

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

### **Decision notice**

**Date:** 28 January 2013

**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 business plan for a free school application.
2. The Commissioner's decision is that the Department for Education (DfE) has incorrectly applied section 36(2)(c). He has also decided that section 40(2) was applied incorrectly. However, his decision is that section 43(2) has been correctly applied to the capital costs of the site.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Provide the information requested except for the information he has identified as being exempt under section 43(2).
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**

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5. On 7 May 2012, the complainant wrote to the DfE and requested information in the following terms:

*"Under the Freedom of Information Act 2000, I would like a copy of the*

*business plan submitted to you for the Etz Chaim Jewish Primary School under a Free School application."*

6. The DfE responded on 6 June 2012. It confirmed that it held the information requested but refused to provide it citing sections 36(2)(c), 40(2) and 43(2) of the FOIA.
7. Following an internal review the DfE wrote to the complainant on 10 July 2012 and upheld its original position.

### **Scope of the case**

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8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner received the complaint on 11 July 2012.
10. The complainant stated that the DfE had refused a very similar request and the Commissioner had issued a decision notice in January 2012. In that case the DfE had relied on section 22 of the FOIA (information intended for future publication). The Commissioner upheld the application of section 22 in that case.
11. The complainant stated that he would like the Commissioner to adjudicate on whether there is now a legitimate reason to refuse publication under section 36 and whether the circumstances still exist as at June 2012 where in the Commissioner's judgement the public interest in maintaining the exemption outweighed the public interest in disclosure.
12. Furthermore the complainant stated that, given the section 36 exemption he would like to Commissioner to examine whether this is a legitimate exemption given that it implies there will never be a future occasion where the DfE deems it in the public interest to disclose this information.
13. The Commissioner considers the scope of this case to be to determine if the DfE has correctly applied the exemptions it has cited to withhold the information requested.

### **Reasons for decision**

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

**Section 36(2)(c) - Prejudice to the effective conduct of public affairs**

15. Section 36(2)(c) of the FOIA 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.
16. The DfE has applied this exemption to the entirety of the business plan.
17. In order to consider the application of this exemption the Commissioner must first determine whether the opinion of the qualified person was reasonable.
18. The DfE has informed the Commissioner that the qualified person in this case was the Minister for Schools, Nick Gibb MP. It also confirmed that it sought his opinion on 28 May 2012 and that his opinion was given on 6 June 2012.
19. 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.
20. 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.
21. The Commissioner has been provided with a copy of the submission given to the qualified person, which included information supporting a recommendation.
22. The submission argued that releasing approved Business Cases and Plans (BCPs):
  - would be likely to encourage similar applications to 'borrow' sections from approved BCPs;
  - potentially stifle innovation;
  - undermine a fundamental part of the DfE's assessment of a group's capacity and capability – the ability to put together a coherent and original bid;
  - might encourage applicants to submit bids that 'ticked the right boxes';
  - might create an expectation that other or future applications received by the DfE would also be released;

- deter future applications from submitting proposals, for fear of intrusive and unhelpful enquiries.
  - may put pressure on proposers to submit to investigation and potentially hostile questioning; and
  - BCPs are all out of date by virtue of the further development that occurred in the pre-opening stage;
  - it would therefore be misleading to publish them.
23. In addition, the DfE stated that a similar previous request had been made in February 2012 and that had also been refused under section 36(2)(c).
24. The DfE has provided sufficient evidence to illustrate that the qualified person was provided with documentation explaining that he was required to form a reasonable opinion in relation to the application of section 36(2)(c) of the FOIA to the information withheld by the DfE.
25. The qualified person has stated that in his opinion the prejudice "*would be likely to have the effect in section 36(2)(c)*".
26. The Commissioner is satisfied that that the opinion was reasonable and he agrees that the exemption is engaged.
27. Section 36(2)(c) is a qualified exemption and therefore it is subject to the public interest test. The Commissioner must consider whether, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
28. The DfE has recognised that there is a public interest in openness and transparency, and that release of this information could have the effect of maintaining public confidence in the decision making at the time. The DfE also appreciates the strong public interest in the Free Schools programme.

### **Public interest arguments in favour of maintaining the exemption**

29. The DfE has stated that at the time of the request it believed, and continues to believe, that there is a strong public interest in withholding publication of business cases. The DfE believes that this is for a number of reasons:
- releasing an approved business case would have been likely and would still be likely to encourage applicants to put forward similar information in applications or 'borrow' sections from approved

business cases. This would potentially stifle innovation (which the policy is designed to encourage) and would undermine a fundamental part of the DfE's assessment of a group's capacity and capability – the ability to put together a coherent and original bid;

- releasing the business case is likely to encourage applicants to submit bids that they think would be successful or 'ticked the right boxes', rather than submitting a bid that best reflects the needs of the local community;
- releasing details of the business case might create an expectation that other or future applications received by the DfE would also be released. This may deter future applicants from submitting proposals, for fear of intrusive and unhelpful enquiries. If the public expect the business plans or applications to be released then this may put pressure on proposers to submit to investigation and potentially hostile questioning;
- it would be misleading to publish the business case as much of it is out of date. It represents an early version of the proposer's thinking;
- final versions of business cases were in most case produced after an iterative process. Many were approved with conditions and they are all out of date by virtue of the further development that occurred in the pre-opening stage. It would therefore be misleading to publish the original versions of business case. The conditions imposed by the DfE are not in the public domain. We would not want to make these publicly available as it could reduce confidence in the proposer group and school.

### **Public interest arguments in favour of disclosing the requested information**

30. The DfE does not appear to have considered this over and above recognition that there is a public interest in openness and transparency, and that release of this information could have the effect of maintaining public confidence in the decision making at the time. The DfE also appreciates the strong public interest in the Free Schools programme.

### **Balance of the public interest arguments**

31. Section 36(2)(c) of the FOIA 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.
32. The Commissioner notes that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would be

likely to have the stated detrimental effect, he must give weight to that opinion as a valid piece of evidence in his assessment of the balance of the public interest.

33. In considering the balance of the public interest, the Commissioner will take 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.
34. It is the Commissioner's view that any prejudice to the DfE to effectively conduct its public affairs would be unlikely to be of any severity in this case. The business plan for the school in question had already been approved when the request was made and the school was one of the first wave of applicants.
35. At the time of the request the school had already been open for several months therefore the disclosure would not impact on a live process.
36. 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 the approval process for proposed schools. The business case in question in this case was part of the first wave of proposals and the Commissioner considers that the disclosure of this information would contribute to this transparency.
37. The Commissioner does not consider the DfE's argument that releasing the information would be misleading as it is out of date, carries much weight. It is for a public authority to provide the context to the information being released. In this case it is apparent that this application was made in the first wave of Free Schools, and the application process has evolved over time, as it would be expected to.
38. The DfE has argued that releasing an approved business case would still be likely to encourage applicants to put forward similar information in applications or 'borrow' sections from approved business cases. Again, as the application process is likely to further evolve with every wave of applications, the Commissioner does not consider that this argument carries much weight.
39. The DfE has further argued that applicants would submit bids likely to tick the right boxes rather than reflect the community's needs. As above, as the application process has changed one would expect

proposers to be aware of this. In addition, one would also expect the DfE to have sufficient processes in place to be able to identify proposals that are not meeting the community's needs i.e. documentary evidence of support provided, canvassing of local opinions etc.

40. The DfE considers that releasing this information may deter future applicants for fear of intrusive or hostile questioning. At the time of the request the school had been open for several months, since 5 September 2011, and releasing at this time would not be likely to have a strong deterrent effect. Any questioning could not be regarded as intrusive if the process was complete. Reasonable questioning is also part of the process of accountability, reasonable questions may sometimes be challenging. This argument has not been accorded significant weight.
41. It is the Commissioner's view that it is unlikely that new proposals and business cases would be expected to be released before being accepted and funding agreements signed. Therefore, the Commissioner does not consider this argument carries significant weight, as these had been completed at the time of the request in May 2012.
42. In essence, when a proposal for a Free School is made it has become a public issue and it is highly likely that there has been a substantial amount of public discussion and debate, as well as canvassing views, opinions and support.
43. Three public meetings took place in 2010, which were widely advertised locally via the local press, notices in the local area and the internet. The proposers set out the ethos and vision for the school and a timetable of how it was intended the project was run. The purpose at the second of these meetings was to present the initial Free School application to a wider body and obtain feedback before proceeding to the business case stage. The Commissioner would therefore argue that many of the issues in the business plan were in the public domain to some extent but disclosure would add significant additional transparency.
44. A brief internet search indicates that there is a local action group that has lobbied against the school being set up and there appears to have been extensive public debate from both sides via internet 'blogs'. Although arguments for both sides have been made, the disclosure of the business plan would provide transparency and understanding to the local community around the decision making processes involved.

## **Conclusion**

45. It is the Commissioner's view that the public interest in disclosing the requested information is not outweighed by the public interest in maintaining the exemption.
46. There is a strong public interest in understanding the process of setting up schools within the Free Schools programme, and the accountability of the Government in its development of that programme. There is also a particular public interest in the local population receiving information about the business plan for this school and the relevance of this information to local debates about options for educational provision in the area. Disclosing the information requested is unlikely to have any detrimental effect on the school itself (since it had opened by the time of the request and its stated aims and vision is already in the public domain), the DfE or the Free Schools programme.
47. The Commissioner does not consider that the DfE has correctly applied section 36(2)(c) to the request.
48. The Commissioner will now go on to consider section 40(2) of the FOIA.

## **Section 40(2)**

49. The DfE stated that the business case contains a mixture of information including the personal details of proposers and governors. The DfE states its belief that this particular information was exempt from disclosure on the basis of section 40(2).
50. The DfE further stated that the business case also contains a mixture of information including the personal details and pen portraits (including personal information not in the public domain) of proposers and potential governors which it also considers to be exempt under section 40(2).
51. Section 40(2) of FOIA states that
  - (2) *Any information to which a request for information relates is also exempt information if-*
    - (a) *it constitutes personal data which do not fall within subsection (1) and,*
    - (b) *either the first or second condition below is satisfied*
  - (3) *The first condition is-*
    - (a) *in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the DPA, that the*



*disclosure of the information to a member of the public otherwise than under this Act would contravene-*

*(i) any of the data protection principles, or  
(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress, and*

*(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the DPA (which relate to manual data held by public authorities) were disregarded.*

*(4) The second condition is that by virtue of any provision of Part IV of the DPA the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).*

**Is the information personal data?**

52. Section 1 of the DPA defines personal data as data which relates to a living individual, who can be identified:
  - a) from that data, or
  - b) from that data and any other information which is in possession of, or is likely to come into the possession of, the data controller.
53. The DfE consider that releasing this information would breach principle 1 and principle 6 of the DPA. It has argued that release of this personal data could affect both their private and public lives and would be unfair.
54. The DfE further states that when proposers were producing their business cases they did not expect this information to be published. No statement about publication was included within the template provided for completion; therefore people completing it would not be aware that the information might be published.
55. In addition, the DfE chose not to seek consent to publish proposers' personal information because Ministers had already made a decision not to publish Business Case Proposals.
56. The Commissioner has considered the information the DfE has withheld under section 40(2) and is satisfied that it is personal data, as identified in paragraphs 40 and 41 above. The information contained within the staffing structure contains information relating to employment histories which is not in the public domain.

57. However, the names of the Governors and Trust board members are in the public domain and can be obtained via Companies House or the school's website.
58. Therefore it is difficult to see how releasing this information would be unfair or have any effect on the personal or private lives of the individuals concerned. The Commissioner finds that disclosure is necessary to meet a significant legitimate public interest – understanding who was proposed for these roles in the business plan. Disclosure of this information would not be unfair and disclosure would meet schedule 2 condition 6 of the DPA.
59. The DfE has indicated that the business case contains 'pen portraits' of proposers and potential governors. Having reviewed the information the Commissioner has found two such items. These pen portraits also contain information on the individuals' employment history.
60. The Commissioner is satisfied that disclosure of these portions of the business case would not be unfair. There is also a significant legitimate public interest in the information – it would enable the public to understand the background of the proposed leaders of the school. The Commissioner is not persuaded that the reasonable expectation is a key factor as by the time of the request very similar information was available on the School's website<sup>1</sup>. The information is not the type of biographical information a senior school leader could find intrusive if disclosed. The Commissioner finds that disclosure would not cause any harm or distress to the individuals. Schedule 2 condition 6 of the DPA is also met for the disclosure of this information.
61. Section 40(2) was incorrectly applied and the information should be disclosed.

### **Section 43(2) – Commercial interests**

62. Section 43(2) provides that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person.
63. The DfE has applied section 43(2) to the information relating to the capital costs of the site.

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<sup>1</sup> <http://www.etzchaim-primaryschool.org.uk/our-school/senior-leadership-team.html>

### **Engagement of section 43**

64. The Commissioner has initially considered whether the relevant criteria for the engagement of section 43(2) were satisfied.

#### **(i) Applicable interest within the exemption**

65. The Commissioner considered whether the prejudice claimed by the DfE is relevant to section 43(2). The DfE has argued that disclosure of some of the information withheld under section 43(2) would be likely to prejudice the commercial interests of the school and the DfE.
66. The DfE state that parts of the business case refer to both potential revenue costs as well as capital costs for the site. At the time of the request these capital costs were not finalised, and in particular the contract with the construction company. The DfE believes it would have affected the negotiating position of the DfE, and on the DfE's behalf, the school, if details of the capital costs envisaged were released as opposed to those which were actually settled on. This was applied at the time of the request when negotiations were on-going.
67. The DfE believes that this also applies now that the final details are known because they differ from those that were previously estimated.

The Commissioner accepts that the disclosure of the withheld information could affect the negotiating position of the DfE and the school. This would clearly be prejudicial to its commercial interests.

#### **(ii) The nature of the prejudice**

68. The Commissioner then went on to consider whether the prejudice claimed was "real, actual or of substance" i.e. not trivial and whether there was a causal link between disclosure and the prejudice claimed. With regard to the first element, the Commissioner is satisfied that the prejudice being claimed is not trivial or insignificant.
69. With regard to the second element, the public authority needs to be able to establish that the disclosure of the information would be likely to lead to the harmful consequences claimed. The Commissioner, having examined the information withheld under this section, notes that the school is awaiting the outcome of a Judicial Review which may result in the re-negotiating of the commercial contracts.

#### **(iii) The likelihood of prejudice**

70. The DfE has argued that the disclosure of the withheld information would be likely to prejudice the commercial interests of the DfE and the school. In the case of *John Connor Press Associates Limited v The*

*Information Commissioner* the Tribunal confirmed that, when determining whether prejudice would be likely to occur, the test to apply is that " *the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk*" (para 15). In other words, the risk of prejudice need not be more likely than not, but must be substantially more than remote.

71. The Commissioner accepts, after reviewing the withheld information that its disclosure would result in a real and significant risk that the DfE and the school would be in an adverse position with regard to commercial negotiations. Disclosure of this information could undermine the school's /DfE's negotiating position which would prejudice its ability to obtain the best deal for the school, and therefore the tax payer. If this information were to be disclosed before the final contracts have been agreed potential service providers may use this to gain advantage in their negotiations.
72. The Commissioner, in consequence of the above, accepts that section 43(2) is engaged. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure.

### **Public interest test**

#### **Public interest arguments in favour of disclosing the information**

73. The Commissioner recognised that there is a general public interest in accountability and transparency in relation to the activities of public authorities. This is particularly the case where the public body obtains funding from the tax payer and in this case, it is particularly strong as the funding, or otherwise, will have a direct impact on children's education and future.
74. The DfE acknowledges that there is a public interest in the transparency and accountability of public funds to ensure that public money is being used effectively, and that departments are getting value for money when purchasing goods and services.

#### **Public interest arguments in favour of maintaining the exemption**

75. The DfE has argued that there is a public interest in ensuring that the DfE and the Free School are able to maintain a strong bargaining position during the commercial negotiations. Disclosure of certain information would have been, and remains, likely to prejudice the commercial interests of the DfE, by adversely affecting its bargaining position and resulting in less effective use of public money. The disclosure of this information would have stifled, and will continue to

stifle, the ability of the DfE and the school to negotiate during discussions on planning proposals and site purchase.

76. Furthermore, the DfE state that it is clearly in the public interest to ensure that the DfE receives sufficient information before entering into financial arrangements. Awareness of the possibility that certain information will be disclosed would make it less likely that organisations or individuals would provide such information to the DfE in future. Disclosure of this information would have limited the DfE's ability to achieve the best value for money on a project as if proposers had restricted the amount of commercial information included in a proposal.
77. The DfE considers that the public interest in maintaining the exemptions did, and still does, outweigh the public interest in disclosing the information.

### **Balance of public interest arguments**

78. The Commissioner acknowledges that there is a public interest in how the Free Schools programme is being funded.
79. The DfE has argued that it is agreed that capital costs will be made public once they are finalised at <http://www.education.gov.uk/schools/leadership.types/ofschools/freeschools/b0066077/free-schools-opening-in-2011>. Therefore there is already a process in place to address the public interest in accountability for funding.
80. The Commissioner accepts that disclosure would be likely to prejudice the commercial interests of the DfE and the school. There is clearly significant public interest in not disclosing information which may have an adverse effect on the commercial interests of any organisation.
81. The Commissioner, however, does not consider that the DfE's argument that disclosing the information would be likely to deter organisations or individuals from providing such information carries much weight.
82. In any business that involves a public authority and commercial contracts for services, be it catering or building contracts, providers would be likely to have an expectation that there would be a possibility of this information being disclosed in future.
83. However, it is the Commissioner's opinion that there is a strong public interest in the DfE and the school being able to obtain the best value for money and that the disclosure of this information would be likely to impact on that ability.

84. After weighing the public interest arguments, the Commissioner has determined that the public interest factors in not prejudicing the commercial interests of the DfE and the school outweigh the public interest factors in favour of disclosure. Consequently, he has decided that the DfE has correctly applied section 43(2) to the parts of the business case which refer to the potential revenue and capital costs for the site.

## Right of appeal

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85. 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)

86. 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.

87. 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**  
**Head of Policy Delivery**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
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