

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

Date: 22 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) additional information to that already disclosed on the existing Excel spreadsheet (by school) of the results of the Condition Improvement Fund (CIF). The DfE refused the request, under sections 43(2), 36(2)(c), and section 22 FOIA.
2. The Commissioner's decision is that the withheld information engages sections 22 and 36(2)(c) FOIA and that the public interest favours maintaining the exemptions. However, the DfE breached section 10(1) FOIA by not responding to the complainant within the statutory timeframe.
3. The Commissioner does not require the DfE to take any further steps.

Request and response

4. On 14 October 2021 the complainant wrote to the DfE and requested information in the following terms:

"The results of the school CIF (Condition Improvement Fund) Bids for 21/22 have now been published. Please would you provide the

following additional information to that on the existing Excel spreadsheet (by school)

- a. Total value of successful CIF Bid for each school
 - b. Split of value between DfE Grant: any loan: contribution from the school
 - c. Total points scored for each successful school
 - d. Breakdown of points score by the various categories assessed.”
5. On 29 November 2021 the DfE refused to provide the requested information, citing section 43(2) to parts (a) and (b) of the request and section 36(2)(c) to parts (c) and (d). The complainant made an internal review request on 2 December 2021.
 6. On 16 March 2022 the DfE provided its internal review and maintained its position, apart from extending the application of section 36(2)(c) to request part (b).

Scope of the case

7. The complainant contacted the Commissioner on 20 January 2022 to complain about the way their request for information had been handled.
8. In his investigation letter the Commissioner asked the DfE why it had not responded under the EIR. The DfE stated that it had spoken to policy clients and explained that,

“the vast majority of CIF bids and awards are for internal repairs/improvements to existing school structures, e.g. heating repairs/improvements, window refurbishments and electrical repairs etc...rather than e.g. the building of new school blocks or physical extensions to existing structures etc”

Less than one per cent of the projects involve extensions and the DfE stated that if it received a request for specific projects, and those projects have an impact on the environment due to eg the extension of a school building, it would be dealt with under EIR.

9. The Commissioner accepts that the DfE responded correctly under the FOIA, rather than the EIR.
10. After the Commissioner had begun his investigation, the DfE also cited section 22 FOIA to the final funding awarded to each school (section a).
11. The Commissioner considers that the scope of this case is the DfE’s citing of section 22 (future publication), section 43(2)(commercial

interests) and section 36(2)(c)(the effective conduct of public affairs). Additionally, he will consider any procedural issues that may have arisen.

Reasons for decision

Section 22 – information held with a view to its future publication

12. Section 22(1) FOIA states that information is exempt information if:

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not)

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in (a).

13. Section 22 is a qualified exemption which means it is subject to the public interest test.

14. The DfE has confirmed that, prior to receiving the FOI request there was a pre-existing commitment to publish the final funding awarded to each school, once the work had been completed and paid for. The pandemic caused a delay in publishing the awards from previous rounds for various reasons – quality assurance checks and final clearance being delayed due to staff capacity and availability. However, the DfE says it is committed to publishing once final funding is settled and the work completed.

15. The DfE states that it does not have a recorded commitment to do so but that it has previously published the CIF funding awarded to successful applicants and provided a link:

<https://www.gov.uk/government/publications/condition-improvement-fund-2015-to-2016-outcome>

16. The DfE later confirmed to the Commissioner in answer to his query that the final funding outcomes for later rounds (up to and including 2019-2020) have been published in line with its fixed intentions to publish when each round was 100 per cent complete (2-3 years after the result is announced). As set out in the paragraph above, the DfE had published before Covid. It explained that a small number of projects in

the 2017-18 round had initially held it back from publishing in late 2019/early 2020.

17. This position has now been amended in light of the small percentage of projects that continue to have delayed completion. The DfE now publishes when 95 per cent complete and will update the final funding data with newly completed projects from any 5 per cent to be confirmed every six months. This is noted in bubble cell H1 in the recently published [2019-20 figures](#).
18. The section 22 exemption is subject to a public interest test.
19. The Commissioner accepts that the information at part a) of the request is held and that there is a settled intention to publish it at some future date, as yet undetermined. The legislation does not insist on a pre-determined date.

Public interest factors in favour of disclosing the information

20. The DfE only cited section 22 FOIA to request part a) after the Commissioner had begun his investigation. The complainant had previously argued that the DfE should commit to publishing the information requested in future years to aid transparency.
21. The DfE did not provide any arguments in favour of releasing the figures under request part a) prior to their publication, other than to say that it is committed to transparency in its use of public funding.

Public interest factors in favour of maintaining the exemption

22. The DfE believes that it is in the public interest to publish information in a manner and at a time of the government's choosing. It is in the interests of the effective conduct of public affairs that these matters are a planned and managed activity and that everyone is allowed to see them at the same time. If non-finalised amounts were released over a protracted period this could lead to confusion and inaccuracy. Once published, the public can scrutinise the allocations and exercise oversight over the DfE's statutory duty.
23. The recipients of CIF may not use all of the funding initially earmarked for their projects. This can result in the DfE awarding less than it initially allocated when final costs are confirmed. Release of the information based on inaccurate figures which do not represent the reality of the project might lead to the recipients being questioned about project spend. It is not in the public interest for the DfE or the recipients to redirect resources in order to field questions from the public or the

media based on imprecise figures. It is in the public interest to be held accountable for the use of public funding based on the accurate published figures.

The balance of the public interest

24. The Commissioner's guidance¹ states that,

"In most instances public authorities will not be able to argue that information is too technical, complex or misleading to disclose, or that it may be misunderstood or is incomplete, because they can explain it or set it into context. However, where such explanation is not possible or would not limit the damage caused, the Commissioner does accept that the argument could be relevant."

25. In its internal review the DfE explained that the CIF terms and conditions specified that grant funding is paid out in installments on a payment profile, depending on the project lifecycle as set out in the bid and on reported progress. The funding may be allocated over two financial years. The total value of the bid is subject to change. The DfE has now gone some way to address the long gap between the final funding award and publication by updating the spreadsheet every six months when projects are complete.

26. The Commissioner agrees, on balance, that it is not in the public interest to release figures that may not be the final figure as this may cause resources to be diverted to answering questions from the media or public based on potentially inaccurate figures.

Section 36 – prejudice to the effective conduct of public affairs

27. Section 36(2) of the FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act – (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

28. The DfE cited section 36(2)(c) to parts b), c) and d) of the request. The Commissioner is satisfied that the withheld information is statistical. It is

¹ [information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf \(ico.org.uk\)](https://ico.org.uk/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf)

not necessary to obtain the reasonable opinion of the qualified person in relation to statistical information. However, the opinion of the qualified person was sought for the requested information. Baroness Barran, Parliamentary Under Secretary of State who signed to that opinion on 10 November 2021.

29. The Commissioner's guidance states that -

"Prejudice to the effective conduct of public affairs could refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose, but the effect does not have to be on the authority in question; it could be an effect on other bodies or the wider public sector. It may refer to the disruptive effects of disclosure, for example the diversion of resources in managing the effect of disclosure."²

30. Section 36 is a qualified exemption, other than for information held by Parliament. In order to engage a prejudice based exemption such as section 36 there must be likelihood that disclosure would, or would be likely to, cause prejudice to the interest that the exemption protects. In the Commissioner's view, three criteria must be met in order to engage a prejudice based exemption:

- Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
- Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; and,
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – i.e. disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice.

31. Consideration of the exemption at section 36 is a two-stage process: even if the exemption is engaged, the information should be disclosed,

² [Section 36 \(ico.org.uk\)](https://ico.org.uk)

unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

The complainant's view

32. The complainant states the following in their review request regarding part a) and b) of the request:

- the funding for the 2021/22 CIF bids would need to have been spent by March 2022.
- Their request was 5 months before when schools would have contracts in place;
- project managers would be aware of the size of the contract awards as, they contend, that the CIF rules make it very difficult to obtain any additional funding for any overspend;
- The complainant argues that it is common to publish the indicative value of the work in advance, irrespective of whatever contractor bids may be received;
- That financial information is published in school accounts. The complainant explains that the DfE provides tools for schools to financially benchmark against each other. The Education and Skills Funding Agency (ESFA) also publishes financial notices and the financial balances of the academies and local authority schools are on the gov.uk website. If publication of CIF bid financing is distracting leaders from core educational activity, then shouldn't the DfE stop the publication of all financial information about individual schools?

Regarding parts c) and d) of the request:

- The complainant's view is that the DfE's comments on the issue of a Trust's financial position are nonsense in view of the comments in the previous bullet point.
- They state that, if projects have been assessed independently against published criteria, there should be no problem releasing the information. The implication is that assessments may have been manipulated to favour certain applications. Publication helps ensure honesty.

The DfE's view

33. The DfE's view is that schools and the DfE need a safe space in which to work and to deliberate issues requiring a funding solution. Full and frank discussions are necessary regarding the condition of school estates prior to funding being allocated, or additional funding awarded during the project. This allows best outcomes for the schools, the staff and pupils and the needs of the wider community. It also enables the DfE to make best use of limited public funding for essential improvements.
34. The DfE explained that it assessed a specific school's needs in relation to the funding. It needs information provided by the schools as an evidence base on which to score the 'project need', 'project planning' and 'cost criteria'. There are also other elements and criteria besides these that feed into the assessment, consideration and final total overall score. The final project score is arrived at by taking the raw scores and applying weightings/adjustments via a model which draws on a number of separate data feeds that impact on the final figure. That is why the raw scores do not always equal the final project score. Releasing these figures without the broader context is likely to lead to misinterpretation. The DfE explains that it cannot provide context as a caveat if they were released because the final scoring is unique to each specific project being awarded funding and no 'one size fits all'.
35. Each application was assessed independently by two assessors against the criteria for each round. These assessments are based on specific situations and supporting evidence presented by each school and are not assessed in comparison with/ranked against other schools. Making these public would lead to inevitable and misleading comparisons based purely on scores given, leading to unnecessary challenge from unsuccessful schools. Multi Academy Trusts already challenge results by arguing comparisons of need. Therefore release would likely lead to unnecessarily increased appeals and complaints from unsuccessful schools, drawing out assessment and approval process. As there is no additional funding available it would be a waste of resources for them and the DfE (which has a small delivery team) and damage the relationships between schools.
36. The condition of the school estate attracts media interest which could be used as a ranked league table and is likely to increase MP queries, putting an additional strain on resources. Regularly successful schools may face undue scrutiny and criticism which would be a significant distraction and divert from their core educational activities.
37. Referring specifically to part d) of the request, the DfE argues that each year ministerial decisions are taken on any funding split between condition and expansion based on sensitive information such as the

financial position of the Trust or their timeliness in making financial returns to ESFA.

38. The DfE's view is that the withheld scores should continue to be withheld under this exemption due to the potential reputational damage to the unsuccessful applicants. Release may deter schools from submitting applications risking rejection leading to undue concerns from staff, pupils and their parents regarding the condition and safety of the buildings where funding is not allocated to make improvements.
39. The Commissioner's guidance says that section 36(2)(c) is concerned with the effects of making the information public. This exemption can refer to an adverse effect on the public authority's ability to offer an effective public service or to meet its wider objectives or purpose. In this case, disclosing information without being able to fully contextualise in order to explain the figures that have been determined. Without this knowledge, release of the requested information is likely to cause actual harm to the DfE's ability to successfully deliver CIF as it would likely lead to misleading comparisons and increased challenge from unsuccessful schools. The Commissioner accepts that the disclosure of information would be likely to prejudice the effective conduct of public affairs.
40. Section 36 is a qualified exemption. Even when the qualified person has given their opinion that the exemption is engaged, the public authority must still carry out a public interest test. The purpose of the public interest test is to decide whether the public interest in maintaining the exemption outweighs the public interest in disclosure. If it does not, the information must be released.

Public interest factors in favour of disclosing the information

41. The DfE acknowledges that it has a responsibility to be open and transparent to assure the public that its decision-making and standards of integrity have been upheld in the awarding of CIF funding.
42. Disclosing the information would demonstrate to the public that the DfE conducts an unbiased application and assessment competition when it awards CIF funding.

Public interest factors in favour of maintaining the exemption

43. The DfE's argument here is based on the potential for misinterpretation, given the lack of evidential context and the scores in isolation for the reasons provided earlier in this decision. The scores are only part of the

overall assessment and award process. Context and background for each application is considered alongside the scoring. "Good government depends on good decision-making..." which is based on evidential context.

44. It argues that release of the information would disrupt the process of application, assessment and award due to challenges made relating to the scores being taken in isolation or out of context. The DfE contends that this would impair and delay the process and would not be in the interest of schools requiring funding for essential improvement work. Additionally, it should be able to discuss the information within the applications with unsuccessful schools to help them improve their applications. It is not in the public interest of the schools or the timely delivery of the policy to hinder this.
45. The DfE also argues that it needs a 'safe space' to consider initial and mid-project funding requests, especially when the issues are 'live' because of unplanned complications. The DfE may become "more reticent in providing and/or formally documenting assessment scores prior to final funding being awarded" if it impacts on the decision-making.
46. Schools might also be less candid in their exchanges particularly when the information is sensitive, might affect their reputation or commercial interests, and it gives the example of solvency. It is not in the public interest to make the process of assessment and the allocation of funds longer for those schools most in need where staff and pupils are in substandard building conditions.

Balance of the public interest

47. The Commissioner has concluded that the requested information was still 'live' at the time the request was made and the need for a safe space still required. The DfE has stressed that final decisions have not been made and that a safe space for deliberation was still required in October 2021. It is hard to establish at what point the figures will be fixed and no longer subject to amendment. The Commissioner acknowledges that there is a large gap before the final funding is published but accepts that it is not in the public interest to release unfinalised figures and notes the commitment to update when finalisation occurs.

Section 10 – time for compliance with request

48. Section 1(1) of FOIA states that:

“Any person making a request for information to a public authority is entitled – (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) If that is the case, to have that information communicated to him.”

49. Section 10(1) FOIA states that a public authority must respond to a request promptly and ‘not later than the twentieth working day following the date of receipt’.
50. The complainant made a request on 14 October 2021 but the DfE did not issue its refusal notice until 29 November 2021 breaching the 20 working day time for compliance.

Other matters

51. The Commissioner notes that the complainant asked for an internal review on 2 December 2021 but the DfE only provided a review on 16 March 2022.
52. The section 45 code of practice³ recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.

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https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

53. 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

54. 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.
55. 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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