

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 8 December 2010

Public Authority: King's College Cambridge
Address: Cambridge
CB2 1ST

Summary

The complainant made a number of requests to King's College Cambridge, focusing on a number of issues relating to King's College School. The College stated that it did not hold any information in its own right. However, it refused to discuss whether any of the requested information was held by the School. Its position was that the School was not part of the College, and as it was an independent school it was not subject to the Act. Therefore it was not required to provide copies of this information. After investigating the case the Commissioner decided that for the purposes of the Act the School is part of the College, and therefore the information held by the School was covered by the provisions of the Act. Therefore the Commissioner requires the College to comply with its duties under section 1 in relation to this information. Finally the Commissioner also decided that the College had not met the requirements of section 10.

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.

Background

2. King's College Cambridge (the "College") is one of the Colleges of Cambridge University, and was established by Royal Charter in 1441.

One of the requirements of this Charter was that the College educates 16 choristers. The College's website notes that,

"One of our statutory responsibilities is to educate 16 choristers, and for this purpose the College operates King's College School."¹

3. King's College School (the "School") is a fee-paying independent school.² The College and the School are closely linked (which is of primary issue in this case), and the School is often described as an integral part of the College. For example the Independent Schools Inspectorate, in its 2010 Standards Inspection Report, described the School as,

"...an integral part of King's College and the Provost of King's is its chair of governors. The school governors are appointed by King's College and include both a number of King's fellows and those recruited from beyond the college."³

The Request

4. The complainant made a number of requests to the College centring on issues relating to the School. He made these requests in several emails on 8 and 16 March, 13 April and 6 May 2010.
5. On 8 March 2010 the complainant requested the following,
- (i) Copies of all correspondence with parents relating to questions raised by such parents in connection with the ISI inspections of Sept 2009, Jan 2010 and Feb 2010. I don't need to see the names of the parents.
 - (ii) How many people requested a copy of the advice note?
 - (iii) Confirmation that all letters and requests for information (including from parents) have been answered by the school.
 - (iv) Confirmation of the date of the "follow on" inspection which is referred to in the DCSF correspondence and the DCSF or ISI

¹ http://www.kings.cam.ac.uk/about/foi/kings-college.html#who_we_are;

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http://www.kcs.cambs.sch.uk/Groups/10875/Kings_College_School/About_Us/Prospectus/Our_School/Our_School.aspx

³

http://www.kcs.cambs.sch.uk/Groups/35258/Kings_College_School/About_Us/Inspection_Reports/Inspection_Reports.aspx

letter, advice note and report relating to such follow on inspection.

6. On 16 March 2010 the complainant wrote to the College and requested the following information,
 - (v) Has King's College School or King's College sent to any parent, fellow or Council a copy of the DCSF letter (not the Advice Note) dated 31 October 2009 and if not why not?
 - (vi) Has King's College School or King's College sent to any parent, fellow or Council a copy of the DCSF Statutory Notice dated 31 October and if not why not?
 - (vii) A list of all documents relating to the unannounced inspection and the subsequent DCSF reports and advice note which have been issued to Council.
 - (viii) Copy of advice (legal and professional) given to King's College School as a result of the serious regulatory failures notified to the school by the inspectors.
 - (ix) What action has been taken against the Headmaster and the School Bursar following the discovery of such serious regulatory failures?
 - (x) The list of documents (relating to King's College School post 28 September inspection) seen by Council.
 - (xi) What documents were seen by the Provost and each Governor prior to the Provost's letter being issued to all parents on 6 November 2009?
 - (xii) Copy of the INITIAL two-day inspection of regulatory requirements which took place in January 2010. The DCSF has confirmed that it was during this INITIAL visit that the follow up inspection took place.
7. The College responded to the requests of 8 and 16 March 2010 in an email dated 30 March 2010. It noted that the issue of whether information relating to the School was sub judice, and as such this information was not considered in its reply. It informed the complainant that the College did not, itself, hold any information related to these requests. It stated that in requests (v), (vi) and (x) it had interpreted the complainant's reference to 'Council' as the Council of the College, and that none of the documents referred to in these requests had been presented to this Council. Finally, it stated that it held no information in relation to the parts of the requests phrased "if not, why not?"
8. On 13 April 2010 the complainant wrote to the College and requested the following information,

- (xv) May I please have a copy of the advice given to the Governors of King's College School as well as the policy recommended to Council by the Governors in relation to my FOI request.
9. The College responded to this request in an email dated 5 May 2010. It informed the complainant that it did not hold any information relating to this request and stated,
- “Specifically: (1) King's College holds no information on advice given to the Governors of King's College School; and (2) the College holds no information on advice given to the King's College Council by the King's College School Governors about handling your FOI request(s).”
10. The complainant responded to this email on 6 May 2010, and wrote,
- “In connection with your reply, you say that King's College holds no information on advice given to Council by King's College School Governors about handling my FOI request. My request was for a “copy of the advice given to the Governors of King's College School as well as the policy recommended to Council by the Governors in relation to my FOI request”. Your answer may well have covered that part of my request which I have now underlined, but would you please either confirm that this is the case or let me have a copy of such policy. In addition, I would like to widen the request to include any FOI request and not just mine.”
11. The College responded to this in an email dated 20 May 2010. It confirmed that it held no copy of advice given to the Governors of the School about handling his FOI requests, nor any documents relating to policy on this matter recommended to the Council by the Governors of the School. In addition to this, it also confirmed that this response also applied to other FOI requests.
12. The complainant queried this in an email dated 20 May 2010, and noted,
- “The November 2009 Council minutes (Item 295) state “it was agreed to support the policy recommended by the King's College School Governors in relation to a Freedom of Information request”. What I do not understand is how Council can have approved something that they have not seen. The policy must have been presented to Council for it to support it. May I have a copy of that policy, or are you saying that Council approved something without reviewing what they were asked to approve?”

13. The College responded in an email dated 21 May 2010, and stated,

“I have checked and the policy was reported orally to Council in November 2009 and agreed. No documents were brought to the meeting and the only record of the discussion is the minute itself.”

The Investigation

Scope of the case

14. The complainant contacted the Commissioner on 16 June 2010 to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether any information that would fall under the scope of his requests of 8 and 16 March, 13 April and 6 May 2010 that is held by the School falls under the scope of the Act by way of the School being part of the College.
15. Therefore Commissioner considered whether the College had met with the requirements of sections 1 and 10 of the Act.

Chronology

16. It should be noted that this case is closely linked to an earlier complaint to the Commissioner about the College (FS50285876). In this earlier case the Commissioner considered whether information held by the School fell under the scope of the Act by way of the School being part of the College. Given the close links between the two cases, the Commissioner has relied upon the submissions of the College in the previous case in order to make a decision on this case. In particular, he has considered a letter from the College to him dated 16 July 2010.
17. The Commissioner wrote to the College on 1 July 2010 and informed it of the details of this case. Given that the investigation for FS50285876 was still underway at that time, he informed the College that he would wait until a decision had been made in this earlier case before proceeding with his investigation of this one.
18. Following the issuing of the Decision Notice for FS50285876 on 21 October 2010 the Commissioner wrote to the complainant on 29 October 2010 and confirmed the scope of this case. In addition to this, the Commissioner contacted the College by way of a telephone call and

informed it that he would now be issuing a Decision Notice for this case.

Analysis

Substantive Procedural Matters

Section 1 - does information held by the School come under the Act?

19. 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.”

The duty placed on a public authority under section 1(1) is subject to the provisions of section 1(2). This states that section 1(1) has effect subject to the provisions of section 1(2) and sections 2, 9, 12 and 14.

20. The full text of section 1 can be found in the Legal Annex at the end of this Notice.

21. The primary issue in this case is whether information held by the School comes under the scope of the Act by virtue of the School being part of the public authority that is the College. As noted above, if the Commissioner reaches the view that it is, the College will be under a duty to comply with the requirements of section 1.

22. The College has argued that the School is an independent school (within the meaning of section 463 of the Education Act 1996) and as such is not subject to the provisions of the Act. It has argued that although the School has close ties to the College, independent schools in general are not subject to the Act. It has also argued that this was what was intended when the Act was drawn up. It has referred both the complainant and the Commissioner to the Ministry of Justice’s response to the consultation on the designation of additional public authorities, which stated that,

“The Act and the National Curriculum do not apply to private schools. Parents and carers who choose to pay for their child to attend a private school exercise a high degree of choice and control. The Government believed that the law as it currently applies and the disciplines of the market place provide sufficient incentive for fee-paying independent schools to operate in line with the interests of pupils and their parents. It sees no justification at present to bring such schools within the scope of [the Act].”⁴

23. The Commissioner is aware that independent schools are not normally covered by the provisions of the Act. However, in this case this is complicated by the relationship between the College and the School. The College’s argument is that although the School is “an integral part” of the College and despite their close ties, it is still independent from the College for the purposes of the Act, and therefore falls outside the Act’s provisions. It has also argued that the Act applies to the Governing Body of the College, rather than to the College itself, and that information about the School is not held by the Governing Body. The complainant has argued that given the close ties between the College and the School they are, for all intents and purposes, one and the same. Therefore, information held by the School is caught by the provisions of the Act by virtue of the School being part of the College for the purposes of the Act.
24. For the Act to apply to this information, the information has to be held by a public authority, as defined in the Act. In this case, the relevant definition of a ‘public authority’ is set out in paragraph 53 of Schedule 1 of the Act. This states that the definition of a public authority includes,

“(1) The governing body of –

...

(b) a university receiving financial support under section 65 of the Further and Higher Education Act 1992,

...

(e) any college, school, hall or other institution of a university which falls within paragraph (b).”

⁴ http://www.justice.gov.uk/consultations/docs/consultation-response-_section5.pdf

In this case the Governing Body of the College is a public authority for the purposes of the Act by way of paragraph 53(1)(e) of Schedule 1.

25. The College has argued that,

“Clearly, the School is not (and is not part of) the College’s Governing Body. The question is therefore whether information that the School holds is information that is held “on behalf of” the College’s Governing Body [...] or whether it is held on its own behalf.”

The College has gone on to provide substantive arguments as to why the information held by the School is not held on behalf of the College’s Governing Body.

26. The Commissioner does not agree with this reasoning, and considers that if information is held by the College for its own purposes, it would also be held by the College’s Governing Body. Therefore the fundamental question is whether the School is part of the College for the purposes of the Act. If so, the information held by the School would be held by the College, and the College’s Governing Body. Therefore he has first considered whether the College’s Governing Body does hold the information in question by virtue of the School being part of the College.

27. In order to reach a view on this, during the investigation of the complaint the Commissioner asked the College to provide him with further information as to the School’s legal status, and asked whether the School is a legal entity in its own right. The College has confirmed that the School has no independent legal personality, and is part of the legal person that is the College.

28. The Commissioner has gone on to consider the status of the Governing Body of the School. In particular he has considered whether, despite the School being a part of the legal person that is the College, the School’s Governing Body is, in reality, independent from the College.

29. This is the position of the College. In support of this argument it has stated:

“In principle, the College’s Governing Body is ultimately responsible for the School. However, direct line management responsibility for the School lies with the School Governors (of which the [College’s] provost is the chairman). Further, under the College’s Ordinances, the School Governors report to the College’s Council (which has day-to-day responsibility for the

College's management) rather than the College's Governing Body. This is also the position in practice: the School Governors report to the Council on their Budget, and the School's Headmaster reports each year to the Council. In neither case is there a report to the Governing Body."

Therefore the College has argued that, although in principle the School's Governing Body is answerable to the College's Governing Body, in reality it reports to the College's Council. This creates a high degree of separation from the College's Governing Body.

30. To emphasise this degree of separation the College has also described the financial position of the School. It has stated that,

"...the School operates a separate budget that is maintained by the School Bursar and agreed – subject to the [College] Council's approval – by the School Governors. Although the School's budget is ultimately incorporated into the College's statutory accounts, the College's financial year is different from the School's financial year, and decisions about the School's budget are made by the Finance Committee of the School Governors, rather than the College's Council / Governing Body."

However, the Commissioner also notes that the College's Accounts list the School's income as part of the College's Consolidated Income and Expenditure Account.⁵

31. The College has sought to emphasise the separation between the School and itself – a relationship that it has described as "relatively arms-length". In particular it has pointed out that:

- the School's site is separate from the College, and members of the College do not have access to the School;
- the Headmaster appoints members of the teaching staff, the Bursar appoints non-teaching staff, and both may also engage legal advisors without reference to the College's Council or Governing Body;
- the School Governors are responsible for School Policies;
- although the College's Statutes make references to arrangements for the education of the 16 Choristers (see paragraph 2 above), the School's functions extend well beyond the education of the Choristers; and
- "...records relating to the day-to-day activities of the School are held by the School... Further, there has never been an occasion,

⁵ <http://www.kings.cam.ac.uk/files/about/college-accounts-2009.pdf>

within living memory, when the College's Governing Body has asked to see any School documents other than those that have been specifically prepared by the School for submission to the Governing Body."

32. The Commissioner acknowledges that independent schools are not subject to the Act, and he has some sympathy with the College using this as the starting point for its arguments in this case. However, he also notes that the relationship between the College and the School is somewhat unusual, and that therefore the School in this case is (potentially) in a different position to most independent schools.
33. After considering the above submissions at length the Commissioner has noted that, despite the fact that the College is arguing that the School is (for all intents and purposes) independent, it has still had to acknowledge that the College's Governing Body is ultimately responsible for the School.
34. The Commissioner has gone on to consider how independent the School's Governing Body is from that of the College. In the School's Terms and Conditions he has noticed that in the definitions it states that the School's Governors,

"...means the Governors of the School who are appointed from time to time to be responsible for governance of the School, under the terms of the governing instrument of King's College Cambridge and are directed by the Governing Body of King's College Cambridge." ⁶ [Commissioner's emphasis]

35. The Commissioner also notes that the College's Accounts state that,

"The School Governors, of which the Provost is Chairman, are appointed by the College Council and are responsible to Council and, where appropriate, to the Governing Body, for the educational and financial policy, and for the effective administration and staffing of the School."⁷
36. As noted at paragraph 29 above, the College has attempted to differentiate between the Governing Body of the College and the College's Council, arguing that the School Governors report to the College's Council rather than the College's Governing Body. In considering this argument the Commissioner has considered the

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http://www.kcs.cambs.sch.uk/Articles/164841/Kings_College_School/About_Us/School_Policies/School_Policies.aspx

⁷ <http://www.kings.cam.ac.uk/files/about/college-accounts-2009.pdf>

- governing instrument of the College, i.e. the College's Statutes and Ordinances 2007 (the "Ordinances"), in order to gain a further insight into the relationship between the Governing Body of the College, the College's Council, and the Governing Body of the School.⁸
37. The Ordinances state that the Governing Body of the College shall consist of the Provost and all the Fellows, other than Visiting Fellows and Honorary Fellows, and four members of the College's students who are in residence, at least one of whom shall be an undergraduate and one a graduate student. It also states that "There shall be held in every academic year a meeting of the Governing Body, to be called the Annual Congregation."
38. The Ordinances go on to state that the College's Council,
- "...shall have such authority in relation to the general administration and management of the affairs of the College as shall from time to time be entrusted to it by the Governing Body, and such authority may be withdrawn or modified in like manner. [Commissioner's emphasis] The Council may, to the extent of the authority so entrusted to it, exercise all powers which by the Statutes are given to the Governing Body by name, but it shall not be authorised to perform any acts which by the Statutes a Congregation is expressly required or empowered to perform."
39. The Ordinances then state that the Council may from time to time establish Council Committees to deal with specific matters of business. The Commissioner notes that one of the Council's Committees listed in the Ordinances is the School's Governors.
40. Finally, he notes that the Ordinances state that, "The arrangements for the governance of the School shall be fixed by Regulation of the Council."
41. Bearing these points in mind the Commissioner is not persuaded that the role of the College's Council in the running of the School creates the degree of separation from the College's Governing Body that has been argued. He believes that there is strong evidence that the Governing Body of the School has only limited independence from the Governing Body of the College or from the College's Council, which he believes acts on behalf of the Governing Body of the College. He also again notes that the School has no legal personality in its own right, but is instead part of the legal person that is the College. Whilst he sympathises with the College's viewpoint that as other independent

⁸ <http://www.kings.cam.ac.uk/sites/default/files/about/statutes-ordnances-2007.pdf>

schools do not fall under the scope of the Act, nor should the School in this case, he has to apply the legislation to the facts of this case. Given the peculiar relationship between the College and the School in this case, the Commissioner believes that despite the position of other independent schools in connection to the Act, in this case the information in question does come under the scope of the Act by virtue of the School being part of the College. Therefore the Commissioner believes that the College should comply with the requirements of section 1 of the Act in relation to this information (as set out at paragraph 19 above).

Procedural Requirements

42. Section 1(1) states 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.”

43. Section 1(2) states that:

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

44. Section 10(1) states 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.”

45. As the Commissioner has decided that any information held by the School (in relation to these requests) is, for the purposes of the Act, held by the College, the Commissioner believes that the College should have complied with the requirements of section 1(1) – subject to the provisions of the sections of the Act listed in section 1(2). The College’s failure to do so therefore constitutes a breach of section 1(1). Furthermore, by failing to comply with section 1(1) within 20 working days of the request the College also breached section 10(1).

46. The full texts of sections 1 and 10 can be found in the Legal Annex at the end of this Notice.

The Decision

47. The Commissioner's decision is that the College did not deal with the request for information in accordance with the Act in that:
- The College did not deal with the request for information in accordance with section 1 in so far as it claimed that it did not hold some of the requested information for the purposes of the Act. In failing to comply with the requirements of section 1 in relation to this information within 20 working days it also breached section 10(1).

Steps Required

48. The Commissioner requires the College to take the following steps to ensure compliance with the Act:

The College should meet the requirements of section 1(1) in relation to the requests made by the complainant dated 8 and 16 March, 13 April and 6 May 2010 (as detailed in paragraphs 5 to 12 above).

49. The College must take the steps required by this Notice within 35 calendar days of the date of this Notice.

Failure to comply

50. 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.

Right of Appeal

51. 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

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.

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 8th day of December 2010

Signed

**Pamela Clements
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

Section 1

- (1)** Any person making a request for information to a public authority is entitled –
- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - (b) if that is the case, to have that information communicated to him.
- (2)** Subsection (1) has the effect subject to the following provisions of this section and to the provisions of sections 2, 9, 12 and 14.
- (3)** Where a public authority –
- (a) reasonably requires further information in order to identify and locate the information requested, and
 - (b) has informed the applicant of that requirement,
- the authority is not obliged to comply with subsection (1) unless it is supplied with that further information.
- (4)** The information –
- (a) in respect of which the applicant is to be informed under subsection (1)(a), or
 - (b) which is to be communicated under subsection (1)(b),
- is the information in question held at the time when the request is received, except that account may be taken of any amendment or deletion made between that time and the time when the information is to be communicated under subsection (1)(b), being an amendment or deletion that would have been made regardless of the receipt of the request.
- (5)** A public authority is to be taken to have complied with subsection (1)(a) in relation to any information if it has communicated the information to the applicant in accordance with subsection (1)(b).
- (6)** In this Act, the duty of a public authority to comply with subsection (1)(a) is referred to as “the duty to confirm or deny”.

Section 10

- (1)** 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.
- (2)** Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.
- (3)** If, and to the extent that –
 - (a) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or
 - (b) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.

- (4)** The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.
- (5)** Regulations under subsection (4) may –
 - (a) prescribe different days in relation to different cases, and
 - (b) confer a discretion on the Commissioner.
- (6)** In this section –

“the date of receipt” means –

 - (a) the day on which the public authority receives the request for information, or
 - (b) if later, the day on which it receives the information referred to in section 1(3);

“working day” means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the

Banking and Financial Dealings Act 1971 in any part of the United Kingdom.