

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 16 January 2012

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

### Decision (including any steps ordered)

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1. The complainant requested the disclosure of the business plan for Etz Chaim Jewish Primary School - a new state-funded Free School. The Department for Education (the "DfE") confirmed it held the relevant information but refused to comply with the request on the basis that it had a settled intention to publish the information prior to the request being received (section 22(1)(a)).
2. The Commissioner has found that the DfE was correct to apply section 22 to the request.
3. The Commissioner requires no steps to be taken.

### Request and response

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4. On 08 May 2011, the complainant wrote to the DfE and requested information in the following terms:  
*"I am sorry to learn that the business case [for the Etz Chaim Primary School] has not been published. [I] would therefore like to request a hard copy of that business plan under the Freedom of Information Act."*
5. On 07 June 2011 the DfE responded to the request. It confirmed it held the information but it stated that the business plan was exempt from disclosure as it intended to publish it at a future date (section 22).
6. On 02 July 2011 the complainant informed the DfE that she was not satisfied with the response and requested an internal review.

7. Following an internal review the DfE wrote to the complainant on 01 August 2011. It upheld its position that section 22 of the FOIA was engaged and refused to disclose the information.

## Scope of the case

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8. On 17 September 2011 the complainant contacted the Commissioner to complain about the way her request for information had been handled.
9. The Commissioner has looked to determine whether the DfE correctly relied upon the exemption at section 22 to withhold the business plan for Etz Chaim Primary School.

## Reasons for decision

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### Exemption: Section 22 – information intended for future publication

10. The DfE has argued that the information falling within the scope of this request was exempt from disclosure by virtue of section 22(1). Section 22(1) is a qualified exemption so if it is engaged, the public authority is still required to evidence that the public interest in maintaining the exemption outweighs the public interest in disclosure. The Commissioner will first consider whether the exemption was engaged.
11. Section 22(1) states that:

*“Information is exempt information if –*

*(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),*

*(b) the information was already held with a view to such publication at the time when the request for information was made, and*

*(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”*
12. In order to determine whether section 22 is engaged the Commissioner therefore needs to consider the following questions:
  - Was the information requested held by the DfE?

- Did the DfE have an intention to publish the information at some date in the future when the request was submitted?
  - In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until some future date (whether determined or not)?
13. The DfE no longer intends to publish the business case for Etz Chaim Jewish Primary School following a change in publication policy made by Ministers on 18 November 2011. Ministers decided that the release of funding agreements (the contract between the DfE and the school Academy Trust, which does not explicitly detail capital expenditure) would meet the needs for transparency concerning the basis for providing the Free School.

**Was the information requested held by the DfE?**

14. The DfE held the business plan for Etz Chaim Jewish Primary School on 08 May 2011.

**Did the DfE have an intention to publish the information at some date in the future when the request was submitted?**

15. In the Commissioner's view, in order to demonstrate that the exemption under section 22(1) is engaged, a public authority must have an intention to disclose information at a future point and that it must be able to demonstrate what information within the scope of the request it intends to publish.
16. The DfE was informed by Ministers that business cases and financial information relating to successful Free School proposals would be published "at an appropriate time". This decision was made on 03 May 2011 in a meeting between Ministers, special advisors and senior officials.
17. On 07 June special advisors agreed the wording for the publication policy as stated on the Free Schools section of the DfE website:

*"We will publish business cases, funding agreements, and financial information for approved Free Schools when their final costs have been agreed. Publishing financial information before negotiations are finished could make it harder to save taxpayers' money."*

**In all the circumstances of the case, was it 'reasonable' that information should be withheld from disclosure until some future date.**

18. The main argument advanced by the DfE in support of it being reasonable for it to delay – at the time the information request was submitted – is that the business plan relates to the commercial negotiating strength of the school. At the time of the request Etz Chaim Jewish Primary School had not secured a permanent site or entered into a contract for the refurbishment of the campus. The DfE argued that 'premature' release of the business plan could have directly affected its negotiating position.
19. The proposed site for the school has proven controversial and the DfE claims it has reason to believe that releasing the business plan, which includes details of the school's financial provisions, could adversely affect the school's already limited ability to achieve the best possible value for money.
20. The DfE argues that the publication of the business plan is unfair to those involved in the school's establishment and could potentially result in "misleading" and "harmful" consequences given the variable nature of the business plan. Business cases were in most part produced after an iterative process. Many, including Etz Chaim, were approved with conditions and they are all in any case out of date by virtue of the further development that occurred in the pre-opening stage. In this instance, 'further development' has since included a complete change in the campus location.

**Public interest arguments in favour of maintaining the exemption**

21. In its refusal notice, the DfE put forward a number of points to support its view that the public interest favoured upholding the exemption at section 22(1). These arguments were repeated during the Commissioner's investigation.
22. The DfE considered that the public interest in securing the best value for money for taxpayers was of paramount concern. This could be materially affected by releasing the business case before negotiations about the permanent site were concluded. Release of the information about the budget for the refurbishment or for a possible temporary site could prejudice negotiations. The Commissioner notes that Etz Chaim Jewish Primary School has still not entered into a contract for the refurbishment of the campus building.
23. The DfE argues that there is likely to be a high degree of media interest in a flagship policy of the Coalition Government. In this case, the

Commissioner notes that the release of the business case could lead to disruptive effects on existing proposers and their projects. The Commissioner recognises the public interest in permitting the Government to publish information in a manner and at a time of its own choosing. It is 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 the public authority.

24. Further to this, the DfE argues that had the business case been released this could have resulted in exhaustive attention focused on the financial arrangements. In this instance there is intense disagreement about the site for the school. This has, according to the DfE, "played out" in the press during which time business plans were being finalised to take account of the best value that could be achieved for the project. Determining best value for taxpayers' money may not have been apparent in media comment, and could additionally undermine parental confidence in any eventual school.
25. The DfE argued that the release of the business plan and subsequent media scrutiny could deter future applicants from coming forward. The DfE warned the Commissioner that this would have a direct impact on the number of Free Schools opening in the future and the Government's aim to provide free choice in the school market. Proposers require a space in which to communicate their evolving plans in a free and frank manner during the process of the school's establishment and this includes the business plan.
26. The DfE considered that it was not reasonable for the Government to be expected to release piecemeal information in advance of its planned timetable and planned publication of financial information. There was additionally a strong argument in favour of allowing everyone to view this information at the same designated time. If it were to release this information as requested this would result in partial information being released over a protracted period leading to confusion and inaccuracy.
27. A piecemeal release could have meant that plans at varying stages could be contrasted with one another, without any contextual information, undermining confidence in those projects. It might also jeopardise the ability to plan by revealing proposed locations before negotiations for those sites were complete. In turn this risks damaging proposers' negotiating positions in a competitive marketplace.

### **Public interest arguments in favour of disclosing the requested information**

28. The Commissioner considers that the introduction of the Free School policy is an area of considerable public debate. This policy represents a

change in national educational policy, and also entails the expenditure of considerable sums of public money. He considers that it is in the public interest to help inform that debate. In addition to this national debate, the Commissioner also considers that particular applications for the foundation of individual Schools are of particular interest to local communities and religious groups. He considers that the disclosure of the information requested in this case will help to inform that debate.

29. Releasing the business plan would help inform ongoing public debate concerning Etz Chaim Jewish Primary School. While the school has sought to re-assure the local community through public engagement and its website, there remains intense disagreement, not least concerning the proposed site for the school. The business plan would offer the transparency sought from local residents and parents of neighbouring schools in disclosing the ambitions of the school's proposers.
30. The DfE acknowledged that the key principles that lie behind the FOIA are transparency, openness and accountability. The Commissioner agrees with the complainant that these factors are enhanced by the context of the withheld information being a completed business plan that has been submitted and accepted by the DfE. He accepts that there are strong arguments about the necessity of public oversight of education spending and its distribution. The disclosure of the requested information would contribute to this oversight. The Commissioner believes that these arguments should have a strong weight.
31. However, in the Commissioner's view, the weight of the factors above is substantially mitigated when acknowledgment is given to the impending release of the funding agreement between the DfE and Etz Chaim Jewish Primary School. This future disclosure will satisfy many of the concerns raised regarding openness, transparency and accountability.

### **Balance of the public interest arguments**

32. The Commissioner's guidance note on section 22 explains that because the application of this exemption presupposes that the requested information will be disclosed, in balancing the public interest the focus is not on the harm that may arise from release of the information itself. Rather the balance of the public interest must focus on whether in the circumstances of the case it would be in the public interest for the public authority to keep to its original timetable for disclosure or whether the public interest would warrant an earlier disclosure. The Commissioner concludes that on balance the public interest in maintaining the exemption outweighs the public interest in disclosure.

33. In reaching this decision the Commissioner does not accept that the DfE can argue against disclosure when it speaks of the potential press slant in the reporting of the business case - even where this might affect public understanding, opinion formation and the future of the Free Schools programme. He does however acknowledge that even though the business case is complete and has been approved, it remains subject to change. Crucially, the disclosure of financial information including the school's capital and revenue set-up costs would likely be detrimental to the school's commercial negotiating strength and ultimately impact on the value for taxpayers' money. The Commissioner has concluded that the risk to the proposals, given there were ongoing commercial negotiations at the time of the request, outweighs, on this occasion, the interest in openness and transparency.
34. The Commissioner has carefully balanced the public interest weighing the need for openness and transparency against the significant adverse impact on the school's negotiating ability to ensure best value for taxpayers' money. While there are strong arguments on both sides, he has come to the conclusion that the stronger arguments favour the maintenance of the exemption.
35. For all the reasons above, the Commissioner therefore determines that the exemption found in section 22(1) has been applied correctly and does not uphold the complaint.

## Other matters

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36. The Commissioner wishes to make it clear that his role in considering complaints under Part I of the Act is limited to considering the circumstances as they existed at the time of the request or at least by the time for compliance with sections 10 and 17, i.e. within 20 working days following the receipt of the request. The Commissioner's approach follows that set out in a number of Information Tribunal decisions and has been upheld by the High Court.<sup>1</sup>
37. If the complainant, or anyone else for that matter, were to submit the request now to the DfE and this resulted in a further complaint to the Commissioner then the Commissioner would have to consider the case

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<sup>1</sup> The Information Tribunal confirmed this principle in many cases including paragraph 110 of *DBERR v Information Commissioner and Friends of the Earth* [EA/2007/0072]. The High Court confirmed that it agreed with this approach in paragraph 98 of *Office of Government Commerce and Information Commissioner and Her Majesty's Attorney General on behalf of The Speaker of the House of Commons* [2008] EWHC 737.

afresh, and (unless the DfE changed its position again) he would not reconsider section 22 (1).



## Right of appeal

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38. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0116 249 4253

Email: [informationtribunal@hmcts.gsi.gov.uk](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

39. If you wish to appeal against a Decision Notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
40. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

**Signed** .....

**Pamela Clements**  
**Group Manager, Complaints Resolution**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**