

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 November 2023

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the Department for Education (DfE) is entitled to rely on FOIA exemptions under section 35(1)(a)(formulation of government policy), section 36(2)(b)(ii) and 36(2)(c) (prejudice to the effective conduct of public affairs) and section 43 (commercial interests) to withhold information in a business case about LocateEd.
2. DfE breached sections 10(1) and 17(1) of FOIA as it didn't communicate non-exempt information or issue a refusal notice in respect of exempt information within the statutory timeframe. It's not necessary for DfE to take any corrective steps.

Background

3. In its submission to the Commissioner, DfE has provided the following background and context.
4. LocatED is an arm's-length body (ALB) working for DfE. It was set-up in 2017 to help deliver world-class education settings across England.
5. LocateEd works across the full life cycle of property projects; buying, developing, and managing sites for schools and colleges, and selling

properties as required. It also provides strategic property advice, to the government and education bodies, to help build a more efficient education estate.

6. LocatED receives an annual remit letter from the DfE as part of the normal process as all other similar ALBs. The annual remit letter sets out the scope and objectives of an ALB's work in the forthcoming year.
7. Details of LocatED's work for DfE and its financial information can be found on its website and within its annual report and accounts.
8. Since 2017, LocateEd has created more than 100,500 new school places and saved millions of pounds for the public purse.
9. The business case requested below is intended to be an internal document. It contains options assessments that directly impact DfE's delivery policy on the education estate and supporting operational and financial information to support each scenario.

Request and response

10. The complainant made the following information request to DfE on 11 January 2023:

"... The most recent LocateEd accounts state: Following LocatED's achievements in 2021-22, I am delighted that its Full Business Case for 2023-25 received approval from the DfE Investment Committee, Cabinet Office and HM Treasury <https://www.located.co.uk/wp-content/uploads/2022/12/LocatED-Annual-Report-and-Accounts-21-22-Web-version.pdf> Please could I have a copy of the business case."

11. DfE's disclosed the requested business case but redacted some information from it under FOIA sections 35(1)(a), 36(2)(b)(ii), 36(2)(c), 40 (personal data) and 43(2).

Reasons for decision

12. The Commissioner has taken DfE's reliance on section 40 out of scope of this investigation as he's satisfied that personal data can be withheld. His reasoning is focussed on whether the remaining information DfE withheld is exempt from disclosure under the other exemptions it's cited. The Commissioner has reviewed the information being withheld.

Section 35 – formulation of government policy

13. Under section 35(1)(a) of FOIA, information is exempt if it relates to the formulation or development of government policy.
14. DfE's refusal notice of 12 June 2023 discusses only the public interest test associated with this exemption.
15. In their request for an internal review, the complainant said:

"...I believe the ICO would support the public interest in releasing more of the information, particularly given you have previously responded to a similar request (FOI 2022-0013808) about a different business case by saying you 'plan to follow Cabinet Office Guidance on establishment of an ALB which says, p13:

'Once approval has been received, it is the responsibility of the department's Principal Accounting Officer (PAO) to ensure that the business case is published on GOV.UK (with suitable redactions should there be any commercial or other confidentiality issues).'

I would argue there is little different between a business case in establishing a quango and a business case put forward for continuing to run a quango, and I'd be keen to hear the ICO's thoughts on this. It might set an important precedent around transparency."

16. In its submission to the Commissioner, DfE has discussed LocateEd and explained that LocatED doesn't exist as a result of legislation. Instead the function it delivers is the subject of a regular business case to identify the best solution for delivery. DfE says that the requested business case follows the good practice and process as set out by the Major Projects Authority¹. Each iteration [of the business case] is scrutinised and challenged by DfE's Investment Committee.
17. DfE goes on to say that disclosing the information in question would be likely to inhibit the thinking in this policy space. This is because the policy area remains 'live'; it's constantly under review and currently under development. DfE considers that the information being withheld clearly relates to and directly impacts the live policy on how educational settings, including new free schools and Special Educational Needs and Disabilities (SEND) and Alternative Provision (AP) schools, are delivered.

¹ <https://www.gov.uk/government/groups/major-projects-authority>

18. DfE says that the broader government policies to which the information relates concerns the outcome of the October 2021 spending review. This confirmed funding for the current pipeline of approximately 200 free schools and a further 60 SEND and AP schools. It was agreed with the Infrastructure and Projects Authority (IPA) that future waves of the programme will move on to Government Major Projects Portfolio (GMPP) when projects were announced earlier in 2023.
19. DfE says that delivering these key policies obviously requires expertise on matters such as land, sites and premises. Discussing options and developing policy to source such expertise and commercial provision through an ALB ultimately allows DfE to access commercial property expertise that works within the commercial sector. This allows DfE to reap maximum benefits and save the taxpayer money. DfE says it would struggle to do this with only the expertise it has available internally.
20. The decision to change the current policy by moving from IPA to GMPP, the details about this in the withheld information and the subsequent announcement, weren't in the public domain at the time of the request.
21. DfE has then discussed some of the information to which it's applied section 35, but the Commissioner doesn't intend to reproduce that discussion in this notice so as not to disclose information DfE is seeking to protect.
22. However, DfE confirmed that the form and detail about the 'physical delivery' of the associated key policies – for example new free schools - was being actively developed during the time of the request. DfE says that it regularly revisits these policies, and their subsequent delivery, through its delivery policy. This is a part of its ongoing review process relating to the government's provision of educational settings. DfE says it fully expects further changes to these policies, and their subsequent delivery, to take place in the future. This would accord with changes to educational needs, the broader educational landscape and future funding rounds.
23. DfE considers that good government depends on good decision-making. In turn, this needs to be based on the best evidence and advice available, within a safe space, so that policy can be developed and delivered effectively. DfE says that ministers must therefore be able to commission a wide range of advice and evidence that will test and help them formulate and improve government policy.
24. DfE has referred to the Commissioner's published guidance on section 35 which it considers is relevant and which states:

"This means the information does not itself have to be created as part of the activity. Any significant link between the information and the activity is enough. Information may 'relate to' the activity due to its

original purpose when created, or its later use, or its subject matter. Information created before the activity started may still be covered if it was used in or affected the activity at a later date. And information created after the activity was complete may still be covered if it refers back to the activity.”

25. DfE concludes its submission by confirming that it considers that the exemption was properly engaged because the withheld information is directly related to the development of government policies on the delivery of free schools and SEND and AP schools.
26. The Commissioner is satisfied that the information to which DfE has applied section 35 relates to the development of policy on provision of education settings. This policy was 'live' at the time of the request and subject to review and change; no definitive and lasting decision had been taken at that point. The Commissioner is therefore satisfied that, in the circumstances and at January 2023, DfE was entitled to rely on section 35(1)(a) of FOIA to withhold information the complainant has requested. The Commissioner's gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

27. Regarding the public interest, in their complaint to the Commissioner, the complainant says that LocateEd spends nearly £10m a year. They say that LocateEd makes important decisions about millions of pounds of taxpayer money buying land and selling off school sites. LocateEd is also, the complainant says, expanding to have an even bigger remit. They consider that transparency about this expansion and what it means for schools and the taxpayer is important.
28. DfE has acknowledged that releasing the information would provide greater transparency about the provision of such education settings and would add to the public debate on this topic.

Public interest in withholding the information

29. As discussed above, DfE was, and is, developing the policy around delivery of free schools and SEND and AP schools. This can be seen through the release of the 'new waves' for free school applicants, usually following each spending review agreement. A policy's development can be seen in terms of the volume of the types of schools changing as the policies develop, for example SEND schools are becoming a greater proportion amongst free schools.
30. DfE's policy on delivering educational properties and provision is based on evidence, relevant emerging data and by considering risks and

contingencies. Releasing the information would, DfE says, heighten the possibility of having out-of-date evidence used for policy making decisions in the public domain. This may dilute the free, frank and candid nature of any future advice and decision-making. This is because of a fear of 'outdated' advice and perceived risks at the time of writing making it into the public domain in the future. In turn this could create confusion for the education sector, their staff, parents and students. DfE therefore considers it's essential that only the latest position is in the public domain.

31. At the time of the request, disclosing DfE's policy position and perceived risks and uncertainties could have a significant impact on DfE's policy to deliver educational establishments via LocatED. As such, disclosure wouldn't further public understanding of the policy. This is because it depends on changes to evidence impacting on what provision is required. It's also dependent on ongoing work with policy officials and LocatED to develop the delivery policy based on developing information for example "the size of the free schools pipeline."
32. In January 2023, DfE says it was continuing to explore a range of policy options for delivering the policy on providing educational settings for free schools and SEND and AP schools. It says this is clearly the case where, within the withheld information, DfE is discussing a range of options, including preferred options, which require a decision - a decision which will have a direct impact on the policy in question.
33. DfE goes on to say that it accepts that in some instances, the public interest in continuing to withhold information will reduce after the policy and formulation stage is complete. However, following the date of the request, this policy has been developed and changed in line with the latest evidence, advice and data available. This was, and is, a very 'live' policy area that will undergo further development dependent on changes to the provision of educational settings that are required. Because of this DfE doesn't believe that the public interest in withholding has diminished at all and that releasing this information has the potential to inflict damage on this 'live' policy, and the overall policy-making process.
34. Its clear focus, DfE says, is the effective and efficient provision of excellent educational settings which also provide the best value for money. As it develops policy based on the latest advice, evidence and facts, this ultimately shapes the policies that DfE is committed to delivering. It also provides evidence which ministers eventually rely on in order to inform their policy decisions. It's critical that their understanding of policy implementation, delivery and impact at grassroots level, the consideration of policy options and the implications of its delivery, isn't hampered. Prematurely releasing into the public

domain previously considered evidence that's being used to develop live and future policy could hamper the process.

35. DfE considers that releasing the withheld advice is also likely to have a prejudicial impact on the development of this policy because release could influence the behaviours, reactions and responses of the key stakeholders affected by the policy, particularly LocatED.
36. It's essential, DfE says, that when undertaking any policy development, including delivering educational provision and settings, it's able to compare and contrast not only the latest evidence and findings, but also previous evidence and advice provided to ministers. It must have a safe space in which all evidence and findings can be considered. Disclosing information that would have a detrimental impact on the development and delivery of a set of key and significant government policies can't be in the public interest.
37. DfE argues it would also have a potential negative impact on the public purse, which it considers can't be in the public interest.
38. These are high-profile policies, DfE says, and it's essential that all related evidence and findings, past and present can be considered freely and frankly within a safe space, when making further changes to its delivery policy around providing excellent educational settings.
39. Disclosure would also be likely to have a negative impact on DfE's relationship with key stakeholders. This is due to the fact that the options considered at that point in time are options which are likely to be revisited in the future based on any changes to data, evidence and the subsequent need for such educational provision and suitable settings.

Balance of the public interest

40. The relevance and weight of the public interest arguments will depend entirely on the content and sensitivity of the particular information in question and the effect its release would have in all the circumstances of the case. Once a policy decision has been finalised and the policy process is complete, the sensitivity of information relating to that policy will generally start to wane, and public interest arguments for protecting the policy process become weaker. If the request is made after the policy process is complete, that particular process can no longer be harmed.
41. The purpose of section 35(1)(a) is to protect the integrity of the policymaking process, and to prevent disclosures which would undermine this process and result in less robust, well-considered or effective policies. In particular, it ensures a safe space to consider policy options in private.

42. In the Commissioner's view, the timing of the request is a key factor in this case because the policy process was still live at the time of the request. As the requested information relates to that policy making, he considers that the need for a 'safe space' to debate policy and reach decisions without external comment is a valid argument. It has been generally accepted by both the Commissioner and First-tier Tribunal that significant weight should be given to maintaining the exemption where a valid need for safe space is identified. A compelling public interest in favour of disclosure is required when a need for safe space is demonstrated.
43. The Commissioner recognises the public interest in contracts the size of DfE's with LocateEd. However he doesn't consider that's a compelling enough interest in and of itself to justify removing the safe space DfE needed to explore and finalise the business case.
44. The public interest in DfE demonstrating transparency has been met satisfactorily through its disclosure of some of the information in the business case. Some of the information in the business case is also already in the public domain. For example, LocatED's key performance indicators and its financial delivery are published in its annual report.
45. The Commissioner has therefore determined that the public interest in protecting the safe space at the time of the request outweighed the general public interest in transparency on this occasion.

Section 36 – prejudice to the effective conduct of public affairs

46. Under section 36(2)(b)(ii) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the free and frank exchange of views for the purposes of deliberation.
47. Under section 36(2)(c) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the effective conduct of public affairs.
48. As noted, the exemptions at section 36(2) can only be engaged on the basis of the reasonable opinion of a qualified person. In its submission to the Commissioner DfE advised that its qualified person (QP) was Baroness Barran MBE, Parliamentary Under Secretary of State for DfE. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5)(a) of FOIA.
49. A significant portion of the requested business case has been redacted under these two exemptions.

50. DfE has provided the Commissioner with a copy of its communications with the QP about the request. The QP gave their opinion on 12 April 2023. From these communications the Commissioner accepts that the QP gave their opinion that the exemptions were engaged.
51. The QP was provided with a copy of the request with the background and context; a copy of the information being withheld under section 36; an explanation of the two exemptions and why they're engaged and arguments both for withholding and disclosing the information. On the basis of the submission provided to them, the QP's opinion was that disclosing the information "would (or would be likely to)" cause the prejudice envisioned under section 36(2)(b)(ii) and section 36(c).
52. It's important to note that 'reasonableness' in relation to the QP's opinion isn't determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it's a reasonable opinion, and not necessarily the most reasonable opinion.
53. Having considered the QP's submission, the Commissioner considers that the QP had sufficient information to enable them to make a decision on the matter.
54. However, as noted the QP's opinion appears to be that the envisioned prejudice both would occur and would be likely to occur through disclosing the withheld information. It can't be both. In the absence of clarity, the Commissioner will accept that the lower threshold – that prejudice would be likely to happen – is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
55. On the basis of the above factors, the Commissioner accepts that the QP's opinion about the exemptions under both section 36(2)(b)(ii) and 36(2)(c) were reasonable ones. DfE has discussed the following points in more detail in its submission to the Commissioner and he will summarise them here.
56. In relation to section 36(2)(b)(ii) the Commissioner accepts that disclosing the information would be likely to inhibit the safe space officials need to openly discuss options relating to a 'live' programme. In relation to section 36(2)(c), he accepts that the disclosed information could be misunderstood and lead to the schools programme being impacted negatively. The Commissioner has gone on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

57. In favour of disclosure, the complainant's position is given above. DfE has acknowledged that there's an argument that releasing an unredacted version of this business case provides greater transparency on its decision making. It also shows DfE is willing to be open and honest with the public.
58. DfE says that disclosing the information could also provide some insight into decision-making. This would lead to increased trust, engagement and confidence that DfE makes decisions based on the best available data, evidence, information and advice. It would also shed light on the internal decision-making process beyond existing information already in the public domain.

Public interest in maintaining the exemption

59. Regarding section 36(2) exemptions, DfE says its officials must have confidence that they can share professional views with one another and ministers. There must be an opportunity to understand and, where appropriate, challenge each other's assumptions etc as part of a process of assessment, deliberation and decision making. The withheld information contains some frank comments about the options available to the department in relation to the commercial property support and expertise that's available and needed to deliver a significant number of educational settings.
60. This is in the context of DfE needing candid information to be provided in any such option papers/business cases. This is to allow those concerned to be able to come to an informed decision about which is the best and most appropriate option to choose, based on evidence, data and analysis provided. If DfE is required to put this information into the public domain, officials would be likely to be inhibited from providing such fully free and frank views in such papers. This in turn would have a negative impact on DfE's ability to make informed decisions as to the best option available to allow the delivery of key policies - in this instance educational settings.
61. Disclosing the information would be likely to remove the space within which the DfE, particularly its officials and ministers, are able to discuss the suitability of organisations in relation to commercial property advice and expertise. Officials would also be more likely to dilute their views/opinions and advice, should they fear this would make it into the public domain. This would possibly jeopardise the relationships they and DfE have key organisations and delivery partners, both existing and in the future.

Balance of the public interest

62. The Commissioner has found that disclosing the information being withheld under section 36(2)(b)(ii) and 36(2)(c) would be likely to prejudice the effective conduct of public affairs.
63. He acknowledges that there's a public interest in contracts as large as DfE's with LocateEd. However, in the absence of any particular concerns about this contract, the Commissioner considers first, that there's greater public interest in officials feeling able to exchange views about the LocateEd business case – through the business case – freely and frankly. This is more likely to result in business case in which all the relevant issues have been explored and in which all the issues are recorded. This in turn is more likely to generate the most appropriate decision.
64. Second, with regard to section 36(2)(c), it appears to the Commissioner that much of the argument for withholding the information in DfE's submission to him concerns the need for a 'safe space' in which to exchange views. These arguments are more relevant to section 36(2)(b)(ii). Section 36(2)(c) concerns prejudice **other** than that caused to the exchange of views (and to the provision of advice under section 36(2)(b)(i)). However, in its submission to the QP, DfE notes that the business case contains the names of schools taking part in pilot projects. The QP is advised that publishing this information could impact the community relationships for the schools in question.
65. It's a less compelling argument than that for section 36(2)(b)(ii) but again, in the absence of any evidence about any particular concerns about the LocateEd contract, the Commissioner is satisfied that there's greater public interest in good relationships with schools being maintained.
66. The general public interest in DfE demonstrating transparency in its decision making has been adequately met through its disclosure of some of the business case. And, as noted, some information in the business case is already in the public domain.
67. On balance therefore, the Commissioner accepts that the public interest favoured maintaining the section 36(2)(b)(ii) and section 36(2)(c) exemptions.

Section 43 – commercial interests

68. Section 43(2) of FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it.

69. DfE considers that its own commercial interests would be likely to be negatively impacted if certain information were to be disclosed. This information includes details of available DfE budgets (which aren't in the public domain) and detailed modelling. DfE says it's also concerned that the success of LocatED in the commercial market would be jeopardised by releasing operational information about the policy decisions being considered. The savings made by LocatED through negotiations wouldn't be as great and the sale of unwanted sites wouldn't gain such a high price.
70. Regarding the detailed modelling, pages 49-52 of the business case provide a modelling breakdown of deliverables and cost savings that could potentially be achieved through 'deprioritising work'. DfE says it's clear that its commercial interests would be likely to be prejudiced should such information be put into the public domain. This is because it would provide detailed breakdowns which potential service providers could use as a basis when making any bids for departmental contracts that concern providing commercial property support/services.
71. The Commissioner is satisfied first, that the harm DfE envisages relates to commercial interests; its own and potentially LocateEd's.
72. Second, the Commissioner accepts that a causal link exists between disclosure and the envisioned commercial prejudice. Disclosing the budget and modelling information would mean potential future bidders and contractors could raise their prices to meet the DfE budget they would now know was available. LocateEd's competitors could also be given an unfair competitive advantage through commercial information about LocateEd being into the public domain. And disclosing the modelling information would provide potential service providers with an insight about particular anticipated costs which they could use to frame relevant bids for future contracts.
73. Finally, the Commissioner accepts DfE's position that the envisioned prejudice would be likely to happen. The Commissioner's decision is therefore that DfE was entitled to apply section 43(2) to some of the withheld information and will go on to consider the associated public interest test.

Public interest test

Public interest in disclosing the information

74. DfE acknowledges that delivering a commercial property support function involves spending public funds. It says there's a strong public interest in ensuring this process is transparent and in DfE being accountable for the public money that it spends. This is to ensure that public money is being used effectively and that DfE is getting value for money.

75. DfE also notes that it's important to ensure that, through transparency, procurement processes are conducted in an open, honest and accountable manner.

Public interest in maintaining the exemption

76. Disclosure could result public money being used less effectively as the information could be used by competitors in this particular market to gain a competitive advantage. Potential third-party bidders and suppliers that provide services could tailor and raise their prices, if they believe that there is adequate space in the budget to do so.
77. Disclosing information about budgets would be detrimental to DfE as it would reduce its ability to negotiate or compete in a commercial environment. This would result in the less effective use of public money and thus a reduction in value for money.
78. DfE believes that releasing this information would allow any future competitors to 'tap into' commercial information and strategies DfE and other providers use, to help mould any applications or bids they put forward. It would have an impact on the fairness of the market when assessing future applications. It would also weaken the broader application and assessment process, with some organisations being at a commercial advantage based on the commercial information of their competitors being in the public domain.
79. DfE therefore considers it's not in the public interest to disclose information about available budgets and modelling.

Balance of the public interest

80. As noted in relation to the other exemptions discussed here, DfE has disclosed some of the information in the business case the complainant has requested. And other relevant information is also already in the public domain.
81. The Commissioner considers that the disclosed information and the relevant information that's already published is sufficient to satisfy any wider public interest there may be in the LocateEd business case, and transparency generally. There is, in the Commissioner's view, more public interest, at the time of the request and presently, in DfE being able to achieve the best value outcomes from its spending decisions and bidding processes. As such, The Commissioner has decided that the public interest favours withholding the information in the business case to which DfE has applied section 43(2).

Procedural matters

82. Section 1(1) of FOIA requires a public authority to confirm whether or not it holds information that's been requested and to communicate the information if it's held and isn't exempt information.
83. Under section 10(1) of FOIA a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.
84. Under section 17(1) of FOIA a public authority must issue a refusal notice in respect of any exempt information within the same timeframe.
85. In this case, the complainant submitted their request on 11 January 2023 and DfE didn't comply with section 1(1) or issue a refusal notice until 12 June 2023. DfE didn't therefore comply with sections 10(1) and 17(1).

Right of appeal

86. 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

87. 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.

88. 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

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