

Supporting material to complaint on fourth wave Free School proposals

This complaint deals with two separate but identical FOI requests: one made by me (Richy Thompson) on 7 January, and the other made by Pavan Dhaliwal on 4 March. We both made the complaints on behalf of the British Humanist Association, the organisation for which we work, and would like them to be considered together. I note that Pavan's complaint has not completed its internal review, but as my complaint has, we hope this is sufficient for the ICO to consider Pavan's alongside mine.

This case has parallels to the previous request for the same information but pertaining to waves one and two of the Free Schools programme, which the Commissioner previously considered on 4 July 2012 ([Decision Notice FS50415927](#)), and the subsequent Information Tribunal case, decided on 15 January 2013, to which the BHA was a party ([Appeal No: EA/2012/0136,0166,0167](#)). There, the DfE relied on sections 35 and 36 of the FOI Act. The Tribunal decided that section 36 was engaged but the associated public interest test was not.

Outline of complaint

On 7 January, I requested the names, locations, previous names, and faith (if any) of all proposals submitted to the Department for Education as part of the fourth wave of Free School proposals. The window for groups to apply had closed on 4 January.

On 4 February, the DfE told me that it believed that the information I was requesting is exempt under section 36(2)(c) of the FOI Act (i.e. its disclosure 'would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs'). On 4 March, the DfE decided that the public interest attached to this exemption was balanced against disclosure. The DfE relied on the same considerations in favour of or against disclosure, but considered that the arguments against disclosure were slightly stronger than in the waves one/two case because 'the timing of this latest request – right at the start of the competitive assessment process – gives rise to new and stronger public interest arguments in favour of withholding the information.'

However, this request was made only 13 working days sooner after the end of the applications window to that of the wave two request. Both requests were made during the subsequent competitive assessment phase.¹ On 4 March I requested an internal review, arguing that:

It is true that this time I requested the information 13 working days closer to the start of the Free Schools window. But on both occasions, the information was requested at a date that meant it needed to be disclosed before interviews start. Therefore, it seems to me that both were at an equally formative stage and that the DfE was wrong to determine the public interest lies against disclosure.

There was no indication in the Tribunal or Commissioner's decisions that the above factors would be much stronger if the request had been made very slightly earlier; indeed, the Tribunal and Commissioner's decisions were very strongly in favour of release of the information.

In other words, the Tribunal's decision constituted a precedent that, I believe, means the DfE should have released this information.

¹ I can provide emails to show this if required.

On 4 March I requested an internal review, while Pavan Dhaliwal also submitted a fresh FOI request, noting my request but saying that 'I have decided to also put in a new FOI request today - today being a date that is later than the date of the FOI request that the Tribunal considered.'

On 27 March, the DfE rejected Pavan's request, not relying on section 36 but instead arguing that section 22 is engaged ('Information intended for future publication') – and again, that the public interest lies against disclosure. Pavan asked for an internal review on 3 April.

On 19 April the DfE rejected my internal review, again setting out the public interest tests, but confusingly adding that 'The panel did, however, agree with you that the 13 days' difference between the date of this request and that considered by the ICO previously was not of material significance. Ministers have, as you know, agreed to release this information once the competitive application process has concluded so it will soon be in the public domain for you to access freely.' The DfE also advised Pavan that the information will be published by the end of May.

Comments

We believe it is wrong that the DfE refused to release this information, as the Information Tribunal ruling in the waves one/two case set a clear precedent that the public interest lies in favour of the information being released even during the competitive assessment stage. A large number of the arguments made in the submissions to that case by the DfE and BHA focussed on the fact that the wave two request was made during this formative phase, and yet the Tribunal still found in favour of disclosure.²

With regards to section 36(2)(c), the Tribunal ruling on the waves one/two case established a precedent that the public interest lies in favour of publishing this information, even during the competitive assessment phase; and as outlined above, even the DfE acknowledge that 'the 13 days' difference between the date of this request and that considered by the ICO previously was not of material significance.'

With regards to section 22, again the Tribunal ruling considered that the public interest lies in favour of disclosure during the competitive assessment phase. The DfE are therefore wrong to claim that the public interest lies against disclosure.

Finally, I acknowledge that any Commissioner ruling in this case will likely come after the DfE has published this information. But we hope that the ruling will set a precedent for future waves and prevent the DfE from replying on either sections 22 or 36 to delay disclosure.

² The BHA can provide these submissions if required.

My initial FOI request, 7 January 2013:

Freedom of Information Request: List of fourth wave free school proposals

Richy Thompson <richy@humanism.org.uk>

7
Jan

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 "fourth wave" (i.e. received in 2013 for opening from September 2014), 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, second or third waves (and if so, which)

Kind regards,

Richy Thompson

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

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DfE acknowledgement, 8 January:

Unmonitored.ACCOUNT@education.gsi.gov.uk

8
Jan

to me

Dear Mr Thompson

Thank you for your recent enquiry. A reply will be sent to you as soon as possible. For information the departmental standard for correspondence received is that responses should be sent within 20 working days as you are requesting information under the Freedom of Information Act 2000. Your correspondence has been allocated reference number 2013/0001105

Thank you

Department for Education
Public Communications Unit
Tel: 0370 000 2288

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DfE notification of delayed response on public interest test, 4 February:

Case Reference 2013/0001105

Unmonitored.ACCOUNT@education.gsi.gov.uk

4
Feb

to me

Dear Mr Thompson,

Thank you for your request for information sent on 9 January.

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").

Although the Department does hold the information you have requested, this information is being withheld under the exemption in Section 36(2)(c) of the Act which covers information relating to the effective conduct of public affairs. Whilst in respect of your previous requests the ICO has found the balance of public interest arguments in favour of disclosure, the Department considers that the timing of your latest request – received at the very beginning of the competitive process - gives rise to new, and stronger, public interest arguments in favour of withholding the information concerned at this time.

The Act obliges the Department to respond to requests promptly, and in any case no later than 20 working days after receiving your request. However, where the exemption contained in S36(2)(c) is applicable, the Department must consider whether the public interest lies in disclosing or withholding the information. In these circumstances the Act allows the time for response to be longer than 20 working days.

In this case the Department estimates that it will take an additional 20 days to take a decision on where the balance of the public interest lies. It is anticipated that you will receive a full response by 4 March. If it appears that it will take longer than this to reach a conclusion, we will keep you informed.

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.

Your correspondence has been allocated reference number 2013/0001105. If you need to respond to us, please visit www.education.gov.uk/contactus, and quote your reference number.

Yours sincerely,

Anna Hamilton
Free Schools Group
Anna.HAMILTON@education.gsi.gov.uk
www.education.gov.uk



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My clarification of request, 21 February:

Richy Thompson <richy@humanism.org.uk>

21
Feb

to Anna.HAMILTON

Dear Ms Hamilton,

Thank you for your email below.

I just wanted to clarify that by "faith (if any)", I meant either a formally designated religious character or a faith ethos (preferably recorded in two separate columns. I am aware that the DfE asks applicants for both of these pieces of information separately, so this should be easiest for you too).

I hope this clarification is not taken by the DfE to constitute a brand new FOI request being made in lieu of my current one. But if this is the Department's interpretation, I would ask that the DfE deals with my current FOI request as it previously understood it by the 4 March deadline, and takes this email as constituting a separate FOI request entirely which does not interfere with the timescale for that previous one.

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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DfE initial refusal, 4 March:

Anna.HAMILTON@education.gsi.gov.uk

4
Mar

to me

Dear Mr Thompson,

I refer to your request for information, which was received on 9 January. You requested 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 also noted your request of 21 February for separate inclusion of both faith designated and faith ethos applications).

In my initial reply on 4 February I explained that, having dealt with your request under the Freedom of Information Act 2000 ("the Act"), the Department believes that Section 36 applies to the information you requested. (As you are aware, the Information Tribunal has confirmed the engagement of Section 36 in relation to the corresponding information from earlier waves covered by your previous requests). By facilitating the identification of specific applications and the individuals involved, the unplanned disclosure of this information could well attract unfair publicity, undermine the fairness of the current assessment process and discourage future applications – thereby hindering the progress of the FS programme and limiting student and parental choice in the future. This is clearly prejudicial to the effective conduct of public affairs.

Further to my initial reply, the Department has decided that the public interest lies in withholding the information. In relation to your first request (for information on Waves 1 and 2 of Free School applications) the ICO found the balance of public interest arguments to be in favour of disclosure and you have now received this information. However, the Department considers that the timing of this latest request – right at the start of the competitive assessment process - gives rise to new and stronger public interest arguments in favour of withholding the information. You may wish to know that, subsequent to your request, the Department has decided to publish the requested (Wave 4) information at a future date so it will then be readily accessible to you.

Whilst acknowledging the general public interest in disclosure, the Department believes this to be outweighed by the following arguments in favour of withholding the information at this time:

- 1) The reputational risk to individuals and organisations is greater and less manageable if this information is released while the assessment process is still on-going and before final decisions have been made.

- 2) There is a danger that releasing details of directly competing applications at this stage will open the way for deliberate smear campaigns against individual proposals.

3) Negative media attention on specific applications which were unsuccessful in previous rounds could have an adverse impact on community support and student recruitment – groups’ progress on gathering evidence of demand is reviewed at the interview stage; all groups deserve a level playing field when marketing their school to their local communities

4) The combined result of points 1-3 is an increased deterrent against previously unsuccessful groups re-applying and new groups submitting in the first place. This deterrent is likely to disproportionately affect smaller or more innovative projects and high profile applicants with ‘a lot to lose’ - skewing the programme away from its core ethos and potentially missing out on exciting new proposals. Any narrowing of the field will have a negative impact on future parental and student choice.

5) The publication of application, as opposed to approval details could lead to false or misleading pictures of the direction of the Free Schools Programme.

6) It is possible that the distorted media attention described in point (3) will have an influence on decision makers. Whilst both official assessors and Ministers are professionals who are, in the words of the Tribunal ‘robust’ and fully conscious of the importance of impartiality, high profile scrutiny of specific proposals or individuals involved will inevitably have an adverse impact on a truly level playing field.

7) There is a cost in terms of human and, potentially, financial resources which would need to be diverted to deal with negative media attention and public scrutiny – both for groups themselves and the Department.

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

Anna Hamilton
Free Schools Group

Department for Education

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My request for internal review, 4 March:

Richy Thompson <richy@humanism.org.uk>

4
Mar

to Anna.HAMILTON

Dear Ms Hamilton,

I would like to request an internal review of this decision.

I note that when I made my request for wave 2 information, it was 21 June 2011. The application window had closed on 1 June and the DfE did not begin interviewing applicants until 1 August (after the decision date was due).

This time, I requested the information on 7 January. The application window closed on 4 January, and interviews start today (4 March).

It is true that this time I requested the information 13 working days closer to the start of the Free Schools window. But on both occasions, the information was requested at a date that meant it needed to be disclosed before interviews start. Therefore, it seems to me that both were at an equally formative stage and that the DfE was wrong to determine the public interest lies against disclosure.

There was no indication in the Tribunal or Commissioner's decisions that the above factors would be much stronger if the request had been made very slightly earlier; indeed, the Tribunal and Commissioner's decisions were very strongly in favour of release of the information.

Best wishes,

Richy Thompson

Campaigns Officer (Faith Schools and Education), British Humanist Association
39 Moreland Street, London EC1V 8BB | 020 7324 3072

Pavan Dhaliwal's FOI request, 4 March:

Freedom of Information Request: List of fourth wave free school proposals

From: Pavan Dhaliwal [mailto:pavan@humanism.org.uk]

Sent: 04 March 2013 17:45

To: 'PCU.CORRESPONDENCE@education.gsi.gov.uk'

Subject: Freedom of Information Request: List of fourth wave free school proposals

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 "fourth wave" (i.e. received in 2013 for opening from September 2014), 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, second or third waves (and if so, which)

By "faith (if any)", I mean either a formally designated religious character or a faith ethos (recorded in two separate columns).

I am aware that my colleague, Richy Thompson, has made a separate FOI request for the same information. However, as his FOI request has been rejected due to being made sooner after the closure of the application window than in the waves 1/2 FOI request which the Tribunal ruled on, I have decided to also put in a new FOI request today - today being a date that is later than the date of the FOI request that the Tribunal considered.

Best,

Pavan

Pavan Dhaliwal

Head of Public Affairs, British Humanist Association

39 Moreland Street, London EC1V 8BB | 020 7324 3065 | 0773 843 5059

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DfE initial refusal of Pavan Dhaliwal's FOI request, 27 March:

From: Unmonitored.ACCOUNT@education.gsi.gov.uk [mailto:Unmonitored.ACCOUNT@education.gsi.gov.uk]

Sent: 27 March 2013 21:07

To: pavan@humanism.org.uk

Subject: Department for Education response: Case Reference 2013/0015149

Dear Pavan Dhaliwal,

Thank you for your request for information, which was received on 5 March. You requested 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").

The Department holds the information you requested but it is being withheld because the exemption contained in Section 22 of the Act applies to this information: as made clear in my response to your colleague, Richy Thompson, the Department intends to publish this information at a future date. Section 22 acknowledges that public authorities must have freedom to be able to determine their own publication timetables.

Section 22 of the Act is a qualified exemption which means that a public interest test needs to be carried out. In doing so, the following factors have been considered:

1. The Department acknowledges the general public interest in disclosure but does not believe this to be compromised by reasonable delay until the information's planned publication.
2. The public interest in permitting public authorities to publish information in a manner and form and at a time of their own choosing is important. It is a part of the effective conduct of public affairs that the general publication of information is a conveniently planned and managed activity within the reasonable control of public authorities.
3. At the time of your request the Wave 4 assessment process was part-way through. Premature disclosure risks harming the private interests of third parties – in this case Free School Applicants whose reputations are at stake. Applications received and schools approved are two very different matters and disclosure of the former in isolation is misleading and risks causing unnecessary public concern.
4. It is in the wider public interest to allow everybody to view the information at the same time, especially given that the information requested will lead to the identification of individuals. Privileging individual FOI applicants with the information in advance is unfair to others who are more directly affected by the planned announcement.

Having considered the public interest question in the context of Section 22 specifically, the Department has concluded that the public interest in immediate

disclosure does not outweigh the public interest in delaying until general publication. In addition to the risks posed to individual members of the public by premature disclosure, it is in the wider public interest that disclosure of information relating to such a high profile programme takes the form of general publication in a planned and managed way.

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

Your correspondence has been allocated reference number 2013/0015149. If you need to respond to us, please visit www.education.gov.uk/contactus, and quote your reference number.

Yours sincerely,

Anna Hamilton
Free Schools Group
Anna.HAMILTON@education.gsi.gov.uk
www.education.gov.uk

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Pavan Dhaliwal's request for internal review, 3 April:

From: Pavan Dhaliwal [<mailto:pavan@humanism.org.uk>]

Sent: 03 April 2013 13:12

To: ACCOUNT, Unmonitored; HAMILTON, Anna

Subject: RE: Department for Education response: Case Reference 2013/0015149

Dear Anna,

I would like to request an internal review of the decision to not publish the information.

Please could you also let me know on what date you intend to publish the information.

Best,

Pavan

DfE refusal of my internal review, 19 April:

Department for Education response: Case Reference 2013/0024984

Unmonitored.ACCOUNT@education.gsi.gov.uk

19 Apr (3 days ago)

to me

Dear Mr Thompson,

Thank you for your reply dated 4 March and follow-up email of 15 April.

The Department has, as requested, convened an Internal Review panel chaired by a senior official wholly independent of the original decision to withhold the information you requested relating to Wave 4 Free School applications.

The panel endorsed the original decision that section 36 of the FOI Act was engaged and that the balance of public interest arguments lay in withholding the information at this time.

In reaching this conclusion the panel considered all the public interest arguments set out in my previous response – also dated 4 March: a wider range of arguments than those considered previously by the ICO. It found the most compelling arguments to be those around:

- the right of applicants to a level playing field – particularly when gathering evidence of demand;
- the reputational risk to applicants, particularly where these are existing schools, and the resulting deterrent against future applications;
- the potential use of application data, detached from the context of actual approvals, for negative campaigning purposes to create a misleading picture about the Free Schools programme.

The panel did, however, agree with you that the 13 days' difference between the date of this request and that considered by the ICO previously was not of material significance.

Ministers have, as you know, agreed to release this information once the competitive application process has concluded so it will soon be in the public domain for you to access freely.

As you are aware, if you are unhappy with this decision you have the right to appeal directly to the Information Commissioner. The Information Commissioner can be contacted at:

The Case Reception Unit
Customer Service Team
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Further information about the Information Commissioner's complaints procedure can be found on the Information Commissioner's Office website: http://www.ico.gov.uk/complaints/freedom_of_information.aspx

Your correspondence has been allocated reference number 2013/0024984. If you need to respond to us, please visit: www.education.gov.uk/contactus, and quote your reference number.

Yours sincerely,

Anna Hamilton
Free Schools Group
Anna.HAMILTON@education.gsi.gov.uk
www.education.gov.uk



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DfE reply to Pavan Dhaliwal stating intended publication date, 19 April:

From: <Anna.HAMILTON@education.gsi.gov.uk>

Date: 19 April 2013 09:28:58 BST

To: <pavan@humanism.org.uk>

Subject: RE: Department for Education response: Case Reference 2013/0015149

Dear Pavan,

Thank you for this reply. We are intending to publish this information relating to Wave 4 applications by the end of May. In the light of this, would you still like us to convene an internal review?

Kind regards

Anna

Pavan Dhaliwal renewing request for internal review, 22 April:

Department for Education response: Case Reference 2013/0015149

Pavan Dhaliwal

14:24 (3 minutes ago)

to Anna.HAMILTON

Yes I would still like you to convene the review.

Best,

Pavan