

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2013

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 about the application by the Russell Education Trust in partnership with the Turing House School dated 20 December 2012 for funding of a new free school. The Department for Education (DfE) refused to disclose this information under section 36(2)(b)(i) and (ii) and section 36(2)(c) of the Freedom of Information Act (FOIA).
2. The Commissioner's decision is that the DfE has correctly applied section 36(2)(b)(i) FOIA in this case.
3. The Commissioner requires no steps to be taken.

Request and response

4. On 28 January 2013 the complainant requested information of the following description:

"Pursuant to section 1(1) and section 8(1) of the Freedom of Information Act 2000 (the "Act") I hereby request (i) to be informed in writing by the Education Funding Agency on behalf of the Department for Education (the "public authority") whether it holds information relating to the application by the Russell Education Trust in partnership with the Turing House School dated 20 December 2012 in respect of its 2014 proposal to the Department for Education for funding of a new free school proposed to be situated in the London Borough of Richmond upon Thames (the "Proposal"); and, if the public authority holds such

information on, in respect of or relating to the Applicant's Proposal, (ii) to have such information communicated to me in accordance with sections 10 and 11 of the Act (the "Request").

5. On 18 February 2013 the DfE responded. It refused to provide the requested information under section 36(2)(b)(i) and (ii) and section 36(2)(c) FOIA.
6. The complainant requested an internal review on 17 March 2013. The DfE sent the outcome of its internal review on 25 April 2013. It upheld its original position.

Scope of the case

7. The complainant contacted the Commissioner on 21 May 2013 to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the DfE was correct to apply section 36(2)(b)(i), section 36(2)(b)(ii) or section 36(2)(c) FOIA in this case.

Reasons for decision

9. Section 36 FOIA provides that,

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

(2)(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

(2)(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

10. The DfE has applied subsections 36(2)(b)(i) and (ii) and 36(2)(c) to the withheld information. The Commissioner has considered section 36(2)(b)(i) first. Information may be withheld under section 36(2)(b)(i) if its disclosure, in the reasonable opinion of a qualified person, would or would be likely to inhibit the free and frank provision of advice.

11. In determining whether section 36(2)(b)(i) was correctly engaged by the DfE the Commissioner is required to consider the qualified person's opinion as well as the reasoning which informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - Establish that an opinion was given;
 - Ascertain who was the qualified person or persons;
 - Ascertain when the opinion was given; and
 - Consider whether the opinion was reasonable.
12. The DfE has explained that, Elizabeth Truss, Under Secretary of State at the DfE, is the qualified person in this case and her opinion was obtained on 13 February 2013 in relation to section 36(2)(c) and on 24 April 2013 in relation to section 36(2)(b). The DfE has provided the Commissioner with a copy of the qualified person's opinion as well as the submissions which were put to the qualified person to enable the opinion to be reached.
13. The following submissions were put to the qualified person in relation to the application of section 36(2)(b)(i):
 - Releasing the information would, or would be likely to, inhibit officials from offering advice to Ministers that would be unwelcome if made public. For example, officials might downplay areas of weakness in an application that is likely to be successful, leading to a not wholly complete assessment of an application.
 - Releasing the information would, or would be likely to, make it more likely that advice from officials would be given that is materially different because of the possibility of disclosure. For example, officials might not refer to areas of weakness at all in an application that is likely to be successful, leading to an assessment of an application that ignores key information.
 - Releasing the information would, or would be likely to, result in pressure being brought to bear on officials to provide particular advice. For example, a vociferous public campaign, using information from the application assessment spreadsheet, might result in officials changing their advice to reflect the perceived public view of the application, leading to an incorrect assessment of an application.

- The Turing House School application was submitted during the Wave 4 Free School application round and is currently being assessed by officials in Free Schools Group. The proposal is to establish a secondary school with sixth form in Richmond upon Thames, to open in September 2014. The Turing House School proposal was submitted by the Russell Education Trust (RET), an approved Academy sponsor which currently has two open Free Schools.
14. The qualified person's response agrees that section 36(2)(b)(i) is engaged. The qualified person's opinion is that the prejudice in this case would be likely to occur.
 15. The Commissioner considers that the application forms and DFE application assessments relating to free schools must be frank and candid. It is a very sensitive area and if the requested information were disclosed the frankness and candour of advice given in this area would be likely to be diminished.
 16. The Commissioner therefore accepts that it was reasonable to conclude that disclosure of this information would or would be likely to inhibit the free and frank provision of advice.
 17. The Commissioner is of the view that the opinion of the qualified person is a reasonable one and that it has been reasonably arrived at. He therefore finds that section 36(2)(b)(i) was correctly engaged.
 18. As the Commissioner has decided that the exemption is engaged, he has gone on to consider whether the public interest in maintaining the exemption outweighs the public interest in disclosing the information. In his approach to the competing public interest arguments in this case, the Commissioner has drawn heavily upon the Information Tribunal's Decision in the case of Guardian Newspapers Limited and Heather Brooke v Information Commissioner and BBC (the Brooke case)¹.
 19. The Commissioner notes, and adopts in particular, the Tribunal's conclusions that, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely, to have the stated detrimental effect, the Commissioner must give weight to that opinion as an important piece of evidence in his

¹ EA/2006/0011; EA/2006/0013

assessment of the balance of the public interest. However, in order to form the balancing judgment required by s 2(2)(b), the Commissioner is entitled, and will need, to form his own view as to the severity of, and the extent and frequency with which, any such detrimental effect might occur. Applying this approach to the present case, the Commissioner recognises that there are public interest arguments which pull in competing directions, and he gives due weight to the qualified person's reasonable opinion that disclosure would, or would be likely to inhibit the free and frank provision of advice.

Public interest arguments in favour of disclosing the requested information

20. The DfE acknowledged that there is a general public interest in disclosure because of the desirability of more open and transparent government and of promoting public accountability.
21. There is a strong public interest in understanding free school application process and being assured that it is being carried out properly and fairly. Disclosure of the requested information would allow the public to better understand and to have a more informed debate on the process

Public interest arguments in favour of maintaining the exemption

22. The Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in this exemption – in this instance, the avoidance of unwarranted inhibition to the free and frank provision of advice.
23. The DfE argued that releasing documents relating to the application would have the result that advice would be less likely to be offered or become more reticent or circumscribed. This would potentially prevent all applications being assessed equally against objective criteria.

Balance of the public interest

24. The Commissioner considers that there is a public interest in openness and transparency. He considers that the issue of free schools has led to strong viewpoints on both sides and therefore there is a strong public interest in disclosure of information which would enable the public to better understand government decision making in this area.
25. The Commissioner also considers that there is a very strong public interest in Officials being able to provide Ministers with open and candid advice based upon all available information to enable decisions to be made in relation to Free Schools. The Commissioner is aware that the Free School in question, if successful, is not due to open until

September 2014. As the application is live and ongoing this adds greater weight to the public interest in favour of maintaining the exemption.

26. On balance the Commissioner considers that public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
27. As the Commissioner has concluded that the DfE has correctly applied section 36(2)(b)(i) to all the withheld information he has not gone on to consider the other section 36 exemptions.

Right of appeal

28. 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

29. 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.
30. 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

Pamela Clements
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