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The Information Commissioner's Office (ICO)

By email to casework@ico.org.uk

DfE refs: 2019-0039907 and CRM:0020004

**Concern about accessing or re-using information from a public body –
FOI request to the Department for Education for an updated list of schools that are
members of the Risk Protection Arrangement (RPA)**

Dear ICO,

I would like to report a concern about the Department for Education's handling of an access to information request. A copy of my email correspondence with DfE, including the internal review response, is enclosed in a separate PDF.

In mid-October I requested from DfE a list of the academies (or academy trusts) and free schools that are members of the Risk Protection Arrangement scheme. This request was made under the Freedom of Information Act and accompanied by a re-use request made under the Re-use of Public Sector Information Regulations.

The Risk Protection Arrangement (RPA) is a Government-backed scheme that provides an alternative to commercial insurance for academy schools and free schools in England. Information about the scheme, including the standard terms, is published on the GOV.UK website: <https://www.gov.uk/guidance/academies-risk-protection-arrangement-rpa>

I have received earlier versions of the RPA member list in response to requests to DfE on five previous occasions between 2015 and 2018. However DfE has refused my most recent request on the basis that the information is exempt from release under Section 43(2) of the FOI Act, which allows for the withholding of information considered to be commercially sensitive.

DfE's internal review response upheld the original decision not to disclose the information. It did not elaborate on the reasons behind that decision or comment on any of the counter-arguments in my internal review request.

I would be grateful if you would consider in particular the following points, which are essentially those that I made to DfE in my internal review request.

1. In its response DfE applied the Section 43(2) exemption on the basis that disclosure of the member list (a) would be likely to prejudice the commercial interests of the RPA members, and (b) would enable the applicant to gain a competitive advantage over competitors and potential new market entrants. I have taken those to be separate reasons, though I cannot see that (b) is relevant to the exemption.
2. DfE's response does not contain any rationale or explanation as to how disclosure of the requested information would be likely to prejudice the commercial interests of the RPA members. In my view some such rationale or explanation should have been communicated with the decision. If no such rationale or explanation exists then DfE cannot sustain the exemption on the basis of the interests of RPA members.
3. Similarly there is nothing in the response to indicate that DfE has carried out the "prejudice test" required when a public authority relies on Section 43(2) to withhold information.
4. The RPA is a scheme underwritten by Government. As such there is no other scheme with a high degree of similarity in the marketplace and no potential for such a scheme to emerge. The RPA pricing and membership rules are standard and openly published.

Eligible schools and trusts do have the alternative of negotiating the purchase of commercial insurance. However the public availability of information on whether an eligible school or trust is a RPA member cannot place that school or trust at any commercial disadvantage in those negotiations, because the RPA is available as a known option at a known price regardless of whether the school or trust is already an RPA member.

5. I drew DfE's attention to the ICO guidance on the application of Section 43(2), which states:

"When a public authority wants to withhold information on the basis that to disclose the information would or would be likely to prejudice the commercial interests of a third party, it must have evidence that this does in fact represent the concerns of that third party. It is not sufficient for the public authority to speculate on the prejudice which may be caused to the third party by the disclosure."

I asked DfE's reviewer to consider whether the department had evidence that RPA members share DfE's view that disclosure of the requested information would be likely to prejudice their commercial interests. That is not apparent from DfE's response to my request.

6. As you will be aware, the entities eligible for RPA membership are themselves public authorities and subject to the FOI Act. I asked DfE to consider how a school or trust that is eligible for RPA membership might respond to a request for information on whether it is a member of the scheme. From that perspective DfE is (or is not) simply a supplier that provides services to the school or trust under contract. Basic information about contracts and suppliers falls within one of the classes of information in the model publication scheme that the ICO has prepared and approved for use by public authorities. In other words there is a presumption that this type of information should be readily available to the public and that its disclosure is unlikely to be prejudicial to the authority's commercial interests.
7. The RPA membership rules and terms of contract, which are [published online](#), do not create any expectation that DfE will keep confidential the fact of membership.
8. My request was for an update to information that DfE has provided in response to equivalent or very similar requests made by me on five previous occasions between 2015 and 2018. DfE did not apply any exemptions when responding to those requests. As far as I am aware there has been no relevant change in either the law or the commercial context of RPA membership that requires DfE to apply the Section 43(2) exemption now when it has not done so in the past.
9. DfE's response stated that "the general public interest in releasing the information requested must be balanced against the public interest in protecting commercially sensitive information." I suggest this formulation is incorrect. There is no general public interest in protecting commercially sensitive information, only a public interest in protecting commercially sensitive information when the failure to do so would undermine some more specific value, such as competition or consumer confidence.
10. DfE's second stated basis for applying the Section 43(2) exemption, that disclosure of the information would "enable the applicant to gain a competitive advantage over competitors and potential new market entrants", is not relevant to the exemption.

Nothing in the FOI Act requires a public authority to withhold information that might provide an applicant with a competitive advantage in any market, except where the public authority can also demonstrate prejudice to the commercial interests of particular persons. Such a broad interpretation of the exemption would, if sustained in law, eliminate a wide swath of access to public information by businesses – contrary to the aims of the Act.

In any case the potential for competitive advantage is imaginary. As the FOI Act is "applicant-blind", any competitor would be able to submit the same request and receive the same information from DfE.

DfE also has the option of publishing itself any information disclosed in response to my request. Indeed, as earlier versions of the RPA member list have been disclosed in response to previous FOI requests there is an argument that DfE should already be publishing updated versions in order to comply with Section 19(2A)(a)(ii) of the FOI Act.

Thank you for your attention to these concerns. Please let me know if I can offer any clarification of my request or this complaint.

Yours faithfully,

Owen Boswarva