

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 April 2019

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

Decision (including any steps ordered)

1. The complainant requested information on organisations that have received concessionary loans from the Education and Skills Funding Agency. The Department for Education (DfE) withheld the information under FOIA sections 36 (prejudice to the effective conduct of public affairs) and 43 (commercial interests) but then released the information during the Commissioner's investigation. The complainant remains dissatisfied with the length of time it took DfE to comply with its duties under section 1(1) of the FOIA.
2. The Commissioner's decision is as follows:
 - DfE's response to the complainant's request of 5 March 2018 complied with section 10(1) of the FOIA as DfE complied with section 1(1) within 20 working days.
3. The information has now been released and the Commissioner does not require DfE to take any steps to ensure compliance with the legislation.

Request and response

4. Through the *WhatDoTheyKnow* (WDTK) website, on 15 February 2018 the complainant wrote to DfE and requested information in the following terms:

"I believe a number of organisations have been in receipt of "concessionary loans" from the ESFA with terms along the lines of "interest free" and with long repayment terms.

I would like a list of Collages, MATs. UTCs and Academies who were in receipt a concessionary loan

If possible I would like the amount loaned, if it's interest free. The annual repayment and the loan term."

5. The Education and Skills Funding Agency (ESFA) is an executive agency of the government that is sponsored by DfE. ESFA went on to correspond with the complainant but, in the circumstances, the Commissioner is satisfied that the complainant's correspondence was with, in effect, DfE.
6. On 2 March 2018 DfE sought clarification about some of the terms the complainant had used, the time period he was interested in and whether his request concerned colleges. The complainant clarified his request on 5 March 2018.
7. On 29 March 2018 DfE provided a response. It released some information: the number of trusts with outstanding recoverable funding repayable over more than 12 months, and some general information about trusts' management of budget deficits.
8. The complainant wrote to DfE on 29 March 2018. He said he wanted to clarify that he had requested 'a list' of organisations, and details about the loans and that since a response to his request was well overdue, he hoped for a speedy response from DfE.
9. By return the complainant received an automatic acknowledgement that said: *"We can confirm that we have received the Freedom of Information request you submitted. We will respond to you within 20 working days."*
10. DfE provided a response to the 29 March 2018 correspondence on 27 April 2018. This correspondence begins: *"Thank you for your request for information, which was received on 03 April 2018."* DfE withheld the specific information the complainant had requested under section 43 of the FOIA.

11. The complainant wrote to DfE again on 6 June 2018 and explicitly requested an internal review. It appeared to him that DfE had treated his correspondence of 29 March 2018 as a new request, rather than as a request for an internal review. He considered this was therefore causing an unacceptable delay. The complainant was also dissatisfied with DfE's reliance on section 43. He again received the automatic acknowledgement at paragraph 9 and wrote to DfE on 4 July to confirm that his correspondence of 6 June 2018 was a request for a review and not a new request.
12. DfE provided a review on 5 July 2018. This correspondence acknowledges that the complainant's correspondence of 6 June 2018 was a request for a review. The review addressed the complainant's dissatisfaction about the delay. It noted he had submitted a clarified request and that the Commissioner's guidance advises that a clarified request should be treated as a new request. On this point, DfE did not confirm whether it was referring to the complainant's 5 March 2018 correspondence or his 29 March 2018 correspondence.
13. The review went on to confirm that DfE was also relying on section 36(2)(c) to withhold the requested information.

Scope of the case

14. The complainant contacted the Commissioner on 10 October 2018 to complain about the way his request for information had been handled.
15. Although it considered the section 36 and 43 exemptions had applied at the time of the request, as a result of the Commissioner's intervention and the passage of time, DfE agreed to release the requested information to the complainant as, in the intervening period, the information had lost its sensitivity. DfE released the information on 19 March 2019.
16. The Commissioner has not included the information released on 19 March 2019 within the scope of this investigation. The complainant is satisfied with the information he has now received and has not indicated that he wants to challenge the application of the exemptions at the time of his request. The complainant has confirmed that the focus of his complaint is DfE's categorisation of particular correspondence as a new request rather than a request for a review. He considers this to have been a deliberate delaying tactic.
17. The Commissioner's investigation has focussed on DfE's compliance with section 1 and section 10 of the FOIA. She has discussed other aspects of DfE's handling of the request under 'Other Matters'.

Reasons for decision

Section 1 – general right of access to information held by public authorities

18. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled (a) to be told if the authority holds the information and (b) to have the information communicated to him or her if it is held and is not exempt information.
19. However, section 1(3) states that where an authority reasonably requires further information in order to identify and locate the information requested, and has informed the applicant of that requirement, it is not obliged to comply with subsection (1) unless it is supplied with that further information.

Section 10 – time for compliance

20. Section 10(1) of the FOIA says that a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
21. However, section 10(6)(b) states that “date of receipt” means the day on which the authority receives the information referred to in section 1(3).
22. In this case, it is the Commissioner’s view that the complainant provided a clarified request on 5 March 2018 – 5 March 2018 was therefore the date of receipt. The 20 working day clock therefore began ticking on 6 March 2018. Taking account of bank holidays, a response was due on Thursday 5 April 2018. DfE provided a response on 29 March 2018, within the 20 working day limit.
23. If the correspondence of 29 March 2018 was considered to be the final clarified request, DfE provided a response to this on 27 April 2018 – again within the required timescale. However, the matter of this correspondence is discussed in ‘Other Matters’. Having reviewed the WDTK correspondence, the Commissioner is satisfied that the complainant’s 5 March 2018 correspondence is the clarified request.
24. Through its 29 March 2018 response, DfE communicated to the complainant some information within the scope of the request. The Commissioner has decided that DfE therefore complied with section 10(1) of the FOIA with regard to the complainant’s request of 5 March 2018 – it complied with section 1(1) within 20 working days.

Other Matters

25. Provision of an internal review is not a requirement of the FOIA and, as such, the Commissioner cannot make a formal decision on an authority's handling of an internal review. However, the Commissioner considers that providing a review is a matter of good practice. She considers that an authority should treat any expression of dissatisfaction with its response as a request for an internal review. The Commissioner considers that an authority should provide a review decision within 20 working days of a request for one and no longer than 40 working days.
26. In a submission to the Commissioner, DfE has explained that when an applicant submits any correspondence through WDTK, he or she will receive an automated response, as was the case in its exchanges with the complainant.
27. DfE considers that it was clear from the WDTK correspondence that it was liaising with the complainant throughout the case. With regard to the complainant believing that DfE categorised his request for an internal review as a new request, DfE confirmed that this was not the case. It says he received an automated response; that his request for an internal review was categorised as such and that DfE responded to him accordingly. The Commissioner here assumes that DfE is referring to the complainant's 6 June 2018 correspondence.
28. The Commissioner has carefully reviewed the complainant's correspondence with DfE on WDTK. She is satisfied that the complainant provided sufficient clarification in his correspondence of 5 March 2018 to enable DfE to understand what was being asked for. This was therefore his clarified request.
29. Having received a response to this request, in his correspondence to DfE of 29 March 2018 the complainant states that he wants to clarify his request. He confirms he had asked for 'a list' and particular details about the loans. The complainant was referring here to his original request of 15 February 2018. Despite the complainant having referred to the matter of clarification, the Commissioner considers that DfE should have treated this correspondence - of 29 March 2018 - as a request for a review rather than a further clarified request. In the Commissioner's view the complainant was expressing dissatisfaction with the response he had received on 29 March 2018 as it did not provide the list or details of the loans that he had originally requested.
30. On 27 April 2018 DfE provided what it categorised in the correspondence as a "response" to the 29 March 2018 "request". At this

point it withheld information under section 43 of the FOIA. This necessitated the complainant explicitly requesting an internal review on 6 June 2018. He was provided with a review on 5 July 2018, at which point DfE also relied on section 36 to withhold the requested information.

31. In the Commissioner's final analysis, the complainant effectively requested an internal review on 29 March 2018 and did not receive a definitive internal review decision until 5 July 2018 – a period of 65 working days (taking account of four bank holidays). The Commissioner notes the delay between the complainant receiving DfE's correspondence of 27 April 2018 and explicitly requesting a review on 6 June 2018 – 25 days (taking account of two of the bank holidays). Taking account of this delay, it took DfE 40 working days to provide a satisfactory review, which is just within the timescale the Commissioner recommends. Given the element of confusion that crept into the correspondence between the complainant and the DfE – she does not see evidence of a deliberate delaying tactic - the Commissioner finds that, on balance, DfE's handling of the review was satisfactory.
32. However, finally, the Commissioner has noted that in her published guidance on section 10 she advises that where a public authority requires further information to process a request, there should be no undue delay in contacting the requester. In this case, the complainant submitted his original request on 15 February 2018 and DfE sought clarification some 10 working days later. In its correspondence of 2 March 2018 DfE did not explain why there had been a delay seeking clarification and, in the circumstances, the Commissioner considers that DfE took too long to clarify the request on this occasion.

Right of appeal

33. 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: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

34. 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.
35. 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

Pamela Clements
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