

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 June 2014

**Public Authority:** Department for Education (DfE)  
**Address:** Sanctuary Buildings  
Great Smith Street  
Westminster  
London  
SW1P 3BT

#### **Decision (including any steps ordered)**

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1. The complainant has requested the DfE to release information relating to its plans to introduce Maths Free Schools. The DfE released some information but refused to disclose other information under section 36 of the FOIA.
2. The Commissioner's decision is that the DfE correctly applied section 36 of the FOIA to the remaining withheld information. However, the Commissioner has decided that the public interest in favour of maintaining this exemption is outweighed by the public interest in favour of disclosure in this case.
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation:
  - The DfE should release all remaining withheld information to the complainant, as detailed in paragraph 11 of this notice.
4. The DfE must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## **Request and response**

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5. On 21 October 2013, the complainant wrote to the DfE and requested information in the following terms:

In respect of specialist Maths Free Schools:

"1. How many expressions of interest has the DfE received re these schools and from which organisations/universities?

2. How many actual proposals has the DfE received and from which organisations/universities?

3. How many proposals have been rejected and why and from which organisations/universities?

4. How many proposals have been agreed and from which organisations/universities?"

6. The DfE responded on 21 November 2013. With regards to questions 1 to 3 the DfE refused to disclose the requested information under section 36(2)(b) and (c) of the FOIA. In relation to question 4, the DfE stated that it held information falling within this element of the complainant's request but considered it was exempt from disclosure under section 21 of the FOIA (as the number of accepted proposals was already available on its website).
7. The complainant requested an internal review on 10 and 12 December 2013.
8. The DfE responded on 14 January 2014 stating that it remained of the view that the requested information was exempt from disclosure under sections 21 and 36(2)(b) and (c) of the FOIA.

## **Scope of the case**

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9. The complainant contacted the Commissioner on 17 January 2014 to complain about the way his request for information had been handled.
10. The complainant confirmed that he was unhappy with the DfE's response to questions 1 to 3 and therefore the application of section 36(2)(b) and (c) of the FOIA. He confirmed that he has no complaint in respect of question 4 and the DfE's application of section 21 of the FOIA.

11. The Commissioner's investigation has therefore focussed on questions 1 to 3 and the DfE's refusal to disclose this information under section 36(2)(b) and (c) of the FOIA. During the Commissioner's investigation the DfE decided to release some of the information to the complainant. This notice will address the remaining withheld information, which is as follows:

- Question 1 – the complainant's request to know how many expressions of interest have been received and from which organisations/universities.
- Question 3 in part. The complainant's request to know the reasons why one of the applications received was rejected.

## **Background**

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12. The DfE confirmed that in December 2011 the Chancellor announced "specialist maths free schools for 16-18 year olds supported by strong university maths departments and academics". It stated that since this announcement it has been encouraging universities to establish these schools. The DfE explained that in keeping with the pathfinder nature of the programme it has asked universities to come forward with ideas for how maths free schools could be run. It has been the DfE's experience that interested Heads of Maths have contacted it for further information before seeking to discuss the idea with their Vice Chancellor. Unlike the free school application process there is no formal expression of interest stage for specialist maths free schools. Instead of having a formal application process the DfE has encouraged universities to discuss their ideas with it in advance of submitting a proposal document. There are also no fixed criteria against which all proposals are assessed.

## **Reasons for decision**

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13. Section 36(2) of the FOIA states that information is exempt from disclosure if, in the reasonable opinion of the 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.

14. Section 36 is also a qualified exemption and is therefore subject to the public interest test.
15. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
16. Section 36(5)(a) states that in relation to information held by a government department in the charge of a Minister of the Crown, the qualified person is any Minister of the Crown. In this case the DfE confirmed that the opinion was given by the Parliamentary Under Secretary of State for Education and Childcare, Elizabeth Truss. The Commissioner is satisfied that she was an appropriate qualified person for these purposes.
17. As the Commissioner is satisfied that the opinion is the opinion of an appropriate qualified person for the DfE, he now needs to consider whether that opinion is reasonable. It is important to highlight at this point that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold.
18. The Commissioner has reviewed the withheld information, the submissions he received from the DfE and the information that was given to the qualified person in order for her to reach her opinion.
19. The DfE explained that it has always made it very clear that the process for applying to open a maths free school is distinct from the mainstream process for applying to open a free school. For mainstream free schools, submitting an expression of interest was a formal discrete stage in the wave one application process. It states that there is no equivalent for maths free schools. Some organisations/universities have contacted the DfE about this policy and therefore expressed an interest. After this initial contact some have gone away to engage key stakeholders and partner organisations in their ideas and work on an application for submission. The DfE confirmed that the application is and has always been the first formal stage of the maths free schools process and it has already stated publicly that it has received three applications from King's

College London, Exeter University and the University of Central Lancashire.

20. It argued that each expression of interest represents a future possible application that the DfE has not yet made a decision about. It considers that by continuing to withhold the identity of those organisations that have expressed an interest and the total number until after they have applied and been given a decision it is protecting the space these organisations have to develop their ideas and in doing so shape the future of this policy. It referred to the general approach the Commissioner has taken in section 36 cases where it is evident that the public authority is still deliberating and deciding on a particular issue or policy. The DfE states that the Commissioner has often agreed in such circumstances that the public authority requires the private thinking space to consider its views, ideas and ultimate policy decisions and therefore that section 36 of the FOIA applies. The DfE considers those organisations that have expressed an interest but not to the date of the request submitted any formal application should be afforded the same private thinking space.
21. The DfE considers disclosure of this information would be likely to be harmful to the future of this policy. Maths free schools were originally announced in December 2011 but the first two schools will not open until September 2014. As it is the DfE's intention to allow the policy to develop as these schools moving toward pre-opening, it means it is still far from a steady state. It confirmed that funding arrangements were only confirmed for the development of maths free schools in February 2014 and many policy decisions on this issue have been shaped by the specifics of the two schools that are due to open soon. It expects the policy to develop even further as more maths free schools are approved.
22. The DfE explained that universities are extremely risk adverse when it comes to protecting their reputation and so do not want to be publically named until they have submitted an application. As such, if they are named at an earlier point it may make them pull out altogether and may make universities unwilling to approach the DfE with ideas.
23. Similarly, the DfE argued that if it were to release the reasons why one of the applications was rejected it would be likely to deter future interest as they would not want the public criticism of its ideas. Given that the policy is driven by university interest, if all potential groups are deterred the policy will fail and students will not be able to enjoy the potential benefits.

24. The Commissioner is satisfied in this case that the qualified person's opinion that sections 36(2)(b)(i) and (ii) and 36(2)(c) is engaged is a reasonable opinion to hold. He can therefore only conclude that these exemptions do apply in this particular case.
25. As stated previously section 36 of the FOIA is a qualified exemption. The Commissioner will therefore now go on to consider the public interest test.

### **Public interest test**

26. The Commissioner notes that it was the qualified person's opinion that disclosure of the withheld information "would be likely" to have the effects set out in sections 36(2)(b)(i) and (ii) and 36(2)(c), as opposed to that it "would" have those effects. In his view this means that there is a real and significant chance of the prejudice occurring, even though the probability may be less than fifty per cent. The Commissioner has taken this into account in assessing the public interest arguments in favour of maintaining the exemption.
27. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

*'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'.*

28. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so  
*"...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."*
29. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should

consider the severity, extent and frequency of the likely inhibition on the free and frank provision of advice, the free and frank exchanges of views for the purposes of deliberation and the likely prejudice to the effective conduct of public affairs.

30. The DfE stated that it recognised there is a general public interest in transparency and open government and that information should be made available to the public on the decisions its makes to encourage public debate on such important issues.
31. However, in this case the DfE considers that it is crucial to the effective implementation of policy that officials and its stakeholders feel able to express their opinions and advice in an honest and protected space. It argued that officials must be allowed the safe space to develop their thinking and explore available options including those brought to it by its relevant stakeholders. DfE stated that this was an important process of effective government and disclosure of the remaining withheld information would be likely to work directly against this, inhibiting officials and stakeholders from exploring ideas and options due to the fear that information about them might be disclosed at an inappropriately early stage.
32. The DfE confirmed that it considers future applications to develop specialist maths free schools may be deterred from applying if their involvement at such an early informal stage of the process was to be disclosed and this would not be in the public interest.
33. The Commissioner has considered the severity and frequency of the likely prejudice and inhibition the DfE has argued. It is the Commissioner's view that the public interest in favour of maintaining sections 36(2)(b) and 36(2)(c) is outweighed by the public interest in favour of disclosure in this case and he will now explain why.
34. Section 36(2)(b)(i) and (ii) exists to allow public authorities the safe space to advise and deliberate free and frankly in order to reach robust decisions. This includes the safe space to deliberate and frankly discuss policy options or ideas with its relevant stakeholders. It is accepted generally that it is not in the public interest to encourage public scrutiny of a particular issue until a final decision is made, as disclosure prior to this could hinder the public authority's (whether the DfE or the organisation/university involved) ability to consider its options free and frankly ultimately resulting in potentially poor decision making.
35. It is important to highlight the information actually requested here. The complainant has requested the number of expressions of interest



received by the DfE, the names of the organisations or universities that have expressed an interest and the reasons why one application was rejected.

36. Addressing the number of expressions of interest received and from which organisations or universities first, the complainant did not request more detailed information on what had actually been discussed between these organisations or universities and the DfE, the ideas proposed or what was the outcome of these discussions – the type of information to which safe space to deliberate free and frankly should be afforded.
37. As the complainant's request was not for details of what was actually discussed but only the number of organisations or universities which have merely expressed an interest and their names, the Commissioner is not satisfied that the disclosure of the requested information in this case would be likely to have prejudicial effects that could be regarded as severe, frequent or extensive on the free and frank provision of advice or the free and frank exchange of views for the purposes of deliberation and the effective conduct of public affairs.
38. The Commissioner considers the organisations or universities concerned would still have the safe space they should be afforded to consider any proposals discussed further, if indeed they still are, if this information was disclosed and therefore disclosure in this case would not hinder their right to private space to the extent the DfE has claimed.
39. Turning now to the reasons why one application was rejected, the Commissioner does not agree that disclosure would deter future applications from other organisations or universities. In fact the Commissioner considers disclosure would be likely to assist public debate further and allow members of the public and those organisations thinking of applying to see why this application was rejected and to make more successful applications in the future.
40. The DfE also argued that the organisation or university concerned would regard disclosure of the reasons why its application was rejected as public criticism of its plans. The Commissioner does not wholly agree that this is how such information would be interpreted. The DfE has stated itself that this policy is in its early stages and the few applications received so far have been used to shape the future application process and the overall policy. Disclosure would aid the development of this policy further and allow those particularly interested in the government's plans to introduce maths free School to aid this process.



41. The Commissioner accepts that disclosure may result in further questions being asked of the organisation or university concerned. However, the Commissioner does not consider such an effect to be particularly severe or indeed wholly negative. In fact the Commissioner considers further questioning or debate on this particular application could ultimately result in the university or organisation concerned putting a more favourable future application to the DfE.
42. The free schools policy (whether mainstream or specialist) generally is an area which has understandably attracted significant public interest and debate. It represents a significant change in national educational policy and also entails the expenditure of large amounts of public money. There is therefore a significant public interest in ensuring, as far as possible, transparency in relation to the programme. Any successful free school application would have the potential to impact on the provision of education in the area in which the school is to be based. Clearly in these circumstances, there is a considerable public interest in allowing members of the public, who may potentially be affected by the setting up of a school, to participate in an informed debate on the merits of any relevant applications and to be able to make representations to their representatives on local councils and in Parliament. The disclosure of the withheld information would be of benefit in relation to this process.
43. Given the level of public interest this new educational approach has attracted, the Commissioner considers that the majority of schools, universities and educational institutions will have a reasonable expectation that information relating to plans to open one in a particular area may be disclosed to the public. He does not accept that disclosure in this case would therefore result in universities or organisations interested in opening a maths free school from being deterred from putting its proposals to the DfE. A sufficiently motivated public authority wishing to take such a plan forward would continue with the process regardless of the disclosure of this information in this case.

## Right of appeal

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44. 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)

45. 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.
46. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**