

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

### **Decision notice**

**Date:** 2 May 2023

**Public Authority:** Department of Education  
**Address:** Sanctuary Buildings  
London  
SW1P 3BT

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

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1. The complainant has requested Key Stage 2 assessment data. The above public authority ("the public authority") relied on section 36 of FOIA (effective conduct of public affairs) to withhold the information.
2. The Commissioner's decision is that the public authority has correctly relied on section 36 of FOIA to withhold the information and that the balance of the public interest favours maintaining the exemption.
3. The Commissioner does not require further steps to be taken.

#### **Request and response**

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4. On 23 January 2023, the complainant wrote to the public authority and requested information in the following terms:  

"Please can you provide a copy of the primary assessment data for the year 2021/22, in line with previous disclosures, as per the the [sic] attached sample for 2019/20."
5. The public authority responded on 14 February 2023. It relied on section 36(2)(c) of FOIA in order to withhold the requested information.
6. The complainant sought an internal review on 20 February 2023. The public authority had not completed an internal review at the date of this notice.

## Scope of the case

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7. The complainant contacted the Commissioner on 4 April 2023 to complain about the way his request for information had been handled. At that point his complaint was that the public authority had failed to complete an internal review.
8. However, having considered the complaint further, the Commissioner notes that the public authority clearly set out its position in its refusal notice. For reasons that will be explained below, the Commissioner has not agreed with every argument put forward, but he does not consider that requiring the public authority to complete an internal review, or provide further submissions, would be likely to sway his view – he either agrees with such arguments or he does not.

## Reasons for decision

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9. Section 36 of FOIA allows a public authority to withhold statistical information if disclosure of that information would prejudice the effective conduct of public affairs.
10. The public authority explained in its refusal notice that it had given explicit assurances to schools that it would not be publishing the 2021-2022 assessment data.
11. Not only would disclosing such information via FOIA breach its assurances, thus undermining trust, the public authority argued, but:

“These tests and assessments returned for the first time since 2019, without any adaptations. No adaptations were made to ensure a consistent approach to the format of the assessments to help understand the impact of the pandemic on pupils and schools. As these assessments used a similar approach to standards setting as in 2019, the results are more likely to reflect the uneven impact of the pandemic between schools rather than the impact individual schools may have had on performance.

“As a consequence of not having adaptations, the disproportionate impact of the pandemic on some schools compared to others may make comparisons between schools unreliable, yet parental choice would likely be influenced by the information if it were released. Thus, releasing the information is likely to be to the detriment of schools based on factors beyond their control.”

12. The Commissioner agrees with the complainant that any assurances the public authority may have offered should carry limited weight. The public authority could not (and does not appear to) have guaranteed that such data would never be released under FOIA – nor should schools (who of course are public authorities themselves) have regarded the public authority's assurances as in any way overriding FOIA.
13. That being said, if the public authority gave assurances that it would not publish the data itself proactively, the schools involved would have had a reasonable expectation that it would attempt to resist disclosure under FOIA – at least whilst disclosure could have harmful effects.
14. The Commissioner accepts the public authority's central argument that the assessment data will have been distorted by the effects of the pandemic – and that not all these effects were under the control of the schools themselves. The data is therefore only a partial reflection of the quality of the teaching at any particular school.
15. Given that testing was not carried out during the 2019/20 or 2020/21 academic years, the Commissioner accepts that, if the 2021/22 data were to be disclosed, it would acquire an inflated significance – being the first such data to be published in three years. In the Commissioner's view, the significance that would be attached to such data would reduce the extent to which the public authority would be able to place the data in proper context, or to explain what the data did and did not show. Parents are likely to be drawn to more recent, though less reliable 2021/22 data, than the more reliable, but historic, 2018/19 data.
16. The Commissioner agrees that the relationship of trust the public authority has with schools (as well as that with other stakeholders such as teachers and trade unions) would be damaged by disclosure. Whilst schools don't have an option to not provide this information in future, the public authority does need to rely on a certain amount of good will to discharge its general functions effectively. There may also be occasions in future where it does need to collect information on assurance of confidentiality – which would be undermined if its previous assurances were shown to be unreliable.
17. However, the Commissioner considers that the public authority's arguments only carry significant weight because of the timing of the request. The Commissioner must consider matters as they stood at the point the public authority issued its refusal notice.
18. At the point at which the request was made and responded to, parents would have already had to have declared which schools they would prefer their child to attend for the 2023/24 academic year – and most would have already been informed of the school in which the local

authority intended to place their child. However, parents have until the end of April to decide to accept or decline the place that has been offered by their local authority. Any new data that was released would be likely to inform parents' decisions to accept or decline the places that have been offered.

19. The Commissioner is of the view that the public authority's arguments apply most strongly during the window in which parents must decide on the school to which they wish to send their child. Releasing distorted data into the public domain during such a period risks distorting that process and may well lead to some schools being unfairly preferred over others. This danger is exacerbated of the lack of recent data that could be used for comparison.
20. However, the Commissioner considers that, once the school selection process for this year is complete and, in particular, once the data for the current academic year (2022/23) is published, the risk of harm will diminish significantly. The 2021/22 data would then be incapable of distorting the completed round of school allocations and a fresh set of data (relatively untainted by Covid-19) would be available to guide parents participating in the next round. In such circumstances, the Commissioner considers that it would be much less reasonable for schools to expect that such data should remain withheld and thus they are less likely to regard such a disclosure as a breach of trust.
21. However, the Commissioner must consider matters as they stood when the request was responded to – which was when the allocations process was ongoing and when no other recent data was available. In those circumstances, the Commissioner is satisfied that disclosure would be likely to cause the harms the public authority has identified and the exemption is thus engaged.

### **Public interest test**

22. The Commissioner accepts that there is a general public interest in transparency. This public interest is heightened here because the public authority has stated that, notwithstanding the issues it has identified, it will be using the data as part of its own processes of monitoring schools' progress.<sup>1</sup>
23. However, in the circumstances of the case, the Commissioner is not convinced that disclosing distorted data during a period in which parents

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<sup>1</sup> <https://www.gov.uk/government/publications/school-and-college-accountability-approach-2020-to-2022/school-and-college-accountability-2021-to-2022-academic-year>

are selecting schools serves the public interest. He also notes that national-level data for the 2021/22 year has already been published.

24. For the same reasons discussed above, the Commissioner considers that the public interest in maintaining the exemption will drop considerably once the current round of allocations has taken place, but he is required to assess matters as they stood at the point the public authority issued its refusal notice.
25. The Commissioner is therefore satisfied that the balance of the public interest favours maintaining the exemption

## Right of appeal

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26. 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](mailto:grc@justice.gov.uk)

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

27. 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.
28. 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**