

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 July 2012

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

Decision (including any steps ordered)

1. The complainant has requested the names and locations of the 281 groups that applied (between 17 March 2011 and 15 June 2011) to open Free Schools in September 2012. The Department for Education (the 'DfE') initially refused this request on the basis that the disclosure of the information would prejudice the effective conduct of public affairs [section 36(2)(c)]. During the Commissioner's investigation of this case the DfE instead relied upon the exemption for information that relates to the formulation and development of government policy [section 35(1)(a)].
2. The Commissioner's decision is that section 35(1)(a) is engaged. However, he has also decided that the public interest in maintaining this exemption does not outweigh the public interest in disclosure. Therefore the information should be disclosed.
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation:
 - The requested information should be disclosed.
4. The DfE must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. The complainant made a request to the DfE for *"...the names and locations of the 281 groups that applied to open Free Schools in September 2012, in the application round that opened on 17 March 2011 and closed on 15 June 2011."* This request was received by the DfE on 22 June 2011.
6. The complainant received a response from the DfE on 22 July 2011. In this response the DfE provided a regional breakdown of the 281 Free School applications that it had received during the period in question. However, it refused to disclose the names and locations of the 281 applicant groups, stating that this information was exempt under section 36(2)(c).
7. The complainant requested an internal review, which the DfE received on 20 September 2011. The DfE carried out an internal review, and confirmed that it still believed that the requested information was exempt under section 36(2)(c).

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 recently carried out an investigation into a similar complaint against the DfE (FS50427672), where the requested information was similar to that requested in this case. During the investigation of this case the Commissioner contacted the DfE and noted that in this previous case the DfE had relied upon section 35(1)(a) to withhold the requested information. Given the close similarities between the previous case and this one, the Commissioner asked the DfE to confirm whether it was relying upon sections 35(1)(a) or 36(2)(c) to withhold the requested information. The DfE confirmed that it would rely upon section 35(1)(a) to withhold the requested information in this case. It also confirmed that it would rely upon the arguments it had provided in this previous case, as well as another case currently under investigation by the Commissioner.
10. Therefore the scope of this case has been to consider the DfE's use of section 35(1)(a) to withhold the requested information.

Reasons for decision

Section 35 – the formulation or development of government policy

11. Section 35(1)(a) of the FOIA provides that information is exempt from disclosure if it relates to the formulation or development of government policy. This is a qualified exemption and is therefore subject to the public interest test.
12. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy.
13. The Commissioner takes the view that the formulation of government policy comprises the early stages of the policy process where options are generated, risks are identified and consultation occurs. Development may go beyond this stage to the processes involved in improving or altering already existing policy such as monitoring, reviewing or analysing the effects of existing policy.
14. In this case the Commissioner has considered whether the overall purpose and nature of the withheld information can be characterised as relating to formulation or development of government policy.
15. The Free School policy was introduced in June 2010 and the DfE has explained it is still in its early stages with evaluations and experiences being incorporated into the 2013 round of applications and assessments. At the time of the request the first round of applications was mostly complete and the second round was underway with applicants due to be interviewed in the summer.
16. The DfE has argued that the Free School policy and the approval process is still in an active stage of development and the evaluation of the experience of the first and second waves has affected future rounds. The DfE further explained that following the first wave, changes were made to the application form and process.
17. In addition to this the DfE has explained that the application process is still being reviewed and evaluated. It has explained that it analyses ratios of successful and unsuccessful applications and uses its analysis in its evaluations which may be fed to organisations supporting the development of applications, such as the New Schools Network, to help applicants improve their proposals and reapply.
18. The timing of the process is important, falling just after the completion of the first wave and before decisions had been made in the second

wave. This was a period in which the DfE was still evaluating and analysing proposals to feed back into improving the process. The Commissioner's view is that whilst the policy is still being reviewed and improved, the development of that policy is still ongoing. Therefore he considers that the withheld information relates to the formulation or development of government policy and the exemption is engaged.

19. Section 35(1)(a) is subject to a public interest test. As such, the information can only be withheld if the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner has first considered the public interest in disclosure.
20. The Commissioner considers that the introduction of the Free School policy is an area of considerable public debate. This policy represents a change in national educational policy and also entails the expenditure of considerable sums of public money. The introduction of the Free Schools programme attracted a considerable amount of public, political and media attention and subsequent debate. The Commissioner therefore considers that there is a public interest in increasing the transparency of the programme and enable the public to take part in the debate about the merit of the Free School policy.
21. The DfE has recognised that there is a public interest in openness, transparency and accountability, and in understanding how decisions which could affect people's lives are taken. The Commissioner accepts that there are strong arguments about the importance of public oversight of education spending and its distribution. The disclosure of the requested information would enable the public to take part in this process and debate the extent of the spending and its geographical distribution.
22. The Commissioner also considers that any successful Free School application would have the potential to impact on the provision of education in the area in which that school would be based. Bearing this in mind, he also considers that there is a public interest in allowing people who would be potentially affected by such a school to be able to have an informed debate on any application that would affect them, or to be able to make informed representations to their local council or MP. The Commissioner considers that the disclosure of the withheld information, even when no decision had been made whether to approve the proposals (as was the situation when the request was made in this case) would contribute to this.
23. The DfE has argued that the public interest in transparency has already been somewhat met by disclosing the details of approved proposals but that the disclosure of unsuccessful proposals is not in the public interest. While the request was for a list of all applicants, and did not request that

the DfE provide separate lists of successful and unsuccessful proposals, the Commissioner accepts that this could be ascertained from a complete list once announcements have been made as to which applications have been approved.

24. In favour of maintaining the exemption, the DfE has pointed out that unsuccessful Free School proposals can be improved and resubmitted, and has given examples of unsuccessful proposals in the first wave of applications being improved and subsequently being successful in the second wave of the application process. The DfE considers that if earlier failed proposals were put into the public domain this could attract negative publicity. It argues that this would likely result in proposers being less likely to resubmit their application in the future and the resultant loss of potentially valid proposals would not be in the public interest.
25. The DfE argues that a new Free School represents increased choice for local parents, wider educational opportunities for pupils. Disclosure of unsuccessful proposals could reduce viable opportunities for pupils and parents because it would adversely impact on the DfE's ability to support projects meeting a gap in existing provision. The DfE states that this would impact on the quality of education available to children in those schools, and their future life chances. This, it has argued, would not be in the public interest.
26. Following on from this the DfE has concerns that disclosure of the requested information could lead to speculation as to why proposals were unsuccessful, for example whether the proposed area or religious character of the school was a factor. This could increase local tensions and deter other proposals.
27. The DfE has also explained that with regards to the Free Schools policy, Ministers and officials need to be able to think through implications of particular options by undertaking candid assessments of the risks of particular programmes that involve a new model of education. Part of this involves evaluating the reasons for success of proposals. The Commissioner does not consider this argument carries any weight in light of the fact that the information requested is of a very high level. Releasing a list of the applicants and their geographical area will not prevent Ministers from still evaluating proposals in more detail by looking at the full proposal forms and subsequent business plans.
28. In reaching a decision as to the balance of the public interest arguments the Commissioner has been mindful of the particular circumstances of this case.

29. In a previous decision notice (FS50412840) the Commissioner dealt with a similar request made to the DfE. This request was for the proposal form for a proposed Free School. In this case, the Commissioner concluded that the public interest was in favour of maintaining section 35(1)(a) for the proposal form for a proposed Free School. His decision was based on a number of factors but one of the key differences between that case and this one is the level of detail contained in the requested information. In the previous case, the request was for the proposal form which contained a significant level of detail of the Free School proposal in question. In this case the request is for the name and geographical area of the 281 groups who applied to open a Free School in September 2012. Taking this into account, the Commissioner considers this information to be of a much higher level than a completed proposal form.
30. In balancing the public interest arguments the Commissioner has therefore been mindful of the high level of information requested. He considers that the negative impacts of disclosure, as argued by the DfE, do not carry as much weight as they would if the withheld information was more detailed, such as proposal forms or business plans.
31. However, he does consider there is weight to the argument that disclosure could draw undue attention to applicants. He recognises that releasing the full list of applicants before a decision has been made about their proposals may lead to attention being drawn to applicants at an early stage than has previously been the case. Successful applicants would expect scrutiny of their proposals but it would not be expected before a decision has been made. The Commissioner accepts that disclosure of the requested information could potentially lead to the applicants attracting public or media attention. The Commissioner accepts that this increased attention may create a greater burden on applicants as they are likely to face scrutiny from local residents and interested parties.
32. One of the key features of any proposed new Free School should be that the proposal can demonstrate there is a gap in the provision of education in the local area, and that there is demand from the local community for the Free School. To establish this it is likely that applicants will have spoken to people in the community to gauge their views and opinions. The Commissioner considers therefore that the fact that a Free School has been proposed (and the identity of the group behind that proposal) may already be known by the local community. Therefore, whilst he accepts that the disclosure of the information may be a deterrent from reapplying for some applicants if they are unsuccessful, the high level nature of the information and the likelihood that local communities may already be aware of the proposed Free

Schools in their area weakens the strength of the argument in favour of maintaining the exemption.

33. The Commissioner considers the public interest factors in favour of disclosure are very strong in this case. The withheld information relates to the practical application of a new national educational policy and the expenditure of public money. There is a very strong public interest in providing the public with information about Free School applications, both on a national and local level. The disclosure of this information would help to increase the transparency of the programme, help public understanding and enable participation.
34. The Commissioner accepts that there are valid public interest arguments for maintaining the exemption but given the high level nature of the information and the strong public interest arguments in favour of disclosure, particularly with regard to the scale of the Free Schools programme and its impact on national education policy, he considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. Therefore the requested information should be disclosed.

Right of appeal

35. 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

36. 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.
37. 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

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