

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 November 2021

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

Decision (including any steps ordered)

1. The complainant has requested information relating to a free school presumption competition. The Department for Education ("the DfE") provided some information and relied on section 36 (effective conduct of public affairs) and section 43 of the FOIA (commercial interests) to withhold the remainder.
2. The Commissioner's decision is that sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged, but only in respect of some of the withheld information. However, where they are engaged, the balance of the public interest favours maintaining the exemption. The remaining withheld information engages both section 36(2)(c) and section 43(2) of the FOIA, but the Commissioner finds that the balance of the public interest only favours maintaining section 43(2). As the DfE failed to complete its public interest considerations within a reasonable timeframe, it breached sections 10(3) and 17(3) of the FOIA respectively.
3. The Commissioner does not require further steps.

Request and response

4. On 20 July 2020, the complainant requested information of the following description:

"Under the Freedom of Information Act, I should like to request information relating to the free school competition run by Milton Keynes Council for Glebe Farm School.

"In particular:

"All internal and external emails, and any other correspondence, related to the free school competition for Glebe Farm School, Milton Keynes, up until the present day

"Information sent by MKC to the RSC in support of its preferred Trust, including assessment criteria, weighting of criteria and performance of each application against scoring system

"Notes taken, or report made, by the DfE representative at the presentations/interviews for the shortlisted organisations

"All the information provided to the Headteacher Board for the meeting held on 4 March 2020 in support of Item 1.2 on the agenda (Whether or not to approve the Local Authority's preferred trust for the Glebe Farm, Milton Keynes, presumption project)

"The application form of the successful organisation together with any supporting documentation submitted by this organisation"

5. On 11 November 2020, the DfE responded. It provided some information within the scope of the request but refused to provide the remainder. It cited sections 36 and 43 of the FOIA as its basis for doing so.
6. The complainant requested an internal review on the same day. The DfE sent the outcome of its internal review on 8 December 2020. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 12 December 2020 to complain about the way her request for information had been handled.

8. On 6 July 2021, the Commissioner opened her investigation with a letter to the DfE, asking for copies of the information being withheld and explanations as to why the cited exemptions would apply.
9. The DfE provided its submissions on 27 August 2021. It maintained its position that the exemptions would apply and noted that the Commissioner had agreed that very similar information, requested from both Milton Keynes Council and Inspiring Futures Through Learning, was exempt – for the same reasons being relied upon here.
10. However, in July 2021, after the Commissioner's initial investigation letter had been sent, the First Tier Tribunal promulgated its decision in *Peter Church v Information Commissioner* EA/2020/0187V.¹ This case also involved a bidding process to run a Free School and the Tribunal found that the commercial prejudice envisaged was weak and that the public interest was such that it favoured disclosure. Drawing specific attention to this fresh judgement, the Commissioner asked the DfE to revisit its arguments about commercial prejudice and make a fresh assessment of the material to decide which was of particular commercial sensitivity. This unfortunately caused some delays to the complaint.
11. Matters took a further twist in September 2021, when a differently-constituted Tribunal issued a judgement in *Currie v Information Commissioner* EA/2020/0350P² which considered a 560 page bundle of withheld information – including some of the information being withheld here. Whilst the Tribunal in *Currie* considered that section 43 was not engaged in relation to *some* of the withheld information, where it considered the information that is also being withheld in this case, it found that section 43(2) of the FOIA was engaged and that the balance of the public interest favoured maintaining the exemption.
12. The Commissioner has set out below her approach to resolving the tensions between the two apparently contradictory judgements.
13. At a late stage of the investigation, the DfE withdrew its reliance on exemptions to withhold a small portion of information and this was disclosed to the complainant on 12 November 2021.
14. The Commissioner considers that the scope of her investigation is to:

¹

<https://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i2886/Church,%20Peter%20EA.2020.0287%20150721.pdf>

² At the point this notice was issued, this decision had been promulgated to the parties, but not published.

- a. Determine the extent to which any or all of the limbs of section 36 apply to the remaining withheld information (as the DfE is relying on this exemption in relation to *all* the information it is withholding).
- b. Where information is not covered by section 36, determine whether any of that information would be covered by section 43 (which the DfE is only relying on in respect of *some* of the requested information)
- c. Assess the procedural handling of the request.

Reasons for decision

Section 36 – Prejudice to the Effective Conduct of Public Affairs

15. Section 36(1) states that this exemption can only apply to information to which section 35 does not apply.
16. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:
 - (a) *would, or would be likely to, prejudice—*
 - (i) *the maintenance of the convention of the collective responsibility of Ministers of the Crown, or*
 - (ii) *the work of the Executive Committee of the Northern Ireland Assembly, or*
 - (iii) *the work of the Cabinet of the Welsh Assembly Government.*
 - (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.*
- (3) *The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2).*

(4) In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

17. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion. The Commissioner's role is to: establish that an opinion has been provided by the Qualified Person; to assure herself that that opinion is "reasonable" and; to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

Who is the qualified person and have they given an opinion?

18. In respect of a government department, any Minister of the Crown is entitled to act as the qualified person for the purposes of section 36 of the FOIA.
19. The DfE supplied the Commissioner with a copy of a submission that had been presented to Baroness Berridge on 30 October 2020, asking her to sign a declaration stating that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of the FOIA were engaged and providing a rationale for that decision. The DfE also provide a copy of the declaration, signed by Baroness Berridge and dated 6 November 2020.
20. At the time Baroness Berridge signed the declaration, she was a Parliamentary Under Secretary of State at the DfE, making her a Minister of the Crown and thus entitled to act as the Qualified Person for the purposes of this request.
21. Whilst it would have been preferable if the Qualified Person had more explicitly adopted the reasoning in the submission as her own (or highlighted any points with which she disagreed), the Commissioner nevertheless accepts that in signing the declaration that she did, the Qualified Person has tacitly accepted the reasoning in the submission.
22. The Commissioner is therefore satisfied that the Qualified Person gave their opinion on 6 November 2020.

What was the Opinion and was it reasonable?

23. It is not the role of the Commissioner to substitute her own opinion for that of the Qualified Person. The Qualified Person is best placed to know the circumstances of their organisation and the significance of the

information concerned. It thus follows that the bar for finding that an opinion is "reasonable" is a low one.

24. A "reasonable" opinion need not be the most reasonable opinion available. It need only be within the spectrum of opinions that a reasonable person might hold and must not be irrational or absurd.
25. The Commissioner considers that an opinion is likely to be unreasonable if it fails to make out the grounds for the exemption or if the information is already in the public domain.
26. The Qualified Person's opinion sets out that section 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA were engaged because the withheld information:

"contains reflections about the [Local Authority]'s assessment process, and candid views about the [Multi-Academy Trusts]. This includes statements about the LA's relationships with the prospective trusts. To release this information could be detrimental to the LA's relationships with such trusts as they may want their relationship status with public bodies to remain private. Officials need space to develop their thinking, carry out candid risk assessments, and explore options and potential implications. If this type of free and frank discussion were to be in the public domain, this would also reduce the effectiveness of advice given to RSCs in the future."

27. The Qualified Person also considered that section 36(2)(c) of the FOIA would be engaged because:

"Applications submitted by MATs as part of this competition should be exempt under s36(2)(c), if this information were to be in the public domain trusts would not feel comfortable to submit their true growth plans, for the risk of plagiarism from its peers. Also, MATs may feel judged on the quality of their applications and decide to not partake in future competitions if their applications are disclosable. If this were to happen the pool of potential sponsors would dramatically decrease, and there may not be sponsors of a high quality to help promote outstanding education."

"The information submitted to the department from the LA details the outcome of their assessment process, including scoring and commentary of the MATs that applied. To disclose this information would also damage the relationships that the LA has with trusts. If this were to happen in the future the decision-making process may not be properly recorded to avoid creating information which is disclosable."

28. Finally the Qualified Person noted that:

"Disclosing this information can damage the relationships we have with trusts which we rely on to take on Inadequate schools and provide good educational provision."

29. The Qualified Person considered that, for these reasons, the lower bar of "would be likely to" prejudice the effective conduct of public affairs was met.
30. The submission presented to (and signed by) the Qualified Person argued that all three limbs of the exemption were being applied to all the withheld information. Whilst the Commissioner accepts that it is reasonable to consider that some of the limbs are engaged in respect of some of the information, it is not reasonable to consider that all the limbs are engaged in relation to all of the information.
31. The withheld information in this case comprises of: the bid submissions from the Multi-Academy Trusts (MATs) that competed to run Glebe Farm School; the scoring table demonstrating the score allocated to each bid for each criterion; a briefing note from the DfE to Milton Keynes Council regarding one of the Trusts and papers submitted to the head teacher board.
32. Turning first to the bid submissions, the Commissioner does not consider it reasonable to suppose that disclosure of these documents would inhibit either the free and frank provision of advice, or the free and frank exchange of views for the purpose of deliberation – the prejudice envisaged by sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA.
33. The bid submissions were not prepared for the purposes of providing advice to the DfE, the Council, or anybody else. The purpose was to put forward the particular MAT's case as to why it was the MAT best suited to running Glebe Farm School.
34. Equally, these documents do not reflect an exchange of views or any form of deliberation. At the point they had been prepared, the deliberation (in order to decide which the best MAT to sponsor the school would be) had yet to take place. The Commissioner does not therefore consider that either of these limbs has been made out in respect of this information, therefore this part of the Qualified Person's opinion is not reasonable and these limbs are not engaged in respect of this information.
35. However, she does accept that the Qualified Person's opinion is reasonable in respect of the correspondence exchanged between the DfE and the Council. This correspondence does reflect an exchange of views and advice passing between those organisations and it is not

unreasonable to suppose that disclosure of the information might inhibit this process in the future.

36. The Commissioner therefore considers that sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA are engaged in respect of the scoring sheet and the correspondence between the DfE and the Council.
37. Next, the Commissioner has turned her attention to section 36(2)(c) of the FOIA.
38. The caselaw in respect of this limb has focused on the need for the Qualified Person to identify some form of prejudice that is not envisaged by any limb of section 36, or indeed any other exemption. If no other prejudice is identified then disclosure will not "*otherwise* prejudice" the effective conduct of public affairs.
39. In respect of the correspondence that the Commissioner has found would engage sections 36(2)(b)(i) and 36(2)(b)(ii) of the FOIA, the Qualified Person's opinion does not identify any additional prejudice that might result from disclosure that is not already covered by these limbs of the exemption.
40. The concerns about the impact on relationships with stakeholders if a public authority's internal thinking were revealed is already covered by the protections for free and frank advice or deliberation – it does not need additional protection.
41. The Commissioner therefore finds that this information does not engage section 36(2)(c) of the FOIA.
42. Turning next to the bid submissions, the Qualified Person's opinion is that disclosure would cause bidders to submit lower quality applications in future for fear of disclosing commercially confidential information. This inhibition is already envisaged by the section 43 exemption and, again, does not need additional protection.
43. However, the Qualified Person has also noted that disclosure of this information would damage the DfE's relationship with MATs and that this might be more broadly harmful. The Qualified Person has noted that the DfE will often step in to ask a particular MAT to take on a failing school in a bid to improve that school's performance – and that MAT's might be less willing to do so in the event that the DfE has undermined the relationship of trust.
44. Whilst the Commissioner will comment below on her assessment of the likelihood of this prejudice occurring, she accepts that it is more than a remote or hypothetical possibility. To that extent, the Qualified Person's

opinion is not irrational or absurd and therefore section 36(2)(c) of the FOIA is engaged in respect of the bid submissions.

Public interest test

45. Even where the Qualified Person has identified that disclosure of information would be likely to cause prejudice, a public authority must still disclose that information unless it can demonstrate that the public interest favours maintaining the exemption.
46. Given that the Commissioner has accepted the possibility that disclosure might cause prejudice, there will always be an inherent public interest in preventing that from occurring. However, the weight that should be attached to that public interest will be determined by the severity of the prejudice and the likelihood of it occurring.
47. The Qualified Person has stated – and the Commissioner accepts as reasonable – that the lower bar of prejudice is engaged. This means that 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.
48. The complainant argued that there was "suspected maladministration" in respect of the process by which the competition had been run – although was unable to point to any specific evidence that this had occurred. This allegation was also put before the Tribunal in *Currie* without success.
49. The Commissioner recognise that there will always be a public interest in ensuring that organisations charged with spending taxpayers' money are doing so properly. Disclosure of the requested information would allow those organisations to be held accountable and would enhance the transparency of the process by which bidders for Free Schools are selected.
50. In this particular case, the Commissioner considers that the public interest is enhanced because of the nature of the contract being awarded.
51. The bid process being carried out here is not the equivalent of Milton Keynes Council deciding who will clean its schools, provide its IT support or manage its payroll for the next three years. The Council was selecting a provider to take charge of a school and, hence, the education of several hundred children, for an indefinite period. There is therefore a much stronger than usual public interest in understanding how that process was run and why the winning bidder was selected.

52. In respect of the correspondence passed between the DfE and the Council, the DfE argued that the public interest should favour maintaining sections 36(2)(b)(i) and 36(2)(b)(ii) because:

"Clearly, the details expressed in such documents are candid, and there was no expectation that such free and frank advice would be released into the public domain, and that this information was provided for the purposes of deliberation. To release such forthright views, which are intended to allow us to fully consider the position and background of such trusts, would also be likely to lead to LA and DfE officials being less forthright and candid when recording and presenting such information to RSCs and HTB. This could lead then limit the detail available when deliberating and discussing trusts, leading to decisions being made without the level of detail that we currently provide and receive as part of our process of deliberation and consideration.

"The department relies on the clarity of the views and opinions of all parties as part of this process, to ensure that we can understand the specific context of the trusts and LAs in question, and to help to assess the suitability and capacity of trusts applying to take on more academies or new schools. To deter those involved from providing such views for fear that they will go into the public domain would lead to the department being unable to fully understand the full background, context and future plans of trusts, and thus lead to the department being less effective in its role in advising/approving trusts to take on more academies. Given new provision and the education of children is at the heart of this, to deter such free and frank advice for RSCs and HTBs to deliberate, thus finding the most suitable trust to support struggling and new schools, would not be in the public interest.

"As well as enabling the department to understand the local context of LAs and trusts, including any issues or challenges they face, such candid exchanges are also important for good government, by enabling government to develop policies and structures which enable the delivery of our Academy and attainment policies, as well as the provision of new schools and sponsored academies policies. If the department has a less clear understanding of the detail of such risks/issues faced by trusts and LAs, we could miss an opportunity to provide advice to individual trusts, LAs and the wider sector, thus missing opportunities to improve our policies and provision."

53. Having considered the particular information in question, the Commissioner is satisfied that the public interest favours maintaining these limbs of the exemption.

54. Whilst the Commissioner is always sceptical of so-called "chilling effect" arguments, such as those advanced by the DfE here, in this particular case, she notes that the documents in question do involve the candid assessments of both DfE and Council officials. These officials were sharing intelligence in order to assist the Council in the decision it had to make.
55. Whilst officials should be robust and not easily dissuaded from providing frank view, the Commissioner recognises that this is an occasion where officials do need a private space in which to exchange views.
56. The Commissioner considers that the provision of such intelligence to be a key part of the decision-making process and it is one that would be considerably inhibited by disclosure of information of this kind. Candour is an essential part of this process and officials must be free to be candid without considering what public perception of that advice (or the perception of the MATs) might be.
57. The Commissioner is therefore satisfied that, where sections 36(2)(b)(i) and 36(2)(b)(ii) are engaged, the public interest favours withholding the information.
58. Turning next section 36(2)(c), the Commissioner accepted that the Qualified Person's opinion was reasonable in this respect because MATs may be less likely to take on failing schools if the DfE breached its relationship of trust. Surprisingly, the DfE did not develop this argument further in its submission.
59. Whilst the Commissioner accepts that it is *possible* that some MATs may be less inclined to engage with the DfE in future if the information is disclosed, she does not consider it is *likely*.
60. Firstly, the Commissioner notes that the FOIA is well established piece of legislation – the regime having been in operation for over 15 years. Organisations that interact with public authorities know (or, at least, should know) that there is a possibility that their correspondence may, in future, be disclosed under the FOIA. The Commissioner does not consider that the possibility of disclosure should prevent such interactions because organisations should have confidence that the most sensitive information will not normally be disclosed.
61. In this case, the various MATs will all themselves be public authorities and therefore well aware of the obligations of the FOIA.
62. Secondly, the Commissioner is not persuaded that the willingness of a MAT to bid for, or take on, a new school will primarily be driven by the ebbs and flows of its relationship with the DfE or with a local education authority. Rather, any expansion will depend on the MAT's assessment

of its own capacity to absorb a new school. A MAT which considers that adding a new school will overstretch its leadership resources is not likely to take on a new school simply to maintain good relations with the DfE.

63. Equally, whilst MATs are not profit-making enterprises, the Commissioner considers that there are still incentives for each MAT to expand – particularly those MATs which have strong and distinctive educational visions that they wish to see more widely adopted. The Commissioner notes that several of the bid submissions referred to expansion plans – and that this appeared to be a largely commercial consideration.
64. The Commissioner therefore considers that, in the circumstances of this case, the public interest does not favour maintaining this particular exemption.
65. As the DfE has cited both section 36 and section 43 in respect of the bid submissions, the Commissioner cannot order disclosure of this information unless she is satisfied that neither exemption applies. She has therefore next considered whether section 43 is engaged in respect of this information.

Section 43 – commercial interests

66. Section 43(2) of the FOIA states that:

Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).

67. The exemption can be engaged on the basis that disclosing the information either “would” prejudice commercial interests, or the lower threshold that disclosure only “would be likely” to prejudice those interests. For the Commissioner to be convinced that prejudice “would” occur, she must be satisfied that there is a greater chance of the prejudice occurring than not occurring. To meet the threshold of “would be likely to” occur, a public authority does not need to demonstrate that the chance of prejudice occurring is greater than 50%, but it must be more than a remote or hypothetical possibility.
68. In the Commissioner’s view it is not sufficient for a public authority to merely assert that prejudice would be likely to occur to another party’s commercial interests to engage the exemption. Nor is it sufficient for the other party to assert that such prejudice would be likely to occur. The public authority must draw a causal link between disclosure of the information and the claimed prejudice. It must specify how and why the prejudice would occur.

The DfE's position

69. The DfE explained that, in its view, disclosure “would be likely to” prejudice the commercial interests of the MATs that had submitted bids.
70. In explaining why this exemption would be engaged, the DfE noted that it had sought the views of the winning bidder, Inspiring Futures through Learning (“IFtL”) on disclosure. The DfE noted that:

“IFtL have highlighted that access to their successful application and any associated documents would have a detrimental impact on their commercial interests, given that this information provides a detailed understanding into how IFtL operates as a trust and a commercial organisation, including details of its strategies and its commercial approach when making such bids.

“Although the remaining applications in scope of the request were unsuccessful, this does not mean that revised versions of these applications will not be successful in future bids to take on school. Irrespective of being unsuccessful on this occasion, this does not detract from the fact that this information provides, as it does for IFtL, an understanding into how each of these trusts operates as a commercial entity, and of their strategies and commercial approach when making such bids. Therefore, release would be likely to have a detrimental impact on all the trusts that applied.”

71. In its correspondence to the DfE, IFtL did not provide any specific arguments about why its interests would be prejudiced. However IFtL did point out that it had itself received an FOI request for its bid submission and drew attention to the Commissioner’s decision notice finding that disclosure would prejudice its commercial interests.³
72. The DfE also noted that the Commissioner had similarly upheld the section 43(2) of the FOIA in respect of a request for the same bid submissions, but made instead to the Council.⁴ It noted that, whilst it had only consulted IFtL, it considered it reasonable to suppose that the sentiments expressed by IFtL would be broadly shared by the unsuccessful bidders.

³ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618531/ic-46987-y7k6.pdf>

⁴ <https://ico.org.uk/media/action-weve-taken/decision-notices/2020/2618710/ic-44850-d0m3.pdf>

The Commissioner's view

73. The Commissioner notes that, whilst both IFtL and the Council argued that disclosure "would" prejudice the commercial interests of the bidders, the DfE is only arguing for the lower threshold of "would be likely to" prejudice those interests.
74. The Commissioner will discuss in more detail under the public interest test, the differing approaches taken in the *Church* and *Currie* decisions, but the Tribunal found in both cases that section 43(2) of the FOIA was engaged in relation to the bid submissions.
75. Having reflected on both decisions, the Commissioner is satisfied that disclosure would be likely to prejudice the commercial interests of the bidders. In doing so, she adopts the same line of reasoning set out in decision notice she has issued to IFtL and to the Council. She also accepts it is reasonable to assume that IFtL's concerns are likely to be shared by its competitors.
76. Having found that section 43(2) of the FOIA is engaged, the Commissioner has gone on to consider the balance of the public interest.

Public interest test

77. As with section 36, even though information may be commercially sensitive, it must still be disclosed unless the balance of the public interest favours maintaining the exemption.
78. Once again, having accepted that prejudice could result from disclosure, there will be some public interest in preventing that prejudice from occurring. However, once again, that will depend on the facts of the case.
79. The complainant did not provide any separate public interest arguments in respect of this exemption, but the Commissioner considers that the arguments set out in paragraphs 48-51 apply equally here.
80. In explaining why the public interest should favour maintaining the exemption, the DfE explained that:

"Information relating to the new Glebe Farm free school includes budget allocation information. If released this could add prejudice to the competition, allowing third party bidders and suppliers providing services to the trust and school to tailor and raise their prices, if they believe that there is adequate space in the budget to do so. Disclosure of this information would also be likely to inhibit the LA's ability to successfully participate in a commercial activity for this project and future presumptions."

"The disclosure of budgets would be detrimental for the Glebe Farm project as this would reduce the LA's ability to negotiate or compete in a commercial environment, given that potential bidders and any future suppliers would have access to, and knowledge of, the budget associated with this school. In addition, to release this information could have a negative impact on the commercial revenue of this project or threaten its ability to obtain supplies or secure finance. Third parties may make judgements on the funding allocated to this project without being properly informed. This would result in the less effective use of public money and thus a reduction in value for money.

"Information regarding the project funding would weaken the LA's position in a competitive environment by revealing this specific, market-sensitive information. This would include disruption to past and future new presumption competitions, with third parties being likely to reassess their bids/supply contracts in light of such budgetary information.

"Disclosure of commercially sensitive information would make it less likely for trusts, companies or individuals to provide the department or LAs with commercially sensitive information in the future, if they felt that their own commercial information would be likely to make it into the public domain, thus reducing their competitiveness in the market.

"We believe that the release of this information would allow future competitors to 'tap into' commercial information and strategies used by other trusts, whose applications had been successful, to help mould their own applications. This would obviously put the trust's whose application, as well as assessments and associated information, fall into scope of this request at a commercial disadvantage when it comes to future applications. It would also have an impact on the fairness of the market when assessing applications, and would weaken the broader application and assessment process, with some trusts being at a commercial advantage based on the commercial information of their competitors being in the public domain. To disrupt a fair and successful process, where the best trusts are found to support underperforming or new schools, would not be in the public interest."

Church v Currie

81. As the Commissioner has noted above, since she opened her investigation of this complaint, the First Tier Tribunal has issued two decisions in respect of Free School competitions. Both these decisions

considered similar information (ie. bid submissions and scoring) and the *Currie* decision included consideration of the exact information being withheld here. Yet the Tribunal took two radically different approaches to the same issue.

82. In the *Church* decision (which was issued first), the Tribunal was asked to consider information requested from Hertfordshire County Council in respect of a Free School Competition run in Bishop's Stortford. The Tribunal commented that:

*"In arguing that the information of this specific [sic] would prejudice commercial interests reliance is placed on consideration of the arrangements for the tendering for services by public authorities and an assumption that the same considerations apply in this case. It seems to the tribunal that this is a misplaced focus. Such tenders are usually focussed on the price to the public authority of a specific service for a number of years (often three) and would frequently involve the pricing of different elements of the service. That is not the case here. **There is barely a single figure in the documents, the information identified as needing protection on commercial sensitive grounds is neither numerical nor managerially or financially sophisticated.** The competition is not, in that sense, a financially driven competition nor is there evidence of innovative managerial thinking. Although the exemption is engaged, it is only weakly so. [emphasis added]"*

"13. The competition in this case was between a number of trusts with their competing proposals to run schools in Bishops Stortford indefinitely – it may be noted that some Voluntary Aided Schools came into existence in the 19th Century, started receiving public money under the terms of the 1870 Education Act (colloquially "Forster's Education Act") and continued to do so into the 21st Century. Free Schools and Academies are the latest iteration of the process by which independent organisations can receive public funds to provide education. This competition was envisaged to place responsibility for the provision of education in Bishop's Stortford in the hands of a group of charity trustees for a very long period of time. The selection of the winning trust is therefore a matter of considerable significance. The tribunal is satisfied that the balance of public interest is decisively weighted in favour of disclosure of the commercial interest material in the applications sought by part 1 of the request."

83. However, in September 2021, a differently-constituted Tribunal promulgated a further decision. In *Currie*, the Tribunal was asked to

consider a substantially similar request made to the Council.⁵ Whilst the scope of information the Council held was larger than that held by the DfE, both public authorities held copies of the bid submissions.

84. Whilst the Tribunal found that several sections of the withheld information did not engage section 43(2) of the FOIA at all, the bid submissions themselves did engage the exemption. The Tribunal commented that:

"27. Having seen the withheld material, however, it is our view that the exemption in s43(2) FOIA does apply to much of it, and that the public interest balance is in favour of withholding the material. This is essentially for the reasons explained by the Commissioner in her decision notice.

"28. Thus, much of the material is commercial in nature and disclosure would be prejudicial to third parties, specifically those bodies involved in competitive tendering to run an Academy school. Such bodies would expect that information about the process would not be made public, and there is a real risk that information would be disclosed which aid competitors in future tendering competitions, to the detriment of those third parties.

"29. We also agree that for the information to which s43(2) FOIA applies, the public interest balance is in favour of withholding the information for the reasons set out by the Commissioner."

The Commissioner's view

85. The Commissioner notes that, as a matter of law, she is not bound to follow (or even refer to) either the *Church* or the *Currie* decision in this case.
86. In both cases the Tribunal considered similar but not identical information. It assessed both cases on their own facts and, having done so, was drawn to different conclusions on where the balance of the public interest lay in each case. The Tribunal is entitled (and indeed obliged) to base its decisions on the particular facts of each case – as indeed the Commissioner does.

⁵ The *Currie* decision arose out of an appeal of decision notice IC-44850-D0M3 which was cited above.

87. However, given their recency and diverging approach to the issue of Free School competitions, the Commissioner feels obliged to confront both decisions.
88. The Commissioner notes that whilst the *Church* decision considered a different set of submissions, the features the Tribunal drew attention to (particular in the emboldened section of the decision quoted above) are also present in the current withheld information. The withheld information in this case contains relatively few figures and very little that the Commissioner considers to represent genuinely innovative managerial thinking.
89. Indeed, the Commissioner notes that the withheld information contains much that is bland and generic. Whilst the information is not published the Commissioner is sceptical of the extent to which each of the bidders is genuinely ignorant of the strategies employed by its competitors – and the extent to which those strategies would not become obvious once a new school opened.
90. There must also be some doubt about the extent to which the features of the Glebe Farm School competition would be replicated in future Free School competitions. A distinctive feature of Glebe Farm School was that it would, once fully functional, educate students from the Reception class all the way to Year 11 (rather than observing the more traditional primary/secondary split). It is not clear whether the Council (which has particular needs, due to its changing demography, which may not be replicated in other boroughs) is likely to run further competitions to run schools based on the same model in the near future – the withheld information may not therefore be wholly relevant when future competitions are run.
91. Finally, the Commissioner notes that, when the DfE runs a bidding process for “Wave” Free Schools, there is an expectation that at least the winning bid submission will be published. Although bidders for that competition will be aware of the possibility that their submissions will be published, it is not wholly clear to the Commissioner why some of the same commercial considerations would not arise.
92. That being said, the Commissioner recognises that the Tribunal in *Currie* had the chance to review the exact same information that is being considered here and to consider similar arguments.
93. Each Tribunal panel consists of a judge, supported by two lay members, they are there to bring their shared expertise to bear on both the law and the particular facts of each case.

94. The Tribunal in *Currie* would presumably have had the benefit of considering the *Church* judgement, but clearly felt that such an approach was not justified by the particular facts of the case.
95. Having considered the matter, whilst her decision is somewhat finely balanced, the Commissioner is not convinced that she should depart from the line of reasoning set out in *Currie* as to the where the balance of the public interest should lie.
96. The Commissioner therefore accepts that section 43(2) of the FOIA is engaged in respect of the information to which section 36 does not apply and that the balance of the public interest favours maintaining this exemption.

Procedural Matters

97. Section 10(3) of the FOIA allows for an extension of the deadline for communicating information if the public authority considers that a qualified exemption is engaged and needs additional time to consider where the balance of the public interest lies.
98. Section 17(3) of the FOIA allows an extension of the deadline for issuing a refusal notice in respect of any exempt information if the public authority considers that a qualified exemption is engaged and needs additional time to consider where the balance of the public interest lies.
99. The FOIA does not provide any limit on how long the public authority may take to consider the balance of the public interest – only that it must be “reasonable in the circumstances”. The Commissioner considers that, whilst an additional 20 working days will usually be reasonable, any extension beyond that will only be justified in exceptional circumstances and she would expect a public authority to be able to justify what those exceptional circumstances were.
100. Commissioner’s guidance explains that:

"the additional time cannot be used to determine whether the exemptions themselves are engaged.

"This means that the authority should have identified the relevant exemptions, and satisfied itself that they are applicable, within the initial 20 working day time limit.”⁶

⁶ <https://ico.org.uk/media/for-organisations/documents/1165/time-for-compliance-foia-guidance.pdf>

101. In this case, the DfE took well in excess of 40 working days to provide its response to the complainant. No justification was provided to the Commissioner – although the DfE's correspondence to the complainant referred to the large volume of information and complexity of the exemptions involved.
102. The Commissioner does recognise that, at the time of the request, the DfE was dealing with the finalisation of GCSE and A Level results for the (at that point) unique circumstances of the 2019-20 academic year. It was also preparing for the return of schools and colleges for the 2020-21 academic year in challenging circumstances.
103. Nevertheless, the Commissioner notes from the correspondence exchanged between the complainant and the DfE that, prior to September 2020, the DfE was *only* considering the balance of the public interest in respect of section 43. It was not until 30 October 2020 that the DfE sought the opinion of the qualified person and that opinion was not provided until 6 November 2020 – at which point it also began relying on section 36 of the FOIA to withhold the information. Furthermore, the position, as set out in its refusal notice, was that it was only relying on section 43 in relation to the bid submissions themselves – whereas it was relying on one or more limbs of the section 36 exemption in respect of all the information it was withholding at that point.
104. The Commissioner therefore considers that the DfE took an unreasonable amount of time to complete its public interest considerations and thus breached both section 10(3) and 17(3) of the FOIA in respect of this request.

Right of appeal

105. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

106. 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.

107. 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

[Name of signatory]

[Job title of signatory]

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