

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 August 2012

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

Decision (including any steps ordered)

1. The complainant requested information which the Department for Education (the "DfE") had used in order to make its decision on its funding position for the Building Schools for the Future programme for Sandwell Metropolitan Borough Council ("Sandwell MBC"). The DfE disclosed some information. However, the remaining information was withheld under the exemption for information reasonably accessible to the applicant (section 21), the formulation of government policy exemption (section 35) and the legal professional privilege exemption (section 42). During the investigation of the case the DfE also informed the Commissioner that it was seeking to rely upon the third party personal information exemption (section 40(2)).
2. The complainant has not complained about the DfE's use of sections 21 and 42. Therefore this notice has only considered the information withheld under sections 35 and 40(2).
3. The Commissioner's decision is that the DfE has correctly relied upon section 35 to withhold the outstanding withheld information.
4. Therefore the Commissioner does not require any steps to be taken.

Request and response

5. The Building Schools for the Future ("BSF") programme was announced in 2004, and was intended to rebuild every secondary school in England.

In July 2010 the Secretary of State for Education announced an overhaul of capital investment in England's schools, which included an end to the BSF programme.¹ This effectively meant that some school projects would not go ahead. Six local authorities (including Sandwell MBC) subsequently sought a judicial review of the decision to cancel their school projects. As a result of the judicial review the DfE was required to revisit its decision on BSF funding in relation to these authorities. The Secretary of State wrote to these authorities on 19 July 2011, and set out his provisional decision in relation to the provision of this funding. Subsequently, the Secretary of State wrote to these authorities on 3 November 2011 with his final decision in relation to this funding.

6. On 29 November 2011 the complainant wrote to the DfE in relation to its letter of 3 November 2011 (where it had set out its final decision in relation to Sandwell's BSF programme), and made the following request:

"We therefore write to request disclosure of the documents created during the consultation process to evidence the steps you have taken as follows:

1. Documentation created in respect of the establishment of the Department's consultation project team, including meeting notes and instructions to the project team;

2. Evidence of the in-depth review of local authority submissions by the Department's project team to enable it to produce a list of queries and clarifications to send to each claimant authority ahead of their meeting with the Department (meeting notes, minutes, summaries, etc produced);

3. Documents reviewed by the Department's project team prior to the announcement of the provisional decision: namely, "Information held either by the Department or PfS. Sources comprised School Capacity data, Edubase and Ofsted reports, school condition data from 2005, and information relating to equalities".

4. Commentary prepared by the PfS Project Directors on particular aspects of individual BSF projects prior to meeting the claimant authorities from 15 June;

¹ <http://www.education.gov.uk/inthenews/inthenews/a0061486/overhaul-to-englands-school-building-programme>

5. The information considered by you/your team in reaching the 19 July provisional decision: the funds available to you, the financial implications of a range of options and the funds needed to meet the local authorities' requests;

6. The PFS site visit reports for each of the school sites;

7. Details of the 'range of options' considered by you/your team prior to reaching the 19 July provisional position;

8. Information held by the Department and available through Edubase on groups with protected characteristics under the Equality Act;

9. The Equality Impact Assessment of the final decision prepared by the Department;

10. The reports commissioned from PFS following the site visits commissioned by the Department based on representations received from a number of MPs about specific schools in their constituencies;

11. Documents evidencing consideration of whether to fund Sandwell's schools on the grounds of basic need or suitability;

12. Documents evidencing consideration of options relating to the payment or project development costs and contractual liabilities;

13. Documents evidencing consideration as to whether funding the schools would be justified on equality grounds;

14. Documents evidencing consideration as to whether or not to make an exception for Sandwell's schools to enable them to be included in the PSBP; and

15. Information about the categorisation of condition used by the Department (PFS A-F standard or PSBP A-D standard)."

For ease of reference these are referred to as requests (1) to (15).

7. The DfE wrote to the complainant on 29 December 2011 and confirmed that it held information that fell under these requests. However, it informed the complainant that its full response would be delayed as it needed additional time to consider the public interest test in relation to section 35(1)(a), or sections 36(2)(b)(i) and (ii) in the alternative. It estimated that it needed an additional 20 working days in order to consider the balance of the public interest test, and therefore intended

to respond by 27 January 2012. It also stated that it was applying sections 21 and 42 to some of the requested information.

8. The DfE wrote to the complainant again on 27 January 2012 and provided the following response to these requests:
 - It disclosed the information that it held that fell under request (10).
 - It applied section 21 to the information it held that fell under requests (3), (6), and (15).
 - The information it held that fell under requests (1), (2), (4), (5), (7), (9), and (11) to (14) was exempt under sections 35(1)(a) and 42.
9. The complainant wrote to the DfE on 1 February 2012 and disputed its use of section 35(1)(a). The complainant asked whether the DfE was prepared to waive the internal review process, so as to allow a complaint to be made directly to the Commissioner. The DfE responded on 6 February 2012, and stated that it was not willing to waive the internal review. Consequently the complainant wrote to the DfE on 7 February 2012 and requested an internal review.
10. The DfE provided an internal review on 5 March 2012 in which it upheld its original position.

Scope of the case

11. The complainant contacted the Commissioner to complain about the way her request for information had been handled. Specifically, she complained about the use of sections 35(1)(a) and 42.
12. Subsequently, the complainant confirmed to the Commissioner that she was no longer complaining about the DfE's use of section 42.
13. During the course of the investigation the DfE informed the Commissioner that it was also seeking to rely upon section 40(2) to withhold some of the personal information contained in the withheld information.
14. Therefore the scope of this case has been to consider the DfE's use of section 35(1)(a), together with its use of section 40(2) where it has applied that exemption to information also withheld under section 35.

Reasons for decision

Section 35(1)(a)

15. Section 35(1)(a) of the FOIA states that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class based exemption, and therefore if the information is of the type specified in the exemption, that exemption is engaged.
16. In order to reach a view on whether this information can be withheld the Commissioner has first considered whether it relates to the formulation or development of government policy.
17. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question and does not specifically need to be information on the formulation or development of that policy.
18. In this case the withheld information relates to the government's policy on the future of the BSF programme, and in particular regarding the future provision of BSF funding for the six local authorities who brought the judicial review. The Commissioner is satisfied that the withheld information relates to the process in which the Secretary of State reached his decision on the provision of BSF funding for these local authorities. As such he is satisfied that the withheld information relates to the formulation and development of that policy.
19. Bearing this in mind the Commissioner finds that section 35(1)(a) is engaged.
20. Section 35(1)(a) is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has first considered the public interest in disclosure.
21. The DfE has recognised that there is a public interest in openness, transparency and increasing accountability in decision making processes, especially where (as in this case) the policy affects the lives of citizens and relates to the spending of public money. In particular, disclosure would be in the public interest as knowledge of the way government works increases if information on which decisions have been made is publicly available. This can increase the public's ability to effectively contribute to the policy making process. It has also recognised that there is a public interest in being able to see if Ministers are being effectively briefed on the key areas of policy that the DfE is

taking forward, and that decisions are being undertaken on a clear understanding of the facts. Finally, it has recognised that the decisions taken in relation to the BSF programme in July 2010, which effectively meant that a number of school projects would not now go ahead, were controversial and sensitive. The judicial review brought by a number of local authorities, including Sandwell MBC, ensured that at the time of the request this issue continued to be one of significant sensitivity. Increasing public understanding of this controversial and sensitive issue would be in the public interest.

22. The complainant has made similar arguments in favour of disclosing this information. In particular, she has argued that given the findings of the judicial review, in January 2011, there was a strong public interest in ensuring that the Secretary of State had taken into account all the correct factors when making his decision (as set out in his letter of 3 November 2011) on BSF funding for Sandwell MBC. She has also argued that there was a particular public interest in the disclosure of the factual information that had been used in order to come to this decision (see paragraphs 44 to 47 below).
23. In favour of maintaining the exemption, the DfE has argued:
 - It is in the public interest that the formulation of government policy and decision making can proceed in the self-contained space needed to ensure that it is done well.
 - Ministers and those advising them need to have the necessary confidence and space to carry out a difficult task effectively. Public interest and accountability are, under certain circumstances, more appropriately served without the disclosure of provisional advice or assumptions because such disclosure is likely to have a distracting, disruptive or otherwise detrimental effect on the formulation and development of government policy.
 - In particular there is a strong public interest in enabling Ministers to consider and decide on policy in a safe space. This request focuses on the decision making process in the formulation and development of a complex, sensitive and high profile issue. Bearing these points in mind, the public interest in maintaining this 'safe space' is particularly strong in this case.
 - Good government depends on good decision making, and this needs to be based on the best advice available and a full consideration of options. Without protecting the thinking space and the ability for Ministers, and senior officials, to receive free and frank advice, there is likely to be a corrosive effect on the conduct of good government, with a risk that decision making

will become poorer. This could result in weaker government. This would not be in the public interest.

- Disclosure of the withheld information is likely to have an inhibitory effect on the free and frank provision of advice to Ministers on the school rebuilding programme.

The Commissioner considers these to be 'safe space' and 'chilling effect' arguments.

24. During the investigation of the case the DfE also argued that the development of this policy was still underway at the time of the request, and as such the public interest in protecting this safe space and in guarding against the chilling effect was particularly strong. Conversely, the complainant has argued that the formulation and development of this policy had been completed at the time of the request. This matter is considered further at paragraphs 32 to 35 below.
25. In reaching a decision as to the balance of public interest arguments the Commissioner has been mindful of the particular circumstances of this case. He has also had to consider the circumstances at the time the request was made.
26. The Commissioner considers that the public interest factors in favour of disclosure are strong in this case. The decisions taken in relation to the BSF programme in July 2010 represented a major change to the BSF policy, which would have a potential impact on existing schools and the provision of education, and would potentially involve the expenditure of public money. These decisions were controversial and attracted a lot of attention, both public and political.
27. The subsequent judicial review sought by six local authorities (including Sandwell MBC), and its outcome, ensured that at the time of the request this issue continued to be one of great sensitivity, that was still controversial, and was still a matter of debate.
28. Although this request was made shortly after the Secretary of State wrote to these local authorities with his final decision in relation to BSF funding, the DfE has informed the Commissioner that at that time none of these authorities had accepted this decision. Whatever the final outcome of this process was going to be, it would have a major impact on school buildings, and the provision of education, in this area. Therefore, the Commissioner considers that the public interest in increasing transparency and accountability of this decision making process particularly strong.
29. In particular, given the level of debate about the decisions made on the future of the provision of BSF funding, and the outcome of the judicial

review, he considers that increasing public understanding of formulation and development of this policy is a particularly weighty public interest factor in favour of disclosure. When considering the weight the Commissioner must also acknowledge that the judicial review meant that the Government had conceded that its original decision had to be reviewed.

30. However, the Commissioner has to balance these public interest arguments in favour of disclosure against those in favour of maintaining the exemption.
31. As noted above, the Commissioner has identified the arguments in favour of maintaining the exemption as safe space and chilling effect arguments. In considering the weight to give to safe space arguments the Commissioner considers the timing of a request is of paramount importance. It is also important to take into account the age of the information, and whether the formulation and development of the policy in question was still underway at the time of the request.²
32. As noted above, the DfE has argued that the development of this policy was still underway at the time of this request. The complainant has argued that the final policy decision in relation to BSF funding had been taken – and has referred to the original announcement (prior to the judicial review) by the Secretary of State in July 2010. Given these arguments, and taking into account the fact that by the time of the request the Secretary of State had written to the six appellant local authorities informing them of his final decision in regard to the provision of BSF funding, the Commissioner wrote to the DfE during the investigation of this case and asked it for further arguments as to how this policy was still under development at the time of the request.
33. The DfE has explained that although the Secretary of State had sent the final decision letter, at the time of the request this decision had not been accepted by any of the six local authorities concerned. Therefore, at the time of the request the policy was still live. Although the Secretary of State had issued his final decision letter, the final position on BSF funding for these authorities was still uncertain, and open to further development.
34. Given that the request was made following the issuing of the Secretary of State's final decision letter, the Commissioner considers that the

² *DfES v the ICO & The Evening Standard* [EA/2006/0006] para 75; *DBERR v the ICO & the Friends of the Earth* [EA/2007/0072] para 114.

complainant's view that the policy was no longer under development is entirely understandable. Nevertheless, he notes that although a final decision letter had been sent, the policy in question was still (at the time of the request) potentially open to change and further development – given that the Secretary of State's decision had not been accepted by the appellant authorities, and was still potentially open to further legal challenge.

35. Therefore the Commissioner is satisfied that at the time of the request the formulation and development of this policy was live and ongoing. He also considers that the withheld information directly related to the formulation and development of this policy by feeding into ministerial decision making for this process. He also notes that some of the withheld information was relatively recent when the request was made.
36. The Commissioner considers that significant and notable weight should be given to the safe space arguments in cases where the policy making process is live at the time of the request, and the withheld information relates directly to that policy making. In these circumstances there is a strong public interest in protecting the need for a private space to develop live policy, allowing ministers and officials the time and space *"to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."*³
37. Given the timing of the request and the live nature of the development of this policy, the Commissioner considers that it is clear that disclosure in this case would impact on safe space. In these circumstances the Commissioner accepts that compelling public interest arguments in favour of disclosure are needed to result in disclosure. One such factor would be if the information clearly reveals wrongdoing, but this is not the only type of factor that is relevant. How the public would be impacted by the policy in question and how many people is also a relevant factor, including a consideration of whether the public had enough information about the impact to enable them to debate the policy whilst it was live. Whilst the Commissioner has acknowledged strong public interest factors in favour of disclosure, he does not consider that these particular factors are met in this case.
38. In considering the weight to give to the chilling effect arguments the Commissioner considers that the central question is the content of the

³ [EA/2006/0006] para 75.

particular information in question.⁴ He also considers that the timing of the request will be important in relation to chilling effect arguments.

39. In this case the Commissioner notes that the withheld information in question contains free and frank advice on a highly controversial subject area, which involved the potential expenditure of large amounts of public money, and directly related to the provision of education in a number of local authorities, in particular Sandwell MBC. He also notes his above findings that this information relates to a policy that was still a live issue at the time of the request.
40. As has been noted above, the decisions taken in relation to the BSF programme in July 2010 attracted a considerable amount of controversy and was a matter of considerable debate, both public and political. The outcome of the judicial review brought by the six local authorities, which led to the DfE being required to revisit its decision on BSF funding for these areas, ensured that this continued to be a matter of considerable debate at the time of the request.
41. As the formulation and development of this policy was still a live issue, the Commissioner accepts that those involved in providing advice for this process had a stronger expectation that this information would not be disclosed than if the request had been made after the matter had been concluded. Therefore, bearing in mind the timing of the request and the sensitivity and controversy of the issue under discussion, the Commissioner considers that the disclosure of the withheld information would be likely to have had an inhibitory effect (i.e. a chilling effect) on those parties providing advice to support the formulation and development of this policy. He also considers that it is likely that this inhibition would have been severe and (at that time) frequent. Therefore the Commissioner accepts that the impact of disclosure would be significant. In particular he accepts that it would clearly be difficult for a government department, which had been required to reconsider a matter because of a judicial review, to then disclose information directly relating to that process whilst it was still reconsidering its position.
42. It is also relevant for the Commissioner to acknowledge the fact that the judicial review had already considered many of the issues surrounding the policy issue and this slightly lessens the public interest in disclosure, particularly related to the process followed by the DfE in its decision making.

⁴ [EA/2006/0006] para 75(i).

43. Therefore, after considering all of the above points the Commissioner considers that in this case there are weighty public interest factors both in favour of disclosure and in favour of maintaining the exemption.
44. As noted above, the complainant has argued that there is a particular public interest in the disclosure of any underlying factual information which the Secretary of State had before him when reaching his decision on the matter of the BSF funding.
45. Section 35(4) of the FOIA, states that in making a determination on the public interest (in relation to the application of section 35), regard should be had for the particular public interest in the disclosure of factual information which has been used, or is intended to be used, to provide an informed background to the decision-taking.
46. The Commissioner has taken this into account when coming to a decision on the balance of the public interest in relation to this exemption, and he recognises the particular public interest in the disclosure of any factual information used to inform the decision making process in the development of this policy. This goes towards the weighty public interest factors in favour of the disclosure of the withheld information.
47. However, the Commissioner still considers that the disclosure of this information would impact on the safe space necessary for the development of this policy, and for the reasons given above he finds the public interest in protecting this safe space particularly weighty. In particular, he again notes that as the DfE had been required to revisit its decision on BSF funding because of a judicial review, it would potentially be particularly damaging to that process were it to be required to disclose the factual information feeding into that process whilst the development of that process was still underway.
48. Due to the timing of the request, the Commissioner finds that the public interest in protecting the safe space necessary for the formulation and development of this policy particularly compelling and weighty. Therefore the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining section 35(1)(a) outweighs the public interest in disclosure. Therefore this information should be withheld.

Right of appeal

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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

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

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