

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2013

Public Authority: Department for Education
Address: Castle View House
East Lane
Runcorn
Cheshire

Decision (including any steps ordered)

1. The complainant has requested from the Department of Education ("the Department") information relating to an application for a Free School to be opened in Stoke by Nayland, Suffolk. The Department cited sections 36(2)(b)(ii) and 36(2)(c) as a basis for non-disclosure of the requested information.
2. The Commissioner's decision is that section 36(2)(b)(ii) was correctly applied to the entirety of the requested information and that the public interest in maintaining the exemption outweighs the public interest in disclosure of the requested information. Therefore, he orders no steps to be taken.

Background

3. Free schools are schools in England which are funded by taxpayers, academically non-selective and free to attend, but not controlled by any local authority. To set up a free school, a group interested in doing so must submit an application to the Department for Education, who will consider it.
4. The complainant seeks information regarding a particular application for a free school, which was unsuccessful.

Request and response

5. On 8 February 2012, the complainant made the following request to the Department:

- 1) "Please provide a summary of feedback given to the Stoke by Nayland high school association following their unsuccessful application for the opening of a Free School in Stoke by Nayland, Suffolk?
- 2) 2) How many people registered an interest in the opening of a free school in Stoke by Nayland in respect of the business case that was submitted in 2011?"
6. The Department responded on 30 March 2012. It stated that the requested information was exempt from disclosure under sections 36(2)(b)(ii) and 36(2)(c) of FOIA.
7. Following an internal review the Department wrote to the complainant on 24 May 2012. The reviewer upheld the original decision.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
9. The Commissioner has considered whether sections 36(2)(b)(ii) and 36(2)(c) of FOIA has been correctly applied to the requested information.

Reasons for decision

10. The Department has applied sections 36(2)(b)(ii) and 36(2)(c) of FOIA as a basis for withholding the requested information. The Commissioner has considered the application of these exemptions.

Section 36

11. Section 36(2)

The relevant parts of section 36(2) state that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

[...]

(b) would, or would be likely to, inhibit-

(i) the free and frank provision of advice, or

(ii) the free and frank exchange of views for the purposes of deliberation, or

(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.”

12. This is a qualified exemption, and is therefore subject to the public interest test.
13. The Commissioner has first considered the application of section 36(2)(b)(ii) to the withheld information.
14. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, lead to the adverse consequences described in that part of the exemption – in this case the inhibition of the free and frank exchange of views for the purposes of deliberation.
15. In order to consider the application of these exemptions the Commissioner will first consider whether the opinion was obtained from a qualified person, and the manner in which this opinion was obtained. He will then consider whether the opinion of the qualified person was reasonable.
16. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
 - ascertain who is the qualified person for the public authority;
 - establish that an opinion was given;
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
17. The University has informed the Commissioner that the qualified person in this case was Mr Nick Gibb, the former Minister of State for Schools. The Commissioner is satisfied that Mr Gibb was a qualified person for the Department.
18. The University has also provided the Commissioner with a copy of the submission provided to Mr Gibb in order to seek his opinion as to whether this exemption was engaged.
19. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable)

conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be a reasonable opinion.

20. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC1*¹ (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus, '*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant*'.
21. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
22. The Commissioner considers that the withheld information relates to and informs discussions regarding the assessment of Free School applications. The Department argues that the information is vital to discussions and deliberations between Ministers, officials and advisers, when deciding whether a school should progress to the next stage of the application process. The Commissioner accepts that the opinion of the qualified person, i.e. that if the requested information were disclosed it would be likely to cause those involved to be less free and frank in their exchange of views and deliberations, is a reasonable one. Whilst the Commissioner does not accept that individuals would be completely put off being involved in these discussions, it is not unreasonable to conclude that the frankness and candidour of the deliberations would be likely to be affected which would have a damaging impact on the ongoing application and decision- making process regarding Free Schools.
23. The Commissioner has been provided with a copy of the submissions given to the qualified person at refusal notice stage. These included copies of the withheld information, as well as information supporting a recommendation. The Commissioner has also been provided with the written and signed opinion of the qualified person. Having considered the submissions and the requested information, the

¹ EA/2006/0011 & EA/2006/0013

Commissioner considers that the opinion of the qualified person is reasonable. The Commissioner is also satisfied that section 36(2)(b)(ii) applies to the whole of the withheld information and therefore he has not considered the application of section 36(2)(c) in this decision notice.

Public interest test

24. Section 36(2)(b)(ii) is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining these exemptions outweighs the public interest in disclosure.

Public interest in disclosing the requested information

The Commissioner has first considered the public interest in disclosure.

25. The Department recognises that there is a public interest in increasing openness, transparency and accountability in the decision-making processes of any government organisation. The Commissioner agrees that this is the case.
26. The Commissioner also considers that there is a strong public interest in understanding the Free School application process and being assured that this is being carried out properly and fairly. Disclosure of the requested information would allow the public to better understand and to have a more informed debate on the process. The Commissioner has gone on to consider the public interest in maintaining the exemption.

Public interest in maintaining the exemption

27. In favour of maintaining the exemption as set out in section 36(2)(b)(ii) the Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in these exemptions – in this instance, the avoidance of unwarranted inhibition to the free and frank exchange of views for the purposes of deliberation.
28. The Department has argued that there is a strong public interest in ensuring that officials and advisers are able to continue expressing their opinions and giving advice in an honest but protected space, without interference. There is a public interest in preserving such a space in which to have open and uninhibited discussions on the relevant issues which were ongoing at the time of the request and are still current.

Balance of the public interest arguments

29. In finding that the above exemption is engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in the inhibition set out in these exemptions. However, in considering the balance of the public interest, the Commissioner takes into account the severity, frequency, or extent of any inhibition that would or might occur. In order to determine this, the Commissioner has considered both the nature of the requested information and the timing of the request.
30. The Commissioner considers that there is a strong public interest in openness, transparency and accountability of the decision-making processes of public authorities. He also considers that there is a strong public interest in allowing the public to be better-informed about Free Schools and the application process. In particular this includes the local population in the area near to the proposed Free School.
31. The requested information consists of documents relating to and informing discussions surrounding the Free School application process within the Department. The Commissioner understands that the application process is a live and ongoing issue – this is a significant factor in favour of maintaining the exemption. Those involved need time and space for free and frank discussions to carry out the process.
32. The Department has informed the Commissioner that the material within the scope of the request is vital in the discussion and deliberation between officials and advisers when deciding whether a Free School application should progress to the next stage. Given the timing of the request the Commissioner has given this argument significant weight. If the information were to be disclosed at this stage, this may inhibit individuals from freely expressing their views for fear that such early deliberations may be released.
33. Therefore, the Commissioner's conclusion is that, in all the circumstances of the case, the public interest in maintaining the exemption set out in section 36(2)(b)(ii) of FOIA outweighs the public interest disclosure of the requested information.

Right of appeal

34. 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

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

35. 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.
36. 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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