

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

BETWEEN:

DEPARTMENT FOR EDUCATION

Appellant

-And-

THE INFORMATION COMMISSIONER

Respondent

-And-

THE BRITISH HUMANIST ASSOCIATION

Second Respondent

**WRITTEN SUBMISSION
BY THE BRITISH HUMANIST ASSOCIATION**

Essential reading

- Decision Notice ref FS50415927 (Thompson/BHA) [1.21-32]
- Second Respondent's Response – EA/2012.0167 (Thompson/BHA), paragraphs 21 to 24, 29 to 39 [1.118-122]
- Second Respondent's Additional Response – EA/2012.0167 (Thompson/BHA) [1.171-172]
- Exhibit PS/1 [5.302]
- Correspondence between the parties with regard to PS/1 [6.303-308]
- Email from NSN to recipients of Questionnaire [6.309]
- Comments from Responses to the NSN Survey [6.311-312]

Introduction and scope of case

1. The British Humanist Association ('the BHA') is the national charity working on behalf of non-religious people who seek to live ethical and fulfilling lives on the basis of reason and humanity. The BHA set out its position on Free Schools and state-funded religious schools in its response to the grounds of appeal [1.113-114 – paragraphs 4-6].

Background

2. On 21 June 2011, Mr Richy Thompson of the BHA requested the following information from the Department for Education ('the DfE', also 'the appellant') under the Freedom of Information Act 2000 ('the Act') [3C.241]:

'A list of free school proposals received by the Department for Education, including the 323 received during the first wave and the 281 received during the second wave, 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.'*

By 'faith (if any)', the BHA meant both schools formally designated with a religious character, and schools with a 'faith ethos'.

By 'local authority / area', the BHA meant the local authority of the proposed schools, as the DfE did when it gave the local authorities in its published spreadsheets of approved Free School proposals under the same heading of 'Local Authority/Area'.

3. The information was requested after the 'first wave' of Free School proposals had been submitted to the DfE, and those 'pre-approved' to open in September 2011 had been announced; and after the 'second wave' of Free School proposals had been submitted to the DfE, but were yet to be assessed by the DfE or invited to interview. Thinking in terms of precedents this Tribunal case might set, none of the parties considers the scope of this case to include proposals not yet formally submitted to the DfE.
4. On 22 July, the DfE rejected Mr Thompson's request [3C.243-244]. On 1 August, Mr Thompson appealed the decision [3C.245-246], and on 8 September, the DfE rejected the appeal [3C.247-250]. On 10 November, Mr Thompson complained about the decision to the Information Commissioner's Office ('the Commissioner'). On 4 July 2012, the Commissioner issued a decision notice in favour of disclosure [1.21-32], and on 6 August (after being granted an extension from 1 August [1.31 – paragraph 46]), the appellant appealed the ruling [1.73-82] under section 57 of the Act.

Legal framework

5. The appellant sets out the legal framework in its grounds of appeal [1.75-77 – paragraphs 14-20].

Scope of the case

6. In the Commissioner's decision notice, the Commissioner decided that sections 21 and 22 of the Act were not engaged. The appellant is not contesting this (as stated in Paul Schofield's witness statement [5.290 – paragraph 19]). The Commissioner considered that section 35(1)(a) of the Act ('Formulation of government policy, etc.') was engaged, but that the public interest test attached to that section meant that the information should be disclosed. The BHA is contesting that section 35(1)(a) was engaged. Both the BHA and the Commissioner are arguing that the public interest lies in favour of disclosure, while the appellant is arguing that it does not.
7. The BHA notes that the name, previous name (if applicable) and local authority of *successful* proposals has been published by the DfE, but the faith (if any) has not. This is acknowledged but not justified by the appellant in Paul Schofield's witness statement [5.291 – paragraph 21.iv]. This portion of Mr Thompson's request therefore remains unfulfilled.
8. At the time of the Commissioner's ruling, the appellant and BHA understood this to be a ruling in favour of releasing all the information requested, including the faith (if any), previous names (if applicable) and local authority, and it was on this basis that the appellant submitted its grounds of appeal [1.78 – paragraph 23]. This understanding of the scope of the case was seemingly supported by the Commissioner's decision notice, which states [1.28-29 – paragraphs 35-37] that areas are being considered as well as names (e.g. '*In this case the request is for the name and geographical area of proposed Free Schools*'), and that religious character is being considered [1.28 – paragraph 35]. The statement that 'the scope of his [the Commissioner's] investigation would be to determine whether the DfE correctly refused to provide the full list of proposals including the names of unsuccessful proposals and their local area' [1.24 – paragraph 11] was not read by the BHA as limiting the scope to *just* the names and local areas.
9. However, in the Commissioner's response to the grounds of appeal, the Commissioner made it clear that he believed that the scope of the case was limited to the names of unsuccessful proposals, and did not include the local authorities, previous names (if applicable) or faiths (if any) of unsuccessful proposals, nor the faiths (if any) of successful proposals [1.103-104 – paragraphs 7-10]. With regards to local area, this directly contradicts the previous paragraph. With regards to faith and previous names, this was due to a misunderstanding by the BHA of an ambiguous email from the Commissioner to the BHA on 26 October [1.115-116 – paragraph 10], where the Commissioner stated:

'The focus of my investigation will be to determine whether the DfE were correct to withhold the proposals, including the names of the unsuccessful applicants, in the first and second waves under section 35(1)(a) or section 36(2)(c).

'Your request was also for the faith and area of the proposed school but as a breakdown by faith and regional area has been provided and information can be assessed through the DfEs [sic] website I am proceeding on the basis that

this part of your request has been satisfied. If this is not the case please let me know by 9 November otherwise I will continue on the basis that the outstanding part of your request which you want investigating is the refusal to disclose a complete list of proposals received in the first and second waves, including unsuccessful applicants.'

The BHA understood this to mean that a breakdown by faith and area would not need to be provided, as this information had already been published, while the Commissioner intended it to mean that no details on the faith and area would be published. In addition, the BHA did not read the phrasing, '*whether the DfE were correct to withhold the proposals, including the names of the unsuccessful applicants*' as limiting the scope to just the names. This misunderstanding was seemingly supported by portions of the decision notice, as discussed in the previous paragraph.

10. The BHA notes that the DfE was granted an extension by the Commissioner to serve its notice of appeal – the initial decision notice required this by the 1 August (28 working days after the decision was taken on 4 July) [1.31 – paragraph 46], but the DfE did not appeal until 6 August [1.72]. Hence, by the time the BHA and the appellant were aware of the misunderstanding, the BHA was already out of time to appeal the scope of the ruling.
11. As a consequence, the BHA decided it would be best for all parties for it to simply challenge the scope of the case in its response to the grounds of appeal. The BHA notes that the appellant has had an opportunity to respond to this challenge in Mr Schofield's witness statement – indeed, the appellant continued to agree with the wider scope of the case despite having seen the Commissioner's response [5.288-289 – paragraph 14] – and will be able to challenge this again in its written submission. The Commissioner will similarly be able to address this point.
12. The BHA does not consider the local authority and faith (if any) of a proposed school to be information of a lower level than the name. The name of the school will often directly state the area and faith, and at any rate, given the name of a proposal, it is possible to search for it online to identify the local authority and faith.
13. The BHA further notes that the Commissioner's rulings in the two cases attached to this one explicitly include the geographic area of the proposed schools within their scope [1.2 paragraph 1 and 1.12 paragraph 1]. It is only in the decision notice for the BHA that this is ambiguous.
14. As a consequence, in its response to the grounds of appeal [1.116 – paragraph 12], the BHA requested that the Tribunal rules that the DfE should publish the faith (if any) of successful Free School proposals, and:
 - 1) Either reads the Commissioner's decision notice as having been made on the broader scope as understood by the BHA and the appellant, and as seemingly supported by portions of the decision notice [1.115-116 – paragraph 10];
 - 2) Or, failing that, to consider whether it would be appropriate to exercise its powers under section 58(1)(b) of the Act to substitute for the Commissioner's

decision notice one written on the broader scope as understood by the BHA and the appellant;

- 3) Or, failing that, to decide that the Commissioner failed to rule on the entirety of the BHA's complaint, and therefore to rule on the present submission as an appeal by the BHA against the Commissioner's non-determination of the majority of its complaint.

The BHA renews its request that the Tribunal uses one of the above three routes to consider the case in terms of the wider information originally requested.

15. The BHA will now consider whether section 35(1)(a) is engaged by this case; then consider whether, if section 35(1)(a) is engaged, what the likely impact on applicants would be of disclosure (in particular, explaining why Exhibit PS/1, the sole piece of evidence upon which the appellant has relied, is unreliable); before finally considering wider public interest considerations.

Section 35(1)(a)

16. Section 35(1)(a) states that 'Information held by a government department or by the Welsh Assembly Government is exempt information if it relates to — the formulation or development of government policy'.
17. The DfE has argued that this exemption applies because, to quote the Commissioner [1.26 – paragraphs 23-24], *'the DfE has explained it is still in its early stages with evaluations and experiences being incorporated into the 2013 round of applications and assessments... The DfE further explained that following the first wave, changes were made to the application form and process.'* The Commissioner agrees.
18. The BHA denies that a simple list of the names, previous names, local authorities and faith (if any) constitute information that relates to the formulation or development of government policy. Such information would be the specific detail of applications on which decisions would be based and the criteria for making such decisions. These are not within the scope of the case, which is confined to high-level information merely identifying the proposals, which in itself is not germane to any subsequent decisions.
19. In addition, as the BHA states in its response to the grounds of appeal [1.117 – paragraph 17]:

'[This is] the normal process of government business, subsequent to the formulation and development of the Free School policy. This information is part of the implementation of that policy, along with an annual review of how that policy should be implemented next year. It will always be the case that the Free School policy is being reviewed, and it is not clear how many years the DfE envisages that the process must be repeated before the information would not engage section 35 of the Act. Therefore, the BHA would invite the Tribunal to oppose this appeal, not only on the basis that the Commissioner

was right to decide that the public interest is in favour of disclosure (something we will subsequently address), but also on the basis that section 35 was not engaged in any event.'

20. This point is reinforced by the BHA's additional response to the grounds of appeal, submitted by the BHA a few days after its first response [1.171-180]. Here, we see the DfE claiming the same exemption in response to an FOI by the BHA for the same information as in this case, except for the 'third wave' of Free Schools (i.e. proposals received in 2012 for schools to open from September 2013), rather than for the first and second waves. In our submission this demonstrates that the DfE is routinely using section 35(1)(a) to reject the release of this information, even beyond the initial years of the Free Schools programme.

Can the BHA challenge the decision on section 35(1)(a)?

21. In Paul Schofield's witness statement [5.289 – paragraph 17; and 5.295 – paragraph 33], Mr Schofield notes that the BHA did not lodge an appeal to the Commissioner's decision that section 35(1)(a) is engaged, and therefore argues that the BHA should not be able to challenge this now.
22. In response to this, the BHA submits that the Tribunal must consider the situation from the BHA's point of view at the time of the decision. While disagreeing with this portion of the decision notice, the BHA was at that time content with the conclusion the Commissioner reached (i.e. disclosure), and therefore did not consider that it was a good use of the Tribunal's (or indeed the DfE's) time to challenge this then-inconsequential portion of that decision. But once the appellant appealed the decision notice, the BHA considered that the decision on section 35(1)(a) might become of some consequence, and so decided that it then became worth challenging this portion.
23. Given these considerations, the BHA is unsure when the appellant would have had the BHA challenge the decision on section 35(1)(a). The BHA notes that the DfE was granted an extension by the Commissioner to serve its notice of appeal – the initial decision notice required this by the 1 August (28 working days after the decision was taken on 4 July) [1.31 – paragraph 46], but the DfE did not appeal until 6 August [1.72]. Hence, by the time the BHA was minded to lodge an appeal to the decision, the deadline to do so had already passed.
24. As a consequence, the BHA decided it would be best for all parties for it to simply challenge the decision on section 35(1)(a) in its response to the grounds of appeal. The BHA notes that the appellant has had an opportunity to respond to this challenge in Mr Schofield's witness statement, and will be able to again in its written submission. The Commissioner will similarly be able to address this point.

Exhibit PS/1 and the likely impact of disclosure on the number of Free Schools

25. The BHA notes that most of the appellant's arguments against disclosure are premised on the public interest being in the Free School programme being successful. Building on this premise, the appellant argues that releasing the disputed information would harm the success of the Free School programme, by discouraging applicants and hence leading to less schools opening.
26. If, for any particular proposer, it is correct that they are so unsure of themselves that the mere prospect of having the public know they have made an application is enough to deter them from making it, the BHA questions whether they are up to the task of consulting, planning, opening and running a school.
27. However, putting that issue to one side, the BHA does not believe the evidence shows that applicants would be discouraged so that fewer Free Schools would open.
28. In its response to the grounds of appeal [1.118 – paragraph 21], the BHA commented that the DfE had not provided any evidence in support of its assertion that informing the public about unsuccessful proposals would discourage those proposers from re-applying. In the subsequent witness statement of Paul Schofield [5.296 – paragraph 36], the appellant responds to this, saying:

'In paragraph 21 of their response, the BHA asserts that the Department has, as yet, provided no evidence showing that the informing of the public about unsuccessful proposals would discourage applicants from applying again. The New Schools Network carried out a survey of proposer groups currently in the pre-opening stage and open Free Schools. A copy of the survey is exhibited hereto marked "PS/1". Proposer groups were asked, in relation to the ICO Decision Notice, whether publishing the details of unsuccessful applicants would have made them less likely to apply/re-apply. Of the 100 respondents, almost half (44) said the judgement would have made them less likely to have applied. 22 said they would have been much less likely to have applied, Extrapolating, this means that the programme would probably have reached just over 100 schools to date, rather than 200.'

29. Exhibit PS/1 [5.302] is the only evidence provided as justification for the appellant's position. The exhibit is a question asked by the New Schools Network ('NSN') to 197 proposers of open or pre-approved Free Schools, along with the results. Respondents were asked, 'If you had known your details might be released, and possibly before the DfE made its decision, would you have been: (A) Much less likely to apply; (B) Less likely to apply; (C) It would have made no difference; (D) More likely to apply; or (E) Much more likely to apply'. 101 proposer groups responded, with 22 picking (A), 22 picking (B), 55 picking (C) and 2 picking (E). This is mistakenly totalled to 100 in Exhibit PS/1 and in Mr Schofield's witness statement. 34 respondents also commented on the survey. These were subsequently categorised by the NSN as 19 being 'against releasing details', 7 being 'for releasing details' and 7 being 'equivocal comments'. 1 is missing [6.311-312].

30. The BHA did not consider this to be sufficient information to assess the survey and so on 13 November asked the appellant six further questions about it [6.306]. The appellant replied to five of these questions on 19 November [6.303-305], and in response to question 3, provided the email which the NSN had sent to Free School applicants in which the question was put [6.309]:

'The Department for Education have recently been petitioned to make public the details of all those who applied to open a Free School, regardless of their success or failure. The Information Commissioner's Office has ruled the DfE must disclose the data, although we believe that the DfE will appeal against this decision.

'To help with that appeal, we would appreciate hearing from successful applicants as to whether this ruling, and the possibility of your details being made public, would have affected your decision to apply to open a Free School. To do this, we have created a short, one question survey...'

31. The appellant responded to the sixth question on 26 November, providing the comments left by respondents to the survey [6.311-312]. Comments for disclosure included 'I would be anxious about groups who feel the need to keep details secret', 'I always expected that our details would be made public anyway' and 'Openness is key to democracy'.

Biases in the survey

32. Given the information now provided, the BHA does not consider Exhibit PS/1 to be reliable evidence in any way, shape or form. In fact, given that the question was biased in favour of eliciting responses (A) or (B), and yet only 44% of respondents picked one of these options, the BHA would argue that the evidence could almost be taken as showing a lack of opposition among open and pre-approved Free School groups. Common statistical biases which are found in this survey and make it unreliable include:

- 1) **Imprecision:** In the NSN's email and in the question put to respondents, it is stated that the intention is to make 'the details of all those who applied' and 'your details', respectively. Respondents are not told what details are actually proposed to be made public, or what petition is being discussed.

Speaking generally, it is commonly observed in statistical literature on psephology that responses to 'opinion questions' are much more sensitive to question wording than 'factual questions'. In this survey the use of the vague reference to 'your details' being made public could cause the respondent to become uncertain and more concerned than if the actual items to be made public were listed.

In this case many may have concluded that the details included personal details, such as names of proposers or other lower level details. This is not

the case –the information being sought is all of a high level. This misapprehension by respondents is especially likely, given that other recently publicised cases considered (and rejected) by the Information Commissioner have involved requests to make entire application forms publicly available.

This can plainly be seen to be true from the comments left on the survey. Of the 19 comments ‘against releasing details’, 15 state they were opposed because of the release of ‘personal details’ or ‘application forms’ – in other words, information outside the scope of this request, allowing head teachers, local authorities or others to personally identify them. Comments included:

- i) *‘Teachers in LA school thinking of opening a Free School face bullying by their anti-free school heads if found out. Releasing the details of those who attempted to open a school but failed would place these teachers at risk of bullying’*
- ii) *‘The application for the establishment of a Free School is a commercially valuable document, it is the product of a good deal of professional expertise which would be of use to a competitor. In addition, a good number of individuals might feel that their reputation in their community would be adversely affected by the publication of the details of an application.’*
- iii) *‘The majority of our group would have said that they would not have made an application at all if, on the application's failure, their personal details were released.’*
- iv) *‘We all have to be so careful with our personal details these days that it would certainly cause some concern if our details were to be made public...’*
- v) *‘Do not want my personal details released at all’*

Of the 14 comments ‘for releasing details’ or neutral, 6 plainly make a similar misassumption, while 2 express confusion about what details are being referred to.

A similar issue is that the survey tells respondents that the information may be published ‘before the DfE made its decision’, but it is not clear how far beforehand this is. Some respondents may have considered that the information would be published even before proposals were submitted to the DfE, which would not be the case.

It is true that respondents could have looked up the Commissioner’s rulings online, but most would not have realised this; the overwhelming majority would not have done so (especially as the NSN encouraged quick responses by saying ‘The survey should take no more than a minute to complete’); and at any rate, respondents would not have known which rulings were pertinent to the question (those rulings asking for the high level details, or those asking for entire application forms).

- 2) **Leading question:** Again, it is well known that it is important to avoid leading questions (especially for 'opinion questions') that push the respondent in a particular direction.

In Exhibit PS/1, the use of the phrase 'even if' is far from neutral and the supplementary phrase 'and possibly before the DfE made its decision' gives a further push.

Even worse, in the email from the NSN to respondents, groups were asked to complete the survey 'To help with that appeal'. This made it explicitly clear to respondents what the DfE wanted the results of the survey to show, and may have further led respondents to a certain response.

- 3) **Influence of survey conductor:** Moreover, the NSN is contracted by the DfE to support the establishment of Free Schools. It is safe to assume that the NSN takes the same line on this issue as the DfE, especially given that Rachel Wolf, the founding Director of NSN, was previously an adviser to Michael Gove and the Conservative Party's education team. As a consequence, and given the way the NSN's email was phrased, the groups surveyed would be under no illusion as to what the 'right answer' would be in this survey conducted by the NSN at the request of the DfE.

The groups surveyed had all just completed a competitive process run by the DfE and supported by the NSN. In order to pass that process, the groups would have had to meet stringent requirements set by the DfE – whether they fully agreed with those requirements or not. As a consequence, the respondents would be used to telling the DfE what it wanted to hear, in order to excel. This surely continues to be a consideration for groups even once pre-approved and opened, as groups continue to work with the DfE/NSN to find or expand sites/get more revenue/apply to set up further Free Schools/etc., and so are reliant on the continued goodwill of the DfE and NSN.

Many respondents are likely to have approached the survey with this mindset. This is especially likely to have been an issue given that respondents were not informed that the survey was anonymous.

- 4) **Non-response bias:** In any sample survey some people who are surveyed choose not to answer the questionnaire. If these people formed a random sample of the survey population, the answers obtained would nonetheless be trustworthy.

In practice, for various reasons, responders tend to be different from non-responders and this can compromise the results, often badly so. This is called non-response bias. In the case of this survey, 96 of the 197 groups surveyed did not respond. Groups that have no particular concern about their details being made public may be less motivated to respond than those for whom

this is a concern. Thus we have reason to think that the ‘concerned’ people are more likely to be over-represented in this survey than under-represented.

- 5) **Self-interest of respondents:** Finally, many groups would obviously be interested in not having their names and local authority published, because publication might lead to public scrutiny that would otherwise be avoided. Putting aside any impact that such publication would have on the success of the programme as a whole, this respondent self-interest is not, in itself, a reason not to publish the details requested.

Other flaws in the appellant’s conclusion

33. Furthermore, even if Exhibit PS/1 was considered to be reliable evidence, the appellant has grossly over-extrapolated the outcome in reaching the conclusions it has. 44 out of 101 respondents said they were much less likely or less likely to apply, if their ‘details’ were to be published. Mr Schofield’s witness statement says that ‘*Extrapolating, this means that the programme would probably have reached just over 100 schools to date, rather than 200.*’ However:

- 1) More accurately, 44% of groups, not 50%, said they *might* not have applied. But it is clearly an over-extrapolation to conclude that a group that said it was less likely to apply, or even (given the biases above) a group that said it was much less likely to apply, would not have applied, had they known that their name, local authority and faith (if any) would be published. This is especially true, given the points of the previous paragraph.

Ignoring the biases outlined in the previous paragraph, the survey could, perhaps, be construed to show an initial degree of discomfort with release, but we do not have evidence that this would have had any material effect on applications.

- 2) *Per contra*, it is arguable that publication of these details would increase trust in the programme, and so encourage more applications than under the current system. This point is expanded upon below.
- 3) Finally, 323 proposals were received in the first year, and 281 in the second year. On the face of it one might assume that the reason why 24 and 55, respectively, were approved to open was that this was the number of proposals in each year to meet the DfE’s standards.

This is a very dubious assumption since there are plainly other factors in play. In the 2011 Autumn Statement, the Treasury announced that the Government would invest an extra £600 million to fund 100 additional Free Schools by the end of this Parliament (i.e. after the first two ‘waves’).¹ This

¹ http://cdn.hm-treasury.gov.uk/autumn_statement.pdf - page 7

was on top of any funding already allocated. It reflects the fact that funding was not keeping up with quality demand.

In addition, many pre-approved Free School applicants have had serious difficulty securing buildings. This is another limitation on the number which could be approved.

Furthermore, in *How to Set up a Free School*, which (as the acknowledgements make clear) was checked with Rachel Wolf of the NSN for accuracy, Toby Young, the successful proposer of West London Free School, writes:

'The way it works is that the Free Schools Directorate – the team of civil servants in the department responsible for delivering the free schools policy – will produce a list of applicants for the minister to consider. They'll be divided into two bands: Band A and Band B. If your application is in Band A, you're home and dry. These are the schools that the civil servants are recommending for ministerial approval. If you're in Band B, your fate is hanging in the balance. The minister will only be able to approve a certain number of schools because of budgetary constraints. So he has to choose which schools in Band B to approve in addition to the ones in Band A.

'This is where political considerations come into play. Is the school in an area where there's acute basic need? Is it in the bottom half of the 'deprivation index'? Is it being set up by a faith group? Generally speaking, the present government doesn't have a problem with faith schools – and free schools set up by faith groups can reserve 50 per cent of their places for members of their particular faith. Nevertheless, if there are already several free schools being set up by faith groups in Band A, the minister won't want to pick too many more from Band B. Politically, he'll want to avoid giving the impression that the free-schools policy is being monopolized by religious zealots.' (underlining added)

These factors make two things clear: first of all, if some of the successful groups had not applied, then there was a number of other good proposals (those in 'Band B' which were not successful) which could have been approved instead. Some of these proposals may have performed as strongly or more strongly against the criteria when compared to successful proposals, but were less strong in PR terms.

Secondly, reinforcing this point, the limit on the number of Free Schools opening is not the quality of the applicants, or at the very least, not solely, but was the budget and buildings available for the programme.

Conclusion

34. Putting all this together, we have that 44 out of 101 respondents (from 197 surveyed) said – in response to a misleading question where the ‘correct’ answer was known – that they might not have applied to open a Free School if unspecified ‘details’ were published. It is wrong to extrapolate from this that there would currently be half as many Free Schools approved to open. Therefore, the sole piece of evidence upon which the appellant has relied to demonstrate its key contention is, in fact, extremely unreliable.
35. However, there is evidence available which runs to the contrary. For instance, it is clear that public trust in the Free Schools programme is very low – a recent scientific survey conducted by YouGov found just 36% of the public supporting their creation, versus 39% against.² Another recent survey by the same firm found just 23% of the public thinking they would make education in England better, versus 33% thinking the opposite and 23% thinking they’ll make no difference.³ Increased transparency in the process by which schools are approved for opening might well lead to increased trust and support, and therefore perhaps to an increase in the number of groups applying.
36. In addition, a large number of Labour councils, such as Coventry, are resisting the establishment of Free Schools through section 6A(1) of the Education and Inspections Act 2006⁴, and many are opposing their establishment through the annual ‘waves’ which are being debated here. If these groups were supportive of the Free Schools programme, this would result in more Free Schools. Once again, increased transparency would lead to an increase in the number of Councils encouraging Free School applications through the annual ‘waves’, or inviting proposals under section 6A.
37. As a matter of procedure, the BHA would like to state that it considered putting paragraphs 25-36 of its response in as a witness statement, but was unable to because of the lateness of the appellant’s response to its questions about Exhibit PS/1 (the last portion only being responded to two days ago).

Other public interest considerations in favour of disclosure

38. The BHA will now turn to wider considerations of public interest, beyond the likely impact on the number of Free Schools which will open as a result of disclosure, before finally addressing the appellant’s wider arguments against disclosure.

Public debate

² http://d25d2506sfb94s.cloudfront.net/cumulus_uploads/document/9rz6ne43wp/YG-Archives-Pol-ST-results%20-%20160912.pdf – page 7

³ http://cdn.yougov.com/cumulus_uploads/document/1or1j1cocr/YG-Archives-Pol-ST-results-03-050212.pdf - page 9

⁴ As amended by the Education Act 2011. This says that ‘If a local authority in England think a new school needs to be established in their area, they must seek proposals for the establishment of an Academy.’ Coventry Council is refusing to recognise the need for new schools, if those schools must be Free Schools.

39. The public debate around Free Schools has been extremely voluminous, with the topic dominating education media coverage since the 2010 General Election. Many would consider the programme to be controversial, while the Coalition considers it to be of very high importance. The high profile of the programme in the media and public discussion heightens the public interest in favour of transparency and hence disclosure. Disclosure of this information would strengthen the public debate.
40. The BHA further notes that religious schools, like Free Schools, are an area of high public debate. The BHA sets out reasons for this, and why this is particularly true for religious Free Schools, in its response to the grounds of appeal [1.117-118 – paragraph 18], quoted here:
- 1) *'State spending on religious schools in general is an area of considerable public debate.'*
 - 2) *'Religious Free Schools have generated even more public interest, because of the wider diversity of religious groups opening and applying to open schools. This includes many more minority religious groups, evangelical Christian groups, and also pseudoscientific proposals, such as the many known proposals to establish Free Schools by the Exclusive Brethren and members of the creationist Christian Schools' Trust. In part, this is as a consequence of the fact that Free School proposers do not have to make any financial contributions to establishing a new school, as was often the case for maintained schools; or to have their proposals publicised by the local authority, as was always the case by maintained schools.'*
 - 3) *'Religious Academies and Free Schools have also generated even more public interest because of the extra freedoms they enjoy over other types of state funded religious school. This includes not having to make any financial contributions to the school; not having to follow the national curriculum; and not having to hire teachers who hold Qualified Teacher Status. These facts allow religious Academies and Free Schools to be more discriminatory than was previously possible for maintained schools.'*

This heightens public interest in transparency with regards to the faith (if any) of proposed Free Schools, as well as the names.

41. Finally, the BHA noted above that as things stand, public support for the Free Schools programme is low. Increased transparency in the process may well lead to increased trust and hence increased support, and if as the DfE contends the public interest lies in the Free Schools programme being successful, then this is an argument in favour of disclosure.

Transparency and accountability

42. There is a general public interest in favour of transparency and accountability. The default presumption must be in favour of disclosure and strong arguments are required to overcome it.

43. The BHA notes the irony that the tendering process, names of applicants, full proposals and assessments for the contract held by the New Schools Network was recently released to a member of the public as a result of another Freedom of Information Act request.
44. The BHA is aware of an ongoing judicial review, being sought by solicitors MG Law, on behalf of a parent who wished her sons to benefit from the Diaspora High School in Lewisham, a proposed Free School from the second wave that was rejected by the DfE. The school would have promoted equality of opportunity among black boys. The claimant argues that there was a failure by the DfE to engage with the public sector equality duty in coming to its decision on whether to approve the school. While the information sought in this case would not have been likely to affect that decision, it is worth noting the wider range of challenges to the transparency of the Free Schools programme.

Money

45. It is well established that the public interest in favour of transparency is greater where public funds are being spent. Significant amounts of public money have been spent on the Free Schools programme. That there is little information about the process used to decide how to spend this money must heighten the public interest in disclosure. Questions about public expenditure which cannot be currently answered include:

- 1) **Location:** How likely a Free School application in one local authority as compared to another is to succeed. Local authorities are diverse geographically, in terms of wealth and in terms of need. While releasing the requested information would not provide the public with information about why any particular application was successful, it would still provide the public with information enabling it to assess the overall picture as between different local authorities in relation to their different circumstances. In addition, statisticians will be able to calculate the likelihood that variation is just due to different qualities of proposals, or whether the probability is that something more systematic might be occurring – thus providing a valuable check on the DfE’s decision-making.

This is also important in making clear whether areas with a need for Free Schools have had no proposals, or no approved proposals. This will help proposers identify gaps in the market, as well as helping the public at large to hold ministers to account about whether the programme is meeting demand where demand exists.

The DfE has already published a breakdown of applicants into regional areas, but there are only 9 areas in England. Releasing a list of applicants with local authority will allow more precise assessments of the sort described above.

- 2) **Faith:** How likely a Free School application of one particular faith is to succeed. In *How to Set up a Free School*, Toby Young states [4.283]:

'The minister will only be able to approve a certain number of schools because of budgetary constraints... This is where political considerations come into play... Generally speaking, the present government doesn't have a problem with faith schools – and free schools set up by faith groups can reserve 50 per cent of their places for members of their particular faith. Nevertheless, if there are already several free schools being set up by faith groups in Band A [already decided to open], the minister won't want to pick too many more from Band B [still under consideration]. Politically, he'll want to avoid giving the impression that the free-schools policy is being monopolized by religious zealots.'

Similarly, *Financial Times* Education Correspondent Christopher Cook wrote in August 2010 [4.273]:

'Michael Gove, education secretary, may drop planned restrictions on religious groups and private schools taking part in the first wave of his free schools "revolution" in order to bolster the likely numbers taking part.'

'One official said that Mr Gove feared "free schools would be synonymous with faith schools – or become seen as a way to bail out private schools".'

'As a consequence the education secretary had asked civil servants to hold back all but the most exceptional applications from faith groups that applied to be part of the initial September 2011 tranche of free schools – schools run by private groups but funded by the taxpayer. Mr Gove had also asked officials to resist pushing forward applications from private schools that wanted to become state schools.'

These restrictions were subsequently relaxed [4.275], and 10 of the 24 schools that eventually opened as Free Schools during the 'first wave' had a religious character or a 'faith ethos'.

It is impossible to assess how likely the Government is to fund religious schools of different denominations, if we do not know who has applied. Notwithstanding that the BHA does not think that the Government should fund any religious schools, it is at present difficult to assess whether the Government is being fair towards different religious groups, given the current lack of transparency.

While releasing the requested information would not provide the public with information about why any particular application was successful, it would still provide the public with information enabling it to assess the overall picture as between different religious groups. In addition, statisticians will be able to calculate the likelihood that variation is just due to different qualities of proposals, or whether the probability is that something more systematic might be occurring.

- 3) **Repeat applicants:** How likely a group which has applied in the past is to be successful if applying again (where this common proposer can be identified from the name or faith). This is particularly pertinent with groups which have been successful with previous proposals, and are submitting further proposals.

Even if the information requested is released, there would still be fairly little information about the processes involved. But being able to see the groups which have applied would help answer some of these questions.

Development of Government policy

46. There is a strong public interest in the Government publicising changes in Government policy and practice. By relying on section 35(1)(a) in its defence, the Government has acknowledged that there are ongoing changes in its policy and practice in this area. However, the precise nature of these changes is not disclosed, beyond revisions to their annual 'How to Apply' guidance. This is discussed in Toby Young's *How to Apply to Open a Free School* [4.282]:

'For groups hoping to open schools in 2013 and beyond, there are no longer any 'minimum' criteria – they'll just be judged according to various 'comparative' criteria. The reason for this change is to give the DfE even more flexibility – the civil servants have effectively made the assessment process less transparent. The way it will work, as far as I can tell, is that proposals deemed to be of sufficient merit will be passed on to an approval panel, who will then award marks section by section to arrive at a total score. Assessing how much effort to lavish on satisfying each of the 'comparative criteria' is tricky because the DfE won't disclose what percentage of the overall mark is allocated to each section. My general advice is to pay particular attention to the educational plan, the 'evidence of demand' and the capacity and capability sections, but that isn't based on any inside information. The weightings are kept secret partly because the DfE doesn't want groups to be able to game the system by focusing on one area and neglecting another. But it's also to make it harder for disappointed applicants to contest the decision. There's another reason, too. If the DfE doesn't make public exactly how the scoring works, it means nothing's fixed in stone. There's more wiggle-room. The approval panels can exercise a little discretion and, more importantly, so can the ministers when it comes to making a final decision.'

47. Releasing the information under consideration in this case would not allow the public to fully understand the changes in Government policy and practice that are being made. However, releasing the information and hence presenting the public with the consequences of those changes would go some distance towards allowing the public to assess and debate them.

Proposals should already be locally disclosed

48. It is already, effectively, a requirement that Free School proposals be disclosed by the proposer at the local authority level. For example, the DfE's 'Free Schools in 2012: How to Apply' guidance states that in their initial application to the DfE to set up a Free School, proposers must '*Provide information that clearly shows the number of parents that want to send their children to your particular school, ensuring that the evidence you have collected is consistent with your stated admissions policy (eg. age range, proximity to the proposed site etc.)*' [1.145] In doing so, proposers must '*Demonstrate how you intend to reach out to the wider community, including children from a range of backgrounds and faiths (if relevant) and across the ability spectrum, (independent schools will need to demonstrate evidence of demand beyond their existing pupil and parent base)*' [1.146]. Therefore, this effective disclosure includes the faith (if any) of the school, and must be for a cross-section of the wider community.
49. Last year the BHA attempted to identify, through Google Alerts, all proposals to establish Free Schools as part of the 'third wave' which were discussed in local media, in blogs or on applicants' websites. At some considerable effort, the BHA was ultimately able to identify 140 of 337 proposals, including 42 faith-based proposals and 98 without a religious character or faith ethos.⁵
50. For the groups which the BHA was able to identify, this Tribunal case is simply a matter of gathering into one place information which is already public but which is scattered and difficult to collate. This surely must undermine the DfE case and heighten public interest in disclosure.
51. It can reasonably be argued that those groups that the BHA was unable to identify must, generally speaking, be failing to reach out to the wider community. This is a particularly concerning issue when it comes to religious groups, who may be able to gather significant numerical evidence of demand without taking their proposals outside of their places of worship. It is particularly important that all groups are subjected to scrutiny by their wider community, in order to meet the assessment criteria, and putting their names, locations and faith (if any) in the public domain (but *not necessarily* the names of any of the individuals behind the proposals) will ensure that this is the case, at least from the time they have submitted their applications. This must, again, heighten the public interest in disclosure.

⁵ Listed at <http://www.humanism.org.uk/news/view/995>

52. Making a similar but more general point, the Commissioner notes that *‘any successful Free School application would have the potential to impact on the provision of education in the area in which that school would be based. Bearing this in mind, he also considers that there is a public interest in allowing people who would be potentially affected by such a school to be able to have an informed debate on any application that would affect them, or to be able to make informed representations to their local council or MP.’* [1.27-28 – paragraph 30]

Other similar processes are transparent

53. It is worth noting that other processes for opening schools require full details of proposals to be published. For proposals published through competition, regulation 8 (‘Manner in which the local education authority must publish details of the proposals’) of The School Organisation (Establishment and Discontinuance of Schools) (England) Regulations 2007 requires that:

- 8.—(1)** The local education authority must—
- (a) in respect of any proposals submitted to them... which relate to a mainstream school, publish:
 - (i) the details from the proposals specified in Part 3 of Schedule 5 to these Regulations
 - ...
 - (b) if they have made proposals... which relate to a mainstream school, publish—
 - (i) the name of the local education authority and a contact address, and
 - (ii) the relevant details from their proposals specified in Part 3 of Schedule 5;
 - ...
 - (d) publish details of how complete copies of the proposals can be obtained;
 - ...

Regulation 10 (‘Promotion of public awareness’) states that:

- 10.—(1)** This regulation prescribes the steps to be taken by a local education authority for the purpose of promoting public awareness of any proposals published under section 7.
- (2) The local education authority must arrange for at least one public meeting to be held to inform the public of the proposals received and the arrangements for making objections and comments.
 - (3) The first of any such meetings must be held within 2 weeks from the date of publication of the proposals by the authority.
 - (4) The authority must invite all the proposers to all such meetings.
 - (5) In carrying out its duties as specified in paragraphs (1) to (4), the authority must consult with, and have regard to, the advice of any person appointed by

the Secretary of State for the purpose of assisting the authority in carrying out such duties.

- (6) The local education authority must send copies of all proposals to—
- (a) any other local education authority likely to be affected by the proposals;
 - (b) all proposers who have submitted proposals in response to the relevant competition notice;
 - (c) the Diocesan Board of Education for any diocese of the Church of England any part of which is comprised in the area of the local education authority;
 - (d) the bishop of a diocese of the Roman Catholic Church any part of which is comprised in the area of the local education authority;
 - (e) any other person or organisation that has previously expressed an interest in writing to the authority in establishing a new school to serve pupils in the area;
 - (f) the Learning and Skills Council for England if the proposals include the provision of 14-16 education or sixth form education;
 - (g) in cases where the proposed school is to be a special school, the relevant Primary Care Trust, NHS Trust or NHS foundation trust; and
 - (h) the Secretary of State

and must send a copy of any particular proposal to any person who requests such a proposal.

There are similar requirements for schools proposed outside of competition. Part 3 of Schedule 5 specifies the details to be published. These include:

- The name of the proposer or proposers and a contact address.
- Whether the proposals are being submitted independently or jointly with another proposer or proposers.
- If the school is to have a religious character, confirmation of the religion or religious denomination in accordance with whose tenets religious education will, or may be required to be provided at the school; and a statement that the proposers intend to ask the Secretary of State to designate the school as a school with such a religious character

as well as further information about the category of school, admissions arrangements, specialisms, and (with religious schools) evidence of parental demand.

54. In other words, for maintained schools, it is required that once proposals are submitted, all the information that is being sought here is published, and more. The process is plainly intended to provide the community as a whole with sufficient information to make an informed decision as to which proposals to support, prior to the decision maker (either the local authority or, if the local authority has applied to set up a school, the schools adjudicator) making a decision on which schools should open. This way of doing things has not had any clear systematic impact on certain

types of proposals, as the appellant fears would be the case with religious Free Schools.

55. In contrast, the identities of Free School applicants are not made publicly available until the DfE has stated its preferences for which groups should open (i.e. pre-approval). It is arguable that this means the subsequent consultation process does not happen at a formative stage, as is legally required.⁶ The BHA examines this issue in more depth in its response to the grounds of appeal [1.121-122 – paragraphs 36 and 38]. Free Schools are extremely difficult to oppose at consultation stage. From what the BHA can ascertain, of the 63 Free Schools which were pre-approved by the DfE to open in 2012 (55 from the ‘second wave’ and eight delayed proposals from the ‘first wave’), just four subsequently had their proposals rejected. One (Rivendale Primary School) was unable to find a site; one (Rotherham Central Free School) had support withdrawn by the DfE prior to consultation; and two (Chorley Career and Sixth Form Academy and Newham Free Academy) had support withdrawn by the DfE subsequent to consultation. The BHA is unclear on the status of two other Free Schools (The Excellence Academy and Hull Free School), but it is safe to surmise that not one of the proposers decided to withdraw their plans due to insufficient support in their consultation (where they are the adjudicator, not the DfE), and in only two cases did the DfE withdraw support debatably for this reason.
56. This compares to just 45.101 proposals to establish schools through competition being successful, and 22.31 proposals to establish maintained schools outside of competition, between May 2007 and February 2012.⁷ It is true that, by the time Free School proposals consult, the DfE has already turned away the weakest applications. But with this high success rate, it is nonetheless hard to conclude that Free School consultations take place at a formative stage. Publishing the names, local authorities and faiths (if any) of proposers much sooner would allow more public scrutiny of Free School proposals, thereby helping alleviate this issue; this would increase public trust in the Free School programme, and is therefore in the public interest.
57. It is also difficult to know how parents can be expected to be making an informed commitment to a certain proposal, when being asked to indicate support for it prior to the proposal being submitted to the DfE. Parents may not be aware of other Free School proposals in their area, and so may not be able to consider the full range of options open to them. If the Tribunal rules in favour of release of this information, then this issue would not be addressed, in that proposals will still not be publicly listed prior to their submission to the DfE. However, proposals will be listed prior to the DfE deciding whether or not to ‘pre-approve’ them, and so parents will then be able to scrutinise the full range proposals and perhaps switch their preferences. This would give the DfE a better picture of demand for different proposals, when it comes to decide which to ‘pre-approve’ subsequent to interviews.

Other arguments made in the witness statement of Paul Schofield

⁶ As established by *R(Sadar) v Watford BC* [2006] EWHC 1590

⁷ <http://www.humanism.org.uk/uploads/documents/freedom-of-information-report-on-organisation-of-faith-schools-in-the-maintained-sector.pdf>

58. The BHA will now consider arguments used against disclosure by the appellant, apart from those to do with 'Exhibit PS/1' (which have already been discussed).
59. First of all, the BHA considered the arguments put forth by the Commissioner in the decision notice, grounds of appeal and Commissioner's response to the grounds of appeal, in its own responses to the grounds of appeal [1.118-122 – paragraphs 21 to 24, 29 to 39; and 1.171-172]. The BHA will not go back over the arguments already presented there. Instead, the BHA will limit its consideration to points made in Paul Schofield's subsequent witness statement which have not already been addressed.
60. Mr Schofield asserts that sometimes releasing the name and local authority of an applicant would enable individuals to identify who is behind the application [5.292 – paragraph 24.c]. Mr Schofield gives the examples of Khalsa Secondary School in Slough (where Khalsa Primary School had been approved in a previous wave), and of an application which included the name of the applicant in the proposal.
61. It is undoubtedly true that in some unusual cases, releasing the name and location of the applicant will enable individuals to identify who is behind the application – although this seems to be an argument in support of retracting some names under section 40 of the Act ('Personal information'), and not in support of retracting the whole list. However, in the examples given, it is not clear that there was a desire for this information to be kept secret. In the Khalsa Primary School case, it is clear that the Free School proposer was trying to build on its existing, locally established brand, and so in fact was trying to take advantage of the fact that they could be identified. Similarly, in cases (such as Khalsa) where proposals have been made by existing Free School providers, the identification of that provider would not cause any problems with existing employees (for example, there is no risk *at all* of teachers being fired) – this being another of the appellant's arguments against disclosure. Finally, in the case of the individual who put their name on their proposed school, one would expect (for reasons set out in paragraphs 49-51) this information to already be known locally, and if the proposal is sufficiently publicised to gain pre-approval, nationally as well; it is clear that the individual had already agreed to this loss of privacy in submitting their proposal.
62. Mr Schofield argues that *'it is highly possible that unsuccessful proposals would attract negative publicity... This may well deter applicants from re-submitting proposals.'* [5.293 – paragraph 26] The BHA has addressed this point above in the section on 'Exhibit PS/1', but further notes that if certain unsuccessful proposals prove particularly controversial, then that surely increases rather than decreases the public interest in those proposals being made known.
63. Mr Schofield asserts that projects not yet approved would not be able to deal with criticism, but once approved they will have departmental support so would be better able to do so. [5.293-294 – paragraph 27]. However, Mr Schofield does not explain why the situation with Free Schools is different from maintained school proposals, which are never secret. Moreover, groups must be assumed to be (or at least to

consider themselves) capable of defending their proposals in answer to scrutiny by the DfE: answering questions from the public cannot be so very different.

64. Mr Schofield states that *'I accept that applicants may well choose to publish the fact that they have made an application and whether they have been successful or not.'* [5.294 – paragraph 28] However, Mr Schofield fails to explain how an applicant could have gathered sufficient evidence of demand from across the community, as required by the 'How to Apply' guidance, if it has not published its intention to make a proposal.
65. Mr Schofield argues that *'Disclosing the information requested prior to the making of [the] initial assessment, particularly in relation to faith schools, may inhibit the decision-making process as some applications will be more controversial than others and thus likely to be swamped by media interest.'* [5.294 – paragraph 30] To rephrase this: those proposals that are likely to attract more scrutiny of the form that Mr Schofield considers unhelpful are, as he says, those the public are more interested in – and so are precisely those in which the public interest in favour of disclosure is greater, which must offset the extra burden of scrutiny. In addition, this extra public interest does not prevent the DfE from assessing proposals in exactly the same manner as it did before, if that is what it wishes – it could simply choose not to substantively engage with public representations it considers premature.
66. The BHA has already responded to 'Exhibit PS/1' and arguments from Mr Schofield about the effect on the number of proposals [5.296-297 – paragraph 36] at length, in a previous section of this response, but to summarise: the appellant has not presented any reliable evidence that disclosing the requested information would lead to fewer Free Schools opening.
67. Mr Schofield's response to the BHA's response to the grounds of appeal [5.295-299 – paragraphs 32-44] could be summarised as expressing a fear that certain proposals will be vilified (as opposed to scrutinised) by some sections of the public, if they were made known. But this seems to the BHA to be a misunderstanding by Mr Schofield of public opposition to some potentially unsound proposals as vilification, or to be a result of people not trusting the Free Schools programme, which is as a result of the Government not trusting the public and not behaving transparently.
68. In its grounds of appeal, the BHA highlighted the example of Beccles Free School, which opened in September, where the consultation showed only 21 parents in favour of the school, while a local petition found over 3,000 against. The school has just 68 pupils, with a capacity of 162 [1.121-122 – paragraph 38]. In response to the Beccles Free School example, Mr Schofield said in his witness statement that [5.297 – paragraph 37]:

'Beccles School faced a sustained negative publicity campaign from the outset, gaining momentum following its approval to the pre-opening stage and prior to signing a Funding Agreement. This opposition included a highly

organised local petition, newspaper articles and blog posts, letter campaigning and leafleting of houses and shops... The increased scrutiny of this proposal weakened the school's position rather than strengthening it... I am not of the view that any proposal should be vilified by a small section of the public to the extent that the bid collapses prior to being properly considered.'

69. This seems to the BHA to amount to an undemocratic dismissiveness towards the opposition to Beccles Free School. 3,000 people is not a 'small section of the public', and those opposed had well-grounded concerns. As the article in the *TES* which the BHA cited said[1.169]:

'Jeremy Rowe, headteacher of Sir John Leman High School... claimed it would be "impossible" for two secondaries to be successful in a town with a population of just 9,000, adding that the creation of a new free school could mean Sir John Leman will be forced to reconsider its curriculum.

"There is no way that we will be able to maintain everything we offer as a school if another opens up around the corner," the head said. "It's an absolute tragedy. We will appeal the decision, but people now have little faith that they will be successful. After all, it is the government that they are fighting against, and they are despairing over it."

Mr Schofield's dismissive attitude to widespread, well-founded opposition should be of serious concern to the Tribunal, and must factor strongly when considering the DfE's arguments.

70. Mr Schofield comments that *'Whilst the views of the local community are of course very important, the proper time for such comments to be considered is during the statutory consultation... the BHA's principal aim is to seek to prevent the establishment of faith Free Schools by building campaigns against them even where there is evidenced demand from local parents'*. However, if there is evidenced demand, then this should mean that there will equally be campaigns built in support of proposed Free Schools. Contestation is the essence of democratic decision-making.
71. It is worth again comparing the situation to the maintained sector, where as soon as proposals are submitted to the local authority, they are published – before the local authority has assessed them, or agreed to 'pre-approve' them and assist them to open. This process does not seem to have negatively affected religious proposals as compared to other types of proposal. However, it has led to fewer proposals being accepted after consultation – as discussed above – and there are no obvious comparable situations to that seen in Beccles, where local public opposition was overwhelming, and yet the school was still opened.

72. Mr Schofield notes that there are ‘very few’ maintained schools which are set up each year [5.298 – paragraph 39]. This is a recent consequence of groups instead applying through the Free Schools programme.
73. Mr Schofield attempts to justify the lateness of the consultation process by saying that *'proposers will usually gather [evidence of demand required as part of their application] through informal consultation at a local level'* [5.298 – paragraph 40]. But this undercuts the formativeness of the subsequent formal consultation process, by allowing one side (support for the proposal) to be built up before the other side may even be aware there is any proposal. Furthermore, an informal consultation run by a proposer in order to build up evidence of demand is clearly not comparable to a consultation run openly and formally. Here, the proposer is free to just ignore any negative feedback received, and does not have to present this feedback to the DfE when submitting its application.
74. Mr Schofield gives an example of a school which changed its admission arrangements from feeder schools as a result of consultation responses and advice from the Office of the Schools Adjudicator [5.298-299 – paragraph 41]. It is notable that the strongest example the DfE can provide of the influence of a formal consultation is not of a proposer deciding not to go ahead, but of a proposer modifying its admissions policies, after the Schools Adjudicator was involved.
75. Mr Schofield highlights a case where teachers were dismissed by their current school because they proposed to establish a Free School [5.299 – paragraph 43]. However, Mr Schofield goes on to say that the teachers won a claim for unfair dismissal. While it is very unfortunate that these teachers were dismissed in the first place, this clearly demonstrates that such dismissal would be unlawful – a message which the DfE should have little difficulty making schools aware of. In any case, the BHA would reiterate that individuals’ personal details are outside the scope of the case, and would therefore not anticipate this issue becoming any more frequent.

Conclusion

76. For the reasons discussed above, the BHA considers that section 35(1)(a) of the Act is not engaged in this case; and if it is, then that the public interest in favour of disclosure of the name, former names, faith (if any) and area of proposed Free Schools is extremely strong, and certainly outweighs the public interest against disclosure.
77. In addition, the BHA reiterates that the DfE has not published the faith (if any) of successful Free School proposals, and has not given any reasons for not doing so.
78. As a result of the above, the BHA asks the Tribunal to rule that the DfE should publish the faith (if any) of successful Free School proposals, and either:
- 1) Dismiss the appeal, and take a reading of the Commissioner’s decision notice as having been made on the broader scope as understood by the BHA and

the appellant, which includes the name, former names, local authority and faith (if any) of all proposals; or

- 2) Exercise its powers under section 58(1)(b) of the Act to substitute for the Commissioner's decision notice one written on the broader scope as understood by the BHA and the appellant, which includes the name, former names, local authority and faith (if any) of all proposals; or
- 3) Decide that as the Commissioner failed to rule on the entirety of the BHA's complaint, it will therefore consider this submission as an appeal from the BHA against the Commissioner's failure to reach a determination on the majority of the BHA's complaint, and so conclude that the DfE must publish the name, former names, local authority and faith (if any) of all proposals.

Name and address of respondent/address for service

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