

From: ACCOUNT, Unmonitored <Unmonitored.ACCOUNT@education.gov.uk>

Date: Tue, 10 Dec 2019 at 08:13

Subject: 2019-0039907 FOI Independant Internal Review CRM:0020004

To: Owen Boswarva <owen.boswarva@gmail.com>

Dear Mr Boswarva

I refer to your request for an internal review which was received on 13/11/19. You requested "*an internal review of the Department for Education's response to my FOI and RoPSIR requests for an updated list of the RPA member schools. I have appended my email of 16 October 2019, and DfE's response as set out in your email*". Please refer to Annex 1 for the full details of the request you made.

The department has now completed its internal review process and has carried out a thorough review of the case, chaired by a senior official who was not involved with the original request. The department has decided to uphold the original decision not to disclose the information concerned for the same reasons set out in the letter of 12/11/19. We know that often the capability and expertise in schools to buy appropriate insurance is not always there or available leading to high excesses or inappropriate levels of cover.

Should you wish to discuss the matter further, Clive Sillince the operational head of the RPA team, will be happy to speak to you over the phone. Please email: clive.sillince@education.gov.uk, with your availability so that he can seek to arrange a suitably convenient time for you to discuss this matter.

If you are unhappy with this decision, you have the right to appeal directly to the Information Commissioner. The Information Commissioner can be contacted at:

The Case Reception Unit, Customer Service Team, Information Commissioner's Office, Wycliffe House, Water Lane, Wilmslow, Cheshire, SK9 5AF

Further information about the Information Commissioner's complaints procedure can be found on the Information Commissioner's Office website: <https://ico.org.uk/for-organisations/guide-to-freedom-of-information/complaints/>

Yours faithfully

██████████

Commercial Directorate, Operations Group

Annex 1

Dear ██████████,

Thank you for your email dated yesterday.

I would like to request an internal review of the Department for Education's response to my FOI and RoPSIR requests for an updated list of the RPA member schools. I have appended my email of 16 October 2019, and DfE's response as set out in your email.

DfE maintains that all of the information I have requested is exempt from disclosure in accordance with Section 43(2) of the FOI Act, which provides for information to be exempt from disclosure where disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person.

Please consider in particular the following arguments:

1. DfE has applied the exemption on the basis that disclosure of the information (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 assumed that those are separate points.

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 in the response. 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 the Section 43(2) exemption 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 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. ICO guidance on the application of Section 43(2) 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."

Please consider whether DfE has evidence that RPA members share DfE's view that disclosure of the requested information would be likely to prejudice their commercial interests. This is not apparent from DfE's response to my request.

6. RPA members are themselves subject to the FOI Act. It may help you 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. As I understand it the RPA membership rules and terms of contract do not create any expectation that DfE will keep confidential the fact of membership.

8. My information request is 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 FOI 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 states 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, if sustained in law, would 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 FOI 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 any information it discloses in response to my request. Indeed, I urge the Department to do so.

11. I note that DfE's response was sent from an unmonitored email account (Unmonitored.ACCOUNT@education.gov.uk) and did not contain any alternative contact details. Please consider as part of your review whether that practice is compliant with DfE's duty under Section 16 of the FOI Act to provide advice and assistance to applicants, and also confirm the Department's preferred email address for further correspondence related to my request.

Thank you for your attention to this internal review request.

In the event that the outcome of the internal review finds in my favour with respect to access to the information I have requested, please also provide a response to the re-use request in my original email.

Kind regards,

Owen Boswarva

From: Owen Boswarva <owen.boswarva@gmail.com>
Date: Wed, 13 Nov 2019 at 04:51
Subject: Re: 2019-0037126 CRM:0020001 FOI internal review request
To: <Academies.RPA@education.gsi.gov.uk>
Cc: <[REDACTED]@education.gov.uk>, ACCOUNT, Unmonitored
<Unmonitored.ACCOUNT@education.gov.uk>

Dear [REDACTED]

Thank you for your email. Please find attached a request for an internal review of DfE's response to my information request.

Kind regards,

Owen Boswarva

Contact details

e-mail: owen.boswarva@gmail.com

telephone: [REDACTED]

address: [REDACTED]

[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

telephone [REDACTED]
email owen.boswarva@gmail.com

13 November 2019

Risk Protection Arrangement for Academies Team
Department for Education

By email to: Academies.RPA@education.gsi.gov.uk
CC: [REDACTED]@education.gov.uk; Unmonitored.ACCOUNT@education.gov.uk

Your ref: 2019-0037126

Internal review request: FOI and RoPSIR requests for information about membership of DfE's risk protection arrangement (RPA) scheme

Dear [REDACTED],

Thank you for your email dated yesterday.

I would like to request an internal review of the Department for Education's response to my FOI and RoPSIR requests for an updated list of the RPA member schools. I have appended my email of 16 October 2019, and DfE's response as set out in your email.

DfE maintains that all of the information I have requested is exempt from disclosure in accordance with Section 43(2) of the FOI Act, which provides for information to be exempt from disclosure where disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person.

Please consider in particular the following arguments:

1. DfE has applied the exemption on the basis that disclosure of the information (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 assumed that those are separate points.
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 in

the response. 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 the Section 43(2) exemption 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 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.

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“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.”

Please consider whether DfE has evidence that RPA members share DfE’s view that disclosure of the requested information would be likely to prejudice their commercial interests. This is not apparent from DfE’s response to my request.

6. RPA members are themselves subject to the FOI Act. It may help you 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. As I understand it the RPA membership rules and terms of contract do not create any expectation that DfE will keep confidential the fact of membership.
8. My information request is 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 FOI 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.

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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, if sustained in law, would 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 FOI 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 any information it discloses in response to my request. Indeed, I urge the Department to do so.

11. I note that DfE's response was sent from an unmonitored email account (Unmonitored.ACCOUNT@education.gov.uk) and did not contain any alternative contact details. Please consider as part of your review whether that practice is compliant with DfE's duty under Section 16 of the FOI Act to provide advice and assistance to applicants, and also confirm the Department's preferred email address for further correspondence related to my request.

Thank you for your attention to this internal review request.

In the event that the outcome of the internal review finds in my favour with respect to access to the information I have requested, please also provide a response to the re-use request in my original email.

Kind regards,

Owen Boswarva

Appendix 1: Information request dated 16 October 2019

From: Owen Boswarva <owen.boswarva@gmail.com>

Date: Wed, 16 Oct 2019 at 09:45

Subject: FOI and RoPSIR requests: membership of risk protection arrangement (RPA) scheme

To: <Academies.RPA@education.gov.uk>

Good morning,

The Department for Education operates a risk protection arrangement (RPA) scheme for academy trusts:

<https://www.gov.uk/academies-risk-protection-arrangement-rpa>

This is a Freedom of Information request for some information about membership of the RPA scheme.

Please provide a list of the academies (or academy trusts) and free schools that are members of the RPA scheme, based on the most recent date for which that information is held. Please include at minimum the name of the school and a unique identifier such as the URN or DfE Number, and ideally also the name of the local education authority (LEA).

This request is for an update to information that EFA provided in response to my earlier requests in May 2015 (your ref 2015-0023814), December 2015 (your ref 2015-0054751), July 2016 (your ref 2016-0033773), March 2017 (your refs FOI: 2017-0004214 and CRM: 0049325), and July 2019 (your refs FOI: 2018-0034314 and CRM: 0988036).

In addition I would like to request, in accordance with regulation 6 of the Re-use of Public Sector Information Regulations 2015, permission to re-use the above information for the purpose of combining that information with data from existing open public datasets and making the outputs available to others in a re-usable electronic form under an open licence. I therefore request that DfE/EFA grants permission to re-use the information for this purpose under the terms of the Open Government Licence v3 (<http://www.nationalarchives.gov.uk/doc/open-government-licence/version/3/>). Given my intended use, any more restrictive licensing terms would be likely to "unnecessarily restrict" the way in which the information can be re-used, contrary to RoPSIR regulation 12.

Thank you for your attention to these information requests.

Kind regards,

Owen Boswarva

Contact details

e-mail: owen.boswarva@gmail.com

telephone: [REDACTED]

address: [REDACTED]

Appendix 2: Department for Education dated 12 November 2019

From: ACCOUNT, Unmonitored <Unmonitored.ACCOUNT@education.gov.uk>

Date: Tue, 12 Nov 2019 at 14:48

Subject: 2019-0037126 CRM:0020001

To: Owen Boswarva <owen.boswarva@gmail.com>

Dear Mr Boswarva

I refer to your request for information, which was received on 16 October 2019. You requested the following:

“Please provide a list of the academies (or academy trusts) and free schools that are members of the RPA scheme, based on the most recent date for which that information is held. Please include at minimum the name of the school and a unique identifier such as the URN or DfE Number, and ideally also the name of the local education authority (LEA).”

I have dealt with your request under the Freedom of Information Act 2000 (“the Act”). As at 18th October 2019, 6116 academies are live RPA members, however the Department holds the specific information you requested, but the information requested is being withheld. The exemption that applies to this information is s43 of the Act, which allows for the withholding of information as it is considered commercially sensitive.

Section 43(2) of the Act provides for information to be exempt from disclosure where disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person. This exemption requires a public interest test to be carried out, to determine whether the public interest in withholding the information, outweighs the public interest in its release.

There is a strong public interest in ensuring transparency in this process and in there being accountability within the Department. This is to ensure that public money is being used effectively and that the Department and academies are getting value for money. It is also important to ensure that policy and processes are conducted in an open and honest way.

However, the general public interest in releasing the information requested must be balanced against the public interest in protecting commercially sensitive information.

This data comprises of confidential commercially sensitive business information about the Department’s Risk Protection Arrangement (RPA) and its members, the disclosure of which would be likely to prejudice the commercial interests of the Department’s RPA members and would enable the applicant to gain a competitive advantage over competitors and potential new market entrants.

If you have any queries about this letter, please contact me. Your correspondence has been allocated reference number 2019-0037126. Please remember to quote the reference number in any future communications. If you are unhappy with the service you have received in relation to your

FOI request and wish to make a complaint, or request a review of this decision, you should write to me within two calendar months of the date of this letter.

If you are not content with the outcome of your complaint, you may apply directly to the Information Commissioner for a decision. Generally, however, the Commissioner cannot make a decision unless you have already exhausted the Department's complaints procedure.

Yours sincerely,

A solid black rectangular box used to redact the signature of the sender.

Risk Protection Arrangement for Academies Team | Commercial Lead
Operations Group | Commercial Directorate | Schools Commercial Team