

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 9 December 2013

**Public Authority:** Department for Education

**Address:** Sanctuary Buildings  
Great Smith Street, London, SW1P 3BT

### Decision (including any steps ordered)

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1. The complainant has requested information relating to the Barnfield Fernwood Free School Project.
2. The Commissioner's decision is that the Department for Education (DfE) has correctly applied section 12(1) to the request dated 15 April 2013, and correctly applied section 36(2) (b) (ii) to the further request dated 13 May 2013.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

### Request and response

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4. On 15 April 2013, the complainant wrote to the DfE and requested information in the following terms:  
*"Please provide copies of all meeting minutes for this project together with communication between Barnfield, DfE, EFA and School for the period September 2012 - April 2013."*
5. The DfE responded on 2 May 2013. It stated that it considered it would exceed the appropriate limit to comply with the request.
6. The complainant wrote to the DfE again revising his request which was again refused by virtue of section 12 of the FOIA.
7. On 13 May 2013 the complainant responded and asked if the DfE could provide some guidance on the extent of the information that could be recoverable, *"for instance, can I obtain just all the meeting minutes over the course of the project"*.

8. The DfE considered this to be a new request for information. The DfE responded and stated that it did hold the information requested but refused to provide it citing sections 36(2)(b)(ii), 36(2)(c) and section 40(2) of the FOIA as its basis for doing so.
9. Following an internal review the DfE wrote to the complainant maintaining its position with regard to the application of section 36. The DfE accepted that while its processes had been followed it could have done more to explain the process. In particular that although it was not possible to say with certainty, further exemptions could be applied even if the scope of the request was narrowed. The DfE apologised for the additional time and effort the complainant had to expend because of this, and for not confirming sooner the timescale for handling his complaint.

## **Background**

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10. In 2012 Fernwood School was granted 'free school' status as part of the Barnfield Federation. However, in February 2013 the DfE withdrew the offer. There are four stages in the process to open a Free School; a written application followed by an interview, then the pre-opening stage and finally, the funding agreement. Applicant groups need to successfully develop their proposals in each of the four stages, and once a funding agreement is entered into, they are then given approval to open.

## **Scope of the case**

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11. The complainant contacted the Commissioner on 9 July 2013 to complain about the way his request for information had been handled.
12. Following clarification from the complainant the Commissioner considers the scope of this case to be to determine if the DfE correctly applied section 12 to the initial request, and subsequently the application of section 36 to the request of 13 May 2013.

## **Reasons for decision**

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13. Section 12(1) allows a public authority to refuse to comply with a request for information if the authority estimates that the cost of

compliance would exceed the appropriate limit, as defined by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (the "Regulations").

14. The appropriate limit for central government departments is £600. The Regulations allow a public authority to charge the following activities at a flat rate of £25 per hour of staff time:
- determining whether the information is held;
  - locating the information, or a document which may contain the information;
  - retrieving the information, or a document which may contain the information; and
  - extracting the information from a document containing it.
15. In relation to a central government department, this equates to 24 hours of staff time. In this instance, the DfE has applied this provision to the complainant's first request made on 15 April 2013.

***Would the cost of compliance exceed the appropriate limit?***

16. Section 12 explicitly states that public authorities are only required to estimate the cost of compliance with a request, not give a precise calculation. In the Commissioner's view, an estimate for the purposes of section 12 has to be 'reasonable': he expects it to be sensible, realistic and supported by cogent evidence.
17. The Commissioner accepts that the DfE explained to the complainant that it would cost more than the appropriate limit of £600 for it to locate, retrieve and extract the information. However, he does not consider that it provided the complainant with sufficient evidence of the process involved to enable him to conclude that the estimate was both sensible and realistic.
18. As is the practice in a case such as this, during the course of his investigation, the Commissioner asked the DfE for:
- "a detailed estimate of the time/cost taken to provide the information falling within the scope of this request".*
19. In response the DfE explained that the information in question was held although it had yet to determine the level of information and in what context, given its estimate of the cost of doing so.

20. The DfE explained its calculations provided the requirements for a reasonable search which would involve 10 members of staff and 400 files/folders/email accounts.
21. The DfE confirmed that the estimate had been based upon the quickest method of gathering the requested information and a sampling exercise had been undertaken. This involved one official from a team of 10 people conducting a search of their emails and basing their calculations on this exercise.
22. The Commissioner sought further clarification from the DfE regarding its estimate. It explained that it had estimated there were approximately 400 emails to be reviewed. It estimated that in order to determine whether it held the information would take two minutes per email. The time spent identifying and locating, retrieving and collating, and extracting the information would take 1 minute per email per activity.

This totals 2000 minutes:

$$(400 \times 2 = 800) + 400 + 400 + 400 = 2000 = 33.33 \text{ hrs} \times \text{£}25/\text{hr} = \text{£}833.33$$

23. The Commissioner accepts that it is difficult for the DfE to provide a precise estimate for this type of activity as it will be dependent on the amount of reading required.
24. Given the DfE's explanation and the above estimated times that would be involved in responding to the complainant's initial request the Commissioner is of the view that Section 12(1) of the Freedom of Information Act (FOIA) 2000 has been correctly applied by the DfE in respect of the first request dated 15 April 2013.
25. The Commissioner has next gone on to consider the application of section 36 to the request dated 13 May 2013.

***Section 36 – prejudice to the effective conduct of public affairs***

26. The DfE has confirmed it is relying on section 36(2)(b)(ii) and 36(2)(c) to withhold the requested information.
27. Section 36(2) of the FOIA states that

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

*(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.”*

28. This is a qualified exemption, and is therefore subject to the public interest test.
29. The Commissioner has first considered the application of section 36(2)(b)(ii) to the withheld information.
30. Information can only be exempt under section 36 if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to, lead to the adverse consequences described in that part of the exemption – in this case the inhibition of the free and frank exchange of views for the purposes of deliberation.
31. In order to consider the application of these exemptions the Commissioner will first consider whether the opinion was obtained from a qualified person, and the manner in which this opinion was obtained. He will then consider whether the opinion of the qualified person was reasonable.
32. To establish whether section 36 has been applied correctly the Commissioner considers it necessary to:
  - ascertain who is the qualified person for the public authority;
  - establish that an opinion was given;
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
33. In this case the DfE obtained the opinion of Elizabeth Truss MP, Parliamentary Under Secretary of State for Education and Childcare. The Commissioner is satisfied that the opinion was provided by a 'qualified person'.
34. The DfE has provided the Commissioner with a copy of the submissions provided to Ms Truss in order to seek her opinion as to whether this exemption was engaged. The Commissioner has next gone on to consider whether the opinion of the Qualified Person was a reasonable one.

### **Was the opinion reasonable?**

35. In deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that is, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable. This is not the same as saying that it is the *only* reasonable opinion that could be held on the subject. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.
36. The Commissioner has also been guided by the Information Tribunal's comments in *Guardian Newspapers & Brooke v Information Commissioner & BBC1*<sup>1</sup> (paragraph 91), in which it indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus, '*does not necessarily imply any particular view as to the severity or extent of such inhibition [or prejudice] or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant*'.
37. Therefore, in the Commissioner's opinion this means that when assessing the reasonableness of an opinion, the Commissioner is restricted to focusing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
38. The Commissioner considers that the withheld information relates to and informs discussions regarding the assessment of free school applications. The DfE has argued that whilst the content of the minutes was not contentious, their release would signal to other free school proposers that their own discussions with officials could be open to public scrutiny. The DfE believed that as a consequence proposers would be more likely to withhold critical information from officials, particularly where projects fall behind schedule.
39. The Commissioner accepts that the opinion of the qualified person, i.e. that if the requested information were disclosed it would be likely to cause those involved to be less free and frank in their exchange of views and deliberations, is a reasonable one. Whilst the Commissioner does

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<sup>1</sup> EA/2006/0011 & EA/2006/0013

not accept that individuals would be completely put off being involved in these discussions, it is not unreasonable to conclude that the frankness and candour of the deliberations would be likely to be affected which could have a damaging impact on the ongoing application and decision-making process regarding free schools.

40. The DfE has provided the Commissioner with a copy of the submissions given to the qualified person at the internal review stage. These included copies of the withheld information, as well as information supporting a recommendation. The Commissioner has also been provided with the written and signed opinion of the qualified opinion. The Commissioner would expect a qualified person's opinion to be sought at the refusal notice stage, however, he accepts that section 36 can still be engaged if the qualified person gives a reasonable opinion at internal review.
41. Having considered the submissions and the requested information, the Commissioner considers that the opinion of the qualified person is reasonable. The Commissioner is also satisfied that section 36(2)(b)(ii) applies to the entirety of the withheld information and therefore he has not considered the application of section 36(2)(c) in this decision notice.

### **Public interest test**

42. Section 36(2)(b)(ii) is subject to the 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.

### **Public interest in maintaining the exemption**

43. The information in this case is copies of minutes of meetings between the DfE and the proposers of the free school, Barnfield Federation.
44. The DfE has argued that whilst the content of the minutes was not contentious, their release would signal to other free school proposers that their own discussions with officials could be open to public scrutiny. The DfE believed that as a consequence proposers would be more likely to withhold critical information from officials, particularly where projects fall behind schedule.
45. The DfE is reliant on proposers' willingness to be candid about issues because without full information it cannot make effective judgements on progress and risks, or be confident on its advice to Ministers on individual projects.
46. The process of establishing a free school can be challenging. To expose and resolve issues that could prevent a free school from opening on time and within budget, officials need to be able to engage freely and frankly

with proposer groups and be confident that proposers are sharing key information. It is the DfE's view that proposers would be more likely to withhold important information from officials if they perceived that the content of what are often challenging conversations might be published in the future.

47. Without assurances that proposers are being open about issues, officials would be unable to fulfil their responsibility to assess properly and advise ministers on the viability of free school projects. Without a proper assessment of viability the DfE would risk opening free schools that prove to be educationally and financially unviable.

### **Public interest in disclosing the requested information**

48. The DfE acknowledges that the strongest argument in favour of disclosure is the advantage of open government and transparency of decision making and that release of this information could have the effect of raising confidence in decision making and that sharing of information with the public should be free and open.
49. The complainant considered that the specific nature of the issues relating to the cancellation of Barnfield Fernwood free school would minimise the impact of releasing the information, on the department's discussion with other free school proposers.
50. In addition, the complainant argued that continuing public dissatisfaction of the department's stated reason for cancellation demonstrates a public interest in releasing the information.

### **Balance of the public interest**

51. The public interest can cover a wide range of values and principles relating to the public good, or what is in the best interests of society. For example, there is a public interest in transparency and accountability, to promote public understanding and to safeguard democratic processes. There is a public interest in good decision-making by public bodies, in upholding standards of integrity, in ensuring justice and fair treatment for all and in securing the best use of public resources.
52. As well as the general public interest in transparency, which is always an argument for disclosure, there may also be a legitimate public interest in the subject the information relates to. However, the public interest in this respect is reduced by the fact that two explanatory letters were sent to the 'Working Party on behalf of the parents of Fernwood School' in March and April 2013 which had set out a clear and final position on the project.



53. Section 2(2) of the FOIA refers to the public interest; furthermore, disclosures of information under FOIA are in effect to the world at large and not merely to the individual requester. So the requester's private interests are not in themselves the same as the public interest and what may serve those private interests does not necessarily serve a wider public interest.
54. The DfE is required to ensure that free school proposals are assessed and evaluated on its financial viability and standards of educational provision, as well as premises and facilities.
55. It could be said that disclosure of the minutes would enable the public, including parents and stakeholders, to gain a wider understanding of what is required to submit a successful free school application.
56. The Commissioner considers that there is a strong public interest in understanding the free school application process and being assured that this is being carried out properly and fairly. However, having viewed the withheld information he does not consider that, in this case, it would allow the public any better understanding or add to any debate on the process.
57. In favour of maintaining the exemption as set out in section 36(2)(b)(ii) the Commissioner notes that when considering the public interest consideration should be given to protecting what is inherent in these exemptions – in this instance, the avoidance of unwarranted inhibition to the free and frank exchange of views for the purposes of deliberation.
58. Taking all of the above into account the Commissioner has concluded that in this case the strong public interest in maintaining the exemption outweighs the public interest arguments in favour of disclosure.

## Right of appeal

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59. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

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

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

60. 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.

61. 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**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**