

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 21 October 2015

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

Decision (including any steps ordered)

1. The complainant has requested from the Department for Education ("DfE") copies of letters sent to Free School applicants in Wave 1, 2 and 3 of the Free Schools programme informing them of the decision to either accept or reject their application and the reasons why. The DfE has disclosed copies of the decision letters sent to the successful applicants but withheld the letters sent to the unsuccessful ones under section 36(2)(c) (prejudice to the effective conduct of public affairs).
2. The Commissioner's decision is that section 36(2)(c) does not apply to the information withheld by the DfE (namely the letters sent to the unsuccessful applicants) as the public interest in maintaining the exemption does not outweigh the public interest in disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose to the complainant:

Copies of all 590 rejection letters held by the DfE and sent to the unsuccessful applicants to set up Free Schools in Wave 1, 2 and 3 of the Free Schools programme;

The DfE is not required to disclose the names, addresses or other personal data of individuals contained within any of the above documents where it believes that the information is exempt from disclosure under section 40(2).
4. The public authority 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

5. On 10 July 2014, the complainant wrote to the DfE and requested information in the following terms:

"I am writing to ask that under the Freedom of Information Act 2000 you release:

(1) The letters sent to Free School applicants in Wave 1, 2 and 3 of the Free Schools programme informing them of the decision to either accept or reject their application and the reasons why. With regard to Wave 1, where numerous letters were sent, I only wish the final letter to be released".

6. The DfE responded on 12 September 2014. It disclosed (and published on its website¹) the letters sent to the successful applicants in Waves 1, 2 and 3 as it concluded that the public interest was balanced in favour of disclosure. However, it withheld the letters sent to unsuccessful applicants under section 36(2)(c) of the FOIA (prejudice to the effective conduct of public affairs).
7. The complainant requested an internal review on 8 October 2014.
8. The DfE responded to the complainant on 5 November 2014 and upheld its original decision.

Background to the request

9. The Free Schools programme was introduced by the Government following the general election in 2010. Its purpose is to allow new schools to be set up in areas where there is local demand with the intention of improving standards of education in the area. Free Schools can be set up by a range of potential applicants including parents, teachers, charities, businesses and religious and voluntary groups. They are funded directly by central government and operate independently of local authorities. Free Schools have greater flexibility over areas such as

¹ <https://www.gov.uk/government/publications/letters-sent-to-successful-free-school-applicants-wave-1>
<https://www.gov.uk/government/publications/letters-sent-to-successful-free-school-applicants-wave-2>
<https://www.gov.uk/government/publications/letters-sent-to-successful-free-school-applicants-wave-3>

the curriculum and teachers' pay and conditions than local authority run schools.

10. Those wishing to set up a Free School are required to submit an application to the DfE. So far there have been eight 'Waves' of applications.
11. The letters sent to the successful Free School applicants for Waves 1, 2 and 3 (the subject of this Decision Notice) were published by the DfE on 12 September 2014 with the schools concerned having actual/anticipated opening dates in September 2011/12, 2012/13 and 2013/14 respectively.
12. The letters sent to the successful applicants for the most recent 'Wave 8' were published by the DfE on 16 July 2015².

Related Decision Notice and Tribunal Appeal

13. On 1 October 2012 the complainant submitted an information request to the DfE very similar to the one which is the subject of this Decision Notice. In addition to the letters sent to Free School applicants, the complainant also requested the completed application forms. The DfE withheld this information under section 36(2)(c) of the FOIA.
14. The complainant referred the matter to the Commissioner and in his Decision Notice FS50478864 dated 18 November 2013³ he upheld the complaint and ordered disclosure of the requested information (with redactions for personal data).
15. The DfE appealed the Commissioner's decision to the Information Tribunal and in addition to section 36(2)(c) also sought to reply upon sections 12, 13 and 14 of the FOIA. In its subsequent decision EA/2013/0270⁴ on 2 July 2014 the Tribunal upheld the DfE's appeal under section 14 of the FOIA (on the basis of the considerable burden involved in locating, retrieving and redacting the requested information) and as a result did not consider section 36(2).

² <https://www.gov.uk/government/publications/letters-sent-to-successful-free-school-applicants-wave-8>

³ https://ico.org.uk/media/action-weve-taken/decision-notices/2013/918020/fs_50478864.pdf

⁴

[http://www.informationtribunal.gov.uk/DBFiles/Decision/i1322/Department%20for%20Education%20EA.2013.0270%20\(02.07.14\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i1322/Department%20for%20Education%20EA.2013.0270%20(02.07.14).pdf)

16. In view of this decision and to reduce the burden on the DfE, the complainant refined and restricted her request to the information which is the subject of this Decision Notice.

Scope of the case

17. The complainant contacted the Commissioner on 18 December 2014 to complain about the way her request for information had been handled.
18. On 16 January 2015 the complainant confirmed that she was happy for the Commissioner to restrict the scope of his investigation to the DfE's refusal to disclose the letters sent to the unsuccessful Free School applicants under sections 36(2)(c) and 40(2) of the FOIA.

Chronology

19. On 20 January 2015 the Commissioner contacted the DfE and requested a copy of the withheld information, the submissions presented to and the opinion given by the qualified person and any further arguments it wished to advance in support of its application of sections 36(2) and 40(2) of the FOIA.
20. The DfE responded on 17 February 2015 and provided the Commissioner with a selection of the 631 or so rejection letters from Waves 1-3 and the submissions presented to and the opinion given by the qualified person. It confirmed it was maintaining its position to withhold the requested information under sections 36(2)(c) and 40(2) of the FOIA and provided detailed arguments to support this. It also pointed out that it had revised its publication strategy for the Free Schools programme in 2014 and in the future would be disclosing on its website successful applications and letters. In relation to rejected applications and rejection letters it said that in the future it was committed to the 'production of an anonymous summary analysis explaining why applications tend to be approved and rejected'.
21. On 19 February 2014 the Commissioner contacted the complainant and invited her to consider whether she would be prepared to resolve her complaint informally by inviting the DfE to disclose the rejection letters with the names of the schools and any individuals identified being redacted.
22. The complainant responded on 26 February 2015 and indicated that she would be willing to consider this option providing the names of the schools and certain individuals (where disclosure of their identity would not be unfair) were not redacted.

23. On 27 February 2015 the Commissioner wrote to the DfE requesting copies of the remainder of the letters sent to the unsuccessful applicants and at the same time invited it to consider disclosing them to the complaint with the names of the various individuals (or any reference to them being redacted).
24. In a subsequent email to the DfE dated 12 March 2015 the Commissioner indicated that he would stand by his analysis regarding the application of section 36 as set out in his earlier Decision Notice FS50478864 (see above). He also said he would not attach much (if any) weight to the public interest argument that in the future it was the DfE's intention to publish general reasons why Free School applicants were unsuccessful. He also pointed out that the impact of disclosure of the unsuccessful letters to Wave 1-3 applicants would be diminished in view of the time which had elapsed since they were sent out.
25. The DfE responded on 18 March 2015 and stated that it was maintaining its arguments and reasoning behind withholding the requested information.
26. After a number of unsuccessful attempts to send the withheld information electronically, the DfE eventually sent it in hard copy by post on 27 March 2015. The DfE pointed out that some of the rejection letters could not be found and therefore were not held.
27. The DfE applied sections 36(2)(c) and 40(2) of the FOIA to the withheld information.

Reasons for decision

Section 1 – Recorded information held

28. The DfE has clarified that the information falling within the scope of the outstanding request comprises of 631 rejection letters. However, it has only been able to locate and send to the Commissioner 590 of these as it cannot find 41. Of these 23 are from Wave 1, 2 from Wave 2 and 16 from Wave 3.
29. The DfE has provided the Commissioner with details of the enquiries and searches it carried out to identify, locate and extract the missing letters. These included consulting with colleagues in its Free Schools Group who confirmed that they searched filing systems and consulted relevant individuals in case they held the letters. The Free Schools Group searched the old (shared drive) and new (Workplaces) IT filing systems

to see if they could locate the missing letters. In addition, they also wrote to all Deputy Directors (including those who had left Free Schools Group) to see if they had any of the missing letters saved in their personal folders. None of these searches and enquiries revealed the missing letters.

30. The Commissioner is satisfied on a balance of probabilities that the DfE does not hold any further recorded information falling within the scope of the complainant's request apart from that already sent to him, namely the 590 rejection letters.

The exemptions

31. The DfE has sought to withhold the requested information under sections 36(2) and 40(2) of the FOIA. The Commissioner will now deal with each exemption in turn.

Section 36 – Prejudice the effective conduct of public affairs

32. The DfE applied section 36(2)(c) to the withheld information.

33. Section 36(2)(c) 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 -

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

34. In order to determine whether section 36(2)(c) has been correctly applied the Commissioner has:
- (i) ascertained who the qualified person was for the public authority;
 - (ii) established that an opinion was given;
 - (iii) ascertained when the opinion was given; and
 - (iv) considered whether the opinion given was reasonable.

The engagement of section 36

35. 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 Minister in charge of

Academies and Free Schools, Lord Patrick Nash. The Commissioner is satisfied that he was an appropriate qualified person for these purposes.

36. In support of the application of section 36, the DfE has provided the Commissioner with a copy of the submissions to the qualified person, which identifies the information to which it is suggested that section 36(2)(c) should be applied, and copy of the qualified person's opinion.
37. The Commissioner notes that the qualified person's opinion was sought on 5 August 2014. The Minister provided his opinion that section 36 was engaged on 6 August 2014 as he believed that disclosure of the withheld information would be likely to have the effects set out in section 36(2)(c). It appears that he accepted that section 36(2)(c) was engaged in relation releasing the letters sent to the unsuccessful Free School applicants for the reasons set out in the submission, namely;
 - (a) The release of rejection letters might discourage applicants from applying again or from applying in the first place. Releasing negative feedback from the Department would increase this risk still further. The feedback could be used by groups opposed to the proposed Free School to discourage local support for any re-application.
 - (b) Many feedback letters for schools that are now open or currently in the pre-opening phase give feedback on areas that the applicants will need to improve before the DfE agrees to enter into a funding agreement with the trust. This could have the effect of making the school more vulnerable than it really was. Parents might lose confidence in the school, teachers might decide not to take up their posts or leave the school, increasing recruitment difficulties and impacting directly on the education of the students in the classroom. While it is a good thing for parents to access information about the performance of schools, for example through Ofsted reports, it would not be helpful for them to see feedback on areas of weakness that will have been addressed before the school opened.
 - (c) Some stronger applications did not receive interview feedback and as such these letters do not contain sensitive information. However, release of some but not all letters would make it simple to work out which open schools has received critical feedback in their acceptance letters, running the risk described above.
38. The DfE informed the Commissioner that there were around 631 letters falling within the scope of the request of which it could only find 590. Copies of these have been sent to the Commissioner.

39. After reviewing the letters to which the exemption had been applied and the opinion of the qualified person, the Commissioner concluded that it was reasonable for the qualified person to conclude that section 36(2)(c) applied to them. As it is a qualified exemption, he went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

Public interest test

40. The Commissioner notes that the qualified person's opinion was that disclosure of the withheld information "would be likely" to have the effects set out in section 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.
41. 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 s 36(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'.

42. 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." 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 prejudice to the effective conduct of public affairs.

Public interest arguments in favour of maintaining the exemption

43. In relation to the public interest arguments in favour of withholding the information, the DfE expanded on the potential prejudicial effects which it believed were likely to arise from the disclosure of the information. These were listed in the submission to the qualified person and expanded upon in its subsequent letter to the Commissioner dated 17 February 2015.

The release of the letters sent to the unsuccessful applicants would be likely to discourage some groups to improve their proposal and reapply in future rounds. Also it might put some other groups off from ever applying. This would be likely to reduce the number and quality of applications and free schools

44. The DfE considers that the feedback included in the letters is specific and direct. It has pointed out that the letters include references to individuals within proposer groups and if disclosed would be likely to discourage some groups from improving their proposal and reapplying in future rounds. It is also of the view that the release of the letters might put other groups from ever applying in the future. The DfE believes this is a real and significant issue and could impact directly on the delivery of public services in a local area through reducing the number and quality of applications and open schools. This is because, on average, around 24% of unsuccessful applicants reapply to the programme in each Wave. Of these, around 24.5% of subsequently go through to pre-opening or successfully open a school.
45. The DfE has stated that the Free School programme is designed to allow innovation and for applicants to think "the unthinkable". Some proposals may be unworkable when first submitted but may contain the core of a proposal which, when developed further, could raise standards, raise aspirations and create opportunities which could transform the life chances of children in those communities. The DfE believes that releasing feedback letters relating to these applications may lead to them being ridiculed as their vision for a school may not fit in with the conventional school model. This could lead proposers to abandon a proposal which could have been both effective and ground-breaking had it been developed over time.
46. The Commissioner accepts that the release of unsuccessful rejection letters may result in increased questions and challenges for those groups that still wished to reapply to the DfE, as more information becomes available to the public about their previous applications. This may lead to increased demands on unsuccessful applicants as a result of questioning by members of the public about the detail of their proposals. Whilst he accepts, therefore, that there may be some prejudicial effect

from disclosure, he does not believe that this would be likely to be particularly severe and not sufficient to deter well motivated applicants from resubmitting new applications or indeed for some groups from submitting first applications.

The release of the letters would diminish support in the community for such projects

47. The DfE believes that the release of the letters to the unsuccessful applicant groups would also be likely to diminish support in the community for such projects. Even though the weaknesses identified in earlier round/s would need to be addressed and rectified before a school was approved for pre-opening, the public perception of weakness may remain and undermine support. Parents may not feel confident in committing their children to the school, even when changes, such as alterations to the senior management team or Principal Designate, had been addressed. This in turn could damage the evidence of demand which groups must be able to demonstrate in order to have a proposal considered by the DfE, rendering otherwise successful attempts to improve proposals and open a successful school null and void.
48. The Commissioner accepts that information in the rejection letters might be used by groups opposed to the free schools to discourage local support for any re-application. However, the disclosure will allow for a balanced debate which is important for openness and transparency.
49. The Commissioner accepts that parents may not feel totally confident in committing their children to schools where weaknesses have been identified. However, where these weaknesses have been addressed or where proposals have been put forward to address them, the Commissioner does not accept that the confidence of parents will be materially affected.

The release of the letters might undermine the status free schools that are currently open or in the pre-opening stage

50. The DfE has stated that the releasing unsuccessful feedback letters for schools that are currently open or in the pre-opening stage is likely to undermine their status in the community. It has pointed out that the letters would be a snapshot of proposed provision at a particular moment in time, which would have moved on and improved considerably in the intervening period in order for the school to have opened. However, it believes that the release of the letters would be likely to cause harm to developing relationships between schools, parents and the local community, and could lead to the breakdown of trust and effective co-operation. This in turn could lead to falling school rolls as parents tried to transfer their children into other schools, staffing

difficulties as teachers sought posts elsewhere before a school might be declared as failing. This in itself could have a significant adverse impact on the children still being educated at these schools, and may impact on the schools' sustainability in the long term.

51. The DfE believes that any unsuccessful applicants from waves 1-3 who went on to be approved in a later wave and open a free school might be adversely effected by the releasing of the feedback letter following their earlier unsuccessful application(s). This is because of the potential for parents to be concerned about the quality of the school, with the result that it may lose pupils and income, even if the issues within the feedback letter had long since been addressed. This in turn would make it difficult for the school to maintain its existing quality of education for pupils who remained in the school.
52. The Commissioner takes the view that if any issues raised in previous unsuccessful applications have been addressed resulting in the school being opened or in the pre-opening stage, the risk of any adverse effect on the school would not be that significant. Schools or the DfE would be able to address this by providing additional context and this would not be unfeasible.

Disclosure of some of the rejection letters for schools now open or in the pre-opening phase

53. The DfE has pointed out that some of the 'stronger applications' did not receive interview feedback and as such the letters sent to these groups do not contain sensitive information. However, the DfE believes that to disclose some but not all of the letters would make it simple to work out which open schools have received critical feedback in their acceptance letters.

The release of letters sent in response to applications by independent schools might have an adverse effect on them

54. The DfE has pointed out that not all of the Free School proposals are related to new projects. It is open to independent schools to apply to become free schools, and a high proportion of applications (32% in wave 1, 18% in wave 2 and 11% in wave 3) in the early round/s of the free schools programme came from this group. Schools which were unsuccessful would not change their status, and would continue to operate as independent schools. The DfE believes that releasing their feedback letters in the public domain now, during an economic downturn, may cause parents to believe, rightly or wrongly, that the schools are second-rate. This could cause them to lose pupils, income and potentially become unsustainable, even if the period since their

applications they have made improvements to their educational offer and staffing.

55. The Commissioner is not persuaded by the DfE's general argument that parents would conclude that an independent school whose application to become a free school was unsuccessful was 'second rate'. It is very likely that each rejection letter will be different and the DfE's feedback and reasons for the application being rejected and could not be reasonably construed as an assessment of the quality of the independent schools. Other information in the public domain, such as information from school inspections, would be far more influential. It is also seems reasonable to assume that parents with children at the school would have been consulted about making an application and information about the progress of the application and some reasons for its rejection would have been given to parents.
56. The DfE have also not provided any persuasive examples of letters, or extracts, that would have this impact.

Public interest arguments in favour of disclosing the requested information

The release of the letters will add very little to the public knowledge about the Free Schools programme

57. In summary the DfE believes that the release of the unsuccessful feedback letters could add very little to public knowledge about the free schools programme beyond the information that will be contained in the summary report (yet to be published). By contrast, it believes that disclosure could actively mislead the public because the feedback given to a specific project represents a 'snapshot' of that proposal during a longer process of development. Furthermore, the letters do not ascribe weighting to specific factors, meaning that meaningful or accurate analysis of the DfE's decision-making process would not be possible from this information. The DfE has stated to the Commissioner that it believes it is taking all steps to meet the real public interest in understanding reasons for the failure of proposals, while protecting the interests of children. Given that pupils' education could be actively damaged as outlined above, it behoves the DfE to be both scrupulous and responsible about the information it releases into the public domain. They argue that it could be actively harmful for erroneous conclusions to be drawn about the quality, performance and future of schools. The conclusion of the DfE is that the public interest in the maintenance of the exemption outweighs the public interest in disclosure for the reasons outlined above.

58. The DfE recognises that there is a public interest in transparency of government generally and in the public understanding the reasons why particular decisions have been made by ministers, not least so that the public can assess whether decisions are being made on a fair and consistent basis.
59. The DfE believes that it has satisfied this public interest by the information it already publishes in relation to the application process, successful applications and the costs of the Free School Scheme. This includes the following;
- The free schools application process:
<https://www.gov.uk/government/collections/opening-a-free-school>.
 - The innovative approaches free schools are using
([https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401458/DFE-RR286 -
_Are free schools using innovative approaches.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/401458/DFE-RR286_-_Are_free_schools_using_innovative_approaches.pdf)).
 - List of open and successful applications:
<https://www.gov.uk/government/publications/free-schools-open-schools-and-successful-applications>.
 - List of all applications received (latest link):
<https://www.gov.uk/government/publications/free-schools-wave-7-application-information>.
 - Capital costs:
<https://www.gov.uk/government/publications/capital-funding-for-open-free-schools>.
 - Revenue costs:
<https://www.gov.uk/government/publications/revenue-expenditure-for-free-schools>.
 - Impact assessments (latest link):
<https://www.gov.uk/government/publications/free-schools-that-opened-in-2014>.
 - Ofsted pre-registration advice notes (latest link):
<https://www.gov.uk/government/publications/ofsted-free-schools-pre-registration-advice-notes-2014>.
 - Wave 1 successful free school applications:
<https://www.gov.uk/government/publications/approved-free->

[school-application-forms-wave-1.](#)

- Wave 2 successful free school applications:
[https://www.gov.uk/government/publications/approved-free-school-application-forms-wave-2.](https://www.gov.uk/government/publications/approved-free-school-application-forms-wave-2)
- Wave 3 successful free school applications:
[https://www.gov.uk/government/publications/approved-free-school-application-forms-wave-3.](https://www.gov.uk/government/publications/approved-free-school-application-forms-wave-3)
- Alternative provision funding agreements:
[https://www.gov.uk/government/collections/alternative-provision-free-school-funding-agreements.](https://www.gov.uk/government/collections/alternative-provision-free-school-funding-agreements)
- All mainstream funding agreements are uploaded on the performance tables website:
[http://www.education.gov.uk/schools/performance/index.html.](http://www.education.gov.uk/schools/performance/index.html)

60. The DfE also informed the Commissioner in its letter dated 17 February 2015 that it intended in the future to publish a summary of general reasons why applications were rejected. It expressed the belief that this information would enable the public to understand why free school applications were unsuccessful, without the likely detrimental effects on the free schools programme and the impact on the education of children in free schools that would flow from releasing feedback letters to unsuccessful applicants.

61. The Commissioner believes that there is a strong public interest in openness, transparency and accountability and in increasing the understanding of how government works and in how decisions affecting people's lives are taken. He notes that the introduction of the Free School policy is an area on which there has been considerable public 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. The public interest has a national dimension and a local one.

62. In the case of the Department for Education v Information Commissioner and British Humanist Association (EA/2012/0136, 0166 and 0167) which concerned requests for particular details in relation to Free School applications, the First Tier Tribunal stated that:

"The Free School programme involves substantial public funds and significant changes to the way the education service is controlled, managed and delivered. It is a matter of considerable public importance and the transparency of the process and its

openness to public debate and consideration are of concern to communities across England.” (para 35)

63. The Commissioner believes that disclosure of the withheld information would enable greater and more informed public debate about the Free School programme and allow greater public oversight in relation to education policy decisions and its implication for education spending. It would enhance public scrutiny, at national and local level, of how effectively the Free School programme is being implemented, including whether decisions are being made consistently against published criteria.
64. The Commissioner also recognises that the release of the withheld information may be of assistance to groups that are considering making applications to set up Free Schools in future as it would enable them to see the content of previous applications and feedback from the DfE on those applications.

Balance of the public interest arguments

65. The Commissioner considers that the public interest factors in favour of the disclosure of the withheld information are very strong. The withheld information would provide considerable information about the implementation of a relatively new and very important educational policy and also provide information about the basis for decisions involving the expenditure of large amounts of public money. Disclosure of the information would help to increase the transparency of the programme, help with public understanding and enable greater public participation in the decision making processes. The Commissioner finds that there is a strong public interest in transparency each of stage of application process. A decision to site a new school in a local community is a significant decision and local communities can have a reasonable expectation about transparency for each stage.
66. The Commissioner has noted the DfE's intention to publish in the future a summary of general reasons why applications were rejected. However, he has not attached much weight to this factor as it is merely an intention to do something in the future.
67. The Commissioner has taken into account of the age of the requested information some of which is now almost 5 years old. Wave 1 of the Free Schools' programme relates to applications submitted and considered in 2010/11, Wave 2 relates to applications considered in 2011 and Wave 3 relates to applications considered in 2012.

68. The latest letters sent to successful applicants for Wave 8 were published by the DfE in July 2015 and the deadline for submitting Wave 10 applications is October 2015.
69. The Commissioner believes any sensitivity attached to the requested information has now been significantly reduced by the passage of time.
70. The Commissioner accepts that there are public interest arguments for maintaining the exemption but, in light of the strong public interest arguments in favour of disclosure, particularly with regard to the scale and importance of the Free School programme and its impact on national education policy, he considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosure. Consequently he has determined that the requested information should be disclosed.

Section 40(2) – Third party personal data

71. The DfE has also applied the exemption in section 40(2) in relation to the third party personal data in the withheld rejection letters.
72. The DfE has pointed out to the Commissioner that the withheld information contains different elements of personal information throughout. In addition to the names and addresses of individuals, the DfE has stated that feedback is frequently given in the rejection letters about the capability of individuals or the management team (which is a small group of people whose identities would be known). For example, one of the rejection letters states that the Free School application would not be taken forward as the preferred candidate for the Principal Designate post attended an assessment centre and was found to be unsuitable for appointment. Although this was not a determining reason for the rejection of the proposal, it does make public that the individual concerned failed to meet the required standard. The DfE believes that the disclosure of such information would be unfair to the individual concerned and could undermine his professional life in the future. Also it said that the same would be true for other unsuccessful feedback letters where the Principle Designate attended an assessment centre test.
73. The DfE has pointed out that all of the rejection letters have been sent/signed by its officials at various grades in the Free Schools Group and although civil servants do not have an absolute right to anonymity, it believes that the release of the names of the junior officials would infringe their rights under the Data Protection Act 1988 (the DPA).
74. The DfE has stated that disclosing personal information about junior officials would be likely to be unfair under the first data protection principal. It has pointed out that personal information relating to civil

servants bears no relevance on the situation nor would it be expected of these individuals to have their names in the public domain.

75. The Commissioner recognises that there is third party personal data in the rejection letters, the disclosure of which would be unfair under the DPA and therefore breach the DPA. Section 40 would therefore be engaged for this information.
76. He therefore finds that the DfE can redact any names and addresses of individuals (including any of its junior officials) from the letters and any feedback comments on the capability of individuals or management teams where it is possible to identify any individuals.

Right of appeal

77. 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: 0870 739 5836

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

78. 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.

79. 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
Head of Policy Delivery
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF