

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 13 July 2020

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

#### Decision (including any steps ordered)

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1. The complainant has requested information about membership of the risk protection arrangement scheme. The Department for Education (DfE) has withheld the information under section 43(2) of the FOIA (commercial interests) and considers the public interest favours maintaining this exemption.
2. The Commissioner's decision is as follows:
  - The requested information is exempt from disclosure under section 43(2) of the FOIA and the public interest favours maintaining this exemption.
3. The Commissioner does not require DfE to take any remedial steps.

#### Request and response

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4. On 16 October 2019, the complainant wrote to DfE and requested information in the following terms:

*"Please provide a list of the academies (or academy trusts) and free schools that are members of the RPA scheme, based on the most recent date for which that information is held. Please include at minimum the name of the school and a unique identifier such as the*

*URN or DfE Number, and ideally also the name of the local education authority (LEA)."*

5. DfE provided the complainant with a refusal notice 12 November 2019. It refused to disclose the requested information citing section 43(2) of the FOIA. DfE considered the public interest favoured maintaining this exemption.
6. Following an internal review DfE wrote to the complainant on 10 December 2019. It upheld its original position.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 11 December 2019 to complain about the way his request for information had been handled.
8. The Commissioner's investigation has focussed on DfE's reliance on section 43(2) to withhold the information the complainant has requested, and the balance of the public interest.

### **Reasons for decision**

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#### **Section 43 – commercial interests**

9. In its submission to the Commissioner DfE first provided the following background. DfE has explained that the risk protection arrangement (RPA) is an alternative to commercial insurance which public sector schools can join, and which can, on occasion, save schools time and money when required to make insurance claims.
10. DfE commenced the RPA for academies in September 2014, on an opt-in basis, as an alternative to commercial insurance.
11. The RPA project was initiated in order to help reduce the cost to the public purse of protecting academies against risk. In 2014 the average cost of commercial insurance for academies was £49.93 per pupil. The RPA launched in September 2014 at a cost of £25 per pupil. In the light of claims experience to date, the RPA has been able to reduce its cost to £18 per pupil in 2019/20. This is an obvious and considerable saving both to schools and to the public purse, particularly as, based on RPA projections, savings of £896m are projected to have been made by March 2021.
12. Following consultation with the sector in 2019, the outcome of which was published January 2020, DfE extended the Academies RPA, which

had previously only been available to academy trusts (ATs), to the local authority maintained schools (LAMS) sector in England, so that the broader sector could benefit from financial savings that ATs had attained through membership of the RPA. There are currently over 6,800 schools covered by RPA.

13. Through his request, the complainant has requested the names of academies, or academy trusts, and free schools that are members of the RPA, with their identifying number and the name of their local education authority. In his complaint to the Commissioner, the complainant has noted that he has received earlier versions of the RPA member list in response to five previous FOIA requests to DfE between 2015 and 2018. The Commissioner observes that because information has been released in the past, that does not mean that similar information must be released in response to a new request. A public authority should consider each request on a case by case basis, taking account of the circumstances that are live at the time of the request.
14. Section 43(2) of the FOIA, which DfE is relying on to withhold the requested information, says that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
15. Section 43(2) is subject to the public interest test. In cases where information is exempt from disclosure the information may still be disclosed if the public interest in releasing the information is greater than in maintaining the exemption.
16. For section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information were disclosed must relate to the applicable interests within the relevant exemption.
17. In its submission, DfE has explained that although it had previously published a list of schools that were covered by RPA, ministers decided in 2019 not to publish the current or future lists.
18. This decision was made after it came to DfE's attention that these published lists were being used by commercial insurance companies to 'cherry pick' schools and offer them lower cost cover than the £18/pupil provided under RPA. Although, on first sight, this appeared to provide schools with further savings on their cover, this cover often came with larger excess charges and differing limits of liability, which some schools appeared not to consider when moving their cover from RPA.

19. At the end of RPA membership year 2018, 113 academies had left the RPA and at the end of RPA membership year 2019 a further 40 academies had also left, citing that they had been approached by a commercial insurer offering a better price per pupil deal. As alluded to in the previous paragraph this cover differed in respect of excesses and limits of liability across a range of covers.
20. DfE therefore considers that its own commercial interests with regards to schools getting best value for money, is at risk in this instance, as releasing the membership list provided competitors of RPA with a targeted mailing list to enact upon, thus putting commercial insurers at a commercial advantage, given that they themselves do not publish lists of those that take out their insurance policies.
21. DfE says it is also the case that its own commercial interests are at risk as there have been occasions where schools have been required to make a claim but do not have the funding to pay the excess on their cover. In such instances DfE has had to intervene to cover the excess charge, which would have been unnecessary had the school remained on RPA, where the excess is £200/primary and £500/secondary school.
22. DfE has gone on to detail for the Commissioner two specific examples of cases where differing commercial insurance cover versus RPA cover has had a negative impact. The Commissioner has noted these examples but does not intend to reproduce them in this notice, in order to protect DfE's commercial interests.
23. Having considered DfE's position, the Commissioner is satisfied that the harm that DfE alleges would, or would be likely, to occur through disclosure relates to the applicable interest within section 43(2). This is because DfE considers its own commercial interests would, or would be likely to, be prejudiced.
24. For the second criteria to be met, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
25. As detailed above, DfE has explained that if it were known – through disclosing their names and other details – exactly which academies or academy trusts, and free schools were signed up to the RPA scheme, commercial insurers would be able to approach those academies and free schools and offer them lower price per pupil insurance cover. This would, or would be likely to prejudice, DfE's commercial interests in two ways. First, by potentially reducing the number of academies and free schools signed up, and so financially contributing, to the RPA scheme.

Second, DfE says that the cover offered by commercial insurance differs in respect of excesses and limits of liability across a range of covers. There have been instances when a school or academy that is no longer part of the RPA scheme has made an insurance claim, and DfE has had to cover the excess charge. This would not have been necessary had the school or academy remained on RPA. From the examples that DfE has provided, the Commissioner has noted that the sums involved can be extremely significant.

26. DfE concludes by explaining that, due to spending restraints, it would face distinct challenges if it was required to increase funding to cover schools that find themselves unable to provide the excess or without sufficient cover when making insurance claims.
27. In his complaint to the Commissioner the complainant has noted that, as an alternative to RPA, eligible schools and academy trusts can negotiate the purchase of commercial insurance. But, he argues, the public availability of information on whether an eligible school or trust is a RPA member cannot place that school or trust at any commercial disadvantage in those negotiations, because the RPA is available as a known option at a known price regardless of whether the school or academy trust is already an RPA member.
28. Quite reasonably, the complainant has concluded that DfE considers that schools' and academies' commercial interests would be prejudiced through disclosing the information. This is perhaps because DfE did not provide the complainant with sufficient explanation or clarity in its refusal notice and internal review as to why it was relying on section 43(2) and whose commercial interests it considered would be prejudiced. In fact, as it has explained in its submission to her, DfE considers that it is its own commercial interests that would, or would be likely to, be prejudiced.
29. It is the case that a commercial insurer could assume that *any* free school and academy was covered by RPA and approach any such school or academy on that basis. However, and as DfE has noted, if the requested information were disclosed it would be significantly easier for commercial insurers to target the specific free schools and academies that are members of the RPA scheme. The Commissioner understands that there are approximately 400 free schools in the UK and approximately 5,500 academies in England.
30. The Commissioner has considered all the circumstances and is satisfied a causal relationship exists between releasing the withheld information and prejudice to DfE's commercial interests. She is satisfied too that such commercial prejudice would be of substance.

31. For the third criteria to be met it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie whether disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. DfE has argued that, since it is in a position to highlight actual instances where this has been the case, releasing the withheld information *would* prejudice its commercial interests. The Commissioner agrees that, given the examples DfE has provided, the higher level of likelihood has been met and that disclosing the requested information would prejudice DfE's commercial interests.
32. In his complaint to the Commissioner the complainant has noted a hypothetical question he asked DfE about how an individual school might respond to a request for information as to whether it was covered by RPA. The FOIA does not require a public authority to answer hypothetical questions (although it may choose to do so). However, the complainant's point is that he considers that there is a presumption that the information he has requested should be readily available to the public and that disclosing it would be unlikely to prejudice "the authority's", ie the school's, commercial interests. He considers that the RPA's published membership rules and terms of contract do not create any expectation that DfE will keep confidential the fact of membership. Finally, the complainant has argued that DfE should already be publishing undated versions of the RPA membership list to comply with section 19(2A)(a)(ii) of the FOIA. That section concerns publication schemes.
33. The Commissioner has noted the complainant's points, but she does not agree with them. The commercial interests at risk here are DfE's, not those of free schools or academies. For the reasons discussed above, the Commissioner is satisfied that the three criteria for engagement have been met and that the information the complainant has requested engages the exemption under section 43(2) of the FOIA. She is satisfied that the information is exempt information and that DfE is not required to proactively publish it or release it in response to a FOIA request. The Commissioner has gone on to consider the public interest test associated with section 43.

## **Public interest test**

### Public interest in disclosing the requested information

34. DfE says it recognises that there is a general public interest in accountability and transparency in relation to a government programme that provides such cover for schools. In this case, disclosing the withheld information would increase its accountability and transparency in relation to such programmes. This would help the public to satisfy itself that money associated with such programmes was being spent appropriately and wisely.
35. DfE accepts that there is a strong public interest in ensuring transparency in relation to the processes involved in insurance programmes associated with academies and the broader schools' sector.
36. In his complaint to the Commissioner the complainant has argued that there is no general public interest in protecting commercially sensitive information per se. He considers that there is only a public interest in protecting commercially sensitive information when the failure to do so would undermine some more specific value, such as competition or consumer confidence.

### Public interest in maintaining the exemption

37. DfE has emphasised that, given it has expanded the RPA - as a means to provide effective cover for all schools whilst saving schools, the public purse and therefore the taxpayer money - there is a real risk that releasing the information could have a negative impact on its commercial interests, and possibly the RPA as a whole. DfE has argued that, at a time of significant funding restraint, to put it and the public purse at undue risk would not be in the public interest.
38. DfE says that it would obviously be placed in an untenable position if required to pay, for example, insurance excess costs for increasing numbers of schools. DfE has given the Commissioner an example - which, again, the Commissioner does not intend to detail - of the circumstances in which it would not be able to refuse to pay such costs. As well as the financial implications, such a position would have a direct negative impact on the pupils at such schools, as well as their parents and the wider community. This would not be in the public interest, or in the interest of the school's children and the school's community. This is even more relevant given the school-time some pupils have lost due to Covid-19.
39. Balanced against the above factors in favour of disclosure, DfE argues that there is the real and tangible consideration that the information requested includes information that is being used by commercial

insurance companies to offer insurance to schools below the rate provided via RPA. DfE is clear that some schools believe that such lower cost cover will provide seemingly better value for money to the school, until a claim is necessary and excess charges are considered.

40. From the perspective of its commercial interests, DfE says it is clear that it would not be in a position to compete with any costs/pupil rates that are undercut by a commercial insurer, given the rate applied under RPA covers all schools that are part of the RPA. DfE is therefore clear that its own commercial interests would be prejudiced.
41. DfE notes that there have been instances (examples of which it has detailed for the Commissioner) where any perceived value for money is not the case in reality due to, for example, inflated excess charges attached to some commercial cover, or insufficient cover. As referred to, there have been cases where schools cannot afford the excess charges, or have had insufficient cover, and have subsequently relied on this being covered by DfE and therefore the public purse. Due to this, DfE believes that releasing the requested information would perpetuate such 'cherry picking' by some commercial insurers, and further weaken its financial and commercial position.
42. As well as being very much a 'live' issue at the time of the request, with DfE being required to cover unforeseen costs due to under insurance by some schools and/or excessive excess charges present in commercial insurance plans, DfE says this continues to be a 'live' issue at the time of this notice.
43. DfE believes that releasing the information at the time of the request and the internal review would have, and still will, directly affect the insurance cover of some schools that are tempted to move from RPA to cheaper commercial cover. DfE would then incur costs where schools cannot afford the excess charges attached to making a claim, and/or where they have insufficient cover. This would prevent both DfE and the taxpayer from achieving full value for money.
44. DfE contends that disclosing the information would prejudice its commercial interests by adversely affecting the value for money achieved from the funds available to the department. This would result in unnecessary additional expenses, and the less effective use of public money. DfE has also reiterated that in the current financial climate funding remains constrained and limited, and it is in the public interest that it is able to make funding and resources go as far as possible.
45. It is DfE's view that the public interest in transparency and in understanding which schools are part of the RPA scheme was, and is, outweighed in this case by the need to ensure value for money and the



prevention of unnecessary additional costs being incurred by DfE and the public purse.

46. Due to the arguments above relating to the potential for unnecessary increased costs and associated reduced value for money, and its impact on the public-purse, DfE has confirmed that it continues to believe that even if the information may be considered '*interesting*', releasing it would not have been in the public interest.

Balance of the public interest

47. The Commissioner has considered the complainant's argument at paragraph 36. She has decided that the information he has requested should be protected - through non-disclosure under section 43(2) - because failing to protect it would undermine "*some more specific value*", namely, DfE's commercial interests. If the complainant's argument is followed, there is, therefore, a public interest in protecting that information.
48. In addition to which, the Commissioner considers that DfE has put forward a strong set of public interest arguments for withholding the information in question. She considers that the information DfE proactively publishes about the RPA scheme is sufficient to satisfy such wider public interest as there may be in that scheme. There is, in the Commissioner's view, significantly more public interest, at the time of the request and presently, in DfE being able to direct as much of its funding as possible to the education of children and not having to divert funds to cover insurance costs incurred by schools and academies that withdraw from the RPA scheme. As such, The Commissioner has decided that the public interest favours withholding the requested information on this occasion.

## Right of appeal

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49. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals  
PO Box 9300  
LEICESTER  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

50. 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.
51. 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

**Pamela Clements**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**