

## Freedom of Information Act 2000 (Section 50)

### Decision Notice

**Date: 17 September 2007**

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

### Summary

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1. The complainant requested information from the Department for Education and Skills (DfES) about a list of schools that were considered suitable to become city academies. The public authority refused to disclose the list, relying upon section 36 of the Freedom of Information Act 2000. The Commissioner has considered the exempt information in question and is satisfied that the public authority has applied section 36 correctly.

### The Commissioner's Role

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2. The Commissioner's role is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 ('the Act'). This Notice sets out his decision.

### The Request

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3. On 5 October 2005 the complainant made a request to the Department for Education and Skills (DfES) via its Freedom of Information website. The request read as follows:  
"I have been told there is a list of schools identified by the department as being potential candidates for becoming academies. A press officer described this to me as a "planning tool" which was not a public document. I would like a copy of this list posted or emailed to me please."
4. On 26 October 2005 DfES replied, explaining that the list was an early planning tool used to identify schools which, based on DfES criteria of educational attainment and deprivation, might benefit from becoming academies in the future. It went on to explain that the list changed on a daily basis and merely showed early possibilities rather than actual projects. DfES refused to disclose the

information, citing the exemption in section 36(2) (b) and (c) of the Act. DfES also confirmed that the opinion of the qualified person, as required by the legislation, had been obtained. DfES explained that it had carried out a public interest test and had concluded that the balance fell in favour of maintaining the exemption cited.

5. On 4 November 2005 the complainant wrote by email to ask for an internal review of the decision. He did not agree that divulging the list would create a situation whereby the Government's work would be inhibited.
6. DfES wrote to the complainant on 15 November 2005 and informed him that, following an independent re-assessment of the case, it had been decided to uphold the original decision not to disclose the information.

## The Investigation

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### Scope of the case

7. On 23 November 2005 the complainant contacted the Commissioner to complain about the way in which his request for information had been handled. In his view the arguments put forward by DfES were unjustified under the Act, and contradictory.

### Chronology

8. The Commissioner wrote to DfES on 9 March 2007 to ask for a copy of the withheld information. The Commissioner also asked for confirmation that the internal review had been carried out by someone other than the original assessor. DfES replied on 1 May 2007, providing the information and confirming that the review had been carried out independently of the initial assessment and that a full record had been kept of the proceedings and the decision. The list contains the names of schools, potential sponsors, and notes on developing issues.

### Findings of fact

9. The Academies programme is a key part of the Government's strategy for raising school standards, particularly in disadvantaged areas. Academies are publicly funded independent schools which can either be established as new schools or which replace a predecessor school with low levels of attainment. The way in which an Academy project proceeds once a school has been entered on the list is that discussions take place initially with the local authority and the potential sponsor and then, once their involvement is confirmed, with the school. A formal 'Expression of Interest' document is then drawn up detailing the nature of the possible Academy (number of students, specialism, and so on). This is then submitted to Ministers for approval. If this approval is granted, then the details of the project will immediately be made public.

10. On 1 October 2005 the Independent online edition published an article entitled 'Government draws up 'hit-list' of 170 schools to become city academies'. It described a list made up of secondary schools that had failed Ofsted inspections and where inspectors had identified serious weaknesses either in teaching standards, exam performance, or attendance.

## Analysis

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11. The Commissioner has considered the public authority's response to the complainant's request for information.

## Exemption

12. Under section 36(2) information is exempt if, in the reasonable opinion of a qualified person its disclosure would, or would be likely to inhibit the free and frank provision of advice, or the free and frank exchange of views for the purpose of deliberation. The qualified person whose opinion was sought in this case was the Secretary of State for Education and Skills and a record of her decision is held on file.
13. The Commissioner is satisfied that the reasonable opinion of a qualified person was obtained. He has also considered whether the opinion of the qualified person was in fact "reasonable". He is of the view that a reasonable opinion is one which lies within the bounds of reasonableness or within a range of reasonable opinions, and can be verified by evidence. The Commissioner is satisfied that, on the basis of information provided to him in the circumstances of this case, the opinion was both reasonable and was reasonably arrived at, and that section 36 is therefore engaged. In coming to this view he has taken into account the Information Tribunal decision in the case of Guardian Newspapers Ltd and Heather Brooke v the Information Commissioner and the British Broadcasting Corporation, in which the Tribunal states that "if the opinion is reasonable, the Commissioner should not under section 36 substitute his own view for that of the qualified person. Nor should the Tribunal".
14. The Tribunal decision goes on to say that the right approach, consistent with the language and scheme of the Act, is that the Commissioner, having accepted the reasonableness of the qualified person's opinion that disclosure of the information would, or would be likely to, have the stated detrimental effect, must then give weight to that opinion as an important piece of evidence in his assessment of the balance of the public interest test. However, in order to form the balancing judgement required by s2 (2) (b), the Commissioner is entitled, and will need, to form his own view on the severity, extent and frequency with which that detrimental effect will or may occur.

## Public interest test

15. The exemption under section 36 (2) (b) and (c) of the Act is a qualified exemption. Accordingly, section 2 of the Act requires the Commissioner to consider whether,

in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

### **The complainant's view**

16. The public interest in this case lies in furthering the understanding of and participation in public debate around issues of the day, and also in creating accountability and transparency in the actions and decisions being taken by a public authority.
17. The complainant's view is that disclosure of the list would lead to a situation where all parties were aware of the government's considerations and could therefore take part in an honest and open debate about the merits of transforming the schools in question into academies. He feels that the reason for keeping the list a secret is to inhibit the ability of certain parties to take part in such a debate.
18. The complainant asked for a review of the original decision and for an explanation of how disclosing the list would prevent "all options" being considered or "full project planning" and "risk assessment" taking place. He did not see how the department could argue, on one hand, that the document was of little significance but, on the other hand, refuse to publish it on the grounds that the effects of publication would be highly significant.

### **The DfES view**

19. DfES recognizes that there are significant public interest arguments in favour of disclosure: in particular, that disclosure might stimulate and inform public debate; the need for open policy making; and the need for the public to feel confident that decisions are taken on the basis of the best available information. It accepts that parents and the wider public have a right to be involved in the decision making process, particularly where those decisions affect matters, such as the schooling of children, that are of fundamental importance to them. However, in this instance, DfES takes the view that release of the list of schools would do more to confound than to inform public debate and has provided a number of arguments to support this position, the essentials of which are set out below.

### **Risks to the schools and pupils**

20. The decision that a school should become an Academy is often a very controversial one. To label or earmark an existing school as a future Academy sends out a clear signal that the current standard of education in that school is not acceptable and that a radical transformation is required. This can be a very difficult message for staff, parents and pupils who are currently at the school and has resulted on previous occasions in reduced teacher morale, uncertainty about the school's future and a sudden movement of pupils out of the school in question.
21. DfES argues that, if this list were to be released, reactions similar to the above could take place simultaneously in the 170 schools across the country. As mentioned above, many of the schools on the list would not yet even have been

contacted about the possibility of becoming an Academy so, if released, the information would be completely unexpected and potentially more damaging. What is more, at least 30 of these schools are no longer being considered as possible Academies, so release of the information that they were potentially in that category at the time the request was made would cause quite needless disruption.

### **Risks concerning potential sponsors**

22. DfES also argues that Academy sponsors have been directly affected by negative reactions. In the past, these have included a local boycott of a potential sponsor's products and the picketing of another sponsor's offices. Both of these incidents resulted in the withdrawal of the sponsors in question. Given that the programme is demand-led and reliant upon a significant financial contribution from individuals and consortia, securing the long-term commitment of sponsors is vital. Any negative press coverage of sponsors will therefore have an adverse impact on the department's ability to secure new ones in future.
23. The list contains the names of potential sponsors for each Academy project. A number of these potential sponsors subsequently decided not to become part of the programme and many more are still in confidential discussions with DfES. The release of these names could result in negative effects of the kind described above even where the individuals concerned had subsequently decided not to become part of the programme.

### **Risks to delivery of the Academies Programme**

24. If the list were to be released DfES has argued that it would put at considerable risk the delivery of this flagship education programme. As a result of the effects mentioned above, it would be far more difficult to persuade schools, local authorities or sponsors to become part of the programme. Current projects that are under discussion would be jeopardised and could fail as a direct result. In addition, the release would also result in a diversion of the Department's resources away from delivering Academies and into managing the effects of disclosure. Taken together, this would present a considerable delivery risk.

### **Section 36(2) (b) aspects**

25. The list represents a very early indication from officials of which schools were then under consideration as possible future Academy projects. The list changed on a daily basis. The list therefore represented the early thinking of officials, which would later form the basis of advice to Ministers, as to which schools should become Academies. If this information were released, DfES argues, it would suggest to officials that they were not free to give candid advice of this nature to Ministers in the future without the fear that it may later become disclosable, and it is at the early stages that officials particularly need to feel free to range as widely as possible. As a result, the quality of advice to Ministers would fall, resulting in potentially sub-optimal decisions being made about which schools should properly become Academies. This could lead to the limited resources of this education programme not being allocated to those schools and pupils most in need, which would be against the public interest.

## Risk of poor record keeping

26. The release of this early planning tool would also discourage officials from keeping full records of their thinking in the future, because of the fear of early disclosure of this information. Given the controversial nature of the eventual decisions on Academy projects, it is essential for reasons of accountability that good records are kept and this process would be inhibited by the release of this list, or of information of this type.

## The Commissioner's view

27. The Commissioner is in no doubt that the subject of educational standards and the potential to improve them is a matter of significant public interest about which the public has a right to be informed. He also acknowledges that this is an area where public debate and engagement is of paramount importance but recognizes also that this must be carried out at the appropriate stage in the proceedings. He has noted that DfES has given consideration to the public interest arguments in favour of disclosing the information sought as well as advancing arguments as to why the information should be withheld. However, if the information is to be withheld, the public interest in maintaining the exemption must outweigh the public interest in disclosure.
28. There is an argument for saying that it would be easy to identify failing schools from Ofsted reports that are already in the public domain. It could also be argued that the possibility of such schools being revamped, and invested in could be seen as positive news. However, the Commissioner has considered the information in question and is of the opinion that to have released it at the time that it was requested would have been to release, in effect, what was no more than a snapshot on a particular day of highly sensitive "work in progress". Taking into account all of the arguments put forward by DfES he considers that to have released the list would have been irresponsible and that it would have caused the school, pupils, teachers, and parents undue alarm at a time when the list was purely an embryonic planning document, the contents of which altered on a daily basis.
29. The Commissioner finds the arguments in favour of withholding the information all the more convincing when considering the cost to the public purse of such projects. It is not in the public interest to release, prematurely, information that might jeopardize potential projects and waste public funds. Public authorities need time, space and privacy to explore and consider all options available when deciding how best to proceed with highly sensitive projects. They also need to have the comfort of being able to negotiate with the sponsors and backers of these potential projects without fear of premature release of the details. To release the information at such an early stage in the planning process would have caused unnecessary and uninvited feedback and would have diverted attention and resources.
30. The Commissioner is less convinced by the arguments put forward by DfES on one point. He has considered the effect disclosure of the information sought might have on record keeping. He has previously commented on the same issue

(DN FS50074589) and the point raised there equally applies in this case, namely that, although openness might have some effect on the way records are kept, ensuring accurate records are kept to meet the public authority's business needs is primarily a management issue. In the same way (see paragraph 25) he finds it hard to believe that officials would not continue to give honest and accurate opinions of the kind required when compiling lists of this nature.

31. While not inclined to attach weight to the strength of the arguments on this last point, the Commissioner believes that the points set out by DfES in paragraphs 20-25 cumulatively argue against disclosure in this instance. Taking all the circumstances into account – especially the characterisation of the list as an "embryonic planning document" at the time of the request - he concludes that the public interest in maintaining the exemption outweighs the public interest in disclosure of the information.

## **The Decision**

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32. The Commissioner's decision is that the public authority dealt with the request for information in accordance with the Act.

## **Steps Required**

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33. The Commissioner requires no steps to be taken.

## Right of Appeal

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34. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal  
Arnhem House Support Centre  
PO Box 6987  
Leicester  
LE1 6ZX

Tel: 0845 600 0877  
Fax: 0116 249 4253  
Email: [informationtribunal@dca.gsi.gov.uk](mailto:informationtribunal@dca.gsi.gov.uk)

Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

**Dated the 17<sup>th</sup> day of September 2007**

**Signed .....**

**Richard Thomas  
Information Commissioner**

**Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**



## Legal Annex

**Section 36(2)** provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) -
- (b) would, or would be likely to, inhibit-
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation,
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.