

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 January 2018

Public Authority: Kent County Council
Address: County Hall
Maidstone
Kent
ME14 1XQ

Decision (including any steps ordered)

1. The complainant has requested copies of correspondence between Kent County Council and the governing body of the Simon Langton Girls Grammar School which specifically references or discusses the report known as 'The Craig Enquiry' and any other memo/correspondence produced by the person conducting that investigation.
2. The Commissioner's decision is that Kent County Council has correctly applied the exemptions at sections 40(2), 36(2)(b)(i) and 36(2)(c) of the FOIA.
3. The Commissioner does not require the public authority to take any steps to ensure compliance with the legislation.

Request and response

4. On 10 May 2017 the complainant made the following request for information via the WhatDoTheyKnow website:

"Please provide copies of all correspondence between any KCC employee and any member(s) of the SLGGS Governing body, jointly and severally, which specifically references or discusses the Inquiry/Disciplinary Report known as 'The Craig Enquiry' or any other or memo/correspondence produced by Dr.Iain Craig in relation to his investigation into Simon Langton Girls Grammar School in Canterbury."
5. On 1 June 2017 the council and said that it cannot comply with the request as it would take in excess of the appropriate limit under section

- 12 of the FOIA to locate extract and collate information meeting the scope of the request. It provided an explanation as to why it is currently prohibitive to search the council estate for the requested information.
6. On the same day, the complainant requested an internal review providing reasons why he believes a search could be performed.
 7. The council provided its internal review response on 29 June 2017. It explained that it had narrowed down the timeline for the search and found 2557 individual emails with the expression 'Craig enquiry/Craig report' in them and that this was then refined by searching specifically for emails sent to, and received from, the known addresses of the SLGGS Board of Governors. It also said that a further search was carried out for any correspondence between the SLGGS Board of Governors and a particular individual that had reference to the investigation but may not have included the expression 'Craig enquiry/Craig report' and that an alternative search was conducted for any correspondence from Dr Craig that referred to the investigation. The council then said that none of the emails can be disclosed as the exemptions at sections 36(2), 40(2) and 41 of the FOIA apply.

Background

8. The council provided the following information as background to this complaint:

"SLGGS is a Voluntary Controlled ('VC') School and the council has given delegation of the management of such VC schools to the relevant Governing Body. This delegation means that the Governing Body is responsible for all matters within the school.

In 2015 the Head teacher and the Governing Body of SLGGS decided to consult parents and staff on the potential to convert to Academy status and become part of a Multi-Academy Trust with a neighbouring academy. A parent consultation meeting was held in April 2016 where parents were able to voice their concerns. The school received various complaints from parents who had no confidence in the Head teacher and Governing Body. Subsequently in July 2016, the Chair of Governors Commissioned an independent investigation, by [name redacted], into the various complaints about the school, many of which concerned the now abandoned proposal to become an academy. This investigation is termed the "Craig enquiry." During the investigation the Chair of Governors stepped down and [name redacted] was appointed. Shortly after [name of redacted] forwarded his investigation outcomes to [name redacted], the Head teacher resigned. Since the appointment of [name redacted] as the Executive

Head teacher of SLGGS, a new Chair of Governors has been appointed.

It is felt by some responders to a school consultation on the proposal of academy conversion, that there has been an orchestrated campaign of harassment and abuse both directly and through social media towards the Head teacher, the Governing Body and those who supported them in their proposal to become an academy. The council has received relentless FOI and SAR requests in relation to this investigation and its surrounding circumstances from a select number of people including the complainant.”

9. The Commissioner has previously issued decision notices on this subject matter.¹

Scope of the case

10. The complainant contacted the Commissioner on 3 July 2017 to complain about the way his request for information had been handled.
11. In response to the Commissioner’s enquiries, the council said that it identified 26 emails (or email chains) that are within the scope of the request. Of those, it identified 14 emails (or email chains) to which it had initially applied the exemption at section 36(2)(c) of the FOIA but given the passage of time, had no objections to releasing subject to redactions.
12. The Commissioner advised the council to disclose such emails to the complainant and understands that the further disclosure took place on 15 December 2017. One email was disclosed in full (email 4), 16 were disclosed with redactions (1-3, 5-17) and 9 were withheld in their entirety (18-26).
13. Following the further disclosure, the Commissioner understands that the council is maintaining reliance on exemptions as follows:

¹ <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172520/fs50658803.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172599/fs50669083.pdf>, <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172581/fs50684618.pdf>

Email/email chain number	Exemption(s) applied
1	s36(2)(c), s40(2), s41
2	s40(2)
3	s40(2)
4	Disclosed in full
5	s40(2)
6	s40(2), s41
7	s40(2)
8	s40(2)
9	s36(2)(c), s40(2), s41
10	s40(2)
11	s40(2)
12	s40(2), s41
13	s40(2)
14	s40(2), s41
15	s40(2), s41
16	s36(2)(b)(i), s40(2)
17	s36(2)(c), s40(2)
18	s36(2)(c)
19	s36(2)(c)
20	s36(2)(b)(i)
21	s36(2)(b)(i)
22	s36(2)(c)
23	s36(2)(c)
24	s36(2)(c)
25	s36(2)(b)(i)
26	s36(2)(b)(i), s40(2)

14. The complainant has confirmed to the Commissioner that this decision notice does not need to consider the application of section 40(2) where it applies to names and contact details only. As the council has applied section 40(2) to names and contact details only within emails 3, 5 and 11, such emails are outside the scope of this decision notice. The council's application of section 40(2) to names and contact details within other emails are also outside the scope of this decision notice.
15. The Commissioner considers that the information redacted from emails 6, 9, 12, 14, 15, 16 and 26 consists entirely of third party personal data. As the Commissioner is also responsible for the ensuring compliance with the Data Protection Act 1998, and she considers the information requested to be personal data belonging to a third parties, she has considered whether section 40(2) of the FOIA applies to the entirety of the information redacted from emails 6, 9, 12, 14, 15, 16 and 26. Although the council has not cited this exemption in relation to the entirety of the information redacted, it would not be appropriate for the

Commissioner to order disclosure under the FOIA which could breach the Data Protection Act 1998.

16. If the Commissioner finds that the exemption at section 40(2) applies to the entirety of the information redacted from emails 6, 9, 12, 14, 15, 16 and 26, it is not necessary to consider the application of the exemptions at sections 36(2)(b)(i), 36(2)(c) or s41 to those emails.
17. If the Commissioner finds that the exemption at section 36(2)(c) applies to the entirety of the information redacted from email 1 it is not necessary to consider the application of the exemption at section s41 to that email.
18. For the avoidance of doubt, the Commissioner has considered exemptions as follows:

Email/email chain number	Exemption(s) considered
1	s36(2)(c)
2	s40(2)
3	Outside scope – only names names/contact details redacted
4	Outside scope - disclosed in full
5	Outside scope – only names names/contact details redacted
6	s40(2)
7	s40(2)
8	s40(2)
9	s40(2)
10	s40(2)
11	Outside scope – only names names/contact details redacted
12	s40(2)
13	s40(2)
14	s40(2)
15	s40(2)
16	s40(2)
17	s36(2)(c), s40(2)
18	s36(2)(c)
19	s36(2)(c)
20	s36(2)(b)(i)
21	s36(2)(b)(i)
22	s36(2)(c)
23	s36(2)(c)
24	s36(2)(c)
25	s36(2)(b)(i)

26

s40(2)

Reasons for decision

Section 40(2)

19. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and its disclosure under the FOIA would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ('the DPA').
20. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”
21. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the data protection principles under the DPA.

Is the withheld information personal data?

22. As explained above, the first consideration is whether the withheld information is personal data.
23. The Commissioner considers that the information withheld under this exemption can be categorised as follows:
- Information about an investigation into a former head teacher, including personnel issues such as performance reviews.
 - Information relating to the contract and fees for the investigator.

- Information relating to a former member of the governing body, including previous roles.
- Information relating to complaints and a witness.
- Consultation responses.
- Sensitive personal data, including that relating to health.

24. Having viewed the requested information, the Commissioner is satisfied that it is personal data.

Does the disclosure of the information contravene any of the data protection principles?

25. In the Commissioner's guidance on the exemption for personal data², it is explained that for the purposes of disclosure under FOIA, it is the first principle that is likely to be most relevant.

26. The first data protection principle states that:

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless –

- (a) at least one of the conditions in schedule 2 is met, and
- (b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

27. In deciding whether disclosure of this information would be unfair, the Commissioner has taken into account the nature of the information, the reasonable expectations of the data subjects, the consequences of disclosure on those data subjects and balanced the rights and freedoms of the data subjects with the legitimate interests in disclosure.

Nature of the information and reasonable expectations

28. The council has said that individuals involved would have reasonably expected that any correspondence in relation to the 'Craig Enquiry' would be kept confidential and not made public due to the nature of the information. It also said that the subject of the enquiry was given an

² <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

assurance that the subsequent report and any information pertaining to the process of the enquiry would remain confidential.

29. The council submitted that, as part of the interview process, the witness would have a high expectation of privacy, and that consultees provided open and honest accounts of how they felt in relation to the proposed academisation at the time. It also said that, as part of a complaint process, it can reasonably be assumed that individuals would have a high expectation of privacy and that their information would remain confidential.
30. In relation to the investigators contract and fees, the council said that the school would have been under an obligation of confidence when it received the information and that the same can be implied to the council.
31. The Commissioner recognises that information relating to internal investigations against individuals carries a strong general expectation of privacy due to the likelihood that disclosure could cause the data subjects' distress and could also cause permanent damage to their future prospects and general reputation.
32. In her guidance on personal data³ the Commissioner states that the expectations of an individual will be influenced by the distinction between his or her public and private life and this means that it is more likely to be fair to release information that relates to the professional life of the individual. However, information relating to an internal investigation or disciplinary will carry a strong general expectation of privacy. This was recognised by the Information Tribunal in the case of *Rob Waugh v Information Commissioner and Doncaster College*⁴ when it said at paragraph 40 that:

“...there is a recognised expectation that the internal disciplinary matters of an individual will be private. Even among senior members of staff there would still be a high expectation of privacy between an employee and his employer in respect of disciplinary matters.”
33. Although the Commissioner considers that the withheld information relates to the individual's professional lives, given the nature of it, she is

³ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

⁴ Appeal no. EA/2008/0038, 29 December 2008

satisfied that the individual would have a strong expectation of confidentiality and privacy in this case.

34. The Commissioner considers it reasonable that the investigator would not expect exact details of the terms he was engaged under to be in the public domain. She also considers that former members of the governing body, complainants, the witness and consultees would have reasonable expectations that their personal information would remain private.

Consequences of disclosure

35. In order to assess the impact of the consequence of disclosure on whether disclosure would be fair, it is necessary to consider whether disclosure of the information would cause unwarranted damage or distress to the data subjects.
36. The council said that disclosure could lead to individual's receiving unwanted attention from various sources, to undue stress, and potentially risk emotional wellbeing, particularly given the expectation that the information would be kept confidential. It submitted that disclosure may cause further distress to the head teacher who was the target of a campaign of harassment from particular persons. It also said disclosure could infringe consultees' right to privacy and a family life who may become victims of unwanted attention from those who disagree with their point of view.
37. In relation to the investigators fees, the council said that although the overall fee for carrying out the investigation is known, the breakdown and the investigators commissioning rate is not known and disclosure may cause damage to relationship he has with the council.
38. The Commissioner considers that the disclosure of information relating to an internal investigation would be an intrusion of privacy, could cause damage to the head teacher's future prospects and general reputation and could cause distress, particularly as she has found that disclosure of the information requested would not have been within the individual's reasonable expectations.
39. The Commissioner also accepts that disclosure of information relating to the investigators fee and contract would be an intrusion of privacy and likely to cause distress.
40. In relation to the personal data of the former member of the governing body, the complainants, witness and consultees, the Commissioner considers that disclosure would amount to an infringement of privacy causing unwarranted damage or distress, particularly as she has found

that disclosure of the information requested would not have been within the individual's reasonable expectations.

Balancing the rights and freedoms of the data subjects with the legitimate interests in disclosure

41. The Commissioner accepts that in considering 'legitimate interests', such interests can include broad general principles of accountability and transparency for its own sake along with specific interests which in this case is knowing the exact details of correspondence relating to the 'Craig Enquiry'.
42. The complainant pointed out that the Governing Body of the school commissioned this report to provide answers to 207 complaints made about the process and other issues relating to the school but since its completion have refused to release any details of the findings of the report and has not replied to any of the 207 complaints raised. He also said that he is particularly concerned that some email correspondence may be making unfounded allegations against parents of the school and their actions in relation to trying to ascertain the truth regarding the now failed academy conversion.
43. The council acknowledged that there is a legitimate interest in the public having access to the requested information as it would aid transparency and accountability. It also said that disclosure may enable individuals to understand why the school procured the investigation in the first place but said that, following the consultation, the Chair of Governors wrote to the parents explaining that due to the number of complaints received she was commissioning the enquiry. It clarified that the circumstances of the complaints have not been released to the school community.
44. The council explained to the Commissioner that actions recommended for the school to put in place as a result of the investigation findings were shared with members of the community by letter on 7 July 2017 and that a copy of that letter is on the school's website. It said that it understands that the complaint responses were wrapped up in the investigation and the letter of 7 July 2017 encouraged complaints who did not receive a personal response to contact the Chair of Governors if they still require a response.
45. The Commissioner considers that disclosure of some of the requested information goes some way towards meeting the legitimate interest in this case.

Conclusion on the analysis of fairness

46. Taking all of the above into account, the Commissioner concludes that it would be unfair to data subjects to release the requested information.

Disclosure would not have been within their reasonable expectations and the loss of privacy could cause unwarranted distress. She acknowledges that there is a legitimate interest in transparency but does not consider that this outweighs the individual's expectations of, and rights to, privacy. The Commissioner has therefore decided that the council was entitled to withhold the information under section 40(2), by way of section 40(3)(a)(i), and regulation 13(1).

47. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 2 condition for processing the information in question.

Sensitive personal data

48. The Commissioner notes that some of the information in this case falls under section 2 of the DPA. As such, by its very nature, this has been deemed to be information that individuals regard as the most private information about themselves. Further, as disclosure of this type of information is likely to have a detrimental or distressing effect on the data subject, the Commissioner considers that it would be unfair to disclose the requested information.
49. As the Commissioner has decided that the disclosure of this information would be unfair, and therefore in breach of the first principle of the DPA, she has not gone on to consider whether there is a Schedule 3 condition for processing the information in question.

Section 36

50. Section 36 states that information is exempt where, in the reasonable opinion of a qualified person, disclosure would or would be likely to prejudice the effective conduct of public affairs. Section 36 operates in a slightly different way to the other prejudice based exemptions in the FOIA. Section 36 is engaged only if, in the reasonable opinion of a qualified person, disclosure of the information in question would, or would be likely to, prejudice any of the activities set out in sub-sections of 36(2).
51. In this case the Commissioner is considering the application of the exemptions at sections 36(2)(b)(i) and 36(2)(c).
52. Section 36(2)(b)(i) provides an exemption where disclosure would, or would be likely to, inhibit the free and frank provision of advice.
53. Section 36(2)(c) provides an exemption where disclosure would, or would be likely to, otherwise prejudice the effective conduct of public affairs.

Are the exemptions engaged?

54. In order to establish whether the exemption has been applied correctly the Commissioner has:
- Ascertained who is the qualified person or persons for the public authority in question;
 - Established that an opinion was given;
 - Ascertained when the opinion was given; and
 - Considered whether the opinion given was reasonable.
55. With regard to the first two criteria, the Commissioner has established that the opinion was given by the council's General Counsel and Monitoring Officer. The Commissioner is satisfied that the council's Monitoring Officer is a qualified person for the purposes of section 36(5) of the FOIA.
56. In relation to the third criterion, the council has provided the dates when the opinions were given. With regards to section 36(2)(c), the Commissioner is satisfied that the opinion was provided after the receipt of the request and before the internal review response. In response to the Commissioner's enquiries, the council said that it is also relying on exemption at section 36(2)(b)(i). The council provided evidence that this was the opinion of the qualified person as at 4 December 2017. Although this is clearly after the internal review, the Commissioner considers that public authorities have the right to raise exemptions for the first time at internal review or during the Commissioner's investigation.
57. With regard to the fourth criterion, in deciding whether an opinion is reasonable the Commissioner will consider the plain meaning of that word, that being: in accordance with reason, not irrational or absurd. If it is an opinion that a reasonable person could hold, then it is reasonable for these purposes. This is not the same as saying that it is the *only* reasonable opinion that could be held on the matter. The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only not reasonable for these purposes if it is an opinion that *no* reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the *most* reasonable opinion that could be held; it only has to be *a* reasonable opinion.

58. The Commissioner has also been guided by the Tribunal's indication, in the case *Guardian Newspapers & Brooke v Information Commissioner & BBC*⁵, that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and thus 'does not necessarily imply any particular view as to the *severity* or *extent* of such inhibition [or prejudice] or the *frequency* with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant' (paragraph 91). Therefore, when assessing the reasonableness of an opinion the Commissioner is restricted to focussing on the likelihood of that inhibition or harm occurring, rather than making an assessment as to the severity, extent and frequency of prejudice or inhibition of any disclosure.
59. With regard to the degrees of likelihood of prejudice the Commissioner has been guided on the interpretation of the phrase 'would, or would be likely to' by a number of Information Tribunal decisions. In terms of 'likely to' prejudice, the Tribunal in *John Connor Press Associates Limited v The Information Commissioner*⁶ confirmed that 'the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk' (paragraph 15). With regard to the alternative limb of 'would prejudice', the Tribunal in *Hogan v Oxford City Council & The Information Commissioner*⁷ commented that 'clearly this second limb of the test places a stronger evidential burden on the public authority to discharge' (paragraph 36).
60. The qualified person's signed section 36 statements indicate that the claimed inhibition and prejudice 'would' occur if the information was disclosed. Therefore, the Commissioner considers that it is appropriate to apply the stronger evidential test.
61. The council explained to the Commissioner that the qualified person was verbally appraised of the content of the emails and what exemptions were being applied to which correspondence and had access to the information if he needed to review it in furtherance of his decision. It said that having completed numerous other FOI requests in relation to the school, which sought disclosure of the investigation report, the qualified person was fully aware of the sensitivity and nature of the information being requested.

⁵ Appeal numbers EA/2006/0011 & EA/2006/0013

⁶ Appeal number EA/2005/0005

⁷ Appeal number EA/2005/0026 & 0030

62. The council also confirmed that the qualified person was provided with arguments for both applying the exemption and contrary arguments supporting the position that the exemption was not engaged.

63. The reasons given for the engagement of section 36(2)(b)(i) are as follows:

“It is absolutely vital that when there are allegations of misconduct against an employee that the employee’s employer is able to carry out a full investigation in order that the full facts can be established.

Governing bodies of schools maintained by Kent County Council need to be able to seek uninhibited advice from the Schools Personnel Service at KCC. They must also be able to have frank but confidential discussions/ communications with Education Officers as to how to progress issues within their school.”

The council then said that to disclose some specific emails would have the effect of inhibiting free and frank advice for the following reasons:

- Schools need to have frank and candid discussions with their HR advisors and education officers in relation to employment and governance matters.
- Governors need to have a safe space to be able to discuss and understand their responsibilities in council policies and procedures.
- To disclose the emails would send a message to those involved in the seeking of advice from the council that the content of their emails are going to be made available to the general public if challenged. This may discourage school governors from seeking frank and candid advice for future sensitive issues.
- The effect of this would be that all of those involved in seeking advice from the council would lose trust and confidence in the integrity and honesty of the process.

64. Whilst the Commissioner does not accept that those involved in the process will be put off seeking advice in full, it is not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner. This would then have a harmful effect on the provision of advice. Therefore the Commissioner finds that the opinion of the qualified person is a reasonable one in this instance and therefore finds that section 36(2)(b)(i) is engaged.

65. The reasons given for the engagement of section 36(2)(c) are as follows:

"It is absolutely vital that when there are allegations of misconduct against an employee that the employee's employer is able to carry out a full investigation in order that the full facts can be established. This then allows for an effective and fair decision to be reached on any further action that may be required.

Failure by an employer to carry out such an investigation is at best not only unfair to all of those concerned and contrary to natural justice but at worst can make the employer vulnerable to legal claims either from the employee, from witnesses and from third parties."

The council then said that to disclose some specific emails in relation to this investigation may have a prejudicial effect for the following reasons:

- To disclose these emails would send a message to those involved in the commissioning of future investigations that the content of their emails are going to be made available to the general public if challenged. This may discourage witnesses from participating in investigations as well as those commissioned by the council to undertake work in future investigations. It may also discourage others from giving full evidence or may encourage some, seeking publicity, to falsify evidence.
- The effect of this would be that all of those involved in the enquiry would lose trust and confidence in the integrity and honesty of the process.
- If the full evidence is not before the investigators it could potentially lead to poorly handled disciplinary investigations, which in turn would lead to equally poor decisions, which in turn could lead staff who should be dismissed remaining at work. Such an outcome would not be good for the functioning of the unit in which those employees are employed and makes it more likely that further claims will be made against the employer arising from their continued poor behaviour.
- Further if employees are dismissed from the outcome of a poorly handled disciplinary investigations there may be an increased number of successful challenges to these decisions in the Employment Tribunal.

It summarised that the potential impact on the future conduct of public affairs and of investigations into such matters would be substantial. As a public body, the council's ability to conduct such investigations should not be impeded.

66. Having viewed the withheld information, the Commissioner finds that the opinion of the qualified person was a reasonable one, namely, it was reasonable to consider that disclosure would have a prejudicial effect on

investigations. Therefore the Commissioner finds that the opinion of the qualified person is a reasonable one in this instance and therefore finds that section 36(2)(b)(c) is engaged.

Public interest test under section 36

67. Sections 36(2)(b)(i) is a qualified exemption and therefore the Commissioner must consider whether the public interest in maintaining the exemption outweighs the public interest in disclosure of the information. The Tribunal in the aforementioned case of *Guardian Newspapers & Brooke v Information Commissioner & BBC* indicated the distinction between the consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within the FOIA:

“The application of the public interest test to the s36(2) exemption involves a particular conundrum. Since under s36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s2(2)(b), it is impossible to make the required judgment without forming a view on the likelihood of inhibition or prejudice.” (Paragraph 88)

68. As noted above, the Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur. Therefore, the Commissioner’s view is that whilst due weight should be given to reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of prejudice or inhibition to the subject of the effective conduct of public affairs.

Public interest arguments in favour of disclosing the requested information

69. The council accepts that there is a requirement for it to be transparent and wherever possible to release documentation. It submitted the following arguments in favour of disclosing the requested information:
- Transparency, openness and accountability in how the local authority advises their maintained schools.
 - There is a strong public interest in knowing the background to the investigation, and how the investigation was commissioned and carried out, given that the existence of the investigation was in the

public arena. This could restore confidence in the process of the investigation, or not.

- There is interest in the story locally following reporting in various forms of media.
 - There is considerable public interest in the scrutinising and debating of the process of how governing bodies hold head teachers accountable.
 - The passage of time since the advice was sought by the governing body.
70. The Commissioner considers that the 'default setting' of the FOIA is in favour of disclosure. This is based on the underlying assumption that disclosure of information held by public authorities is in itself of value because it promotes better government through transparency, accountability, public debate, better public understanding of decisions and informed and meaningful participation of the public in the democratic process.
71. In this particular case, disclosure would aid transparency in relation to 'The Craig Enquiry'.

Public interest arguments in favour of maintaining the exemption

72. The council submitted the following arguments in relation to section 36(2)(b)(i):
- Schools need to have frank and candid discussions with their HR advisors and education officers in relation to employment and governance matters. As a school maintained by the local authority the council has delegated responsibility to the school on certain matters and has a duty to advise the school in respect of these. By their very nature, employment discussions tend to be sensitive especially if in relation to disciplinary action.
 - Governors need to have a safe space to be able to discuss and understand their responsibilities in council policies and procedures. To impede these discussions would lead to incorrect interpretation of how to proceed and mistakes being made and ultimately place the school, and the council, in a position where they could be challenged through court proceedings.
 - It is accepted that the email content relates to advice sought in respect of the investigation which has now ended. However for the school and the council this is still contentious. Both the council and the school still receive FOIA requests in relation to the investigation

report. The governing body is still being challenged by individuals as to how they are moving forward since the recommended actions of the report were published. Those governors seeking advice would be likely to be inhibited from expressing themselves so freely and frankly in the future if there was a real possibility of disclosure.

- To disclose these emails would break down trust and confidence in the integrity of the process. As a consequence governing bodies may not then seek important advice on delicate issues which could lead to impaired and potentially unlawful decisions being made.

73. The council submitted the following arguments in relation to section 36(2)(c):

- These are investigations into an employee and, as such, require candour. The disclosure of this information would affect the subject of the investigation, those that contributed and the future conduct of public affairs, specifically the consideration and procurement of future investigations.
- Disclosure would suggest to those who may be involved in the commissioning and production of future investigations that the content of their email correspondence could be made available to the public. This may discourage those commissioned by KCC to undertake work in future investigations as well as discouraging any witnesses who may be involved.
- Those arranging and procuring investigations must be able to do so with a focus on the matter at hand and without prejudice or inhibition.
- Those contributing to the report did so with no expectation that their involvement in the report or the outcomes would be published. Similarly, those corresponding about the procurement and arrangement of any investigation would not expect disclosure.
- Some of the emails contain confidential information as well as information given in confidence. The disclosure of such information could lead to the involvement of the Information Commissioner and subsequent actions for defamation and actionable breach of confidence.
- The potential impact on the future conduct of public affairs and of investigations into such matters would be substantial. As a public body, the council's ability to conduct such investigations should not be impeded.

Balance of the public interest arguments

74. Where, as with this case, a qualified exemption is engaged, the information requested must still be disclosed unless, in all circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing it.
75. The council said that it has carefully considered the arguments for disclosing the information and maintaining the exemptions. It explained that it has balanced the competing interests and recognises that given the passage of time there is considerable interest in disclosure of the information, but it is not satisfied that it is in the public interest to disclose the information in this case. It said that its ability to provide advice to governing bodies and its ability to conduct such investigations should not be impeded.
76. Having seen the withheld information, the Commissioner will consider where the balance of the public interest lies. In doing so, she will take into account the opinion of the qualified person. In accepting that the qualified person has given a reasonable opinion that disclosure would cause the inhibition described, this carries a certain amount of weight through to the public interest test.
77. However, the exact weight that should be given to maintaining the exemption depends on the particular circumstances of the case. This means that while the Commissioner accepts that a reasonable opinion has been expressed that inhibition would occur she will go on to consider the severity, extent and frequency of that inhibition in forming her own assessment of whether the public interest test dictates disclosure.
78. The Commissioner notes that there is public interest inherent in sections 36(2)(b)(i) and 36(2)(c), those being prejudice-based exemptions, in avoiding the harm specified in the exemptions. Therefore she has taken into account that there is automatically some public interest in maintaining these exemptions.
79. One of the arguments presented by the council relates to the concept of a 'safe space'. Public authorities may argue that they need a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction.

80. The Commissioner's guidance on section 36⁸ states that:

"The safe space argument could also apply to section 36(2)(b), if premature public or media involvement would prevent or hinder the free and frank exchange of views or provision of advice... This need for a safe space will be strongest when the issue is still live. Once the public authority has made a decision, a safe space for deliberation will no longer be required. If it was a major decision, there might still be a need for a safe space in order to properly promote, explain and defend its key points without getting unduly sidetracked. However, this can only last for a short time and the public authority would have to explain clearly why it was still required at the time of the request on the facts of each case. The timing of the request will therefore be an important factor."

81. The Commissioner acknowledges that the investigation had ended at the time this request was responded to. However, the council has explained that for it, and the school, the issue is still contentious. As stated in paragraph 72, both the council and the school still receive FOIA requests in relation to the investigation report and the governing body is still being challenged by individuals. The council further explained that when the request was made, and at the time of the internal review, the matter was very much still live as the head teacher had only just resigned, many parents and staff had still not received an answer to their complaints and no information had been passed from the governing body to the school community. The council also said that even at the time of its response to the Commissioner, in December 2017, members of staff and parent governors at the school were still seeking feedback as to the outcome of the investigation.
82. Therefore the Commissioner accepts that parties involved in this matter would be likely to be inhibited from expressing themselves freely and frankly and that full investigations, with trust in the integrity of the process, would be hindered by disclosure in this case. She has therefore given significant weight to the public interest in maintaining a safe space.
83. Another argument presented by the council relates to the concept of a 'chilling effect'. The chilling effect argument is that disclosure of information would inhibit free and frank discussions in the future, and

⁸ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making.

84. The council said to the Commissioner that it is currently advising the school in two areas. It explained that the school and another local school are in discussions with the council in relation to developing joint sixth form curriculum offer and also whether to create a federation or amalgamate the two schools. Council education officers have been replying to queries from parents on this and the school has recently undertaken a parent survey to seek views on these proposals. The council is also advising the school on a priority building project with funding from Education and Skills Funding Agency and without the council's involvement this project would not have gone ahead. The council submitted that the school needs to be able to have these free and frank discussions with council education officers to improve the wellbeing of the students and staff at the school. It said that should disclosure of discussions be ordered, maintained schools, especially in this instance SLGGS, would feel inhibited to enter into such discussions in the future which will lead to the loss of candour and damage the quality of advice and deliberation prior to decision making. It also said that if the information in this case is disclosed, other maintained schools in similar positions may be highly reticent about coming to the council to seek advice which would effectively preclude the council from carrying out its statutory duty.
85. The Commissioner's aforementioned guidance on section 36 states that:
- "Chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions."
86. When considering the public interest, the Commissioner should give such 'chilling effect' arguments appropriate weight according to the circumstances of the case and the information in question. As stated in the Tribunal case *Department for Education and Skills v the Information*

*Commissoner*⁹ and endorsed as a statement of principle in the *Export Credits Guarantee Department*¹⁰ High Court case;

"The central question in every case is the content of the particular information in question. Every decision is specific to the particular facts and circumstances under consideration. Whether there may be significant indirect and wider consequences from the particular disclosure must be considered case by case."

87. Having viewed the withheld information, and considering the circumstances, the Commissioner considers that disclosure could lead to a chilling effect given that the information relates to a matter which remains a contentious issue and involves an internal investigation. The Commissioner accepts the qualified person's opinion that disclosure could lead to information relating to internal investigations being less descriptive and couched in a more cautious manner in future. Although the Commissioner recognises that individuals have a duty to be open and honest in investigation processes, she acknowledges that where individuals may be seen to be at fault they may take action to minimise their degree of culpability. The Commissioner also accepts that maintained schools would feel inhibited to enter into such discussions with the council in the future which will lead to the loss of candour and damage the quality of advice and deliberation prior to decision making
88. On the other hand, whilst the Commissioner accepts the qualified person's opinion that a 'chilling effect' leading to poorer quality decision making would occur, knowing that information might be subject to future disclosure under FOIA could actually lead to better quality decisions being made. In this case, being aware that email correspondence could be disclosed in response to a FOIA request could ensure that investigations are thorough and robust which in turn would ensure that future decisions in this, and related areas, are improved.
89. The Commissioner has considered the complainant's argument as to why the information should be disclosed. As noted earlier in this decision notice in relation to the application of section 40(2), the complainant pointed out that the Governing Body of the school commissioned this report to provide answers to 207 complaints made about the process and other issues relating to the school but since its completion have refused to release any details of the findings of the report and has not

⁹ Appeal number EA/2006/0006

¹⁰ 2008 EWHC 638

replied to any of the 207 complaints raised. He also said that he is particularly concerned that some email correspondence may be making unfounded allegations against parents of the school and their actions in relation to trying to ascertain the truth regarding the now failed academy conversion. The Commissioner has taken into consideration that that actions recommended for the school to put in place as a result of the investigation findings were shared with members of the community by letter on 7 July 2017 and that a copy of that letter is on the school's website and that the complaint responses were wrapped up in the investigation and the letter of 7 July 2017 encouraged complaints who did not receive a personal response to contact the Chair of Governors if they still require a response.

90. The Commissioner considers that disclosure of some of the requested information in this case, together with information disclosed in the previous cases mentioned in paragraph 9, goes some way towards meeting the public interest in this case. However, she acknowledges that there is public interest in being provided with a full picture and that the issue is of significant importance to families directly affected within the area and linked to the school.
91. The Commissioner has considered the public interest arguments presented in this case. She has given due weight to the opinion of the qualified person and has considered the likely extent, frequency and severity of any impact of disclosure on the free and frank provision of advice and the ability for full investigations to be carried out. She has taken into account the content and nature of the information and has to consider that the issue remains contentious. She has therefore given weight to both the safe space and chilling effect arguments. The Commissioner has concluded that in the circumstances of this case the public interest in maintaining the exemptions outweighs the public interest in disclosure of the requested information and therefore the exemptions at sections 36(2)(b)(i) and 36(2)(c) have been applied correctly.

Right of appeal

92. 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,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

93. 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.
94. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Andrew White
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