

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 May 2016

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

Decision (including any steps ordered)

1. The complainant requested information from the Department for Education ("DfE") concerning applications under wave 10 of the Free School programme. The DfE withheld the information under section 22.
2. The Commissioner's decision is that the DfE has incorrectly withheld the information under section 22.
3. The Commissioner does not require the DfE to take any further steps to ensure compliance with the legislation as it has published the withheld information.

Request and response

4. On 13 October 2015 the complainant requested the following information from the DfE under FOIA:

"A list of free school applications received by the Department for Education during "wave ten" (i.e. from Monday 28 September to midday on Wednesday 7 October 2015), giving for each:

- *The name of the proposed school*
- *The local authority of the proposed school*
- *The previous name (if applicable) of the proposed school*

- *The religious designation or faith ethos (if any) of the proposed school (and whether it is proposed to be designated or have an ethos)*
 - *Whether the proposal had been received before in any of the previous waves (and if so, which)“*
5. The DfE responded on 26 November 2015 and refused to provide the requested information citing the exemption in section 22 of FOIA.
 6. The complainant requested an internal review on 27 November 2015. The DfE provided the outcome of the internal review on 18 December 2015 in which it maintained its original position.

Scope of the case

7. The complainant contacted the Commissioner on 11 January 2016 to complain about the way his request for information had been handled, specifically the DfE's application of section 22 to the information that he had requested.
8. The Commissioner considered whether the DfE correctly applied section 22 to the information that it withheld.

Reasons for decision

Section 22 – Information intended for future publication

9. Section 22 of FOIA provides that information is exempt if, at the time a public authority receives a request for it:
 - the public authority holds it with a view to its publication;
 - the public authority or another person intends to publish the information at some future date, whether determined or not; and
 - in all the circumstances it is reasonable to withhold the information prior to publication.
10. The DfE informed the Commissioner that it had routinely published each wave of Free School applications on the GOV.UK website since 2013. It confirmed that the wave 10 information within scope of the complainant's request had been published in line with that intention on 18 February 2016 on the website.

11. The DfE noted that the Commissioner considered a similar request in 2014 relating to a list of wave 5 applications (under ICO case reference FS50522685) and that he was satisfied that it held the information at the time it received the request, with a view to publish the information at a future date.
12. The Commissioner was informed by the DfE that, although at the time of the request it did not have a named date to publish the wave 10 list, the intention had not changed. The intention remained to publish this once it had concluded the Free School assessment process, in line with previous practice.
13. The Commissioner accepts that the DfE held the requested information at the time it received the request, with a view to publish the information at a future date.
14. The Commissioner then considered whether it was reasonable, in all the circumstances, for the DfE to withhold the information prior to the publication date.
15. The complainant complained about the DfE's refusal to release information about Free School applications in a timely manner. He argued that the names and details of Free School applicants should enter the public domain prior to the DfE deciding which to approve, "*...as otherwise this represents a serious democratic deficit and lack of transparency in the Free Schools application process.*"
16. The complainant pointed to a previous decision of the Commissioner in relation to a similar request for wave 5 applications (FS50522685 referred to above) in which the Commissioner had decided that it was not reasonable for the DfE to withhold the requested information under section 22. He argued that the same principles should apply in this case.
17. The DfE noted the Commissioner's decision in FS50522685 and informed him that it was seeking to provide more explanation on this occasion to meet his concerns. It pointed out that in his decision the Commissioner had noted that earlier release of the information would have enabled information from Free School proposals to be available whilst the process of considering applications was live which in turn would have enabled public debate and participation in the process.
18. The DfE contended that the publication of the list of proposals was far from the first point at which individuals who could potentially be affected would become aware of the proposal or have an opportunity to engage in the debate. It believed that there was already considerable public debate and participation before applications were submitted, as proposer groups must show evidence of demand for the school or

schools they wished to open. This meant that local consultation with interested parties, including the local authority, diocese or other religious authority where appropriate, parents, local representative groups, MPs and others. It argued that these consultations would enable proposer groups to discuss their plans with the public and shape them accordingly. It noted that applications were expected to provide evidence of support from, and engagement with, the local community, as well as a clear rationale for the need for a new school. It argued that the publication of the list of applications at a later date in no way interfered with this important local debate and consultation process.

19. The DfE stated that it also wanted to make clear that moving to 'pre-approval' stage did not indicate that all decisions had been taken and the school would open. Free School applicants were required by law to consult key stakeholders before they entered into a funding agreement with the Secretary of State. It therefore contended that national organisations with an interest in this area still had the opportunity to see the wider national picture well before the proposed schools opened their doors, which provided them with ample opportunity to make any representations of their own.
20. The Commissioner was informed by the DfE that it was essential that it ensured that the information it published was accurate. To do this, it needed to ensure the assessment process had concluded before it published the list of Free School applications that it had received during wave 10. This allowed applicants some breathing space to consider whether to pause or withdraw their application before the list was released.
21. The DfE argued that releasing the list of applications at the end of the process also enabled proposer groups, which may still be staffed by volunteers at this point in the process, to concentrate on preparing for interviews or providing any missing information that the DfE required without distraction from national lobbyists. The DfE believed that it was essential for local people who could be affected by a proposed new school to have a chance to become involved in the debate at a formative stage, and this was built into the application process. However, it was of the view that it was entirely possible that small proposer groups could be bombarded with enquiries and criticism from national lobbying groups when they were attempting to prepare for interviews, and this could adversely affect the quality of their proposal. It contended that this in itself could be undemocratic, particularly if the proposal had the support of local people. The need to divert significant resources into dealing with such lobbying and away from the preparation of their proposal for a school would mean that those groups affected would have an externally applied competitive disadvantage when compared to other applicants, thereby undermining the fairness of the Free School process.

22. The DfE provided the Commissioner with evidence from a national organisation's website which it believed demonstrated its opposition to the establishment of new faith schools and its willingness to be involved in campaigns in opposition to the setting up of such schools.
23. The DfE contended that there was clearly a further public benefit to proposer groups being able to finalise their plans without being subject to lobbying and distraction. Better articulated planning means that the DfE could be better sighted on whether the proposal was likely to result in an effective school for the local area and thereby make an informed decision on whether to approve an application.
24. The DfE noted that the wave 10 list had six applications that were paused and three that were withdrawn. The decision to pause and withdraw the applications was taken at the final stages of the assessment process. It believed that if it published/released the list before its assessment had concluded it would have published/released inaccurate information.
25. While the DfE recognised that in many cases it was possible to publish information with a caveat or explanation, it believed that it was also true that such explanations could be separated from information, for example, if a list of schools was published in a newspaper without all of the accompanying context. In this case, it was of the view that providing parents with misleading information about schools potentially opening in their area, particularly when this could affect decisions about applying for limited school places in a time-limited round, would potentially have very serious adverse consequences. Hence it still believed that it was reasonable to withhold the information under section 22.
26. In making his decision in relation to case reference number FS50522685, the Commissioner stated that:

"When considering the reasonableness of withholding the information until the DfE's publication date the Commissioner finds that they should have taken into account the importance of information from free school proposals being available whilst the process of considering applications is live. This would enable public debate and participation in the process. The Commissioner would also contend that there is a relevant parallel between the need for openness in relation to planning applications e.g. whilst the applications are being considered." (para. 26)

27. The DfE has pointed out that proposer groups wishing to set up Free Schools would need to provide evidence of support from, and engagement with, the local community, which would inevitably involve consultations with local interested parties. It could therefore be argued

that this addresses the issue of the need for public debate and participation at the application stage of the process.

28. However, the Commissioner notes that the proposer groups would make the decision as to who to consult at the application stage and this would be likely to be limited in its scope. This could mean therefore that individuals and organisations, both locally and nationally, that might have made representations that could have been of significance regarding the setting up of a school might not be consulted as part of this process and might not learn of a relevant application until it had been approved by the DfE. This could have a consequent limiting effect on public debate and participation and run contrary to the principle of openness identified by the Commissioner in his earlier decision, referred to above.
29. The DfE went on to argue that there was an opportunity for national organisations, not originally consulted by proposer groups at the application stage, to make representations as proposers were required by law to consult with key stakeholders before they entered into a funding agreement with the Secretary of State. However, the Commissioner notes that there may very well be interested parties who wished to make relevant representations who did not fall into the category of "key stakeholders" required to be consulted by proposer groups. He therefore does not believe that this is sufficient to address his concerns over the limiting of public debate and participation that he identified in the previous paragraph.
30. The DfE also raised concerns about the impact that the disclosure of the details of applications might have on proposer groups, particularly smaller ones, in terms of being distracted from their primary purpose by lobbying from national organisations. The Commissioner believes that the people involved in the setting up of new schools would be aware that they might have to respond not only to issues raised locally but also, sometimes, to issues raised by national organisations. Given the nature and importance of the task being undertaken, he is of the view that appropriate applicants should have the requisite ability and resolve to be able to deal with such matters, whilst ensuring the necessary preparatory steps for the setting up of proposed schools continued as planned.
31. Finally, the DfE has contended that it was important that it did not publish details of applications until the assessment process had concluded in order to ensure that the information that it published was accurate. It believed that this helped to avoid potential parents being misled about the opening of schools and allowed proposer groups time to consider whether to pause or withdraw their applications before a list was published.

32. The Commissioner notes that the process for applying to set up new schools is likely to be a fluid one as it is possible that applications could be being withdrawn at various points in time. Consequently, the accuracy of information about which applications are proceeding might be subject to regular change, even after the initial approval stage when the DfE has published details of applicants. It would clearly be open to the DfE, where it believed it was important to do so, to update published information about applications to ensure that potential parents remained informed as to any issues affecting the opening of a proposed school.
33. As regards the delay in publication allowing proposer groups time to consider whether to pause or withdraw their applications, the Commissioner assumes that they would be continually reviewing their applications if they believed that putting an application on hold or withdrawing might be a possibility. He is not convinced that this argument is sufficient to outweigh the important issue of the need to promote public debate and participation in the application process that he has previously identified.
34. In light of the considerations above, the Commissioner has determined that it was not reasonable, in all the circumstances, for the DfE to withhold the requested information until publication at a later date. He therefore finds that section 22 was not engaged and has, consequently, not gone on to consider the public interest test.
35. As the DfE has now published the requested information, the Commissioner does not require it to take any further steps to ensure compliance with the Act.

Right of appeal

36. 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: GRC@hmcts.gsi.gov.uk

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

37. 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.
38. 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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