

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 March 2012

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

Decision (including any steps ordered)

1. The complainant requested copies of proposal forms for Free Schools, together with copies of communications between the Department for Education (the "DfE") and several third parties. The DfE disclosed some information. However, it also withheld some information under the future publication exemption (section 22); the formulation of government policy exemption (section 35(1)(a)); the effective conduct of public affairs exemption (sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c)); the third party personal information exemption (sections 40(2) with 40(3)(a)(i)); and the commercial interests exemption (section 43(2)).
2. The Commissioner's decision is that the DfE has correctly relied upon sections 22, 35(1)(a), 36(2)(c), and 40(2) with 40(3)(a)(i) to withhold the outstanding information.
3. The Commissioner does not require any steps to be taken.

Request and response

4. The DfE received a request from the complainant on 9 July 2010 for the following information:

"i) copies of all completed 'Free Schools-Proposals Forms' received by the Department for Education

ii) all correspondence (including by email) and records of any telephone conversations between ministers or officials of the Department for Education and the New Schools Network

iii) minutes, agendas or any other records of any meetings between ministers or officials of the Department for Education and the New Schools Network

iv) all correspondence (including by email) and records of any telephone conversations between ministers or officials of the Department for Education and the Independent Schools Association and/or Independent Schools Council since 6 May 2010

v) minutes, agendas or any other records of any meetings between ministers or officials of the Department for Education and the Independent Schools Association and/or the Independent Schools Council since 6 May 2010

vi) minutes, agendas or any other records of any meetings at which the issue of funding for the New Schools Network was discussed since 6 May 2010

vii) all correspondence (including by email) and records of any telephone conversations between ministers or officials of the Department for Education and the following companies since 6 May 2010: Tribal; Nord Anglia; Cambridge Education; Serco; Tribal; Nord Anglia; Cambridge Education.

viii) minutes, agendas or any other records of any meetings between ministers or officials of the Department for Education and the following companies since 6 May 2010: Tribal; Nord Anglia; Cambridge Education; Serco; Tribal; Nord Anglia; Cambridge Education

ix) records, including dates and times, of any visits to the Department for Education by representatives of the New School Network since 6 May 2010."

For ease of reference these will be referred to as requests (i) to (ix) throughout this notice.

5. On 20 July 2010 the complainant clarified that requests (iv), (v), (vii) and (viii) were for information regarding Free Schools.
6. The DfE responded on 17 January 2011 and informed the complainant that it did not hold any information in relation to requests (iv) and (v). It confirmed that it did hold information in relation to the other requests, and disclosed some information in relation to requests (ii), (viii) and

(ix). However, it also withheld some information and relied upon the following exemptions in relation to the following requests:

- Request (i) – sections 22, 36(2)(b), 36(2)(c), 40(2) and 43(2).
- Request (ii) – sections 21, 36(2)(b), 36(2)(c) and 43(2).
- Requests (iii), (vi), (vii) and (ix) – sections 36(2)(b) and 36(2)(c).

7. The complainant wrote to the DfE on 15 March 2011 and requested an internal review of its responses to requests (i) to (iii), (vi) and (vii). He also asked further questions in regard to requests (viii) and (ix).
8. Following an internal review the DfE wrote to the complainant on 17 May 2011 and stated that:
 - In relation to request (i) this information was exempt under sections 22, 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). In addition, some information was also exempt under sections 40(2) and 43(2).
 - In relation to request (ii) this information was exempt under section 36.
 - In relation to request (iii) this information was exempt under section 36.
 - In relation to requests (vi) and (vii) this information was exempt under section 36.
9. In addition to this, it also referred to section 35(1)(a) – although it did not clarify which information it was applying this exemption to. Finally, it also provided further clarification in relation to its responses to requests (viii) and (ix).

Scope of the case

10. The complainant contacted the Commissioner to complain about the way his request for information had been handled. During the investigation the Commissioner confirmed to the complainant that he would consider the DfE's use of sections 22, 35, 36, 40 and 43 to withhold the requested information.
11. During the investigation the DfE provided further submissions to support its use of the exemptions, together with a copy of the withheld information. Having considered these submissions and the withheld

information, the Commissioner considers that the DfE is relying upon the following exemptions in relation to the following requests:

- **Request (i)** – sections 22, 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). In addition to this it also relied upon sections 40(2) with 40(3)(a)(i), and 43(2) to withhold some of the requested information.
 - **Request (ii)** – sections 35(1)(a), 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c). In addition it provided arguments showing that it was also relying upon section 43(2) to withhold some of the requested information.
 - **Request (iii)** – sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
 - **Requests (vi) and (vii)** – sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c).
12. Although not specifically cited by the DfE, the Commissioner notes that in providing submissions to support its use of sections 40(2) with 40(3)(a)(i) it has referred to the personal data of junior civil servants and junior personnel at the New Schools Network. Bearing this in mind the Commissioner considers that the DfE has also applied this exemption to any personal data that is contained in the withheld information that falls under any other of the requests.
13. Therefore the scope of this case has been to consider the application of these exemptions to these requests.

Reasons for decision

14. The Commissioner has considered the use of the exemptions to each of these requests in turn.

Request (i)

15. The DfE has relied upon sections 22, 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) in relation to this request. In addition, it has also relied upon sections 40(2) with 40(3)(a)(i), and 43(2) to withhold some of the information that falls under this request.
16. The Commissioner has first considered the application of section 22.

Section 22 – information intended for future publication

17. The DfE has argued that the information falling within the scope of request (i) was exempt from disclosure under section 22(1).

18. The DfE initially relied upon section 22(1) to withhold all of the proposal forms that it held at the time of the request, on the basis that at that time it had a firm intention to publish them. However, during the investigation it informed the Commissioner that by the time of the internal review, its intention was to only publish successful proposal forms. Therefore it only sought to rely upon this exemption in relation to successful proposal forms. Instead, it was relying upon section 36(2) to withhold the unsuccessful proposal forms. It also informed the Commissioner that at the time of the request, no decision had been made as to which of the proposal forms were successful or not successful.
19. When a public authority deals with a request for information, and applies the provisions of the FOIA, it can either consider the circumstances in existence at the date of the request or alternatively at the point it actually deals with the request – provided this is within the time for statutory compliance (20 working days).
20. Bearing this in mind, because at the time of the request the DfE intended to publish all proposal forms, and as such applied section 22 to this information, the Commissioner has considered the application of this exemption to all of the information that falls under this request – which is the position that was set out by the DfE in the refusal notice.
21. Section 22(1) states that information is exempt information if:
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

This is a qualified exemption, and is therefore subject to a public interest test.

22. In order to determine whether this exemption is engaged the Commissioner has considered the following points:
 - Was the requested information held by the DfE with an intention to publish it at some date in the future (whether determined or not)?

- If so, was it reasonable in all the circumstances of the case for this information to be withheld until some future date (whether determined or not).
23. The DfE has confirmed that at the time of the request it had a settled intention to publish all Free School proposal forms (both successful and unsuccessful) at an 'appropriate' time. To support this statement it has referred the Commissioner to the proposal forms template that was in use at the time of the request. This stated, *"Please note, all information provided on this form will be published on the Department for Education website."*
24. As noted above, the Commissioner considers that a public authority can either consider the circumstances in existence at the date of the request or alternatively within 20 working days following the receipt of the request. Therefore, although the Commissioner is aware that the DfE's intention to publish all the proposal forms subsequently changed, he has to consider whether the DfE had a settled intention to publish them at the time the request was made.¹ Bearing in mind the DfE's arguments, he is satisfied that at the time of the request it did have a settled intention to publish this information.
25. The DfE has argued that it was reasonable for the information in question to be withheld until some future date. In particular it has argued that,
- "...it was not reasonable for the Government to be expected to release piecemeal information in advance of its planned timetable and planned publication of proposals, and that there was a strong argument in favour of allowing everyone to view this information at the same time. 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."*
26. In reaching a view on this argument the Commissioner notes that at the time of the request no decision had been made as to which Free School proposals to accept (and to take forward to the second stage of the application process). The introduction of the Free Schools policy had attracted a high level of media and political interest and debate, which was at a particularly high level at the time of the request. Bearing this in mind, the Commissioner considers that the disclosure of the proposal

¹ The Commissioner notes that if the same request was made now, the circumstances that he would consider would be different.

forms at this stage – before any decisions were made on the individual proposals – would have had the potential to disrupt the approval process for those proposals.

27. Taking this potential for disruption into account, the Commissioner considers that it was reasonable to withhold the requested information until some future date.
28. The Commissioner has gone on to consider whether the public interest in maintaining this exemption outweighs the public interest in disclosure.
29. The DfE has acknowledged that there is a public interest in openness and transparency, and that information which could affect a future choice of schools should be free and openly shared with the public.
30. The Commissioner notes that the introduction of the Free Schools policy had resulted in a considerable amount of political and public debate, and a significant amount of press attention. At the time of the request, this policy was still in its infancy, and no decisions had been made as to the first wave of proposals for these new schools. Consequently, there was little public knowledge at that time as to the type of schools that were being proposed, or the details of those proposals. Consequently the Commissioner considers that there was a significant public interest in increasing public understanding of the development of this policy, and of the details of the proposals that were being made. Increasing this understanding would have allowed a more informed public and political debate at that time. This would have been in the public interest.
31. In favour of maintaining the exemption the DfE argued that had the information in question been disclosed at that time this could have resulted in exhaustive attention being focused on the initial proposers, their previous activities and their plans. Given the high degree of political and media interest at the time of the request, this could have been considerably disruptive. It is likely that this would have had a disruptive effect on existing proposers and their applications. In addition, at the time of the request proposals were at an early stage, and no decisions had been made as to which to approve. Much more work and development would be needed before any approvals were made, and any financial agreements were entered into between the DfE and the proposers. It has argued that this may not have been made apparent in media comment if the requested information were to be disclosed. This could additionally undermine parental confidence in any eventual school.
32. The DfE also argued that it was not reasonable for it to be expected to release piecemeal information in advance of its planned timetable and

planned publication of proposals. It argued that there was a strong argument in favour of allowing everyone to view this information at the same time. If it were to release this information as requested this would result in partial information being released over a protracted period leading to confusion and inaccuracy. A piecemeal release could have meant that plans at varying stages could be contrasted with one another, without any contextual information, undermining confidence in those projects. It might also jeopardise the ability to plan by revealing proposed locations for Free Schools before negotiations for those sites were complete. In turn this risked damaging proposers' negotiating positions in a competitive marketplace. This would not be in the public interest.

33. Finally, the DfE argued that the release of the proposal forms, and subsequent media scrutiny on the details of proposals at an early stage, could deter future applicants from coming forward. This would have a direct impact on the number of Free Schools opening in the future and its aim to provide free choice in the school market. This would not be in the public interest.
34. In reaching a decision as to the balance of public interest arguments the Commissioner has been mindful of the particular circumstances of this case.
35. The Commissioner considers that the public interest factors in favour of disclosure are particularly strong in this case. The introduction of the Free Schools policy represented a major change in national educational policy, which would have a potential impact both on existing schools and the wider provision of education, and would also involve the expenditure of public money. At the time of the request, there was little information in the public domain about the types of proposals that were being made. The disclosure of the requested information would have significantly helped to inform the public about the introduction of this new policy, and the Free School proposals that were being made. This would have helped inform the public and political debate on this issue, and would have greatly increased the openness and transparency of both the development of this policy, and the approval process for individual proposals.
36. However, this has to be balanced against the public interest in favour of maintaining the exemption. In particular, the Commissioner considers that the timing of the request is crucial in this case. At the time of the request the proposal forms in question had only recently been submitted to the DfE, and no decisions had been made as to which of the proposals to approve or decline. Given the high level of public, political and media interest in the introduction of the Free Schools policy, the Commissioner is satisfied that the disclosure of this information would have been likely

to result in significant attention being paid to individual proposals. Whilst the Commissioner has noted the public interest arguments for disclosure, he also considers that this attention would be likely to have had a prejudicial effect to the approval process, were this information to have been disclosed at this time.

37. The Commissioner accepts that the proposal forms did state that information on those forms would be published – but he also notes that they did not state when this would take place. He considers that it would have been reasonable for applicants to assume that this publication would not take place at such an early stage in the proposal process.
38. After considering these points the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining this exemption. Therefore the information that falls under request (i) is exempt from disclosure under section 22(1).
39. As he has found that all the information held by the DfE that falls under request (i) is exempt under section 22(1), the Commissioner has not gone on to consider the application of the other cited exemptions to this information.

Requests (ii), (iii), (vi) and (vii)

40. The Commissioner has next gone on to consider the DfE's application of section 35(1)(a).

Section 35(1)(a) – formulation or development of government policy

41. Section 35(1)(a) states that information held by a government department is exempt if it relates to the formulation or development of government policy. This is a class based exemption, and therefore if the information is of the type set out in the exemption, the exemption is engaged.
42. The DfE has only applied section 35 to some of the information that it holds that falls under request (ii). In order to reach a view on whether this information should be withheld under this exemption the Commissioner has first considered whether it actually relates to the formulation or development of government policy.
43. In the Commissioner's view, the term 'relates to' should be interpreted broadly to include any information which is concerned with the formulation or development of the policy in question and does not specifically need to be information on the formulation or development of that policy.

44. During the course of the investigation the Commissioner asked the DfE to provide further details of the rationale it used in order to apply sections 35 and 36 to the withheld information. It explained that generally speaking it had applied section 36 to information that was more 'process-driven' (for example, information relating to specific Free School proposals, or the organisation of events), whereas section 35 had been applied to information that related more to issues being resolved that were policy based.
45. The information in question relates to records of communications between the DfE and a number of third parties (in particular the New Schools Network). Having considered this information the Commissioner is satisfied that it relates to issues relating to the Free Schools policy. He is also satisfied that this information relates to the formulation and development of that policy. The information was created at a time when the policy was still in a process of both formulation and development.
46. Bearing this in mind the Commissioner finds that section 35(1)(a) is engaged in relation to the information it has withheld under this exemption.
47. 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.
48. The DfE has recognised that there is a public interest in openness and transparency. In particular, disclosure would be in the public interest as knowledge of the way Government works increases if information on which decisions have been made is publicly available. This can increase the public's ability to effectively contribute to the policy making process. It has also recognised that there is a public interest in being able to see if Ministers are being effectively briefed on the key areas of policy that the DfE is taking forward. Finally, it has recognised that the Free Schools policy represents a new model for educational provision and as such "*is a controversial and sensitive one on which people hold strong and opposing views.*" Increasing public understanding of this controversial and sensitive issue would be in the public interest.
49. As discussed at paragraph 30 above the Commissioner considers that at the time of the request the Free Schools policy was a subject of a considerable amount of political and public debate, as well as a significant amount of press attention. Given the potentially significant impact the introduction of Free Schools would have on education policy, and the expenditure of public money, he considers that there was a significant public interest in increasing public understanding of the formulation and development of this policy. In particular, increasing

public understanding would have allowed a more informed public and political debate in relation to this policy.

50. The Commissioner also considers that there is a public interest in increasing public understanding of the relationship between the DfE and the New Schools Network. The New School Network is a charity that had previously promoted the concept of Free Schools. The DfE announced in June 2010 that the New Schools Network had been chosen to act as a first point of contact for all groups who wish to start Free Schools and would provide them with information as they went through the application process. Initial funding of £500,000 was granted to the New Schools Network to carry out these functions in the period 18 June 2010 to 31 July 2011.² However, the relationship between the DfE and the New Schools Network, and the manner in which it had been chosen and appointed to carry out this role, had been a matter of considerable debate. The Commissioner considers that the disclosure of this information would help increase the transparency of this relationship, and further public understanding of this issue. This would be in the public interest.
51. In favour of maintaining the exemption, the DfE has argued:
- It is in the public interest that the formulation of government policy and decision making can proceed in the self-contained space needed to ensure that it is done well. Good government depends on good decision making, and this needs to be based on the best advice available and a full consideration of options. Without protecting the thinking space and the ability for Ministers and senior officials to receive free and frank advice, there is likely to be a corrosive effect on the conduct of good government, with a risk that decision making will become poorer. This could result in weaker government.
 - It is important for officials to feel comfortable in formulating and developing policy in the new area of Free Schools. If officials feel that their discussions are not private, then they may not express themselves freely and completely.
 - In this instance, there was a considerable amount of controversy around the introduction of the Free Schools policy. It is particularly important that Ministers receive clear and frank advice to Ministers on controversial issues.

² <http://education.gov.uk/inthenews/inthenews/a0061366/michael-gove-outlines-process-for-setting-up-free-schools>

The Commissioner considers these to be 'safe space' and 'chilling effect' arguments.

52. In reaching a decision as to the balance of public interest arguments the Commissioner has been mindful of the particular circumstances of this case. He has also had to consider the circumstances at the time the requests were made.
53. The Commissioner considers that the public interest factors in favour of disclosure are strong in this case. The withheld information relates to the early formulation and development of the Free Schools policy. As this policy represented a major change in national educational policy, which would have a potential impact on existing schools, the provision of education, and the expenditure of public money, he considers that the public interest in increasing transparency and accountability particularly strong. In particular, given the level of debate about the introduction of this policy, and the role of the New School Network, he considers that increasing public understanding of the introduction and development of this policy, and the relationship between these two bodies, is a particularly weighty public interest factor in favour of disclosure.
54. However, the Commissioner has to balance these public interest arguments in favour of disclosure against those in favour of maintaining the exemption. As noted above, the Commissioner has identified the arguments in favour of maintaining the exemption as safe space and chilling effect arguments.
55. In considering the weight to give to safe space arguments the Commissioner considers the timing of a request is of paramount importance. It is also important to take into account the age of the information, and whether the formulation and development of the policy in question was still underway at the time of the request.³
56. In this case the request was made only a matter of weeks after the announcement and introduction of the Free Schools policy. The DfE has confirmed that at the time of the request many major decisions about this policy were yet to be made, and that the decision making process was ongoing. Bearing this in mind, the Commissioner is satisfied that at the time of the request the formulation and development of this policy was live and ongoing. He also considers that the withheld information directly related to the formulation and development of this policy, or to matters which fed into that process.

³ *DfES v the ICO & The Evening Standard* [EA/2006/0006] para 75; *DBERR v the ICO & the Friends of the Earth* [EA/2007/0072] para 114.

57. The Commissioner considers that significant and notable weight should be given to the safe space arguments in cases where the policy making process is live at the time of the request, and the requested information relates directly to that policy making. In these circumstances there is a strong public interest in protecting the need for a private space to develop live policy, allowing ministers and officials the time and space *"to hammer out policy by exploring safe and radical options alike, without the threat of lurid headlines depicting that which has been merely broached as agreed policy."*⁴ In such scenarios the public interest is very unlikely to favour disclosure unless for example it would expose some level of wrongdoing. The Commissioner notes that this has not been suggested by the complainant, and nor is there any suggestion of this in the withheld information.
58. In considering the weight to give to the chilling effect arguments the Commissioner considers that the central question is the content of the particular information in question.⁵ He also considers that the timing of the request will be important in relation to chilling effect arguments.
59. In this case the Commissioner notes that the withheld information in question reflects free and frank discussions between DfE officials and employees of the New Schools Network, in relation to the formulation and development of the Free Schools policy.
60. As has been noted above, the introduction of the Free Schools policy had attracted a considerable amount of controversy, and the relationship between the DfE and the New Schools Network was a matter of considerable debate at the time of the request. Bearing in mind that this policy was at an early stage of development at that time, the Commissioner accepts that those involved in the formulation and development of this policy – both at the DfE and the New Schools Network – would possibly have been inhibited were these exchanges to not be made with the expectation that they would not be disclosed at that time. Therefore, bearing in mind the timing of the request, the Commissioner accepts that – to a certain extent – the disclosure of this information may have had an inhibitory effect (i.e. a chilling effect) on those parties involved in the formulation and development of this policy.
61. Therefore, after considering all of the above points the Commissioner considers that in this case there are weighty public interest factors both in favour of disclosure and in favour of maintaining the exemption.

⁴ [EA/2006/0006] para 75.

⁵ [EA/2006/0006] para 75(i).

However, due to the timing of the request, the Commissioner finds that the public interest in protecting the safe space necessary for the formulation and development of this policy particularly compelling.

62. Taking this into account, the Commissioner has concluded that, in the circumstances of this case, the public interest in maintaining section 35(1)(a) in relation to the withheld information in question outweighs the public interest in disclosure. Therefore this information should be withheld.
63. The Commissioner has gone on to consider the DfE's application of section 36(2).

Section 36(2)(c) – the effective conduct of public affairs

64. The DfE has applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to all the information it is withholding that falls under requests (ii), (iii), (vi) and (vii) – other than the information that falls under request (ii) that it is withholding under section 35(1)(a), and some information that it is withholding only under sections 40(2) with 40(3)(a)(i).
65. The Commissioner has first considered the application of section 36(2)(c).
66. Section 36(2)(c) provides an exemption where, in the reasonable opinion of a qualified person, the disclosure of the information would or would be likely to prejudice the effective conduct of public affairs.
67. In order to consider the application of this exemption the Commissioner must first determine whether the opinion of the qualified person was reasonable.
68. The DfE has informed the Commissioner that the qualified person in this case was the Minister of State for Schools, Nick Gibb MP. It also confirmed that it sought his opinion on 30 November 2010 and that his opinion was given on 6 December 2010.
69. The Commissioner is satisfied that Mr Gibb is a qualified person for the DfE and that his opinion was given at the relevant time. He has gone on to consider whether that opinion was reasonable.
70. In reaching a view on whether the opinion is reasonable the Commissioner will consider the plain meaning of the word 'reasonable' – i.e. whether the opinion is in accordance with reason, not irrational or absurd. The DfE has argued that the disclosure of the information in question would be likely to:

- harm relations with external partners, potential sponsors and Free School providers;
- deter parties from making proposals for Free Schools in the future; and
- damage the relationship between the DfE and the New Schools Network.

Prejudice to these relationships, and the resultant damage to the running of the Free Schools policy, would amount to prejudice to the effective conduct of public affairs.

71. The Commissioner has been provided with a copy of the submission given to the qualified person, which included information supporting a recommendation. Additionally, the DfE confirmed that the qualified person had access to the withheld information. The Commissioner notes that the withheld information in this case relates directly to communications between the DfE, the New Schools Network, and other external third parties. He also notes that the withheld information contains frank comments about specific Free School proposals. He is satisfied that at the time of the request the Free Schools policy, and consequently the relationship between the DfE and the New Schools Network was in its infancy. He is also satisfied that at the time of the request no final decisions had been made in relation to the Free School Proposals referred to in the withheld information. Taking these factors into account, and bearing in mind the content of the submission to the qualified person, the Commissioner is satisfied that the opinion given was reasonable.
72. Therefore section 36(2)(c) is engaged in relation to this information.
73. 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 first considered the public interest in disclosure.
74. The DfE has recognised that there is a public interest in openness and transparency, and in understanding how decisions which could affect people's lives are taken. This contributes to an ability to hold the government to account.
75. The Commissioner considers that the public interest factors in favour of disclosure listed at paragraph 35 are also applicable in relation to this exemption. Additionally he considers that the introduction of the Free Schools policy, and the relationship between the DfE and the New Schools Network, had attracted a considerable amount of public, political and media attention, and subsequent debate. The disclosure of this

information would help to inform that debate by giving an insight into how that policy was working in practice, into the type of proposals that were being submitted to the DfE, and in increasing the transparency of the relationship between the DfE and the New Schools Network. This would be in the public interest.

76. In favour of the public interest in maintaining this exemption, the Commissioner notes that consideration should be given to protecting what is inherent in the exemption – the avoidance of unwarranted prejudice to the effective conduct of public affairs.
77. The DfE has argued that the disclosure of confidential communications with the New Schools Network could prejudice its relations with that body. As this information also contained candid comments about particular Free School proposals, disclosure could also damage relations between both those bodies and the parties behind those proposals. Reducing the operating efficiency of those relationships would not be in the public interest.
78. The DfE has pointed out that any Free School proposals that were (ultimately) unsuccessful in the first wave of applications could be improved and resubmitted in the second wave of applications. It has argued that disclosure of the information containing comments on proposals could make proposers less likely to resubmit their application in the future. The resultant loss of potentially valid proposals would not be in the public interest.
79. Disclosure of candid and frank comments about specific proposals, at an early stage in the application process (before any decisions had been made) would also be likely to deter future proposers. Again, the resultant loss of potentially valid proposals would not be in the public interest.
80. In reaching a decision as to the balance of public interest arguments the Commissioner has been mindful of the particular circumstances of this case. He has also had to consider the circumstances at the time the requests were made.
81. The Commissioner considers that the public interest factors in favour of disclosure are strong in this case. The factors that he considers to be particularly weighty are the same as those listed at paragraph 53 above.
82. However, these factors have to be balanced against the public interest factors in favour of maintaining the exemption, i.e. in favour of avoiding unwarranted prejudice to the effective conduct of public affairs.
83. In finding that this exemption is engaged, the Commissioner has already accepted that the disclosure of this information is likely to result in

prejudice to the effective conduct of public affairs. However, in considering the balance of the public interest, the Commissioner will take into account the severity, frequency, or extent of any prejudice that would or might occur. In order to determine this, the Commissioner has considered both the nature of the withheld information and the timing of the request.

84. In relation to the nature of the withheld information the Commissioner notes that it contains free and frank exchanges between DfE officials and external third parties – in particular, personnel at the New Schools Network. He also notes that it contains frank and candid comments about specific Free School proposals that had been made at the time of the request, or were likely to be made in the future.
85. The Commissioner accepts that as the Free Schools policy had only been recently introduced at the time of the request, and given the free and frank nature of communications between the DfE and these third parties, there would have been little expectation by those involved that this information would have been disclosed at that time. As has been previously noted, the Commissioner considers that the introduction of the Free Schools policy had attracted a considerable amount of controversy and debate. Whilst he accepts that this withheld information relates to more 'process-driven' issues relating to that policy (rather than its formulation and development), the Commissioner considers that if this information were to have been disclosed at the time of the request this would have been likely to result in a considerable amount of public and media scrutiny of this information. Whilst this policy was in its infancy, and whilst the formal relationship between the DfE and these various external third parties was in its infancy, the Commissioner is satisfied that prejudice to those relationships would potentially have been severe and frequent were these communications to have been disclosed at this stage. Bearing this in mind the Commissioner finds this public interest argument in favour of maintaining the exemption particularly weighty.
86. In addition to this, the Commissioner also accepts that groups who had made a Free School proposal would not have expected candid comments about their proposals to have been into the public domain. As such, he is satisfied that the disclosure of this information would have been likely to prejudice the relationship between the DfE, the New Schools Network, and these proposers. In particular, he considers that this could have resulted in a lack of trust and in potential damage to the willingness of those proposers to cooperate in the application process. This would have been likely to prejudice the effective running of the Free Schools approval process. In addition to this, he also accepts that disclosure of candid comments about specific proposals would be likely to deter both

unsuccessful candidates from modifying their proposals and applying again, and potential proposers from applying in the future.

87. Therefore, after balancing the public interest factors, the Commissioner considers that the public interest in maintaining section 36(2)(c) outweighs the public interest in disclosing the withheld information in question. Therefore all the withheld information that this exemption has been applied to should be withheld.
88. As he has come to the conclusion that the information in question should be withheld under section 36(2)(c), the Commissioner has not gone on to consider the application of sections 36(2)(b)(i) and 36(2)(b)(ii).
89. The Commissioner has gone on to consider the DfE's application of section 40.

Section 40(2) – third party personal information

90. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
91. In this case the relevant condition is contained in section 40(3)(a)(i), this applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act 1998 (the "DPA"). This is an absolute exemption, and is therefore not subject to a public interest test.
92. The DfE has sought to rely upon this exemption to withhold the personal data of individuals contained on the proposal forms, together with the names and contact details of junior officials at the DfE and the New Schools Network. It has also withheld the telephone numbers of more senior staff at both the DfE and the New Schools Network.
93. Given his findings in relation to sections 22, 35 and 36 above, the Commissioner has only reached a decision on the application of this exemption in relation to the names and contact details of individuals where they appear in the information that has already been disclosed to the complainant. The DfE has argued that the disclosure of this information would be in breach of the first principle of the DPA.
94. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information is the personal data of third parties.
95. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that

information and other information in the possession of, or likely to come into the possession of, the data controller.

96. In this case, the withheld information in question clearly relates to several identifiable individuals. Bearing this in mind, the Commissioner is satisfied that this information is the personal data of third parties.
97. The Commissioner has gone on to consider whether the disclosure of the names of individuals withheld under this exemption would be in breach of the first data protection principle. This requires, amongst other things, that personal data is processed fairly.
98. The Commissioner has first considered whether the disclosure of the withheld information would be fair.
99. In considering whether disclosure of this information would be fair the Commissioner has taken the following factors into account:
 - whether disclosure would cause any unnecessary or unjustified damage or distress to the individual concerned;
 - the individual's reasonable expectations of what would happen to their information; and
 - are the legitimate interests of the public sufficient to justify any negative impact to the rights and freedoms of the data subject.
100. The DfE has argued that the disclosure of this information would be unfair. Junior officials at the DfE and the New Schools Network would have no reasonable expectations that their details would be disclosed under the FOIA. It has also pointed out that the junior DfE officials in question do not have public facing roles. In addition to this, it has also referred to the danger in these individuals being targeted by the media or opponents of the Free Schools policy were this information to be disclosed.
101. Given the controversy surrounding the introduction of the Free Schools policy, and the role of the New Schools Network, together with the amount of media interest in this topic, the Commissioner is satisfied that were this information to be disclosed, it would have increased the likelihood of these junior officials being contacted directly in relation to this policy. He is also satisfied that it would have been unlikely that these individuals would have had any reasonable expectation that this information would be disclosable under the FOIA.
102. The last factor is the most persuasive and the Commissioner considers that the disclosure of this information would be an invasion of the privacy of these individuals.

103. In relation to the withheld contact details of the more senior staff at both the DfE and the New Schools Network, whilst the Commissioner notes the relative seniority of these individuals, he still considers that the disclosure of their direct telephone numbers would be an unwarranted breach of these individual's privacy given the circumstances surrounding the introduction of this policy.
104. In relation to the legitimate interests in disclosure of this information, the Commissioner considers that there is a public interest in increasing transparency into formulation and development of the Free Schools policy, together with increasing the transparency of the relationship between the DfE and the New Schools Network. However, the Commissioner is not persuaded that this legitimate interest is a weighty factor, given that the withheld information is the names and contact details of junior officials at these two bodies, together with the direct telephone numbers of a limited number of more senior personnel.
105. These legitimate interests have to be balanced against any negative impact to the rights and freedoms of the individuals concerned. Taking into account his findings that the disclosure of this information would be an invasion of the privacy of those individuals, the Commissioner finds the arguments in favour of withholding this information particularly weighty.
106. Taking all these factors into account, the Commissioner considers that the disclosure of this information would be unfair. Therefore the names and contact details of the individuals in question are exempt from disclosure under sections 40(2) with 40(3)(a)(i).

Right of appeal

107. 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

108. 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.

109. 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
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Water Lane
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