

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 10 October 2019

Public Authority: Department for Education
Address: Piccadilly Gate
Store Street
Manchester
M1 2WD

Decision (including any steps ordered)

1. The complainant has requested information relating to the national early years funding rates. The Department for Education (DfE) refused the request under section 35(1)(a) – information relating to the formulation and development of government policy.
2. The Commissioner's decision is that although the exemption is engaged, the public interest in maintaining the exemption does not outweigh that in disclosure.
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation.
 - To disclose the withheld information.
4. The public authority 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 12 December 2018 the complainant made a request to the DfE for the calculations used to determine the average national early years hourly funding rates for local authorities. The request was made in the following terms:

"I would like to request, under the Freedom of Information Act, the specific underlying calculation used to determine the average national early years hourly funding rates for local authorities for £4.88 and £5.39 for three-and-four-year -old funding and two-year-old funding respectively, as confirmed by government in November 2015. This should include the assumed cost drivers at the time (e.g. staff costs, rent costs etc) and their levels as factored into the calculation, and in particular, the assumptions with regard to how increases in the National Living Wage and Minimum Wages would impact staff costs up until 2020, and how this was built into those funding rates.

I'm well aware of the Cost of Childcare Review which gives an overview of the factors that were taken into consideration when arriving at these funding rates. For avoidance of avoidance of doubt, I am not asking for a summary of the factors taken into consideration or a link to the Cost of Childcare Review. I'm asking for the exact calculation undertaken to arrive that the respective rates of £4.88 and £5.39."

6. The DfE responded to that request on 10 January 2019 by providing some calculations relating how the hourly rates had been determined and links to where further information was available on its website, together with an explanation of the process the DfE had followed when calculating the rates.
7. The complainant was not satisfied with the DfE's response so later that same day i.e. 10 January 2019, the complainant emailed the DfE reiterating what information she was seeking. She did this by highlighting specific parts of the original request as follows:

"My Freedom of Information request specifically requested:

"the **specific underlying calculation** used to determine the average national early years hourly funding rates for local authorities for £4.88 and £5.39 for three-and-four-year -old funding and two-year-old funding respectively, as confirmed by government in November 2015" and stated that "this should include the assumed cost drivers at the time (e.g. staff costs, rent costs etc) and their levels as factored into the calculation, and in particular, the assumptions with regard to how increases in the National Living Wage and Minimum Wages would impact staff costs up until 2020, and how this was built into these funding rates."

I also stated in my request that:

"I'm well aware of the Cost of Childcare Review which gives an overview of the factors that were taken into consideration when arriving at these funding rates. For the avoidance of doubt, I am not asking for a summary of the factors taken into consideration or a link to the Cost of Childcare Review. I'm asking for the exact calculation undertaken to arrive that the respective rates of £4.88 and £5.39."

8. The complainant reiterated that:

"What I'm after are the numerical calculations that prove that the increases in the average childcare funding rates for two-, and three/four-year old that were announced in 2015 were sufficient to meet the rising cost of delivering said places up until 2020 ... I am unable to ascertain this from your response."

9. Before going onto say:

"If these are not available, I would be grateful if you could provide any other proof the government has that the funding rates of £4.88 (/£4.94) and 5.39 (as derived from the £2.36bn review settlement, and the 7% funding increase respectively) were calculated as being sufficient to cover the costs of delivering childcare up until at least 2020, taking into account delivery cost increases, especially statutory wage requirements."

10. For reasons that will become clearer, the DfE considered that at this stage the complainant had extended the scope of her request and therefore treated it as a fresh request. The Commissioner accepts the DfE was entitled to adopt this approach and that therefore the request considered in this decision notice is that as set out in paragraphs 7 to 9. The element which effectively extends the request is that quoted in paragraph 9.

11. On 7 February 2019 the DfE responded to this new request. It stated that although information was held which fell within the scope of the request, the DfE considered it was exempt from disclosure under section 35(1)(a) - the formulation or development of government policy. The DfE went on to explain that this exemption is subject to the public interest test and that the DfE required a further 20 working days to conduct that test.

12. On 1 March 2019 the DfE informed the complainant that it had concluded the public interest favoured maintaining the exemption provided by section 35.

13. On 5 March 2019 the complainant asked the DfE to carry out an internal review of its handling of this request. The DfE sent the complainant the

outcome of its internal review on 19 March 2019. The DfE upheld its original position.

Scope of the case

14. The complainant contacted the Commissioner 21 March 2019 to complain about the way her request for information had been handled.
15. The Commissioner considers that the matter to be decided is whether the exemption provided by section 35(1)(a) is engaged, and, if so whether the exemption can be maintained in the public interest.
16. Before looking at that issue however the Commissioner will consider the interpretation of the request.

Reasons for decision

Interpretation of the request

17. The Commissioner considers it would be helpful to clarify how the request has been interpreted and therefore the nature of the information captured by the terms of the request made on 10 January 2019.
18. In broad terms the request seeks information that supports the DfE's decision to set the hourly rates for childcare at £4.88 and £5.39. This presupposes that having analysed the cost of providing childcare and determining what the hourly rates should be, the DfE was then free to commit to that level funding. However the process is more involved than that. For one thing, it is the Treasury that decides the level of funding that is available to the different government departments to meet their policy objectives and to perform their functions. At the time in question, the DfE's bid to the Treasury formed part of the government's 2015 spending review.
19. Furthermore, in respect of any particular policy area or manifesto commitment the DfE's policy teams present briefings on a number of funding scenarios/models to the DfE's ministers ahead of spending review bids going to the Treasury. Based on that information DfE ministers decide which options they would like officials to pursue. This is then followed by a bid going to the Treasury to cover the scenario/model that had been agreed with ministers. There is then a process of negotiations between the Treasury and the DfE. The Treasury then makes the final funding decision which may or may not cover all the funding requested by the DfE. Once the overall level of funding has been determined by the Treasury, the DfE decides how best to use the funds

available to it and, in respect of childcare provision, sets the hourly rates.

20. Therefore there is no single calculation, worked up from aggregating the costs of the different aspects of providing childcare (e.g. wages, rent, heating etc.), which produces the hourly rates that were ultimately set by the DfE.
21. Following a telephone conversation with the DfE, the Commissioner understands that it does hold a breakdown of how the hourly rates determined after the award of funding by the Treasury, relate to the costs incurred by childcare providers. However the DfE did not interpret the request as seeking this post Treasury award breakdown, it understood the request to be seeking the information that supports the DfE's initial bid to the Treasury.
22. Knowing that it did not hold the one single calculation that produced the rates of £4.88 and £5.39, which was the primary focus of the request, the DfE therefore focussed on the part of the request set out in paragraph 9 above, i.e.

“... any other proof the government has that the funding rates of £4.88 (/£4.94) and 5.39 (as derived from the £2.36bn review settlement, and the 7% funding increase respectively) were calculated as being sufficient”

23. The DfE considers the information captured by this element of the request includes a range of scenario based options developed by the relevant policy team, briefings to ministers based on that work and the final bid presented to the Treasury.
24. The Commissioner has consulted with the complainant who has confirmed that she is not interested in the breakdown of the rates post the Treasury award. Although she is not in a position to know exactly the range of information the DfE has identified as being captured by the 'any other proof' element of the request, she has advised the Commissioner that she is interested in the DfE's internal thinking on the level of funding it decided to bid for and how this took account of the different factors making up the costs incurred by childcare providers.
25. Having viewed the information identified by the DfE, the Commissioner is satisfied that it does fall within an objective interpretation of the request. She is also satisfied that it reflects the internal thinking which the complainant is seeking.

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

26. So far as is relevant, section 35(1)(a) of FOIA states that information held by a government department is exempt information if it relates the formulation or development of government policy.
27. The Commissioner understands the terms 'the formulation or development of government policy' to refer to the design of new policy, and the process of reviewing or improving existing policy. The exemption will not cover information about the application or implementation of an existing policy.
28. In line with Tribunal decisions, the Commissioner applies a broad interpretation of the term 'relates to' as used in section 35. This means that any significant link between the information and either the development or formulation of government policy is sufficient to engage the exemption.
29. In this case the DfE has explained that the information relates to the government's policy to provide quality childcare provision for children under school age. The policy was developed from a manifesto commitment to provide 30 hours of childcare for eligible working parents from September 2017.
30. From internet searches the Commissioner understands that the policy to provide 30 hours of childcare was taken forward by the Childcare Act 2016 which was first introduced to the House of Commons as the Childcare Bill in June 2015. The Childcare Act became law in March 2016.
31. The DfE explained that the government conducted a review of the cost of delivering childcare in 2015 and the findings of this review led to the development of the Early Years National Funding Formula (EYNFF). The aim of the EYNFF is to ensure funding for early years childcare reaches providers and that funding settlements are fair. The DfE has stated that the provision of and access to quality childcare provision, which is cost effective, is a key departmental policy.
32. The requested information relates to the cost to the government of funding its early years childcare policy. Although the development of government's policy on early years childcare was at an advanced stage, with the Childcare Bill having started its passage through parliament, by the time the information was created, the policy had not yet been finalised and fine tuning of the policy was still taking place. The DfE has advised the Commissioner that at the time the information was produced and decisions on the level of funding were being considered, the policy underwent active development. Decisions relating to the cost of funding would have helped shape that policy.

33. The Commissioner is therefore satisfied that the requested information is significantly linked to development of the government's child care policy; the exemption is engaged.

Public interest test

34. As set out in section 2 of the FOIA the exemption is subject to the public interest test. This means that although the exemption is engaged, the information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
35. The Commissioner notes that under section 10(3) of the FOIA, the DfE extended the time for considering the public interest by additional 16 working days beyond the normal 20 working days. This would indicate that consideration of the public interest is more involved and perhaps more finely balanced than in other cases.
36. The DfE has presented a number of arguments in favour of maintaining the exemption and withholding the information. Firstly it has argued that good government depends on decision making and that this in turn requires a full consideration of all the options available without fear that these will be disclosed prematurely. The consideration of options involves candid risk assessments of the alternatives and the withheld information records, in part, those risk assessments.
37. The Commissioner recognises the need for officials to be able fully consider an issue when providing advice to ministers, in order for those ministers to make robust decisions, taking account of all the relevant factors, to ensure policy objectives are met. The development of robust policy may involve thinking the unthinkable and consideration of difficult policy options. However the information in question relates to decisions taken some years ago in respect of the 2015 spending review and the fine tuning of the government's policy on childcare provision. The DfE has provided the Commissioner with extracts of the Treasury's Settlement Letter dated 16 February 2016. The Childcare Act 2016 became law on 16 March 2016. It is therefore difficult to argue that the disclosure of information relating to policy decisions taken around 20 months before the request was received would be premature in the sense that it could undermine the particular decision making processes followed in either the 2015 spending review, or the development of the Childcare Act.
38. The DfE maintains that the withheld information is still current and will be used to develop new policy and inform advice to ministers during the forthcoming spending review negotiations. It has not however identified a particular strand of childcare policy which is currently under development for which the withheld information may be relevant. Based

on previous Tribunal decisions, the Commissioner does not accept the concept of there being a continual cycle, or 'seamless web' of policy implementation, review and further development. The conclusion of the 2015 spending review as determined by the Treasury's settlement letter and the introduction of the Childcare Act 2016 marks the end of the particular policy process for which the information was created. Even if there was a need to preserve the confidentiality of the withheld information whilst those policy decisions were bedding in, the Commissioner considers that time would have passed by the time the request was made in December 2018.

39. In respect of the DfE's argument that the information would be used to inform forthcoming spending review negotiations, the Commissioner recognises that at whatever point the DfE starts to prepare its case, it may well start by reviewing the work carried out in the previous spending review. The Commissioner also notes that the 2015 spending review established funding up until 2020, suggesting the next review is imminent. Unfortunately the DfE has not provided any details as to if and when that review will take place. Furthermore, to accept an argument that information relating to a previous spending review remain live information, simply because it may be considered when preparing for the next review seems unrealistic.
40. The Commissioner considers that although at the time the information was created it deserved protection in order to allow decision makers safe space in which to shape childcare policy through its negotiations with the Treasury on funding, the need for that safe space would have ceased once those policy decisions had been completed.
41. The DfE has also presented arguments in respect of the actual contents of the information. It contends that the information contains clear and candid assessments of risk. Having viewed the withheld information, the Commissioner accepts the DfE description of the information and that some of it does contain a robust and candid discussion of different policy options. The Commissioner also recognises that the level of funding of childcare was and continues to be a controversial subject. Given this is the case the Commissioner accepts that the information remains sensitive even though that sensitivity has waned over time to some degree. However disclosing such information could still impact on the candour of future discussion on policy in this area. This is as a consequence of the so called 'chilling effect' where by officials become more cautious in the advice they provide when discussing similar policy issues in the future for fear that advice may also be disclosed. The Commissioner often gives little weight to such arguments, but she accepts that this is a controversial area and that disclosure of any information is likely to generate some public discussion of the issues which may impact on the candour of future discussions. Having said that, such an effect would be very much limited by the professionalism

of officials and the need of ministers for particularly robust advice in order to make sound decisions on an issue they would anticipate attracting public comment and scrutiny.

42. The DfE contends that the information is fragmentary and so may be misleading if disclosed. Again, having viewed the withheld information, the Commissioner agrees with this description of the information. However the Commissioner does not accept that the potential for information to be misleading is a valid argument for refusing a request. If the information is incomplete, it is open to the public authority to provide some context to the information to help mitigate any risk of people drawing erroneous conclusions from the information.
43. Another point raised by the DfE is that government must be allowed to formulate budgets without interference, particularly where there is a finite sum and where policy is under development. The Commissioner does not necessary accept that it is an absolute requirement of formulating budgets that they are set without interference from third parties. It is quite plausible that an external party may be able to input to such decisions making in a constructive manner. The Commissioner also considers that budgets will always be set in line with a finite sum. Nevertheless the Commissioner does recognise the value in the government having safe space to thrash out funding negotiations. However the Commissioner considers that those budget decisions had long since taken place by the time the request was received and that although the information may be of some interest to those involved in future budget decisions on childcare, the value of that information to future decisions must decrease over time and therefore so too, its sensitivity.
44. As the information relates to negotiations between the DfE and the Treasury, the DfE argues that disclosure of such interdepartmental communications may undermine the collective responsibility of government. The Commissioner considers the public are sophisticated enough to understand that within government there are competing interests that are resolved through a process of negotiation and discussion. She is not convinced that the fact the information informed negotiations between two departments significantly impacts on its sensitivity, or that its disclosure would erode the ability of the government to present a united position in respect of the decisions that it had taken in respect of the funding of childcare.
45. The last two factors for maintaining the exemption which the DfE presented are broad, generic arguments. Firstly the DfE argues that advice should be broad-based and there may be a deterrent on external experts or stakeholders who might be reluctant to provide advice for fear that advice may be disclosed later. Having viewed the withheld information, the Commissioner does not accept the argument to be

relevant to the actual information which is captured by the request; there is no obvious input from third parties. DfE asserts that the withheld information must be kept within its own department, prior to engagement with stakeholders such as the Treasury. The Commissioner notes that by the time the request, the DfE had clearly already consulted with the Treasury as the budgets has long since been set. More importantly, the Commissioner would not automatically accept that the disclosure would impact on the ability or willingness of third parties to contribute to a policy debate. Certainly it is difficult to envisage that the Treasury would be deterred from performing its role in respect of negotiating budgets with a department because some of that department's internal thinking had previously been disclosed.

46. The final point raised by the DfE is that the impartiality of the civil service would be undermined if their advice was routinely disclosed due to the risk that the officials could come under political pressure not to challenge ideas in the formulation of policy. The Commissioner is not clear how the DfE anticipate this pressure would arise or where from. She does not give this argument any weight.
47. In terms of the public interest arguments in favour of disclosure the DfE has taken into account that more openness about the process and delivery of policy may lead to an improved standard of public debate, and improved trust. In addition it has recognised that there is a general public interest in the disclosure of information to the public, to demonstrate the openness and transparency of government.
48. The complainant, who is obviously well informed on the subject of childcare provision, has presented a number of her own public interest arguments in favour of disclosure. She has pointed out that the funded entitlement to free childcare in England is a flagship government policy which she argues impacts on around 50,000 providers of such care and approximately 1.3 million pre-school aged children. It therefore follows that assurance the policy has been adequately funded is of substantial public interest. She continues, that although representatives of government have repeatedly stated that the funding rates announced in 2015 took into account the impact of future cost pressures on the providers of early year care, in particular, the national living wage and minimum wage, substantial concern has been raised over whether or not that funding is adequate.
49. The complainant has cited independent research from Ceeda (which describes itself a leading provider of independent research and intelligence for childcare providers, with two decades of experience). That research estimates there is currently a shortfall of £600m in the private and voluntary early years sector. The Commissioner is unable to comment on the accuracy of that analysis, but it does demonstrate that there is clearly a concern amongst childcare providers over funding.

Furthermore, surveys carried out by the Early Years Alliance (a registered educational charity representing 14,000 childcare provider members) suggest that 42% of childcare providers say there is a chance they will have to close in the next academic year due to underfunding of the entitlement to 30 hours free childcare.

50. The Treasury Committee also published a report on Childcare in March 2018. This demonstrates the matter is one of genuine public debate.
51. The Commissioner has also identified a report produced by the All Party Parliamentary Group for Childcare and Early Education, titled 'Steps to Sustainability'. Although this report was not published until June or July 2019, which post-dates the request, it was produced in response to concerns that had been raised by the time of the request and reflects the situation around that time. In very broad terms the report finds that the financial sustainability of a significant number of childcare providers had been weakened following the extension of free childcare to 30 hours and that the funding rates had not risen in line with the increasing cost of childcare provision.
52. It is the complainant's contention that given the concerns that have been raised by those in positions to have an informed view on such matters, there is a genuine and significant public interest in accessing information that would reveal the extent to which the DfE took account of the costs incurred by childcare providers when the funding rates were negotiated and set.
53. The Commissioner recognises the importance of the government's policy on the provision of early year's childcare. The DfE has itself identified the issue as being a key policy area for the Department. The level of funding, public spending, is significant.
54. Various commentators have evaluated the effectiveness of the policy and therefore disclosing the information is not necessary to allow the impact of the policy to be assessed. It is not for the Commissioner to comment on the policy itself, but it is clear that it has proved controversial and has been the subject of debate within the sector. Although its disclosure has not been necessary to assess the impact of the policy, disclosing the requested information would reveal the thinking behind the funding rates and there is still a public interest in allowing such policy thinking to be scrutinised. This may assist those representing childcare providers to contribute to future policy development. Having said that, the Commissioner accepts the DfE's point that the information is fragmentary and does not provide a comprehensive explanation of all the different factors that were considered when deciding what level of funding should be bid for. This does reduce the value in disclosing the information.

55. Having weighed up the competing public interest arguments for and against disclosure, the Commissioner recognises that the level funding for early years childcare is a controversial issue which has attracted some criticism. This may heighten the Department's sensitivity to the disclosure of information relating to how funding levels were set. This in turn may heighten the chilling effect caused by its disclosure. The flip side of this is that the controversy increases the public interest in those effected by the decisions, gaining a better understanding of how those decisions were taken and the factors that were taken into account. This would enable more informed input by interested parties to any future debate on the level of funding. Those effected are not just the childcare providers, but also the children and parents whom the policy seeks to benefit. There is a significant number of these.
56. The Commissioner has also taken into account the time that had elapsed between the budget and policy decisions for which the information had been generated and the date of the request. The Commissioner is satisfied that at those decisions had been finalised by the time of the request. Although the information may be referred to when undertaking future policy and spending reviews, the information would be dated and its value to future considerations had declined by the time the request was made.
57. In light of the above the Commissioner finds that the public interest in favour of maintaining the exemption does not outweigh the public interest in its disclosure. The DfE are not entitled to rely on the exemption provided by section 35(1)(a). The Commissioner requires the DfE to disclose the information.
58. The only exception to this is any reference to junior officials who are identified within the information. The complainant has advised the Commissioner that she is not interested in accessing the personal data of such individuals.

Right of appeal

59. 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

60. 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.

61. 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

Rob Mechan
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