in August 2015 and was consequently preparing its tender submission at the time of the request.
30. The EFA noted that, at a later date, it removed CPS from the existing contractor as it was unhappy with the proposals the contractor put forward, particularly in relation to price, and therefore put the project back out to the market using the EFA's Regional Framework. A new contractor was confirmed as the successful bidder in this second procurement in March 2016.
31. In relation to the figures for the various aspects of the External Works and Abnormal Costs included in the Feasibility Stage Estimate for CPS, the EFA confirmed that these were a mixture of standard costings that it would use across all schools in the Devon batch and batches in other areas of the country (with location factor adjustments applied) and also project specific costings. It explained that all projects had unique design solutions that would need to be specifically priced, for example, removal of asbestos, removal or treatment of ground contamination, removal and possible replacement of trees and provision of an access road.
32. The Commissioner was informed by the EFA that, at the time of the request, the sample scheme in its Contractors Framework Devon Batch was at a pivotal stage. At that time, it was working towards signature of the Design and Build contract on the sample scheme. The other schools in the EFA Contractors Framework Devon Batch, including CPS, were all in the tender stage at this point.
33. The EFA explained that it regarded the level of pricing for four small primary schools (including Chagford) to be unacceptable and therefore these schools were removed from the contractor and released to the Regional Framework in November 2015. Therefore, at the point when the complainant's request was being considered, the EFA believed that the release of costs worked up for CPS would have had a detrimental impact on its tendering process and procurement of CPS and the other three primaries in Devon.

34. The EFA considered it worth noting that there were 537 schools in the PSBP and the programme was expected to be completed by the end of 2021. It currently had just over 50% of the schools in the programme that it still needed to procure, using similar procurements to CPS, and to which the withheld costing information would be relevant.

The complainant's arguments

35. The complainant noted that the EFA had written a significant amount about the information that had been withheld under section 43(2). He emphasised however that he was asking specifically about the cost of two minor elements of the project, this being asbestos removal and demolition/removal. He went on to inform the Commissioner that he could not see how the release of estimated costs for these small components in one specific school could possibly affect the overall bidding process for a contractor going to build the whole school.
36. The complainant noted that, on the other hand, the public would be interested to know just how high the cost of asbestos removal was if the school was demolished. He explained that a significant factor in determining that the existing school should be demolished (and made great play of by the EFA) was the cost of asbestos treatment if it was refurbished. However, if demolished, he noted that every speck would have to be removed and therefore this cost was likely to be vastly higher than the cost of management for the refurbishment option (which the EFA had made public). The complainant argued that, similarly, releasing the cost of demolition would demonstrate just how much money was being wasted on this and not spent on the building itself. Therefore, his view was that the decision to not release this information had nothing at all to do with commercial interests and everything to do with the information being embarrassing for the EFA.

The Commissioner's view

(i) Applicable interest within the exemption

37. The Commissioner considered whether the prejudice claimed by the EFA is relevant to section 43(2). The Commissioner is satisfied, in light of the EFA's arguments, that the potential prejudice that it has identified relates to its commercial interests.

(ii) The nature of the prejudice

38. The Commissioner next went on to consider whether the prejudice being claimed was "real, actual or of substance", that is it is not trivial and whether there was a causal link between disclosure and the prejudice claimed. The Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant and that there is the relevant causal link.

(iii) The likelihood of prejudice

39. The EFA argued that the disclosure of the withheld information would prejudice its own commercial interests. The Commissioner interprets "would" to mean more probable than not, in other words, that there is a more than 50% chance of disclosure causing the prejudice identified by the public authority, even though it is not absolutely certain that it would do so.
40. The Commissioner has previously noted that the EFA has disclosed the total cost of the Abnormal Costs contained in its Feasibility Stage Estimate for CPS but has withheld a more detailed breakdown as to how these total costs have been calculated. The Abnormal Costs included the costs for items such as asbestos removal, tree removal and protection, the demolition of the existing school and gas protection measures. Each of the items contained within the breakdown of the Abnormal Costs are calculated on the basis of a specified rate for each square metre required or are a specified amount for the number of items required.
41. The Commissioner accepts the EFA's contention that the disclosure of the detailed breakdown of the Abnormal Costs would have potentially prejudiced its commercial interests by providing the contractor chosen to undertake the work on CPS with a clear indication of the prices that the EFA would accept for each item under that heading. This would have given the contractor a significant advantage in submitting tenders for that work and in any subsequent negotiations with the EFA.
42. The Commissioner also notes that at the time that the EFA was considering the complainant's request, it was starting a new tendering process for the rebuilding of CPS, as well as three other primary schools in the Devon area. She believes that the disclosure of the detailed breakdown of the Abnormal Costs would also have been to the advantage of any contractors who were tendering for the work in that new procurement process as it would have provided them with an indication of the prices acceptable to the EFA. This would have made it much more difficult for the EFA to obtain value for money and also effectively assess whether the costings provided by contractors for the different elements of the Abnormal Costs were a true calculation of their estimated costs for that work.
43. The Commissioner also accepts that the disclosure of the withheld information would probably have had a similar prejudicial effect on other tendering exercises being run by the EFA on the basis of the costings of the items under Abnormal Costs for CPS being similar to those for the same work in relation to other schools, either in the Devon area or the large number of schools undergoing redevelopment under the PSBP in other parts of the country.

44. The Commissioner is satisfied that the disclosure of the withheld information would more probably than not have led to the prejudice identified by the EFA and that therefore section 43(2) was engaged. However, she notes that section 43(2) is a qualified exemption and so is subject to a public interest test.

Public interest test

Public interest arguments in favour of maintaining the exemption

45. The EFA accepted that there was a strong public interest in ensuring transparency in relation to the processes involved in the PSBP and in there being accountability for the public money that it spent. It also acknowledged that this transparency also ensured that public money was being used effectively and that it was getting value for money.
46. The EFA argued that balanced against the above factors in favour of disclosure was the consideration that the information requested included a detailed build-up of financial figures (the funding envelope) which would be considered as part of any future tendering exercise. It believed that the release of these figures would disadvantage its negotiating position.
47. The Commissioner was informed by the EFA that a live procurement process would be undermined if the detailed build-up of funding for specific purposes was made available to potential bidders. It believed that the release of this information would directly affect tender prices, with bids being less competitive and the taxpayer not getting full value for money. It contended that the disclosure of this information would prejudice its commercial interests by adversely affecting the value for money from the funds provided by the PSBP, which could result in the less effective use of public money. The EFA pointed out that resources were limited and that it was in the public interest for it to make them go as far as possible by ensuring that procurement processes were competitive and as effective as possible.
48. The EFA's view was that the public interest in transparency and understanding how public money was spent was outweighed in this case by the need to ensure this was done as effectively as possible.

Public interest arguments in favour of disclosing the information

49. The Commissioner recognises that there is a general public interest in accountability and transparency in relation to the activities of public authorities. In this case, disclosure of the withheld information would increase the EFA's accountability and transparency in relation to the spending of public money. This would help the public to satisfy itself that money was being spent appropriately and wisely. This would include

allowing the public to scrutinise the financial rationale for the EFA's decision to rebuild, rather than refurbish, CPS.

50. As previously noted, the complainant argued that the public would be interested to know just how high the cost of asbestos removal was if CPS was demolished. He explained that this was a significant factor in determining that the existing school should be demolished as the EFA had emphasised the potential cost of asbestos treatment if it was refurbished. However, if demolished, this cost was likely to be vastly higher than the cost of management for the refurbishment option (which the EFA had made public).
51. The complainant went on to argue that, similarly, releasing the cost of demolition would demonstrate just how much money was being wasted on this and not spent on the building itself. Therefore, he believed that the decision to not release this information had nothing at all to do with commercial interests and everything to do with the information being embarrassing for the EFA.

Balance of public interest arguments

52. The Commissioner acknowledges the public interest arguments in favour of disclosure put forward by the complainant so as to allow greater public scrutiny of the EFA's decision to rebuild, rather than refurbish, CPS and, in particular, to be able to scrutinise part of the financial basis for that decision.
53. However, the Commissioner notes that the PSBP is a major ongoing government programme involving the spending of very large amounts of public money. She has accepted that disclosure of the withheld information would have prejudiced the EFA's commercial interests and that the prejudicial effect would not only have impacted on the procurement exercise in relation to CPS but also other procurement exercises within the PSBP, in the Devon area and outside it. In light of this, the Commissioner has determined that the public interest in favour of disclosure is outweighed by the public interest in avoiding the prejudicial effect to the EFA's commercial interests. She has therefore decided that the EFA correctly applied section 43(2) to the information that it withheld.

Procedural issues

Section 1 – Information held

54. The complainant informed the Commissioner that he did not believe that the EFA had identified all of the information falling within the scope of his request. He argued that the relatively small amount of correspondence identified as falling within the scope of his request of 29

September 2015 appeared inconsistent with the EFA's contention as to the large amount of correspondence potentially falling within the scope of a previous related request of 24 June 2015.

55. This point was raised with the EFA by the Commissioner and it provided the following explanation:

"In his original request dated 24 June 2015 [the complainant] requested internal and external correspondence or documents created over a 13-month period (1 June 2014 to 23 June 2015). In his request dated 29 September, [the complainant] narrowed the request significantly to a period totalling less than 1.5 months (1 to 31 October 2014 and 1 to 10 June 2015).

The longest continuous period within scope of the narrowed request was the month of October 2014. Formal engagement on the Chagford Project started in September 2014 and therefore we would not have expected significant levels of correspondence during October 2014. The EFA team would at that time have been establishing relationships and organising initial meetings with all the stakeholders. We would not expect emails concerning the organisation of meetings, i.e. checking availability, confirming venues to be held in the project files.

This time period, therefore, falls one month after the commencement of the entire batch. It is also worth noting that Chagford was not planned to be the sample school (first school to be built of the batch).

Accordingly, there would be very little consideration at this stage of the options for addressing condition need (rebuild or refurb) of the school – which is reflected in the small amount of documentation located for this period."

56. The complainant subsequently informed the Commissioner that he was not persuaded by the EFA's explanation as to why only a relatively small amount of information was identified as falling within the scope of his request of 29 September 2015. He explained that amongst the documents provided to him in response to his request of 29 September 2015 was an email from CPS to the EFA sent at 14.00 on 16 October 2014 which he believed clearly stated that the EFA had advised the school that a decision had been made that the school would be replaced rather than refurbished. The complainant stated that he did not find it credible that there were no internal documents identified in response to his request discussing such a fundamental decision. He therefore queried whether the EFA might hold further information falling within the scope of his request that had not been identified.

57. In scenarios where there is some dispute between the amount of information located by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of Information Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, in order to determine such complaints she must decide whether on the balance of probabilities a public authority holds any further information which falls within the scope of the request which has not already been identified. This is not the criminal standard that requires proof beyond a reasonable doubt. The standard is satisfied if the Commissioner accepts that there is a greater than fifty percent chance that the public authority does not hold any further information.
58. The Commissioner initially asked the EFA to explain what searches had been carried out to locate information falling within the scope of the request and to explain why it believed that the searches that it had undertaken would have been likely to retrieve any relevant information.
59. The EFA explained that it contacted all staff engaged on the Chagford PSBP Project and asked them to search their online email, their email archives and their project filing system using the words 'refurb' (which would also capture 'refurbishment', 'refurbished' etc), 'build' (to capture 'new build', 'rebuild' etc), and 'built' (to capture 'rebuilt' etc). It informed the Commissioner that all searches conducted only related to electronic files, as all records and information held on this project were held electronically and that any hard copy documentation that it received, e.g. signed copies of a Memorandum of Understanding from schools and other key stakeholders, was scanned and saved electronically.
60. The EFA further explained that email correspondence was saved in personal email accounts and email archives and that it had also established a SharePoint electronic records management system (Huddle) where all project documentation was stored. It confirmed that project documentation was not stored locally on personal computers. It informed the Commissioner that staff engaged on the Chagford PSBP Project searched their email accounts, their email archives and the project files held in Huddle for the information requested.
61. The EFA explained that due to the use of the search-terms outlined above, the fact that it made searches to all applicable email and project files, and the breadth of staff that undertook these searches, it continued to believe that it had retrieved all the relevant information that it held that was in scope of this request.
62. The Commissioner asked the EFA for a response to the complainant's point that, in light of the content of the email from the school to the EFA sent on 16 October 2014, he did not find it credible that no documents

had been identified as falling within the scope of his request relating to the decision to replace, rather than refurbish, the school.

63. The EFA explained that, as communicated to the complainant in January 2016, following the internal review of this case, the project to address the condition need at CPS was at a very early stage in October 2014 and that formal engagement with the school only began the previous month (September 2014). Therefore there was not a significant level of correspondence or documentation during that October.
64. The EFA went on to explain that the feasibility study that was underway at that time, was undertaken to identify and evaluate the options available to address the condition need of the existing school buildings. It informed the Commissioner that a formal decision on the option offering the best value for money to the public purse would not be taken until a feasibility study had been completed and had been reviewed by an independent panel. In this instance the independent panel approved the feasibility study for CPS in August 2015. It confirmed that the feasibility study had been released to the complainant, once approved, in response to an earlier FOI request.
65. The EFA noted that in the email of 16 October 2014, the school had chosen to describe the possible refurbishment of Chagford School as "not an option" rather than choosing phrases such as "less likely" or an "unlikely option". However, it explained that, unfortunately, the choice of phrasing the school used in this email was not something over which it had control.
66. The Commissioner notes the concerns raised by the complainant as to whether the EFA had identified all of the information falling within the scope of his request that was held at the time of that request. However, based on the EFA's explanation of its records management processes and of the searches that it has carried out for information falling within the scope of the request, she is satisfied that, on the balance of probabilities, it does not hold any further information falling within the scope of the complainant's request. She therefore does not require it to take any further steps in relation to this part of the complaint.

Section 10(1) – Time for compliance with the request

67. Section 1 of FOIA states that any person making a request for information is entitled to be informed by a public authority whether it holds the information and, if so, to have that information communicated to him, subject to the application of any relevant exemption. Section 10(1) of FOIA provides that this must be done *"...promptly and in any event not later than the twentieth working day following the date of receipt."*

68. The complainant informed the Commissioner that, given the EFA's previous dealings with him in relation to the issue of CPS, he did not believe that a response to his request was provided "promptly" in accordance with section 10(1).
69. The EFA informed the Commissioner that the complainant had made several FOI requests and sent other correspondence directly to a number of officials since October 2014 in relation to the CPS project. It explained that all members of the PSBP team that had been engaged on the project needed to search their emails for correspondence containing discussions on the refurbishment or rebuilding of the school during the two periods requested (the core team consisting of a Project Director, Project Manager, Design Adviser and ICT Adviser; the central team, including the Programme Director and other members of the leadership team; and the external Technical and Legal Advisers and the survey companies). The EFA went on to explain that the team worked remotely and were often at school sites, local authority offices, adviser offices and other locations. In order to search their archive files they needed to be on the EFA's systems and this was only possible when they were in the office or working at home.
70. The EFA also informed the Commissioner that, when responding to the complainant's FOI request of 29 September 2015, a number of the personnel that needed to be engaged were also involved in providing evidence for a complaint to the ICO made by the complainant in October 2015.
71. The EFA proceeded to explain to the Commissioner that the relevant team was under particular resource pressure at the time of the complainant's request. There were changes of personnel in the core team responsible for delivering the eight school projects in the Devon batch (of which one was CPS) and the Devon team were particularly pressed in getting a number of the batch schemes to contract close or through planning. Additionally, there was a vacancy for the role of Communications and Correspondence Manager.
72. The EFA acknowledged that the complainant, and other requesters, would prefer a response with as little delay within the statutory deadline as possible, but explained that the team handling his request was extremely busy, and owned a large portfolio of work in delivering new school buildings to address significant condition needs in existing buildings. It submitted that, as its core work was in delivering school buildings, inevitably the team had to balance individual pieces of correspondence amongst its other workload.
73. The Commissioner notes that the EFA had applied section 12 (the estimated cost of compliance would exceed the appropriate limit) to

previous requests made by the complainant for similar information. In relation to one of those requests, made on 24 June 2015, the Commissioner has already found that the EFA did not comply with section 10(1) as it did not provide a response “promptly” (ICO case reference number FS50590699). This decision was based on the fact that the request of 24 June 2015 was very similar in nature to two previous requests made by the complainant and to which the EFA had also applied section 12. Consequently, it was concluded that the processes that the EFA would have needed to follow and the factors that it would have needed to take into account would have been very similar for each request and so the Commissioner was not persuaded that it should have taken the EFA as long as it did to provide a response to the request of 24 June 2015.

74. However, the Commissioner notes that the EFA did not apply section 12 to the request of 29 September 2015. Consequently, the processes that it needed to follow and the factors that it needed to take into account in reaching its decision would have been different to those that were relevant to responding to the complainant’s previous requests. These would have included needing to identifying and locating relevant information falling within the scope of the request, determining whether any exemptions were applicable and, where appropriate, considering the public interest test. Consequently, the Commissioner is of the view that providing a response to this request would have likely to have been a more time consuming process for the EFA than responding to the request that he previously considered.
75. The Commissioner also accepts, in light of the explanations provided by the EFA, that the team that was tasked with responding to the complainant’s request appears to have been under significant pressure of work at the time that the request was received and would therefore have had a significant amount of time taken up with dealing with its core work.
76. In light of the above, the Commissioner is satisfied that when the EFA responded to the complainant’s request on 26 October 2015, it did so promptly and so did not breach section 10(1).

Section 10(3) – Extension of time to consider public interest test

77. The complainant informed the Commissioner that he did not believe, in the circumstances of the case, that the EFA had complied with section 10(3) in extending the time for carrying out the public interest test.
78. The EFA informed the Commissioner that at the time of the complainant’s request, it was concerned that the release of the information requested could have had a detrimental impact on its ability

to secure best value for money for the public purse, as outlined in its arguments regarding the application of section 43(2). It therefore wished to thoroughly consult with colleagues in its Legal and Transactions team who operated the EFA Frameworks and its Technical Advisers who provided costing information, to consider whether it could helpfully release the information requested without detrimental impact on the other schools in the programme. This is why it felt that the extension to the time to consider the public interest test was justified.

79. The Commissioner's guidance "*Time limits for compliance under the Freedom of Information Act (Section 10)*" deals with issues connected with situations where a public authority is considering extending the time to consider the public interest under section 10. The guidance states:

"60. Section 10(3) enables an authority to extend the 20 working day limit up to a 'reasonable' time in any case where;

- it requires more time to determine whether or not the balance of the public interest lies in maintaining an exemption; **or***
- it needs further time to consider whether it would be in the public interest to confirm or deny whether the information is held.*

61. This extension will therefore only apply to requests where the authority considers a 'qualified exemption' (an exemption that is subject to a public interest test) to be engaged.

62. The Act does not define what might constitute a 'reasonable' extension of time. However, our view is that an authority should normally take no more than an additional 20 working days to consider the public interest, meaning that the total time spent dealing with the request should not exceed 40 working days. An extension beyond this should be exceptional. Examples of such circumstances could include extreme pressures placed on the public authority by a major incident or exceptional levels of complexity involving a number of external parties. Public authorities will need to demonstrate that the length of any time extension is justified.

80. As already noted, the EFA received the request on 29 September 2015, issued the complainant with a notice for the extension of the time to consider the public interest test on 26 October 2015 and, having concluded its consideration of the public interest test, provided its response to the complainant on 1 December 2015.
81. Whilst the Commissioner accepts, given the issues involved, that there may have been a basis for the EFA to consider extending the time for its consideration of the public interest under section 10(3), she notes that it

took in excess of additional 20 working days for its considerations and exceeded 40 working days in term of the total time spent dealing with the request. Having reviewed the circumstances in which the request was made and the nature of the information requested, she would not consider the circumstances exceptional so as to justify the length of time taken by the EFA. The Commissioner has therefore determined that the EFA took more than a reasonable time to carry out the public interest test and so breached section 10(3).

Section 17(1) – Refusal of the request

82. The EFA, having received the request on 29 September 2015, issued the complainant with a notice for the extension of the time to consider public interest test on 26 October 2015. It provided the complainant with its decision on 1 December 2015.
83. The complainant pointed to the EFA's email of 26 October 2015 which sought to extend the time for the consideration of the public interest test in relation to the application of section 43(2). It also stated that:

"Other exemptions, such as section 40(2) (in relation to third-party personal data contained within the information) may also be engaged, and we will give you full details of any exemptions applied when we write to you again."
84. The complainant argued that the application of section 40(2) should have been determined within the initial period of 20 working days from receipt of the request as it is an absolute exemption as the extended period is only applicable to the additional time required to consider the public interest test in relation to qualified exemptions.
85. The EFA informed the Commissioner that it did not apply a public interest test extension to consider the balance of public interest in relation to section 40(2). It explained that in its letter it had sought to inform the complainant that section 40(2) was also engaged and that it would set this out in detail when it responded substantively.
86. The Commissioner notes that the EFA did not state that it was applying the exemption in section 40(2) to some of the requested information, only that it "may" be applied. By failing to state that it was applying section 40(2) to some information within 20 working days of receipt of the request, the EFA breached section 17(1).

Right of appeal

87. 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

88. 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.
89. 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

Rachael Cragg
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SK9 5AF