

BHA BRIEFING: Timeline of the BHA's FOI requests for names of Free School applicants

13 February 2015



Briefing from the British Humanist Association (BHA)

For the past three years, we have submitted FOI requests for the names, locations, and religions (if any) of proposals to establish Free Schools as part of each 'wave' of applications, roughly around when the window for submitting an application has closed. Until this month, the Department for Education has repeatedly rejected these requests, often recycling different grounds for doing so.

What follows is a timeline of these cases. Each wave is highlighted in a different colour, with waves one and two in yellow, three in green, four in red, five in pink, six in light grey, seven in brown, eight in dark brown and enforcement notice in blue.

2011

1 June: Application window for second wave (i.e. opening from September 2012) of Free Schools closes.

21 June: We submit an FOI request asking for the details with respect to the first two waves.

30 August: The Department for Education (DfE) [announces](#) the last of the Free Schools that have been 'pre-approved' to open as part of the first wave (i.e. from September 2011).

8 September: The DfE rejects our FOI request and request for internal review with respect to waves 1 and 2. The DfE initially relied on section 36(2) ([prejudice to effective conduct of public affairs](#)) of the Freedom of Information Act, but after internal review, instead relied on section 21 of the FOI Act ([information accessible by other means](#) – for the details of those already pre-approved to open), section 22 ([information intended for future publication](#) – for those that will be pre-approved), and section 35(1) ([formulation of Government policy](#)) – with section 36 acting as an alternative to section 35. In addition, with respect to the public interest test attached to sections 22, 35 and 36, the DfE said that the balance of public interest lay against disclosure.

19 September: We complain about the waves one and two decision to the Information Commissioner's Office (ICO).

11 October: The DfE [announces](#) all the Free Schools that have been pre-approved to open as part of the second wave.

2012

24 February: Application window for third wave of Free Schools (i.e. opening from September 2013) [closes](#).

4 July: The ICO [concludes that](#) sections 21 and 22 were not engaged at the date of the request, and that while section 35 is engaged, the public interest lies in favour of disclosure – and therefore determines that the information we requested should be released.

6 July: We submit an FOI request asking for the details with respect to the third wave.

14 July: The DfE [announces](#) all the Free Schools that have been pre-approved to open as part of the third wave.

8 August: The DfE appeals the ICO's decision to the Information Tribunal. The BHA is subsequently added as a second respondent to the case.

7 September: The DfE rejects our FOI request and request for internal review with respect to wave three, relying on section 35 and arguing that the public interest lay against disclosure.

28 September: We complain about the wave three decision to the ICO.

5 December: The paper hearing in the Tribunal case takes place.

2013

4 January: Application window for fourth wave of Free Schools (i.e. opening from September 2014) closes.

7 January: We submit an FOI request asking for the details with respect to the fourth wave.

15 January: The Tribunal [decides](#) it agrees with the Commissioner's decision, except that it also agrees with the BHA's submission that section 35 is not engaged at all (and hence the DfE has to fall back to section 36). It orders the DfE to release the relevant information. The Tribunal is extremely scathing of the DfE's attempted use of bad evidence in the case:

'The quality of the survey evidence upon which the Department (blessed as it is with a wealth of expertise in surveys and other statistical matters) has chosen to rely is poor... The bias in design and description of the questionnaire fatally undermines any reliance that can be placed upon it. The Tribunal is satisfied that the analysis of the questionnaire carried out by the British Humanist Association fairly and appropriately demonstrates the fundamental flaws. The Tribunal was surprised that a Department of State should have chosen to rely on a survey which even on its face was of doubtful reliability but which on further analysis is deeply suspect.'

19 February: The Government [releases](#) the names, locations and religions of Free School proposals with respect to the first three waves (except for the fact that it doesn't know the religions with respect to first wave proposals). We agree with the ICO for the wave three case (which is still pending a decision) to be withdrawn. Michael Gove and Information Commissioner Christopher Graham [exchange](#) hostile public letters with respect to the decision, with Gove reiterating the unsuccessful arguments his Department relied upon.

4 March: The DfE [rejects](#) our FOI request with respect to wave four, relying on section 36 and arguing that the public interest lay against disclosure. It did this on the basis that our request came thirteen days closer to the end of the application window than our wave two request, and this therefore meant the public interest against disclosure is stronger than in the case the Tribunal

considered. We ask for an internal review and a second BHA member of staff submits a fresh request.

19 April: The DfE rejects our request for internal review with respect to wave four and by now also rejects the second staff members' initial FOI request. It continues to rely on section 36 in the first case, but relies on section 22 in the second case.

22 April: We [complain](#) about the wave four decisions to the ICO. We argue that it is important that the details are known at a formative stage, before any Free School applicants have been pre-approved, and that the Tribunal case set a precedent in this regard (indeed this point was the subject of some lengthy discussion with respect to wave two).

22 May: The DfE [announces](#) all the Free Schools that have been pre-approved to open as part of the fourth wave.

1 July: The DfE [releases](#) the names, locations and religions of Free School proposals with respect to the fourth wave. We ask the ICO to continue with our complaint, not wanting the DfE to continue to attempt to rely on exemptions.

14 August: The DfE withdraws its claims for exemption under sections 22 and 36, leaving the ICO to [issue](#) two near-identical decisions concluding that the DfE was in breach of [section 10\(1\) of the Act](#) (in not complying with our request within 20 working days) with respect to wave four. The concern now becomes that with each wave, the DfE will use exemptions in the FOI Act to refuse disclosure until after pre-approval.

13 September: Application window for fifth wave of Free Schools (i.e. from September 2015) closes.

18 September: We submit an FOI request asking for the details with respect to the fifth wave.

21 November: The DfE rejects our FOI request and request for internal review with respect to wave five, relying on section 22 and arguing that the public interest lay against disclosure.

1 December: We complain about the wave five decision to the ICO.

2014

10 January: Application window for sixth wave of Free Schools (also opening from September 2015) closes.

23 January: The DfE [announces](#) all the Free Schools that have been pre-approved to open as part of the fifth wave.

27 January: After being told by ICO officials that there is no way to get a permanent decision, we [conclude that](#) there is no way to force the DfE to release the information prior to pre-approval – the DfE can just obfuscate every year.

28 January: The Campaign for Freedom of Information contacts us and tells us that the ICO got it wrong – in fact it can issue a permanent decision, known as an 'enforcement notice', which is binding on all future behaviour. However, the ICO does not like to use these powers, [having only ever](#) done so twice previously and not since 2010. Nonetheless, we ask the ICO to issue an enforcement notice in this case.

17 February: The DfE [releases](#) the names, locations and religions of Free School proposals with respect to the fifth wave. We again ask the ICO to continue with our complaint.

24 February: The ICO agrees to consider issuing an enforcement notice, starting with arranging to meet the DfE after the then ongoing Information Tribunal cases relating to [Steiner Free Schools](#) and [Free School application forms/decision letters](#) are resolved.

26 March: We submit an FOI request asking for the details with respect to the sixth wave.

9 May: Application window for seventh wave of Free Schools (also opening from September 2015) closes.

12 May: We submit an FOI request asking for the details with respect to the seventh wave.

23 May: The ICO [concludes](#) that section 22 is not engaged and so concludes that the DfE was wrong in refusing to release the information with respect to wave five.

18 June: The DfE rejects our FOI request and request for internal review with respect to wave six, relying on section 22 and arguing that the public interest lay against disclosure. In doing so it uses identical words to those it used in rejecting our wave five request, in spite of the fact that the ICO has by now decided that the section 22 exemption is not valid for wave five. We complain about the wave six decision to the ICO.

19 June: The DfE [announces](#) all the Free Schools that have been pre-approved to open as part of the sixth wave.

25 June: The Steiner Free School case [concludes](#).

27 June: The DfE [releases](#) the names, locations and religions of Free School proposals with respect to the sixth wave. We again ask the ICO to continue with our complaint.

2 July: The Free School application forms/decision letters case [concludes at the Information Tribunal](#), clearing the way for the ICO to schedule a meeting with the DfE about the possibility of an enforcement notice.

11 August: The DfE rejects our FOI request and request for internal review with respect to wave seven, initially relying on section 22 and arguing that the public interest lay against disclosure, but after internal review, instead relying on section 36 and public interest arguments. Again, in doing so the DfE used identical wording to previous rejections.

13 August: We complain about the wave seven decision to the ICO.

12 September: Later than planned, the ICO schedules a meeting with the DfE for October to discuss enforcement issues.

16 September: The DfE [releases](#) the names, locations and religions of Free School proposals with respect to the seventh wave – in spite of not yet having pre-approved any applicants.

19 September: The DfE contacts us, confirming that 'The Department has not yet announced successful applications from wave seven. This is the first time that the list of applications has been

published before such an announcement. In doing so, we have considered your concerns and that of the Information Commissioner.'

23 September: We agree with the ICO to withdraw our sixth and seventh wave complaints, given the fresh approach being taken by the DfE to the wave seven complaint.

24 September: DfE tells us, 'We have now published a list of the applications received in every free school wave. It is our intention that this will continue in future. In wave 7, for the first time we published the information before making an announcement about which applications were successful. We will review the impact timing and implications of this going forward. We have not decided on the precise timing for release of any lists of applications from wave 8 and beyond. The department is unable to speculate on how it would respond to a potential Freedom of Information request. Any future request would be considered on a case by case basis.'

October: ICO and DfE meet regarding enforcement notice and other Free School FOI-related issues.

10 October: Application window for eighth wave of Free Schools (opening from September 2016) closes.

14 October: We submit an FOI request asking for the details with respect to the eighth wave.

2015

30 January: Having rejected our FOI request with respect to wave eight, relying on section 22 and arguing that the public interest lay against disclosure, after a delayed internal review the DfE instead [decides](#) to provide the information to us. However, in so doing, the DfE says 'I would like to reiterate that this list is only being supplied to you. The list will be published on the [GOV.UK](#) website at a later date once the wave 8 free school interview rounds have finished.'

About the BHA

The British Humanist Association (BHA) is the national charity working on behalf of non-religious people who seek to live ethical and fulfilling lives on the basis of reason and humanity. It is the largest organisation in the UK campaigning for an end to religious privilege and to discrimination based on religion or belief, and for a secular state.

Our expertise lies in the 'religion or belief' equality strand, which includes non-religious beliefs such as Humanism, and how that strand relates to and intersects with other protected characteristics. We also work closely with others on wider equalities issues in a range of forums. The BHA is a member of the National Children's Bureau Sex Education Forum (SEF) and the Children's Rights Alliance for England.

For more details, information and evidence, contact the British Humanist Association:

Richy Thompson
Campaigns Officer (Faith Schools and Education)
020 7324 3072
richy@humanism.org.uk
www.humanism.org.uk