

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 01 March 2012

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

### Decision (including any steps ordered)

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1. The complainant has requested the proposal form for the Three Valleys Independent Academy, together with copies of representations of support for this proposal, with the names and addresses of the supporters omitted. The Department for Education (the "DfE") withheld the former under the effective conduct of public affairs exemption (section 36(2)(c)), and the latter on the grounds that the provision of this information would exceed the appropriate cost limit (section 12).
2. The Commissioner's decision is that the DfE has correctly relied upon section 36(2)(c) to withhold the proposal form. However, he has also decided that it cannot rely upon section 12 in order to withhold copies of representations of support for this proposal, with the names and addresses of the supporters redacted.
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation.
  - It should now disclose copies of representations of support for this proposal, with the names and addresses (including email addresses) of third party individuals redacted.
4. The DfE must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

## Request and response

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5. On 18 March 2011, the complainant wrote to the DfE and requested the following information:

*"1. The proposal, application and completed 'How to apply' form for the Three Valleys Independent Academy in Rotherham, submitted by the Nationwide Independent College of Higher Education.*

*2. Each representation from parents and supporters of the Three Valleys Independent Academy in Rotherham – including emails, letters, other statements of support and petitions – received as part of the proposal, application and completed 'How to apply' form."*

The complainant also made a third request. However, this is not quoted here as it does not form part of his complaint.

6. Following an exchange of correspondence the DfE provided a response on 2 June 2011, and refused to provide the requested information. In relation to the first request, it stated that this information was exempt under section 21 (information readily accessible by other means) and section 36(2)(c). It also withheld personal details about the proposers under section 40(2) (third party personal information exemption). In relation to the second request, it stated that this information was exempt under section 40(2).
7. On 9 June 2011 the complainant asked for an internal review. In relation to the second request he suggested that if the third party personal information was redacted from the requested information, section 40(2) would not apply.
8. Following an internal review the DfE wrote to the complainant on 21 July 2011. In relation to the first request it upheld its use of section 36(2)(c) to withhold this information. In relation to the second request it upheld its use of section 40(2), although it informed him that it had received 423 expressions of support. It stated that if it redacted this information (as suggested by the complainant) it would leave no substantive content left – although it provided him with some anonymised examples of the information that it held that fell under this request.
9. Subsequently the complainant contacted the DfE again on 1 August 2011 in regard to the second request, and stated,
- "I would be grateful to you for providing all 423 representations from parents and supporters of the Three Valleys proposal, rather than just the examples or templates attached to your 21 July email.*

*Names and addresses can of course be redacted as they were in the templates."*

10. The DfE responded on 17 August 2011 and refused to provide this information in this way, stating that complying with this request would exceed the appropriate cost limit (section 12).

### **Scope of the case**

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11. The complainant contacted the Commissioner on 24 August 2011 to complain about the way his requests had been handled.
12. On 15 September 2011 the Commissioner contacted the complainant to seek clarification of his complaint. In particular, he asked the complainant to confirm whether – in relation to the second request – he was complaining about the DfE's use of section 40(2) to withhold the information originally requested, or its use of section 12 to withhold the information as modified in his email of 1 August 2011.
13. The complainant contacted the Commissioner on 20 September 2011 and confirmed that in relation to the second request his complaint was focused on the DfE's use of section 12 to refuse to provide this information with the names and addresses of third parties redacted.
14. Therefore the scope of this case has been to consider:
  - the DfE's use of section 36(2)(c) in relation to the first request, and
  - the DfE's use of section 12 in relation to the second request, subject to the complainant's email of 1 August 2011.

### **Background**

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15. The Three Valleys Independent Academy was (at the time of the request) a proposed Free School. The Free Schools programme was introduced by the DfE following the 2010 general election. Further information on the Free Schools programme can be found on the DfE website.<sup>1</sup>

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<sup>1</sup> <http://www.education.gov.uk/schools/leadership/typesofschools/freeschools>

## Reasons for decision

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16. The Commissioner has first considered the use of section 36(2)(c) to withhold information that falls under the first request.

### **Prejudice to the effective conduct of public affairs – section 36(2)(c)**

17. Section 36(2)(c) provides an exemption where, in the reasonable opinion of a qualified person, the disclosure of the information would or would be likely to prejudice the effective conduct of public affairs.

18. In order to consider the application of this exemption the Commissioner must first determine whether the opinion of the qualified person was reasonable.

19. The DfE told the Commissioner that the qualified person in this case was the Minister of State for Schools, Nick Gibb MP. It also confirmed that it sought his opinion on 18 May 2011 and that his opinion was given on 23 May 2011.

20. The Commissioner is satisfied that Mr Gibb is a qualified person for the DfE and that his opinion was given at the relevant time. He has gone on to consider whether that opinion was reasonable.

21. In reaching a view on whether the opinion is reasonable the Commissioner will consider the plain meaning of the word 'reasonable' – i.e. whether the opinion is in accordance with reason, not irrational or absurd.

22. In this instance it has been argued that the disclosure of the withheld information would be likely to prejudice the approval process of Free School applications, together with the future operation of the Free Schools application programme (by discouraging future potential applicants). Prejudice to these processes would amount to prejudice to the effective conduct of public affairs.

23. The Commissioner has been provided with a copy of the submission given to the qualified person. This included details of the withheld information, as well as information supporting a recommendation. He has noted that the withheld information in this case relates directly to a specific Free School application. He has also noted that at the time of the request no final decision had been made in relation to this application. Taking these factors into account, and bearing in mind the content of the submission to the qualified person, the Commissioner is satisfied that the opinion given was reasonable.

24. Therefore the Commissioner is satisfied that section 36(2)(c) is engaged in relation to this information.
25. This exemption is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has first considered the public interest in disclosure.
26. The DfE has recognised that there is a public interest in openness and transparency, and in understanding how decisions which could affect people's lives are taken. This contributes to an ability to hold the government to account.
27. The Commissioner considers that the introduction of the Free Schools programme represented a major change in national educational policy. Bearing in mind that this policy directly related to the education of children, and also to the potential expenditure of significant sums of public money, the Commissioner considers that there is a public interest in increasing the transparency of this programme, and of the approval process for proposed schools. The proposal form in question in this case was (at the time of the request) part of the first wave of proposals and the Commissioner considers that the disclosure of this information would have contributed to this transparency.
28. The introduction of the Free Schools programme attracted a considerable amount of public, political and media attention, and subsequent debate. The Commissioner considers that the disclosure of this information would help to inform that debate by giving an insight into the application process, and the type of proposals that were being submitted to the DfE. This would be in the public interest.
29. The Commissioner also considers that any successful Free School application would have the potential to impact on the provision of education in the area in which that school would be based. Bearing this in mind, he also considers that there is a public interest in allowing people who would be potentially affected by such a school to be able to have an informed debate on any application that would affect them, or to be able to make informed representations to their local council or MP. The Commissioner considers that the disclosure of the withheld information, even when no decision had been made whether to approve the proposal (as was the situation when the request was made in this case) would contribute to this.
30. The Commissioner has gone on to consider the public interest in maintaining the exemption.

31. In favour of maintaining the exemption, the Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in the exemption – the avoidance of unwarranted prejudice to the effective conduct of public affairs.
32. The DfE has provided further details of the prejudicial effects that it believes are likely to occur, should this information to be disclosed. By way of background, it has explained that at the time of the request the Free School application process was as follows:
  - Interested groups submitted a proposal to set-up a Free School to the DfE (this would be contained on a Proposal Form).
  - If this was approved, proposers would then write a more detailed business case and plan, providing full details of all aspects of the proposals. The Secretary of State would then approve or reject the business case.
  - If this was approved, the proposers would work with the DfE to prepare all aspects of the school ready for opening, signing a Funding Agreement with the Secretary of State.
  - However, if an application was unsuccessful, proposers could address the issues upon which their application had been rejected, and resubmit their application again in the future.
33. At the time of the request, the DfE has confirmed that the initial application for the Three Valleys Independent Academy had been approved, and that a more detailed business case and plan had been submitted. However, no final decision had been made at that time as to whether to approve or reject the application.
34. The DfE has pointed out that any unsuccessful Free School proposals could be improved and resubmitted. It considers that if earlier failed proposals were put into the public domain (through disclosure under the FOIA) this could lead to the proposal, or the individuals behind it, attracting negative publicity – especially in the media. It has argued that this would be likely to result in proposers being less likely to resubmit their application in the future. The resultant loss of potentially valid proposals would not be in the public interest.
35. In addition to this, it has also argued that if proposal forms were to be disclosed at this stage – before any final decision had been made as to whether to give final approval to the proposed project – this could lead to a breakdown of trust between the DfE and proposers (both current, and future). This would be likely to result in proposers being less candid in submitting applications. This would be likely to prejudice the application process, and would not be in the public interest.

36. It has pointed out that at the time of the request the Free Schools policy and application process was so new that potential future proposers would not know what to expect, were they to submit a proposal. Therefore they would be watching the experience of the first wave of proposers in order to decide whether they wished to participate. If the full details of proposals were to be disclosed at a stage where no final decision had been made (and where many would indeed be unsuccessful), this would be likely to deter future proposers. Again, the resultant loss of potentially valid proposals would not be in the public interest.
37. In considering the balance of the public interest the Commissioner considers that the public interest factors in favour of disclosure are strong in this case. The withheld information relates to the practical application of a new national educational policy. In the specifics of the withheld information, the proposal for this Free School would, if successful, result in the expenditure of public money, and would also (potentially) have a significant impact on the provision of children's education in that area. The Commissioner considers that there is a strong public interest in increasing public understanding, both on a national and local level, of the operation of the Free Schools application process in practice.
38. The Commissioner also finds that disclosure would aid public participation in the debate about the merits of setting up the Free School in question. This is a further public interest argument in favour of disclosure. However, the Commissioner also notes that a statutory consultation process has to take place and this process had not started at the time of the request. The details of the proposed consultation will be included in an application and it then takes place if the application has been approved. The Secretary of State makes the final decision under the Academies Act 2010. The public interest in disclosure at the time of a consultation would be higher, as this would significantly aid public participation in this stage of the process.
39. However, this has to be balanced against the public interest factors in favour of maintaining the exemption, i.e. in favour of avoiding unwarranted prejudice to the effective conduct of public affairs.
40. In finding that this exemption is engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in prejudice to the effective conduct of public affairs. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any prejudice that would or might occur. In order to determine this, the Commissioner has considered both the nature of the withheld information and the timing of the request.

41. In relation to the nature of the withheld information, he notes that it shows a significant level of detail of the Free School proposal in question (albeit not to the level that the Commissioner would expect to be shown in the subsequent business plan), and includes some details of the individuals involved in the proposal. In relation to the timing of the request, the Commissioner is satisfied that at the time of the request the DfE had not made any final decision as to whether to give final approval to the proposed project.
42. Whilst the Commissioner accepts that successful proposers would expect scrutiny of their proposals, were those proposals to be successful, he does not consider that this would be expected at this early stage in the approval process. Bearing in mind the significant level of public, media and political interest in the Free School programme, he accepts that the disclosure of a Free School proposal at this stage would potentially lead to that proposal, and the individuals involved in that proposal, attracting a significant level of public, media and political attention. This, he accepts, would be likely to deter unsuccessful candidates from modifying their proposals and applying again, or deter potential proposers from applying in the future.
43. Given these factors and, in particular, taking into account the timing of the request when a final decision on the proposal had not been made, the Commissioner considers that were this information to have been disclosed the prejudice argued by the DfE would have been frequent and potentially widespread (in relation to future potential proposers). Bearing this in mind, the Commissioner finds that the public interest in maintaining the exemption particularly weighty.
44. Therefore the Commissioner considers that the public interest in maintaining this exemption outweighs the public interest in disclosure. Therefore this information should be withheld.
45. The Commissioner has gone on to consider the use of section 12 to withhold information that falls under the second request.

### **The appropriate cost limit – section 12**

46. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of compliance would exceed the appropriate limit, as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations").
47. The appropriate limit for central government departments is £600.
48. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:



- determining whether the information is held;
- locating the information, or a document which may contain the information;
- retrieving the information, or a document which may contain the information; and
- extracting the information from a document containing it.

In relation to a central government department, this equates to 24 hours of staff time.

49. In this instance, the DfE has applied this provision to the complainant's second request, as modified in his email of 1 August 2011 (see paragraph 9 above).
50. During the course of the investigation the Commissioner asked the DfE to provide further arguments to support its use of this exemption. He also drew the DfE's attention to his guidance on section 12 entitled "*Redactions and the Fees Regulations*".<sup>2</sup>
51. The DfE explained that the information in question was only held in paper format. Therefore, in order to provide the requested information it would have to extract it manually.
52. It has estimated that it would take 5 minutes to determine whether the requested information is held, and 5 minutes to identify and locate this information held within filing cabinets. It has also estimated that it would take an additional 20 minutes to retrieve and collate the requested information. However, it has gone on to estimate that it would, in relation to each expression of support for the Free School proposal, take 4 minutes to extract this information. Given that there are 423 expressions of support, the extraction of this information would take an estimated 1692 minutes (or 28 hours and 12 minutes). Overall, therefore, it would take 28 hours and 42 minutes to provide this information. This would exceed the appropriate limit.
53. As noted above, in considering whether responding to a request would cost above the appropriate cost limit, a public authority can take into account the cost of extracting the requested information from the

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<sup>2</sup> <http://www.ico.gov.uk/foikb/FOIPolicyRedactionandtheFeesRegulations.htm>

document containing it. However, a public authority cannot take into account the cost of redacting exempt information.<sup>3</sup>

54. The issue here is whether the DfE can categorise the provision of the requested information – other than the third party names and addresses – as necessitating the 'extraction' of this information. If so, it can then take the cost of this into account when deciding whether the cost of complying with this request would be over the appropriate cost limit.
55. The part of the regulations which set out that a public authority can take into account the cost of extraction of information is regulation 4(3)(d). The Commissioner considers that this is concerned with "*...the process of differentiating the requested information from other information which has not been requested where a document contains both.*"<sup>4</sup> It is not concerned with the cost of redaction.
56. In this instance, the information that falls under the second request was originally identified by the DfE – who confirmed to the complainant that it held it. However, it withheld this information on the grounds that it contained third party personal information (section 40(2)). As noted at paragraphs 7 and 9 above, the complainant stated that he was content to be provided with this information (i.e. with the expressions of support for the proposed free school) with the names and addresses of the individuals concerned redacted from it.
57. As the complainant has stated that he is content to accept the requested information, subject to the section 40(2) redactions already applied by the DfE, the Commissioner does not consider that the provision of the remaining information would involve the extraction of information from the expressions of support referred to in the request. He does not consider that the information in question would need to be differentiated from other information which has not been requested. Instead he considers that the process of providing this information would involve the redaction of third party personal information under section 40(2).
58. Bearing this in mind, as he has reached the view that the provision of the requested information would not involve the 'extraction' of information, the Commissioner does not consider that the DfE can take this factor into account when considering whether the cost of complying with this request would exceed the appropriate cost limit.

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<sup>3</sup> *Chief Constable of South Yorkshire Police v ICO* [EA/2009/0029] & [2011] EWHC 44 (Admin).

<sup>4</sup> *Chief Constable of South Yorkshire Police v ICO* [EA/2009/0029] para 34.

59. Additionally, as a public authority is not able to take into account the cost of redacting information from requested information, the Commissioner does not consider that the cost of the application of section 40(2) can be taken into account by the DfE.
60. Therefore, after taking into account the DfE's estimated cost of complying with this request (as quoted above), other than the estimated cost of extracting the requested information, the Commissioner's decision is that it cannot rely upon section 12 to refuse to comply with the second request. Therefore the requested information, subject to the redaction of the names and addresses of third parties, should be disclosed.

## Right of appeal

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61. 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: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

62. 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.
63. 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 .....**

**Steve Wood**  
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