

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 May 2024

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Education (DfE) is entitled to rely on the FOIA exemptions under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA to withhold information about a business case for a training programme. Section 36 concerns prejudice to the effective conduct of public affairs.
2. It's not necessary for DfE to take any corrective steps.

Background

3. In its submission to the Commissioner, DfE has provided the following background and context:

"The best Multi-Academy Trusts (MATs) make a real difference to the life chances of the children they educate. To harness the benefits of a strong, supportive family of schools, we need outstanding leaders across the system with capacity to drive change. For that reason, the Schools White Paper committed to creating a new MAT CEO development programme to boost the pipeline of trust leaders.

The development programme is aimed at individuals currently leading small groups of schools as CEOs or executive headteachers, looking to lead a large trust effectively. This is consistent with the recent pattern of trust growth and the consolidation of smaller trusts. It builds on the

'golden thread' of professional development and the success of the suite of National Professional Qualifications, including the National Professional Qualification for Executive Leadership.

The request relates to the decision made by ministers to allow the National Institute of Teaching (NIOt) to bid uncontested to deliver the MAT CEO development programme. It also relates to the subsequent award of the contract to the NIOt on 24 July 2023, following our appraisal of their bid and the approval of the Full Business Case at the Commercial Approvals Board.

We proceeded with the NIOt as we had an existing Framework Agreement with this provider. Extending this agreement allowed the department to deliver the programme through the most cost-effective route, under a single provider that was well-placed to bring the sector behind it for support..."

Request and response

4. The complainant made the following information request to DfE on 8 September 2023:

"... I would like to request the following information under the Freedom of Information Act: 1. For the new MAT CEO training programme, the initial business case when it went out to the market for market engagement this year. 2. The evidence and business case (including market analysis) for not going out to competitive tender and instead awarding the contract to the National Institute of Teaching. Please can this include why the contract value was increase in the final award."

5. DfE's final position is that it doesn't hold information within scope of part 1 of the request and that the information it holds within scope of part 2 is exempt under the FOIA exemptions under section 36(2)(b)(i) and (2)(b)(ii), 36(2)(c), 41 (information provided in confidence), 42 (legal professional privilege) and 43 (commercial interests).

Reasons for decision

6. DfE is relying on the three exemptions under section 36(2) of FOIA in respect of all the information within scope of part 2 of the request. The Commissioner's investigation will therefore consider DfE's application of section 36(2), in the first instance. If necessary, he'll consider the other exemptions on which DfE is relying.

Section 36 – prejudice to the effective conduct of public affairs

Section 36(2)(b)

7. Under section 36(2)(b)(i) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank provision of advice.
8. Under section 36(2)(b)(ii) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank exchange of views.
9. The exemptions under section 36(2)(b) can only be engaged on the basis of the reasonable opinion of a qualified person. In its submission to the Commissioner DfE advised that its qualified person (QP) was Baroness Barran MBE, Parliamentary Under Secretary of State for DfE. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5)(a) of FOIA.
10. DfE has provided the Commissioner with a copy of its submission to the QP about the request. These show that the QP gave their opinion on 8 October 2023. From these communications the Commissioner accepts that the QP gave their opinion that the exemptions were engaged, and that they gave their opinion at the appropriate time ie in advance of DfE's response to the request on 9 October 2023.
11. The QP was provided with a copy of the request with the background and context; an explanation of the two exemptions and why DfE considered they were engaged.
12. Regarding section 36(2)(b)(i), the QP was advised that disclosing the requested information could inhibit officials from providing frank critiques of possible delivery partners.
13. Under section 36(2)(b)(i) the QP was also advised that, were these assessments to be shared, it's likely that they'd have a negative impact on DfE's working relationships with such organisations that are currently successfully delivering other programmes or may be well-equipped to deliver other programmes in the future. The Commissioner considers that this is a factor more relevant to the exemption under section 36(2)(c).
14. Regarding section 36(2)(b)(ii), it was noted that ahead of the formal decision to award the contract, it was necessary for DfE to exchange views with the proposed provider, to assess its suitability for delivery. The QP was advised that disclosing the information in this case might prejudice DfE's ability to conduct these conversations in future. This

would weaken its ability to deliver effectively and with assurance through contracted organisations.

15. The QP was further advised that, in combination, sharing the content of the business cases might set a precedent. Policy and commercial officials could then feel unable to provide honest advice in case the advice was to be shared back to the sector out of context. This would undermine officials' ability to complete business cases satisfactorily, and this would weaken DfE's internal commercial assurance processes.
16. The submission to the QP indicates that it was considered that disclosing the information "would be likely to" cause the prejudice envisioned under section 36(2)(b)(i) and (2)(b)(ii), rather than "would" cause this prejudice. The Commissioner will accept that the lower level is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring
17. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
18. However, DfE has discussed the exemptions further in its submission to the Commissioner.
19. Regarding section 36(2)(b)(i), DfE says that business cases such as the one requested here are circulated internally between policy officials and commercial leads to share analyses and assessment of options as part of the free and frank provision of advice. Business cases are designed to ensure strategic, economic, commercial, and financial assurance for any proposal. They identify key considerations and risks so that senior officials and ministers can be advised on the current situation. Business cases conclude by selecting a course of action that best addresses the identified considerations and risks.
20. DfE says it needs to be able to investigate a full range of options, and to ensure officials can provide free, frank, and candid advice, which can be shared and discussed in a safe space. It's therefore essential that such information within these business cases continues to be withheld.
21. Releasing the detail of the advice provided by officials risks officials becoming concerned that such internal commentary could make it into the public domain. This could, DfE says, dilute the frank provision of advice in future business cases with officials being overly cautious on what they choose to share. If this were to occur, DfE says it expect that advice would be framed less clearly, causing ambiguity and confusion. This confusion could result in extensions to the time taken to understand

and propose positive actions, a situation which could otherwise be avoided if clear and frank advice were provided. DfE has provided the Commissioner with two examples which it considers demonstrate its point but has asked the Commissioner not to reproduce them in this notice.

22. Regarding section 36(2)(b)(ii), DfE says that business cases are, by design, circulated internally for the purposes of deliberation. They are drafted by officials, shared to include the input of different specialist teams, and then provided to senior civil servants and ministers to illustrate and assure the decision-making process. In this instance DfE says, the business cases outlined DfE's options and recommended approach to the delivery of this programme, along with the associated analyses of risks and potential or actual issues.
23. DfE goes on to say that these business cases are a record of, and active part in, the discussions between officials and ministers. They iterate as officials and ministers deliberate, with the incorporation of new considerations, proposals, and recommendations, as well as updated evidence as the policy planning develops. The market analysis spreadsheet within scope of the request is an example of this iterative process as it emerged from concerns about the full range of providers and incorporates evidence on each of their suitability to deliver. The differences between the Outline and Full business cases are also indicative of this iterative approach.
24. DfE says that this is an essential part of the programme assessment and delivery process, ensuring that through advice, consideration, and deliberation, as well as the exchange of views and thoughts, the best options are chosen to deliver this, and other, programmes.
25. As part of the process of deliberation, the official in this case listed and evaluated a range of options for delivery. The arguments for and against each delivery route are explained against different categories and a short summary table 'ranks' each of the options. This analysis underpinned the advice provided within the business cases and gives other officials, including senior officials and ministers, the opportunity to feed into the evaluation of options, or even challenge the proposed approach, ahead of any decision being signed-off.
26. DfE considers that such clarity around the options being provided and the associated next steps that will be taken, with the opportunity to input into, shape or challenge the proposed approach, is essential when agreeing the delivery of such key programmes. Officials prepared both business cases, with the market analysis spreadsheet as supporting documentation, and took them to the internal Commercial Assurance Boards. There, commercial experts had the opportunity to pick apart the proposals and identify any irregularities. DfE considers it's important to

note that the proposed value of the contract was lower than the minimum threshold to warrant discussion at the boards, but officials felt it prudent for an additional layer of independent scrutiny given the potential sensitivity of the decision. This internal deliberation refined and assured the approach.

27. The business cases also provide a record so that any confusion around an agreed approach is avoided, with the next steps clearly mapped out. DfE says it's therefore essential that officials are allowed the 'safe space' in which to share and deliberate proposals, raise questions and challenge as necessary, set out the required next steps, and demonstrate that an agreed consensus has been reached on the actions to be taken.
28. DfE has confirmed that it doesn't consider that officials would, for fear of release, not provide their honest and professional views and details on proposed approaches/next steps as part of the deliberative process. However, there is, again, a risk that they may dilute their advice and possibly be more guarded if they felt that such information was to make it into the public domain. This in turn could lead to assurance boards receiving partial or confused information on which to provide their second-level check, weakening the entire process. This might lead to extended or repeated engagement, which would delay timelines. Or incorrect decisions could be made on the basis of insufficient information which would damage outcomes and lead to the misspending of budgets.
29. The Commissioner considers that the QP had sufficient information to enable them to make a decision on the matter. Based on the submission to the QP (and DfE's submission to him), the Commissioner accepts that the QP's opinion about withholding the requested information under section 36(2)(b)(i) and section 36(2)(b)(ii) of FOIA was a reasonable one.
30. The Commissioner finds that disclosing the information would be likely to inhibit officials' preparedness to provide advice and exchange views freely and frankly, in relation to decision making about how best to deliver a training programme for MAT CEOs. DfE was therefore entitled to apply section 36(2)(b)(i) and section 36(2)(b)(ii) to part 2 of the request. The Commissioner has gone on to consider the public interest tests associated with these exemptions.

Public interest test

Public interest in disclosing the information

31. In their request for an internal review the complainant said that they believed disclosing how this decision was made is within the public interest. They considered that moving from a possible public tender to extending NIO's contract deserves proper public scrutiny. The

complainant also noted that some business cases have been published on gov.uk including one for Oak National Academy.¹ In their complaint to the Commissioner the complainant also observed that the contract value had increased by £1m when it was awarded to NIoT.

32. Regarding both section 36(2)(b)(i) and section 36(2)(b)(ii), in its submission to the Commissioner DfE has acknowledged that sharing the requested information would increase the transparency of the department's decision-making processes, and the access to information that's used to inform decisions that are made. Transparency can increase trust and engagement between the government, the education sector, and the public. This could lead to increased benefits from currently delivered programmes and buy-in to the policy development phase of future offers.
33. DfE says it has taken into account that considerations for disclosure add up to an argument that more openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.
34. Finally, DfE has noted that there's a general public interest in disclosing information to the public, to demonstrate the openness and transparency of government. It says there's also a public interest in transparency around such procurement processes and the associated use of public funding for the delivery of the department's programmes.

Public interest in maintaining the exemption

35. Regarding section 36(2)(b)(i), in its submission to the Commissioner, DfE has presented the following arguments:
 - "The department relies on information provided within these business cases to help make informed, evidenced and risk-assessed decisions in order to determine the appropriate course of action to take, or advice to give, relating to the delivery of its policies and programmes.
 - The provision of advice for these types of deliberations needs to remain confidential. There is a focus on sensitive handling, and the equal weighing of all evidence and options which can only take place in a secure environment. When conducted appropriately, this enables all evidence and options to be

¹ <https://www.gov.uk/government/publications/oak-national-academy-business-case>

considered during the drafting and assessment process of such business cases, so that we can put forward the strongest possible recommendations to senior officials and ministers.

- If the department is required to disclose this information, it would be likely to prejudice the department's ability to clearly and candidly provide advice and recommendations during the iterative process and delivery of a fully evidenced and considered final business case. This is a fundamental step in the policy design and delivery process, and any obstacles could hinder the department's ability to fully consider a range of important issues when considering such delivery and procurement processes, with key partners being less likely to candidly engage with the department going forward.
- It is essential that the department and its officials can provide such clear and honest advice between teams and to ministers, when addressing the potential risks and issues certain options present to the successful delivery of this programme. This provides the best conditions for deciding on a fully informed approach that can give the programme the best possible chance of success. To unnecessarily jeopardise this could lead to the procurement of weaker delivery options, risking the successful delivery of this, and other, programmes, and providing poorer value for money for the taxpayer."

36. Regarding section 36(2)(b)(ii), in its submission to the Commissioner, DfE has presented the following arguments:

- "DfE officials must have confidence that they can share professional views with one another and ministers. This provides an opportunity to understand and, where appropriate, challenge each other's assumptions as part of a process of assessment, deliberation and decision making. The withheld information contains some frank and informed commentary regarding the options available to the department in relation to the tendering, procurement and delivery of this programme.
- This is in the context of the department requiring candid information to be provided in any such business cases, to allow senior officials and ministers to be able to come to a fully informed decision regarding which is the best and most appropriate procurement option, based on evidence, data and analysis provided. If the department is required to make the information that underpins these decisions public, this has the possibility of jeopardising the vital relationships officials and the wider department have with key organisations and delivery partners, both existing and future.

- Disclosure of the information outlined above would be likely to remove the space within which departmental officials, across policy, commercial and financial teams, as well as ministers, are able to discuss the suitability of providers - outlining the available options in relation to tendering and procuring to deliver this programme. Officials would also be more likely to dilute their analysis and advice, should they fear this would make it into the public domain. In turn, this would have a negative impact on the department's ability to make informed decisions as to the best option(s) available to allow the delivery of key policies, such as increasing the pipeline and capacity of excellent MAT CEOs..."

37. DfE also noted the Commissioner's decisions in FS50587396 (paras 25-26) and IC-76510-R3L8 (paras 54-57) which DfE considers supports its position here.

Balance of the public interest

38. The Commissioner has found that disclosing the information being withheld under section 36(2)(b)(i) and 36(2)(b)(ii) would be likely to prejudice the effective conduct of public affairs by inhibiting the provision of advice and the exchange of views.
39. When he considers the balance of the public interest, the Commissioner takes account of the weight of the QP's opinion, the timing of the request, and the severity, extent and frequency of the envisioned prejudice or inhibition.
40. The QP in this case was the Parliamentary Under Secretary of State for DfE; as such they had the requisite knowledge of how the Department works and the consequences of any disclosure. Their opinion that the envisioned prejudice would be likely to happen therefore carries weight, though less than if they'd considered the prejudice would happen.
41. The Commissioner has next considered the timing of the request. The public interest in being able to provide advice and exchange views about an issue freely and frankly, for example, will be greater if the issue is ongoing and live at the time of a request.
42. In this case, at the time of the request in September 2023 the decision about the training provider had been made and the contract had been awarded to NIOT in July 2023. That specific matter, and the associated business case, requested here, was therefore no longer 'live' at the time of the request.
43. However, the envisioned prejudice is focussed on inhibiting officials' willingness to provide frank advice and share candid views about possible providers in the course of procurement exercises generally.

Because such exercises will continue to happen in the future, that's an ongoing going concern.

44. Regarding severity, the consequences of DfE making procurement decisions based on advice that isn't frank, without everyone's candid views and without all the facts would potentially be serious. As for extent and frequency, as noted, such procurement exercises will be undertaken regularly in the future.
45. The complainant is concerned that the contract value increased by £1m when it was awarded to NIoT. The Commissioner put that point to DfE and it explained as follows:

"The final contract award was £3,795,485. The figure that was presented at the early market testing was £2.8million. The final award therefore represents a £1million increase on the initial figure tested.

However, the department sought early market feedback to ensure that the developing offer took into account the needs of the sector, and the viability of emerging proposals. The figure presented at the early market testing was indicative only, and the department reserved the right to amend the value as needed.

It is common commercial practice to adjust the budget following market testing, as the budget declared at the point of issuing the Prior Information Notice (PIN) is an estimate notifying the market of the general scale of the service.

One of the purposes of market engagement is to seek feedback from the market on initial costing assumptions to allow the development of a should-cost model which is used to determine the final budget of the procurement or contract."

46. DfE has advised that the above information is already in the public domain.
47. The Commissioner hasn't been presented with evidence to suggest there's anything particularly unusual about this contract. Having considered all the circumstances, the Commissioner therefore accepts that the public interest favours maintaining the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions in this case.
48. The Commissioner has found that the entirety of the information within scope of part 2 of the request engages sections 36(2)(b)(i) and 36(2)(b)(ii), and the public interest favours withholding the information under these exemptions. However, for completeness the Commissioner will also consider DfE's application of section 36(2)(c) to the information.

Section 36(2)(c)

49. Under section 36(2)(c) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
50. The exemption under section 36(2)(c) can only be engaged on the basis of the reasonable opinion of a qualified person. As noted, in its submission to the Commissioner DfE advised that its QP was Baroness Barran MBE, Parliamentary Under Secretary of State for DfE, who is authorised as the QP under section 36(5)(a) of FOIA.
51. The submission provided to the QP is described in the section 36(2)(b) analysis.
52. Regarding section 36(2)(c), the QP was advised that business cases are dynamic documents that go through several iterations as they develop. If each iteration were published, this could result in discussion and challenge being inhibited, encroaching on a 'safe space' for DfE to develop ideas and consider a variety of options.
53. Under its discussion of sections 36(2)(b)(i) and (2)(b)(ii) (which concern providing advice and exchanging views), the QP was also advised that were the assessments of the market in the business case to be shared, it was likely that they would have a negative impact on DfE's working relationships with such organisations that are currently successfully delivering other programmes, or may be well-equipped to deliver other programmes in the future. This appears to the Commissioner to be a section 36(2)(c) consideration.
54. The submission to the QP indicates that it was considered that disclosing the information "would be likely to" cause the prejudice envisioned under section 36(2)(c), rather than "would" cause this prejudice. The Commissioner will again accept this lower level of likelihood.
55. DfE has discussed the exemption further in its submission to the Commissioner. It says that,

"as part of a strong and effective working relationship, ministers, departmental officials and its lawyers, and agencies such as the NIoT, need a safe space in which to constructively engage. This allows all relevant parties to work together to deliberate issues, concerns, and potential next steps. This provides full assurance that decisions are made, with a consciousness of all risks and awareness of all relevant information, to achieve the best outcomes for the delivery of this programme. For this programme, there was a focus on ensuring that public funding was used appropriately and that the project would be

implemented effectively to increase the pipeline of excellent MAT CEOs.

The space to deliberate was essential when looking at the most efficient and effective way to deliver this programme which would maximise the impact while providing the best value for money.”

56. DfE has then discussed an aspect of the business case, as an example, which the Commissioner won't reproduce in this notice as doing so would disclose information DfE is seeking to withhold.

57. DfE goes on to say,

“...the NIoT provided commercially sensitive information to inform official's advice. The information was used to inform the discussion of different options on pages 45-46 of the enclosed withheld information. Information of this kind, provided to outline and evidence risks, options and recommendations must be able to be shared frankly and candidly, without fear of such advice or information going into the public domain.

Releasing this information would damage our relationship with the NIoT, and therefore the continuing work on the delivery of the programme as we would be breaking trust by sharing information that was shared in confidence due to its commercially sensitive nature. Weakening our relationship with the sole provider for this programme, who also delivers a range of other professional development programmes in the education sector, could severely impact outcomes in schools across the country. This would not be in the public interest.

Furthermore, it should also be considered that releasing information from these business cases would be very likely to have a detrimental impact on the development of strong business cases to deliver departmental policies and associated programmes in future. Providers might determine that any information they share with the department could be subject to release into the public domain, which may result in less detailed information being shared if providers perceive that it could ever pose a reputational or commercial risk to that provider if published. If the department is unable to access information of this kind, it would weaken the department's ability to fulfil its obligation to fully assure the spending of all public funds in future, which would not be in the public interest.

If the department is unable to access information of this kind it would also be likely to have an impact on procurement decisions themselves, resulting in the possible misinterpretation of bids or offers submitted by providers to lead future programmes. Evaluating these bids without full access to a wide range of information would

damage the department's ability to secure value for money through effective procurements. This is not in the public interest.

Separately, the purpose of a business case for commercial assurance necessitates frank analysis using factual information and informed judgement of procurement options, by internal and external stakeholders. Sharing the content of these analyses, both supportive and critical could have a range of negative impacts.

As part of our effective conduct of public affairs, the department is required to have a strong understanding of the capabilities of all possible providers in order to make an informed decision on procurement. Those understandings must be communicated, or recorded in the business cases, but if shared could be damaging to the department's relationship with this provider (the NIoT), the department's relationship with other providers, and the NIoT's relationship with other providers. If the department's relationship with the NIoT is damaged through the sharing of analyses of their capability, that will weaken the delivery of this programme and the ability for the department and the NIoT to continually work to improve the offer. If the relationship between the department and other providers is damaged that will negatively impact work going on across other policy areas and programmes where those providers are active partners of the department. We may also expect to receive fewer bids in future programme procurements, weakening our ability to effectively choose a procurement route and lessening competition. If the relationship between the NIoT and other providers is damaged, it will also impact negatively on the delivery of this programme, weakening the ability of the NIoT and other providers to work constructively in the sector.

More broadly, the business cases in scope for this request, as with other internal business cases, are not designed for public disclosure. They are instead intended to provide internal commercial assurance and good governance in relation to proposed procurement exercises. Therefore, the considerations within the business cases present a partial picture of the advice provided which could be misinterpreted if published, undermining public and sector support for the MAT CEO development programme and thereby lessening the buy-in required for its ongoing delivery to be a success."

58. The QP's opinion was that disclosing the business case would be likely to damage DfE's current and future working relationship with the provider in question, and possibly other providers in the future. The Commissioner considers that the QP had sufficient information to enable them to form that opinion. Based on the submission to the QP and DfE's submission to him, the Commissioner accepts that the QP's opinion about withholding information under section 36(2)(c) of FOIA was a

reasonable one. DfE was therefore entitled to apply section 36(2)(c) to part 2 of the request. The Commissioner has gone on to consider the public interest test associated with this exemption.

Public interest test

Public interest in disclosing the information

59. The complainant's and DfE's arguments for disclosure have been presented above.

Public interest in maintaining the exemption

60. Regarding section 36(2)(c), DfE has presented the following arguments:

"The withheld information regarding the professional views of officials on the assessment and suitability of the NIoT to deliver this programme, including forthright views and advice on associated risks and other options, needs to remain, now and in the future, free, frank and candid. The information held and advice provided was drafted for a specific audience, to be considered within a 'safe space'.

Officials need a 'safe space' to consider and debate key and often 'live' issues, away from external interference and distraction. If this were to be inhibited officials would be less likely to fully document the risks, issues and concerns relating to the approaches being proposed and recorded within these business cases. Disclosure of information may lead to departmental officials being more reticent in providing and/or formally documenting their views and advice which would, in turn, impact on the quality of decision making. This therefore engages Section 36(2)(c).

The information presented by officials contains reference to the perceived risks and issues surrounding the options available when proposing the NIoT deliver this programme. To release this information would likely be detrimental to the department's relationships with the NIoT and the other possible providers, as the withheld information assesses and critiques the strengths of weaknesses of each option. Officials must have confidence that they can share and record their professional views with senior officials and ministers when requested, via such business cases. It is important that there is an opportunity to understand and, where appropriate, challenge assessments and assumptions presented by them. If the department is required to put this information into the public domain, officials would be likely to be inhibited from providing this level of free and frank exchange of views for the purposes of deliberation, which in turn would have a negative impact on the department's ability to conduct public affairs effectively.

Disclosure of the information would be likely to prejudice the effective conduct of public affairs in the future. It would remove the space within which officials can present their advice and evidence-based opinions and options relating to the tendering, procurement and delivery of key programmes and policies, freely and frankly. It would make it more difficult for the department to work collaboratively and cohesively with the relevant parties to ensure that we can, when requested by ministers, effectively present the options available to the department to deliver key policy commitments.

In particular, the disclosure of information shared in confidence by the NIoT may impact on the willingness of them, and other organisations, to work with the department in future. If providers decide to withhold information to protect their interests and the department is not able to access information on provider financials, or proposed delivery plans, the department would be unable to fully assure future procurement decisions. If providers decide not to work with the department at all, we might expect to have less competition for future procurements, meaning we are less able to drive value for money and select the most efficient and effective proposals.

When considering the ongoing citing of s36(2) in this case, we also considered a previous DN where the Commissioner found in favour of our application of this exemption, which was published on 24 July 2017 (FS50670089)...

...We also think that we have already provided transparency around the process of procurement and the award of the contract to NIoT via information provided within Contract Finder on the GOV.UK website."

61. The Commissioner considers that the 'safe space' arguments above are more relevant to section 36(2)(b), but he has taken account of the arguments associated with DfE's future working relationships.

Balance of the public interest

62. The Commissioner has found that disclosing the information being withheld under section 36(2)(c) would be likely to prejudice the effective conduct of public affairs.
63. The Commissioner has again taken account of the weight of the QP's opinion.
64. The Commissioner has next considered the timing of the request. As has been noted, the matter of the NIoT contract was no longer 'live' at the time of the request. However, DfE considers that its ongoing working relationship with NIoT would be damaged if the information were to be disclosed.

65. The envisioned prejudice is focussed on DfE's working relationship with NIoT and with other providers in the future. Since strong working relationships with partner organisations will be ongoing matter, that's a continuing concern.
66. Regarding severity, undermining DfE's relationship with NIoT – which is delivering this significant contract to train MAT CEOs - would potentially be serious in terms of DfE not meeting its objectives. Similarly, other providers need to form relationships with DfE based on trust from the outset. Potential providers being reluctant to particulate in procurement exercises would also potentially be serious as it would reduce choice and competition. As for extent and frequency, as noted, DfE having good working relationships with other bodies is an ongoing matter.
67. Again, having considered the circumstances and for the reasons cited in his discussion of the section 36(2)(b) exemptions, the Commissioner accepts that the public interest also favours maintaining the section 36(2)(c) exemption.
68. The Commissioner has found that information within scope of part 2 of the request also engages section 36(2)(c), and the public interest favours withholding the information under that exemption. He's also found that the exemptions under section 36(2)(b) are engaged and the public interest favours withholding the information. It's therefore not necessary for the Commissioner to consider the remaining exemptions that DfE has applied to the information.

Right of appeal

69. 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

70. 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.

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

Cressida Woodall
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SK9 5AF