

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 7 June 2022

**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 information relating to St Bede's Free School Project.
2. The Department for Education (DfE) withheld the requested information, citing section 36(2) (prejudice to the effective conduct of public affairs), section 42 (legal professional privilege) and section 40(2) (personal information).
3. The Commissioner's decision is as follows:
  - Section 36(2)(b)(i), (ii) and section 36(2)(c) are engaged but the public interest favours disclosure.
  - Section 42 (legal professional privilege) is engaged but the public interest favours disclosure.
  - The DfE is entitled to withhold the personal information of officials below the grade of deputy director in line with section 40(2).
  - In failing to respond to the request within twenty working days, the DfE breached section 10 (time for compliance with request).
4. The Commissioner requires the DfE to take the following steps:
  - Disclose the information that engages section 36(2)(b)(i) and (ii), and section 42, that is a copy of all of the withheld information (with the information that engages section 40(2) redacted).

5. 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 FOIA and may be dealt with as a contempt of court

## **Background information**

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6. The Commissioner understands that this request relates to St Bede's Free School Project which is a new 600 place secondary school in Soham.
7. The Free School Policy Initiative was introduced by the Conservative-Liberal Democrat coalition in 2010. Free Schools are funded by the government but are not run by the local authority and can be set up by groups such as: charities; universities; religious groups; businesses; independent schools and parents. Free Schools have more freedom, for example, they do not have to follow the national curriculum.
8. The proposed new school in Soham would be ran by St Bede's Inter-Church School Trust which is supported by the Catholic Diocese of East Anglia and the Church of England Diocese of Ely.
9. The local authority, as well as other educational providers in the area, have objected to the St Bede's Free School Project. There are concerns that the requirement for more school places could be achieved through the expansion of existing schools rather than the introduction of a competing school which will destabilise the local education system.

## **Request and response**

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10. On 12 November 2020, the complainant wrote to the DfE and requested information in the following terms:

"Dear Baroness Berridge,

We write further to the letter that you sent to Wendi Ogle-Welbourne, Executive Director: Children, Families and Adult Services, Cambridgeshire, dated 12 October, concerning your decision that the project to open St Bede's Inter-Church Free School in Soham should continue towards an opening date of September 2023. The Staploe Education Trust operates Soham Village College which will be directly impacted by this decision.

Your letter acknowledges that there has been concerned raised about this proposal. Your letter suggests that you have reviewed the risks

involved with this project and that you are aware of 'the anxiety around basic need expressed by **some** of the existing local schools.' In fact, we invite you to acknowledge that concern was expressed by **all** the local secondary schools and correspondence with your officials was signed by five local Multi Academy Trusts. You have perhaps misunderstood the unanimity of these concerns.

No one in the Department for Education over the last two years has addressed these concerns. There is a weight of correspondence and argument in opposition to this project: your letter gives no reassurance that these concerns have been heard or understood.

It is clearly important that your decision to invest considerable public funds in this project is transparent and perceived to be rational. In the interests of good governance, and mindful of your public duty to the whole school system, we are therefore writing to request that you share your risk assessments and the Equality Impact Assessment you have undertaken (this is also a formal Freedom of Information Act request).

The Staploe Education Trust is particularly interested in your evaluation of impact upon Soham Village College. We should like to point you to the concerns first raised in a letter to [Redacted] on 17 September 2018, below, to which no response was ever received. The scope of your concerns remains unaltered. We should be grateful if you would share your full assessment of impact upon community cohesion and the particular contribution of the Staploe Education Trust to the community of Soham. How do you expect the risks to the community, and to a very good school already at the heart of that community, to be mitigated?

With regard to your letter to Wendi Ogle-Welbourn, you acknowledge that your decision was 'finely balanced'. You give three reasons for your decision.

1. A basic need for school places (which you acknowledge are not actually needed in 2023)
  2. A belief in the capacity of a St Bede's free school to raise educational standards at Soham Village College
  3. The desire to give parents more choice, particularly a faith choice.'
11. The DfE responded on 4 March 2021. It confirmed that the requested information was exempt from disclosure under section 36(2)(b)(i), (ii) and 36(2)(c).

12. The DfE provided its internal review response on 25 March 2021. It upheld its original position and also indicated that some of the requested information was exempt under section 42.

### **Scope of the case**

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13. The complainant contacted the Commissioner on 12 July 2021. They raised concerns about the timeliness of the DfE's handling of the request and its application of the exemptions.
14. During the course of this investigation, the DfE confirmed to the Commissioner that, at the time that the request was made, there was no equality impact assessment conducted that focused on Soham Village College. Therefore, this information is not held.
15. However, the DfE did clarify that, upon reviewing its handling of the request, it disclosed a redacted copy of the impact assessment conducted in relation to all schools in the area, including Soham Village College. The Commissioner understands that the following information was redacted from the impact assessment: the 'preliminary impact rating' for Soham Village School and information relating to different sites that does not fall within the scope of the request.
16. The DfE confirmed that it interpreted the complainant's request for a 'full assessment' in relation to the St Bede's Free School Project as the briefing written by the DfE which was submitted to ministers. The majority of the briefing is being withheld under section 36(2) and a small amount under section 42.
17. The DfE also confirmed that the personal information contained within the briefing (of those below the level of Deputy Director) was being withheld under section 40(2).
18. The Commissioner considers the scope of his investigation to be to determine if the DfE has correctly withheld the requested information under section 36, section 42 and section 40(2). The Commissioner will also consider the timeliness of DfE's handling of the request.

## Reasons for decision

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### Section 36 – prejudice to the effective conduct of public affairs

19. Section 36(2) of FOIA states that:

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this 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.”

20. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, QP for that public authority. The QP’s opinion must also be a ‘reasonable’ opinion, and if the Commissioner decides that the opinion is an unreasonable one, he may find that section 36 has been applied inappropriately.

21. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the QP for the exemption to be applied appropriately. Furthermore, the opinion does not have to be the only reasonable opinion that could be held or the ‘most’ reasonable opinion. The Commissioner only needs to satisfy himself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.

22. Section 36 is a qualified exemption, other than for information held by Parliament. This means that even if the Commissioner finds that the exemption has been applied properly, the public authority must still disclose the information unless the public interest in maintaining the exemption outweighs the public interest in disclosure.

23. The DfE has applied section 36(2)(b)(i), (ii) and (c) to the majority of the information that is being withheld, this includes most of the briefing and the information that has been redacted from the impact assessment. The Commissioner has reviewed the withheld information and the DfE’s arguments.

24. The Commissioner appreciates there is significant overlap between the free and frank provision of advice and the free and frank exchange of

views for the purposes of deliberation. Therefore, the Commissioner is satisfied that he can consider these two subsections together.

25. However, in order for information to prejudice section 36(2)(c) it must **otherwise**, or would be likely **otherwise** to prejudice, the effective conduct of public affairs. The "otherwise" indicates that the prejudice must differ to that outlined in section 36(2)(b) which is the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.
26. The Commissioner notes that the DfE's arguments in support of section 36(2)(c) include an emphasis on the need for a safe space for officials to constructively engage and challenge proposals. The Commissioner does not consider this represents a new argument but a duplication of the 36(2)(b)(i) and (ii) arguments.
27. Therefore, the Commissioner has decided to focus his analysis on the DfE's application of 36(2)(b)(i) and (ii) first. He will then go onto consider section 36(2)(c).

### **Who is the qualified person and how was their opinion sought?**

28. The QP is Minister Baroness Berridge, Parliamentary Under Secretary of State for the School System and their opinion was sought on 8 February 2021. In order for the QP to form a reasonable opinion on the case they were provided with a copy of the request, context surrounding the St Bede's Free School Project and arguments in support of the application of section 36.
29. The Commissioner notes that the QP was not provided with a copy of the briefing or the redacted elements of the impact assessment. However, the content of this information was described to QP, as well as the envisaged consequences of disclosure.
30. The Commissioner has had sight of the submission provided to the QP to help inform their opinion. The Commissioner notes that no counter arguments in relation to section 36 were put forward. However, the QP was reminded of the principles that underpin FOIA, transparency and accountability.
31. The submission provided to the QP asks them to sign a statement which reads 'I confirm that, in my reasonable opinion as a qualified person, disclosure of the information under the Freedom of Information Act 2000 would be likely to have the effect set out in section 36 (2)(b)(i), (ii) and 36(2)(c) of that Act.'
32. The QP has signed this statement, expressing their agreement that the exemption should be engaged.

### **Is the qualified person's opinion reasonable?**

33. In order for the exemption to be engaged the QP must give an opinion that the release of the requested information would or would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or otherwise prejudice the effective conduct of public affairs.
34. To reiterate, the Commissioner does not necessarily need to agree with the QP's opinion in order for the exemption to be engaged. As long as it is a reasonable opinion for the QP to have, then the exemption can apply.
35. The Commissioner's guidance<sup>1</sup> states 'Information may be exempt under section 36(2)(b)(i) or (ii) if its disclosure would or would be likely to inhibit the ability of public authority staff and others to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. The rationale for this is that inhibiting the provision of advice or the exchange of views may impair the quality of decision making by the public authority.'
36. The DfE has explained that the briefing contains opinions, expressed freely and frankly, for the purpose of providing advice to ministers to allow them to make an informed decision, or raise concerns or challenge proposals made in relation to the St Bede's Free School Project.
37. The DfE has explained that 'we are certain that such candid advice was only provided by officials in this straightforward form, because they were secure in the knowledge that such issues and risks, which if released would be likely to be used to delay or prevent this free school from progressing, would not be released into the public domain.'
38. The DfE has argued that in order to address any issues, challenge any shortcomings and provide appropriate advice to Ministers, its officials must be allowed a 'safe space' in which to consider key projects. The DfE is concerned that, if the briefing and the preliminary impact rating were disclosed, this would 'dilute' future submissions.
39. This is what is known as the 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage

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<sup>1</sup> [Section 36 \(ico.org.uk\)](https://ico.org.uk)

the quality of advice and deliberation and lead to poorer decision making within government.

40. Public officials are expected to be impartial and robust when giving advice and partaking in discussions. The Commissioner believes that public officials should not easily be deterred from expressing their views by the possibility of future disclosure.
41. The DfE agrees and has clarified, although it does not believe that department officials would be deterred from providing advice via such submissions, there is a risk that the opinions contained within these submissions could become more guarded or 'watered down' and opinions expressed may not be as robust and forthright as those contained within the briefing.
42. The DfE is concerned that disclosure would 'lessen the impact of such submissions, as well as the sharing of intelligence between officials and ministers, discussions, and advice when it comes to key actions being implemented to resolve issues relating to the provision of free schools, so to meet an areas lack of capacity and their need for additional school places.'
43. The Commissioner is conscious that any argument that rests on the concept of a generalised chilling effect on future discussions needs to be questioned. The Commissioner must be satisfied that the public authority is taking into account the specifics of the request and the circumstances that surround it.
44. The Commissioner recognises that if the briefing dealt with a more benign topic it would be harder to argue that disclosure would result in a chilling effect. However, the St Bede's Free School Project is a divisive topic and this is evident from the request itself. The Commissioner notes that the briefing explicitly outlines which parties are for, and which are opposed, to the St Bede's Free School Project and their rationale.
45. The DfE is concerned that 'should officials be concerned that this would go into the public domain, particularly when flagging distinct disagreements between the relevant parties, they may have couched their comments in a less explicit manor, which may not have explicitly highlighted the detail of where the parties disagree and thus not given the opportunity of input/challenge from other officials/ministers.'
46. The Commissioner also notes that the matter was also very much live at the time that the request was made. The request was made on 16 November 2020 and the Minister considering the briefing was asked to raise any concerns regarding the briefing no later than 2 October 2020.
47. However, the Commissioner notes that the QP was also advised that some of the withheld information, if disclosed, could be misconstrued by



the general public. The Commissioner considers this argument irrelevant, since it is not for the DfE to anticipate how any information disclosed in response to a FOI request will be interpreted.

48. Returning to section 36(2)(c), even though the DfE has maintained its need for a 'safe space' in which to officials can provide advice and deliberate, and the need to protect such submissions, it has also cited separate and distinct prejudice arguments.
49. For example, the DfE is concerned that disclosure would put unnecessary strain on its professional working relationships with ministers, departmental officials, applicant free school trusts and local authorities. The DfE is concerned that disclosure would result in 'unnecessary distractions' from any third parties who might question or highlight any current, or historic, disagreements which would lead to the delay of the project.

### **Is the exemption engaged?**

50. The Commissioner's guidance states that 'An opinion formed purely on the basis of a 'blanket ruling' may not be reasonable if it does not take account of the circumstances at the time of the request. The qualified person should consider the facts in each case, weigh the relevant factors and ignore irrelevant factors in order to reach their opinion.'
51. For example, the Commissioner may not consider an opinion reached by a QP to be a reasonable one should the issue to which the requested information relates have long been concluded. The Commissioner notes that the St Bede's Free School is due to open in 2023/2024 and the project is likely to continue to attract interest and opposition.
52. The Commissioner has also considered the threshold of prejudice that the DfE is relying upon to engage section 36. In this instance, the DfE appears to be relying upon the lower threshold of prejudice, disclosure 'would be likely to' prejudice the effective conduct of public affairs.
53. The Commissioner's guidance<sup>2</sup> interprets 'would be likely to' as 'there must be more than a hypothetical or remote possibility of prejudice occurring; there must be a real and significant risk of prejudice, even though the probability of prejudice occurring is less than 50%.'
54. To reiterate, the Commissioner only needs to accept that the QP's opinion is one that a reasonable person could hold which he does. The

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<sup>2</sup> [the prejudice test.pdf \(ico.org.uk\)](https://ico.org.uk/the-prejudice-test.pdf)

Commissioner is also satisfied that the DfE has applied the exemption on the lower threshold of prejudice. Therefore the exemption is engaged. Now the Commissioner will go onto determine if the public interest lies in disclosure or in maintaining the exemption.

55. The Commissioner has determined that section 36(2)(b)(i) and (ii) are engaged. He has also determined that section 36(2)(c) is also engaged.

### **Public interest test**

#### **Public interest arguments in favour of disclosure**

56. The DfE acknowledges that disclosure would allow further scrutiny of its decision making, data analysis and modelling with regard to the St Bede's Free School Project and Free Schools in general. It also acknowledges that disclosure would demonstrate transparency and accountability, the principles that underpin FOIA.
57. The DfE also acknowledges that there is a specific public interest in how it liaises with its partners, such as schools, colleges and local authorities, especially when delivering Free Schools Projects. There is also a public interest in ensuring that the DfE is pursuing solutions to problems whilst obtaining value for money.
58. The Commissioner notes that the local authority has been vocal about its opposition to the St Bede's Free School Project and disclosure would help to inform the debate around this issue.

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

59. The DfE has reiterated the need for its officials and staff to be able to provide advice, and exchange free and frank views for the purposes of deliberation. The DfE is concerned disclosure may damage the safe space that is required for officials to do so and it may damage the relationship between the DfE and its partners or may lead to further scrutiny from parties who oppose the project. As a result, the DfE is concerned that the delivery of key projects such as the St Bede's Free School Project, would be delayed at a time when the local area needs more secondary school places.
60. Ultimately, the DfE is concerned that disclosure would hamper the language used to by its officials to present their views and arguments which, in turn, 'would be likely to reduce the impact and clarity of the advice given, which would not be in the public interest when trying to resolve issues such as a lack of school places.'
61. Furthermore, the DfE has identified that there may be instances in which it needs to act without the unanimous agreement of all parties who may be affected by an issue or proposal. For example, if the DfE's safe space

was compromise 'this would limit the department's ability to work effectively with stakeholders, and provide ministers with clear and straightforward detail around the current position and any opposition, so to allow us to quickly identify and address issues such as the need for additional school places, even where all parties involved are not in consensus.'

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

62. The Commissioner believes that the public interest lies in disclosure, though he notes the balance is very fine in this instance.
63. The Commissioner acknowledges that the DfE 'has engaged with our key stakeholders throughout this process, e.g. via numerous meetings and 'roundtable events' with local schools and the council. The outcomes of such engagement, including the opposition and concerns raised, have been fed into the submission presented to ministers, allowing them a full picture of the issues, risks and objections.'
64. The DfE has also explained that 'any differences between the local authority' and the DfE will be publicly played out and tested through the planning application, thus providing further transparency and further engagement at that stage in the process.'
65. There are clearly strong arguments in favour of maintaining the exemption and the Commissioner notes that the DfE has engaged with the local authority and other schools in the area throughout this process. However, the Commissioner disagrees that any questions, concerns or queries that any affected party might have would lead to 'unnecessary' delays.
66. The Commissioner has considered the number of pupils, parents and educational establishments that may be affected by the new school, and with that, comes the need for transparency and accountability. The Commissioner is also mindful that the St Bede's Free School Project will be funded by a significant amount of tax payer money.
67. The local authority and other educational establishments in the area are concerned that the introduction of a new school will detract students from existing schools, therefore affecting their performance. There are also concerns that, as a faith school, St Bede's Free School will prioritise entry to Christian pupils outside of the catchment area over local pupils who do not identify as Christian. The overall worry is that the introduction of a new secondary school will destabilise the local education system and the local authority has presented evidence to the DfE that shows any requirement for school places in the future can be met by the expansion of existing schools.

68. It is not the role of the Commissioner to consider the appropriateness of the DfE's policies or decisions. He notes the DfE has been clear that it considers 600 new school places, from an already 'outstanding' Ofsted provider, to be a good thing.<sup>3</sup> However, the Commissioner cannot ignore the blatant opposition from the community who will be affected by these plans.
69. The Commissioner has accepted that the lower bar of prejudice, 'would be likely to' is engaged. This means that the chance of prejudice occurring doesn't have to be more likely than not, but there must still be more than a remote or hypothetical chance. Whilst it is easier to demonstrate that the lower bar of likelihood is met, the weight to be attached to that prejudice is also lower.
70. Whilst the Commissioner acknowledges the arguments in favour of protecting the 'safe space' required by officials to conduct public affairs effectively, he questions the severity, extent and frequency with which the safe space would be likely to be prejudiced, given the content of the information being withheld. If the DfE has already engaged at length with the local authority and other schools, a full picture should be painted of the proposal that is being put forward to Ministers.
71. Furthermore, the Commissioner notes that the content of the briefing is largely general and it is not possible to attribute certain statements to their authors. He also considers the intelligence gathered by the DfE fairly common sense, given the local authority's explicit opposition to the St Bede's Free School Project.
72. Ultimately, there are concerns raised by the local authority about the project in question and concerns about Free Schools in general.<sup>4</sup> Given the costs of opening a new secondary school, the Commissioner considers that transparency is paramount. The Commissioner notes that the request appears to mirror concerns of other educational establishments and concerns that the DfE has not adequately addressed such concerns only adds to the need for disclosure.

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<sup>3</sup> [Cambridgeshire.cmis.uk.com](http://Cambridgeshire.cmis.uk.com)

<sup>4</sup> [Michael Gove's free schools at 10: the most successful policy since the war – or a costly mistake? | Free schools | The Guardian](#)

## **Section 42 – legal professional privilege**

### **Legal professional privilege**

73. Section 42(1) states:

'Information in respect of which a claim to legal professional privilege, or in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information.'

74. Section 42 is a class-based exemption. This means that there is no requirement to demonstrate any prejudice or adverse effect would follow disclosure. However, like section 36, section 42 is also a qualified exemption which means that a public interest test must be conducted and arguments about any prejudice or adverse effect are likely to be taken into account as part of the public interest consideration.

75. The Commissioner's guidance<sup>5</sup> clarifies the two different types of privilege within LPP. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation. Whereas advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the main purpose of seeking or giving legal advice.

76. The DfE has clarified that it is relying upon advice privilege to engage section 42 in this instance.

### **Is the exemption engaged?**

77. In order for information to fall within the section 42(1):

- The material must be between a qualified lawyer acting in their professional capacity and a client;
- It must be created with the sole or dominant purpose of obtaining or providing legal advice;
- It must be confidential.

78. LPP protects the confidentiality of communications between a client and their legal adviser which is vital in protecting the fairness of legal proceedings. However, what LPP specifically protects is the substance of those communications. The fact that a public authority has sought or

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<sup>5</sup> [legal professional privilege exemption s42.pdf \(ico.org.uk\)](#)

received legal advice is not itself legally privileged, unless disclosing that fact would reveal the substance of those communications.

79. The DfE has explained that the information withheld under section 42(1) 'is advice provided to policy colleagues, and subsequently ministers, by DfE lawyers. We are clear that this information relates directly to advice requested by the DfE official surrounding our legal position when considering the level of risk of challenge in relation to the proposed next steps, and possible legal steps to take.'
80. The Commissioner is also satisfied that this advice was given in confidence. The DfE has explained 'given that the legal advice sought and the legal advice provided concerns issues including 'risk of challenge' surrounding the building of the free school, we believe that there was an expectation that this information was, and is, being dealt with in confidence.'
81. Having considered the withheld information, the Commissioner is satisfied that the purpose of this information is to seek or give legal advice in relation to St Bede's Free School Project. Furthermore, disclosure would do more than simply confirm that legal advice had been given and sought. Having reviewed the withheld information, the Commissioner is satisfied that disclosure of this information would disclose the substance of that legal advice.
82. The Commissioner is satisfied that section 42(1) is engaged. Therefore he has gone onto consider the public interest test.

### **Public interest test**

#### **Public interest arguments in favour of disclosure**

83. The DfE recognises that disclosure would provide more context around the process and delivery of the DfE's projects including the St Bede's Free School Project. This context would promote openness and accountability and improve the debate around the issue. The DfE also considers that disclosure would lead to improved trust between it and its stakeholders, specifically those who are directly affected by St Bede's Free School Project.
84. The DfE has also acknowledged 'the general public interest in disclosure of information to the public, to demonstrate the openness and transparency of government.'

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

85. The DfE considers that there is a very strong public interest in maintaining lawyer-client confidentiality. It has explained that it is vital

that its officials are able to consult lawyers to obtain effective legal advice, and exchange views and assessments without fear of disclosure.

86. The DfE has explained that it is essential that Government departments have access to high quality and comprehensive legal advice in order to make its decisions in a 'fully informed context'. Furthermore, legal advisors to the Government need to be able to set out arguments for and against a particular project without fear of disclosure.
87. The DfE is concerned that disclosure of legal advice has a high potential to prejudice its legal interests should it be required to defend its position. The DfE believes that disclosure of the legal advice contained within the briefing would expose its legal position to challenge and undermine its ability to rely upon the legal advice it received. Again, the DfE do not consider it within the public interest to compromise a legal position that may be required at a later date.
88. The DfE notes that weakening its position in relation to any ongoing or future legal proceedings and to do so would be a waste of resources funded by the taxpayer.

### **The balance of the public interest**

89. The Commissioner believes that the public interest lies in disclosure in this instance, though he notes the balance is very fine.
90. The Commissioner's guidance<sup>6</sup> states 'The general public interest inherent in this exemption will always be strong due to the importance of the principle behind LPP: safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.'
91. If the DfE was unable to obtain legal advice in private, or access candid legal advice, it would be at a disadvantage in any ongoing or future legal proceedings. In turn, this would have an adverse effect on decision making, compromising the ability of the DfE and its officials to carry out its public task. Disclosure would also compromise the DfE's ability to obtain good quality legal advice in the future.
92. However, looking at the information that is engaged in this instance, the Commissioner notes that it largely relates to the 'risk of challenge' surrounding the project. It is fairly common sense to assume that, if

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<sup>6</sup> [legal\\_professional\\_privilege\\_exemption\\_s42.pdf \(ico.org.uk\)](#)

parties such as educational trusts and the local authority are against the project, they may challenge it.

93. For all of the reasons listed in the public interest analysis above, the Commissioner considers that the public interest lies in disclosure.

### **Section 40(2) – personal information**

94. Section 40(2) of FOIA states:

“Any information to which a request for information relates is also exempt information if-

- (a) It constitutes personal data which does not fall within subsection (1), and
- (b) The first, second or third condition below is satisfied.”

Subsection (1) refers to exempt information that constitutes personal data of which the applicant is the data subject.

95. In this instance the relevant condition is contained in section 40(3A)(a) which states:

“The first condition is that the disclosure of the information to a member of the public otherwise than under this Act-

- (a) Would contravene any of the data protection principles.”

96. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (‘DPA18’). If this is not the case then section 40 cannot be used as a basis for refusing to disclose the information.

97. Secondly, and only if the Commissioner is satisfied that the requested information constitutes personal data, he must establish whether disclosure of that information would breach any of the data protection principles.

### **Is the requested information personal data?**

98. Part 1, Section 3(2) of the DPA18<sup>7</sup> defines personal data as:

“any information relating to an identified or identifiable living individual.”

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<sup>7</sup> [Data Protection Act 2018 \(legislation.gov.uk\)](https://legislation.gov.uk)



99. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable from that information.
100. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
101. An identifiable living individual is one who can be identified, either directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
102. The DfE has confirmed that 'The personal data we consider should be withheld relates to the personal details (i.e. names and contact details) of departmental officials below the grade of Deputy Director (DD).' The Commissioner notes that the briefing also contains the names of the Parliamentary Under Secretary of State for the School System and the Deputy Director of the DfE. Both of these names are already in the public domain.
103. The Commissioner is satisfied that the names and contact details of DfE officials both identifies and relates to individuals. Therefore the Commissioner is satisfied that this information falls within the definition of 'personal data'.
104. The fact that information constitutes personal data does not automatically exclude it from disclosure under FOIA. The Commissioner must now consider whether disclosure of the requested information would contravene any of the data protection principles.
105. The most relevant data protection principle in this case is principle (a) which states that "Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject"<sup>8</sup>.

### **Would disclosure contravene principle (a)?**

106. Personal data is processed when it is disclosed in response to the request. This means that a public authority can only disclose personal

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<sup>8</sup> [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](https://legislation.gov.uk/eur/2016/679)

data in response to an FOI request if to do so would be lawful, fair and transparent.

107. In order to be lawful, one of the lawful bases listed in Article 6(1)<sup>9</sup> of the UK General Data Protection Regulation (UK GDPR) must apply to the processing.

### **Lawful processing: Article 6(1)(f) of the UK GDPR**

108. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states: "processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data."

109. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information made under the FOIA, it is necessary to consider the following three-part test:

110. **i) Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;  
**ii) Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;  
**iii) Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

### **Legitimate interest test**

111. The Commissioner must first consider the legitimate interest in disclosing the personal data to the public and what purpose this serves. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may represent legitimate interests; they can be the requester's own interests as well as wider societal benefits. These interests can include the broad principles of accountability and

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<sup>9</sup> [Regulation \(EU\) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC \(General Data Protection Regulation\) \(Text with EEA relevance\) \(legislation.gov.uk\)](https://legislation.gov.uk/eur/2016/679)

transparency that underpin FOIA, or may represent the private concerns of the requestor.

112. It is important to remember that disclosure under FOIA is effectively disclosure to the world at large. The Commissioner is of the opinion that, if the requester is pursuing a purely private concern which is unrelated to any broader public interest, then disclosure is unlikely to be proportionate. Legitimate interests may be compelling or trivial, but trivial interests may be more easily overridden by the fundamental rights and freedoms of the data subject during the test under stage (iii).
113. In this case it is clear that the complainant is seeking access to the withheld information for a specific reason: they are against the St Bede's Free School Project and are concerned about its effect on Soham Village College.
114. The complainant does not request the names of any DfE officials in their request. The Commissioner does not believe that the complainant is specifically concerned with the names or contact details of the officials involved in the decision but the decision taken by the DfE as an organisation.
115. The Commissioner accepts that other individuals who are opposed to the St Bede's Free School Project may be interested to know which officials were involved in, or had sight of, the briefing. However, the Commissioner considers that the names and contact details contained within the briefing only act as representatives of the DfE and the Commissioner believes that the names and contact details of these individuals may only be of limited interest to the general public.
116. However, the Commissioner also accepts that legitimate interests may be represented by the broad principles of accountability and transparency that underpin FOIA. Therefore, the Commissioner will proceed to the necessity test.

### **Necessity test**

117. The Commissioner must also consider if disclosure is necessary for the purpose that this legitimate interest represents or if there is an alternative method of doing so.
118. 'Necessary' means more than desirable but less than indispensable or absolute necessity. The necessity test is a means of considering whether disclosure under FOIA is necessary to meet the legitimate interest identified, or whether there is another way to do so that would interfere less with the privacy of individuals.
119. The Commissioner is satisfied that the names and contact details of the officials involved in the briefing has not otherwise been made available

to the public. However, the Commissioner is not satisfied that disclosure of this information makes the DfE any more transparent or accountable about its rationale behind the St Bede's Free School Project. Any decision a DfE official makes will be done in their professional capacity as a representative of the DfE.

120. Furthermore, an individual who opposes the St Bede's Free School Project does not require the names or contact details of junior officials to raise their concerns. The Commissioner notes that the request cites correspondence between Baroness Berridge and Wendi Ogle-Welbourne, Executive Director of Children, Families and Adult Services for Cambridgeshire at the time.
121. There is clearly an ongoing dialogue between the DfE and the local authority and any representations that a member of the public wishes to make should be done via their MP or by writing to the council directly. They do not require the personal data contained within the briefing to do so.

### **The Commissioner's view**

122. The Commissioner has decided that disclosure is not necessary to meet any legitimate interest in disclosure and he has not gone on to conduct the balancing test.
123. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a). The Commissioner has therefore decided that the Post Office was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

### **Section 10 – time for compliance with request**

124. Section 1(1) of FOIA states that:

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

125. Section 10 of FOIA states that:

"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

126. The complainant is concerned that requests submitted to the DfE prior to the request of 26 November 2020 were not responded to. The DfE has explained that it has no record of receiving these requests. These requests, and whether or not they were received by the DfE, are not the subject of this notice.

127. However, in relation to the request of 26 November 2020 the Commissioner can see that the DfE failed to respond within twenty working days. Therefore it breached section 10.

## **Right of appeal**

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128. 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](mailto:grc@justice.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

129. 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.

130. 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**

**Alice Gradwell**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**