

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 12 May 2014

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

#### Decision (including any steps ordered)

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1. The complainant has requested information from the Department for Education (the "DfE") relating to Free School proposals received by the DfE during the "fifth wave" (received by 13 September 2013 for opening from September 2015).
2. The DfE withheld the information under section 22 of the FOIA.
3. The Commissioner's decision is that the DfE has incorrectly applied section 22 of the FOIA to the withheld information.
4. Because the information has since been disclosed, the Commissioner does not require any action from the DfE.

#### Request and response

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5. On 18 September 2013, the complainant wrote to the DfE and requested information in the following terms:

*"I am writing to make a request for all the information to which I am entitled under the Freedom of Information Act.*

*In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand that under the act, you are required to advise and assist requesters.*

*I am seeking the following information in electronic form.*

*A list of Free School proposals received by the Department for Education during the "fifth wave" (i.e. received by 13 September for opening from September 2015), giving for each:*

- *The name of the project*
  - *The local authority/area of the proposed school*
  - *The previous name (if applicable) of the proposed school*
  - *The faith (if any) of the proposed school*
  - *Whether the proposal was received in the first wave, second or third waves (and if so, which)"*
6. The DfE responded on 16 October 2013. It stated that it held the information requested but it was being withheld because an exemption under section 22 of the FOIA applied.
  7. The DfE explained how the government has already determined that it will publish the Wave 5 Free School applications information on its website in due course. It added that it is not reasonable for the government to be expected to release "*piecemeal*" information in advance of its planned timetable and planned publication of the Wave 5 applications information, and that there is a strong argument in favour of allowing everyone to view this information at the same time.
  8. The DfE clarified the result of releasing the requested information would be that partial information being disclosed over a protracted period would lead to confusion and inaccuracy. The DfE stated that the balance of public interest falls in favour of the maintenance of this exemption in relation to the information connecting to this request.
  9. On 25 October 2013 the complainant requested an internal review.
  10. Following an internal review on 21 November 2013 the DfE wrote to the complainant upholding its original decision under section 22 of the FOIA and that the balance of public interest arguments lay in withholding the information at this time.
  11. The DfE added that it had confirmed to the complainant the importance of the DfE's freedom to determine its own publication timetable in a planned and managed way. It explained that whilst acknowledging the general public interest in disclosure, it agreed that this was outweighed by the public interest in allowing everybody to view the information, at the same time.

## Scope of the case

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12. The complainant contacted the Commissioner on 1 December 2013 to complain about the way his request for information had been handled.
13. On 23 January 2014 the DfE released some of the requested information which was made available on its website.
14. On 3 February 2014 the complainant expressed his dissatisfaction with the recently released information.<sup>1</sup> He stated that only some of the relevant information was released and that it did not contain the names of the groups whose applications have been rejected and also it did not contain "*religious designation or faith ethos of the applicants.*"
15. Following a telephone conversation with the complainant in which the complainant's concerns were discussed and the recent information released by the DfE, the Commissioner noted to the complainant that the remaining information requested would be available for viewing on the DfE's website in the near future. This information was subsequently published by the DfE.<sup>2</sup>
16. In view of this, the Commissioner asked the complainant how he wished to proceed with the case.
17. The complainant requested that the Commissioner continues to issue a decision notice with respect to the specific request he made on wave 5 of Free School proposals. Therefore the scope of this case has been to consider whether the DfE was correct to rely upon section 22 to refuse to disclose the requested information at the time of the request.

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<sup>1</sup> <https://www.gov.uk/government/news/successful-free-school-proposals-announced>

<sup>2</sup> <https://www.gov.uk/government/publications/free-schools-wave-5-application-information>

## Reasons for decision

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### Section 22 – information intended for future publication

18. Section 22 of the FOIA says that information is exempt if, at the time a public authority receives a request for it:
  - the public authority holds it with a view to its publication;
  - the public authority or another person intends to publish the information at some future date, whether determined or not; and
  - in all the circumstances it is reasonable to withhold the information prior to publication.
19. During the investigation of the case the DfE clarified that it was finalising the excel spreadsheet for wave 5 and it would publish this on 14 February 2014. This would include all the requested information. As noted above, this information was subsequently published by the DfE.
20. The DfE confirmed that the exemption under section 22 of the FOIA applied to this information. It stated that the DfE has to rely on its own publication timetable.
21. The Commissioner accepts that the DfE held the information at the time it received the request, with a view to publish the information at a future date.
22. The Commissioner has then considered whether it was reasonable, in all the circumstances, for the DfE to withhold the information prior to the publication date.
23. The complainant has argued that the names and details of free school applicants should enter the public domain prior to the DfE deciding which to approve, *"...as otherwise this represents a serious democratic deficit and lack of transparency in the Free Schools application process."* The complainant added that he believed *"that it appears that the amount of time it takes from the DfE receiving Free School applications and deciding which to back is shorter than the time it takes to go through the FOI process for the information and for the ICO to then reach a decision on a subsequent complaint."*
24. The DfE is of the view that it is not reasonable for the government to be expected to release piecemeal information in advance of its planned timetable and planned publication of the Wave 5 applications

information, and there is a strong argument in favour of allowing everyone to view this information at the same time. The DfE added that if it were to release this information as requested on varying occasions this would result in partial information being released over a protracted period leading to confusion and inaccuracy.

25. The Commissioner has also considered arguments that the complainant has put forward in a connected case; that the process for opening other types of schools is far more open. The other processes require publication once proposals are submitted, and similar information to the information withheld under section 22 is published whilst the application process is still live. The complainant cites The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2007 as requiring publication. He argues that in contrast: "*the identities of Free School applicants are not made publicly available until the DfE has stated its preferences for which groups should open (i.e. pre-approval)*".
26. Without needing to reach a conclusive view on the difference between the process for publishing proposals to open free schools and other types of school the Commissioner has concluded that the difference in transparency between the systems is a relevant factor to take into account. When considering the reasonableness of withholding the information until the DfE's publication date the Commissioner finds that they should have taken into account the importance of information from free school proposals being available whilst the process of considering applications is live. This would enable public debate and participation in the process. The Commissioner would also contend that there is a relevant parallel between the need for openness in relation to planning applications e.g. whilst the applications are being considered.
27. The Commissioner has considered the reasonableness of the arguments made by the DfE about piecemeal disclosure. Whilst the Commissioner accepts, in general terms, that they can be relevant arguments under section 22, he does not believe DfE have argued them convincingly in this case. The deadline for applications had closed by the time the complainant had made his request and the Commissioner is not convinced this would lead to piecemeal disclosure. He accepts this would be different if the applications had to be disclosed "bit by bit", as they were received and before the deadline. The Commissioner also accepts the general relevance of arguments about disruption to timetables and the need to plan disclosure but the DfE have advanced little specific evidence as to why this is important or relevant in this case.
28. The Commissioner finds that it was not reasonable, in all the circumstances, for the DfE withhold the information until publication at a

later date. He therefore finds that section 22 is not engaged and he has not gone on to consider the public interest test.

## **Other Matters**

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29. Whilst not making a formal finding in this decision notice the Commissioner also notes that the information requested in this case may constitute a dataset under the Section 11(1A) of the FOIA. If the information is a dataset the DfE will need to consider their obligations under section 19(2A), including publishing the information in a form capable of re-use and any updated version held by the authority of such a dataset, unless the DfE is satisfied that it is not appropriate for the dataset to be published. Further guidance on the dataset provisions is available on the ICO website<sup>3</sup>.

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[http://ico.org.uk/for\\_organisations/guidance\\_index/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_specialist\\_guides/datasets-foi-guidance.pdf](http://ico.org.uk/for_organisations/guidance_index/~media/documents/library/Freedom_of_Information/Detailed_specialist_guides/datasets-foi-guidance.pdf)

## Right of appeal

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30. 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](mailto:GRC@hmcts.gsi.gov.uk)

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

31. 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.
32. 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**