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Freedom of Information Act 2000 (FOIA)

Decision notice

Date: **22 November 2019**

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

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Education ("DfE") regarding the trial of a reception baseline assessment in schools. The DfE refused to provide some of the requested information citing section 35(1)(a) – the formulation and development of government policy and section 40(2) – third party personal data.

2. The Commissioner's decision is that the DfE has correctly withheld the requested information under section 35(1) and section 40(2). However, she finds that the DfE did not comply with section 10(1) and section 17(1) of the FOIA.

3. The Commissioner does not require the DfE to take any further steps.

Request and response

4. On 2 March 2019 the complainant made the following request under the FOIA:

   "This FOI refers to the following document, published on 27 February 2019 on the gov.uk website: https://assets.publishing.service.gov.uk.... Please could you provide me with the following:
   - Details of the early years practitioners, teacher panel, and assessment and inclusion experts involved in the development. If you are unable to provide names of those involved, please confirm how many people were involved in each category and whether there was any overlap between the groups.
   - The full analysis of the trialling data that you have completed.
   - The practitioner feedback from a questionnaire sent to all schools involved in the trial, and any summary you have done of the responses to the questionnaire.
   - Any analysis you undertook of how long it took the participants in the trial to perform the assessment. Please include details of averages and the shortest/longest times.
   - Details of any practitioner feedback that indicated that children were upset at any time during the trials of the test."

5. The DfE responded on 28 March 2019 applying section 35 but stating that it needed 10 extra working days to consider the public interest test. On 12 April 2019 the DfE wrote again to say that it required 10 more working days to consider the public interest. A public authority is allowed an additional 20 working days to consider the public interest, if necessary.

6. On 29 April 2019 the DfE responded and provided some information within the scope of the request. It explained that the reception baseline assessment would no longer include self-regulation which meant that this information was no longer confidential and could be released. The data released in the reports it attached applied to the self-regulation component of the trialled assessment.

7. The DfE confirmed the panels involved, the numbers concerned and any overlap. The DfE provided information within the scope of the remainder of the request but withheld the full analysis under section 35(1)(a) in the three reports (trialling data, practitioner feedback and timing data) it had provided. The DfE also applied section 40(2) to any third party personal data in the reports and the names of the panel members.

8. The complainant asked for a review on 14 May 2019 querying why the details of the expert panel members had been withheld. She also

objected to the heavily redacted reports about which the complainant raised several points.

9. The DfE provided an internal review on 12 June 2019 in which it partly maintained and partly revised its position. The DfE provided the names of the Standards and Testing Agency stakeholder reference group and indicated how much of the reports had been redacted which was one of the complainant's principal objections.

10. The complainant subsequently asked why the names of the expert panel had been withheld.

11. On 27 June 2019 the DfE confirmed that it was continuing to rely on section 40(2) regarding the expert panel member names because they had been promised confidentiality.

Scope of the case

12. The complainant contacted the Commissioner on 12 June 2019 to complain about the way her request for information had been handled. She was not content with the fact that the DfE's response had been delayed twice, meaning that the DfE's request for schools to take part in the voluntary baseline assessment had closed. The complainant also complained about the small amount of information she had been sent and that it was heavily redacted and therefore difficult to make sense of.

13. The Commissioner considers the scope of this complaint to be whether the DfE is entitled to rely on section 35(1)(a) and section 40(2) to withhold some of the requested information.

Background

14. The DfE has provided the Commissioner with some background and context to this request.

15. The reception baseline assessment is a new national assessment that will be administered in reception classes in all primary, infant and first schools in England. It will form the baseline for primary progress measures with the intention that this will allow schools to receive credit for the progress made in primary schools. Currently a key measure is progress made between the end of key stage one (year 2) and the end of key stage two (year 6). The new assessment will allow the government to take account of the different challenges schools face,

given their pupils' starting points. This will enable the DfE to remove statutory end of key stage one assessments.

16. The National Foundation for Educational Research ("NFER") has been contracted by the DfE to develop, trial and pilot the new reception baseline assessment from May 2018 and deliver it from September 2020.

Reasons for decision

Section 35(1)(a) – formulation or development of government policy

17. Section 35(1) of the FOIA states that information held by a government department (or by the National Assembly for Wales) is exempt if it relates to-

    (a) The formulation or development of government policy…

    The Commissioner understands these terms to broadly refer to the design of new policy, and the process of reviewing or improving existing policy.

18. The Commissioner's guidance states that there is no standard form of government policy; policy may be made in a number of different ways and take a variety of forms. Government policy does not have to be discussed in Cabinet and agreed by ministers. Policies can be formulated and developed within a single government department and approved by the relevant minister.

19. The Commissioner considers that the following factors will be key indicators of the formulation or development of government policy:

    - the final decision will be made either by the Cabinet or the relevant minister;
    - the government intends to achieve a particular outcome or change in the real world; and
    - the consequences of the decision will be wide-ranging.

20. However, the Commissioner's guidance makes it clear that not all government policy will need to be discussed in Cabinet and jointly agreed by ministers. Some policies will be formulated and developed within a single government department, and approved by the minister responsible for that area of government.

21. Section 35 is class-based which means that departments do not need to consider the sensitivity of the information in order to engage the exemption. This is not a prejudice-based exemption, and the public

authority does not have to demonstrate evidence of the likelihood of prejudice. The withheld information simply has to fall within the class of information described - in this case, the formulation or development of government policy. Classes can be interpreted broadly and will catch a wide range of information.

22. The DfE has confirmed that the government policy this information relates to is the development of policy on the delivery of the reception baseline assessment. The public authority explained that it is currently undergoing active development during its pilot phase, which was still taking place at the time of the DfE's response to the Commissioner on 30 October 2019.

23. The information consists of three reports –

- *Self-regulation: Trial outcomes Reception Baseline Assessment*
- *Reception baseline assessment: Outcomes from the trial Interim Report January 2019*
- *Gateway 2: Report on completed trial including analysis of outcomes and recommendations for changes Reception Baseline Assessment*

24. The Commissioner has had sight of the withheld information from the three Reports and the expert panel list of names.

25. Whilst she has considered whether the assessment reports might be viewed as implementation, the pilot is described on the NFER's website as follows:

"this pilot is a key part of the development process, which will be used to ensure that:

- *the assessment approach, systems and guidance are fit for purpose*
- *the outcomes of the assessment meet all key requirements*

It is important to pilot the assessment in schools to enable us to evaluate the effectiveness of individual questions, as well as the assessment as a whole."[1]

26. The Commissioner's guidance states that, in some cases, the

[1] https://www.nfer.ac.uk/for-schools/participate-in-research/information-about-the-201920-reception-baseline-assessment-pilot

government may decide to run a pilot scheme or trial to test a potential policy on a small scale before deciding whether to roll it out in full. Piloting a policy is one way of gathering evidence on its efficacy before making a final decision on whether or not to take it forward. Pilot schemes may therefore form part of the policy formulation process, particularly if the scheme's limits and end date are clearly defined, and no final decision has yet been taken on whether, or in what form, the policy should be adopted or rolled out more widely.

27. The Commissioner therefore went back to the DfE in order to establish whether the policy was merely being implemented by NFER. She queried if all decisions regarding the reception baseline assessment were being formulated and developed solely by NFER as it was rolled out, in conjunction with the DfE, or solely by the DfE.

28. The DfE responded on 11 November 2019 and confirmed that a final ministerial decision had not been made as another submission is due to go to ministers in January 2020. They will be asked if they are happy to go ahead with the planned statutory implementation of the reception baseline assessment in autumn 2020. Only after this, will the process begin to put the reception baseline assessment into law. In response to the Commissioner's query, the DfE also confirmed that all such decisions are taken by a DfE minister and not by NFER.

29. The Commissioner is therefore satisfied that the information falls into the class of information covered by section 35(1)(a).

Public interest test

30. Although the Commissioner considers the exemption to be engaged, the public interest test needs to be considered because the exemption is qualified. Departments can only withhold the information if the public interest in maintaining the exemption outweighs the public interest in disclosure. There is no automatic public interest in non-disclosure just because it falls within this exemption.[2]

31. Section 35(1)(a) covers any information relating to the formulation and development of government policy. The Commissioner's guidance says that public interest arguments should focus on potential damage to policymaking from the content of the specific information and the timing

[2] https://ico.org.uk/media/for-organisations/documents/2260003/section-35-government-policy.pdf

of the request. Arguments will be strongest when there is a live policy process to protect.

Public interest in disclosing the information

The DfE's view

32. The DfE has considered the arguments for the disclosure of the requested information and concluded that openness about the process and its delivery may lead to greater accountability, an improved standard of public debate and trust.

33. The public authority acknowledges that there is a public interest in openness and transparency of government and, particularly so, when considering the evidence around the implementation of government policy.

34. The DfE also factored in the time that has passed since the 2018 trial and whether the situation had changed significantly enough not to pose a negative effect on the development and delivery of the policy.

The complainant's view

35. The complainant argues that this is a national test that is going to be carried out on children who are not of compulsory school age and that the public has a right to know the details of the testing. Parents have a right to be reassured about the content and outcome of the trials.

36. Her view is that, if so much has changed between the trials and the pilot, it is not reasonable to withhold the information on the basis that it might prejudice the pilot or the eventual baseline assessment. She quotes the DfE's assessment explaining that the trial and assessment are very different.

37. She further contends that as soon as the baseline is statutory, all schools will have access to the test. Concerns about sharing the information affecting the "validity of the baseline" are therefore weak and unevidenced. The baseline is not going to be a reliable or valid test in the longer term. Even if staff in schools keep the details secret, four year olds will not be under an obligation to do so. She suggests that the public authority is saying that the baseline will become invalid as soon as it is in the public domain.

38. The complainant believes that the trial data on the language and maths trials could be shared, even if the names of the tasks were redacted. Keeping it secret leads to public concern over what the trials showed, particularly as the self-regulation trials clearly showed that the outcome of the tests was linked to the age in months of the child. This concern

she says has been repeatedly raised by the early years sector as a likely issue in the reliability of the test. If the baseline turns out to be a proxy for age in months it is likely that the pilot will also fail and the project have to be shelved.

39. The complainant's view is that the baseline is a waste of public money because the DfE had undertaken a pilot of a set of baselines barely three years earlier at the time of the request. It was pointed out by the early years sector that baselines being piloted would not be comparable and that public money was being wasted. She states that the DfE went ahead and found that the tests were not comparable.

40. The complainant says that there can be no grounds for not releasing all the self-regulation data as it has been dropped from the baseline. As the DfE has been a standard bearer for the value of research in education, the information would allow researchers and academics to research self-regulation, an important area of childhood education.

41. In not releasing all the data, the public could perceive that the DfE is attempting to cover up negative results and lose confidence in the test. Parents should be able to give informed consent to their children taking part in the test because they are below compulsory school age and the test is unevidenced.

Public interest in maintaining the exemption

The DfE's view

42. The DfE explained that the trial period (the subject of the request) involved more than 300 nationally representative schools in autumn 2018. The DfE contends that trialling this policy is a key part of the policy development process because it enables it to evaluate the effectiveness of individual questions, as well as the assessment and policy as a whole. Evidence from the qualitative and quantitative data from the trial was used to select the assessment material intended for use in the pilot that is currently underway, a pilot which is to ensure that this assessment is high quality and appropriate for the age of the pupils taking it.

43. The DfE accept that the public interest can reduce over time after the policy and formulation stage has been completed. However, the 2018 trial period fed into the current pilot of this policy, a policy which is under development and currently 'live'. The DfE therefore does not believe that the public interest in withholding it has diminished at all and that it has the potential to inflict considerable damage on the current 'live' pilot and the policy-making process.

44. The focus of the DfE is improving standards of education and for the associated policy to be developed and delivered following a tested and

evidence-based process. The outcomes of these processes shape the final policy that the DfE is committed to delivering. They provide evidence which ministers rely on to inform their policy decisions. If trial and pilot evidence is prematurely released, it could hamper the consideration of policy options, its delivery implications and understanding of its implementation.

45. Releasing the redacted findings from the trial is likely to have a prejudicial impact on the current pilot phase as release could influence the reactions and responses of the professionals taking part. The DfE has provided examples to the Commissioner that cannot be disclosed here.

46. The DfE argues that, when undertaking pilots, it is essential that information and findings from previous trials are not in the public domain. Release could mean that the findings, evidence and overall outcomes are skewed or tainted. Its view is that any detriment caused to a key government policy cannot be in the public interest. Trials such as these and their subsequent pilots provide an expert input from the practitioners that deliver the policy, testing real outcomes in the actual field in which it is implemented. It is not in the public interest to undermine that process or reduce the value of the evidence base through which ministers can understand the impact and measure the success of a policy.

47. The DfE stresses that contributors need to offer honest, candid advice without influence or prejudice. Should the current pilot be undermined by the release of the information it is likely to have a negative impact on policy development and the process would be poorer.

48. Although the request concerns a completed trial, the pilot only began in September 2019. It is currently 'live'. Any release of evidence from the pre-pilot trials would inevitably influence the findings of the current pilot phase and undermine the policy-making process.

49. The DfE explains that the assessment will become statutory in September 2020. The statutory assessment will be comprised of items from the trial and pilot in 2018 and 2019. Releasing items that might allow schools to prepare children would invalidate the assessment and potentially mean that government could not implement a progress measure.

50. The DfE concludes that good government depends on good decision-making based on advice and a full consideration of the options. A space needs to be protected so that ministers and senior officials can receive unbiased evidence and findings. Without this, there is likely to be a corrosive effect on the conduct of government and poorer decision-making which is not in the public interest.

The Commissioner's view

51. The Commissioner accepts the complainant's view concerning the public interest in the introduction of the new assessment, given the widespread effect on reception age children, their parents and teachers. However, her decision has been based on the 'live' nature of the requested information and the fact that disclosure of the withheld information has the potential to taint or undermine the pilot which is currently underway and ultimately the policy-making that emerges. The balance has been tipped in favour of non-disclosure because of the timing of the request. Jeopardising the integrity of the pilot before it is completed by releasing the withheld information from the trial that fed into it would not be in the public interest.

Section 40(2) – third party personal data

52. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.

53. In this case the relevant condition is contained in section 40(3A)(a)[3]. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

54. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then section 40 of the FOIA cannot apply.

55. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

56. Section 3(2) of the DPA defines personal data as:

"*any information relating to an identified or identifiable living individual*".

57. The two main elements of personal data are that the information must

[3] As amended by Schedule 19 Paragraph 58(3) DPA.

relate to a living person and that the person must be identifiable.

58. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.

59. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

60. In the circumstances of this case, having considered the withheld information, the DfE has stated that the personal information consists of the names of NFER staff (below the equivalent grade of Deputy Director in a government department) and the names of NFER's expert panel (some of whom may be above the equivalent level of Deputy Director). She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

61. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

62. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

63. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

64. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

65. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

66. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data,

in particular where the data subject is a child"[4].

67. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

    i) **Legitimate interest test**: Whether a legitimate interest is being pursued in the request for information;
    ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
    iii) **Balancing test**: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

68. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

69. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

70. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

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[4] Article 6(1) goes on to state that:-

> "*Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks*".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

> "*In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted*".

71. The complainant specifically requires the names of the expert panel in order to establish whether the experts identified had sufficient expertise in the field of early years education in order to advise on a test of national significance. Although she puts forward the views of the general public, she clearly has a professional knowledge of the sector beyond an average member of the public and her interest is in establishing the expert panel's credentials.

72. For this reason the Commissioner agrees that the complainant has a legitimate interest in the disclosure of the expert panel's names.

Is disclosure necessary?

73. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

74. The complainant has not argued that the names of more junior staff should be released and the Commissioner does not consider it necessary to meet the legitimate interests of the complainant, despite the fact that this information relates to the working life rather than the personal life of the individuals concerned. She considers that these individuals who do not have a public-facing role would not expect their details to be released.

75. However, the complainant has argued that there are no reasonable grounds for withholding the names and qualifications of the eight experts who made up the expert panel advising on the trial. The complainant disputes the DfE's view that the likely expectations of these data subjects are that his or her information would not be disclosed to others. Her argument is that these experts are advising on a national test of such significance and at considerable cost that it is unreasonable to expect that their names will not be shared, not least in order to ensure public confidence in the trial and the baseline test. She queries why these names cannot be released when experts advising on the new National Curriculum were. The complainant suggests that the public needs transparency and confidence that the experts have the expertise required in early years education and that this will also allay sectoral fears.

76. The Commissioner agrees that the complainant has a legitimate interest in disclosure and that those interests cannot be met by any less intrusive means than disclosure.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

77. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

78. In considering this balancing test, the Commissioner has taken into account the following factors -

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

79. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

80. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

81. The DfE has not consulted with the experts concerned but has relied on the argument that the privacy notice assured NFER's panel that their personal details would not be disclosed. Where explicit assurances were not given, personal data has been released (at review stage) and it provided the example of the Standards and Testing Agency stakeholder reference group. It considers that release of the NFER expert panels' personal data in the face of explicit assurances to the contrary would be in breach of data protection.

82. The Commissioner has taken into account the likely seniority of the NFER panel members and that the information concerns their professional life. Nonetheless, she accepts that explicit assurance was given regarding non-disclosure, that the personal data requested is not in the public domain, and that release would therefore not be within the panel's reasonable expectations. Consequently, release would be likely to result in unwarranted damage or distress for that reason.

83. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and given the

above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

84. The Commissioner has therefore decided that the DfE was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 10 – timeliness of response

85. Section 1(1) of the 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."*

86. Section 10(1) of the FOIA states that:

> *"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."*

87. Although the DfE was entitled to take extra time to consider the public interest relating to section 35, it was not entitled to withhold the information it subsequently released. In doing so, it breached section 10(1) of the FOIA by responding late to the complainant and disclosing information beyond the statutory timeframe.

88. Additionally, the DfE breached section 17(1) as it did not cite one of the exemptions it later relied on to withhold the information.

Right of appeal

89. 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

90. 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.

91. 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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