

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date 22 November 2006

Public Authority: The Governing Body of Garforth Community College
Address: Lidgett Lane
Garforth
Leeds LS25 1LJ

Summary

1. The complainant requested information relating to bullying complaints at the College and also information about 3 teachers at the College. The College stated that it did not hold information relating to bullying complaints and refused to provide information requested about 3 teachers on the grounds that disclosure would contravene the requirements of the Data Protection Act 1998 (DPA98). The Commissioner has decided that the College did, in fact, hold bullying complaints information. In failing to explain this to the complainant, the College contravened the requirements of Section 1(1) of the FOI Act. However, the Commissioner has found that location, retrieval and extraction of this information in order to provide it under the FOI Act would exceed the appropriate limit of £450. This limit would be exceeded where it would take the College more than 18 hours work to locate, retrieve and extract the requested information at the specified calculation rate of £25/hour.
The Commissioner has also decided that the College should have cited the specific exemption it sought to rely on (Section 40(3)(a)(ii) – Disclosure would contravene DPA98 Section 10) when refusing to provide information about 3 teachers. In failing to specify the exemption it sought to rely on, the College contravened the requirements of Section 17(1)(b) of the FOI Act.
In addition, the specific exemption it sought to rely on is qualified by a public interest test. The Commissioner has also decided that the College should have explained why it considered that the public interest in maintaining this exemption outweighed the public interest in disclosing the requested information. In failing to explain its position with regard to the balance of public interest the College contravened the requirements of Section 17(3) of the FOI Act.
In any event, in the Commissioner's view, the information relating to the 3 teachers is exempt from disclosure under a different exemption (Section 40(3)(a)(i) – Disclosure would contravene a DPA98 data protection principle). This exemption is not qualified by a public interest test.
No further action is required.
More detail about the Commissioner's reasoning is given in the Notice.

The Commissioner's Role

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 FOI Act'). This Notice sets out his decision.

The Request

3. On 27 January 2005, the complainant requested the following information:
 - a. *All information held about bullying complaints [at the College]*
 - b. *All information held about Teacher A including complaints about him and his behaviour generally*
 - c. *Ditto Teacher B*
 - d. *Ditto Teacher C*
4. The complainant submitted this request to another public authority, Education Leeds. Education Leeds is a not-for-profit company, wholly owned by Leeds City Council. The company was established in April 2001 and is a partnership between Leeds City Council and Capita, operating under a direction from the Secretary of State for Education and Skills. Education Leeds is responsible for providing all education support services that relate to children and young people of statutory school age in Leeds. The complainant had apparently been advised by the College to contact it via Education Leeds. This followed a breakdown in the relationship between the complainant and the College.
5. The complainant had raised a number of concerns with Education Leeds about the College and about Education Leeds itself. These concerns related to matters under the FOI Act, under the Data Protection Act 1998 ("DPA98") and to customer service matters.
6. For reasons which are not relevant to this decision, the complainant finds it more convenient to raise his concerns over the phone or in person. He is not in a position to follow such discussions with letters confirming his understanding of what has been agreed verbally. Education Leeds attempted to confirm what had been discussed in its various letters to the complainant but these letters cover the wide range of the complainant's concerns including data protection and customer service matters as well as concerns related to the FOI Act. In other words, the correspondence is not an exact and detailed analysis of every single aspect of the FOI Act or what was agreed between the parties in relation to the FOI Act. In the absence of contemporaneous correspondence from either side which covers the detail of these discussions, the Commissioner has considerable difficulty in determining exactly what was agreed verbally between the parties. Noting the efforts Education Leeds made to progress all matters brought to its attention and noting all the circumstances of this case, he has given the benefit of the doubt to

Education Leeds in relation to its compliance with its own obligations under the FOI Act in the absence of any substantive evidence to the contrary. He recognises that the complainant has genuinely felt concerns about his children's education and has made considerable efforts to raise those concerns with appropriate authorities.

7. The complainant queried with the Commissioner whether Education Leeds could act on the College's behalf in this matter. The Commissioner made inquiries to this effect and is satisfied that the College has authorised Education Leeds to act on its behalf. This is evidenced by an email sent by the College to Education Leeds dated 17 February 2006 which confirms this to be the agreed position between the two public authorities. Public authorities and complainants are at liberty to authorise other parties to act on their behalf in correspondence with the Commissioner or with each other.
8. To avoid confusion between the two public authorities, this Notice will now refer to Education Leeds as the "College's agent" or the "agent" rather than refer directly to Education Leeds. This complaint and the Commissioner's investigation of this complaint focussed on the College's alleged non-compliance with its obligations under the FOI Act.
9. The College's agent responded to the complainant's request in a letter dated 8 February 2005. The response stated that "*there are no records of official complaints regarding bullying at [the College].*" It went on to quote from a recent OfSTED (Office for Standards in Education) report ("the OfSTED Report") on the College where positive comments had been made about behavioural standards at the College, about relationships across the College and about "*awareness of bullying and the need to treat others with respect*".
10. The response further stated that "*there are no official complaints about the above-named staff with the exception of the one which you yourself made against [Teacher B].*"
11. The response then referred to the complainant's request for other information held about the 3 teachers in question. It explained that disclosure of this information would breach DPA98 and that, specifically, each of the 3 had exercised his or her right under Section 10 of DPA98 "*restricting disclosure of information about them.*" It further stated that "*as this is their legal right we must respect their wishes*". DPA98 Section 10 is provided in a legal annex to this Notice.
12. The complainant was offered a right of appeal and was also provided information about applying to the Commissioner's office under Section 50 of the FOI Act. The author of the letter also provided his own and a colleague's direct telephone number if the complainant had any queries or wished to discuss the contents of the letter.
13. The complainant evidently telephoned the author of the letter on 7 March 2005 because this conversation is referred to in a further letter from the College's agent to the complainant of the same date. This letter offers additional comment on the

application of DPA98 Section 10. The letter states that *"I have no authority to override or to refuse to accept such a notice; this is the job of the Information Commissioner who would consider such matters on appeal"*.

14. On 10 March 2005, the complainant submitted a written appeal in person to the College's agent for a review of the refusal to provide him with the information listed in paragraph 3 above. It also requested that the reviewer investigate a related data protection concern and a customer service complaint.
15. At the same time, the complainant was in daily contact with the College's agent on a range of related matters concerning both the College and its agent. He was dissatisfied with the responses he was receiving in writing, by telephone and in meetings. However, the College's agent took the view that it had investigated those matters in full. Due to the volume of correspondence generated, the number of telephone calls that had taken place and the incidences when the complainant had visited its offices requesting meetings, the College's agent decided that it was only prepared to address new issues raised by the complainant. It wrote to the complainant to advise him of this decision on 18 March 2005. It did not, therefore, conduct an internal review of its initial refusal on behalf of the College to provide the complainant with the information he had requested.

The Investigation

Scope of the case

16. On 20 June 2005 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - He complained about the College's apparent failure to respond to his request for an internal review
 - He disputed the College's assertion that it did not hold records, official or otherwise, of complaints about bullying made against it (i.e., other than complaints he himself had made)
 - He disputed the College's assertion that it did not hold records, official or otherwise, of complaints made against the 3 teachers in question (i.e., other than complaints he himself had made)
 - He disputed the legitimacy of the College's assertion that disclosure of other information held about the 3 teachers would breach DPA98.
17. The complainant also raised other issues relating to the application of DPA98 and relating to customer service concerns about the College and about its agent. These are not addressed in this Notice because they are not requirements of Part 1 of the FOI Act. As has already been discussed at paragraph 7 he also queried whether the agent could act on behalf of the College in this matter. This Notice deals exclusively with his concerns about the College's response to his request for information dated 27 January 2005.

Chronology of the case

18. The Commissioner is not required to make a decision under the FOI Act where there has been undue delay in making a complaint to him. The Commissioner normally requires complainants to submit their complaints to him within 2 months of having exhausted a public authority's internal review procedure. It should be noted that the Commissioner was not, at this stage, aware of the 18 March 2005 letter referred to at paragraph 15 above and understood that correspondence between the parties had reached an impasse at 10 March 2005. He had construed this impasse as the point at which a complaint under the FOI Act could properly be made and had then considered whether there had been any undue delay in making that complaint.
19. By 20 June 2005, 3 months had passed since the complainant's last reported contact with the agent, i.e., since 10 March 2005 when he submitted an appeal for a review. The complainant had therefore exceeded the Commissioner's normal time limit for submitting complaints by 1 month. However, in the particular circumstances of this case, the Commissioner decided that there had not been undue delay in making a complaint under the FOI Act. It should further be noted that had the Commissioner known about the 18 March 2005 letter at this time it would not have altered his view in this regard.
20. The complainant submitted further clarification of his concerns in correspondence received by the Commissioner on 14 September 2005. He also enclosed relevant documentation which the Commissioner had requested. This Notice will now outline the Commissioner's investigation in relation to each of the points raised at paragraph 16 above. The Notice will then cover the Commissioner's analysis of each of the points raised.

Request for internal review

21. An officer of the Commissioner contacted the College's agent on 21 November 2005 to discuss the College's apparent failure to respond to the complainant's 10 March 2005 appeal for a review.
22. The College's agent responded by referring to its letter of 7 March 2005 asserting that it had made it clear that the 3 teachers had submitted DPA98 Section 10 Notices to the College and that further appeal about the Notices should be made to the Commissioner's Office. The Commissioner's officer asked whether the College was waiving what is, in effect, the opportunity to further consider the matter at internal review without the intervention of the Commissioner. The Commissioner's officer also commented that the subsection of Section 40 that dealt with Section 10 Notices was subject to a public interest test. Strictly speaking, this should have been addressed by the public authority in its refusal notice. The full text of Section 40 is provided in a legal annex to this Notice.
23. On 22 November 2005, the College's agent provided the Commissioner with a copy of the 18 March 2005 letter referred to in paragraph 15 above and confirmed that it was waiving the opportunity to conduct an internal review. It also forwarded

two letters which it had sent to the complainant on 23 February 2005 and 7 March 2005 to illustrate further its position with regard to DPA98 Section 10 Notices.

24. The College's agent explained that the 7 March 2005 letter had followed a telephone conversation where the complainant had asked if the College could refuse to accept the DPA98 Section 10 Notices. Recognising that the complainant remained dissatisfied with this position on this point, the College's agent directed the complainant to the Commissioner's office for adjudication. The College's agent acknowledged to the Commissioner that "*In retrospect, [the College via its agent] should have considered the public interest in this instance but omitted to do so due to the volume of correspondence both written and verbal with [the complainant].*"
25. Having established the College's position in relation to the internal review the Commissioner then made further contact with the parties to address the substantive matter of the College's refusal to provide the requested information. This Notice will now continue the outline of the Commissioner's investigation of the points raised at paragraph 16 above.

Further correspondence with the complainant

26. The Commissioner's officer wrote a further letter to the complainant on 20 December 2005 with additional questions that had arisen after analysis of the relevant documentation referred to in paragraph 20 above. Having received clarification over the phone on 17 January 2006, the officer wrote to the complainant again on the same day to confirm the matters that had been discussed. It should be noted that during the telephone conversation, the complainant refused to specify what further information he was seeking about the 3 teachers in addition to complaint information or information about their behaviour generally. He recognised that some of this further information could be withheld but expressed the view that disclosure could only be refused on a very limited basis. He cited national security as a possible basis for refusal. The Commissioner's officer expressed the view that this was unlikely to be relevant here. The complainant also refused to concede that medical information about the 3 teachers could legitimately be withheld. He did concede that it would be difficult to tease out what information could be released but was not prepared to offer to the Commissioner's officer any further suggestion as to what that might reasonably be.

Further correspondence with the College

27. The officer then wrote to the College's agent on 25 January 2006 asking it to provide the following information on behalf of the College:
- Copies of all 3 DPA98 Section 10 Notices submitted by Teachers A, B and C
 - A list of the categories of information held by the College about those 3 individuals
 - An outline of the College's reasons for accepting the DPA98 Section 10 Notices in full or in part

- An outline of the steps the College took to satisfy itself that it did not hold any of the information requested in paragraph 3 above in relation to bullying complaints
- An outline of the steps the College took to satisfy itself that it did not hold any records of complaints, official or otherwise, about Teachers A, B and C other than those made by the complainant.

28. The College's agent responded in a letter dated 17 February 2006.

Categories of information held about the 3 teachers

29. The College's agent explained that the categories of information held by the College about the 3 teachers are: personnel administration (e.g., pay, travel and expense claims, holidays, etc); staff development and training; sickness records.
30. The Commissioner's officer also asked how the College held its records about the 3 teachers in question. It confirmed that it held most of this information in manual files.

Reasons for accepting the DPA98 Section 10 Notices

31. The College's agent submitted copies of the DPA98 Section 10 Notices. It also provided a commentary on the 3 teachers' previous dealings with the complainant which had given rise to the DPA98 Section 10 Notices and explained why the College believed it was justified in accepting these notices.

Bullying complaints information and records of complaints about the teachers

32. The College's agent then described the search undertaken by the College in relation to these two aspects of the complainant's request. It said that the search was "*full and exhaustive*" and that a further "*double check*" had been made of records in early March 2005 in relation to the complainant's DPA98 subject access request. The College's agent also supplied copies of the letters it had sent to the College querying whether it held certain information in relation to subject access requests that the complainant had made on his own account and on behalf of his children.
33. The Commissioner's officer noted that in its refusal letter of 23 February 2005, the College, via its agent, stated that it did not hold complaints about bullying (this comment was clarified in a letter of 7 March 2005 to explain that this did not refer to complaints about bullying that the complainant himself had made). As noted in paragraph 9 above, the refusal letter also drew the complainant's attention to an extract from the OfSTED Report following an inspection of the public authority. This extract read as follows: "*Behaviour in lessons and around the college is excellent. Relationships across the college are very good and students' collaboration enhances learning. There is a high awareness of bullying and the need to treat others with respect. This is very well promoted through assemblies and personal, social and health education (PHSE)*".

34. The Commissioner's officer accessed the full report on-line <http://www.ofsted.gov.uk/reports/108/108089.pdf> and noted that the above extract was followed by further commentary as follows:

"Staff deal promptly with all reported cases of bullying and this results in a happy and harmonious learning atmosphere. Exclusions are very low and incidents of racism rare. Boys are more often excluded than girls. Staff expectations of good behaviour are high and students respond very well to this. Discipline is firm but fair and although the behaviour policy dwells on sanctions, greater emphasis is placed on encouraging the positive. Students are honest and trustworthy and respect both the college's and each other's property".

OfSTED Inspection Report - Garforth Community College (September 2003)
PART B: Commentary on the Inspection Findings

35. The Commissioner's officer noted that the first sentence of this further commentary appeared to indicate that cases of bullying had been reported. The officer contacted the College directly to ask where such reports were recorded. The College advised that such reports would be recorded on the pupil's individual record rather than in a central log given that incidences of bullying were rare. The College advised the Commissioner's officer that it had some 2,000 pupil records. The officer then asked the College the following questions:

1. *Could you provide information about bullying complaints at the college within the appropriate limit? [see paragraph 36 below for an explanation of this term]*
2. *If not, please explain how you have calculated that it would exceed the appropriate limit to extract such information.*
3. *If you could extract some relevant information within the appropriate limit, e.g. the number of complaints in a particular academic year, please advise whether you would be prepared to give this information to the complainant*
4. *If you would not be prepared to do so, please advise which FOIA exemption from your duty to disclose requested information would be applicable."*

36. The "appropriate limit" refers to the limit set by the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI No. 3244). These Regulations prescribe the "appropriate limit" referred to in Section 12(1) and (2) of the FOI Act. Section 12 is provided in full in a legal annex to this Notice as are the relevant sections of the Regulations. The appropriate limit sets the amount of work that a non-central government public authority is required to do at its own expense in order to respond to a request under the FOI Act. It sets the limit at £450 or 18 hours work at £25 per hour.

37. The College conducted a sample search exercise using the records of a class of Year 9 pupils. There are 31 pupils in this class. Year 9 pupils are at the middle of the student age range and their records would be more likely to represent an average record size. It reported that it took 4 hours to read all the 31 sample files to find out whether there was a record of bullying on any of those files. It explained that there were 50 classes across years 7 -11 each with 31 pupils. It

calculated that it would therefore take approximately 200 hours to read all the pupils' files to locate, retrieve and extract the requested information.

38. In relation to its 404 Sixth Form students, it would take 52 hours to complete the same exercise.
39. It also explained that it held approximately 10 years of archive records in relation to school leavers in accordance with guidelines published by the Records Management Society of Great Britain and endorsed by the Department for Education and Skills. It approximated 10 classes of leavers per year. With 100 classes over a 10 year period, it would take, at a conservative estimate, 400 hours to complete search of these records. It pointed out that school leaver records are likely to be larger than Year 9 records and therefore it would be likely to take longer than 4 hours to search the files of each class.
40. In response to providing a sample figure e.g. for an academic year, it said that it would be prepared to consider this provided the exercise did not take it above the appropriate limit. It noted that it would take 40 hours to locate and retrieve bullying complaint information from one academic year's worth of pupil records (10 classes per year at 4 hours per class). This would exceed the appropriate limit of 18 hours or £450 at £25/hour.

Findings of fact

41. The complainant was in verbal contact with the College's agent both over the telephone and in person on a number of occasions before, during and after the date of his request under the FOI Act dated 27 January 2005. This is evidenced by reference to these conversations and meetings in letters that both parties have submitted to the Commissioner.
42. The three teachers submitted DPA98 Section 10 Notices to the College on 14 February 2005.

Analysis

43. The Commissioner has considered the College's response to the complainant's request for information. As previously stated in paragraph 16 of this Notice, the complainant's complaint focussed on the following points:
 - He complained about the College's apparent failure to respond to his request for an internal review
 - He disputed the College's assertion that it did not hold records, official or otherwise, of complaints about bullying made against it (i.e., other than complaints he himself had made)
 - He disputed the College's assertion that it did not hold records, official or otherwise, of complaints made against the three members of staff in question (i.e., other than complaints he himself had made)

- He disputed the legitimacy of the College's assertion that disclosure of other information held about the three members of staff would breach DPA98.

Procedural breaches

44. This Notice will first deal with procedural matters that the complainant did not raise but which the Commissioner has noted.
45. In its refusal notice of 23 February 2005, the College did not specify which exemption it sought to rely on in refusing to disclose information about the 3 teachers although it made reference to DPA98 Section 10 Notices which had been submitted by each of the 3. Its refusal notice should have specified that it sought to apply Section 40(2) by virtue of Section 40(3)(a)(ii). This exemption applies where disclosure would contravene DPA98 Section 10. Section 40 is provided in full in a legal annex to this Notice as is DPA98 Section 10. In failing to cite the specific exemption it sought to rely on the College contravened Section 17(1)(b) of the FOI Act. Section 17 is also provided in full in a legal annex to this Notice.
46. Section 40(2) by virtue of Section 40(3)(a)(ii) is a qualified exemption under the FOI Act and, in accordance with Section 17(3) of the FOI Act, a public authority is also obliged to state its reasons for claiming that the public interest in maintaining a specified qualified exemption outweighs the public interest in disclosing the requested information. In failing to do so, the College did not comply with its obligations under Section 17(3) of the FOI Act.
47. This Notice will now cover the procedural issues that the complainant did raise, namely:
 - Did the College fail to respond to the complainant's request for an internal review?
 - Does the College hold records, official or otherwise, of complaints about bullying made against it (i.e., other than complaints that he himself had made)?
 - Does the College hold records, official or otherwise, of complaints made against the three members of staff in question (i.e., other than complaints he himself had made)?

Did the College fail to respond to the complainant's request for an internal review?

48. As stated in paragraph 14 above, on 10 March 2005, the complainant submitted in person a written appeal to the College's agent asking that it review its refusal to provide him with the information listed in paragraph 3 above. It also requested that the reviewer investigate a related data protection concern and a customer service complaint.
49. On 16 March 2006, the complainant had a meeting with the Strategic Manager in the agent's Human Resources Department. This meeting was followed by the

letter dated 18 March 2005 which addressed a range of topics that the complainant had raised and which refers to this meeting. This letter also made clear that the agent would only deal with any new complaints that the complainant wished to raise. It imposed other restrictions on how the complainant was to contact the agent and explained its reasons for imposing those restrictions. It added that *“this same approach applies to your contact with [the College]”*.

50. The Commissioner also notes that on 7 March 2005 (see paragraph 22 above), the agent directed the complainant to the Commissioner's office where he disputed the College's position in relation to the DPA98 Section 10 Notices.
51. The Commissioner recognises that, ideally, the agent's letter of 18 March 2005 to the complainant should have spelled out that it was, on reflection, now withdrawing its offer of an internal review of its response to his request under the FOI Act and should have directed the complainant to the Commissioner's office in relation to all matters arising from this request. However, the Commissioner acknowledges that contact and correspondence between all the parties had become very difficult and often fraught for all concerned. He accepts that the agent's letter of 18 March 2005 was a reasonable attempt to focus the complainant's attention on new matters that he may seek to raise. It believed that it had already provided definitive responses to any matters that the complainant had already raised, including any matters related to his request under the FOI Act.
52. In the context of difficult and often fraught correspondence between the parties, the Commissioner does not consider that the College failed to respond to the complainant's request for an internal review. The Commissioner accepts that the College, in effect, withdrew its offer of an internal review but he considers that the College should have put this in writing to the complainant via its agent as a specific and separate point.

Does the College hold records, official or otherwise, of complaints about bullying [made against it] (i.e., other than complaints that the complainant himself had made)?

53. Based on the OfSTED Report extract reproduced in paragraph 34 above, it is now apparent that the College does hold records of bullying complaints. As indicated in paragraph 35 above, the College asserts that it does not have a separate log of bullying complaints but, instead, records any report of bullying in the individual files of the pupils in question. At the request of the Commissioner, the College conducted an exercise to assess whether or not it could locate, retrieve and extract all the records of bullying complaints that it might hold and what the costs of that exercise might involve. This exercise is detailed in paragraphs 37-40 above. The Commissioner is satisfied that this exercise offers a reasonable assessment of the likely costs involved in obtaining this information in response to this request.
54. The Commissioner is further satisfied that the costs of obtaining this information in order to provide a response would exceed the limit of £450 or 18 hours work at £25/hour that is stipulated as the appropriate limit in the aforementioned

Regulations (see paragraph 36).

55. In the Commissioner's view, the College did not provide a proper response in its refusal notice in relation to this part of the complainant's request. It should have confirmed that information relevant to this part of the request was held, as required under section 1 (1) (a). If the public authority was concerned about the time and cost of searching for and retrieving that information it could have claimed Section 12 in relation to this point. Had it chosen to claim Section 12, it should have explained how the location, extraction and retrieval of this information would have exceeded the appropriate limit. In passing, the Commissioner notes that the College could examine the records of 4 - 5 classes of students within the appropriate limit based on its own calculations where it receives further requests for information of this nature.

Does the College hold records, official or otherwise, of complaints made against the three members of staff in question (i.e., other than complaints the complainant himself had made)?

56. The Commissioner is satisfied that the College scrutinised its records in order to identify any complaints logged against the teachers. He notes that the complainant was unable to provide information which might suggest that other individuals had made complaints about the teachers e.g. testimony from third parties or reference to complaints in other correspondence he had received. The Commissioner is therefore satisfied that its refusal notice of 23 February 2005 provides a proper response to this aspect of the complainant's request. In other words, he is satisfied that the College does not hold records, official or otherwise, of complaints made against the 3 teachers (other than complaints made by the complainant).

Exemptions

57. The College's refusal notice suggests but does not specify that it is citing Section 40(2) by virtue of Section 40(3)(a)(ii) as its basis for refusing to provide any information about the 3 teachers. It believed it was compelled to cite this exemption because all three had issued DPA98 Section 10 Notices ("the S10 Notices") in relation to the complainant's request under the FOI Act. The Commissioner has read all the S10 Notices. All 3 state that disclosure would cause substantial and unwarranted distress and each notice explains why the individual in question believes this to be the case. The S10 Notices also state that the consequences of disclosure would significantly impact on the individual's duties.
58. The Commissioner notes that a data controller (in this case, the College) has the right to refuse to comply with a DPA98 Section 10 Notice in whole or in part if it considers that it is, to any extent, unjustified. An individual can challenge this refusal in court. The Commissioner notes that the College did not refuse to accept the S10 Notices. The Commissioner has provided further comment on this point at paragraph 71 below in "Other Matters".

59. In the Commissioner's view, the information in question is caught by one of the absolute exemptions in Section 40 rather than one of the qualified exemptions in Section 40 implied by the College. The provisions of Section 40 are provided in full in a legal annex to this notice. In this case, the Commissioner considers that the information is exempted from disclosure under Section 40(2) where the first condition referred to in that subsection is satisfied by virtue of 40(3)(a)(i). This relates to the disclosure of personal data in contravention of any of the data protection principles. It states that if disclosure of requested information would contravene one of the data protection principles, the information in question is exempt information. This exemption is not subject to a public interest test.
60. In reaching this view, the Commissioner considered the matter in three stages:
- Is the information "data" as defined by DPA98?
 - Is the data "personal data" as defined by DPA98?
 - Would disclosure of the personal data contravene any of data protection principles of DPA98?

Is the information "data"?

61. There are five categories of "data" in DPA98. The first 4 categories of data are defined in DPA98 Section 1(1) and are listed from (a) to (d). They are computerised records, information held with the intention of being recorded on computer, information held in a "relevant filing system" (this is a structured manual file) or what is known as an "accessible record" (normally a health, education, housing or social services record). The relevant provisions of DPA98 Section 1(1) are given in a legal annex to this notice.
62. The fifth category of data, also known as "category (e) data" is defined in an amendment to DPA98 found in Section 68 of the FOI Act. This states that "data" means information which is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d).' The relevant provisions of Section 68 of the FOI Act are given in a legal annex to this notice.
63. The Commissioner understands that the information relating to the three members of staff is recorded on a manual file. He also understands that the manual file is structured such that it would satisfy the definition of a "relevant filing system" (DPA98 Section 1(1)(c)).

Is the information "personal data"?

64. Having satisfied himself that the information is "data" as defined in DPA98, he went on to consider whether the information is "personal data" as defined in DPA98. The meaning of "personal data" is also defined in DPA98 Section 1(1). It states that personal data means data which relates to a living individual who can be identified from that data. The definition is provided in full in a legal annex to this notice. Its meaning has also been clarified in a recent case heard by the Court of Appeal (*Durant v Financial Services Authority*). The Commissioner has published guidance on that case and a copy can be found on his office's website via http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_speciali

[st guides/the durant case and its impact on the interpretation of the data protection act.pdf.](#)

The Court of Appeal concluded that data will relate to an individual if it: *“is information that affects [a person’s] privacy, whether in his personal or family life, business or professional capacity”*. It identified two notions that may assist in determining whether information *“is information that affects [an individual’s] privacy”* and, therefore, *“relates to”* an individual: *“The first is whether the information is biographical in a significant sense that is, going beyond the recording of [the individual’s] involvement in a matter or an event which has no personal connotations...”*

The second concerns focus. *“The information should have the [individual] as its focus rather than some other person with whom he may have been involved or some transaction or event in which he may have figured or have had an interest ...”*

65. As described in paragraph 29 above, the information in question is personnel administration information (pay, travel and expense claims, holidays, etc.), staff development and training information, sickness record information. In the Commissioner’s view, the information requested here is obviously biographical in a significant sense and focuses clearly on the three individuals in question. The Commissioner is therefore satisfied that the information in question constitutes 3 sets of personal data relating to each of the teachers.

Would disclosure of the personal data contravene any of data protection principles of DPA98?

66. The Commissioner believes that the first data protection principle is relevant here. There are two components to the first principle. Firstly, processing of personal data must be fair and lawful. Secondly, certain conditions for processing must be satisfied. The conditions for processing are found in Schedules 2 and 3 of DPA98. At least one Schedule 2 condition must be satisfied for processing to be in accordance with the first principle. Where the information in question is sensitive personal data, at least one condition in Schedule 3 must also be satisfied. Sensitive personal data means information about, for example, an individual’s health, their religious beliefs, their racial or ethnic origin. A full definition of the term “sensitive personal data” is given in a legal annex to this notice. Both components of the first principle must be satisfied for processing to be in accordance with that principle.

Would processing be fair and lawful?

67. When analysing fairness, the Commissioner considers what the individual has been told about the processing of their personal data and what their reasonable expectations are in relation to that processing. The Commissioner also takes into account the potential for unwarranted detriment to the individual where that processing takes place. In the Commissioner’s view, none of the three individuals would reasonably expect that the bulk of the information in their personnel records would be disclosed to the public. This particularly applies to information

relating to their health, i.e., their sickness absence records. Such information is provided with a clear expectation that it will remain confidential. Information in personnel records is generally subject to highly restricted access even within an organisation. Some of that information may even be subject to restricted access within a personnel or human resources department. Individuals expect that only relevant persons would have sight of information in that file and even those relevant persons would only be able to access information that is relevant to a particular purpose. For example, a person's line manager may see that person's recent staff development and training information but would not ordinarily see details of that person's taxation or pension arrangements. That said, given that all 3 are employees at a public authority, they might reasonably expect that general information about their levels of pay, e.g., their pay band, could be made available to the public under the FOI Act. However, the Commissioner notes that the complainant gave no particular emphasis to such information in his request. His focus was on "complaints" (see paragraphs 3 and 26 above) and "information about [each teacher's] behaviour in general".

68. Taking into account the nature of the information requested, i.e., that it is information held with a strong expectation of confidentiality, and the genuinely felt concerns of the three members of staff in question, the Commissioner does not consider that disclosure of the requested information to the public at large would be fair in the circumstances of this case. In other words, he does not consider that the first component of the first data protection principle could be satisfied.
69. Having decided that the first component is not satisfied, the Commissioner does not propose to consider whether the second component could be satisfied.
70. In view of the above the Commissioner is satisfied that the information is exempt from disclosure under Section 40(3)(a)(i) of the FOI Act because that disclosure would contravene the first data protection principle of DPA98. Given that the Commissioner is satisfied that Section 40(3)(a)(i) applies, he does not propose to consider whether Section 40(3)(a)(ii) also applies, that is, whether the Section 10 Notices would prohibit disclosure in this case.

Other matters

71. The Commissioner notes the College's comment via its agent at paragraphs 13 and 14 stating that it has no authority to override or refuse to accept a DPA98 Section 10 Notice. This is not correct. If a data controller believes that such a notice is, in whole or in part, unjustified, it is entitled to refuse to accept that notice. It must provide a written notice within 21 days explaining why it believes the notice is unjustified and the extent to which it does not intend to comply with it. In the Commissioner's view, an individual cannot assume that the submission of a DPA98 Section 10 Notice will automatically prevent disclosure of personal data relating to them under the FOI Act. Further details of the requirements of DPA98 Section 10 are given in full in a legal annex to this notice.

The Decision

72. The Commissioner's decision is that the public authority did deal with some areas of the request for information in accordance with the FOI Act, but failed to deal correctly with others. The Commissioner is satisfied that there is no information held by the College that ought to have been disclosed in response to the complainant's request.

Steps Required

73. The Commissioner requires no steps to be taken at this time but he will consider issuing a practice recommendation if he receives evidence that the College continues to fail to comply with the procedural requirements of the FOI Act.

Right of Appeal

74. 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

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 22nd day of November 2006

Signed

**Graham Smith
Deputy Commissioner**

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

Legal Annex

Extracts from the Freedom of Information Act 2000

Relevant exemptions

Section 40

40. - (1) Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.

(2) Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.

(3) The first condition is-

- (a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-
 - (i) any of the data protection principles, or
 - (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.

(4) The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data).

Procedural obligations

Section 1 – General right of access

1. - (1) 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.

Section 12 – Appropriate Limit

12. - (1) Section 1(1) does not oblige a public authority to comply with a request for information if the authority estimates that the cost of complying with the request would exceed the appropriate limit.

(2) Subsection (1) does not exempt the public authority from its obligation to comply with paragraph (a) of section 1(1) unless the estimated cost of complying with that paragraph alone would exceed the appropriate limit.

(3) In subsections (1) and (2) "the appropriate limit" means such amount as may be prescribed, and different amounts may be prescribed in relation to different cases.

(4) The Secretary of State may by regulations [see the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI No. 3244) below] provide that, in such circumstances as may be prescribed, where two or more requests for information are made to a public authority-

(a) by one person, or

(b) by different persons who appear to the public authority to be acting in concert or in pursuance of a campaign,

the estimated cost of complying with any of the requests is to be taken to be the estimated total cost of complying with all of them.

Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004 (SI No. 3244)

The appropriate limit

3. - (1) This regulation has effect to prescribe the appropriate limit referred to in section 9A(3) and (4) of the 1998 Act [this means the Data Protection Act 1998] and the appropriate limit referred to in section 12(1) and (2) of the 2000 Act [this means the Freedom of Information Act 2000].

(2) In the case of a public authority which is listed in Part I of Schedule 1 to the 2000 Act, the appropriate limit is £600 [this refers to central government departments, both Houses of Parliament, the Northern Ireland Assembly, the Welsh Assembly and the armed forces of the Crown excluding special forces and units assisting GCHQ].

(3) In the case of any other public authority, the appropriate limit is £450.

Estimating the cost of complying with a request - general

4. - (1) This regulation has effect in any case in which a public authority proposes to estimate whether the cost of complying with a relevant request would exceed the appropriate limit.

(2) A relevant request is any request to the extent that it is a request-

- (a) for unstructured personal data within the meaning of section 9A(1) of the 1998 Act and to which section 7(1) of that Act would, apart from the appropriate limit, to any extent apply, or
 - (b) information to which section 1(1) of the 2000 Act would, apart from the appropriate limit, to any extent apply.
- (3) In a case in which this regulation has effect, a public authority may, for the purpose of its estimate, take account only of the costs it reasonably expects to incur in relation to the request in-
- (a) determining whether it holds the information,
 - (b) locating the information, or a document which may contain the information,
 - (c) retrieving the information, or a document which may contain the information, and
 - (d) extracting the information from a document containing it.
- (4) To the extent to which any of the costs which a public authority takes into account are attributable to the time which persons undertaking any of the activities mentioned in paragraph (3) on behalf of the authority are expected to spend on those activities, those costs are to be estimated at a rate of £25 per person per hour

Section 17 – Refusal of request

17. - (1) A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which-

- (a) states that fact,
 - (b) specifies the exemption in question, and
 - (c) states (if that would not otherwise be apparent) why the exemption applies.
- (2) Where-
- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 - (i) that any provision of Part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or
 - (ii) that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached.

(3) A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming-

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information.

(4) A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

(5) A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.

(6) Subsection (5) does not apply where-

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.

(7) A notice under subsection (1), (3) or (5) must-

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50

Section 68 – Definition of “data”

68. - (1) Section 1 of the Data Protection Act 1998 (basic interpretative provisions) is amended in accordance with subsections (2) and (3).

(2) In subsection (1)-

(a) in the definition of "data", the word "or" at the end of paragraph (c) is omitted and after paragraph (d) there is inserted "or

(e) is recorded information held by a public authority and does not fall within any of paragraphs (a) to (d);", and

b) after the definition of "processing" there is inserted-

""public authority" has the same meaning as in the Freedom of Information Act 2000;".

Extracts from the Data Protection Act 1998

Section 1 – Basic interpretive provisions

1. - (1) In this Act, unless the context otherwise requires-

"data" means information which-

(a) is being processed by means of equipment operating automatically in response to instructions given for that purpose,

(b) is recorded with the intention that it should be processed by means of such equipment,

(c) is recorded as part of a relevant filing system or with the intention that it should form part of a relevant filing system, or

(d) does not fall within paragraph (a), (b) or (c) but forms part of an accessible record as defined by section 68;

"personal data" means data which relate to a living individual who can be identified-

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

Section 2 – Sensitive personal data

2. In this Act "sensitive personal data" means personal data consisting of information as to-

- (a) the racial or ethnic origin of the data subject,
- (b) his political opinions,
- (c) his religious beliefs or other beliefs of a similar nature,
- (d) whether he is a member of a trade union (within the meaning of the Trade Union and Labour Relations (Consolidation) Act 1992),
- (e) his physical or mental health or condition,
- (f) his sexual life,
- (g) the commission or alleged commission by him of any offence, or
- (h) any proceedings for any offence committed or alleged to have been committed by him, the disposal of such proceedings or the sentence of any court in such proceedings.

Section 10 – Right to prevent processing likely to cause damage or distress

10. - (1) Subject to subsection (2), an individual is entitled at any time by notice in writing to a data controller to require the data controller at the end of such period as is reasonable in the circumstances to cease, or not to begin, processing, or processing for a specified purpose or in a specified manner, any personal data in respect of which he is the data subject, on the ground that, for specified reasons-

- (a) the processing of those data or their processing for that purpose or in that manner is causing or is likely to cause substantial damage or substantial distress to him or to another, and
- (b) that damage or distress is or would be unwarranted.

(2) Subsection (1) does not apply-

- (a) in a case where any of the conditions in paragraphs 1 to 4 of Schedule 2 is met, or
- (b) in such other cases as may be prescribed by the Secretary of State by order.

(3) The data controller must within twenty-one days of receiving a notice under subsection (1) ("the data subject notice") give the individual who gave it a written notice-

(a) stating that he has complied or intends to comply with the data subject notice,
or

(b) stating his reasons for regarding the data subject notice as to any extent unjustified and the extent (if any) to which he has complied or intends to comply with it.

(4) If a court is satisfied, on the application of any person who has given a notice under subsection (1) which appears to the court to be justified (or to be justified to any extent), that the data controller in question has failed to comply with the notice, the court may order him to take such steps for complying with the notice (or for complying with it to that extent) as the court thinks fit.

(5) The failure by a data subject to exercise the right conferred by subsection (1) or section 11(1) does not affect any other right conferred on him by this Part.

Section 33A - Manual data held by public authorities

33A. - (1) Personal data falling within paragraph (e) of the definition of "data" in section 1(1) are exempt from-

(a) the first, second, third, fifth, seventh and eighth data protection principles,

(b) the sixth data protection principle except so far as it relates to the rights conferred on data subjects by sections 7 and 14,

(c) sections 10 to 12,

(d) section 13, except so far as it relates to damage caused by a contravention of section 7 or of the fourth data protection principle and to any distress which is also suffered by reason of that contravention,

(e) Part III, and

(f) section 55.