

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 11 March 2014

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

#### **Decision (including any steps ordered)**

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1. The complainant requested copies of the information used by the DfE in reaching its decision of 3/11/11 to refuse funding for Sandwell Council's "Building Schools for the Future" (BSF) programme.
2. The Commissioner's decision is that the DfE has incorrectly relied upon s36 FOIA to withhold the information. The s35 exemption is engaged but the Commissioner has decided that the public interest in maintaining the exemption does not outweigh that of disclosure. The s42 exemption was correctly engaged in relation to parts of the information. The Commissioner has also determined that a small amount of information is exempt under s40(2).
3. The Commissioner requires the DfE to disclose the information that had been withheld under s36 apart from that which is subject to the exemptions at s42 and s40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

#### **Background to the request**

5. BSF was the largest single schools capital investment programme for over fifty years. Its aim was to rebuild or renew every secondary school in England. Significant capital allocations were provided to local authorities by the government in order to carry out the programme.

The rebuilding was estimated to take fifteen years at a cost of £45 billion to complete. The first wave of rebuilding started in March 2004. The programme was cancelled by the incoming government in 2010. Following the cancellation, Sandwell was one of six local authorities to challenge the decision through Judicial Review. In February 2011 the judge found in favour of the government on the substantive grounds but in favour of the claimants on procedural grounds.

## Request and response

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6. On 30 September 2012 the complainant made the following request in relation to the decision to cancel the BSF programme:

*"We request copies of all reports, submissions, minutes of meetings and discussions, notes, emails, letters and any other relevant document upon which the Decision is based. We also request copies of the following specific information:*

- (i) Documentation created in respect of the establishment of the Department's consultation project team, including meeting notes and instructions to the project team;*
- (ii) 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);*
- (iii) Commentary prepared by the PfS Project Directors on particular aspects of individual BSF projects prior to meeting the claimant authorities from 15 June;*
- (iv) The information considered by the Department team in reaching the 19 July provisional decision: the funds available to the Department, the financial implications of a range of options and the funds needed to meet the local authorities' requests;*
- (v) Details of the "range of options" considered by the Department team prior to reaching the 19 July provisional decision;*
- (vi) The Equality Impact Assessment of the final decision prepared by the Department;*
- (vii) Documents evidencing consideration of whether to fund Sandwell's schools on the grounds of basic need or suitability;*
- (viii) Documents evidencing consideration of options relating to the payment of project development costs and contractual liabilities;*
- (ix) Documents evidencing consideration as to whether funding the schools would be justified on equality grounds; and*
- (x) 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".*

7. On 14 November 2012 the DfE withheld the information under s35(1)(a) and s42 FOIA.
8. The complainant appealed on 3 December 2012. The DfE carried out an internal review and determined that the exemption at s35(1)(a) no longer applied. It informed the complainant on 25 February 2013 that the exemptions at s36(2)(b)(i), s36(2)(b)(ii) and s36(2)(c) were engaged instead. The DfE's review upheld its initial finding that some of the information was also exempt under s42.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 5 April 2013 to complain about the way her request for information had been handled.
10. This decision notice addresses the DfE's withholding of the information under s36 and s42.

### **Reasons for decision**

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11. The DfE provided the Commissioner with a copy of the withheld information and its arguments in support of the exemption at s36. The DfE said its substitution of s35 with s36 reflected the fact that time had moved on and that BSF was no longer subject to policy formulation.
12. The Commissioner has previously determined the same information to be exempt under s35(1)(a). His findings were published in two decision notices - FS50429127 and FS50439355 - dated 21 May 2012 and 9 August 2012. The passage of time is not relevant as to whether the s35 exemption is engaged. Consequently the information remains exempt under s35(1)(a). As the exemptions at s35 and s36 are mutually exclusive s36 cannot apply.
13. The Commissioner informed the DfE that s36 was not engaged but that he was prepared to consider the arguments that it had submitted under s36 as far as these were relevant to the exemption at s35.
14. Section 35(1)(a) provides that information held by a government department is exempt if it relates to the formulation or development of government policy. The exemption is qualified and therefore subject to the public interest test.
15. The Commissioner considers that the term 'relates to' within the wording of s35 FOIA should be interpreted broadly to include any information

concerned with the formulation or development of policy. It does not specifically need to be information on the formulation or development of that policy.

16. He is satisfied that the withheld information related to the formulation of policy regarding school capital funding. Accordingly he finds that s35(1)(a) is still engaged in relation to the withheld information.
17. The exemption at s35(1)(a) is subject to the public interest test whereby the information can only be withheld if the public interest in maintaining the exemption outweighs that of disclosure.
18. The Commissioner has considered the public interest arguments in favour of disclosure.
19. The DfE acknowledged the following factors in favour of disclosure: the inherent value of open and transparent government; the value of the public being able to see how decisions are made in contentious areas; the ability to satisfy the public that ministers are well-briefed and that decisions are made on a clear understanding of the facts.
20. The Commissioner recognises that the BSF policy and its termination attracted significant public debate. The government programme to improve the nation's schools had involved substantial expenditure of public money. Abolition of the programme necessitated further considerable payments from the public purse in order to settle the contractual liabilities of a number of public authorities. In addition to national debate and general public interest there was also considerable debate and interest in particular local areas where the programme was being used to renew and rebuild a large number of schools. There was a strong public interest in understanding a decision that had the potential to impact on the quality of school provision and educational experience of students. Increasing public understanding of all the issues involved would therefore be in the public interest.
21. The Commissioner has gone on to consider the public interest arguments in support of withholding the information.
22. Prior to being informed that s36 was not engaged the DfE had submitted safe space arguments in favour of withholding the information. The key principle of those arguments was that ministers and officials should have safe space to develop their thinking and explore available options. The decision to end BSF was made in July 2010. Safe space in which to consider a policy decision is not required for one that has long since been implemented. The Commissioner has therefore determined that due to the passage of time the DfE's safe space arguments no longer apply.

23. The DfE had also submitted the following 'chilling effect' arguments in favour of withholding the information. The term 'chilling effect' refers to an adverse effect on the frankness and candour of participants in the policy making process.

- (a) The DfE maintained that disclosure would inhibit civil servants' willingness to offer free and frank advice and thereby reduce the quality of advice given to ministers. It said officials would be less frank when drafting advice and recommendations because they would worry about damaging relationships with a stakeholder or partner or worry about damaging ministers' relationships with partners. In this regard the Commissioner is mindful of the alternative argument that rather than producing a chilling effect leading to poorer quality advice, the knowledge that it might be disclosed could actually lead to better quality advice. The Commissioner accepts that disclosure of the information in question has some potential to cause a chilling effect but the DfE has not properly addressed the issue of why that risk would still be significant for a policy decision that had been finalised more than two years prior to the request.
- (b) The DfE said officials needed to be able to engage in free and frank discussions about capital building programmes in order to analyse the options available. If officials knew that discussions would be disclosed they would not be properly recorded. Officials would also be less likely to carry out or record internal analysis if they thought this would be released. This would inhibit and disrupt policy deliberations on future school funding.
- (c) The DfE said release of internal email exchanges would be likely to inhibit officials from recording their planning and on-going work in the future.

The points at (b) and (c) both rely on the argument that disclosure could affect future record keeping by officials. The Commissioner is mindful in this regard that the Information Rights Tribunal has given little weight to arguments that disclosure might lead to poorer record keeping. It is considered to be a matter of effective staff management for government departments to ensure that sound advice is made available to decision makers and that such advice is properly recorded.

- d) The DfE said it was unlikely that local authorities would want the spreadsheets that they might have supplied to be released. However, the DfE did not provide any correspondence from the local authorities themselves in order to support this submission. Consequently the argument appears to be speculative.

24. On being informed that s36 was not engaged the DfE submitted the following arguments:

(e) It maintained that the passage of time does not reduce the impact that disclosure would have on similar exercises in the future. However, the DfE did not explain why disclosure in this particular instance should have any bearing on future programme terminations. The Tribunal has given little weight to arguments about wide ranging "chilling effects" that are not specifically related to the information in question. Whilst there may be cases where the Commissioner might accept that some wider chilling effect could occur, such arguments should not be accepted as general "arguments of principle". A public authority needs to make a convincing case as to why disclosure of the information in question would have this wider effect.

(f) Because the decision to stop the BSF programme was a major exercise taken at pace in order to quickly discharge the administration's wishes, the DfE submitted that the chilling effect was likely to be of greater impact than would be the case with a more routine submission. The DfE did not explain why this should be the case.

(g) The DfE said that after a future general election it would be likely that officials would be asked to review and advise on options to wind down or stop some of the programmes from the previous administration. It said that the withheld information constituted a methodology for taking such decisions at pace. In its view the fact that this decision had been finalised did not remove the risk of a chilling effect on future exercises. However, the DfE did not explain why disclosure in this particular instance should cause a chilling effect on any other exercises in the future. It did not explain how the overall methodology of the exercise was inextricably linked to the information nor did it explain why any perceived methodology could not be used again.

(h) The DfE extended its earlier argument that disclosure might lead to poor recording with the suggestion that disclosure could lead to officials deleting records once future decisions were reached. In this respect the Commissioner refers to his position that it is a matter of effective and responsible staff management for government departments to ensure that advice and decisions are properly recorded.

25. In reaching his view as to where the public interest lies the Commissioner acknowledges that in some circumstances a wider chilling effect might occur as a result of disclosure. He has accorded some weight to maintaining section 35(1)(a) but the Commissioner finds that the chilling effects of disclosure were unlikely to be severe and this weight is limited.

26. He recognises the considerable public debate which ensued from the ending of a major government programme in which substantial sums of public money had been invested in improving the nation's schools. In his view there is a powerful public interest in understanding the whole picture and in providing full transparency to the reasons which led to the decision to cancel the school improvement programme. The Commissioner considers that the public interest in disclosure outweighs the public interest in maintaining the exemption. Therefore the information should be disclosed.

## **Section 42**

27. Section 42 provides that information in respect of which a claim to legal professional privilege could be maintained in legal proceedings is exempt from disclosure.
28. Legal professional privilege (LPP) protects the confidentiality of communications between a lawyer and client. There are two types: litigation privilege and legal advice privilege. In this instance the DfE relied upon a claim of advice privilege. This is available where the information consists of confidential communications between a client and legal adviser made for the sole or dominant purpose of obtaining legal advice.
29. The Commissioner has examined the information withheld under s42. It consists of correspondence requesting legal advice, the receipt of that advice, discussion by officials of the legal advice and summaries of that advice. He is satisfied therefore that the exemption is engaged.
30. The s42 exemption is qualified and therefore subject to the public interest test.

### *Public interest arguments in favour of disclosing the requested information*

31. The DfE said it acknowledged that it is in the public interest to demonstrate that its decisions have been made on the basis of high quality legal advice. It recognised the importance of public confidence in the legality of decisions concerning contentious issues such as the BSF programme.

### *Public interest arguments in favour of maintaining the exemption*

32. The DfE argued that there is a strong public interest in maintaining lawyer-client confidentiality. It is important that officials are able to consult lawyers in confidence to obtain effective legal advice in a safe forum, conducive to a candid exchange of views and assessment of potential risks without fear of disclosure.

33. The DfE maintained that ministers and officials need high quality legal advice for the effective conduct of their business and in order to take decisions in a fully informed legal context. Legal advisers need to be able to set out arguments for and against a particular line without fear that this might expose weaknesses in the government's position and open it up unnecessarily to legal challenge which would waste public resources.

34. The Commissioner has taken into account the inbuilt public interest within the concept of legal professional privilege. In *Bellamy and Secretary of State for Trade and Industry* (EA/2005/0023) the Information Tribunal noted the inbuilt public interest as follows:

*"...there is a strong element of public interest inbuilt in to the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt interest...it is important that public authorities be allowed to conduct a free exchange of views as to their legal rights and obligations with those advising them without fear of intrusion, save in the most clear case..."*

35. The Commissioner considers it important for public authorities to be able to consult with their lawyers and obtain legal advice in confidence. Fear of doing so due to the prospect of disclosure may deter them from seeking appropriate legal advice. This in turn would not be in the public interest.

#### *Commissioner's conclusion*

36. The Commissioner acknowledges the public interest in disclosing information which will lead to greater openness and accountability.

37. However, he recognises that the general public interest inherent in the s42 exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in communications between client and lawyer to ensure access to full and frank legal advice which in turn is fundamental to the administration of justice.

38. The Commissioner has concluded that the public interest in disclosure is outweighed by the public interest in favour of maintaining the exemption. Therefore the information exempted under s42 should be withheld.

#### **Section 40**

39. Section 40(2) FOIA states that information is exempt if it constitutes personal data disclosure of which would breach any of the data protection principles.

40. The DfE identified a small number of emails within the information which contain brief personal references such as birthday greetings between individuals. These references comprise personal data. The Commissioner considers that they should be redacted before release of the information. Disclosure would breach the first principle of the Data Protection Act which requires that personal data shall be processed fairly and lawfully. Public disclosure would be unfair as the individuals concerned would not expect their personal details to be made publically available. Accordingly the references are exempt under s40(2) FOIA.

### **Procedural matters**

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41. The DfE failed to provide the requested information to the complainant within 20 working days of the date of request. In failing to do so the DfE breached s10 of the FOIA.

## Right of appeal

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42. 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: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

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

43. 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.
44. 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 .....**

**Steve Wood**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**