

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 March 2014

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 statutory assessments made in respect of proposed free schools.
2. The Commissioner's decision is that the Department for Education (DfE) has correctly applied section 22(1) of the FOIA to the withheld information.
3. The Commissioner does not require any steps to be taken as a result of this decision notice.

Request and response

4. On 18 July 2013 the complainant wrote to DfE and requested information in the following terms:

"Please now send me copies of the statutory assessments made pursuant to section 9 of the Academies Act 2010 and made in respect of all proposed free schools where the Secretary of State has made the decision whether or not to open the free school save that there is no need to send those assessments which were put on the Government publications website on the 28 June 2013."
5. On 8 August 2013 DfE responded. It refused to provide the requested information citing section 22 of the FOIA as its basis for doing so.

6. Following an internal review the DfE wrote to the complainant on 18 October 2013 maintaining its original position.
7. Further information relating to the background of this case, provided by the complainant, is contained in an Annexe at the end of this decision notice.

Scope of the case

8. The complainant contacted the Commissioner on 18 October 2013 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of this case to be to determine if the DfE has correctly applied section 22(1) of the FOIA to the withheld information.

Reasons for decision

10. 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).*
11. This is a qualified exemption, and is therefore subject to a public interest test. In order to determine whether section 22 is engaged the Commissioner needs to consider the following questions:
 - 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).
12. The DfE explained that it had interpreted the request to encompass the impact assessments of any free school where the Secretary of State had entered into a funding agreement with respect to the school. Therefore

the impact assessments for 55 free schools that opened in 2012 and 44 free schools that opened in 2013 fell within the scope of the request.

Was the requested information held by the DfE with an intention to publish it at some date in the future (whether determined or not)?

13. DfE explained that at the time of the request it intended to publish the 55 impact assessment of schools that opened in 2012 in early October 2013, and intended to publish the impact assessments of schools that were opening in September 2013 in 2014.
14. The impact assessments for the free schools which opened in September 2012 were released on 17 October 2013. The impact assessments for the free schools which opened in September 2013 are scheduled to be released in April 2014.
15. The DfE advised that the decision to publish this kind of information was taken by the time that it received the request, although the precise timing had not been established. Indeed, the release of impact assessments is now a well-established part of the department's annual communications on the free schools programme. The 2012 impact assessments were published in October 2013 and, having now embedded the process for publication, it has been able to bring forward the release of the 2013 impact assessments to April 2014.
16. It subsequently published the next batch of another 55 schools (which it considered fell within the scope of this request) on 17 October 2013 within the timeline agreed above.
17. The remaining signed funding agreements in scope of this request are for a significant proportion of 2013 openers. The DfE plans to publish these in late April, shortly after the Easter break.
18. This information is included as part of its internal free schools planned publications timetable and the DfE currently has no plans to change this schedule.
19. The complainant has argued that the DfE did not hold the requested information with a view to its publication at some future date. It holds the requested information as the Secretary of State is required by statute to carry out the assessment in respect of each and every proposed free school.
20. When the complainant made a similar request on 11 October 2012 at no point in its response did the DfE say that it held the then requested information with a view to publication at some future date. The DfE did

not claim section 22. The DfE put a forthright case against any disclosure at any time based on section 36.

21. In addition the complainant stated that following the publication of the Commissioner's decision notice in that case (FS50448179¹) of 26 March 2013 the DfE through the Treasury Solicitor initiated an appeal against the decision to the First Tier Tribunal. Thereafter the DfE withdrew its appeal. By letter of 27 June 2013 to the complainant, the Treasury Solicitor indicated that the DfE would publish all wave one impact assessments and invited the complainant to agree to dispose of the appeal of the DfE by consent. This letter made no mention of any intention on the part of the DfE to publish further assessments, that is for wave two or wave three or any further assessments at any time in the future.
22. The complainant explained that the present request for information was made on 18 July 2013. The response came on 8 August 2013. In this response for the first time the DfE argues the section 22 exemption. The response says that at the time the complainant made the request the DfE held the documents with a view to publication by the DfE or any other person at some future date. The complainant argued that this claim does not appear to be supported by the chronology and the previous position of the DfE. He considered the appearance is that the DfE only came up with the section 22 argument after the present request was made on 18 July 2013 and as a response to that request.
23. The DfE wrote further to the complainant on 18 October 2013 with the outcome of its internal review. The complainant stated that this letter did not say when the DfE had decided it intended to publish. The internal review took the view that the DfE would not have been able to invoke section 22 if the decision to publish the information had not already been taken. The complainant argued that this rather circular argument does not give confidence that the internal review investigated whether in fact the DfE had taken the decision to publish.
24. In the DfE's response to the Commissioner it stated that having published the first wave assessments it has been its intention to publish all assessments since accepting the ICO's ruling in FS50448179. The first wave was published in June 2013, prior to the complainant's request. In addition, subsequent to this request the DfE also published the impact assessments for the free schools that opened in September 2012 on 17 October 2013. This supports the DfE's argument of its

¹http://ico.org.uk/~media/documents/decisionnotices/2013/fs_50448179.ashx

intention to publish and has evidenced that it does publish this information. The Commissioner is therefore satisfied that the DfE had an intention to publish the requested information at the time of the request.

Is it reasonable in all the circumstances that the information should be withheld until a later date?

25. In considering the reasonableness of withholding information the Commissioner's guidance on this subject says that authorities should first give separate consideration as to whether or not such an approach is 'sensible, in line with accepted practises and fair to all concerned to withhold information prior to publication'
26. The DfE concluded that it was reasonable to withhold information until a later date.
27. It explained that it is now routinely publishing the impact assessments for open free schools and intends to publish the information in due course. The DfE published the impact assessments for all free schools that opened in September 2012 on 28 June 2013 and those that opened in September 2012 on 17 October 2013. The planning of this work into a regular schedule means that other essential operational work can take place alongside it. The free schools team manage the preparation of this information in a scheduled manner, and within a reasonable timeframe.
28. The DfE has noted the complainant submissions that the desire for the management of information by the Government should have far less priority than the entitlement of the public to the requested information. The complainant argues that if they so request the public are entitled to the information "piecemeal" that is in relation to an individual school or group of schools before the Government has decided to publish the information for that particular wave. This follows from the decision notice of 26 March 2013, including at paragraph 44, which determined that the assessment for a school should be disclosed when its application for free school status had been settled.
29. The complainant argued that schools in wave three opened in September 2013 so their applications have obviously long since been settled. All of the wave three assessments could have been put on the Departmental website some months ago, that is once final approval was given by the Secretary of State and certainly once the Funding Agreements have been signed. This deals with concerns of the DfE about members of the public receiving accurate information at the same time.

30. The complainant also stated that no indication has been given when the requested assessments will be provided beyond use of the phrase "in due course" in its response of 8 August 2013.
31. The Commissioner has considered the arguments presented by both parties. He acknowledges the complainant's concerns in paragraph 23. Regardless of the fact that the complainant has referred to a previous decision notice, this does not necessarily set a precedent.
32. Give the passage of time, and the DfE's experience of dealing with these type of requests, it is not surprising that it has reviewed and adapted its policies and procedures to make the disclosure of this type of information more manageable.
33. Therefore the Commissioner considers that section 22 has been engaged correctly and has gone on to consider the public interest. The exemption can only be applied where the public interest in maintaining the exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

34. The DfE acknowledges that there is a general public interest in disclosure because of the need for there to be an open and transparent government and that the sharing of information with the public should be free and open.
35. It has already determined (and informed the requester) that it will publish the impact assessment information for open free schools on the departmental website in due course.
36. The complainant has argued:
 - a) the public have an interest in understanding how the DfE makes decisions in relation to free schools, because they are publicly funded;
 - b) the DfE will make decisions in relation to other free schools. The public needs to understand how these decisions have been made in the past in order to engage effectively with decision-making in the future;
 - c) local people have an obvious interest in understanding the decisions made in relation to the opening of any new school in their area;
 - d) since the DfE is under a statutory duty to assess the impact of opening a free school, the public ought to be able to exercise oversight over its compliance with the duty; and
 - e) there is a contrast between the open democratic processes involved in local decisions to open maintained schools and the closed Whitehall

decision-making process for opening free schools. This makes it all the more important for DfE to fulfil its statutory duty in as open a manner as possible.

- f) The public information test was considered carefully by the Commissioner in his initial decision of 26 March 2013 (FS50448179) in the context of section 36. The same or very similar considerations arise in the context of section 22 save that no "safe space" for discussion section 36 type issues now arise. The Commissioner found that the public interest test favoured disclosure.

Public interest arguments in favour of maintaining the exemption

37. The DfE considered that the public interest in permitting it to publish information in a manner and at a time of its own choosing is important. It is part of the effective conduct of public affairs that the general publication of information is a conveniently planned and managed activity within the reasonable control of the public authority.
38. The DfE argued that it is not reasonable for it to be expected to release piecemeal information in advance of its planned timetable, and there is 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 could result in partial information being released over a protracted period leading to confusion and inaccuracy.

Balance of the public interest arguments

39. The Commissioner considers that timing of the request to be important in this case. At the time of the request the DfE had already embedded a plan to routinely publish the impact assessments.
40. In addressing the complainant's arguments in paragraph 33, the Commissioner considers that the public interest will be addressed by the publication of the impact assessments.
41. Once in the public domain these will enable the public to scrutinise the assessments and ensure DfE is fulfilling its statutory duty. The public will also be able to exercise oversight over its compliance with the duty.
42. Therefore the Commissioner has decided that the public interest in disclosure is outweighed by the public interest in maintaining the exemption. Therefore the information is exempt from disclosure under section 22(1).

Annexe

43. The Government introduced its free schools policy in the Academies Act 2010. This allows a group of individuals to set up new publicly-funded schools in their area, with the agreement of DfE. A free school may open even where there is a surplus of school places in the neighbourhood, attracting pupils and resources away from existing schools.
44. The procedure for opening a free school bypasses the usual democratic procedures for setting up a new local school. When a local authority used to open a new maintained school, extensive local consultation would take place, including town hall meetings with local residents. When a free school is opened, the decision is taken in Whitehall, behind closed doors.
45. Section 9 of the Academies Act provides a potentially important check on decision-making in relation to free schools. It places an obligation on the Secretary of State to take into account the impact of opening a free school on existing maintained schools in the local area.
46. In September 2011 the first 24 free schools opened, the wave one schools. A further 57 opened in the academic year September 2012 to August 2013, the wave two schools. Ninety three more opened in September 2013, the wave three schools.
47. On 11 October 2011 the complainant wrote to the DfE to request disclosure of impact assessments and statutory assessments made under section 9 of the Academies Act in relation to each of these schools. The DfE refused that initial request and relied on section 36(2)(b)(i) and section 36(2)(c) of the FOIA. The DfE stated that the public interest in disclosure was outweighed by two factors: first, the need for Ministers and officials to have "space" to provide free and frank advice; and second, the risk of a detrimental impact on existing schools if discussions were disclosed regarding their underperformances.
48. On 24 January 2012 the complainant requested an internal review of this decision and the identity of the "qualified person" making the decision under section 36. The complainant was informed on 9 February 2012 that the Minister of State for Schools, Nick Gibb MP, made the section 36 decision. On 2 March 2012 the complainant was informed that the internal review had upheld the decision to refuse disclosure.
49. On 8 May 2012 the complainant submitted to the Commissioner an application to obtain the requested disclosure. This led to the granting of disclosure in the terms as set out in the decision notice of 26 March 2013 FS5044817.

50. On or about 28 June 2013 the DfE published on a Government website the "wave one" impact assessments, that is for those free schools which opened in 2012.
51. On 18 July 2013 the present request for information was made.

Right of appeal

52. 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

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

53. 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.
54. 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

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