

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)
Decision notice**

Date: 14 November 2022

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

Decision (including any steps ordered)

1. The complainant has requested from the Department for Education (DfE) the amounts awarded to each of the schools under the Selective Schools Expansion Fund (SSEF). The DfE provided some information at the review stage whilst withholding information regarding uncompleted projects under sections 22 and 43(2) FOIA. After the Commissioner began his investigation the DfE accepted that the request should have been considered under the EIR and cited regulation 12(5)(e) (confidentiality of commercial and industrial information) as its reason for withholding the remaining requested information.
2. The Commissioner's decision is that the DfE has cited regulation 12(5)(e) of the EIR correctly. However, it has breached regulations 5(2) and 11(4) of the EIR.
3. The Commissioner does not require the DfE to take any further steps.

Background

4. The DfE has explained the background to this request as follows:

"The Selective Schools Expansion Fund (SSEF) funds academy schools and local-authority-maintained schools which select by ability to expand, subject to certain conditions. There have been 2 bidding rounds in 2018 and 2019."

Request and response

5. On 30 October 2021 (received on 4 November 2021) the complainant made a request for the following information:

"I would like to reduce the scope of my Freedom of Information request to just the amounts awarded to each of the schools under the Selective Schools Expansion Fund (SSEF). I have searched the gov.uk website for this information and have not been able to find this, however I am sure that my request can be simply resolved by the Department for Education telling me where to look..."

6. For context, the complainant included in their request a refusal notice that had been provided by the DfE in response to a previous request which was as follows:

"Please provide details of the successful bids from schools and the responses from the DfE for funding under the Selective Schools Expansion Fund (SSEF)."

7. This request had been refused under the EIR (rather than the FOIA) after a complaint to the Commissioner. It was explained that,

"This is because the funding awarded to successful bidders will be used to expand the provision of selective schools through, for example, the redevelopment of existing buildings, the building of new classrooms, and/or the removal/demolition of existing buildings/classroom settings etc... thus having an impact on the environment."

8. The response had gone on to cite regulation 12(4)(b) of the EIR as the reason why the DfE was refusing the request. It emphasised its commitment to transparency and explained that the funding allocated to each successful school would be published once the tendering exercises were complete and the final funding awarded. The DfE also provided other information. It suggested that if the complainant make a narrower request (and gave examples) it might be able to comply with the request.

9. The DfE acknowledged the narrowed request (see paragraph 5) on 5 November 2021.
10. On 26 November 2021 the DfE refused to provide this information and cited section 22 FOIA, stating that the information would be published around the end of 2023.
11. The complainant made an internal review request on 29 November 2021 as they did not accept that the information was still pending, even if the figures might be subject to change.
12. On 31 December 2021 the DfE apologised for the lateness of its review. The complainant provided further argument on 5 January 2022, asking why the information was still being withheld two years after their original complaint to the Commissioner when it had been promised, and stating that it was not confidential information.

Scope of the case

13. The complainant contacted the Commissioner on 15 January 2022 to complain about the way their request for information had been handled.
14. The DfE sent its internal review to the complainant on 25 January 2022 and provided the funding amounts for the fully completed projects. The remaining information regarding ongoing projects was withheld under section 43(2) (commercial interests) and section 22 (future publication).
15. The complainant asked for a further internal review on 5 July 2022 into what they termed their "rerequest" raising various points which they wanted addressing.
16. On 9 August 2022, the DfE provided its independent reassessment, releasing some further information but citing sections 43(2) and 22 FOIA as the reasons why it could not provide the remaining information. The DfE pointed out that the coronavirus pandemic had affected the expected completion dates of projects.
17. After the Commissioner began his investigation he asked the DfE why it had responded under the FOIA instead of the EIR. The DfE accepted that the request should have been considered under the latter legislation, explaining that there had been a shift in focus between the original request in 2019 and the current case which made the later request "substantially different".

18. The Commissioner considers the scope of this case to be the DfE's citing of regulation 12(5)(e) - confidentiality of commercial or industrial information and any procedural matters.

Reasons for decision

Is the information environmental information for the purposes of the EIR?

19. Regulation 2(1) of the EIR defines environmental information as being information on:
- (a) the state of the elements of the environment, such as air and atmosphere, water, soil, land, landscape and natural sites including wetlands, coastal and marine areas, biological diversity and its components, including genetically modified organisms, and the interaction among these elements;
 - (b) factors, such as substances, energy, noise, radiation or waste, including radioactive waste, emissions, discharges and other releases into the environment, affecting or likely to affect the elements of the environment referred to in (a);
 - (c) measures (including administrative measures), such as policies, legislation, plans, programmes, environmental agreements, and activities affecting or likely to affect the elements and factors referred to in (a)...as well as measures or activities designed to protect those elements;
 - (d) reports on the implementation of environmental legislation;
 - (e) cost-benefit and other economic analyses and assumptions used within the framework of the measures and activities referred to in (c);
 - (f) the state of human health and safety, including the contamination of the food chain, where relevant, conditions of human life, cultural sites and built structures inasmuch as they are or may be affected by the state of the elements of the environment referred to in (a) or, through those elements, by any of the matters referred to in (b) and (c);
20. The SSEF is defined as follows:

“The SSEF is only available to fund proposals which will create additional places where they are needed. This means the proposal must be for an enlargement of the physical capacity of a school’s buildings, and must also increase the school’s published admission number(s) (PAN). This includes reconfiguring existing space to increase capacity, for the clear purpose of admitting additional pupils. The year of intake (‘relevant age group for admission’) for additional pupils can be year 7, year 12 or any other year group that is appropriate. Your bid should make clear to which relevant age group(s) your increased PAN(s) applies.”¹

21. The requested information relates to the enlargement of the physical capacity of a school. This is clearly an environmental measure that will affect the state of the elements of the environment referred to in (a) and therefore falls under regulation 2(1)(c) of the EIR.

Regulation 12(2) – Presumption in favour of disclosure

22. Regulation 12(2) of the EIR states that a public authority shall apply a presumption in favour of disclosure.

Regulation 12(5)(e) - Confidentiality of commercial or industrial information

23. Regulation 12(5)(e) of the EIR provides that a public authority may refuse to disclose information to the extent that its disclosure would adversely affect:

“the confidentiality of commercial or industrial information where such confidentiality is provided by law to protect a legitimate economic interest”.

24. A copy of the withheld information was provided to the Commissioner. There are several conditions that need to be met for this exception to be applicable. They are as follows –

- Is the information commercial or industrial in nature?

¹ [Selective schools expansion fund: Information for applicants \(publishing.service.gov.uk\)](https://publishing.service.gov.uk)

- Is the information subject to confidentiality provided by law?
- Is the confidentiality provided to protect a legitimate economic interest?
- Would the confidentiality be adversely affected by disclosure?

25. The Commissioner's guidance says that,

"For information to be commercial in nature, it needs to relate to a commercial activity, either [the public authority's] or a third party. The essence of commerce is trade. A commercial activity generally involves the sale or purchase of goods or services, usually for profit. Not all financial information is necessarily commercial information. In particular, information about [the public authority's] revenue or resources is not generally commercial information, unless the particular income stream comes from a charge for goods or services."²

26. The guidance also states that,

"it is not enough simply to argue that disclosure would adversely affect your commercial interests or those of a third party. [The public authority] must also demonstrate that there is confidentiality provided by law, which may turn on some of the same factors relevant to section 41 but it is not an identical test."

This includes confidentiality imposed on any person by the common law of confidence, contractual obligation, or statute. However it differs from section 41 FOIA as there is no need for the public authority to have obtained the information from another. The exception covers information obtained from a third party, jointly created or agreed with a third party and information created by the public authority. For the information to have the necessary quality of confidence it needs to not be trivial nor in the public domain.

The complainant's view

27. The complainant explained that the DfE had argued previously that the requested information should not be disclosed at that point because the amounts of the award were not yet finalised. They contend that the

² [Commercial or industrial information \(regulation 12\(5\)\(e\)\) | ICO](#)

impression was given that the information was due to be disclosed imminently and that it had been exempted under section 22, though no formal decision was reached by the Commissioner. Two years later it had still not been published and a further request was made in October 2021.

28. The complainant does not accept that the content of the grant funding agreement is confidential as set out in its terms and conditions. The Commissioner notes that the DfE does set out a proviso that it will determine what is confidential within the provisions of the FOIA.

The DfE's view

29. The DfE contends that the information it has withheld is commercial in nature as it covers the funding that is currently available for the remaining 'live projects' in the SSEF not yet completed. It explains that the money is paid in stages and that the projects are prone to shifts in the funding envelope. Some final prices for such work would be subject to continuing negotiations. Issues may arise during the project cycle that require more funding. Conversely, the funding agreed for the project may be found to exceed the amount needed for completion. This would be confirmed once the project has been completed.
30. If the funding amounts were made public before the projects were completed, service providers such as building contractors would be provided with information that has only been shared between the DfE and the individual schools. It gives the example of a building contractor seeking a higher rate should they have access to the amount of funding the school has initially been allocated, whereas portions of the funding may already have been spent or reserved for other parts of the project and/or the school may want to combine work required to include a number of building elements in order to reduce the overall costs through economies of scale. Further tendering may be required if issues have arisen during the project. A school may directly appoint all suppliers separately during the life of the project rather than appointing one major contractor that then sub-contracts.
31. Suppliers are likely to be put at a commercial advantage where further work is tendered for mid-project as they will be aware of the funding that is currently available. These projects are "one-off" local delivery, where small to medium sized local suppliers are contracted and there is less of an incentive for the type of competitiveness associated with potential future work.
32. The DfE argues that service providers might then tailor their individual costs based on the knowledge of the flex and change in the funding

envelope mid-project. The DfE's view is that this would be detrimental to a school's initial tendering and bargaining position, resulting in poorer value for money than if suppliers had based their tendering on information the schools wished to divulge or information gleaned from site visits or surveys.

33. This would impact negatively on the DfE's commercial interests in relation to value for money and, by extension, the public purse. A school's commercial position would also be prejudiced by releasing funding figures that have not yet been finalised. Any inflation in supplier costs would reduce the value for money and the overall budget and funding available to schools for expansion work. Any issues uncovered can be addressed without prolonging the tendering process.
34. The DfE is withholding this information so as "... to protect a legitimate economic interest" – that of the schools involved and the DfE. The remaining projects have not yet been fully completed, further tendering may be required for elements of project delivery and the final funding amounts are yet to be confirmed.
35. It has also considered whether its officials are under an obligation of confidence imposed by contract. The DfE states that its officials are bound by the Civil Service Code and it quotes the following requirement to:

"carry out your fiduciary obligations responsibly (that is make sure public money and other resources are used properly and efficiently)"

To release the confidential funding information prior to finalisation and publication may breach the code and waste public money through value for money not being achieved. This is potentially a disciplinary matter. The DfE believes that the condition is met because it was under an obligation of confidence imposed by ensuring limited access to the mid-project funding figures.

36. The Commissioner's guidance says that he considers that the threshold for engagement of EIR regulation 12(5)(e) is a high one, and in order for it to be applied, it must be shown that the disclosure of specific information will result in specific harm to the legitimate interests of one or more parties. In demonstrating harm an explicit link needs to be made between specific elements of withheld information and specific harm which disclosure of these elements would cause.
37. The Commissioner accepts the DfE's view that the information is commercial in nature as it relates to funding that is available as part of

the SSEF project. He also accepts that the amounts awarded are subject to confidentiality and that confidentiality protects a legitimate economic interest – that of the schools and, by extension, the DfE and taxpayers' interests. Disclosure would adversely affect confidentiality, consequently the exception is engaged.

38. Nonetheless, it may be in the public interest to disclose the requested information and the Commissioner will consider this in the following paragraphs.

Public interest factors in favour of disclosing the requested information

39. The complainant "disagrees that the public interest lies in withholding the provisional amounts awarded, simply because they have not been fully finalised".
40. They contend that the SSEF seeks to award £200 million of public money to schools which have made specific commitments over a four year period to admit more children from disadvantaged backgrounds. Their request relates to the first tranche of funding which allowed 16 schools to expand their year 7 intake from September 2020. The complainant suggests that the schools must have expanded before the pupils were admitted. "School census data taken in January 2021 provides reliable information as to the effectiveness of this policy". January 2022 will provide twice the amount of data to evaluate effectiveness. They believe that the DfE is trying to delay disclosing even approximate amounts of money awarded, for no good reason.
41. The complainant explained that the policy has been controversial and provided the Commissioner with links to articles to support their view.
42. The DfE acknowledges the argument that more openness about the process and delivery may lead to greater accountability and an improved standard of public debate and trust.
43. It recognises the public interest in openness and transparency and would also aid the public understanding of the funding allocated to each school expansion project.

Public interest factors in favour of maintaining the exception

44. However, the DfE argues that there will be an impact on its commercial interests and that of the schools which will be likely to prejudice current and future commercial interests and procurements by giving building contractors etc information that will put them at a commercial advantage over schools when bidding for work. This would ultimately

limit the amount of work schools or the DfE could undertake, as funding is finite.

45. Releasing this information may allow tenderers to develop pricing models in advance of procurement. The DfE states that this would be likely to be detrimental to both itself and the schools' commercial interests for the reasons outlined earlier in this decision relating to value for money.
46. The process must be seen to be fair and the commercial interests of the parties not unduly prejudiced by the release of commercially sensitive information.
47. Sharing the funding allocated to named schools prior to projects being completed in full is likely to change the relationship between the DfE and schools and their potential suppliers. Release has the potential to allow suppliers to tailor costs if they are aware of the funding envelope currently available to each of these schools which is not in the public interests. Providing suppliers with a commercial advantage over individual schools would not be fair or in the public interest as it would drive up the building costs.
48. The DfE supports its public interest arguments by referring the Commissioner to his decision notice [IC-139941-L6Q0](#) which it considers has similarities to this case. The Commissioner notes that he considers this case to also have some significant points of difference.

The balance of the public interest

49. The Commissioner understands the frustration of the complainant who has been asking for this information for some considerable time and cannot see why it cannot be provided to them, given the intention to publish it. There is a strong public interest in disclosure of data related to selective education.
50. The balance of the public interest has been tipped in favour of non-disclosure because of the ongoing tender process and the potential changes in the funding amount granted. Had the funding been set in stone and the tender process completed at the time of the request, the public interest would potentially have favoured disclosure for the reasons provided by the complainant in paragraphs 39-41 but as the projects remain 'live' and the amounts awarded by the SSEF are subject to change, the public interest in favour of value for money assumes greater significance. The DfE explained in its second review that the coronavirus pandemic had severely impacted on the construction industry. Delays on SSEF projects had been caused by lockdown, labour

shortages and the supply of materials. It released at that point extra information on projects where payments had been finalised. However, as the DfE's intention is to publish this information (as it has provided/published the funding amounts for the finished projects) the matter of transparency will be met, though not in the short term.

Regulation 5(2) – time for compliance

51. The complainant's request was received by the DfE on 4 November 2021 and a refusal notice was issued on 26 November 2021. The DfE later disclosed information to the complainant beyond the date for compliance.
52. The Commissioner's decision is therefore that the DfE did not comply with the requirements of Regulation 5(2) of the EIR.

Regulation 11 – representations and reconsideration

53. Under regulation 11(4) of the EIR, a public authority must provide an internal review as soon as possible and no later than 40 working days after the date of receipt of the request for a review.
54. The complainant requested an internal review on 29 November 2021 and the DfE provided one on 25 January 2022. Even allowing for bank holidays this was outside the 40 working day requirement and therefore the DfE was in breach of regulation 11(4) of the EIR.

Right of appeal

55. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

56. 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.
57. 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

Janine Gregory
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