

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 May 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 list of applications to open 16-19 Free Schools and UTC's in September 2012, including their geographical areas. The Department for Education (the 'DfE') refused the request on the basis that the information related to the formulation and development of government policy (section 35(1)(a)). DfE also applied the section 21 and section 22 exemptions.
2. The Commissioner's decision is that the section 35(1)(a) exemption is engaged but after considering the public interest arguments he has concluded that the public interest favours disclosure of the requested information.
3. The Commissioner also found that the section 21 and section 22 exemptions were not engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the requested information.
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 the FOIA and may be dealt with as a contempt of court.

Request and response

6. On 15 June 2011, the complainant wrote to the DfE and requested information in the following terms:

"Please can the Department publish the list of applications to open 16-19 free schools in September 2012, including information as to which geographical area each would be located, if approved".

"Please can the Department publish the list of applications to open a University Technical College or a Technical Academy in September 2012, including the geographical area which each will be situated in if approved".

7. The DfE responded on 25 July 2011. It stated that it had published a breakdown of the 281 Free School applications¹ received by 15 June 2011 and provided a table showing a regional breakdown. The DfE also stated it would publish a list of successful applications in the autumn. However, the DfE refused to provide a list of the applications and their geographical areas as it considered that section 36(2)(c) of the FOIA applied – that disclosure would be likely to prejudice the effective conduct of public affairs.
8. Following an internal review the DfE wrote to the complainant on 3 October 2011. In its response the DfE cited three exemptions as a basis for refusing the request. Firstly, the DfE explained it was relying on section 21 (information readily accessible by other means). Secondly, the DfE applied section 22 with regards to the successful applications in the second wave as it intended to publish this list in the autumn. Finally, after reviewing the request, the DfE withdrew its application of section 36(2)(c) and instead explained it was relying on section 35(1)(a) to withhold the requested information as a full list would include failed applicants.

Scope of the case

9. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
10. The Commissioner considers that the scope of his investigation will be to establish whether the DfE was correct in its application of sections 21, 22 and 35(1)(a) of the FOIA to refuse the request.

¹ <http://www.education.gov.uk/inthenews/inthenews/a0077950/michael-gove-announces-2012-free-school-applications>

Reasons for decision

Section 21 – information readily accessible by other means

11. Section 21(1) of the FOIA states that:

“Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information”.

12. This means that where a complainant is reasonably able to obtain the information from another source then the information is exempt from disclosure under the FOIA.

13. The DfE has argued that some of the requested information is available via its website and provided a link to an announcement made on 20 June 2011 about applications to open Free Schools in 2012.

14. The Commissioner notes that this announcement provided figures for the number of applications received but did not detail the names of the applicants or their locations. In any event, this announcement was made after the complainant requested information from the DfE. The Commissioner is therefore not satisfied that any of the requested information was reasonably accessible to the complainant at the time of the request. The DfE was therefore wrong to apply section 21 of the FOIA.

Section 22 – information intended for future publication

15. The DfE has applied section 22(1) of the FOIA as a basis for withholding the information relating to successful applications in the second wave. Section 22(1) is a qualified exemption and is therefore subject to a public interest test.

16. Section 22(1) states that information is exempt if it is held by a public authority with a view to publication at some future date and it is reasonable in all the circumstances that the information should be withheld from disclosure until the date specified for publication. In order to determine whether section 22 is engaged the Commissioner therefore needs to consider the following questions:

- Was the information requested held by the DfE?
- Did the DfE have an intention to publish the information at some date in the future when the request was submitted?
- In all the circumstances of the case, was it ‘reasonable’ that information should be withheld from disclosure until some future date (whether determined or not)?

Was the information requested held by the DfE?

17. The DfE appears to have applied this exemption to specifically withhold the list of successful applications, although this has not been made clear in its submissions. The request was made on 15 June 2011 and a list of successful applicants with their geographical area was published on 10 October 2011². However, at the time the request was made, whilst all applications had been received and were held by the DfE decisions on which applications would be successful had not been made. Therefore the list of successful applications that the DfE has applied this exemption to was not held at the time of the request. For this reason the Commissioner does not accept that this exemption is engaged.

Section 35 – the formulation or development of government policy

18. 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.
19. The Commissioner has first considered whether the information in question relates to the formulation or development of government policy.
20. 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.
21. The Commissioner, following the approach of the Tribunal, has looked at whether the overall purpose and nature of the information supports the characterisation of relating to formulation or development of government policy.
22. 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.
23. The DfE has argued that 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

² <http://www.education.gov.uk/inthenews/inthenews/a00199061/79-new-schools-now-approved-to-open-from-2012-onwards>

explained that following the first wave, changes were made to the application form and process.

24. In addition to this the DfE has explained that the application process is still being reviewed and evaluated. DfE 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.
25. 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, in a period when 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 policy development is still ongoing and he therefore considers that the withheld information relates to the formulation or development of government policy and the exemption is engaged.
26. This exemption 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 gone on to consider these arguments.

Public interest arguments in favour of disclosure

27. 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.
28. 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 to part in this process and debate the extent of the spending and its geographical distribution.
29. 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.

Public interest arguments in favour of maintaining the exemption

30. The DfE recognises the public interest in transparency in relation to the new policy area and specific parental interest in new local opportunities. It believes this is met by disclosing the details of approved proposals but that the disclosure of unsuccessful proposals is not in public interest. While the request was for a list of all applications 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.
31. The DfE has pointed out that any unsuccessful Free School and UTC proposals can be improved and resubmitted and has given examples of unsuccessful proposals in the first wave of applications being improved and 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.
32. The DfE argues that a new Free School or UTC 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"*.
33. 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.
34. 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 has considered this argument but does not consider it carries any weight in light of the fact that the information requested is of a very high level. Releasing a list of applications 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.

Balance of the public interest arguments

35. In a previous decision notice (FS50412840) the Commissioner dealt with a related 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 the exemption for the proposal form. His decision was based on a number of factors but one of the key differences between the two cases is the level of detail requested. 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 proposed Free Schools and UTC's. The Commissioner considers this information to be of a much higher level than the proposal form itself.
36. In balancing the public interest arguments the Commissioner has therefore been mindful of the high level of information requested and 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.
37. 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 applications before a decision has been made may lead to attention being drawn to proposers at an early stage than has previously been the case. Successful proposers 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 that proposal, and the individuals involved in that proposal, 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.
38. One of the key features of any proposed new Free School or UTC should be that the proposal can demonstrate there is a gap in the local area and there is demand from the local community for the Free School or UTC. 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 or UTC has been proposed 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 proposed Free Schools and UTC's in their area, weakens the strength of the argument in favour of maintaining the exemption.

39. 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.
40. 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 disclosure outweighs the public interest in maintaining the exemption.

Right of appeal

41. 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

42. 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.
43. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Steve Wood
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF