

Freedom of Information Act 2000 (Section 50)

Decision Notice

Dated 26 September 2006

Public Authority: The Governing Body of
Boston Grammar School

Address: Boston Grammar School
Rowley Road
Boston
Lincolnshire
PE21 6JY

Summary Decision and Action Required

The Information Commissioner's decision in this matter is that Boston Grammar School (the "school") has partly dealt with the complainant's request in accordance with Part I of the Act.

- 1) The school failed to comply with its obligations under section 1(1)(a) in so far as it failed to accurately confirm or deny whether it held any information of the description outlined in 7 and 9 of the complainant's request.
- 2) The school complied with its obligations under section 1(1)(b) of the Act in so far as on the basis of the information available to the school at the time of the request, it correctly applied the exemptions under section 40(2) and section 41 of the Act to the Disciplinary Hearing Meeting Minutes (the "Minutes") outlined in part 5 of the complainant's request. However, during the course of the Commissioner's investigation, the teacher who is the focus of the Minutes consented to disclosure of his personal information under the Act. As the Minutes contain the personal data of other third parties the Commissioner considered that it would be necessary to redact the personal information of these third parties and disclose the remainder. Therefore in the Commissioner's view disclosure of a redacted copy of the Minutes would not breach either section 40(2) or section 41 of the Act.
- 3) The school failed to issue a refusal notice in accordance with its obligations under section 17 of the Act.

In view of the matters referred to above the Information Commissioner ("the Commissioner") hereby gives notice that in exercise of his powers under section 50 of the Act he requires that:

The school shall, within 35 days of the date of the notice, release a redacted copy of the Disciplinary Hearing Meeting Minutes to the complainant. The school should redact all

third party information except that relating to the individual (the teacher) who consented to the disclosure.

1. Freedom of Information Act 2000 (the 'Act') – Applications for a Decision and the Duty of the Commissioner

1.1 The Information Commissioner (the 'Commissioner') has received an application for a decision whether, in any specified respect, the complainant's request for information made to the Public Authority has been dealt with in accordance with the requirements of Part I of the Freedom of Information Act 2000 (the 'Act').

1.2 Where a complainant has made an application for a decision the Commissioner is under a duty to make a decision, unless:

- a complainant has failed to exhaust a local complaints procedure, or
- the application is frivolous or vexatious, or
- the application has been subject to undue delay, or
- the application has been withdrawn or abandoned.

1.3 The Commissioner shall either notify the complainant that he has not made a decision (and his grounds for not doing so) or shall serve a notice of his decision on both the complainant and the public authority.

2. The Complaint

2.1 The complainant made a request for information in a letter to the school of 16 December 2004. The school dealt with the complainant's request as a valid request under the Act from 1 January 2005. Boston Grammar School as a foundation is a maintained school and the governing body is therefore a public authority for the purposes of the Freedom of Information Act 2000.

2.2 In a letter and attached enclosures of 17 January 2005, the school disclosed some of the requested information to the complainant and addressed other aspects of his request.

2.3 In a letter to the school of 25 January 2005 the complainant made a complaint regarding the school's response to his request. The school responded in a letter of 31 January 2005. In this letter the school provided some answers to questions outlined in the complainant's request, provided some further clarification in respect of the information it holds and further justified its application of the exemptions to the requested information. The school also attached a copy of its publication scheme.

2.4 The complainant was dissatisfied with these responses and he complained to the Commissioner on 14 March 2005.

2.5 The complainant alleged that the school failed to issue a refusal notice in accordance with its obligations under section 17 of the Act. The complainant also alleged that the school had incorrectly applied sections 40(2), 41 and 42 of the Act to various aspects of the information he requested in 5, 7 and 9 below.

2.6 The complainant requested:

- 1) "The Boston Grammar School Register of Members' Interests (i.e. the Governing body).
- 2) The school's written procedures to be followed on disciplinary matters regarding academic staff.
- 3) Under what procedure was the "select committee" constituted.
- 4) What, if any, contractual/employment relationships (outside of the role of school governors) exist between any members of the "select committee" and are not included in the Register of Members' Interests?
- 5) Minutes from the "select committee" meeting at which it was decided to terminate [the teacher's] employment.
- 6) The minutes of all other meetings held by the School Governors in relation to the disciplinary action [of the teacher].
- 7) What, legal advice, if any was taken by the School of Governors in anticipation of termination [of the teacher]?
- 8) How were witness statements taken from pupils present in the class when the incident that led to [the teacher's] dismissal occurred? Did this follow the correct procedure?
- 9) Was the pupil involved disciplined?"

3. Relevant Statutory Obligations under the Act

3.1 **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.

3.2 **Section 17** provides that –

"A public authority which...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."

17(7) provides that –

a refusal notice must include 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. It must also include particulars of the right to apply for a decision to the Information Commissioner.

3.3 **Section 40(2)** provides that –

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

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

(3) The first condition is-

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

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

3.4 **Section 41** provides that –

“(1) 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.

(2) The duty to confirm or deny does not arise if, or to the extent that, the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) constitute an actionable breach of confidence.”

3.5 **Section 84** provides that –

“information” (subject to sections 51(8) and 75(2)) means information recorded in any form.

4. **Review of the case**

What legal advice if any was taken by the Board of Governors:

- 4.1 The school applied section 42 of the Act (pertaining to information in respect of which a claim to legal professional privilege could be maintained in legal proceedings) to this aspect of the complainant’s request. In letters to the complainant of 17 January 2005 and 31 January 2005, the school explained that the advice sought from human resource consultants, HBS was professional rather than legal advice. Further, in the letter of 31 January 2005 the school states that this professional advice from HBS was given verbally. Therefore, no legal advice is held because no legal advice was sought by the school.
- 4.2 In any case, verbal advice is not covered by the definition of information in section 84 of the Act, and as such it does not fall within the scope of the Act’s provisions. Section 84 defines ‘information’ as “information recorded in any form”. In response to enquiries by the Commissioner, the school has confirmed that information falling within this part of the request is not contained in any recorded information held by the school, or its contractual partner HBS. The school has explained the circumstances in which the advice was given by HBS and that this advice was not given by a legal professional. The school has also explained that this professional advice was given verbally before, during and after the disciplinary hearing. The school has confirmed that this advice was not recorded in any form.
- 4.3 The Commissioner is satisfied that the school does not hold any recorded information falling within this part of the applicant’s request. Therefore, in the Commissioner’s view, the school was not required to consider an exemption under the Act as it does not hold any recorded information for the purposes of section 84 of the Act. On this basis the Commissioner shall not make a decision in respect of the school’s application of section 42 to this aspect of the complainant’s request.
- 4.4 However, under section 1(1)(a) of the Act a person making a request is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. This is often referred to as the duty to confirm or deny. In the Commissioner’s view the school did not clearly confirm or deny whether it holds information of the description specified in this part of the complainant’s request, and therefore, that the school did not comply with its’ obligations under section 1(1)(a) of the Act.

Was any action taken to discipline the student involved:

- 4.5 The school applied section 40(2) and section 41 of the Act to this aspect of the complainant's request. During the course of the Commissioner's investigation the school informed the Commissioner that it does not hold any recorded information in relation to this aspect of the request. The Commissioner is satisfied that the school does not hold any recorded information falling within this part of the applicant's request. Therefore, in the Commissioner's view, the school was not required to consider an exemption under the Act as it does not hold any recorded information for the purposes of section 84 of the Act. On this basis the Commissioner shall not make a decision in respect of the school's application of sections 40(2) or 41 to this aspect of the complainant's request.
- 4.6 However, as explained above, under section 1(1)(a) of the Act a person making a request is entitled to be informed in writing by the public authority whether it holds information of the description specified in the request. In the Commissioner's view the school did not clearly confirm or deny whether it holds information of the description specified in this part of the complainant's request, and therefore, in this respect the school did not comply with its' obligations under section 1(1)(a) of the Act.

Section 17 – the School's Refusal Notice.

- 4.7 The school's refusal letter of 17 January 2005 did not comply with the requirements of section 17 of the Act. It did not clearly specify which exemption(s) apply or the reasons why these exemption(s) apply. In a letter dated 31 January 2005, the school did attempt to clarify which exemptions it was applying and why. Although the school did provide some further clarification in respect of which exemptions it was applying, it did not explain why the exemptions apply.
- 4.8 Section 17(7) of the Act requires that a refusal notice contain particulars of any procedure provided by a 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 set out the applicant's right to make a complaint to the Information Commissioner. The School's refusal notice of 17 January 2005 did not do this. Therefore the school failed to comply with section 17 of the Act. The school's publication scheme does contain information about its complaints procedure and the right to complain to the Information Commissioner. A copy of this was provided to the complainant as an attachment to the school's letter of 31 January 2005. However, these details were not included in the refusal notice of 17 January 2005.

Disciplinary Hearing Minutes (the "Minutes"):

- 4.9 **Section 40(2)-** The focus of the Minutes is the teacher, the incident he was involved in and the action the school intended to take in response to the incident. Therefore the Minutes constitute the personal data of a third party (the "teacher"). In addition, the Minutes contain the personal data of other third parties including a pupil. Section 40(2) exempts the personal information of a third party from

disclosure if this would breach any of the data protection principles or section 10 of the Data Protection Act 1998 ("1998 Act").

- 4.10 The teacher would have a reasonable expectation that information about the disciplinary proceedings he was involved in would not be disclosed to the public. Paragraph 2.13.1 of the Commissioner's Supplementary Guidance to *The Employment Practices Code* (a statutory code of practice issued under section 51 of the 1998 Act) recommends that employers be particularly careful that records of disciplinary investigations, proceedings and action are kept secure and only made available to those staff whose duties require that they should have access to them. This reflects the Commissioner's view that records of individuals' disciplinary hearings should not normally be disclosed.
- 4.11 The Commissioner is aware that some of the personal data included in the Minutes relates to the teacher's private life and one would expect this to remain private. The Minutes also contain the personal data of other third parties including a pupil who would also have a reasonable expectation that information about them would not be disclosed to the public. Therefore in the Commissioner's view, the school correctly applied the exemption under section 40(2) of the Act in so far as disclosure of this personal information without the consent of the its subject (the teacher) and other third parties would be unfair and would therefore breach the first data protection principle.
- 4.12 However, in this case, during the course of the Commissioner's investigation the teacher consented to disclosure of the information about him contained in the Minutes. The teacher had not given such consent when the school originally considered the complainant's request. In an attempt to informally resolve the complaint, the Commissioner took steps to verify the teacher's consent. As a result, the Commissioner is satisfied that the teacher has given his consent to the disclosure under the Act of information about him contained in the Minutes and that in doing so the teacher is aware that disclosure under the Act is to the world at large without restriction.
- 4.13 The Commissioner also considered that the Minutes contain the personal data of other third parties who have not consented to the disclosure of information about them. However, given that the teacher has now consented to the disclosure of information about him, section 40(2) of the Act no longer provides a basis for withholding a redacted copy of the Minutes (e.g. a version from which information identifying third parties other than the teacher has been removed).
- 4.14 **Section 41-** In reviewing the school's application of section 41 to the Minutes the Commissioner considered the circumstances under which the information was provided, the nature of the information and whether release of the information to a third party would constitute an actionable breach of confidence.
- 4.15 The teacher provided information to the disciplinary hearing which was then recorded as part of the Minutes of the proceeding. The Commissioner is not aware of any explicit confidentiality clause restricting the subsequent use or disclosure of the information recorded by the school during the disciplinary hearing. However, it is reasonable to assume that an implied obligation of

confidence is attached to the information provided by the teacher. The Commissioner understands that the information was divulged for the limited purposes of the disciplinary hearing and this took place in private. In the Commissioner's view it is reasonable to assume that the parties involved would have an expectation that the proceeding was confidential and that an obligation of confidence existed. Therefore the Commissioner is satisfied that the circumstances under which the information was provided were confidential.

- 4.16 The Commissioner considers that information which is protected from disclosure by an obligation of confidence must also have the necessary quality of confidence. In this respect the Commissioner considered two key elements. The first element is the level of sensitivity of the information and secondly whether the information is readily available via other means.
- 4.17 The Commissioner reviewed the information contained in the Minutes. It relates to a disciplinary matter between an employee and employer which is of a highly personal nature. The Minutes also contain particularly sensitive information about the teacher's private life and that of other third parties.
- 4.18 It is important to note that for information to be confidential it is not necessary that it be completely secret. The Commissioner is aware that information pertaining to the circumstances which were the subject of the disciplinary hearing, including the outcome of the proceeding was reported in the press. Although this information was reported by the press, the information contained in the Minutes was not reported and is not available to the public by other means.
- 4.19 For the exemption under section 41 to apply, the disclosure of the information to a third party must constitute an actionable breach of confidence. An actionable breach of confidence would not arise where, for example, the person whom the obligation of confidentiality is owed consents to the disclosure, where disclosure is required by law or where there is an overriding public interest in disclosure.
- 4.20 In this case, at the time of the request the school had not obtained the consent of the teacher involved, nor was disclosure required by law. Further, it is difficult to argue that there is an overriding public interest in disclosure of the Minutes given that the press has already reported on the circumstances which were the subject of the disciplinary hearing, including the outcome of the proceeding. In this case the Commissioner is also aware that the outcome of the proceedings has been subjected to the relevant appeal procedure. Whilst the Commissioner acknowledges that there is a public interest in information which informs public debate and gives the public access to information about the nature of decisions taken by public authorities the Commissioner is of the view that any public interest in disclosure of the Minutes is outweighed by the overriding public interest in preserving a confidence between an employer and employee in relation to a disciplinary matter.
- 4.21 On the basis of the facts outlined above the Commissioner's view is that at the time of the request, the Minutes were exempt from disclosure under section 41 of the Act. However, as outlined above, the teacher, to whom the school owes an obligation of confidence, has now consented to disclosure of information about

him contained in the Minutes thereby waiving his right to confidentiality. The Commissioner is also aware that the Minutes contain confidential information about other third parties to whom the school also owes an obligation of confidence and who have not consented to disclosure of confidential information about them. Therefore, in the Commissioner's view information about third parties other than the teacher must be redacted prior to disclosure.

5. The Commissioner's Decision

- 5.1 The school did not comply with its obligation under section 1(1)(a) of the Act in so far as it failed to accurately confirm or deny whether it held information of the description specified in parts 7 and 9 of the complainant's request.
- 5.2 The school complied with its obligations under section 1(1)(b) of the Act in so far as on the basis of the information available to the school at the time of the request, it correctly applied the exemptions under section 40(2) and section 41 of the Act to the Minutes outlined in part 5 of the complainant's request. However, during the course of the Commissioner's investigation, the data subject who is the focus of the Minutes consented to disclosure of his personal information under the Act. As the Minutes contain the personal data of other third parties the Commissioner considered that it would be necessary to redact the personal information of these third parties and disclose the remainder. Therefore in the Commissioner's view disclosure of a redacted copy of the Minutes would not breach either section 40(2) or section 41 of the Act.
- 5.3 The Commissioner's decision is that the school did not comply with its obligations under section 17 of the Act. In particular the school failed to clearly state that the information claimed was exempt information, to specify the exemption being relied upon or to state why the exemption being relied upon to refuse the request for information applied. The school also failed to include particulars of any procedure provided by it for dealing with complaints about the handling of requests for information or state that it does not provide such a procedure and provide the complainant with the particulars of the right to apply for a decision of the Information Commissioner.

6. Action Required

- 6.1 The Commissioner requires that:

The school shall, within 35 days of the date of the notice, release a redacted copy of the Disciplinary Hearing Meeting Minutes to the complainant. The school should redact all third party information except that relating to the individual (the teacher) who consented to the disclosure.

7. Right of Appeal

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

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@dca.gsi.gov.uk

7.2 Any Notice of Appeal should be served on the Tribunal within 28 days of the date on which this Decision Notice is served.

Dated the 26th day of September 2006

Signed

**Graham Smith
Deputy Information Commissioner**

**Information Commissioner
Wycliffe House
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Wilmslow
Cheshire
SK9 5AF**