

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 20 December 2010

Public Authority: The Governing Body of Aberdare Girls' School
Address: Cwmbach Road
Aberdare
CF44 ONF

Summary

The complainant requested information regarding the legal costs and legal advice given to the Governing Body in relation to a Judicial Review it had defended concerning the exclusion of a pupil for refusing to remove a religious bangle. The Governing Body refused the request citing sections 12, 14, 21, 31, 32, 41, and 42 of the Act. The Commissioner has investigated the complaint and finds that some of the requested information is not held and that some of the information is exempt under section 42 of the Act. However, the Commissioner also finds that sections 12, 14, 21, 31, 32 and 41 are not engaged and orders the Governing Body to take appropriate steps. The Commissioner also recorded a significant number of procedural breaches of the Act and was particularly concerned with the Governing Body's lack of co-operation with his investigation.

The Commissioner's Role

1. The Commissioner's duty 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 "Act"). This Notice sets out his decision.

The Request

2. On 6 March 2009 the complainant wrote to the Governing Body requesting the following information:

- (1) "What are currently, and what are likely to be, the total legal costs to the school, including solicitors' and barristers' fees, arising out of the [named individual] case?"*
- (2) What are currently, and what are likely to be, the total of all other administrative costs?"*
- (3) Has Liberty billed the school with their costs, and if so, what are those costs?*
- (4) Have any further costs been incurred by any individual member of the Governing Body arising out of the [named individual] case?*
- (5) Were the costs referred to under number 4 above, charged to the school.*
- (6) What costs have been incurred for travelling, by staff and/or governors relating to the [named individual] case?*
- (7) On what dates was each item of correspondence, including e-mails, received from the Local Authority advising either staff of the school, or members of the Governing Body, on matters relating to the [named individual] case?*
- (8) On what dates were each of the items referred to in number 7 above, made available to each and every member of the Governing Body?"*
- (9) Did each and every member of the Governing Body see all correspondence, including emails, referred to in number 7 above?*
- (10) On what date did the school receive formal legal advice in respect of the [named individual] case?*
- (11) What arrangements are being made by the Governing Body to fund all costs arising out of the [named individual] case?*
- (12) Did the Board of Governors receive advice about how much the court case was likely to cost? On what date did it receive that advice? What was the advice on costs?*
- (13) Was the Board of Governors told who was liable for the legal costs of the court case? Was the Board of Governors advised that its members may have potential personal liability for any legal costs incurred?*
- (14) On what date did the Board of Governors inform Rhondda Cynon Taff County Borough Council about advice it had been given about how much the court case was likely to cost?"*

3. Not having received a response to her request, the complainant sent a covering letter to the Governing Body on 16 April 2009 asking for a response and enclosed a copy of her original letter of 6 March 2009.
4. On 5 May 2009 the Governing Body acknowledged receipt of the complainant's letter of 16 April 2009 and its enclosure. It confirmed that it had not received a copy of the letter dated 6 March 2009 until this time.
5. On 21 May 2009 the Governing Body sent its substantive response to the complainant. The substantive response was effectively the Governing Body's refusal notice, however no exemptions were cited. The response did however inform the complainant that information held in respect of questions 12 and 13 was '*privileged information*'.
6. The complainant wrote to the Governing Body on 9 June 2009 expressing dissatisfaction with both the content and the tone of its response and also highlighting a number of procedural breaches in relation to the Governing Body's handling of her request for information.
7. The Governing Body issued the outcome of its internal review to the complainant in a letter to the complainant dated 30 June 2009. The review addressed the numbered points raised in the request and stated the following:

(1) This was contained in your previous request for information. We refer to our response in this regard.

(3) We are refusing your request for information on this point. We specifically reply [sic] on sections 21, 31, 32, 41 and 42 of the Freedom of Information Act 2000.

(7) We are refusing your request for information on this point. We specifically rely on sections 12, 21, 31, 41 and 42 ...

(9) We do not hold such information...

(10) We received advice on a daily basis.

(11) This is contained within your previous request for information. We have previously disclosed such information and therefore have no duty to do so again pursuant on section 14(2).

(12) This is privileged information... We specifically rely on sections 31, 14 and 42 ...

(13) This is privileged information. We specifically rely on section 31, 41 and 42 ...

8. The Governing Body also confirmed its intention to conduct an internal review in relation to points 3, 7, 12 and 13 and stated that the complainant would be notified of the outcome in writing.

The Investigation

Scope of the case

9. On 15 July 2009 the complainant contacted the Commissioner to complain about the way her request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - The Governing Body's refusal to answer her requests for information numbered 1,3,7,9,10,11,12 and 13.
 - The Governing Body's reliance on multiple exemptions.
 - Various aspects of the Governing Body's procedural handling of her request for information.
10. The complainant did not make a complaint about the Governing Body's response to points 2,4,5,6,8 and 14 of her request and they do not therefore form part of this Notice.
11. During the course of the Commissioner's investigation the following matters were resolved informally and therefore these are not addressed in this Notice:
 - In October 2009, the Governing Body provided the complainant with details of the final costs of the Judicial Review. This addressed point 1 of her request.

Chronology

12. On 7 October 2009 the Commissioner contacted the Governing Body and requested a copy of the withheld information, a reasonable breakdown of costs in relation to point 7 of the request, which had been withheld on the basis of section 12 of the Act, and further arguments in respect of the exemptions cited. The Commissioner asked for a full response by 4 November 2009.
13. On 5 November 2009 the Commissioner attempted to contact the Governing Body via the School. Although the Commissioner was unable to speak to the Chair of the Governing Body, the school emailed a response from the Governing Body dated 5 November 2009. The response stated:

"The independent review officer has already adjudicated on these issues and a copy of his written decision has been sent to [name of complainant]. We wonder in the circumstance if that will assist?"

14. The Governing Body appears to have paid an external legal advisor to conduct an independent review in relation to its handling of this request and referred to that person as the 'independent review officer'. The Commissioner has used the same term of reference in this Notice but considers a response from a person employed by a public authority for the purposes of responding to a request or the Commissioner's enquiries to effectively be a response from the public authority. A copy of the independent review officer's decision dated 22 September 2009 was attached. The review officer considered points 3, 7, 12 and 13 of the complainant's request. It upheld the Governing Body's decision in respect of each request with the exception of question 3 on the basis that:

"...when the issue of costs is finally determined, the decision of the Governors should be reversed, and the Applicant should be provided with the information requested in question (3)."

15. On the same date, the Commissioner confirmed in writing to the Governing Body that whilst the copy of the report of the independent review officer might assist him with his investigation, it would not be sufficient to allow him to reach a decision in this matter. The Commissioner took the opportunity to explain his role as regulator of the Act and asked that all outstanding information should be provided by 19 November 2009. For clarity, the information that the Commissioner considered to be outstanding was reiterated in an email to the Governing Body on 6 November 2009, via the School's administrative support. It was necessary for the Commissioner to communicate with the Governing Body, via the School, because he had not at that point been provided with direct contact details for the Chair of the Governing Body.
16. The Commissioner received a response from the Governing Body on 16 November 2009, (dated 10 November 2009). The Governing Body provided what it considered to be a reasonable estimate of costs in relation to question 7 of the request, however it declined to provide further arguments in respect of the exemptions cited. In terms of the withheld information it stated that:

"The information is subject to ongoing litigation and therefore cannot be disclosed..."

17. On 20 November 2009 the Commissioner made various unsuccessful attempts to speak to the Chair of the Governing Body. He did however speak to the Vice Chair and took the opportunity to explain the

Commissioner's role and reassure her that information provided by the Governing Body during the course of his investigation would be held in confidence by his office. The Commissioner also telephoned the Head Teacher of the School to reiterate the need for the outstanding information.

18. On 23 November 2009 the Chair of the Governing Body telephoned the Commissioner to confirm that the withheld information would be sent to his office without further delay. On the same day, and as requested by the Governing Body, the Commissioner emailed it a copy of his response to the Governing Body's letter of 10 November 2009.
19. The Commissioner's letter dated 23 November 2009 confirmed that the Governing Body was not required to provide any further arguments in respect of each exemption cited if it considered those provided to date were sufficient. However, he informed the Governing Body that he did not consider that it had provided a reasonable breakdown of costs in relation to point 7 of the request, which had been refused on the basis of section 12 of the Act and asked for further information in respect of this. He also informed the Governing Body that he required an explanation of the 'other means' by which it had stated that information was accessible to the complainant in relation to information withheld under section 21 of the Act. The Commissioner asked for a full response by 7 December 2009.
20. On 23 November 2009 the Commissioner received confirmation from the Governing Body that his letter had been received. The Governing Body also stated and that since it had already sought legal advice it would allow its advisor to consider the letter before sending a full reply.
21. Not having received a response, the Commissioner telephoned the public authority on 15 December 2009 and the Governing Body's response was subsequently received the same day via email. The Governing Body provided further information in respect of its application of section 12 and provided further detail to support its application of section 21 of the Act. However, the Governing Body refused to provide a copy of the withheld information stating:

"Upon receipt of your legal undertaking as requested by us we will consider the matter further with our departmental advisors."
22. In view of the Governing Body's refusal to disclose to the Commissioner information he required to make a decision in this matter, on 17 December 2009, he served an Information Notice on the Governing Body.
23. On 20 January 2010 the Commissioner was notified that the Governing Body had appealed the Notice.

24. On 18 February 2010 the Commissioner informed the Governing Body that for specified reasons he had withdrawn the Information Notice but that he still required information to complete his investigation of this complaint and would shortly be writing to the Governing Body.
25. On 2 March 2010 the Commissioner sent a further letter to the Governing Body outlining the information he required to reach a decision in this matter. In effect this repeated his earlier requests for the information. He requested a full response by 16 March 2010.
26. On 15 March 2010 the Commissioner received a response from the Governing Body dated 9 March 2010. The response provided some additional information and further details in support of its use of section 12. However, it failed to clarify some outstanding queries or to provide copies of the withheld information.
27. On 1 April 2010 the Commissioner sent a further letter to the Governing Body stating explicitly what information he still needed to complete his investigation of this complaint and asked for a full response by 15 April 2010.
28. Not having received a response to this letter the Commissioner served the Governing Body with a second Information Notice on 27 April 2010.
29. On 4 May 2010 the Commissioner received a letter from the Governing Body providing further information but making no reference to his Information Notice. The Commissioner therefore wrote to the Governing Body on 6 May 2010 to confirm that his Notice remained valid.
30. On 27 May 2010 the Commissioner received confirmation that the Governing Body had appealed the second Information Notice to the First-tier Tribunal (Information Rights).
31. On 19 August 2010 the Tribunal dismissed the appeal and instructed the Governing Body to comply with the Commissioner's Information Notice within 30 days.
32. The Commissioner received a letter and enclosures from the Governing Body on 14 September 2010. The enclosures included redacted copies of the withheld information that the Governing Body had identified as falling within the scope of points 12 and 13 of the complainant's request.
33. The Commissioner wrote to the Governing Body on 7 October 2010 to request unredacted copies of the information it had provided and to request additional information he had identified that if held by the Governing Body would have fallen within the scope of the request. He also reiterated his request for a sample of information to assist with his

investigation of the Governing Body's application of section 12. The Commissioner asked for a full response by 18 October 2010.

34. On 4 November 2010 the Commissioner received a fax from Aberdare Girls' School stating that a letter and enclosures it sent to his office on behalf of the Governing Body had been 'returned to sender'. The Commissioner telephoned the School to confirm that he had no knowledge of the attempted delivery of either the letter or enclosures. It was agreed that the School would resend the letter via guaranteed next day delivery and the Commissioner received the above on 5 November 2010.
35. The enclosures contained further (redacted) withheld information, a promise to provide the requested sample of information and an invitation for the Commissioner to meet with the Chair of the Governing Body.
36. The Commissioner wrote to the Governing Body on 11 November 2010 requesting clarification of a number of matters and reiterated the request for a sample of information to assist him in determining whether the application of section 12 had been appropriate. The Commissioner informed the Chairman that his immediate priority was to reach a point where he could complete his investigation of this complaint and that he did not consider meeting with the Governing Body at this stage was necessary. The Commissioner asked for a substantive response by 18 November 2010.
37. On 24 November 2010 the Commissioner received a further letter dated 19 November 2010 and (redacted) enclosures from the Governing Body. The Commissioner found the tone of the letter unhelpful and in particular was concerned that the Governing Body had made the provision of information relevant to his investigation conditional to his agreement to meet to discuss the case. The Governing Body's letter stated:

"...we will bring you a sample of further redacted information when you will agree to see us...We can find no provision under the Act for you to refuse to meet us."
38. The Commissioner considers that there is nothing to be gained from further correspondence with the public authority, and has made his decision on the basis of the information he has at this point. The Commissioner would also point out that, where appropriate, he is willing to meet with public authorities if it will assist with his investigation of the complaint. However, in this particular case the Commissioner does not consider that a meeting is necessary to achieve this objective. There is no requirement in the Act for the Commissioner to meet with public

authorities and the Commissioner has therefore based his decision on the information he has received to date.

Analysis

Substantive Procedural Matters

Section 1(1)(a) - Information not held

39. Under section 1(1) of the Act, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request. The Governing Body has stated that it does not hold information relevant to point 9 of the request of 6 March 2009, which asked:

"Did each and every member of the Governing Body see all correspondence, including emails, referred to in number 7 [point 7 of the request of 6 March 2009] above?"

40. The Commissioner has considered the Governing Body's arguments that the information is not held and is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any requested information the normal standard of proof to apply is the civil standard of the balance of probabilities.
41. In his determination of where the balance lies, the Commissioner has taken into consideration the nature of the request itself. The complainant asked if each individual member saw all correspondence, including emails from the Local Authority advising either staff or members of the Governing Body, on matters relating to the relevant court case. The Commissioner considers it unlikely that the Governing Body would hold recorded information that would demonstrate that each of its members had seen all correspondence from the Local Education Authority (referred to in point 7 of the request) on the court case. The Commissioner also considers that even if it could be demonstrated that each piece of relevant correspondence had been circulated to each of its members, it is unlikely that it would have recorded whether the information had been seen. For example, the Governing Body is unlikely to ask each of its members whether they read all correspondence forwarded to them and less likely to make a record of that fact. As such, the Commissioner has concluded that, based on the balance of

probabilities, the Governing Body does not hold the information requested in point 9.

Section 1(1)(b) – the communication of information

42. The Commissioner is aware that that the complainant was not satisfied with the response she received to point 10 of her request. The information was not explicitly refused by the Governing Body but neither did it disclose the requested information. The Commissioner has therefore considered its response and whether it complied with its obligations under section 1(1)(b) of the Act. That section provides that information held must be communicated to the applicant (unless an exemption is cited).

43. Question 10 of the request asked on what date the school received formal legal advice in respect of judicial review case. The response from the Governing Body stated:

"We received advice on a daily basis."

44. The complainant believes that this does not constitute a satisfactory answer to her complaint unless dates are provided. The Commissioner agrees that without dates the response from the Governing Body does not constitute a satisfactory answer in compliance with section 1(1)(b) of the Act. As such, the Governing Body should either disclose the requested information or cite a relevant exemption.

Section 12 – The cost of compliance exceeds the appropriate limit

45. Section 12(1) provides that:

"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."

46. Section 12(2) of the Act provides that:

"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."

47. The appropriate limit is set out in the Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004. The Regulations prescribe the 'appropriate limit' as being £600 for Central Government and £450 for other public authorities, with a rate of £25 per

hour to be used by all public authorities in calculating the cost of a member of staff dealing with a request. For the Governing Body to legitimately cite section 12 in this case, it therefore needs to demonstrate that the time needed to comply with the requests exceeds 18 hours. The Governing Body should also have confirmed whether it held information of the type requested unless the cost of doing so would exceed the appropriate limit.

48. Regulation 4(3) of the Regulations provides that the following factors can be taken into account by a public authority when formulating an estimate of the cost involved in complying with a request for information:
- (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.
49. The former Information Tribunal considered the issue of what constitutes a reasonable estimate in the case of *Alistair Roberts v the Information Commissioner [EA/2008/0050]* and made the following comments:
- “Only an estimate is required” (i.e. not a precise calculation);
 - The costs estimate must be reasonable and only based on those activities described in regulation 4(3);
 - Time spent considering exemptions or redactions cannot be taken into account;
 - Estimates cannot take into account the costs relating to data validation or communication;
 - The determination of a reasonable estimate can only be considered on a case by case basis; and
 - Any estimate should be “sensible, realistic and supported by cogent evidence” as per the former Information Tribunal’s findings in *Randall v Information Commissioner and Medicines and Health Care Product Regulatory Agency (EA/2007/0004)*.
50. The Commissioner has considered whether the Governing Body’s decision to refuse point 7 of the request under section 12(1) of the Act was correct. For convenience, question 7 has been reproduced below:

"On what dates was each item of correspondence, including e-mails, received from the Local Authority advising either staff of the school, or members of the Governing Body, on matters relating to the [named individual] case?"

51. The Commissioner did not expect the Governing Body to provide an actual breakdown of the costs involved in complying with the request but he did expect it to provide a reasonable estimate supported by evidence.

52. In its letter to the complainant setting out the outcome of its internal review, the Governing Body provided the following explanation of its application of section 12:

"...as the resource cost to locate all such items would be unduly onerous and not cost effective bearing in mind that the dispute has been going on for several years."

53. The Governing Body informed the Commissioner in its letter dated 16 November 2009 that its reasonable estimate of costs was £750 due to the volume of information requested. It confirmed that this was based on the four elements described in paragraph 48 of this Notice and that it had based it on the rate of £20 per hour. However, the Governing Body did not provide any explanation of how it arrived at this figure or clarify whether its calculations applied solely to information withheld on the basis of section 12 or to the cost of complying with the request in general.

54. The Governing Body subsequently clarified that the hourly rate it had used to estimate costs of £750 was £25, that its calculations applied to all of the information refused under section 12 and that it would take at least 30 hours to extract all such information. It also confirmed that the information is held on paper and electronically and would involve an individual accessing all of the school records in question dating back some 5 years. It also stated that:

"There are in addition in the region of ten thousand documents that were generated by the Court case and many thousands that were in existence in any event."

55. The Governing Body further clarified that there are approximately twenty thousand pages of written material that could fall within the scope of the request. It explained that as many of these pages are extremely detailed, it had estimated that it would take an average of two minutes per page to search for relevant information, which equates to 30 pages per hour. The Commissioner considers that this estimate clearly exceeds the previous estimate provided by the Governing Body; 20,000 pages divided by 30 equals 666.67 hours. 666.67 hours multiplied by £25 equals £16,667.

56. Given the inconsistent estimates provided by the Governing Body, the Commissioner did not consider that he had received a 'reasonable estimate of costs' and asked for further clarification and a sample of the relevant information so that he could verify the Governing Body's estimate. The Governing Body subsequently confirmed that there is no index of the relevant information and that it had estimated the volume of information by counting it. It also provided a very small sample to enable the Commissioner to verify its cost estimate, which the Commissioner considered insufficient for this purpose. The Governing Body offered no further explanation of the way in which the information is stored.
57. Despite requests for a further sample of the relevant information, the Governing Body then appeared to make the provision of a sample conditional on the Commissioner meeting with the Chair of the Governing Body to discuss the case in general. Given the length of time that his investigation had taken and the resistance encountered, the Commissioner did not consider that a meeting was appropriate at that stage. Therefore, while he appreciates that it is not ideal, he has made his decision on the basis of the information he has received to date.
58. In making his decision, the Commissioner has considered whether Governing Body has provided a reasonable estimate of the costs involved in complying with the request. In line with the Tribunal's ruling outlined in paragraph 49 of this Notice, he also considered whether the estimate is '*sensible, realistic and supported by cogent evidence*'.
59. The Commissioner has firstly considered the nature of the request itself and would point out that point 7 relates only to correspondence from the Local Authority advising either staff of the school, or members of the Governing Body on matters relating to the court case in question. Further, the request it is not for copies of the correspondence itself but for the dates of each item of correspondence.
60. The Commissioner notes that its original estimate was based on 30 hours at £25 per hour which equates to £750 in total. However, in the absence of any further information explaining how this figure was arrived at, the Commissioner cannot accept that this is either a reasonable breakdown of costs or that it is '*sensible, realistic and supported by cogent evidence*'.
61. The Governing Body's subsequent estimate differed significantly from its original and the Commissioner notes that it has provided no explanation for this. Although the Governing Body has stated that there is no index of relevant information, it has failed to provide any further details regarding how the information is stored and why it would be necessary to go through the information page by page. The Commissioner is not

therefore persuaded that this subsequent estimate is either sensible, realistic or supported by cogent evidence.

62. Further, even if he were to accept that it was necessary to check over twenty thousand pages of information relevant to this particular request, the Commissioner is not persuaded that the estimate of two minutes per page is realistic. The request is for dates of correspondence from the LEA to either staff at the school or to members of the Governing Body. The Commissioner would expect that a glance at the first page of each document would suffice to establish whether the information was within the scope of the request; firstly to check for the LEA's logo and, where appropriate, a second check for the date of the correspondence. In the case of emails, it is likely that they would be sent from a limited number of individuals within the LEA and the process of filtering the email system by names to search for any relevant information would be both straightforward and quick.
63. In summary, the Commissioner has concluded that the Governing Body's failure to clarify its application of section 12 and the inconsistent estimates it has provided have left him with no option but to determine that it was not appropriately applied to point 7 of the request.
64. However, the Commissioner notes that the Governing Body has also cited the following exemptions under Part II of the Act for point 7 of the complainant's original request:
- Section 21; Information accessible to applicant by other means
 - Section 31; Law enforcement
 - Section 41; Information provided in confidence
 - Section 42; Legal professional privilege
65. Where a public authority has relied on section 12 as the basis to refuse a request for information, the Commissioner is mindful that the public authority is not required to cite exemptions under Part II of the Act.
66. However, where the public authority has chosen to do so and the Commissioner has determined that section 12 is not engaged, it is often the case that the public authority will subsequently provide the withheld information to the Commissioner to enable him to investigate its use of exemptions.
67. Although the Governing Body has cited exemptions under Part II of the Act in addition to section 12, the Commissioner has not subsequently requested the withheld information due to the delays and resistance the Commissioner has encountered from the Governing Body during the

course of his investigation of this complaint. He has ultimately decided to issue this Notice without making a decision in relation to these exemptions as he has not had sight of the relevant withheld information.

Section 14(2) – Repeated requests

68. Section 14(2) of the Act does not oblige a public authority to comply with a request for information if the request is repeated. It states that:

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent or similar request from that person unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.”

69. The Commissioner notes that the Governing Body cited section 14(2) of the Act for points 11 and 12 of the complainant’s request of 6 March 2009.

70. The Commissioner considers that a request can be refused as repeated if:

- it is made by the same person as a previous request;
- it is identical or substantially similar to the previous request; and
- no reasonable interval has elapsed since the previous request.

71. The Commissioner is aware that the complainant made a previous request for information to the Governing Body on 10 March 2008. The first limb of this test is therefore fulfilled.

72. The Commissioner has therefore gone on to consider whether the requests were identical or substantially similar.

73. In her request to the Governing Body of 10 March 2008, the complainant requested information under five numbered questions, with questions 2 to 5 relating to information regarding legal advice and costs in regarding the court case previously referred to in this Notice. For convenience, these questions have been reproduced in full below:

(2) “An explanation of how your legal costs are going to be paid.

(3) What advice have you received about the school’s and the governors’ liability for the costs of this case.

(4) How much has the court case cost the Governing Body to date?

(5) How much do you anticipate it is going to cost in total?”

74. of the request of 10 March 2008 asked for information about how the Governing Body's legal costs were going to be paid, question 3 asked for details of the advice the Governing Body had received about the school's and Governing Body's liability for the costs of this case, how much the court case had cost the Governing Body to the date of that request and the anticipated total costs.
75. Question 11 of the request of 6 March 2009 asked:
"What arrangements are being made by the Governing Body to fund all costs arising out of the [named individual] case?"
76. In the Commissioner's view, question 11 of the request of 6 March 2009 is similar to question 2 of her previous request of 10 March 2008 which asked for:
"an explanation of how your legal costs are going to be paid"
77. However, section 14(2) can only be engaged where a public authority has previously complied with a request for information. It is not obliged to comply with a subsequent identical or similar request from that individual unless a reasonable interval has elapsed between compliance with the previous request and the making of the current request.
78. The Commissioner has not formed a judgement regarding compliance with the request of 10 March 2008 but the complainant does not consider that the Governing Body complied with that request. As there is a disagreement between the complainant and the public authority on this issue, the Commissioner has gone on to consider whether a reasonable time had elapsed between the requests (see paragraph 81 of this Notice).
79. Question 12 of the request of 6 March 2009 asked:
"Did the Board of Governors receive advice about how much the court case was likely to cost? On what date did it receive that advice? What was the advice on costs?"
80. The Commissioner considers that this question differs to questions 2 to 5 of the request of 10 March 2008. Nevertheless, for the sake of thoroughness, he has gone on to consider whether a reasonable time has elapsed between the requests.
81. Whilst the Act does not specify what constitutes a 'reasonable interval' between requests the Commissioner's guidance regarding the aggregation of requests for the refusal on the basis of section 12 (costs) states that requests from the same individual for similar information can be aggregated if received within 60 working days of the previous

request. Using this guidance as a basis, the Commissioner has concluded that the interval between requests in this case (10 March 2008 to 6 March 2009) of nearly one calendar year is reasonable.

82. The Commissioner is also mindful that at the time of the complainant's request of 10 March 2008, the Judicial Review was on-going. However it had concluded at the time of her request of 6 March 2009. The Commissioner considers that this is significant because if the information held was unlikely to have altered during the period between requests then it is more likely that the second request could be considered repeated. In this case it is possible that the information had changed.
83. Taking the above two factors into consideration, the Commissioner has determined that it was not therefore appropriate for the Governing Body to apply section 14(2) of the Act to either question 11 or 12 of the request of 6 March 2009.

Exemptions

Section 21 - Information accessible to the applicant by other means

84. Section 21 of the Act provides that information which is reasonably accessible to the applicant is exempt information.
85. The Governing Body refused points 3 and 7 of the complainant's request on the basis that this exemption was engaged. As stated in paragraph 67 of this Notice, the Commissioner cannot make a decision regarding any exemptions relied on in relation to point 7 of the request of 6 March 2009. The Commissioner's investigation of this exemption therefore relates solely to point 3 which stated:

"Has Liberty billed the school with their costs, and if so, what are those costs?"

86. In order for a public authority to rely on section 21 of the Act, it must hold this information and it must be 'reasonably accessible' to the applicant by other means. The Commissioner is satisfied that the Governing Body holds this information. However, the Commissioner notes that in its refusal notice, the Governing Body instructed the complainant to *"contact the originating party"* in order to obtain the information requested. It subsequently confirmed to the Commissioner that it considered this information to be available via Liberty and the individual at the centre of the relevant court case.
87. Liberty is an independent campaigning organisation working to protect civil liberties and to promote human rights. It is not a public authority and not bound by the Act. Nor is the individual in question a public authority for the purposes of the Act. The sources in question could not

be required to disclose the relevant information and the Governing Body has not demonstrated that the information is available by any other means. As such the Commissioner does not consider that the Governing Body has demonstrated that section 21 of the Act is engaged.

Section 32 – Court records

88. Section 32 exempts information contained in certain litigation documents and court, tribunal and inquiry records and applies regardless of the content of the information.
89. Section 32 is an absolute class-based exemption. This means that in order to demonstrate that it is engaged, it is simply necessary to show that information in question conforms to the class specified in the relevant subsection of section 32. Where a class-based exemption is claimed it is not necessary to demonstrate prejudice or harm to any particular interest in order to engage the exemption. Also, as it is an absolute exemption, it is not necessary to consider the public interest test.
90. The Governing Body has cited section 32 for questions 3 and 7 of the complainant's request of 6 March 2009. However, as stated in paragraph 67 of this Notice, the Commissioner cannot make a decision in relation to the exemptions cited for question 7 without having had sight of the information itself. The Commissioner's analysis of this exemption therefore relates solely to question 3, which asked whether Liberty had billed the school for its costs, and, if it had, for details of those costs.
91. The Commissioner notes that the Governing Body has not cited a subsection of this exemption. However, as the request centres around the legal costs and legal advice in relation to a Judicial Review, the Commissioner considers that the appropriate subsection of this exemption is 32(1) as confirmed in section 32(4)(a) of the Act.
92. Section 32(1) of the Act states:

“Information held by a public authority is exempt information if it is held only by virtue of being contained in –

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,*
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or*
- (c) any document created by-*

(i) a court, or

(ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter."

93. In considering the extent to which the withheld information satisfies the criteria laid down by the Act, the Commissioner has taken into account the observations on the nature and scope of the section 32 exemption contained in the case of *Mitchell v Information Commissioner* (EA/2005/0002).
94. In the case of *Mitchell v Information Commissioner*, section 32(1) is described as applying to three classes of court document. While paragraphs (a) and (b) relate to documents filed or served by the parties or by a third party pursuant to an order of the court, paragraph (c) refers to documents created by a court or a member of the administrative staff of the court.
95. The Commissioner considers that if the exemption is engaged, the information relevant to this request is most likely to fall within 32(1)(c)(ii) of the Act. However, the Governing Body has declined to provide further arguments in support of the exemption. The Commissioner's guidance regarding this exemption state that examples of court records covered by the exemption include witness statements, statements of case, details of how and when a fine is paid, warrants issued by a magistrate at his home, indictment (charge) sheets and bail application sheets. However, in the absence of further arguments the Commissioner is not aware of how the information requested under point 3 of the request could satisfy the criteria laid down by the Act, and as a consequence he has no alternative other than to find the exemption not engaged.

Section 42 – Legal professional privilege

96. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege.
97. Legal professional privilege (LPP) is not defined in the Act or in any other legislation. It is a common law concept shaped by the courts over time.
98. LPP is intended to protect the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI* (EA/2005/0023) the former Information Tribunal described LPP as:

"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers related communications

and exchanges which contain or refer to legal advice which might be imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation...”

99. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA (EA/2007/0136; 8 August 2008)*.
100. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
101. The Governing Body has cited LPP for information in respect of points 3, 7, 12 and 13 of the request. As stated in paragraph 67 of this Notice, the Commissioner is not able to investigate any of the exemptions contained within Part II of the Act in relation to question 7. The Commissioner's investigation will therefore focus only on points 3, 12 and 13.
102. The Commissioner would also point out that he has not had sight of the actual documents which contain the information but that the Governing Body has provided him with some arguments and a limited amount of withheld information in respect of points 3, 12 and 13.
103. Although the Governing Body has relied on LPP, it has not specified whether it considers the information to have litigation privilege or legal advice privilege. As this information relates to the judicial review, the Commissioner has therefore concluded that litigation privilege is more relevant.
104. In his determination of whether this information does in fact attract LPP, the Commissioner has considered both the nature of the information and the originator of that information.
105. Point 3 of the request asked whether Liberty had billed the Governing Body for its costs relating to the judicial review, and if so, for details of those costs.
106. Point 12 asked whether the Governing Body had received advice about how much the court case was likely to cost, if so, the dates of that advice and for details of that advice.

107. Question 13 asked if the Board of Governors were told who was liable for the legal costs of the court case and whether they were advised that its members may have potential personal liability for any legal costs.
108. In the Commissioner's view, information relevant to point 3 could not constitute legal advice. The request is for information regarding the claimant's costs and the Commissioner cannot conceive any circumstances under which the Governing Board would have requested or received legal advice in relation to this information.
109. Information in respect of point 12 relates to generic estimates for the likely costs associated with defending the judicial review. The Commissioner is not persuaded that any information held by the Governing Body relates to a communication between a lawyer and their client, or that it is for the dominant purpose of obtaining legal advice. In the absence of any further arguments in respect of why the Governing Body considers that this information attracts LPP, the Commissioner does not therefore consider that section 42(1) is engaged for this information.
110. The Commissioner has therefore gone on to consider the information in respect of point 13, which relates to advice concerning the financial liability for those costs. Based on the information he has seen, the Commissioner is satisfied that the information in respect of this question was provided by a legal advisor to its client and was for the purpose of preparing for litigation. The Commissioner is therefore satisfied that information in respect of question 13 does attract LPP and has gone on to consider the public interest test.

Public interest arguments in favour of disclosing the requested information

111. The Commissioner is mindful that there will always be an assumption in favour of disclosure due to the need for accountability and transparency in the decision making process of the public authority.
112. This particular case is no exception and the Commissioner notes there is a strong public interest in favour of disclosure of the information in the interests of transparency regarding the decision of the Governing Body to defend the Judicial Review.
113. There is also a strong public interest in favour of disclosure of the information so that the Governing Body is accountable for its decision to the pupils, staff and parents of the school and indeed the wider community. Any decision to defend a Judicial Review will not only involve a significant amount of time but will potentially have significant financial implications. In this case, the Governing Body lost the Judicial Review and was therefore liable for the costs of both the defence and

the claimant. That there is a strong public interest in accountability for its decision making is therefore undeniable.

Public interest arguments in favour of maintaining the exemption

114. The Commissioner is mindful of the inherent strong public interest test in favour of maintaining the right of LPP between a client and a legal advisor in the interests of safeguarding the right of any person to obtain free and frank legal advice which goes to serve the wider administration of justice. This position was endorsed by Justice Williams in the High Court case of *DBERR v Dermod O'Brien* who stated:

"...Section 42 cases are different simply because the in-built public interest in non-disclosure itself carries significant weight which will always have to be considered in the balancing exercise (para 41).

115. Although the Commissioner notes that the judicial review had concluded at the time of the request, he is aware that there is satellite litigation in progress in relation to the Judicial Review. He therefore considers that this adds further weight to factors in favour of maintaining the exemption.

Balance of the public interest arguments

116. The Commissioner accepts that there is a strong public interest in favour of disclosure of the information in this particular case in the interests of transparency, accountability and to widen the public debate.
117. However, the Commissioner is mindful of the fact that there is a general public interest inherent in the exemption due to the importance of the principle behind LPP of safeguarding openness in all communications between client and lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice.
118. In summing up the case of *Bellamy v the Information Commissioner and the DTI*, the Information Tribunal stated (in paragraph 35) that: "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong counter-veiling considerations would need to be adduced to override that inbuilt public interest." In summary, legal professional privilege was referred to as being "a fundamental condition" of justice and "a fundamental human right", not limited in its application to the facts of particular cases.
119. The Commissioner has also taken into consideration, that although the Judicial Review itself was concluded at the time of the request, there remained on-going satellite litigation which adds further weight to the factors in favour of maintaining the exemption.

120. In this particular case, the Commissioner considers that the balance of public interest favours maintaining the exemption and has therefore concluded that section 42(1) of the Act is engaged for point 13 of the complainant's original request. As the Commissioner has decided that section 42(1) is engaged in respect of this question, he has not gone on to consider any of the other exemptions cited for this information (section 31 and 41).

Section 41 – Information provided in confidence

121. The Governing Body applied this exemption to points 3, 7, and 13 of the complainant's request of 6 March 2009.
122. Section 41 provides an exemption for information provided in confidence. Section 41(1) of the Act states:

“Information is exempt information if –

(a) it was obtained by the public authority from any other person (including another public authority), and

(b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

123. There are therefore two components to determining whether the exemption under section 41 is engaged:
- Information must have been obtained by the public authority from another person. A person may be an individual, a company, a local authority or any other 'legal entity'. It is not restricted to information provided verbally or in writing. It is the information itself, and not the document or other form in which it is recorded, which needs to be considered.
 - Disclosure of the information would give rise to an actionable breach of confidence. In other words, if the public authority disclosed the information, the provider or third party could take the authority to court.

Was any of the requested information obtained by the public authority from a third party?

124. In deciding whether information has been 'obtained from any other person' the Commissioner generally focuses on the content of the information as opposed to the mechanism by which it was imparted and recorded. This is consistent with the Tribunal's ruling in the case of the Department for Business, Enterprise and Regulatory Reform (DBERR)

and the Friends of the Earth where the complainant requested a copy of information about meetings and correspondence between the DTI (the predecessor of DBERR) and the CBI. [EA.2007/0072]

125. The Tribunal rejected the Commissioner's arguments that because the DTI had created the record of the information, the exemption was not engaged arguing that the information contained within it had been obtained from a third party. The Tribunal went on to say:
- "...the Commissioner confuses the information imparted and the form in which it is recorded, or the party by whom it is recorded. The consequences of such an application, for example, are that highly confidential information passed by an informant to a police officer would be protected if it was recorded in a letter sent to the police by that source, but would not be protected if the police officer met the source, had a conversation, and then recorded it in a statement or memorandum. This privileges the accident of form (or record) over content and cannot be correct. (para 78)"*
126. Therefore, the Commissioner's view is that there is no requirement for documents to physically pass from one party to another in order to demonstrate that information was 'obtained from' a third party. He considers that information provided by one party – for example in a meeting - which is transcribed or recorded by a second party can fall under section 41(1)(a) of the Act if that record contains information disclosed to it in whatever form from a third party.
127. In his consideration of whether any or all of the information requested by the complainant under points 3, 7 and 13 was provided by a third party, the Commissioner is mindful that it is the content of any such information that is relevant, as opposed to the mechanism by which it was imparted or recorded.
128. The Commissioner has considered the information which has been refused on the basis of section 41. The Governing Body cited section 41 in relation to information it held relevant to points 3, 7 and 13. It is also possible, but not clear, that it intended to cite section 41 for point 12 and the Commissioner has also considered whether section 41 is engaged in relation to that point. The Commissioner has taken each question individually but as stated in paragraph 67 of this Notice, he has not investigated any of the exemptions cited for point 7 and, as he has determined that section 42 is engaged for question 13, he has focused his investigation on question 3 and question 12.
129. Point 3 of the request asked the Governing Body to confirm if Liberty had billed it with its costs, and if so what were the costs.

130. Point 12 asked if the Board of Governors received advice regarding the likely costs of the court case, and for both the date and nature of this advice.
131. Although the Commissioner has not had sight of the actual documentation in respect of points 3 and 12, the Commissioner accepts that any information held by the Governing Body in relation to point 3, (from Liberty) and point 12 (from the Local Authority or some legal entity) would therefore have been provided by a third party.

Would disclosure of information constitute an actionable breach of confidence?

132. A breach will always be considered actionable if:
- the information has the necessary quality of confidence;
 - the information was imparted in circumstances importing an obligation of confidence; and
 - there must be an unauthorised use of that information to the detriment of the confider (the element of detriment is not always necessary).
133. This three part test is taken from the case of *Coco v Clark* (see paragraph 135, below), which the Commissioner considers relevant to this case.
- (i) Would the requested information have the necessary quality of confidence to justify the imposition of an obligation of confidence?**
134. Information will have the necessary quality of confidence if it is not otherwise accessible, and if it is more than trivial. Information which is known only to a limited number of individuals will not be regarded as being generally accessible or in the public domain, whilst information which is of importance to the confider should not be considered trivial.
135. This is consistent with *Coco v Clark* by Megarry J, in *Coco v A N Clark (Engineers) Limited* (1968) FSR 415 (*Coco v Clari*) and cited by the former Information Tribunal (Tribunal) in *Bluck v The Information Commissioner & Epsom St. Helier University NHS Trust* (EA/2006/0090). According to Megarry J: which stated that,
- "However confidential the circumstances of communication, there can be no breach of confidence in revealing something to others which is already common knowledge."*

136. In his determination of whether the information contains the necessary quality of confidence the Commissioner has again considered each point individually:
137. The information requested in points 3 and 12 is not generally accessible or in the public domain and, as it would be considered important to the confider, it would not therefore be trivial. The Commissioner therefore accepts that the information contains the necessary quality of confidence.

(ii) Could the information be considered to have been imparted in circumstances importing an obligation of confidence?

138. The Commissioner considers that information which is shared in public is not confidential because the circumstances in which it is provided do not give rise to an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly. If information is provided in circumstances that created an obligation of confidence, the circumstances in which any further information provided subsequently, connected to and arising out of the first provision, will also give rise to an implied obligation of confidence. Again, the Commissioner has considered the information relevant to each point separately.
139. In relation to point 3, the Commissioner has considered whether the bill for Liberty's costs in respect of this Judicial Review would have been imparted in circumstances importing an obligation of confidence.
140. Liberty financed the case for the Claimant and since the Judicial Review found in the Claimant's favour, Liberty was entitled to ask the Governing Body to pay its costs associated with Judicial Review.
141. However, whether it forwarded a bill for those costs to the Governing Body, and if it did, whether details of those costs could be considered to be imparted in circumstances giving rise to an obligation of confidence needs to be considered. The Governing Body has not stated that there was any explicit obligation of confidence. The Commissioner has therefore considered if there was likely to be an implicit obligation of confidence.
142. The Commissioner notes that there is no absolute test of what constitutes a circumstance giving rise to an obligation of confidence. However, the judge in the case of *Coco and Clark* discussed in paragraph 135 of this Notice suggests that the 'reasonable person' test may be useful. The judge stated:

"If the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised that upon

reasonable grounds the information was being given to him in confidence."

143. The Commissioner has considered whether a reasonable man would consider that if he was told that Liberty had billed the Governing Body with its costs he would realise it was information being given in confidence. The fact that the Governing Body defended and lost the Judicial Review is indeed in the public domain and has been reported widely in the local and national press. Additionally, it is also in the public domain that Liberty represented the Claimant of the Judicial Review. It is also widely known that the losing party in a court case is liable for the legal costs of the other party. The Commissioner considers that a reasonable man would not therefore assume that this information was given to him in confidence. Nevertheless, for the purposes of completeness, he has gone on to consider the issue of detriment in paragraph 150 of this Notice.
144. The Commissioner has also applied the same test in his consideration of whether the actual details of Liberty's costs were imparted in circumstances giving rise to an implicit obligation of confidence.
145. In the Commissioner's opinion, a reasonable man standing in the shoes of the recipient of the information in relation to the actual costs (as opposed to whether a bill for those costs had been received by the Governing Body) incurred by Liberty may conclude that it was given to him in confidence. The Commissioner he has therefore concluded that the information relevant to this part of the request was imparted in circumstances giving rise to an obligation of confidence. The Commissioner has therefore considered in paragraph 150 the issue of detriment to the confider in respect of this information.
146. The Commissioner has also considered the information relevant to point 12 that relates to advice given to the Board of Governors concerning the likely costs of the court case. The Commissioner notes that the request asked for information held by the Governing Body on advice it received, the dates the advice was given and the nature of the advice itself. The issue therefore is whether the Governing Body received advice, and if so the nature of the advice itself.
147. As before, the Commissioner is not aware of any explicit obligation of confidence in relation to this information and he has therefore considered whether a reasonable man would realise that the information had been provided in confidence. In the Commissioner's view, a reasonable man standing in the shoes of the recipient of the information would not realise that the information had been given to him in confidence as any individual, organisation or company considering defending a court case is likely to take advice on the matter.

148. In terms of the advice itself, the Commissioner notes that such advice is likely to be generic in nature, regarding the approximate costs of defending a judicial review. However, for the purposes of completeness, he has considered the issue of detriment in paragraph 151 and 153 below.

(iii) Detriment to the confider

149. As the Commissioner has concluded that information in respect of point 3 of the request, regarding the actual costs Liberty incurred in relation to the judicial review, was imparted in circumstances giving rise to an obligation of confidence, he has gone on to consider if there was an unauthorised use of the information whether there would be any detriment of the confider.

150. It is often stated that for disclosure to constitute a breach of confidence there has to be a detrimental impact to the confider. However, detriment is not in fact a prerequisite of an actionable breach of confidence in the case of personal and private information. Establishing detriment in the case of information of a personal nature is not therefore crucial to this three part test. However, where the information is not personal in content, the Commissioner would generally expect there to be some detriment to the confider.

151. In his consideration of whether the disclosure of the costs in question would have a detrimental impact on the confider, the Commissioner notes that the Governing Body has declined to offer any arguments in this regard. In the absence of any arguments from the authority, the Commissioner struggled to understand the detriment to Liberty that would arise from the disclosure of the actual costs. He was therefore left with little option but to conclude that Liberty could not suffer any detriment. As the Commissioner has determined that in this case detriment is necessary in order to engage the exemption he has concluded that all three elements of the test of confidence have not been satisfied. As a result the Commissioner has concluded that section 41 of the Act is not engaged in relation to point 3 of the request.

152. The Commissioner has gone on to consider any possible detriment in respect of the disclosure of information in respect of question 12.

153. Again, the Governing Body has declined to offer any arguments in this regard. In the absence of any arguments from the authority, the Commissioner struggled to find any detriment to either the LEA or a legal advisor of the disclosure of information in respect of information regarding advice on the costs, dates and nature of the advice. As with point 3, he was therefore left with little option but to conclude that neither the LEA nor a legal advisor would suffer any detriment. As the

Commissioner has determined that in this case detriment is necessary in order to engage the exemption he has concluded that all three elements of the test of confidence have not been satisfied. As a result the Commissioner has concluded that section 41 of the Act is not engaged in relation to question 12 of the complainant's request.

Section 31 – Law enforcement

154. Section 31 relates to law enforcement, with section 31(1)(a) –(f) covering broad areas of law enforcement, whilst section 31(1)(g)-(i) relates to specific law enforcement purposes.
155. Section 31 is a qualified and prejudice based exemption. This means that there is a two part test required for section 31 to be engaged. Firstly, it must be at least likely that disclosure of the information would result in prejudice relevant to the exemption. Where this is likely, consideration of the public interest test must be given and where it can be demonstrated that in all the circumstances of the case, the public interest of maintaining the exemption outweighs the public interest in disclosure of the information, the exemption will be engaged.
156. The Governing Body has cited section 31 in relation to the information relevant to points 3, 7, 12 and 13 of the complainant's request. As stated in paragraph 67 of this Notice, the Commissioner is unable to consider any of the exemptions contained in Part II of the Act in relation to question 7 and as the Commissioner has already determined that section 42(1) is engaged in respect of question 13 he has focused his investigation of this exemption on question 3 and question 12.
157. The Governing Body did not specifically cite a subsection for information withheld under this exemption in its internal review. However, it did inform the complainant that disclosure of the information would prejudice the administration of justice. In subsequent correspondence, the Governing Body has also relied on section 31(1)(c). The Commissioner also considers that the only possible subsection which may be of relevance to this information is section 31(1)(c) which states that:

“Information ...is exempt information if its disclosure under this Act would, or would be likely to, prejudice the administration of justice.”
158. In the Information Tribunal hearing of *Hogan v The Information Commissioner and Oxford City Council (EA/2005/0030)* ('Hogan') the tribunal stated that:

“The application of the ‘prejudice test’ should be considered as involving a number of steps. First, there is a need to identify the applicable interest(s) within the relevant exemption... Second, the nature of

'prejudice' being claimed must be considered... A third step for the decision-maker concerns the likelihood of occurrence of prejudice."

159. When considering the nature of the prejudice, the Tribunal stated in the hearing of Hogan that:

"An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and the prejudice is, as Lord Falconer of Thoroton has stated "real, actual or of substance" (Hansard HL (VOL. 162, April 20, 2000, col.827). If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

160. As stated above in paragraph 158, the third step of the prejudice test is to consider the likelihood of occurrence of the prejudice claimed. The Commissioner notes that there are two limbs to this test; "would be likely to prejudice" and "would prejudice". The first limb of the test places a lesser evidential burden on the public authority to discharge. "Would be likely to prejudice" was considered in the Information Tribunal hearing of *John Connor Press Associates Limited v The Information Commissioner (EA/2005/0005)*. The Tribunal stated that:

"...the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

161. The second limb of the test "would prejudice" places a much stronger evidential burden on the public authority to discharge. Whilst it would not be possible to prove that prejudice would occur beyond any doubt whatsoever, it is the Commissioner's view that prejudice must be at least more probable than not.

The prejudice test

162. In his consideration of this exemption, the Commissioner has attempted to follow the three part test outlined in paragraph 158 of this Notice.
163. The Commissioner notes that the Governing Body has identified the applicable interests as both the Claimant and the Defendant in the case of the Judicial Review.
164. The Commissioner also notes that the Governing Body has argued that disclosure of the information:

"...would clearly prejudice the Administration of Justice to both the Claimant and the Defendant as it is currently a matter of on going litigation between the parties."

165. However, the Governing Body has not identified the nature of the prejudice which it considers 'would' occur and in the absence of any arguments from the Governing Body regarding the nature of the prejudice or the likelihood of that prejudice occurring, the Commissioner is unable to conclude that disclosure of the relevant information would prejudice the administration of justice. As the Governing Body has failed to identify that disclosure of the information would result in prejudice to the administration of justice and the Commissioner himself has been unable to identify the nature of any prejudice, he has determined that section 31(1)(c) is not engaged for information held in respect of either points 3 or 12 of the request of 6 March 2009. He has not therefore gone on to consider the public interest test.

Procedural Requirements

Section 1(1)(b) – Right to information

166. As the Authority did not deal with the request for information in accordance with section 1(1)(b) by inappropriately relying on section 12(1), 14(2), 21(1), 31(1)(c), 32(1)(c)(ii), 41(1) and 42(1) for some of the information, it has breached section 1(1)(b) of the Act.

Section 10 – Time for compliance with the request

167. Section 10 of the Act stipulates the timescale for complying with a request for information. Section 10(1) states:

"...a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

168. As the Commissioner has determined that the Governing Body incorrectly withheld information in respect of sections 12(1), 14(2), 21(1), 31(1)(c), 32(1)(c)(ii), 41(1) and 42(1) the Governing Body has breached section 10(1) of the Act.

Section 17 – Refusal of the request

169. Section 17 of the Act is concerned with the refusal of the request.

Section 17(1)

170. Section 17(1) provides that:

"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."

171. The Governing Body's failure to cite all exemptions relied on under Part II of the Act and to state why the exemptions applied, represents a breach of section 17(1) of the Act.

Section 17(3)(b)

172. The Commissioner notes that the Governing Body also failed to explain in the case of qualified exemptions (sections 31 and 42), why in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information and it therefore breached section 17(3)(b) of the Act.

Section 17(5)

173. Section 17(5) of the Act states:

"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."

174. The Governing Body's failure to cite section 12(1) and section 14(2) in its refusal notice therefore means that it breached section 17(5) of the Act.

Section 17(7)

175. Section 17(7) of the Act provides that:

"A notice under section (1), (3) or (5) must –

(d) 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

(e) contain particulars of the right conferred by section 50."

176. The Commissioner notes that the refusal notice issued by the Governing Body did not contain particulars of its internal complaints procedure or the complainant's rights under section 50 of the Act. The Commissioner has therefore recorded a breach under section 17(7) of the Act in relation to the Governing Body's handling of this request for information.

The Decision

177. The Commissioner's decision is that the public authority dealt with the following elements of the request of 6 March 2009 in accordance with the requirements of the Act:

- Information which fell under point 9 of the request was not held and therefore section 1(1)(a) was correctly applied.
- Information in respect of point 13 of the request was correctly withheld under section 42(1)

178. However, the Commissioner has also decided that the following elements of the request were not dealt with in accordance with the Act:

- The public authority did not deal with the request for information in accordance with section 1(1)(b) insofar as it inappropriately relied upon sections 12, 14(2), 21, 31(1)(c), 32(1)(c)(ii), 41(1) and 42(1) to withhold some of the requested information.
- In failing to comply with the requirements of section 1(1)(b) within 20 working days it also breached section 10(1).
- In failing to cite all exemptions relied on under Part II of the Act the Governing Body breached section 17(1).
- The Governing Body also breached section 17(3) of the Act by failing to give details of its public interest test for the qualified exemptions it relied on under Part II of the Act.
- In failing to cite sections 12(1) and 14(2) in its refusal notice, the Governing Body breached section 17(5).
- The failure of the Governing Body to give details of its internal complaints procedure and the particulars of complainant's rights under section 50 of the Act was a breach of section 17(7) of the Act.

Steps Required

179. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
- Disclose to the complainant the information he has decided is not exempt under sections 14(2), 21(1), 31(1)(c), 32(1)(c)(ii), 41(1) and 42(1); namely information requested under points 3, 11, and 12 of the request of 6 March 2009.
 - Either disclose to the complainant the information requested under points 7 of the request that was refused on the basis of section 12, or issue a valid refusal notice citing the relevant exemptions under Part II of the Act.
 - Either disclose the dates of information requested under point 10 of the request or issue a valid refusal notice citing the relevant exemption under Part II of the Act.
180. The public authority must take the steps required by this notice within 35 calendar days of the date of this notice.

Failure to comply

181. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Other matters

182. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Engagement with the Commissioner

183. During the course of his investigation, the Commissioner has encountered considerable delay on account of the public authority's reluctance to meet the timescales for response sent out in his letters. Furthermore, the Commissioner has met with resistance in his attempts to understand the public authority's reasons for handling the request as it did and for invoking particular exemptions. The delays and resistance were such that the Commissioner was forced to issue an Information Notice in order to obtain details relevant to his investigation.

184. Having considered the public authority's marked failure to cooperate with his investigation the Commissioner has concerns that it might not fully understand its obligations under the Act. In order to ensure that future investigations relating to complaints about the public authority are not subject to similar delays and resistance, the Commissioner intends writing to the authority to seek assurances in this regard.

Internal reviews

185. Under the Act, a public authority is not legally required to have an internal review procedure, but in order to conform with the Section 45 Code of Practice each public authority should have a review procedure in place. The Commissioner has issued guidance concerning the internal review procedure to assist public authorities in this regard.
186. The review should be impartial, thorough and swift and the outcome must be notified to the complainant promptly. The review should be a one stage process and, in the Commissioner's view, in most cases completed within 20 working days. In exceptional cases it may be appropriate to take longer but the Commissioner does not consider that the process should exceed 40 working days.
187. In this particular case, the Commissioner notes that the internal review process and the timescales for providing a response failed to adhere to either the section 45 Code of Practice or his own guidance.
188. In terms of the process, the Commissioner notes that the Governing Body's letter which communicated the outcome of its internal review informed the complainant that it would conduct an internal review of points 3,7,12 and 13 of her request. However, the Commissioner considers that the Governing Body's letter dated 30 June 2009 constituted the outcome of its internal review and, as it should only be a one stage process, he is concerned that the Governing Body may not have a full understanding of the internal review process.
189. The Commissioner also notes that the complainant expressed dissatisfaction with the original response from the Governing Body on 9 June 2009. However, the 'second stage' of the Governing Body's internal review was not completed until 22 September 2009 which is well in excess of the 40 working days the Commissioner considers acceptable in exceptional circumstances.
190. The Commissioner hopes the Governing Body's approach to the internal review in this case is not representative of its usual approach in this regard.

Right of Appeal

191. Either party has the right to appeal against this Decision Notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

192. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
193. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 20th day of December 2010

Signed

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

Legal Annex

General Right of Access

Section 1(1) provides that -

"Any person making a request for information to a public authority is entitled –

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

"Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14."

Time for Compliance

Section 10(1) provides that –

"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."

Exemption where cost of compliance exceeds appropriate limit

Section 12(1) provides that –

"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."

Vexatious or Repeated Requests

Section 14(1) provides that –

"Section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious"

Section 14(2) provides that –

“Where a public authority has previously complied with a request for information which was made by any person, it is not obliged to comply with a subsequent identical or substantially similar request from that person unless a reasonable interval has elapsed between compliance with a previous request and the making of the current request.”

Refusal of Request

Section 17(1) provides that -

“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 -

- (f) states that fact,
- (g) specifies the exemption in question, and
- (h) states (if that would not otherwise be apparent) why the exemption applies.”

Section 17(2) states –

“Where–

- (i) in relation to any request for information, a public authority is, as respects any information, relying on a claim-
 1. 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
 2. that the information is exempt information only by virtue of a provision not specified in section 2(3), and
- (j) 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."

Section 17(3) provides that -

"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 -

(k) 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

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

Section 17(4) provides that -

"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.

Section 17(5) provides that –

"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."

Section 17(6) provides that –

"Subsection (5) does not apply where –

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

(n) 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

(o) 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."

Section 17(7) provides that –

"A notice under section (1), (3) or (5) must –

(p) 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

(q) contain particulars of the right conferred by section 50."

Information Accessible by other Means

Section 21(1) provides that –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

Section 21(2) provides that –

"For the purposes of subsection (1)-

(r) information may be reasonably accessible to the applicant even though it is accessible only on payment, and

(s) information is to be taken to be reasonably accessible to the applicant if it is information which the public authority or any other person is obliged by or under any enactment to communicate (otherwise than by making the information available for inspection) to members of the public on request, whether free of charge or on payment."

Section 21(3) provides that –

"For the purposes of subsection (1), information which is held by a public authority and does not fall within subsection (2)(b) is not to be regarded as reasonably accessible to the applicant merely because the information is available from the public authority itself on request, unless the information is made available in accordance with the authority's publication scheme and any payment required is specified in, or determined in accordance with, the scheme."

Law enforcement

Section 31(1) provides that –

"Information which is not exempt information by virtue of section 30 is exempt information if its disclosure under this Act would, or would be likely to, prejudice-

- (a) the prevention or detection of crime,
- (b) the apprehension or prosecution of offenders,
- (c) the administration of justice,
- (d) the assessment or collection of any tax or duty or of any imposition of a similar nature,
- (e) the operation of the immigration controls,
- (f) the maintenance of security and good order in prisons or in other institutions where persons are lawfully detained,
- (g) the exercise by any public authority of its functions for any of the purposes specified in subsection (2),
- (h) any civil proceedings which are brought by or on behalf of a public authority and arise out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment, or
- (i) any inquiry held under the Fatal Accidents and Sudden Deaths Inquiries (Scotland) Act 1976 to the extent that the inquiry arises out of an investigation conducted, for any of the purposes specified in subsection (2), by or on behalf of the authority by virtue of Her Majesty's prerogative or by virtue of powers conferred by or under an enactment."

Section 31(2) provides that –

"The purposes referred to in subsection (1)(g) to (i) are-

- (a) the purpose of ascertaining whether any person has failed to comply with the law,
- (b) the purpose of ascertaining whether any person is responsible for any conduct which is improper,
- (c) the purpose of ascertaining whether circumstances which would justify regulatory action in pursuance of any enactment exist or may arise,
- (d) the purpose of ascertaining a person's fitness or competence in relation to the management of bodies corporate or in relation to any profession or other activity which he is, or seeks to become, authorised to carry on,

- (e) the purpose of ascertaining the cause of an accident,
- (f) the purpose of protecting charities against misconduct or mismanagement (whether by trustees or other persons) in their administration,
- (g) the purpose of protecting the property of charities from loss or misapplication,
- (h) the purpose of recovering the property of charities,
- (i) the purpose of securing the health, safety and welfare of persons at work, and
- (j) the purpose of protecting persons other than persons at work against risk to health or safety arising out of or in connection with the actions of persons at work."

Court Records

Section 32(1) provides that –

"Information held by a public authority is exempt information if it is held only by virtue of being contained in-

- (a) any document filed with, or otherwise placed in the custody of, a court for the purposes of proceedings in a particular cause or matter,
- (b) any document served upon, or by, a public authority for the purposes of proceedings in a particular cause or matter, or
- (c) any document created by-
 - (i) a court, or
 - (ii) a member of the administrative staff of a court, for the purposes of proceedings in a particular cause or matter."

Information provided in confidence.

Section 41(1) provides that –

"Information is exempt information if-

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person."

Legal Professional Privilege

Section 42(1) provides that –

"Information in respect of which a claim to legal professional privilege or, in Scotland, to confidentiality of communications could be maintained in legal proceedings is exempt information."