

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 19 December 2019

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

#### **Decision (including any steps ordered)**

---

1. The complainant requested information from the Department for Education ("the DfE") relating to a specific academy trust being identified as a suitable sponsor for the Barclay School, Stevenage ("the Barclay School"), which is now known as Barclay Academy. The DfE provided some information to the complainant, but also withheld some information under section 36(2) – prejudicial to the effective conduct of public affairs – and section 40(2) – third party personal data. It also withheld some information as falling outside the scope of the request.
2. The Commissioner's decision is that the DfE correctly withheld some of the information in accordance with the relevant provisions of the FOIA. However, the Commissioner has determined that:
  - The DfE incorrectly identified some information as falling outside the scope of the request;
  - Some of the information withheld under section 40(2) is not exempt; and
  - The balance of the public interest favours the disclosure of some of the information withheld under section 36(2)(b)(i).
3. The Commissioner requires the DfE to take the following steps to ensure compliance with the legislation.

- In relation to the information referred to in paragraph 21 and identified to the DfE in a covering letter, issue an appropriate fresh response that complies with the FOIA;
  - disclose the name of the individual she has identified in paragraphs 54 – 68, where it appears throughout the information; and
  - disclose the relevant portions of the letter identified in paragraph 86.
4. The DfE must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

### **Background to the request**

---

5. This request was about the identification of an academy sponsor for the Barclay School, Stevenage, following an unfavourable Ofsted report. The school initially worked with a local authority multi-academy trust, Herts for Learning ("HfL"); however, on the direction of the Regional Schools Commissioner ("RSC"), a different sponsor was subsequently identified for the school: Future Academy Trust ("FA Trust").

### **Request and response**

---

6. On 30 October 2018, the complainant's solicitor wrote on her behalf to the DfE to request information of the following description

*"we confirm the School is seeking:*

*All evidence and information provided to the DFE and RSC from FA Trust which led to the decision that it would be a suitable sponsor academy;*

*Any further evidence and information after the decision was made;*

*Clarification of what due diligence requests were made to the FA Trust and copies of all responses received.*

*All correspondence and emails between the DFE, RSC and FA Trust and notes of all meetings with their relevant dates.*

*All correspondence from the DfE, RSC and FA Trust and any other party which led to the decision to stop the conversion with HFLMAT with relevant dates."*

7. On 28 November 2018, the DfE responded. It provided some information. Other information was redacted under section 40(2) of the FOIA – personal information.
8. On 10 December 2018 the complainant's solicitor wrote on her behalf to the DfE requesting an internal review, as follows:

*"From reviewing the disclosure provided... it appears limited, as there are a key number of documents missing. These include, but are not limited to, documents emanating from the following discussions:*

*Notes from meetings/correspondence held with/between DfE officials in the Regional Schools Commissioner's office as well as the Regional Schools Commissioner, Martin Post, and Hertfordshire County Officials (the Director of Children's services, Jenny Coles and the Operations Director of Education, Simon Newland) about The Barclay School in relation to Sponsor Options and the nature of school improvement support offered to the school before academy status would be implemented;*

*Notes from meetings/correspondence which were held with/between the MP for Stevenage, Mr Stephen McPartland, the Minister of State for Schools, Nick Gibb MP, the Regional Schools Commissioner, Martin Post, and DfE officials about sponsor options for The Barclay School;*

*Notes from meetings/correspondence which were held with/between the Secretary of State for Education, the Rt Hon Damian Hinds MP; the Minister of State for Schools, Nick Gibb MP and the Parliamentary Under-Secretary of State for Education, Lord Agnew and his predecessor in post, Lord Nash, about sponsorship options for the school; and*

*Notes from meetings/correspondence which were held with/between the multi-academy trust first identified to sponsor the school (Herts for Learning multi-academy trust) about the proposed timescale to conversion, progress towards achieving the intended conversion date and challenges; the support to be offered to the school, and the decision of the RSC to identify an alternative sponsor to Herts for Learning multi-academy trust. These discussions were with the Chair of the Trust, Jan Paine and the interim chief executive, Pat McAteer.*

*We know such documents are in existence, as we have been made aware of the results of a separate freedom of information request made by a local Councillor who requested confirmation of meetings and*

*disclosure of any correspondence from the DfE on any topic relating to the Barclay School, and whose response from the DfE details these meetings.*

*It is very concerning that our client has not received the same confirmation, as this suggests the Department has failed to provide to our client full disclosure of all relevant documents. Such documents are key to our client's case, and whilst we would require at the very least documents and notes from these meetings, with this letter we repeat our client's request for full disclosure of all relevant documents."*

9. The DfE responded on 19 December 2018, stating that this appeared to be a new request, and as such, should be submitted to it through its online portal.
10. On 20 December 2018 the solicitor wrote to the DfE. She considered that her client had not made a new request, but rather had asked for an internal review. On 21 December the DfE stated that a response would be provided by 21 January 2019.
11. On 21 January 2019, the DfE provided a response in which it continued to treat the correspondence of 10 December 2018 as a new request. It stated that it held relevant information but believed it to be exempt under section 36(2) of the FOIA – prejudicial to the effective conduct of public affairs. However, it stated that it required a further 20 working days to consider the balance of the public interest in the disclosure of the information.
12. On 18 February 2019, the DfE issued a further response. It provided some information to the complainant but withheld other information under section 36(2) of the FOIA: specifically, under section 36(2)(b)(i) – disclosure would, or would be likely to inhibit the free and frank provision of advice – and/or section 36(2)(c) – disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs. Other parts of the information were withheld under section 40(2) of the FOIA.

## **Scope of the case**

---

13. The complainant contacted the Commissioner on 13 January 2019 to complain about the way her request for information had been handled. At that stage, she was awaiting the outcome of the DfE's internal review. Following the DfE's response of 21 January 2019, the Commissioner accepted the case for investigation.

14. During the course of the investigation, the complainant explained that while she was no longer a governor at the Barclay School, as she had been at the date of the request, she wished to pursue her complaint in any event.
15. Also during the course of the investigation, the DfE clarified that it had redacted some of the information it had provided on 28 November 2018 and 18 February 2019 respectively because it considered that it related to other schools and therefore fell outside the scope of the request.
16. The following analysis covers whether some information was correctly withheld as being outside the scope of the request. It also covers whether other information was correctly withheld under section 40(2), or sections 36(2)(b)(i) and/or 36(2)(c) of the FOIA.

## Reasons for decision

---

### Section 1 - information of the description specified in the request

17. Section 1(1) of the FOIA provides that any person making a request for information to a public authority is entitled (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and (b) if that is the case, to have that information communicated to him.
18. In order to consider a request for information, a public authority is required to carry out an objective reading of the request in order to be able to identify the "*information of the description specified in the request*".
19. In this case, the DfE redacted some of the content of the materials that were disclosed on 28 November 2018 and on 18 February 2019, since it considered that it fell outside the scope of the request.
20. It explained to the Commissioner: "*we consider that the relevant sections of the information have been redacted as being out of the scope of the request... because they relate to other schools, and not to the Barclay School*".
21. The Commissioner agrees with the DfE that the request was for information which pertained to the Barclay School. However, having reviewed the information redacted by the DfE as being out of scope, she considers that certain parts relate to the Barclay School, and therefore fall within the scope of the request.

22. The Commissioner has determined that this information should be considered for disclosure. She has identified the information in question, in a covering letter to the DfE.
23. The Commissioner orders the DfE to consider the information in the covering letter for disclosure to the complainant and to issue a response in respect of that information, which complies with the requirements of section 1(1) of the FOIA.
24. In the event that the DfE wishes to withhold any of that information, it should issue a refusal notice which complies with section 17(1) of the FOIA.

### **Section 40(2) – third party personal data**

25. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
26. In this case, the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data (“the DP principles”), as set out in Article 5 of the General Data Protection Regulation (“GDPR”).
27. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (“DPA”). If it is not personal data then section 40 of the FOIA cannot apply.
28. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### **Is the information personal data?**

29. Section 3(2) of the DPA defines personal data as:

*“any information relating to an identified or identifiable living individual”.*

30. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

---

<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

31. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
32. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
33. In this case, most of the information withheld under this exemption comprises individuals' names and/or contact details. The individuals appear as authors, reviewers or approvers of specific documents, attendees at a meeting, and/or in the context of correspondence to which they were parties.
34. In addition, the DfE redacted two brief opinions of individuals connected to the Barclay School, as it considered that these were their personal data.
35. Having considered the withheld information, the Commissioner is satisfied that the information both relates to and identifies the relevant individuals. The information therefore falls within the definition of personal data in section 3(2) of the DPA.
36. The fact that information constitutes the personal data of identifiable living individuals does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
37. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

38. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

39. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

### ***Lawful processing***

40. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the article



applies. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f), which states:

*"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"<sup>2</sup>.*

41. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- (i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
  - (ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
  - (iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
42. The Commissioner considers that the test of "necessity" under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

43. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

---

<sup>2</sup> Article 6(1) goes on to state that:- *"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks"*.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted"*.



44. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
45. In this case, the complainant is seeking transparency around the reason for the decision of the RSC that the Barclay School should be sponsored by FA Trust, when it was already working closely with HfL. As previously set out, as chair of governors, she considered that the Barclay School had established a successful relationship with HfL, and was improving. She considers that the DfE should be transparent about the decisions that were taken which affected the school, and has also commented that she considers it should be transparent regarding decisions that may be being taken in relation to other schools.
46. Since this case concerns information which is held by the DfE, there is also a general legitimate interest in transparency in government.
47. The Commissioner is satisfied that there are legitimate interests in the disclosure of the information withheld under section 40(2).

*Is disclosure necessary?*

48. "Necessary" means more than desirable but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
49. In this case, therefore, the Commissioner has considered whether it is necessary to disclose the information to the world at large in order to achieve transparency around the RSC's decisions regarding the school.
50. In all cases except one, the Commissioner notes that the redacted names are those of staff (at the DfE and at the school) who would not have played a part in the decisions being taken. The Commissioner does not consider that disclosure of these individuals' names and/or opinions is necessary to achieve transparency regarding the relevant organisations' contributions to the decision-making process. The responsibility for decision-making lay with more senior officials and with the RSC himself.
51. Nor does the Commissioner consider that it is necessary for any of the redacted contact details to be disclosed in order to achieve the legitimate interests in disclosure.

52. As the Commissioner has decided in this case that disclosure of most individuals' names and/or opinions, and all of the redacted contact details, is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test for this information, since there would be no lawful basis for this processing and it would be unlawful. It therefore does not meet the requirements of principle (a).
53. The Commissioner has therefore decided that the DfE was entitled to withhold this information under section 40(2), by way of section 40(3A)(a).
54. However, from reviewing the information, the Commissioner notes that the "Academy Converters Lead for the East of England region" played a key role. She therefore considers that disclosure of his name would be necessary to achieve the legitimate interests that exist in disclosure, and will consider the balancing test for this individual, below.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

55. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
56. In considering this balancing test, the Commissioner has taken into account the following factors:
  - the potential harm or distress that disclosure may cause;
  - whether the information is already in the public domain;
  - whether the information is already known to some individuals;
  - whether the individual expressed concern about disclosure; and
  - the reasonable expectations of the individual.
57. In the Commissioner's view, a key issue is whether the individual concerned has a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

58. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
59. In this case, as previously stated, the individual holds the post of "Academy Converters Lead for the East of England region" and as such, his name is in the public domain. The Commissioner notes that the individual has been party to much correspondence concerning the governance of the Barclay School and attended meetings with the complainant and other senior individuals concerned with the process.
60. The information from which this individual's name has been redacted clearly pertains to him in his professional role.
61. The Commissioner also considers that the individual would have some expectation that his name would be in the public domain in relation to decisions that were taken about the Barclay School, owing to the post that he holds and the role that he played in attending meetings and corresponding with the Barclay School.
62. While she is not aware whether he has expressed any specific concern, she does not consider that significant damage or distress would be caused to this individual from the disclosure of his name in connection to the exercise of his normal role, and the DfE has not provided any specific arguments in relation to this.
63. The Commissioner has determined that there is sufficient legitimate interest to outweigh this data subject's fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of his name would be lawful.

### ***Fairness and transparency***

64. Even though it has been demonstrated that disclosure of this individual's name under the FOIA would be lawful, it is still necessary to show that disclosure would be fair and transparent under the principle (a).
65. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons. This is so in this case.
66. The requirement for transparency is met because as a public authority, the DfE is subject to the FOIA.
67. In this instance, the Commissioner has decided that the DfE has failed to demonstrate that the exemption at section 40(2) is engaged in relation to the name of the Academy Converters Lead for the East of England Region.

68. Her decision is that section 40(2) is not engaged and that this individual's name should be disclosed.

**Section 36(2) – prejudicial to the effective conduct of public affairs**

69. The information withheld under this exemption is chiefly correspondence: the parties to the correspondence include DfE officials including the RSC, the Under Secretary of State for Schools, an MP, and senior staff at HfL. There are briefing notes for proposed meetings between certain of these parties.
70. Section 36(2) of the FOIA states that information is exempt from disclosure under the FOIA if, in the reasonable opinion of a "qualified person", disclosure of the information:
- (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, or
  - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
71. In order to engage section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person ("QP") as to whether inhibition or prejudice relevant to the subsection cited would be at least likely to occur as a result of disclosure of the information in question.
72. The DfE confirmed that the QP for the purposes of considering the request was Schools Minister Nick Gibb. When responding to the complainant in January 2019, the DfE sought Mr Gibb's opinion as to the application of the exemption.
73. The DfE explained that the QP considered the withheld information in January 2019. The information was provided to him for consideration together with an explanation as to the background of the case. In the QP's opinion, the exemptions at section 36(2)(b)(i) and section 36(2)(c) were engaged with regard to the information.
74. The DfE provided to the Commissioner a declaration signed by the QP indicating that, in his opinion, the two limbs of the exemption were engaged with regard to the withheld information. He considered that it was likely that there would be inhibition to the free and frank provision of advice, and prejudice to the effective conduct of public affairs, if the information were disclosed.

75. With regard to section 36(2)(b)(i), the QP indicated that he considered the advice contained in the information is wide-ranging, and was written on the understanding that it would have a closed ministerial audience, facilitating ministers continuing discussions freely.
76. Regarding whether disclosure would otherwise prejudice the effective conduct of public affairs (section 36(2)(c)), the approach of the Commissioner to this subsection is that it should only be cited in relation to a prejudice that would not be relevant to any of the other exemptions in Part II of the FOIA.
77. As reasoning for citing section 36(2)(c), the QP considered that some of the information reflects the need for departmental officials to have "*a safe space in which to work and to propose effective solutions to issues and concerns and to propose preferred policy or delivery outcomes for ministerial meetings, to ensure that full and frank discussions, investigations and deliberations can take place to achieve the best outcome for key departmental priorities*".
78. The Commissioner's view is that it is not the case that this reasoning could not have been covered by any of the other Part II exemptions. She believes that section 36(2)(b)(ii) could have been cited in relation to this reasoning, and also that this explanation scarcely differs from that given for the QP's opinion on section 36(2)(b)(i). The Commissioner does not, therefore, accept that the QP's opinion was reasonable in relation to section 36(2)(c). The remainder of this analysis concerns only section 36(2)(b)(i).
79. In order to make a finding as to whether any of the subsections of section 36(2) are engaged, the Commissioner must consider whether the QP's opinion was a "reasonable" opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the QP in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. The Commissioner only needs to satisfy herself that the opinion was reasonable; in other words, that it was an opinion that a reasonable person could hold.
80. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:
  - Whether the inhibition envisaged by the QP relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.

- The nature of the information and the timing of the request, for example, whether the request concerns an important ongoing issue requiring the free and frank provision of advice.
  - The QP's knowledge of or involvement in the issue.
81. Regarding the nature of the information and the timing of the request, having reviewed the withheld information, the Commissioner is satisfied that it relates to a process that was ongoing at the date of the request: the academisation of the Barclay School. It also relates to wider policy issues around academisation. She accepts that these were significant matters, about which the DfE required advice and a safe space in which to deliberate.
82. The Commissioner is also satisfied that the QP has had knowledge of and involvement in the issues.
83. The Commissioner notes that the QP is relying on the view that disclosure of the information "would be likely" to inhibit and prejudice the relevant matters. This is a lower level of probability than "would", but one which is still significant. The Information Tribunal in *John Connor Press Associates v Information Commissioner* (EA/2005/0005, 25 January 2006), stated:
- "We interpret the expression 'likely to prejudice' as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk."*
84. With this view in mind, the Commissioner has considered the opinion of the QP.
85. Regarding the majority of the withheld information, she is satisfied that it was reasonable for him to hold the opinion that inhibition would be likely to occur to the free and frank provision of advice if the information were disclosed.
86. However, the Commissioner notes that one item of the withheld information comprises a letter from the then Chair of HfL to the RSC dated 19 September 2017. In her view, the disclosure of the redacted portions of this letter would have a minimal, if any, impact on the free and frank provision of advice. While the letter demonstrates that HfL was willing to express strong views to the RSC, the Commissioner is not persuaded that disclosing the redacted portions in response to the request would prevent an organisation from being equally forthright in future.
87. The Commissioner therefore considers that the it was not reasonable for the QP to hold the opinion that some of the contents of this letter should



be withheld under section 36(2)(b)(i). The exemption is therefore not engaged in respect of this letter.

88. She orders this letter to be disclosed in full to the complainant (save for the Chair's contact details, which were redacted correctly under section 40(2) of the FOIA).
89. With regard to the remainder of the information withheld under section 36(2)(b)(i), since she accepts that the opinion of the QP was reasonable, the Commissioner has determined that the exemption at section 36(2)(b)(i) is engaged. Since this is a qualified exemption, the Commissioner has considered the balance of the public interest in this case.

### **The balance of the public interest**

90. Having accepted that the opinion of the QP that inhibition to the free and frank provision of advice would be likely to result was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP.
91. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the DfE to carry out its work. As to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the inhibition and prejudice identified by the QP.

### *The complainant's view*

92. The complainant has argued that the balance of the public interest lies in the disclosure of the information. From her former association with the Barclay School, in her opinion the DfE had "*refused to engage with the Governing Board and provide evidence to show how the decisions regarding Barclay School were made and the process that was followed*".
93. This led to a wider concern, which the complainant expressed to the DfE, that the "*lack of transparency*" in this case was "*clearly a cause for concern to anyone who is worried about how ministers make decisions about choice of academy sponsors*".
94. The complainant interpreted the DfE's responses to her request as an indication that its view was that discussions regarding the choice of academy sponsor "*should all take place behind closed doors*".



95. She felt that the public was entitled to a demonstration from the DfE that it had *"considered all options, completed their own due diligence, and that the decision to change academy trust at the last minute was not politically motivated"*.

*The DfE's view*

96. The DfE stated that it recognised that there is a *"responsibility to be open and transparent"* and that *"disclosing the information would demonstrate to the public that we have been thorough and fair when making our assessment"*.
97. However, in the DfE's view, *"disclosing information about discussions or advice given to officials or Ministers would undermine the ability of all parties to fully explore and debate issues on the potential for schools to become sponsored Academies and the different solutions available to secure sustainable outcomes"*.
98. In relation to section 36(2)(b)(i), the DfE argued that:  
*"It is essential that departmental officials, ministers, MPs and other stakeholders such as members of multi-academy trusts, can discuss concerns and provide advice on a range of issues, without worrying about the public presentation of these discussions... good government depends on good decision-making... based on the best advice available and a full consideration of the options."*
99. It argued: *"it is clear from the information withheld, that officials and our key stakeholders feel able to provide free and frank professional views and advice, due to the fact these exchanges were not intended to go into the public domain. However, should we make such information public the likely result is that future advice given by officials and stakeholders, as well as any issues and concerns raised, would be less candid"*.
100. The DfE therefore considered that inhibition would be likely to occur in relation to the provision of advice, which would be contrary to the public interest since it would have a negative impact on decision-making and on government in general.
101. It also considered that disclosure of the information in this case could have led to a delay in *"handling significant delivery and business issues"* such as those matters relevant to this case.
102. In summary, the DfE argued that the removal of the 'safe space' in which to brief ministers and senior officials in an *"impartial and focused way"* would *"make it more difficult for the department to work collaboratively and cohesively when developing and delivering its core*

*business*” and would be likely, therefore, to prejudice the effective conduct of public affairs in the future. This, in its view, is contrary to the public interest.

103. The DfE, therefore, concluded that the balance of the public interest lay in maintaining the exemption at section 36(2)(b)(i).

*The balance of the public interest: the Commissioner's view*

104. It is the Commissioner's well-established approach, in line with the spirit of the FOIA, that there is always a public interest in how a public authority conducts its business and reaches decisions that have an impact on the public.

105. The Commissioner has also considered the specific circumstances of this case. She considers that school performance, in general, is a matter of wide public interest, and that within this, the DfE's approach to the academisation of schools that have received unfavourable Ofsted reports, and the identification of sponsors, is also a matter of public interest. While the requested information in this case relates to a particular school, it concerns these wider issues. This lends weight to the public interest favouring disclosure.

106. As explained previously, in cases where any or all of the exemptions at section 36(2) have been cited, it is for the Commissioner to consider the severity, extent and frequency of the inhibition and prejudice that the QP has identified as being likely to occur.

107. In this case, she has taken into account the fact that the conversion of the Barclay School into an academy was still a 'live' issue at the date of the request. It is evident from the request itself (and is, indeed, a matter of public record) that the potential change of sponsor from HfL to FA Trust was a matter of concern to the school community. The Commissioner therefore acknowledges that publication of the information would have been likely to attract attention.

108. The Commissioner is satisfied that the level of inhibition that the QP considered would be likely to occur, would be sufficiently severe as to persuade her that the balance of the public interest favours withholding the information. She also considers that, since the DfE is required to consider issues of school performance and the academisation process regularly, that the inhibition and prejudice would occur frequently and be of significant extent.

109. In view of the severity and frequency of the inhibition and prejudice, the Commissioner is satisfied that the balance of the public interest (albeit fairly narrowly) favours maintaining the exemption with regard to the

remainder of the information withheld under section 36(2)(b)(i) and section 36(2)(c).

110. She therefore does not require the DfE to take any steps in respect of this.

### **Other matters**

---

111. In this case, the complainant expressed her concerns to the Commissioner that the reason for the DfE considering her request for an internal review as a new request, and subsequently taking extra time to consider the public interest and then withholding some information, was a deliberate delaying tactic while the academisation process was still ongoing.

112. The Commissioner would comment that, in her view, the complainant's communication of 10 December 2018 was clearly a request for an internal review, since the examples of information which were cited by the complainant as "missing" from the DfE's initial response, clearly fell within the scope of the initial request and should have been considered for disclosure at that point. The Commissioner would remind the DfE to consider the scope of any request for information in full before issuing a response.

113. She would also remind the DfE that a request for information made to any accurate DfE address is valid. Whilst the DfE may state a preference for information requests to be made through a specific portal, it cannot insist on this.

## Right of appeal

---

114. 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: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

115. 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.

116. 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 .....**

**Ben Tomes  
Team Manager  
Information Commissioner's Office  
Wycliffe House  
Water Lane  
Wilmslow  
Cheshire  
SK9 5AF**