

**IN THE MATTER OF AN APPEAL TO THE FIRST TIER TRIBUNAL (INFORMATION RIGHTS)
UNDER SECTION 57 OF THE FREEDOM OF INFORMATION ACT 2000**

EA/2012/0167

BETWEEN:

DEPARTMENT FOR EDUCATION

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

-And-

THE BRITISH HUMANIST ASSOCIATION

Second Respondent

**ADDITIONAL RESPONSE
BY THE BRITISH HUMANIST ASSOCIATION**

1. This Response is served in accordance with Rule 23 of the Tribunal Procedure (First Tier Tribunal) (General Regulatory Chamber) Rules 2009.
2. The Department for Education ("The Appellant") is appealing against the Information Commissioner's ("the Commissioner") Decision Notice under reference FS50415927. The appeal is brought under section 57 of the Freedom of Information Act 2000 ("the Act").
3. The British Humanist Association ("the BHA") has been joined to the appeal as a second respondent, as the complainant that submitted the request for information that led to this case.
4. On 14 September 2012 the BHA submitted its Response to this case. However, the BHA would like to draw the Tribunal's attention to an additional piece of evidence.
5. In paragraph 17 of the BHA's Response of 14 September, the BHA argued that the Commissioner was wrong to conclude that section 35(1)(a) of the Act is engaged. The BHA argued that the information does not relate to the formulation or development of government policy, but to the normal process of government business, subsequent to the formulation and development of the Free School policy. The BHA questioned how many years the DfE envisages that the process must be repeated before the information would not engage section 35 of the Act.

6. On 6 July 2012, the BHA submitted another Freedom of Information request to the DfE, asking for very information to that which is being considered in this case, except for the 'third wave' of Free Schools " (i.e. received in 2012 for opening from September 2013), instead of for the first and second waves.
7. On 8 August, the DfE rejected this request, and on 7 September, the DfE rejected the BHA's internal appeal. The DfE again argued that section 35(1)(a) is engaged, and that public interest lies against disclosure.¹ Today the BHA has submitted a complaint to the Commissioner about the DfE's decision in this case.
8. The BHA believes the point made in paragraph 17 of its Response is strengthened in light of the fact that the DfE has used the same argument to reject this new Freedom of Information request. The BHA believes that this shows that the DfE is routinely using section 35(1)(a) to reject Freedom of Information requests around this area – not just during the initial two years of the Free School programme.

Name and address of respondent/address for service

9. Please use the Richy Thompson of the British Humanist Association's address (below).

David Wolfe QC, MATRIX

Richy Thompson, BRITISH HUMANIST ASSOCIATION
1 Gower Street,
London,
WC1E 6HD
richy@humanism.org.uk

17 September 2012

¹ All relevant correspondence appended.

Supporting documents to complaint on third wave Free School proposals

Initial complaint, 6 July 2012:

Freedom of Information Request: List of free school proposals

Richy Thompson  richy@humanism.org.uk

6
Jul

to PCU.CORRESPOND.

To whom it may concern,

I am writing to make a request for all the information to which I am entitled under the Freedom of Information Act.

In order to assist you with this request, I am outlining my query as specifically as possible. If however this request is too wide or too unclear, I would be grateful if you could contact me as I understand that under the act, you are required to advise and assist requesters.

I am seeking the following information in electronic form.

A list of Free School proposals received by the Department for Education during the "third wave" (i.e. received in 2012 for opening from September 2013), giving for each:

- The name of the project
- The local authority/area of the proposed school
- The previous name (if applicable) of the proposed school
- The faith (if any) of the proposed school
- Whether the proposal was received in the first wave or the second wave

Kind regards,

Richy Thompson

Campaigns Officer (Faith Schools and Education), British Humanist Association
1 Gower Street, London, WC1E 6HD | 020 7462 4993

www.humanism.org.uk | facebook.com/humanism | twitter.com/BHAhumanists | humanismforschools.org.uk

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Initial response, 8 August 2012:

Case Reference 2012/0045702

Unmonitored.ACCOUNT@education.gsi.gov.uk 

8
Aug

to me

Dear Mr Thompson,

Thank you for your request for information sent on 6 July.

You asked for details of applications received for the latest wave of Free Schools. Specifically, you requested a list of all applications, showing the name of the school, the relevant local authority, the previous name of the school/proposal (where applicable), the faith of the school and whether the application was a resubmission from earlier waves.

I have dealt with your request under the Freedom of Information Act 2000 ("the Act")

As you will be aware, on 13 July we published a list of all applications approved in this third wave of Free Schools, showing the local authority for each. That list provides information about the number of successful applications for the latest wave of Free Schools and the name of the school and local authority for each. You can find this information

here: <http://www.education.gov.uk/schools/leadership/typesofschools/freeschools/a00211685/2013>

Although the Department does hold the remainder of the information you have requested, this information is being withheld under the exemption in Section 35(1)(a) of the Act, covering information relating to the formulation and development of Government policy. This exemption applies here because there is a need to allow space for government policies to develop effectively. Releasing the details of failed applicants threatens this process as it is likely to discourage future applicants.

You will be aware that the ICO has agreed that Section 35 is engaged with regard to this type of information. We consider that the public interest lies in withholding information on resubmissions and unsuccessful applications for the following reasons:

- There is a general public interest in disclosure. Knowledge of the way Government works increases if the information on which key decisions have been made is available. This can lead to public contribution to the policy making process becoming more effective. There is a general public interest in being able to see if Ministers are being briefed effectively on the key areas of policy the Department is

taking forward.

- However, at the date of your request, we were engaged in a competitive assessment process for applicants applying to open a Free School in 2013. This was a complex and confidential assessment of all the applications we had received and needed to take place without public scrutiny on the applicants, to allow them all an equal chance of success. It is competitive and some applications do not pass these tests. Releasing information on applicants before we have informed them about the success or otherwise of their applications would be very disruptive for the applicants concerned and might lead to undue pressure being brought to bear for or against particular applications.

- If we publish the lists showing which applications were resubmissions and hence had been unsuccessful in previous waves, some applicants who are initially unsuccessful might be discouraged from reapplying because they would be worried that there would be a loss of confidence in their school if it became known that it had made an unsuccessful application in a previous round. However, the Department considers afresh any applications we receive on their merits. The Department considers that discouraging future applications would inhibit or skew the development of the Free Schools programme and policy.

- If additionally we release information about which applications (both successful and unsuccessful) were for faith schools this could discourage potential applicants from applying or reapplying because they conclude, wrongly, from the information that certain types of application are more likely to succeed than others. The Department takes into account a wide range of information about applications but whether or not an application is for a faith school is not a criteria that is taken into account in the decision making.

- Many applicants are existing teachers and school leaders. To release the names and locations of unsuccessful applicant groups would attract unwelcome media attention. Rejecting an application from existing educationalists could lead others to question the efficacy with which they conduct their existing work in schools, with pupils.

- It is in the public interest that the formulation of Government policy and Government decision making can proceed in the self-contained space needed to ensure that it is done well. Good Government depends on good decision making which needs to be based on the best advice available and a full consideration of the options. Decisions on Free School applications are not taken on the basis of the characteristics you have requested of location, faith or re-application but of the quality of applications and applicants. Without protecting the thinking space and the ability for Ministers and senior officials to receive free and frank advice, there is likely to be a corrosive effect on the conduct of good Government, with a risk that decision making will become poorer and will be recorded inadequately.

- The Free Schools programme is still only two years old and is therefore still open to substantial change and development; Ministers have made a deliberate decision to inform the development of the policy through experience of assessing applications and working with approved applicants to set up schools. As the scale of

the programme continues to increase at a rapid rate (almost doubling each year) the way in which the Department assesses applications, the criteria against which they are tested and the decisions taken by Ministers must rightly be free to evolve to reflect the growing programme.

The Department has concluded that in this instance the factors comprising the public interest consideration in withholding the information are greater than the general public interest considerations for disclosure described above.

If you have any queries about this letter, please contact me. Please remember to quote the reference number above in any future communications.

If you are unhappy with the way your request has been handled, you should make a complaint to the Department by writing to me within two calendar months of the date of this letter. Your complaint will be considered by an independent review panel, who were not involved in the original consideration of your request.

If you are not content with the outcome of your complaint to the Department, you may then contact the Information Commissioner's Office.

Yours sincerely,

Jen Halmshaw
Free Schools Group
Jen.HALMSHAW@education.gsi.gov.uk
www.education.gov.uk



Your correspondence has been allocated the reference number 2012/0045702.

The original of this email was scanned for viruses by the Government Secure Intranet virus scanning service supplied by Cable&Wireless Worldwide in partnership with MessageLabs. (CCTM Certificate Number 2009/09/0052.) On leaving the GSi this email was certified virus free. Communications via the GSi may be automatically logged, monitored and/or recorded for legal purposes.

Internal appeal, 8 August 2012:

Richy Thompson  richy@humanism.org.uk

8
Aug

to Jen.HALMSHAW

Dear Ms Halmshaw,

I would like to appeal this decision.

In rejecting this FOI request, you have given six bullet points. I have pasted these below, and given a response to each in italics.

- However, at the date of your request, we were engaged in a competitive assessment process for applicants applying to open a Free School in 2013. This was a complex and confidential assessment of all the applications we had received and needed to take place without public scrutiny on the applicants, to allow them all an equal chance of success. It is competitive and some applications do not pass these tests. Releasing information on applicants before we have informed them about the success or otherwise of their applications would be very disruptive for the applicants concerned and might lead to undue pressure being brought to bear for or against particular applications.

In [Decision FS50415927](#), the initial request in that case was made on 21 June 2011, and included a request for information about the second wave of Free Schools. On 21 June, the second wave was similarly involved in a competitive assessment process, just as the third wave was on 6 July 2012. However, the ICO found that the public interest laid in disclosure. Therefore, this defence is inadequate.

- If we publish the lists showing which applications were resubmissions and hence had been unsuccessful in previous waves, some applicants who are initially unsuccessful might be discouraged from reapplying because they would be worried that there would be a loss of confidence in their school if it became known that it had made an unsuccessful application in a previous round. However, the Department considers afresh any applications we receive on their merits. The Department considers that discouraging future applications would inhibit or skew the development of the Free Schools programme and policy.

In [Decision FS50415927](#), the ICO ruled that details of the first and second wave bidders must be published. Once this information is published, it will therefore be possible already to identify which bids are resubmissions. Therefore, requesting which bids are resubmissions is materially no different from the request that was made in [Decision FS50415927](#).

- If additionally we release information about which applications (both successful and unsuccessful) were for faith schools this could discourage potential applicants from applying or reapplying because they conclude, wrongly, from the information that certain types of application are more likely to succeed than others. The Department takes into account a wide range of information about applications but whether or not an application is for a faith school is not a criteria that is taken into account in the decision making.

The ICO ruled in [Decision FS50415927](#) that this does not outweigh the public interest in favour of publication.

- Many applicants are existing teachers and school leaders. To release the names and locations of unsuccessful applicant groups would attract unwelcome media attention. Rejecting an application from existing educationalists could lead others to question the efficacy with which they conduct their existing work in schools, with pupils.

The ICO ruled in [Decision FS50415927](#) that this does not outweigh the public interest in favour of publication.

· It is in the public interest that the formulation of Government policy and Government decision making can proceed in the self-contained space needed to ensure that it is done well. Good Government depends on good decision making which needs to be based on the best advice available and a full consideration of the options. Decisions on Free School applications are not taken on the basis of the characteristics you have requested of location, faith or re-application but of the quality of applications and applicants. Without protecting the thinking space and the ability for Ministers and senior officials to receive free and frank advice, there is likely to be a corrosive effect on the conduct of good Government, with a risk that decision making will become poorer and will be recorded inadequately.

The ICO ruled in [Decision FS50415927](#) that this does not outweigh the public interest in favour of publication.

· The Free Schools programme is still only two years old and is therefore still open to substantial change and development; Ministers have made a deliberate decision to inform the development of the policy through experience of assessing applications and working with approved applicants to set up schools. As the scale of the programme continues to increase at a rapid rate (almost doubling each year) the way in which the Department assesses applications, the criteria against which they are tested and the decisions taken by Ministers must rightly be free to evolve to reflect the growing programme.

The ICO ruled in [Decision FS50415927](#) that this does not outweigh the public interest in favour of publication.

Best wishes,

Richy Thompson

Campaigns Officer (Faith Schools and Education), British Humanist Association
1 Gower Street, London, WC1E 6HD | 020 7462 4993

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Response to internal appeal:

Jen.HALMSHAW@education.gsi.gov.uk 

7 Sep (8 days ago)

to me

Dear Mr Thompson,

Thank you for your reply dated 8th August.

The Department has, as requested, convened an Internal Review panel chaired by a senior official wholly independent of the original decision not to release the list of applications you requested.

The panel endorsed the original decision that section 35 of the FOI Act was engaged and that, on balance, the public interest was not in favour of releasing the information requested to you.

In reaching this conclusion the panel noted that several arguments advanced in my original response to you (also dated 8th August) were new and therefore have not been considered by the ICO as you suggest in your reply.

I also wanted to ensure that you are aware that the Department is currently in the process of appealing the decision notice issued by the ICO regarding your earlier request for a full list of applications, including those which were unsuccessful.

We remain convinced that it would be prejudicial to the Free Schools Programme as well as to proposers for the names of unsuccessful projects to be released.

Regards

Jen Halmshaw