

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 May 2022

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

Complainant: Ms Samantha Booth on behalf of SchoolsWeek
Address: samantha.booth@schoolsweek.co.uk

Decision (including any steps ordered)

1. The complainant has requested information relating to the National Tutoring Programme. The Department for Education ("the DfE") disclosed some information but relied on section 36 of FOIA (prejudice to effective conduct of public affairs) to withhold the remainder.
2. The Commissioner's decision is that the DfE has not demonstrated that either section 36(2)(b)(i) or 26(2)(b)(ii) of FOIA is engaged in respect of the non-statistical information. Whilst section 36(2)(c) is engaged in respect of this information, the balance of the public interest favours disclosure. The remaining information is statistical information and the DfE has not demonstrated that any of the limbs of the exemption are engaged. The DfE is therefore not entitled to rely on any limb of the exemption to withhold the statistical information.
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information it has withheld.
4. The DfE must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 8 March 2021 the complainant requested information of the following description:
- “Please can I request the following information under the Freedom of Information act. Please refer to them by the question number below.
- “[1] Please can I request the contracts for the providers of the National Tutoring Programme this year, including the Education Endowment Foundation and Teach First.
- “[2] Please can I request the key performance indicators (KPIs) for the tuition partners and academic mentor arms of the National Tutoring Programme.
- “[3] Please can I request any reports that DfE receives from the EEF and Teach First on how they are meeting these KPIs. For example, any reports that EEF are meant to send back to DfE routinely to report on their progress.
- “[4] Please can I request the regional targets in numbers for each 9 regions of England for both schools and pupils enrolled for the 2020-21 academic year in the tuition partners pillar? Please can this include an explanation of how these figures were calculated
- “[5] Please can I request the national target set by DfE on how many pupil premium eligible pupils it is aiming to be enrolled this academic year?”
6. On 6 May 2021, the DfE responded. In respect of elements [1] and [2], it disclosed some information but withheld the remainder – relying on section 40(2) and 43 of FOIA to do so. In respect of elements [3] and [4], it refused to disclose any information and relied on section 36 of FOIA (prejudice to effective conduct of public affairs) in order to do so. Finally, in respect of element [5], it said that it did not hold the requested information.
7. The complainant requested an internal review on 28 May 2021 in respect of elements [3] and [4]. The DfE sent the outcome of its internal review on 2 July 2021. It upheld its original position.

Scope of the case

8. The complainant contacted the Commissioner on 23 July 2021 to complain about the way her request for information had been handled.
9. The complainant has not challenged the DfE's use of the section 43 or section 40(2) exemptions to withhold information and the Commissioner therefore assumes that she does not wish to pursue this element of the request.
10. The Commissioner considers that the scope of his investigation is to determine whether any of the limbs of section 36 are engaged and, if they are, where the balance of the public interest lies.

Background

11. The DfE explained to the Commissioner that the National Tutoring Programme (NTP) supports schools and pupils by providing access to high-quality tutoring to help pupils whose education has been affected by the Covid-19 pandemic.
12. As part of the Education Recovery programme, the government invested £1bn to support up to six million, 15-hour tutoring packages for pupils who need help.
13. At the time of the request, the Education Endowment Fund had been engaged to provide tuition partners and Teach First to provide academic mentors.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

14. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
15. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) would, or would be likely to, prejudice—
 - (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or

- (ii) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (iii) the work of the Cabinet of the Welsh Assembly Government.
- (b) would, or would be likely to, inhibit—
- (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
- (3) The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).
- (4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words “in the reasonable opinion of a qualified person”.
16. The information the DfE has withheld in respect of this request are three sets of powerpoint slides and a table of data.

Is the information statistical?

17. Having viewed the withheld information, the Commissioner considers that it is mostly statistical information.
18. FOIA does not define “statistical information”. However, the Collins Dictionary defines the word statistical as “relating to the use of statistics” and it defines the word “statistics” as:
- “quantitative data on any subject, especially data comparing the distribution of some quantity for different subclasses of the population”¹
19. The Cambridge English Dictionary defines “statistics” as:

¹ <https://www.collinsdictionary.com/dictionary/english/statistics>

"information based on a study of the number of times something happens or is present, or other numerical facts"²

20. The powerpoint slides include various data about the number of pupils who have interacted with the NTP and the number of tutors and mentors engaged. These are presented in both tabular and graphical form. Underneath are some text boxes which pick out highlights from the data as well as a small amount of analysis of that data.
21. The Commissioner considers that graphs and data tables constitute "quantitative data" or "numerical facts." He is therefore satisfied that this information is statistical information for the purposes of section 36(4) of the FOIA.
22. In respect of the text boxes the distinction is less clear cut. The text boxes contain bullet points, many of which summarise or pick out highlights from the graphs and tables on the slide – these, whilst not always numerical, are arguably statistical information too. However, other sentences (sometimes in the same bullet point) comment on the performance relative to targets – which would not be statistical information.
23. For the sake of simplicity and given his findings below, the Commissioner has taken the view that the text boxes are not statistical information but the remainder of the slides (and the data table) are.

Does the statistical information engage any of the limbs of section 36?

24. Where the withheld information is statistical, the Commissioner does not consider that he is required to afford the Qualified Person's opinion any special status. Nor is he required to decide whether that opinion is reasonable or not. He is simply required to determine whether disclosure of the withheld information would (or would be likely to), in his own opinion, otherwise prejudice the effective conduct of public affairs.
25. The DfE argued that disclosure of the information would be likely to inhibit the free and frank provision of advice because:

"It is extremely important that there is the fullest and clearest possible understanding between the department, the NTP Board and its providers, in relation to the advice and/or concerns and potential

² <https://dictionary.cambridge.org/dictionary/english/statistic>

issues they may have in relation to pupil enrolment, school engagement and providers delivering this programme This programme is an essential part of a package of support being delivered to ensure that pupils impacted by the pandemic have the opportunity to access high quality tutoring so they can catch-up on missed education and achieve the best possible educational outcomes. We must ensure that clear advice can be provided so that we are able to find the best and most suitable tutoring provision for schools and pupils, whilst taking onboard the advice and evidence provided by all parties involved.

"The 'safe space' in which all parties, and particularly our providers can advise the department (and vice versa) on their concerns, issues and the evidence they have to support their position, is essential to preserve. This is to ensure that the providers can supply the department and NTP Board with detailed data and the associated candid, explanatory advice and background required when advising on the progress being made in delivering the NTP.

"It is important that officials can receive such candid advice when the progress of the programme is being considered at the NTP Board meetings. We believe that releasing this information would be likely to deter providers from providing full, free and frank data, analysis and associated advice in the future. This is particularly the case as there is no statutory or contractual obligation upon our providers to share this live progress data via their dashboards. It would put the department and the NTP Board at a clear disadvantage, by limiting the data and advice it has at its disposal, making it more difficult to consider or challenge the progress being made in the delivery of this programme . This would be likely to hinder and delay any appropriate interventions made by the department and/or NTP Board that may be required to get the programme back on track if it is facing issues, or at worst, we could miss key opportunities to question and challenge providers to ensure they are delivering the programme as expected, ensuring the best value for money is being achieved."

26. In addition the DfE argued that disclosure would prejudice the free and frank exchange of views for the purposes of deliberation because:

"Such information allows departmental officials and Board members the opportunity to consider the latest delivery and performance data and commentary, as part of their ongoing monitoring, review and challenge processes. Such dashboards include candid explanatory notes on information provided by our providers for the purposes of deliberation.

"Given the nature of the information, particularly commentary from providers within the dashboards presented to department and NTP Board, we are clear that these include candid, free and frank views provided to the department and the Board to allow parties to deliberate the progress of the programme in its delivery and take-up. It also allows the department and the NTP Board the opportunity to raise questions and/or ask for further information from the providers delivering the programme if the data or commentary provided raises concerns about the delivery of the programme.

"We are clear that the providers sharing this information were of the implicit understanding that this information, data and associated commentary were provided to the department in confidence, and would not go into the public domain. This is even more the case when we consider that there was no statutory or contractual obligation upon our providers to share this level of information with the department, and they did so voluntarily and in the nature of ongoing good working relationships."

27. Finally, the DfE identified other potential harms that might flow from disclosure: the need to foster good relationships with its stakeholder, the prevention of "misleading" information being placed into the public domain and its concerns about the possibility of disclosure harming its ability to run a successful tendering exercise for Phase Two of the NTP.³

The Commissioner's view

28. In the Commissioner's view, the DfE has not demonstrated why any of the limbs of the exemption are engaged.

29. In respect of sections 36(2)(b)(i) and (ii) Commissioner notes his own guidance on section 36 that:

"an exchange of data or purely factual information would not in itself constitute the provision of advice or, for that matter, the exchange of views."⁴

30. The statistical information is purely factual information. It is not advice and it is not an exchange of views. Even if the Commissioner were to

³ Randstad Education was eventually selected as the new provider but the matter was still under discussion at the time the request was refused.

⁴ <https://ico.org.uk/media/for-organisations/documents/2260075/prejudice-to-the-effective-conduct-of-public-affairs-section-36-v31.pdf>

accept that disclosing this data would be likely to inhibit the providers from supplying this information to the DfE in future, that would not in itself be inhibiting the provision of advice or the exchange of views. The Commissioner does not consider that disclosing factual data should reasonably inhibit the providers from providing free and frank advice to the DfE (or vice versa). Nor should it prevent the providers from having free and frank discussions with the DfE.

31. Having determined that neither of these limbs applies to the statistical information, the Commissioner has gone on to consider whether disclosure would "otherwise prejudice" the effective conduct of public affairs. His guidance on this limb of the exemption and the relevant case law state that, in order to engage this limb, a public authority must demonstrate some form of prejudice, not covered by another limb, that might result from disclosure.
32. The Commissioner accepts that the DfE does need to manage contracts effectively in order to ensure that public money is being spent wisely. Managing contract performance does rely on a flow of data between the contracting parties. The Commissioner also recognises that, whilst some management information will be agreed between the parties, other data may also be relevant in assessing contract performance.
33. The DfE has already disclosed, to the complainant, the relevant parts of the contracts, with both the Educational Endowment Fund and Teach First, that deal with key performance indicators.
34. The contract with Teach First stipulates that the provider has to provide to the DfE, on a regular basis, various data relating to each mentor in the scheme plus data on the number of applications, offers and acceptances. It must also provide the Unique Reference Number (URN) of each school that it works with.
35. The contract with the Educational Endowment Fund requires the Fund to notify the DfE of the Unique Pupil Number of each child on the programme, as well as the URN of the schools it is working with. It must also provide statistics on pupil-level participation, attendance levels and the subjects being covered.
36. The Commissioner therefore takes the view that a large proportion of the data being withheld is either data that the providers were obliged to provide to the DfE or that could be derived from data that the providers

were obliged to provide.⁵ He therefore considers that there is a minimal risk that providers will no longer provide such data to the DfE when it is a contractual requirement for them to do so.

37. Any organisation that does business with the government should be aware of the fact that any information they exchange may be vulnerable to a FOIA request – and the default position that a public authority must disclose information unless an exemption is shown to apply (and, where relevant, that the public interest favours maintaining that exemption). At least one of the contracts refers specifically to the information exchanged being subject to the Freedom of Information Act.
38. If the DfE has concerns about the future flow of data, it can address this itself by negotiating future contracts to ensure that the data it needs must be supplied on a regular basis.
39. The Commissioner also notes that, in order to demonstrate that they are meeting the terms of their contract (and, hence, entitled to payment) the providers will have an incentive to provide information to the DfE. If they do not provide information, they risk being found to be non-compliant and not receiving payment.
40. Finally, in relation to misleading information, the Commissioner does not consider that any of the statistical information that is being withheld would, when seen in its proper context, provide a misleading picture. Each powerpoint is a snapshot of the situation at a given moment in time – but this is clear from the document and the fact that there are three such documents reinforces this view. Whilst the data is now out of date (the most recent spreadsheet is dated 13 April 2021), at the time the DfE responded to the request, it would have been relatively current.
41. If the DfE has genuine concerns about how disclosure will alter the narrative now, it always has the ability to provide additional information to place the data in its proper context or to publish more recent data.
42. The Commissioner is therefore not satisfied that the DfE has demonstrated that there is a real likelihood that disclosure of any of the statistical information would otherwise prejudice the effective conduct of public affairs and therefore none of the limbs of the exemption are engaged. However, he considers that, even if he were so persuaded, the

⁵ For example, the URNs of each school could be used to determine the region it was located in, whether it was a primary, secondary or alternative provision school.

public interest would be likely to favour disclosure – for the same reasons set out in respect of the text boxes.

The text boxes

43. The Commissioner has accepted that the information in the text boxes does not constitute statistical information and in respect of this information, he must therefore consider the opinion of the Qualified Person.
44. The DfE supplied the Commissioner with a copy of a submission it had sent to Nick Gibb MP, dated 23 March 2021. Mr Gibb signed and dated the submission to signify his agreement on 24 April 2021. At that time, Mr Gibb was the Minister of State for school standards and therefore a minister of the crown.
45. The Commissioner is satisfied that Mr Gibb was entitled to act as the Qualified Person for the purposes of section 36 and that, in signifying his agreement with the submission, he provided his opinion on 24 April 2021.
46. The submission that Mr Gibb signed off covered much the same ground as has been discussed in relation to the statistical information. The Qualified Person was concerned that disclosure would “damage the relationship and trust that is essential for an effective collaboration with these organisations” and was also concerned about the effect that disclosure would have on the DfE’s ability to negotiate a successful partnership for Phase 2 of the NTP. Mr Gibb considered that disclosure would be likely to prejudice: the free and frank provision of advice; the free and frank exchange of views for the purpose of deliberation and; would otherwise prejudice the conduct of public affairs.

Was the opinion reasonable?

47. It is not the role of the Commissioner to substitute his own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the information concerned. It thus follows that the bar for finding that an opinion is “reasonable” is not a high one.
48. A “reasonable” opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
49. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.

50. In respect of section 36(2)(b)(i) and 36(2)(b)(ii), the Commissioner does not consider that Mr Gibb's opinion is reasonable.
51. As the Commissioner has already pointed out above, purely factual information is not advice and it does not represent an exchange of views. Whilst the commentary in the text boxes is not statistical information, it is derived from the statistics which form part of that particular slide. The majority of the commentary is purely factual. Only a few sentences go into the realms of analysis and, when they do, this is based around other publicly-known facts.
52. There is nothing in the withheld information that discusses specific issues being encountered by either provider. There is nothing about specific challenges either faces. There are no candid opinions presented, nor is there any discussion of options as to how matters should or might move forward.
53. Had the withheld information contained any genuine exchange of opinions, the Commissioner might have been persuaded that the Qualified Person's opinion was reasonable. However, as the withheld information consists almost entirely of factual information, the Commissioner cannot consider that it is reasonable to suppose that its disclosure would prejudice either the free and frank provision of advice or the free and frank exchange of views. He thus concludes that neither section 36(2)(b)(i) or 36(2)(b)(ii) is engaged in respect of any of the information.
54. Next the Commissioner turns his attention to the question of whether disclosure might "otherwise prejudice" the effective conduct of public affairs.
55. The arguments advanced by the Qualified Person are the same as those advanced in respect of the statistical information – however the test this time is different. Where the withheld information is statistical, the Commissioner is entitled to reach his own view about the likelihood of prejudice occurring and is not obliged to give any significant weight to the Qualified Person's opinion. Where the information is not statistical information and the Qualified Person's opinion is that its disclosure would (or would be likely to) cause prejudice, the Commissioner's role is to determine whether that is a reasonable opinion for the Qualified Person to hold.
56. The Commissioner has already expressed his own opinion that disclosure of the statistical information (on which the non-statistical information is based) would not be likely to cause significant prejudice to the effective conduct of public affairs. However, in respect of the non-statistical

information, he feels obliged to say that the Qualified Person's opinion is reasonable for two reasons.

57. Firstly, the wording of this exemption is such that the Commissioner is required to allow the Qualified Person a significant margin of appreciation when considering whether their opinion is reasonable. The Qualified Person has a wider appreciation of the context of the withheld information and its relevance to the work of the DfE. The test here is not what the Commissioner considers to be reasonable, but whether the Qualified Person's opinion is so unreasonable as to be irrational or absurd.
58. Secondly, the Commissioner notes that the information in question, whilst similar to the statistical information, is not the same and it does at times venture away from facts and towards analysis.
59. Whilst it would not be his preferred view, the Commissioner does not consider that the Qualified Person's opinion is so unreasonable as to be irrational or absurd. It is not wholly unreasonable to suppose that providers may harbour doubts about working with the DfE if they consider that their own internal analysis is likely to be disclosed.
60. The Commissioner has therefore accepted that Mr Gibb's opinion in respect of section 36(2)(c) of FOIA is reasonable and thus this limb of the exemption is engaged.

Public interest test

61. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, the public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
62. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
63. The Commissioner has accepted as reasonable that the lower bar of prejudice is engaged. This means that that the chance of prejudice occurring doesn't have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.
64. In explaining why the public interest should favour disclosure, the complainant pointed to the lack of available information showing how

the NTP was performing – with only national figures available. She also noted the amount of public money being spent on the scheme.

65. In explaining why the exemption should be maintained, the DfE noted the prejudice which it maintained would result from disclosure and the public interest in preventing it from occurring – as well as the public interest in maintaining good relationships with suppliers.

The Commissioner's view

66. In the Commissioner's view, the balance of the public interest favours disclosing the information in the text boxes.
67. The Commissioner notes that the NTP is a large project costing £1 billion of taxpayers' money. When such a large sum is spent there has to be a corresponding public interest in ensuring that that money is being put to good use.
68. Secondly, the Commissioner notes the importance of the NTP to both the government's Covid recovery strategy and its education policy in general.
69. Reports from Ofsted have highlighted how the pandemic – and particularly the enforced switch from classroom-based to remote learning has had a detrimental effect on pupils' educational progress and general welfare – with the most vulnerable being hardest hit.⁶ Another report, this time produced for the DfE, found that, over the course of the 2020/21 academic year, primary pupils' reading progress was about a month behind what would normally have been expected pre-pandemic.⁷ The report also found that, at secondary level, disadvantaged pupils' progress fell by more than half a month more on average than the falls experienced by their less disadvantaged peers.
70. Clearly, if such a gap persists, this will have an impact on the life chances of those children. The NTP is designed to help pupils make up

⁶ <https://www.gov.uk/government/news/covid-19-isolation-having-detrimental-impact-on-childrens-education-and-welfare-particularly-the-most-vulnerable>

⁷

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/1062286/Understanding_progress_in_the_2020_to_2021_academic_year_Findings_from_the_summer_term_and_summary_of_all_previous_findings.pdf

that educational gap by offering one-to-one tuition, in addition to normal schooling, to pupils in need.

71. In the Commissioner's view the importance of the NTP adds considerable weight to the public interest in disclosure of information demonstrating how well the programme is (or is not) performing.
72. Finally, the Commissioner has considered the actual information being withheld. In his view, the information is relatively factual with few opinions being expressed at all – let alone candid views. To the extent that any harm is likely to occur it will be at the minor end of the spectrum. Officials should be sufficiently robust as to be not easily dissuaded from offering robust views. Providers fortunate enough to be awarded large government contracts should be well aware of the enhanced public scrutiny that is likely to result.
73. That does not mean that providers should never have a safe space in which to discuss matters honestly and openly with a government department. Only that there is a distinction to be drawn between genuinely candid discussions and the general interaction between parties. Which side of that line particular information falls on will be determined by the particular facts of each case.
74. The Commissioner is therefore satisfied that, in the circumstances of this case, the balance of the public interest favours disclosing the withheld information.

Right of appeal

75. 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

76. 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.

77. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF