

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 17 June 2024

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

### Decision (including any steps ordered)

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1. The complainant has requested DfE to disclose a list of the local authorities (LAs) which have had to submit Actions Plans for schools in deficit and for a copy of those Actions Plans. DfE disclosed an up to date list but refused to disclose the Actions Plans citing sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA.
2. The Commissioner's decision is that DfE is entitled to rely on sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA. He does not require any further action to be taken.

### Request and response

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3. On 26 September 2023, the complainant wrote to DfE and requested information in the following terms:

""In response to a previous FOI, reference: 2023-0028005, you named the following LAs as those that have so far had to submit an action plan to the ESFA because of school deficits. 1. Bristol: 12 schools 2. Cheshire East: 6 schools 3. Croydon: 6 schools 4. Gateshead: 7 schools 5. Gloucestershire: 10 schools 6. Greenwich: 6 schools 7. Islington: 7 schools 8. Lambeth: 11 schools 9. Liverpool: 13 schools 10. North East Lincolnshire: 2 schools 11. Reading: 7 schools 12. Southampton: 8 schools 13. Southwark: 9 schools 14. Sutton: 3 schools 15. Waltham Forest: 5 schools 16. Westminster: 9 schools 17. Windsor and

Maidenhead: 4 schools I understand councils can be required to send action plans at any time during the year, so I would like to request an updated version of this list as of today, and also request copies of action plans submitted by all councils on the updated list.”

4. DfE responded on 15 November 2023. It disclosed an updated version of the list but refused to disclose the Action Plans submitted by the councils under sections 36(2)(b)(i), (ii) and 36(2)(c) of FOIA.
5. DfE upheld this position at internal review and this decision was communicated to the complainant on 29 November 2023.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 22 December 2023 to complain about the way their request for information had been handled. They said that the requested information relates to a policy specifically aimed at improving transparency of maintained school finances. The public interest in disclosure therefore outweighs any concerns about the conduct of public affairs. They also commented that some councils had already chosen to share their reports and detailed financial information about every school is already published, albeit with a significant time lag, via the school financial benchmarking service.
7. The Commissioner considers that the scope of his investigation is to establish whether or not DfE is entitled to refuse to disclose the remaining information in accordance with section 36(2)(b)(i), (ii) and/or section 36(2)(c) of FOIA.

### **Background**

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8. As part of DfE’s monitoring of schools’ financial health and strengthening arrangements to help schools in financial difficulty, the Educational and Skills Funding Agency (ESFA) may request to see a LA’s Action Plan, which is the information being withheld in this case.
9. It said that the request to share these plans was introduced to ensure there was more consistency as to how different LAs work with their schools and, in turn, how consistently ESFA are working with LAs to ensure their schools have access to the same resources and support. Actions Plans are in effect an internal mechanism to facilitate a ‘safe space’ in which DfE can develop a closer working relationship between the department and LAs, to provide support and challenge around them managing schools in financial difficulty.

10. DfE advised that on receipt of these plans, ESFA may discuss the plan with the LA and, where appropriate, suggest advice on DfE tools which the LA can take advantage of for their schools. It provides a suite of tools and practical support for schools to help with their financial planning and approach to resource management. For example, help to reduce costs on regular purchases and recruitment, improve access to financial information or options to change staffing structures. DfE advised that it can also offer practical support through the deployment of School Resource Management Advisers (SRMAs) who are accredited, independent advisers.
11. DfE confirmed that it has no statutory powers to intervene in the finances of a maintained school or compel an LA to do so. As this is the responsibility of the LA. It explained how LAs have ultimate responsibility for the operation and management of their maintained schools and have a statutory duty to determine their school's budgets and support on deficit returns in accordance with schools' finance regulations. The Actions Plans (withheld information) are authored and owned by each LA and they may document the inner workings, plans and processes between an LA and their maintained schools or advice and suggestions provided by a previous SRMA visit or the LA's own strategic view of the schools and issues in their area.

## Reasons for decision

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### Section 36 – prejudice to the effective conduct of public affairs

12. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information –
  - (b) would, or would be likely to, prejudice-
    - (i) the free and frank provision of advice, or
    - ii) the free and frank exchange of views for the purposes of deliberation, or
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
13. The DfE confirmed that it obtained the opinion of the then qualified person – Minister Gibb – on 15 October 2023. In the qualified person's opinion disclosure would be likely to prejudice the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation and therefore section 36(2)(b)(i) and (ii) is

engaged. It is also their opinion that disclosure would be likely to otherwise prejudice the effective conduct of public affairs and therefore section 36(2)(c) applies. The submission to the Minister together with the Minister's signed authorisation were supplied to the Commissioner.

14. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
15. DfE explained that the withheld information often contains LAs candid advice on their schools' current financial positions and sets out their plans to address financial difficulties with their schools. Action Plans often contain sensitive information/proposals, such as proposed school mergers or closures, or the need for staff reductions as well as unpublished and/or sensitive financial information/data and this could be used to identify the schools concerned.
16. It is the qualified person's opinion that disclosure would be likely to damage relationships between LAs and their schools and thereby significantly impact the free and frank provision of advice provided by the LA to their schools and the free and frank exchanges of that advice and views for the purposes of deliberation.
17. It pointed out that the DfE has no authority to instigate, challenge or compel the LA to act on any of the proposals or issues detailed in their Action Plan. It is the qualified person's opinion that if disclosure occurred, it is highly unlikely that LAs will wish to share the Action Plans with DfE in the future or they may provide a plan in which the advice they provide is so lacking in detail that it is unable to determine where its offers of support could be best directed. This would severely curtail its ability to effectively support LAs with managing their maintained schools. The qualified person highlighted how it is entirely reliant on the goodwill relationships with LAs over the provision of these detailed plans and confidentiality and trust is the basis of this ongoing relationship to ensure all parties have the safe space to discuss options for support and potential changes to sensitive matters, such as staffing structures.
18. The DfE provided the Commissioner with several examples from the withheld information to highlight its point (for obvious reasons these examples cannot be shared in this notice). It however said that to disclose such sensitive information, which at the stage of drafting the Action Plan were merely options for consideration and an avenue being

explored, in the qualified person's opinion, would be likely to cause concerns amongst school staff and the broader community, given that the staffing and operating models of named schools were under review. It was argued that LAs need the safe space in which to consider, deliberate and respond to such options, without them being put prematurely into the public domain.

19. DfE also argued that it is the qualified person's opinion that LAs must be able to share such free and frank advice with it so that appropriate action can be taken on the back of such advice. This needs to be done without the fear that it will prematurely make its way into the public domain, to enable LAs to determine a clear course of action for educational settings in significant financial difficulties. The support tools offered by DfE may be used by LAs to help them in their final decision making process, which may include options which they may have not previously considered themselves, which could in turn, move them away from more controversial options such as staff reductions/closures.
20. It confirmed that it is the qualified person's opinion that it is important that LAs can provide forthright advice when proposed courses of action are being considered. Disclosure would be likely to deter such external partners from providing full, free and frank advice in the future, particularly in sensitive circumstances such as the possible reduction in staffing numbers. It would be likely to prejudice the ability of those concerned from candidly and frankly exchanging views, options and solutions for the purposes of deliberation and hinder the ability of the relevant parties from determining the best way forward for the relevant schools and nursery settings.
21. For the above reasons DfE considers that section 36(2)(b)(i), (ii) and 36(2)(c) apply.
22. The Commissioner agrees that it is a reasonable opinion to hold that disclosure of the withheld information would be likely to have the effects described. He notes that there is no statutory obligation on LAs to share their Actions Plans with DfE and accepts that DfE's ability to influence and assist those LAs and schools is entirely reliant on a good working relationship with them and the voluntary supply of information. The more free and frank that information is, the more able DfE is to determine where best to assist and what sorts of advice and tools can be provided. Disclosure at a time where those educational settings and LAs are exploring options in a free and frank manner, exchanging views and advice and deliberating on that information would be likely to deter those parties from openly and freely exchanging and engaging going forward. It would be likely to damage the working relationship DfE currently has with LAs – a relationship on which it heavily relies in order to engage and assist those LAs with schools that are struggling

financially. Premature disclosure would also be likely to be detrimental to DfE's ability to reach a fully informed decision quickly and effectively when considering what support and resources are available for educational settings in financial difficulty.

23. The Commissioner is therefore satisfied that it is a reasonable opinion to hold that sections 36(2)(b)(i), (ii) and section 36(2)(c) are engaged.
24. The complainant has stated that they have received a few Actions Plans from the relevant LAs directly, suggesting therefore that there is no issue with DfE disclosing them in response to this request.
25. DfE responded to this by saying that individual LAs (and it is only aware of two, as two plans have been shared by the complainant) may have handled similar requests and disclosed all or parts of their Action Plan where they have considered this to be appropriate. But for DfE it needs to consider the broader risk disclosure may have on its wider relationships with LAs, not just relating to the provision of these Actions Plans, but other information that LAs share with it on a similar non-obligatory basis. It said that an LA, as the author and primary 'owner' of the plan, may decide to publish or disclose under FOIA. But it would be a very different action/situation if DfE was to do that and to decide to publish information LAs had supplied to it on a confidential basis. Disclosing information shared under an expectation of confidentiality would be likely to significantly damage DfE's working relationships with the relevant LAs and other stakeholders and therefore its ability to provide advice and exchange views with them for the purpose of deliberation and deciding a way forward.
26. DfE viewed the Actions Plans the complainant received from two LA's and commented that these do not include some of the more sensitive business options that other plans include, which may indicate why these two LAs may have considered disclosing the information to them.
27. It also said that it is not privy to all the internal workings of the LAs, and their maintained schools, their communication plans or stakeholder management strategies. It cannot therefore judge on a LA's behalf exactly what information should be viewed as sensitive or whether publishing the Action Plan may disrupt the effective conduct of public affairs.
28. Additionally, it reminded the Commissioner that there is no statutory obligation on LAs to share their Actions Plans, detailing the views and thoughts of each LA with their respective schools, and how it is completely reliant on them sharing this information with it when asked. The ability to monitor effectively and efficiently the finances of schools and offer resource and help quickly is dependent on the openness and

frankness of that sharing and the cooperation of LAs and the schools concerned.

### **Public interest test**

29. DfE argued that there is a responsibility for it to be open and transparent, to assure the public that there is good decision making between public bodies and that standards of integrity and fair treatment have been upheld.
30. It stated that disclosure of the withheld information would also show the information and options being considered in relation to improving the financial position of named schools within a named LA and the advice, resource and support it can offer them.
31. However, it considers the public interest rests in maintaining the exemptions. It confirmed that LAs, SRMAs and DfE officials must have the confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge each other's assumptions and proposed options to help support financially struggling schools, as a part of a process of assessment, deliberation and resolution. It advised that the withheld information contains some frank comments regarding the financial positions and options being considered regarding named schools.
32. It said this is in the context of DfE requiring candid information to be provided in these plans, to allow those concerned to be able to come to an informed decision regarding what support and resources can be made available to help address financial issues. If DfE was required to disclose the withheld information, LAs and SRMAs would be likely to be inhibited from providing such fully free and frank views in these plans, which would in turn have a negative impact on DfE's ability to suggest support on the suitability, or otherwise, of options being considered. This would not be in the public interest.
33. DfE argued that disclosure would likely remove the space within which DfE and LAs are able to discuss the position of named schools and the options available to them, both freely and frankly. SRMAs and LAs would be more likely to dilute their views, opinions and advice should they fear this would be disclosed to the public, with the possibility of jeopardising the relationship they and DfE have fostered with schools. It would also limit DfE's ability to provide advice, where needed, to ministers on the current financial state of the sector effectively and efficiently, ensuring that any appropriate options and support are provided as quickly as possible. Again, such consequences are not in the public interest.

34. DfE argued that disclosure would be likely to damage its working relationships with LAs and the named schools and again this is not in the wider interests of the public. It said that it relies on the voluntary supply of such information from key partners in order to provide whatever advice, resource and support it can in order to assist with the financial turnaround of the schools concerned. These deliberations need to remain confidential to ensure that they are handled sensitively and appropriately. It confirmed that it is not in the public interest to damage such relationships and DfE's ability to assist where it can, as quickly and as efficiently as possible. Rather it is in the public interest to enable the relevant parties to openly, freely and frankly exchange views and advice, deliberate on the options available, secure the right assistance and support from government to ensure that the financial position of those schools concerned is turned around for the benefit of the wider public and the school communities.
35. The Commissioner considers there are the general public interest arguments in openness, transparency and accountability and allowing members of the public to have access to as much information as possible in order to assess the decisions made by public authorities. In this case, there is also the significant public interest in ensuring the financial stability and safety of the UK's schools and educational settings. He accepts that schools identified as being in difficulty will raise alarm with the relevant, staff, pupils and parents. They will all want to know what has been discussed, what options are being considered and what support is being offered by government. Any changes made will have an impact and it is understandable that those affected by any possible changes will be worried and concerned and want to know what is being done and why.
36. However, in this case, the Commissioner recognises the role DfE plays and how it relies heavily on the goodwill relationships with LAs and schools and the supply of candid and frank information from them in order to assess where it can help and put that in place efficiently and as quickly as possible. Disclosure would be likely to hinder the ability of DfE to make those decisions and assist with the financial recovery of the schools named. He accepts that this is not in the public interest.
37. Although he'd expect officials both at LAs, within DfE and those that carry out SRMAs to not be easily deterred from providing free and frank advice and engaging freely with government over the plans for the named schools, the Commissioner does not believe it can be dismissed out of hand that disclosure may lead to some dilution of that advice and freeness of discussions and deliberations in the future, especially if disclosure took place in this case at a time when relevant parties were still working together to develop the right plans and assistance for the schools concerned.



38. DfE has assured the Commissioner that ongoing discussions and deliberations were still taking place at the time of the request and so he accepts that there was still a need for private thinking space. When issues are still live, ongoing, under debate, the need for safe space to exchange views, discuss and deliberate and reach the right decision for the said schools will carry significant weight when considering the balance of the public interest test.
39. While the Commissioner considers there are noticeable and significant public interest arguments in favour of disclosure in this case, he considers at the time of the request, due to the ongoing deliberations and actions, the public interest rests in maintaining the exemptions.

## **Right of appeal**

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40. 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](mailto:grc@justice.gov.uk)

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

41. 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.
42. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Samantha Coward**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**