

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 February 2014

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

Decision (including any steps ordered)

1. The complainant has requested information about two free schools based in Chester. The Department for Education (DfE) refused to provide the requested information under section 36(2)(b)(ii), 36(2)(c), 40(2) and 43(2) of the Freedom of Information Act 2000 (FOIA).
2. The Commissioner's decision is that the DfE has correctly applied section 40(2) FOIA but incorrectly applied section 36(2)(b)(ii), section 36(2)(c) and section 43(2) FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - The DfE should now disclose the withheld information but should redact the information to which section 40(2) FOIA applies. That is the personal details of proposers and governors.
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 7 March 2013 the complainant requested information of the following description:

"Wish to request a copy of the applications made to the Department to establish 2 Free Schools in Chester - namely St Martins Academy Free School, Hoole, Chester and University of Chester Cathedral Free School, Abbey Square, Chester. I understand that commercially sensitive or personal information may have to be redacted from these applications. In addition I would also like to obtain copies of the local authority consultation response relating to the application to establish these 2 schools - the local authority being Cheshire West and Chester Council. Please feel free to contact me if anything in this request is unclear. I hope the documents are relatively easily available".

6. On 3 April 2013 the DfE responded. It refused to provide the requested information under section 36(2)(c) FOIA.
7. The complainant requested an internal review on 20 May 2013. The DfE sent the outcome of its internal review on 10 July 2013. It upheld its original position but also applied section 36(2)(b)(ii) FOIA.

Scope of the case

8. The complainant contacted the Commissioner on 27 August 2013 to complain about the way his request for information had been handled.
9. During the course of the Commissioner's investigation the DfE disclosed the requested local authority consultation response. It also applied section 40(2) and 43(2) FOIA to parts of the remaining withheld information.
10. The Commissioner has considered whether the DfE was correct to apply section 36(2)(b)(ii), 36(2)(c), 40(2) or 43(2) FOIA.

Reasons for decision

11. Section 36 FOIA provides 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-

(2)(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

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

12. The DfE has applied section 36(2)(b)(ii) and section 36(2)(c) to the withheld information. In determining whether these exemptions were correctly engaged by the DfE the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:

- Establish that an opinion was given;
- Ascertain who was the qualified person or persons;
- Ascertain when the opinion was given; and
- Consider whether the opinion was reasonable.

13. The DfE has explained that, the first opinion was sought on 27 March 2013 for section 36(2)(c) and the qualified person (Minister of State for Schools, David Laws) confirmed his opinion that the exemption was engaged on 28 March 2013. The subsequent opinion for section 36(2)(b)(ii) was added at internal review stage on 6th June 2013, the confirmation of that was received on 10th July 2013 by the qualified person (Parliamentary Under-Secretary of State for Education and Childcare, Elizabeth Truss).

14. The following submissions were put to the qualified person in relation to the application of section 36(2)(b)(ii) and section 36(2)(c):

- Releasing the applications and local authority consultation response would be likely to encourage applicants to put forward similar applications or 'borrow' sections from approved applications. This would stifle innovation (which the policy is designed to encourage) and undermines 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 documents might encourage applicants to submit bids that they thought would be successful because of 'ticking the right boxes', rather than submitting a bid that best reflected the needs of the local community.
- The DfE considers that releasing the requested information is likely to discourage future applications. Potential

applicants would know that the details of their proposal would become public knowledge, demoralising proposers, if they are unsuccessful, and making it unlikely that they would want to act on the feedback they received to re-submit a better quality application next time.

- The proposers would not have been aware that there was a risk that the information would be disclosed and would perceive this as unfair and possibly as a breach of confidence.
- Disclosure of the local authority consultation response may inflame existing community tensions. Disclosure of this information from the local authority would also hinder free and frank exchange of views. The likely consequence would be less written communication between the local authority and the DfE resulting in a less clear understanding of the facts on the ground, not allowing for the effective conduct of public affairs.

15. The qualified person's response agrees that section 36(2)(b)(ii) and section 36(2)(c) is engaged. The qualified person's opinion is that the prejudice in this case would be likely to occur.

16. The withheld information is two free school applications submitted during the Wave 3 application round. The free schools relevant to this request had not opened at the time the request was made. The Commissioner therefore accepts that it was reasonable to conclude that disclosure of this information would be likely to inhibit the free and frank exchange of views for the purposes of deliberation and would be likely otherwise to prejudice, the effective conduct of public affairs.

17. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(ii) and section 36(2)(c) were correctly engaged.

18. As the Commissioner has decided that the exemptions are engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's

Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.

19. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest. However, in order to form the balancing judgment required by section 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

20. The DfE has acknowledged that there is a public interest in the transparency of the accountability of public funds to ensure that public money is being used effectively, and that government departments are getting value for money when purchasing goods and services.
21. The Commissioner considers that there is a public interest in the government working in an open and transparent way. There is a public interest in disclosing information which provides the public with a better understanding behind the decision making process and enables the public to contribute where possible in relation to an area which is a sensitive issue of significant public interest. Furthermore there is a public interest in the government being accountable for decisions made.

Public interest arguments in favour of maintaining the exemption

22. The DfE has explained that there is a public interest in avoiding the negative impact that release of information would have on the free school programme, if future applications were submitted to simply tick the same boxes as a previously successful application rather than meet local demand and need.

¹ EA/2006/0011; EA/2006/0013

Balance of the public interest arguments

23. The Commissioner considers the whilst there is a public interest in avoiding a negative impact upon this programme, by not discouraging future applications, he does consider that there is a strong public interest in the government operating in an open and accountable manner in relation to a programme which affects a large number of people. The Commissioner considers that the public interest in favour of maintaining section 36(2)(b)(ii) FOIA is outweighed by the public interest in favour of disclosure.
24. The information requested in this case was also covered in a previous Notice issued by the Commissioner under the reference FS50478864 which is now the subject of an appeal to the First -Tier (Information Rights) Tribunal. For the same public interest considerations set out in the previous decision notice FS50478864, the Commissioner considers that the public interest in favour of maintaining section 36(2)(c) FOIA is outweighed by the public interest in favour of disclosure.

Section 40(2)

25. Section 40(2) FOIA provides an exemption for information that constitutes the personal data of third parties:

"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 the second condition below is satisfied."

Section 40(3)(a)(i) of the Act states that:

"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 Data Protection Act 1998, 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),"

26. The DfE explained that the application forms contain a mixture of information including the personal details of proposers and governors.

Upon considering the redacted information the Commissioner considers that it would be the personal data from which the data subjects would be identifiable.

27. Personal data is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. In this case the Commissioner has considered whether disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.

Likely expectation of the data subject

28. The DfE argued that when proposers were producing their applications they did not expect that this information would be published. It said that no statement about publication was included within the template provided to proposers for completion, therefore individuals completing it would not be aware that the information might be published.

Would disclosure cause damage and distress to the data subject

29. The DfE explained that as the proposal was in the early stages of progression it considers that release of the personal data contained within the applications could affect the individual's public and private lives.

The legitimate public interest

30. The Commissioner considers that there is a legitimate public interest in disclosure of information surrounding the free schools programme to ensure transparency, accountability and better public understating of government decision making.
31. However the Commissioner also considers that the data subjects were unlikely to have had an expectation that their personal details would be disclosed into the public domain when they were submitted onto the application forms.
32. The Commissioner considers that disclosure of the personal details of proposers and governors only meets the legitimate public interest described above in a very limited way. The Commissioner is satisfied that the interests of the data subject would not be outweighed by the legitimate public interest in this case.
33. The DfE was therefore correct to apply section 40(2) FOIA to the personal details of governors and proposers.

Section 43(2)

34. Section 43(2) FOIA provides an exemption from disclosure of information which would or would be likely to, prejudice the commercial interests of any person (including the public authority holding it). This is a qualified exemption, and is therefore subject to the public interest test.
35. The DfE has explained that it has applied section 43(2) FOIA to information which identifies sites for the proposed new schools. The DfE said that disclosure would prejudice its own commercial interests.
36. In order to determine whether the exemption is engaged the Commissioner has first considered whether the prejudice claimed relates to the named company's commercial interests.
37. The term 'commercial interests' is not defined in the FOIA. However the Commissioner has considered his awareness guidance on the application of section 43. This comments that,

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."
38. The Commissioner considers that acquiring a site for the free schools is a competitive commercial activity. The Commissioner therefore considers that the withheld information falls within the scope of the exemption.
39. The Commissioner has gone on to first consider how any prejudice to the commercial interests of the DfE would be caused by the disclosure of the requested information.
40. The DfE has explained that at the time the request was made, the sites had not been finalised and the schools did not open until 6 months later. It said that it would have affected the negotiating position of the DfE, and the schools on its behalf, if details of the sites envisaged were released as opposed to those which were actually settled on. It said it could have encouraged land owners to inflate the price of potential sites, thus pushing up the cost of acquiring the sites. It said that this applied at the time of the request when negotiations were ongoing.
41. As the DfE has claimed that disclosure would prejudice its commercial interests in this case, it has a higher evidential burden than if it had claimed the prejudice would be likely to occur. The request was made whilst negotiations were ongoing, however the Commissioner does not consider that the DfE has demonstrated that disclosure of the names of the potential sites would have resulted in landowners pushing up the

cost of acquiring the sites. As the DfE has not established a causal link between disclosure of the potential sites and the prejudice it has claimed would occur, the Commissioner has gone on to consider whether the prejudice would be likely to occur.

42. The Commissioner doesn't consider the DfE has established a causal link to demonstrate that the prejudice claimed would be likely to occur. It has argued that if all potential sites had been released as opposed to those that were actually settled upon this could have led to landowners inflating the prices of potential sites. It has not explained why this prejudice would be likely to occur. The Commissioner considers that if a list of potential sites were disclosed landowners could similarly reduce prices to become more competitive in any potential negotiating process. However the DfE has not provided any evidence to explain why prices would be altered if the identity of the potential sites were disclosed. The Commissioner does not therefore consider that section 43(2) FOIA was correctly applied in this case.

Right of appeal

43. 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: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

44. 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.
45. 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

Pamela Clements
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF