

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 October 2024

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

Decision (including any steps ordered)

1. The complainant has requested from the Department for Education (DfE) the day rates for consultants working on the SEND (Special Educational Needs and Disabilities) and AP (Alternative Provision) Change programme¹. The DfE refused to provide the information, citing section 43(2) of FOIA – commercial interests, section 41(1) of FOIA – information provided in confidence and section 40(2) of FOIA – personal information.
2. The Commissioner's decision is that the DfE correctly withheld the requested information under section 43(2) and that the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps.

1. The DfE has explained that "The aims of these reforms are to ensure all children with special needs and disabilities receive the right, consistent high-quality support when they need it and as early as possible."

Request and response

4. On 19 December 2023, the complainant wrote to the DfE:

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

 1. The day rates for consultants working on the SEND and AP change programme. To be clear, I'm not asking for any identifying details, such as names, only the actual date rate fees.”
5. The DfE responded on 22 January 2024 and refused to provide the requested information, citing section 43(2) of FOIA – commercial interests.
6. The DfE provided an internal review on 23 May 2024 in which it maintained its original position and additionally cited section 41(1) of FOIA – information provided in confidence.

Scope of the case

7. The complainant contacted the Commissioner on 14 June 2024 to complain about the way their request for information had been handled as they believed it to be in the public interest for this information to be released.
8. After the Commissioner began his investigation the DfE also cited section 40(2) of FOIA – personal information.
9. The Commissioner considers that the scope of his investigation is to establish whether the DfE is entitled to rely on the exemptions it has cited.

Reasons for decision

Section 43(2) – commercial interests

10. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.
11. The Commissioner has defined the meaning of the term “commercial interests” in his guidance on the application of section 43 as follows:

“A commercial interest relates to a legal person’s ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.”²

12. Most commercial activity relates to the purchase and sale of goods but it also extends to other fields such as services.
13. The Commissioner’s guidance says that there are many circumstances in which a public authority might hold information with the potential to prejudice commercial interests. The actual harm that the public authority alleges would or would be likely to occur if the withheld information was disclosed has to relate to commercial interests.
14. The public authority must demonstrate a clear link between disclosure and the commercial interests of either itself, a third party or both. There must also be a real and significant risk of the prejudice to commercial interests occurring for it to be successfully engaged.
15. The exemption is subject to the public interest test. This means that, even if the exemption is engaged, the Commissioner needs to assess whether it is in the public interest to release the information.
16. The DfE explained that “the consortium [PA Consulting Ltd] was awarded this contract through a competitive tender process using the Crown Commercial Service³ (CCS) cross government Management Consultancy Framework Three⁴”. The DfE stated that “PA Consulting Ltd is a consortium made up a number of members providing consultancy services[...]: PA Consulting; National Council for Disabled Children; Impower; and Olive Academies.” It states that the rates are “below the maximum day rates on the framework and are a national market price, therefore providing the department and the taxpayer with value for money”.
17. The DfE went on to explain that it is standard practice to publish a contract award and the redacted contract. It accepted that an unredacted version had been “uploaded in error” and was published for a short time before it was removed. The redacted version was subsequently published.
18. It argues that the requested information was provided to the DfE in confidence and that releasing it would prejudice the DfE’s commercial

² [Section 43 - Commercial interests | ICO](#)

³ [Crown Commercial Service - CCS](#)

⁴ [Management Consultancy Framework Three \(MCF3\) - CCS \(crowncommercial.gov.uk\)](#)

interests and those of the "members of the consortium". If the daily rates of consultants "even if anonymised, would allow providers, or any third parties, to determine the day rates of other providers and competitors within the market".

19. The DfE seeks "to receive competitive bids and secure the best expertise and value for money...possible" in a "highly competitive environment" for "the provision of consultancy work". Disclosing the information would prejudice the DfE's ability to obtain value for money. Consultants "receiving a lower daily rate" may "push for renegotiations" with the DfE which has "current cost pressures" it is "attempting to manage proactively, without entering into individual negotiations with consultants or their firms".
20. Releasing the day rates "would directly impact on consultant's ability to be competitive in these environments and the broader market". The provision of these rates "which is a key driver for competition and differentiation of providers in this market" to their competitors would be likely to reduce competition and price differentiation.
21. Its view is that the publishing of the tender information, the amount awarded and the contract "fulfils" its "commitment to transparency". There is information therefore in the public domain and "the release of such granular information, along with the publicly available contract details, would be likely to directly prejudice the current consultancy provider's (sic) and the department's commercial interests".
22. The DfE argues that those prejudiced would be the consortium and its members (see paragraph 17). It contends that the prejudice is "real and substantial affecting both the provider's ability to compete in a competitive market" and the DfE's ability to obtain value for money. There is a clear causal link:

"Even if anonymised, competitors will be able to compare their own daily rates with those paid to other companies by the department, which is likely to lead to them adjusting their rates within a range paid by the department, thus leading to reduced VfM."
23. Having asked PA Consulting Ltd for its view, confirmation was given that disclosure of the granular information would have a negative commercial impact as it would provide competitors with the day rate costings for this work and place them at a commercial disadvantage within the provider market. These costs "differ from other consultancy firms providing similar services due to their different delivery models". The DfE assesses the likelihood of prejudice as "at the high end" of the lower level of prejudice.

The Commissioner's view

24. The Commissioner accepts that the disclosure of the requested information would be likely to prejudice the commercial interests of both the DfE and PA Consulting Ltd. He accepts that the DfE has provided a causal link between disclosure and its own ability to obtain value for money and PA Consulting's ability to compete with its commercial rivals.
25. He has therefore gone on to consider whether it is in the public interest to disclose this information, despite this.

Public interest factors in favour of disclosure

26. The DfE acknowledges that it is expending public funds on the procurement of research and consultancy services for the SEND and AP change programme. Therefore "there is a strong public interest in ensuring transparency in this process" and "accountability for publicly spent money". It suggests that "this is to ensure that public money is being used effectively " and that the DfE is getting the best value for money.
27. It also stressed the importance of transparency in conducting procurement processes "in an open, honest and accountable manner".
28. The complainant argues that they –

"had requested from the Department for Education the day rates paid to consultants running the special educational needs and alternative provision 'change programme' under a £7.6 million contract. The SEND system is in crisis, with dozens of councils with deficits on their SEND budgets. The reforms are hoping to change the system to make it focus on early intervention. PA Consulting are leading a consortium to trial these changes in certain areas of the country".
29. The complainant goes on to explain why they consider that it is -

"within the utmost public interest to understand what the day rates are for consultants working on SEND reforms, which in some quarters are seen as controversial. We need to understand what fees consultants are charging for how much of their time."
30. Their view is that "There also appears to be a precedent set in this case where the ICO ordered the NHS to respond to an FOI regarding these fees". The Commissioner notes that the decision concerned the public authority's lack of response and not whether the information should be disclosed. The complainant states that this information was subsequently disclosed by the public authority and that it provided information that included the fees "regarding the same company". The complainant contends that they "cannot see how the exemptions apply if other public bodies have deemed this information suitable for release".

They state that "the public deserves to know this and not releasing it could mean that it creates a secret industry with no scrutiny on rates being charged to public bodies with taxpayers money".

Public interest factors in favour of maintaining the exemption

31. Conversely, the DfE argues that "there is considerable information already in the public domain on the allocation of funding for procured research and consultancy development services..." regarding the SEND and AP Change programme.

32. The DfE provided a link to "'Contract Finder'⁵", and the consultancy firm who are involved in this policy area", contending that

"This includes the total contracted funding made available to PA Consultancy and, along with other information, provides significant transparency in relation to the funding, delivery and accountability relating to the delivery of the change programme."

33. The DfE's view is that

"the general public interest in releasing the information requested, which would show the daily rates of individual roles within the specific consultancy firm, must be balanced against the public interest in protecting commercially sensitive information which, if released, would be likely to have prejudice[d] the department's commercial interests as well as those of the current suppliers".

An adverse effect to the DfE's "bargaining position during future negotiations and competitive bidding rounds...could result in the less effective use of public money".

34. Disclosing the requested information which "is not already publicly known...would be likely to be used by competitors in this particular market to gain a competitive advantage over both the department and their competitors". The DfE's view is that disclosure of consultant rates at a granular level would reduce its ability "to negotiate or compete in a commercial environment" because "any potential bidders and future suppliers" would have knowledge or access to this information. Any reduction in value for money is not in the public interest.

35. The DfE details how the daily rates are "commercially sensitive information" that, if released "could prejudice any tendering/bidding competition should future options/providers be considered, allowing

⁵ [SEND and AP Change Programme - Contracts Finder](#)

potential third party bidders and suppliers providing services to tailor and alter their prices, if they believe that there is adequate space to do so based on the existing daily rates being paid". It would also be likely to inhibit the DfE's "ability to successfully participate in a commercial activity for this policy and any future presumptions".

36. The DfE argues that the disclosure of the requested information into the public domain "would have an impact on the fairness of the market when assessing future tendering exercises, and would weaken the broader application and assessment process, with some organisations being at a commercial advantage based on the commercial information of their competitors being in the public domain".

The balance of the public interest

37. Although the Commissioner understands the concerns put forward by the complainant about the sums involved in paying consultants, he has balanced this against the likely harm to the commercial interests of the DfE in getting value for money in future tenders for the reasons given. He has factored into his decision the commercial detriment to the consultants as a result of disclosing their day rate fees when competitors' day rates have not been disclosed. Considered together these negate any public interest benefit which would be served by the disclosure of the withheld information. In reaching this conclusion he has taken into account the fact that a significant amount of information is in the public domain via Contract finder.
38. As the Commissioner has reached the conclusion that this information should not be disclosed, he has not gone on to look at the DfE's citing of sections 41(1) and 40(2) of FOIA.

Right of appeal

39. 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

40. 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.
41. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Janine Gregory
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