

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 December 2019

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

Decision (including any steps ordered)

1. The complainant has requested information on a high pay exercise conducted by the Department for Education (DfE) into academy trusts and for trusts to be named in relation to various categories. The DfE refused the request on the basis of section 36(2)(c) of the FOIA.
2. The Commissioner's decision is that the DfE was entitled to rely on section 36(2)(c) and the public interest favours maintaining the exemption and withholding the requested information.

Request and response

3. On 14 January 2019 the complainant made a request to the Department for Education (DfE) in the following terms:

["https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2017/inquiry16/publications](https://www.parliament.uk/business/committees/committees-a-z/commons-select/public-accounts-committee/inquiries/parliament-2017/inquiry16/publications)

In response to the below information, submitted by the DfE to the PAC, please can you tell me the names of each of the below: "Question 279 (Layla Moran): On high salary levels how many academies has the Department been concerned about?" As a result of this work, at the end of November 2018:

- *131 trusts demonstrated that their processes for setting executive salaries were compliant with the challenge set out in the 2017 Academies Financial Handbook – 1. Please name the 131 trusts?*
 - *43 trusts have committed to reviewing and strengthening their pay policy and processes to ensure that levels of pay accurately reflect the level of educational and financial challenge faced by the trust, and the responsibilities of the individual being paid – 2. Please, name the 43 trusts?*
 - *11 trusts have made a commitment to reduce salaries in the future – 3. Please name the 11 trusts?*
 - *2 trusts have implemented an immediate significant reduction in salaries following negotiations with the ESFA – 4. Please name the 2 trusts?”*
4. The DfE responded on 8 February 2019 and confirmed it held the requested information but stated it was being withheld on the basis of section 36(2) of the FOIA.
 5. The complainant requested an internal review on 12 February 2019. He asked the DfE to consider providing updated figures/names reflecting the current situation rather than the historical position.
 6. The DfE conducted an internal review and responded on 8 March 2019. It upheld the decision to withhold the requested information on the basis of section 36(2). The DfE also concluded that it could not provide live data as opposed to historic information for the same reasons as set out in the refusal notice.

Scope of the case

7. The complainant contacted the Commissioner on 18 March 2019 to complain about the way his request for information had been handled.
8. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld information within the scope of the request on the basis of section 36(2).

Background

9. In December 2017, the Education and Skills Funding Agency (ESFA)(an agency part of the DfE) sent letters to 29 trusts identified as having a single academy and paying an executive salary in excess of £150k on the basis that these were potentially the least justified salaries in the sector. The intention was to use this activity to signal to the sector that

the DfE were considering the issue. The DfE used the information received from the 29 trusts to inform the development of its longer term approach on this matter.

10. The first tranche of letters was then followed up with a second tranche of letters to multi-academy trusts paying an individual over £150k and a third tranche to trusts paying two or more individuals over £100k. Overall, 212 trusts were challenged on their pay across these three tranches of letters. The names of these trusts were published online.
11. On 14 January 2019 the Public Accounts Committee (PAC) published a response from the department, answering questions raised by the Committee at an oral session on the consolidated academy sector accounts and the financial health of the academy sector on 21 November 2018.
12. This response set out the scope of the ESFA's work on high pay and categorised it by volume according to four outcomes. These categories form the basis of this request and are as follows:
 - trusts demonstrating compliance with the Academies Financial Handbook 2017;
 - trusts that are committed to reviewing and strengthening their pay policy;
 - trusts that are committed to reducing salaries in future; and
 - trusts that had already reduced salaries following contact from the ESFA and Ministers.
13. The work on executive pay in academies is being continued throughout 2019, and the ESFA has written to a new list of trusts based on their 2017/18 Accounts Returns with further letters to follow. The ESFA has also written again to around 30 of the 212 trusts challenged in the previous round of high pay activity to further challenge where salaries have not been reduced.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

14. Section 36(2) of FOIA states that information is exempt if its disclosure would,
 - (2)(b) would be likely to inhibit –
 - (i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purpose of deliberation, or

(2)(c) would otherwise prejudice, or be likely to prejudice, the effective conduct of public affairs.

15. Section 36(2) is unique in that it depends on the reasonable opinion of the qualified person in order to be engaged.
16. When considering the application of section 36 the Commissioner will:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person;
 - Ascertain when the opinion was given;
 - Consider whether the opinion was reasonable.
17. For government departments any minister of the crown may act as the qualified person. In this case, Lord Agnew, the Minister for the School System provided his opinion on 31 January 2019. The Commissioner has seen evidence that the qualified person was provided with submissions both in support of disclosure and withholding the requested information.
18. The qualified person can engage section 36(2) on the basis that the prejudice 'would' occur or, the lower threshold that the prejudice is only 'likely' to occur. The Commissioner interprets the record of the qualified person's opinion as being that the prejudice would be likely to occur.
19. It is now necessary to consider whether the qualified person's opinion was a reasonable one. When considering reasonableness the Commissioner relies on the Oxford English Dictionary definition of reasonableness, that is, the opinion must be "in accordance with reason; not irrational or absurd". There can be more than one reasonable opinion on a matter and it is not necessary for the Commissioner to agree with the qualified person's opinion. The qualified person's opinion can only be considered unreasonable if it is one that no reasonable person can hold.
20. The qualified person's opinion was based on arguments presented by the DfE in favour of engaging the exemption. The DfE informed the qualified person that the issue of high salaries in the education sector is prominent in the public's consciousness and the central focus of the high pay exercise was to improve trust's compliance with the Academies Financial Handbook. The DfE stated that publishing the names of trusts and labelling them according to the broad categories provided to the PAC has the potential to prejudice the whole process of scrutinising high

pay of individuals in trusts. The qualified person was informed this would disrupt relationships with the trusts and create an atmosphere of constant intensive scrutiny, undermining the exercise as it develops.

21. The DfE explained the outcomes of the exercise are generally positive but the data provided to the PAC was a snapshot and a reflection of the state of the exercise as of November 2018, not an absolute expression of progress. The DfE therefore stated that if the ESFA publicly links trusts to these categories the trusts are likely to react negatively.
22. The Commissioner considers this to be a reasonable opinion and accepts that the exemption is engaged.

Public interest test

23. Section 36 is subject to the public interest test as set out in section 2 of the FOIA. Its application means that although the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
24. When considering the public interest in favour of maintaining section 36 the Commissioner will give some weight to the opinion of the qualified person. This means that the Commissioner accepts that it is more probable than not that there would be some prejudice to the conduct of public affairs. However under the public interest test the Commissioner will go on to consider the severity, extent and frequency of that prejudice before weighing that against the value in disclosing the information.
25. The main impact of the prejudice to the DfE's functions would be in the ESFA's relationship with the trusts and in the ESFA completing the exercise over the next tranches. Whilst the Commissioner notes that the names of the trusts who received the first tranche of letters was published the point being argued is whether it would be prejudicial to these functions to link the names of the trusts with the categories as set out in the information request.
26. The DfE has serious concerns that providing the requested information, when the exercise is not complete and the trusts are still engaging with the ESFA would cause a negative reaction, increasing the pressure on the trusts and leading to challenges from the press, parents and other interested parties. The DfE considers the consequence of this would be to damage its relationship with trusts, both to listed trusts who have been named (and then later shamed by disclosure in response to this request) and to new trusts the ESFA may want to approach.

27. The DfE argues that any future hostility from trusts could create difficulties in accessing the sensitive information on individual's pay and personal circumstances that the high pay exercise needs to be successful. The DfE states that in the past trusts have been reticent to discuss high pay when challenged and any outcome that has the potential to increase a trust's reluctance to engage would likely prejudice the DfE's engagement on pay and financial concerns and damage the work being done on high pay.
28. The Commissioner is of the view that it is likely that disclosing not just the names of the trusts but which trusts fall under each of the categories set out in the request will lead to increased scrutiny and attention from various parties. Whilst the DfE could provide explanatory notes to clarify that the high pay exercise is ongoing there will still be increased scrutiny on the trusts. The impact this would have on the DfE's ability to carry out its functions is difficult to quantify but it is almost always the case that government department and public bodies can function more effectively with good working relationships with organisations in the sector they operate in.
29. This is especially true where there is a reliance on the voluntary flow of information and the DfE has stated that trusts have provided information and engaged in discussions on the understanding this would remain confidential and certainly not with further disclosures when the information was, at the time of the request, a snapshot of the individualised nature of pay and the DfE's view of this and further engagement was needed.
30. Undermining this implied obligation of confidence would likely cause issues with the DfE's relationships with the trusts, disrupting the voluntary flow of information and effecting the DfE's ability to effectively carry out its functions in openly discussing and challenging sensitive issues and achieving value for money.
31. The Commissioner, as set out above, accepts there is a very real possibility of damage to its relationships with trusts and that therefore the extent and severity of the prejudice is more than just speculative.
32. The Commissioner will now consider the public interest in favour of disclosure.

Public interest arguments in favour of disclosure

33. The DfE acknowledges there is a public interest in promoting transparency in government departments, particularly around how and which trusts within the sector the DfE is challenging in relation to their

use of public funding of salaries and how successful this challenge has been.

34. The DfE also accepts that there is a public interest in increased openness about the process and delivery and disclosure may lead to greater accountability, an improved standard of debate and improved confidence in the work of the DfE.
35. The complainant argues that the information relates to positive confirmations from trusts over issues with huge public interest and it is therefore unlikely they would refuse to engage with the DfE in the future if the information were to be disclosed.

Public interest arguments in favour of maintaining the exemption

36. The DfE argues that given the nature of the withheld information and the sustained media coverage¹ and controversy surrounding what are often portrayed as excessive salaries within the education sector, it is important the DfE has a safe space in which to openly and effectively challenge any trust that it feels are paying staff salaries perceived as excessive. The DfE further argues that in order to get best value for money it needs to be able to quickly and robustly challenge trusts where it feels funding is not being managed and used as efficiently and effectively as it could.
37. The DfE emphasises that academy trusts are free to set their own salaries and it has not regulatory levers to intervene or change these. This means that that to suggest an appropriate figure for CEO salaries would not be realistic, particularly as different trusts and their staff will face different challenges. As a result, CEO pay is not a simple binary exercise and is dependent on a number of mitigating factors.
38. The highly individualised nature of pay has defined the DfE's approach with each trust being approached individually about their pay, and their circumstances considered on a case by case basis as opposed to having a uniform criteria every trust must adhere to. The DfE argues that publicly linking trusts to fixed categories on pay has the potential to upturn discussions with trusts so that what were objective discussions become a subjective free-for-all in the public domain. Despite

¹ <https://www.theguardian.com/education/2019/may/10/department-for-education-academy-chains-cut-executive-pay>

<https://www.independent.co.uk/news/education/education-news/academy-chains-school-salaries-pay-rise-chief-executives-lord-agnew-a8770716.html>

information about pay being anonymised it is very likely individuals could be identified by the press or parents who would, in turn, pressure them to reduce their pay. This could have several impacts.

39. Firstly, the DfE considers that there would be unfair attention placed on high profile individuals in the trusts, forcing them and senior leaders to reduce pay arbitrarily, causing difficulties for recruitment and diluting the quality of leadership in the sector. Secondly, publicly categorising trusts in the way set out in this information request, could sour relations between the DfE and senior leaders who believed they were engaging on pay in good faith and in confidence. Any reduction of trust between the DfE and trusts would be likely to inhibit further discussions and challenge taking place. Thirdly, whilst it could be argued having pay discussions in the public domain will allow for greater transparency, there are already various vehicles for the public to be informed about pay. The DfE publishes a list of trusts that have been written to about pay and The Academies Sector Annual Report and Accounts also lists trust that pay a member of staff over £150k.
40. The DfE highlights that it does not have legislative or statutory powers to restrain, cap or reduce any perceived excessive pay in the sector. Negotiations to understand and justify high pay and reduce it where necessary are based on cooperation and good will. The DfE continues to challenge trusts, however academy trusts are autonomous and can set their own pay as long as their processes are compliant with the Academies Financial Handbook. On this basis, the DfE argues it is vital it is not perceived to be 'naming and shaming' the trusts it has worked with or continue to work with as any reductions made to salaries are done so in good will. To sour such negotiations and relationships through disclosure of this nature and therefore reduce the likelihood that excessive pay levels will be addressed, it is argued cannot be in the public interest.
41. The DfE states that the categories provided to the PAC were internal and intended to be a representation of work at the time, as opposed to the DfE's final progress on the issue of some instances of significant pay within the academies sector. As the DfE has worked with each trust on a case by case basis, it should be noted the DfE has built on the work, underlined by the summary in scope, developing both individual assessments for each trusts and expanding the DfE's categorisation to encompass pay processes, salaries and future planning.
42. As this work is ongoing and intended to run over multiple years (some trusts the DfE has worked with will not have reduced all their salaries beyond the scope of the DfE's work meaning conversations will continue and may be re-opened year on year) the DfE believes that any release which would be seen to be categorising these trusts would not be a fair

representation, it would not fairly reflect the position of these trusts and would have a negative impact on the DfE's ongoing work to reduce excessive salaries.

43. This is because the positions of these trusts can and do change, with trusts making more progress than listed in the withheld information, or being further challenged if it is seen that they had not taken the action expected. Naming trusts has the potential to result in backlash as trusts may feel unfairly represented, particularly on the sensitive issue of pay, which would potentially damage the DfE's current and ongoing relationships with them and make its ongoing work to ensure sector pay is realistic but reasonable, and therefore that there is effective use of public funding and value for money, more difficult than necessary. To potentially hamper the DfE's ability to seek and achieve value for money, the DfE argues, cannot be in the public interest.

Balance of the public interest arguments

44. The Commissioner acknowledges there is a public interest in disclosing information which reveals how the DfE is addressing the issue of perceived excessive high pay in trusts. It is clear from the media reports that this is an issue of interest to a number of parties, not least parents. There is a public interest in understanding not just which trusts the DfE are engaging with but how this engagement progresses so that it can be properly seen how the DfE encourages trusts to review their high salaries. Where there is public money being spent there will always be a public interest in disclosing information which increases transparency and accountability in how this is being spent.
45. Balanced against this the Commissioner is very conscious of the fact the DfE has no statutory basis for forcing trusts to reduce salaries and the high pay exercise is entirely based on voluntary disclosures of information and building relationships with the trusts. Whilst trusts who are failing to adhere to the Academies Financial Handbook should be held to account, there is a time and place for 'naming' in this context to take place and whilst the high pay exercise is ongoing and engagement with the trusts continues there is a strong public interest in maintaining the safe space the DfE needs to continue meaningful engagement and to ensure that its relationships with the trusts are productive.
46. The Commissioner acknowledges that if there is evidence that trusts are paying high salaries and are not adhering to financial guidelines there will be a number of interested parties that will want to know this and the DfE has named the trusts who have been written to about high salaries for individuals. The Commissioner has to consider whether there is sufficient public interest in the disclosure of additional information detailing which trusts have shown compliance with the Academies

Financial Handbook and those that have made commitments and implemented reductions. She must also consider that disclosing this information may lead to assumptions being made that any of the other trusts named by the DfE who are not listed in these categories are not reducing or committing to reducing salaries.

47. There is clearly some public interest in this information so that trusts can be held accountable for the use of public funds and parents can be assured that trusts are operating effectively. That being said, acknowledging this public interest argument also means acknowledging the public interest in allowing the DfE the safe space needed to continue to engage with trusts to achieve salary reductions.
48. The DfE has provided the Commissioner with an example of its engagement with one trust which shows that there was continued engagement following the first letter and continuing for some time afterwards to work towards ensuring salaries were within the guidelines in the Handbook.
49. The Commissioner has accepted there would be a risk to the DfE in disclosing the information, in terms of damaging its relationships with other parties, but it should also not be understated that disclosure is likely to put the trusts under scrutiny this is not the intention of the high pay exercise at this stage. In some cases where trusts are paying salaries over £150k there may be justifiable reasons, such as the size or complexity of the trust issues the trust faces . There is clearly a very strong public interest in ensuring that the DfE can function effectively, assess the pay at trusts and effectively engage with trusts to ensure compliance. The Commissioner does not think there is sufficient public interest in this information which may be of some interest but is only part of an ongoing exercise which is very reliant on maintaining good relationships with the trusts given the DfE's lack of legislative or statutory powers in this area.
50. The Commissioner therefore finds that on balance the public interest in maintaining the exemption outweighs the public interest in disclosure. The DfE is entitled to rely on the exemption provided by section 36(2)(c).

Right of appeal

51. 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@justice.gov.uk

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

52. 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.
53. 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

Jill Hulley
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