

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2025

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Education (DfE) correctly applied the exemption under section 35(1)(a) of FOIA to the request for information about the "levelling up premium" for teachers. This exemption concerns the formulation or development of government policy.
2. It's not necessary for DfE to take any corrective steps.

Request and response

3. The complainant made the following information request to DfE on 26 June 2024:

"Regarding to DfE's Levelling Up premium payments for FE teachers.
 1. What is the allocated budget for this? Please provide a minimum, probable and maximum budget estimate.
 2. Please also provide the same (min, max) estimate for the number of teachers likely to receive the payment.
 3. Please confirm the methodology behind which subject teachers should and shouldn't receive the payment.

4. Please outline the administrative/governance process which behind the approval of this decision, eg what steps were taken for the formal approval of the scheme? Were risk analysis carried out? Who exactly signed it off?

5. Please confirm what documents, reports or evaluations were produced and signed off by DfE SLT and the relevant ministers with regards to this scheme. Please provide this information in a list form, with the title of each document and the name of the team that produced them.

Separately, please also provide a copy of each of these documents."

4. DfE responded to the request on 24 July 2024. It addressed part 4 of the request and directed the complainant to where information within scope of parts 1 and 3 of the request is published, withholding this information under section 21 of FOIA (information accessible to the applicant by other means).
5. DfE disclosed some information within scope of parts 2 and 5 and withheld the remainder under section 35(1)(a) of FOIA.
6. The complainant requested an internal review on 24 July 2024. This focussed on DfE's response to parts 4 and 5 of the request.
7. DfE carried out an internal review on 6 September 2024. It addressed the complainant's query about part 4. Regarding part 5, DfE disclosed some information it had previously withheld under section 35 and confirmed it continued to withhold the remainder. It provided a list of the information it was withholding.

Reasons for decision

8. On the basis of their request for an internal review and complaint to the Commissioner, this reasoning covers DfE's application of section 35 of FOIA to part 5 of the complainant's request.
9. Under section 35(1)(a) of FOIA, information held by a government department is exempt information if it relates to the formulation or development of government policy.
10. Section 35 isn't a prejudice-based exemption; it's class-based. That means that the information must simply fall within the class of information described. If the withheld information relates to the formulation or development of government policy, it's exempt information. The timing of a request isn't relevant. The question is whether the information relates to the activity, irrespective of when the

request was made. However, section 35 is a qualified exemption which means that it's subject to the public interest test. The timing of the request is likely to be a factor when considering that test.

11. In its submission to the Commissioner, DfE has explained that in October 2023 it had announced the expansion of the "levelling up premium" (LUP) retention payments for early career teachers in key STEM and technical subjects. Then, in July 2024, the government confirmed that recruitment and retention incentives for teachers will continue in 2024-2025 and 2025-2026. This includes Targeted Retention Incentive payments, which replace the previous LUP offer.
12. DfE says it is clear that, at the time it received this request, the information it withheld related directly to ministers' consideration and active development of LUP policy. It says it withheld the information to ensure that the policy could be developed to reflect and encompass the manifesto commitments made by the then 'new' government. The government had taken office following the 4 July 2024 general election, only 22 days before DfE received the request.
13. DfE has provided the Commissioner with a copy of a submission it put to ministers on 24 July 2024. It says that this isn't information in scope of the request because it postdates the request received in June 2024. However, it says, this goes to prove that this policy was being developed even after the date of the request, with the submission putting policy proposals to ministers, to seek a ministerial approval to develop this policy.
14. The Commissioner has reviewed the information being withheld under section 35 and he's satisfied that this information relates to the development of a government policy on LUP payments. The Commissioner is satisfied that DfE was entitled to apply section 35(1)(a) of FOIA to the information it's continuing to withhold. He's gone on to consider the associated public interest test.

Public interest test

15. In their request for an internal review, the complainant provided the following arguments to support their view that the information should be disclosed:
 - "The ICO has consistently found that there is a strong public interest in disclosing documents that shed light on government decision-making processes, provided they do not undermine the ongoing policy development or prejudice future policy-making.

- Case law, such as the Upper Tribunal decision in *Department of Health v Information Commissioner* (2011), emphasizes that while there is a need to protect the "safe space" for policy formulation, this must be balanced against the public interest in transparency..."

16. DfE has acknowledged the following:

- More openness about the process and delivery may lead to greater accountability, an improved standard of public debate, and improved trust.
- Disclosure would demonstrate the government being open and transparent about how it implements policy.

17. DfE has also provided public interest arguments to support its view that the information should be withheld, which are summarised below:

- At the time of the request, the policy was still ongoing and is still ongoing. The public interest in withholding the information hasn't therefore diminished at all. Disclosure has the potential to inflict damage on the development of 'live' policy, and the overall policy-making process.
- It's not in the public interest to have an out-of-date policy position, which formed the basis of advice that went to a previous administration, in the public domain. The current policy surrounding LUP is based on aligning previous consultation, evidence, and associated emerging data and expertise on this area with related manifesto commitments.
- It's not in the public interest to potentially inhibit officials from giving free and frank views and advice as part of the policy development process. Disclosing the information could cause this inhibition because officials could be wary of 'outdated' advice, policy positions and perceived risks making it into the public domain in the future. In turn, this could create confusion for the education sector, its staff and associated unions. It's therefore essential that only the agreed position is in the public domain.
- Releasing the withheld information is likely to have a prejudicial impact on the development of this policy. As above, disclosure could influence the behaviours, reactions and responses of the key stakeholders affected by the policy, particularly the education sector.

- This is a high-profile policy, and a vital lever in delivering the government's commitment to recruit an extra 6,500 teachers. It's in the public interest that DfE has a 'safe space' in which it can record and consider all evidence and findings, and officials' professional views and opinions.
 - Good government depends on good decision-making and this needs to be based on the best advice and a full consideration of the options available at that point in time. Not having a 'safe space' is likely to have a corrosive effect on the conduct of good government, with a significant risk that policy and decision-making will become poorer. Where policy is dealing with such significant issues as recruiting and retaining a highly skilled teacher workforce, any such corrosion of the conduct of good government wouldn't be in the public interest.
18. DfE has also quoted and discussed excerpts from the withheld information - what it describes as examples of frank and candid proposals - to support its public interest arguments. To protect the withheld information, the Commissioner hasn't reproduced those elements in this notice.
19. The Commissioner has considered the balance of the public interest. Public interest arguments associated with section 35(1)(a) must focus on the effect of disclosing the information at the time of the request, rather than the effect of routinely disclosing that type of information. Public interest matters also need to be considered at the time the public authority should have responded to the request and take account of the circumstances as they were at that point.
20. It's the case that there's public interest in how teachers in particular subjects will be recruited and maintained in post. However, on balance the Commissioner considers that there's greater public interest in withholding the requested information.
21. The policy in question was 'live' at the time of the request, and currently. The Commissioner notes that, where dated, the majority of the withheld information is dated from February and June 2024 (one item appears to be dated 9 July 2024) and other information is dated from November 2023 ie the withheld information in scope of the request is very or relatively recent in relation to the timing of the request and DfE's response.

22. The Commissioner has given some weight to DfE's 'safe space' argument although he's not completely persuaded that senior officials would be deterred from contributing their full and frank views and advice about a policy they're considering. However, there's also weight to the argument that putting out of date information into the public domain – while the policy is still being developed – may confuse, concern, or alienate, interested and affected stakeholders and potentially generate unnecessary distraction for DfE. This would undermine the process of developing an important policy.
23. There is, of course, a public interest in DfE demonstrating it's transparent about its policymaking. But, on balance, the Commissioner finds that the public interest favours withholding the requested information in this case, for the reasons above.

Right of appeal

24. 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

25. 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.
26. 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
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF