

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

### **Decision notice**

**Date:** 20 May 2021

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

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

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1. The complainant has requested information about state funded Alternative Provision from the Department for Education (DfE). DfE has withheld the information under section 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs) and considers that the public interest favours maintaining this exemption.
2. The Commissioner's decision is as follows:
  - DfE is entitled to withhold the requested information under section 36(2)(c) of the FOIA and the public interest favours maintaining this exemption.
3. The Commissioner does not require DfE to take any remedial steps.

#### **Background**

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4. In its submission to the Commissioner, DfE has provided the following background and context. Local authorities (LAs) have a duty under Section 19 of the Education Act 1996 to arrange suitable education at school or otherwise for each child of compulsory school age who would not otherwise receive it if such a provision was not put in place. As set out in its statutory guidance, Alternative Provision (AP) is education

arranged by LAs (and in some circumstances schools) for these children and young people.

5. This includes education arranged for:
  - a. pupils who have been expelled from a mainstream school, or suspended for a fixed period;
  - b. pupils being directed by schools to off-site provision to improve their behaviour; and
  - c. pupils who cannot attend mainstream schools because of illness, medical conditions or other reasons (for example children who have recently arrived in the area who do not have a school place).
6. The request in this case is for data on state funded AP, which includes Pupil Referral Units (PRUs), AP free schools and AP academies. AP can also be arranged in independent schools and unregistered settings which is outside of the scope of this request. DfE estimates that around half of all AP placements are an independent AP, so the data that has been requested, from state-funded AP only, does not include information on any pupils who completed key stage 4 qualifications in independent or unregistered AP.
7. The AP cohort includes some of the most vulnerable and disadvantaged pupils in the education system, including pupils with complex behavioural issues, and/or long-term illnesses.
8. For some children, their health needs or circumstances mean that they are not able to attend a mainstream or special school and are therefore educated in an AP school. DfE says it is vital that it ensures that these children are offered equal opportunities to make the most of their talents and to help them to become successful adults.
9. The sector provides valuable education and support for a very diverse cohort, including those who have often had a very disrupted journey through education. They have differing needs and prior attainment levels, and the amount of time they remain in an AP varies hugely but most placements are very short, with some pupils entering and leaving APs on several occasions during their time in school. Many enter AP during the latter stages of key stages 3 and 4 and by then they can be significantly behind in their learning. By this point it is often unrealistic to expect them to make up for the lost time from their disrupted education and achieve GCSE results that are comparable with their peers in mainstream schools.
10. DfE says that, looking forward, its vision is to ensure that all AP settings provide high quality education and that the routes into and out of AP

settings work in the best interests of the children that attend. DfE says it does this by working collaboratively with partners across the education sector, including head teachers at AP schools. This approach enables DfE to build a strong evidence base. It also helps DfE deliver reforms so that mainstream and special schools support children to remain and reintegrate into their settings, promote collective responsibility for delivering a high-quality education in AP, and ensure that young people leaving AP have choices around what they can do next.

## Request and response

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11. On 14 February 2020 the complainant wrote to DfE and requested information in the following terms:

"For each AP setting, including any dual enrolled students, please tell me

- School identifier (e.g. URN)
- Number of year 11 students (academic age 15)
- Average attainment 8 score for these pupils • Percentage getting 9-4 in English (of all year 11 students, not just those entered for GCSEs)
- Percentage getting 9-4 in maths (of all year 11 students, not just those entered for GCSEs)
- Percentage getting 9-4 in both (of all year 11 students, not just those entered for GCSEs)
- Progress 8 score
- Average number of GCSEs entered per student
- Average number of other qualifications entered per student

Please can I have this data for

- a) 2018/19
- b) a combined total for three academic years, 16/17, 17/18, 18/19

By AP settings, I am including Pupil Referral Units, Free Schools - Alternative Provision, Academy Alternative Provision Converters, Academy Alternative Provision Sponsor Led, and any other LA Alternative Provision. always, I am happy to accept any simplifying or clarifying assumptions needed in order for you to be able to answer this question. I had hoped to get most of it from the recent school performance tables, but they didn't seem to include any AP settings!"

12. DfE responded on 22 April 2020. It refused to disclose the information, citing section 36(2)(c) of the FOIA and advised that it considered the public interest favoured maintaining this exemption.
13. The complainant requested an internal review on 27 May 2020, focussing on the public interest test in particular. DfE provided an internal review on 14 June 2020. It upheld its position.

## **Scope of the case**

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14. The complainant contacted the Commissioner on 1 August 2020 to complain about the way his request for information had been handled.
15. The Commissioner's investigation has focussed on DfE's reliance on section 36(2)(c) to withhold the requested information, and the balance of the public interest.

## **Reasons for decision**

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### **Section 36 – prejudice to the effective conduct of public affairs**

16. Section 36 differs from all other prejudice exemptions in that, in most cases, the judgement about prejudice must be made by the legally authorised, qualified person for that public authority.
17. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

#### Section 36(2)(c)

18. Section 36(2)(c) of the FOIA says that information held by a public authority is exempt information if, in the reasonable opinion of a qualified person, disclosing the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
19. However, in relation to statistical information, under section 36(4) of the FOIA subsection (2) shall have effect with the omission of the words "in the reasonable opinion of a qualified person". DfE has confirmed that it considers the information in this case to be statistical information and that, therefore, no qualified person's opinion was required.

20. DfE has provided the Commissioner with a copy of the information it is withholding under the section 36(2)(c) exemption. It is an Excel workbook, comprising three sheets of statistical information for the years 2016/2017, 2017/2018 and 2018/19. The Commissioner agrees that the information is statistical in nature.
21. In its submission to the Commissioner, DfE has said that as part of a strong and effective working relationship, AP settings and DfE need a safe space in which to work together to further improve this essential provision. This will help ensure that AP settings are able to provide the support and opportunities for their students and the broader community.
22. DfE goes on to say that the withheld information relates to data which it has previously reassured AP settings would not be released. Releasing this information would therefore be likely to stifle the open and honest relationship DfE has developed with AP settings. It could impact on the willingness of current and future APs to openly provide this data or discuss issues with DfE if there are concerns that such information may be published.
23. As DfE continues to work closely with AP settings across the education sector, releasing this data could have a particularly detrimental impact on its relationships with heads of AP settings. In particular, DfE says, over the last year it has established a very positive working relationship with the sector in order to work through a number of challenges, so that AP schools remained open for vulnerable pupils during the pandemic. DfE says it would not wish to jeopardise this positive relationship.
24. DfE notes that as it set out in our response to the request, allowing this data to be released is likely to lead to the production of de-facto performance tables for AP settings. The attainment data for AP settings which it is withholding is a poor measure of the success for AP. The AP student population is transient and fluid and effective AP should result in students moving back into mainstream education when ready, with their attainment data moving with them.
25. The data that the complainant has requested will show the key stage 4 outcomes of students who are solely registered in a state-funded AP (ie a student referral unit, AP academy or AP free school). Many other AP students remain on the role of a mainstream school while also attending an AP. These dual-registered students are also registered at an institution included within the Secondary School Performance Tables, and they are therefore not included in the AP data.
26. The scope of the request excludes data relating to many students who have been supported by AP schools before reintegrating into the mainstream school system. It also excludes those who have been

placed in independent AP by mainstream schools and local authorities which are not state-funded placements. Due to this, the data requested does not include the key stage 4 outcomes of many students who have been supported by AP to address complex behavioural needs, medical conditions and other issues. DfE says it therefore believes that releasing this data, even with any caveats or context provided to highlight the incompleteness or limits of this data, would provide an incomplete and misleading picture of the invaluable support that the whole AP sector provides to these vulnerable and disadvantaged children and young people.

27. DfE considers that a more established and accurate measure of the effectiveness of AP settings is via their Ofsted reports, which are freely available and already in the public domain.
28. DfE says it is also concerned about the possible impact disclosure could have on the AP settings themselves. Releasing this information, which would give an unrealistic and unfair impression of the provision available at such settings, could lead to staff within these settings becoming concerned about their professional reputations. This could result in talented and experience individuals moving away from AP or being deterred from joining an AP setting in the first place. This is because they could feel that such data going into the public domain could have a negative impact on their professional reputation. DfE says excellent teachers are obviously needed within AP settings to provide the quality teaching needed to help reintegrate students at these settings. To do anything that is likely to prevent this happening cannot be in the public interest.
29. Finally, in its submission to the Commissioner, DfE has noted that if the information were to be released, it is likely that the AP settings would become the focus of unwarranted and unnecessary attention – from parents or the media. This would detract from their ability to provide excellent education and support to their students.

### *Conclusion*

30. DfE considers that disclosing the requested information would be likely to undermine the 'safe space' that exists in which it can work with AP providers to continue to improve that provision. DfE has previously advised AP providers that it would not disclose this type of material and, if this information was disclosed, AP providers may be less likely to provide DfE such data in the future. Even when placed in context, DfE considers that, if published, the data could give a misleading impression of the AP providers, causing concern to staff in these settings and potentially dissuading staff from staying in the sector or individuals from joining the sector. AP settings may also have to deal with attention

from parents or the media. This would impact on their ability to provide their students with appropriate education and support.

31. The Commissioner agrees with DfE that the prejudice it envisions would be likely to occur if the requested information was disclosed. As has been noted, in his correspondence with DfE the complainant himself appeared to accept that section 36(2)(c) was engaged, and his focus was the balance of the public interest. The Commissioner has therefore decided that DfE is entitled to rely on section 36(2)(c) to withhold the requested information. She has gone on to consider the public interest test.

### **Public interest test**

#### Public interest in disclosing the information

32. In correspondence to the Commissioner, the complainant argues that there is strong public interest in the information being made available in order that charities, researchers, policymakers etc can get a thorough understanding of the Alternative Provision landscape, in order to undertake work to improve the quality of education. The complainant considers this to be a "fairly obvious" public priority with a high political profile. This is even more so at the moment, in his view, given the Coronavirus pandemic, and outweighs an "entirely hypothetical concern" about how the information might be reported. Other than the reference to the pandemic, this summarises the arguments the complainant put forward in his request for an internal review, in which he also suggested that DfE could put provide some extra contextual information alongside his request.
33. In its submission DfE acknowledged the general public interest in disclosing information to the public and that disclosing the information in this case would provide greater openness and transparency about key stage 4 data for state funded AP schools.

#### Public interest in withholding the information

34. DfE considers that there are three key arguments in favour of continuing to withhold the requested information.
35. First, data on GCSE results is not a reliable way to measure AP performance, and could result in unofficial league tables where inaccurate comparisons could be made between the different types of AP providers and cohorts. In its submission DfE goes on to discuss the nature of the AP sector's provision, the cohort it supports and the associated challenges. DfE notes that it already publishes data for AP settings at national and LA level, without specific AP settings being named. It states in its attainment statistics that "due to the nature of

alternative provision schools, they are not held accountable for their results” and that “pupils also registered at an institution included within the Secondary School Performance Tables are excluded from the Alternative Provision data”.

36. Finally, in relation to its first argument DfE says it considers that releasing the information, even with a caveat, would provide an inaccurate and unfair summary of AP performance. Releasing the information unnecessarily which, due to it not providing the whole picture of the quality and impact of AP provision, could lead to confusion for parents and pupils, as well lead to unfair and inaccurate comparisons between AP and other settings, and in DfE’s view this cannot be in the public interest.
37. DfE’s second broad argument is that releasing performance data for AP may result in unfair reputational damage for AP providers. This could lead to a reduction in placements at the schools. This, in turn, would affect their financial viability, their capacity to pay and retain staff, and their ability to offer a tailored curriculum. To support this argument DfE has discussed the increased pressures on AP as a result of the pandemic. However, the Commissioner must consider the situation at the time of the request. At 14 February 2020, the scale and impact of the pandemic had not emerged.
38. However, DfE has also discussed the nature of AP schools – they are generally much smaller than mainstream schools – and the possible impact of disclosure on those schools’ students. It could negatively affect the students’ morale if they feel that they could be deemed to be attending a poorly performing school, or that this data represents a public reflection of their own performance and achievements. DfE also argues that disclosure could make it harder to recruit and retain staff for AP schools, and have a detrimental impact on the wellbeing of staff in these settings. DfE notes that there are many examples of remarkable AP settings, thanks to the dedication and passion of many inspiring teachers. DfE says it is essential that it retains such skilled teachers within these settings, as well as encourage more excellent teachers to work in the sector. In addition, DfE considers that AP settings would be likely to be negatively impacted should it have to disclose the requested information. DfE considers these settings would be likely to become the focus of unwarranted and unnecessary attention, whether from parents or the media. This would detract from their ability to provide excellent education and support to their pupils.
39. DfE’s third argument is that releasing the information would be likely to damage its effective working relationship with the sector. DfE says that, as with all other schools/institutions, key stage 4 attainment data from AP settings is collected and sent to DfE by the relevant awarding

associations (AOs). And as with other schools/institutions, there is no obligatory or voluntary arrangement around AP settings providing DfE with qualification results data. But the provision of such data is an essential part of the evidence DfE uses when developing any reforms to this sector. DfE considers that if it was required to put the information into the public domain, AP settings and their AOs would be likely to be deterred from freely providing such information in an effective and timely manner. This in turn would have a negative impact on DfE's ability to conduct public affairs effectively. Disclosure would remove the space within which AP settings and their AOs are able to share data with DfE officials in confidence. This would make it more difficult for DfE to work collaboratively and cohesively with such settings to deliver its core business and ensure that the best provision is made available to some of the most vulnerable and disadvantaged children in our society.

40. DfE notes that it does not use the withheld information to hold AP schools to account for their students' performance at key stage 4, and there is currently no agreed way of measuring the performance of AP schools based on attainment data. Releasing this data publicly could have an adverse effect on DfE's positive relationship with this group, which is necessary now and in the future. DfE has provided a small amount of other information in support of its third argument, which the Commissioner has considered but has not included in this notice.

#### Balance of the public interest

41. As with DfE's public interest argument, the Commissioner cannot take the complainant's argument about the pandemic into account. She must consider the circumstances as they were at the time of the request. There is significant public interest in children being educated in an AP setting in which they receive a high standard of education and support, that addresses their individual needs. To a large extent, the Commissioner considers that published Ofsted reports about individual settings satisfy that interest, and the interest in public authorities being open and transparent. These reports include a narrative discussion of a school including its strengths and weakness. As such they provide a rounded picture and context. DfE also published reports about AP settings at national and local authority level (without naming those settings). Again, this satisfies the public interest in AP settings. Publishing the requested information about each setting - bald numbers and a means of identifying each school - would, the Commissioner agrees, effectively act as a league table. The information could be used to compare one setting's performance with another without there being a full picture of the circumstances each setting faces. As the Commissioner has accepted, this would be likely to erode trust, undermine relationships, concern current and potential staff and distract

AP settings from their core business of educating and supporting their students.

42. The Commissioner notes the public interest arguments that the complainant has put forward but, given the likely effects of disclosure, she is satisfied that, on this occasion, there is greater public interest in withholding the information he has requested.

## **Right of appeal**

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

44. 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.
45. 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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