

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 16 March 2011

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DE

Summary

The complainant requested information about extremist groups, racist incidents in schools and ethnicity of teaching staff within the North Hertfordshire council district. The public authority provided some information, stated that other information was not held by it and refused some information on the grounds of the exemptions provided at section 36(2)(c) and 40(2) of the Freedom of Information Act. The Commissioner finds that the refused information was correctly refused under section 36(2)(c) of the Act and has therefore not gone on to consider the public authority's application of section 40(2). He finds that the public authority breached section 1(1)(a) of the Act in failing to state that certain detailed information was not held by it, and section 10 of the Act because some information was provided outside the 20 working day timescale. He requires no action to be taken.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 20 November 2009 the complainant submitted the following request in an email to the public authority.

"[1] What methods do the Hertfordshire County Council use to ensure that employees are not linked to extremist groups.

[2] Please provide the numbers of reported Racial Incidents for each Primary and Secondary school in the North Hertfordshire council district, each year between 2002 - 2009, giving:

**the ethnicity of the perpetrator and victim.*

**the action taken by the school.*

**parent satisfaction with action taken by school (resolution).*

**the number of all pupils at each school by ethnicity.*

3. What is the ethnicity and gender of teachers and headteachers for each Primary and Secondary school in the North Hertfordshire council district each year between 2002 – 2009"

(Items [1] and [2] are numbered for clarity, the complainant's numbering is for part 3 only).

3. The public authority responded on 18 December 2009. It answered part [1] of the request relating to employees and extremist groups. It confirmed that it holds information in relation to part [2] concerning racial incidents at primary and secondary schools but refused to disclose part of this information on the basis of the exemptions provided by section 36(2)(c) and section 40(2) of the Act. In respect of the second and third elements of this part (action taken by the school and parent satisfaction) the public authority stated that no information was held.
4. The public authority also disclosed a spreadsheet giving information on the number of pupils at each school in North Hertfordshire broken down by ethnic group, based on the Summer 2009 school census. The public authority's response indicated that, in response to part 3 of the request, it had intended to enclose tables containing a summary of the number of racist incidents reported by schools in the North Hertfordshire district, and a table giving a breakdown of the ethnicity and gender of teachers within the public authority's schools, but these tables were not found in the response received by the complainant.
5. The complainant requested an internal review by email, on 23 December 2009.

6. The public authority conducted an internal review and wrote to the complainant on 22 January 2010 with the outcome. This verified that the public authority had provided a response to the first and third elements of his request and upheld the application of section 36 to the withheld elements of the second part of the request. It confirmed that in respect of the 4 specified parts of the second element, the public authority did not hold information in respect of the second and third parts, upheld the decision to withhold information on the first part also under section 40(2) of the Act, and confirmed that information had been disclosed in response to the fourth part.

The Investigation

Scope of the case

7. On 19 February 2010 the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider the following points:
 - He accepted the response to the first part of his request.
 - He disputed the public authority's application of section 36(2)(c) and 36(4) of the Act as 'unclear and otherwise unreasonable'.
 - The spreadsheet disclosed as part of the response to part [2] did not fully comply with the relevant element of the request.
 - He disputes the application of section 40(2) to the withheld information as 'unclear and unreasonable'.
 - Information for part 3) of his request had not been provided.
8. The Commissioner's investigation has therefore focused on the public authority's application of section 36(2)(c) and section 40(2) to the withheld information. With regard to the complainant's point that information relating to part 3) of his request had not been provided, the Commissioner understands that the public authority believed it had already provided this information in its response. The Commissioner undertook to ensure the public authority's response to that part of his request was duly forwarded to him.
9. The complainant also raised other issues during the investigation that are not addressed in this Notice because they are not requirements of Part 1 of the Act.

Chronology

10. The Commissioner contacted the public authority on 17 June 2010 and observed that the response provided to the complainant contained a sub-heading '3.' which was blank. It appeared to him that this may have been intended to provide information in response to item 3 in the complainant's request. The public authority confirmed that this sub-heading should have contained a table, and forwarded a copy of that table to the complainant on 17 June 2010.
11. The Commissioner wrote to the complainant on 2 July 2010, observing that the table provided in response to part 3 of his request appeared to have been omitted (possibly due to a formatting or software error) but that this had now been provided. He explained the intended scope of his investigation as the examination of the public authority's refusal of elements of his request under section 36(2)(c) and 40(2) of the Act.
12. The complainant responded on 13 July 2010, the Commissioner understands the complainant's response to indicate that he does not consider the table provided by the public authority in its response to part 3 of his request to be sufficient. The complainant subsequently acknowledged the scope of the Commissioner's investigation into the application of section 36(2)(c) and 40(2) with the addition of the disputed elements of the response to part 3 of his request, which the Commissioner had confirmed to him on 14 July 2010.
13. On 2 July 2010 the Commissioner wrote to the public authority, requesting further clarification of its position in respect of its refusal of parts of the request on the grounds of section 36 and section 40 of the Act. He subsequently explained that the complainant also maintained that the response to part 3) of his request, recently provided, was unsatisfactory.
14. The public authority responded on 16 July. It provided further arguments in support of its decision to refuse information on the grounds of section 36 and section 40 of the Act, and clarified that it does not hold the categories of information requested in relation to part 3) of the request. It explained that it monitors and reports ethnicity information in its workforce in accordance with guidance from the Equality and Human Rights Commission, which does not require monitoring by geographical base. The public authority reports on its workforce as a whole, in respect of ethnicity, but does monitor down to directorate level which allows some identification of particular roles, such as teaching staff, which has been supplied to the complainant.

15. The Commissioner corresponded further with the complainant at intervals from September to November 2010.
16. On 21 September 2010 the Commissioner contacted the public authority, drawing attention to its omission of the data for 2002-2008 in its disclosure of information on the breakdown of pupils by ethnicity based on the summer 2009 school census and inviting it to consider whether further disclosures could be made, and also wrote to the public authority on 21 September 2010, requesting further clarification of its application of the exemption at section 36(2)(c).
17. The public authority provided the complainant with further information on 28 September 2010, namely copies of spreadsheets comprising information on the ethnicity of pupils for the years 2005-2010, stating that it did not hold the requested information for the entire period requested.
18. On 30 September the Commissioner wrote to the public authority, requesting clarification of the public authority's explanation as to why information prior to 2005 is 'not held' by it.
19. The public authority replied on 5 October 2010 with its response to the Commissioner's 21 September enquiries about its application of the exemption provided at section 36(2)(c) of the Act, and further on 8 October 2010 with clarification about the provision of information prior to 2005. It explained that, while some information was held on the ethnicity of pupils for the years 2002-2004, the method of collecting the data was different and the information was not directly comparable with, nor as robust as, that provided for 2005-2010. The Commissioner contacted the public authority on 22 October 2010 and asked it to provide the information for the period 2002-2004 to the complainant. This was disclosed to the complainant on 25 October 2010.

Analysis

Substantive Procedural Matters

Section 1

20. With regard to the public authority's response to part 3) of the request, missing from the original response and provided once the Commissioner brought the omission to its attention, the complainant argues that the table provided by the public authority:

- does not provide information separated into categories of teachers and headteachers;
- does not provide information separated into categories of primary and secondary schools; and
- does not comprise demographic information on North Hertfordshire.

21. The Commissioner put this to the public authority, which responded that the information thus requested is not held by it and that it has explained this to the complainant in other correspondence with him. It has explained to the Commissioner what information it is required to hold in relation to the ethnicity of its workforce. The Commissioner notes that the information disclosed provides a response to a superficial reading of the request, but fails to confirm or deny whether information is held to a greater level of detail, which appears to have been the complainant's intention in making the request. The internal review, in noting that a response has been given, fails to notice that a proper objective reading of the request requires a more detailed response.

The requirement to monitor ethnicity

22. The guiding legislation is the Race Relations (Amendment) Act 2000, an amendment of the Race Relations Act 1976 (the 1976 Act)¹, and The Race Relations Act 1976 (Statutory Duties) Order 2001² (the Statutory Duties Order). The legislation does not list the information required to be held, but confines itself to requiring a public authority to promote race equality and incorporate effective procedures to prevent racial discrimination. It confers a duty on a public authority in amendment of section 71 of the 1976 Act, as follows:

"Specified authorities: general statutory duty.

(1) Every body or other person specified in Schedule 1A or of a description falling within that Schedule shall, in carrying out its functions, have due regard to the need—

(a) to eliminate unlawful racial discrimination; and

(b) to promote equality of opportunity and good relations between persons of different racial groups."

¹ Available online at <http://www.legislation.gov.uk/ukpga/2000/34>

² Available online at <http://www.legislation.gov.uk/uksi/2001/3458/contents/made>

23. The Statutory Duties Order states, at section 5(2):

"It shall be the duty of such a person to monitor, by reference to the racial groups to which they belong,

(a) the numbers of—

*(i) staff in post, and
(ii) applicants for employment, training and promotion,
from each such group, and*

(b) where that person has 150 or more full-time staff, the numbers of staff from each such group who—

*(i) receive training;
(ii) benefit or suffer detriment as a result of its performance assessment procedures;
(iii) are involved in grievance procedures;
(iv) are the subject of disciplinary procedures; or
(v) cease employment with that person."*

24. The Equality and Human Rights Commission has issued a code of practice³ on the duty to promote race equality. In respect of compliance with section 5(2) of the Statutory Duties Order it advocates the use of ethnic monitoring, namely the process of collecting, storing and using data about people's ethnic backgrounds. The code of practice does not specify the level of detail required in ethnic monitoring, and also reminds users that the disclosure of ethnic data is voluntary.

25. The public authority has clarified its position to the Commissioner as follows:

"Public Sector organisations do have a statutory obligation to report equalities information to meet the general duties outlined in key equality legislation such as the Race Relations Amendment Act (2000), the Disability Discrimination Act (2005) and the Equality Act (2006). In fulfilling these we follow advice from the Equality and Human Rights Commission, which does not require monitoring by geographical base.

³ Available online at http://www.equalityhumanrights.com/uploaded_files/PSD/cop_red_eng_and_wales.doc

Hertfordshire County Council monitors its Workforce as a whole in respect of ethnicity in order to ensure that [its] recruitment processes are fair and open and that we employ a diverse and representative Workforce.

Once employed by HCC staff may move geographic base for a variety of reasons, but will still be part of the Workforce of the County Council. It is the make-up of the Workforce as a whole which we report on, not by base or geographical location. Within the organisation we do monitor down to directorate (department) level which allows some identification of particular roles, such as that of teaching staff, which we have supplied to [the complainant] "

26. The public authority directed the Commissioner to guidance issued by the Department for Education and Schools (DfES) in 2006⁴, titled "*Recording and reporting racist incidents guidance*" which it confirmed as the latest guidance. The guidance is not prescriptive about the information which is required in reporting racist incidents, stating:

- *[schools] must record all racist incidents, and report them at least annually to their local authority;*
- *the format and the procedures for reporting and recording racist incidents are a matter for each local authority to decide.*

27. The guidance also strongly *recommends* that:

"[...] all schools and local authorities adopt the definition of a racist incident that was set out in Recommendation 12 of the Macpherson Report on the Stephen Lawrence Inquiry published in February 1999 [which is:]

'any incident which is perceived to be racist by the victim or any other person.' "

28. The Home Office issued a Code of Practice in April 2000⁵ which also adopts the definition of a racist incident, above, and indicated the nature of information which should be recorded:

"Each school should record all racist incidents, including the date, the names of perpetrators and victims, the nature of the incident, and action taken in response."

⁴ The Commissioner verified this at the time but at the time of writing, due to recent changes in provision, the document is not currently available from the DfES website: www.standards.dfes.gov.uk/ethnicminorities/resources/racistincidents2006v1f.pdf

⁵ Available online at

<http://webarchive.nationalarchives.gov.uk/+/http://www.homeoffice.gov.uk/docs/code.html>

29. The Commissioner is satisfied that the guidance and definitions above accurately reflect the situation with regard to statutory reporting, and he notes that the guidance, and the Code of Practice leave some discretion as to the interpretation of a racist incident, and the specific level of information which should be reported.
30. The public authority has explained to the Commissioner that its processes enable it to collect ethnicity data at the point of recruitment (provided the applicant does not decline to provide it) but that this data is separated from the application at that time and cannot be correlated back to specific individuals. Therefore, the public authority did not conduct searches for the requested information at a demographic level, nor with reference to primary or secondary schools, or categorised by teacher or head teacher, because it is aware that this information is not collected by it and therefore not held.
31. The Commissioner notes that the public authority is not required to hold the requested information to the level of detail specified in the request, and he acknowledges that it does not collect it. The public authority has confirmed that it did not conduct searches for the requested information because it was aware that, for this reason, the information would not be held.
32. As there can seldom be absolute certainty that a public authority does not hold further information in its records, the standard of proof required for the Commissioner to find that information is 'not held' is the normal civil standard of the 'balance of probabilities'. This has been confirmed by the Information Tribunal, for example in the case of *Linda Bromley and others v the IC and Environment Agency* (EA/2006/0072)⁶ which stated:

"We must therefore consider whether [...] the Environment Agency did not hold any information covered by the original request, beyond that already provided [...] In the process we may review any finding of fact on which [the Commissioner's] decision was based. The standard of proof to be applied in that process is the normal civil standard, namely, the balance of probabilities." (paragraph 10)
[...]

"There can seldom be absolute certainty that information relevant to a request does not remain undiscovered somewhere within a public authority's records. [...] the test to be applied was not certainty but the balance of probabilities. This is the normal standard of proof and clearly applies to Appeals before this Tribunal [...]" (paragraph 13)

⁶ Available online at <http://www.informationtribunal.gov.uk/DBFiles/Decision/i64/Bromley.pdf>

33. The Commissioner accepts that a public authority should not be required to conduct unnecessary searches in response to a request for information, in circumstances where information is already known to be 'not held'. In this case, he is satisfied that the public authority has put forward sufficient grounds for its belief that the requested information is not held, on the basis that the information is not collected and the information which it does hold cannot be cross-referenced with other information held to enable it to provide the requested information.
34. In respect of the information requested in part 3) of the complainant's request, he therefore finds that, on the balance of probabilities, the public authority does not hold information, beyond that which has already been disclosed to the complainant. In failing to state that this information is not held by it, however, the public authority has breached section 1(1)(a) of the Act.

Section 10

35. The public authority disclosed further information to the complainant during the course of the Commissioner's investigation. Specifically, this comprised:

- the missing table in response to the third part of the request;
- information on the ethnicity of pupils in North Hertfordshire schools from 2002-2010.

36. This information was requested on 20 November 2009 and not disclosed in full until, variously, 16 June, 28 September and 25 October 2010 (the Commissioner acknowledges the additional information for 2010 volunteered by the public authority). These disclosures were therefore made outside the period of 20 working days for disclosure, provided at section 10(1) of the Act.

Exemptions

Section 36

37. The requested information is statistical information, therefore under section 36(4) the exemption may be applied without the '*reasonable opinion of a qualified person*' which is usually required before section 36 of the Act may be engaged. Accordingly, the Commissioner has considered the public authority's application of section 36(2)(c), that the disclosure '*would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs*' to the requested information.

The nature of the prejudice

38. The Commissioner is assisted by the findings of the Information Tribunal in the case of *Hogan v Oxford City Council & IC* (EA/2005/0026 & 0030)⁷ which considered the matter of prejudice at paragraphs 27-36. He notes particularly the following comments:

"The application of the 'prejudice' test should be considered as involving a number of steps.

First, there is a need to identify the applicable interest(s) within the relevant exemption." (paragraphs 28-29)

Further, at paragraph 30:

"Second, the nature of the 'prejudice' being claimed must be considered. An evidential burden rests with the decision maker to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, as Lord Falconer of Thoronton has stated, "real, actual or of substance" (Hansard HL, Vol. 162, April 20, 2000, col. 827)⁸. If the public authority is unable to discharge this burden satisfactorily, reliance on 'prejudice' should be rejected."

And:

*"A third step for the decision-maker concerns the likelihood of occurrence of prejudice. A differently constituted division of this Tribunal in *John Connor Press Associates Limited v Information Commissioner* (EA/2005/0005) interpreted the phrase "likely to prejudice" as meaning that the chance of prejudice being suffered should be more than a hypothetical or remote possibility; there must have been a real and significant risk." (paragraph 34)*

⁷ Available online at

<http://www.informationtribunal.gov.uk/DBFiles/Decision/i42/MrCMHoganandOxfordCityCouncilvInfoComm17Oct06.pdf>

⁸ A fuller extract of the quote from Lord Falconer of Thoronton is "Finally, on the subject of exemptions, I want to emphasise the strength of the prejudice test. Prejudice is a term used in other legislation relating to the disclosure of information. It is a term well understood by the courts and the public. It is not a weak test. The commissioner will have the power to overrule an authority if she feels that any prejudice caused by a disclosure would be trivial or insignificant. She will ensure that an authority must point to prejudice which is "real, actual or of substance".

Does the prejudice relate to the conduct of the public affairs claimed?

39. The public authority has explained to the Commissioner that the public affairs ('applicable interests' in *Hogan*, above) for which it claims prejudice would be caused by the disclosure are:

- The Council's ability to offer an effective public service in managing the admissions process for schools and meeting its objective as the local education authority to provide sufficient education for the children resident in its area.
- The council's relationship with the schools regarding the collection of data on racial incidents and, consequently, its ability to comply with the requirement to report accurately on racial incidents, and also its ability to direct resources to schools in dealing with race related issues.

40. The public authority argues that the disclosure of statistical information about the number of racial incidents at schools in North Hertfordshire would permit the creation of, in effect, 'league tables' of schools in relation to racial incidents.

41. It observes, from its experience in publishing other performance data for schools, that parents are apt to use 'headline' figures when making decisions associated with school admissions rather than analyse the data in detail. In those cases where schools had recorded a higher number of racial incidents, that would lead to a perception that such schools were less desirable and may lead to reduced applications for admission or, in some cases, pupils being withdrawn from particular schools. While other data released about school performance are derived from factual information such as examination results, the subjective nature of the definition of a racial incident means that an individual school's figures for racial incidents will be based on similarly subjective decisions in the school about what should be recorded as such, and on reporting practices in the schools.

42. In multicultural areas this would result in parents avoiding schools perceived to have a race problem and, conversely, in schools with no perceived problem becoming oversubscribed. This might cause some schools, which were undersubscribed, to be able to provide only limited education, or perhaps face closure. Release of the withheld information would therefore prejudice the council's ability to offer an effective public service in managing the admissions process for schools. The link between disclosure and the prejudice occurring is shown in the tendency of parents to assess statistical information at a superficial level only, leading

to avoidance of applications to schools which have a high recorded number of racial incidents.

43. The second area where the public authority asserts prejudice would occur relates to its ability to collect accurate data on racial incidents. Given the suggested prejudicial effect on admissions to schools, and consequential effect on certain schools' reputations, the public authority argues that there would be a tendency towards 'under-reporting' so that schools might be less likely to record some incidents as racial incidents in order to keep down the number of reported cases.
44. The public authority believes that this would impact on its ability to comply with the requirement to report accurately on racial incidents which occur within the county and, further, that it would affect its ability to direct resources to areas which need them most, due to an inability to identify those areas. It explains that, at present, it uses the information collected to identify where to spend resources; for example it is currently running a 'red card' programme (linked to similar football ground campaigns) and promoting it at schools which have currently recorded the highest number of racial incidents in a year.
45. The Commissioner agrees that the two elements which the public authority argues would be prejudiced can be classed as 'the conduct of public affairs' in that they are proper and legitimate functions of the public authority. He also finds persuasive the public authority's analysis, which suggests that parents would be likely to interpret the information in a way which would create, in effect, league tables of schools with perceived racial problems. He observes the importance which is currently attached by parents to existing school 'league tables' which are based on objective measurement criteria, and the associated tendency for high-scoring schools to become oversubscribed.
46. He also agrees that this appears to lead to a corresponding tendency for parents to avoid schools which show perceived problems. He therefore agrees that the disclosure of the information may be linked directly to the prejudice asserted by the public authority.
47. He finds the public authority's second argument less persuasive, not least because the official guidance, and the code of practice, cited above, both stress the need to record all incidents diligently. He nevertheless cannot dismiss the possibility that individual teachers, faced with an incident which they would otherwise class as a racial incident, might elect not to describe it as such if the victim did not do so for themselves.
48. Given the subjective nature of the definition as '*any incident which is perceived to be racist by the victim **or any other person***' (ICO

emphasis) he accepts that even if a victim does not explicitly characterise an incident as racist, it is still open to a teacher to class it as such if he or she perceives it in that way. If doing so were likely to result in damage to a school's reputation, the Commissioner acknowledges that, particularly in borderline cases, a teacher might exercise discretion not to class an incident as racist in circumstances where they might otherwise have done so.

49. The Commissioner therefore agrees that the public authority has established a valid link between the disclosure of the requested information and prejudice to the conduct of public affairs which it has described.

The degree of prejudice

50. As noted in the case of *Hogan*, above, any prejudice caused must be "real, actual or of substance" and the Commissioner will not find an exemption engaged if the prejudice asserted is found to be trivial. In this case, the public authority has explained its view that the prejudice would be to its ability to manage the admissions process for schools, and also to its ability to accurately report on (and allocate resources to deal with) racial incidents in schools. Neither of these functions can reasonably be classed as 'trivial' nor would the sort of prejudice envisaged by the public authority, above, lead the Commissioner to the view that the prejudice would be inconsequential. He is therefore satisfied that the degree of prejudice asserted by the public authority would be sufficiently substantial to warrant consideration of the exemption provided at section 36(2)(c) of the Act.

The likelihood of prejudice

51. The Information Tribunal in the case of *Hogan* is similarly helpful in the matter of the likelihood of the prejudice occurring, stating:

"On the basis of these decisions there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly, the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not." (paragraph 35)

52. The Commissioner requested the public authority to give its view as to the level of likelihood of prejudice. That is, did it intend to rely on the higher standard of 'would prejudice' (which would suggest that any likelihood of prejudice would be at least more probable than not), or did it intend to assert the lower standard of 'would be likely to prejudice' (for

which the risk of prejudice need not be 'more likely than not', but must be substantially more than remote).

53. The public authority replied, giving its view that:

"Whilst the Council would argue that it would "be more likely than not" to prejudice the Council's conduct of public affairs on both of the above [claims of prejudice]. The Council does accept that as no other Local Authority has disclosed such information there is no direct evidence to support the Council's position, and it might be maintained, therefore, that "it would be likely to prejudice" rather than "it would prejudice". However the fact that parents use other league tables and Ofsted reports for determining the schools they will apply to, is a very good indicator that they will use this information in the same way without attempting to analyse the data by comparing it to the ethnicity mix within the school and without being fully aware how the school has formed its view as to whether an incident should be recorded as racist or not."

54. The Commissioner understands the public authority's position to be that the likelihood of prejudice should be taken as the lower standard of 'would be likely to prejudice', partly because it accepts that it cannot produce evidence to support a more substantial claim. The Commissioner accepts that the public authority's overall assessment of the prejudice is, to some degree, hypothetical because it cannot produce any definitive evidence which proves its claim. Nevertheless, he agrees that the public authority's arguments are a reasonable extrapolation based on its current experience of the disclosure of other performance indicators for schools. He therefore accepts the public authority's estimate of both the degree of prejudice, and the likelihood of prejudice, as reasonable assessments based on its experience of similar, but not identical, circumstances.

55. The Commissioner finds that the public authority has satisfactorily established a link between disclosure of the requested information and prejudice to the conduct of public affairs, which is more than trivial. He accepts the public authority's assessment of the likelihood of prejudice and, consequently he finds that the exemption provided at section 36(2)(c) of the Act is engaged in this case. He has therefore gone on to consider the relative merits regarding the public interest in disclosure of the information, against the public interest in maintaining the exemption.

Public interest arguments in favour of disclosing the requested information

56. There is a general public interest in openness in the conduct of public affairs, so that the public can have confidence in the process and is able

to examine decisions taken on its behalf and scrutinise the processes which led to those decisions being taken. Also, the public authority acknowledges, and the Commissioner agrees, that there is a public interest in knowing the issues which affect children at school – particularly if parents are considering placing their children in a specific school. The Commissioner acknowledges, therefore, that if the information were to be disclosed, and were to show that certain schools had a particular and intractable problem with racial issues, that would be an important public interest consideration in favour of disclosure.

Public interest arguments in favour of maintaining the exemption

57. The public authority proposed the following arguments in favour of maintaining the exemption:

- The likelihood of damage to an individual school's reputation, and consequent effect on applications for admission to that school;
- The possibility of individuals being identified in cases where only one incident is classed as racist for a given school. (This is also relevant to the public authority's application of section 40(2) to elements of the withheld information).
- The general public interest in maintaining good relations between the local education authority and schools.
- The public interest in ensuring the public authority is able to accurately obtain information from schools, in order to enable it to monitor and evaluate progress in preventing and addressing racism.

Balance of the public interest arguments

58. The Commissioner has viewed the withheld information. He observes a degree of variation from year-to-year, which may suggest that no particularly endemic or intractable problems emerge from analysis of the basic figures, but which may also partially reflect the subjective nature of the classification of an incident as racial. He considers, therefore, that any information contained in these statistics lacks the rigour inherent in the so-called 'league-table' information routinely published about schools, not least because the decision to class an incident as racial is largely left to individual perception.

59. For this reason, he gives only a limited amount of weight to the argument that disclosure of the requested information gives parents important information about issues facing children in schools. The withheld information, in isolation, does not permit a reasoned analysis of any such issues as they relate to racist incidents.

60. Balancing this, the Commissioner finds the public authority's points in favour of maintaining the exemption to be persuasive. The propensity for 'bald' statistics to be taken in isolation, without the underlying supporting data, is acknowledged, as is school staff's natural and understandable desire not to present an unfavourable impression of a school, and the real possibility that such data would be under-stated in consequence, to the detriment of the various purposes for which the data are collected.
61. Consequently, the Commissioner finds that the public interest arguments in favour of maintaining the exemption outweigh the public interest arguments in favour of disclosure and the information should not be disclosed.

Section 40

62. The information refused under section 40(2) is the information requested in the first sub-section of part [2] of the complainant's request, namely the ethnicity of the perpetrator and victim. Part [2] of the request was refused in its entirety under section 36(2)(c) and, if the information about the numbers of racial incidents is not to be disclosed, it follows that the ethnicity of the perpetrator and victim will not be disclosed. Consequently, as the Commissioner upholds the public authority's decision to withhold the information under section 36(2)(c) he has not found it necessary to go on to consider the application of section 40(2) to the specified elements.

The Decision

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

- The withheld information was correctly refused under the exemption provided at section 36(2)(c) of the Act.

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

- The public authority failed to state that information was not held, in respect of a more detailed breakdown of information for part 3) of the request, in breach of section 1(1)(a) of the Act.

- The public authority failed to disclose information which was not withheld within 20 working days, and consequently breached section 10(1) of the Act.

Steps Required

64. The Commissioner requires no steps to be taken.

Right of Appeal

65. 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 16th day of March 2011

Signed

**Gerrard Tracey
Principal Policy Adviser
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**

Legal Annex

General Right of Access

Section 1(1) provides that -

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

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (b) if that is the case, to have that information communicated to him."

Section 1(2) provides that -

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

Section 1(3) provides that –

"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."

Section 1(4) provides that –

"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."

Section 1(5) provides that –

“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).”

Section 1(6) provides that –

“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”.

Time for Compliance

Section 10(1) provides that –

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

Section 10(2) provides that –

“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.”

Section 10(3) provides that –

“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.”

Section 10(4) provides that –

“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.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner.”

Section 10(6) provides that –

“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.”

Prejudice to effective conduct of public affairs.

Section 36(1) provides that –

“This section applies to-

- (a) information which is held by a government department or by the National Assembly for Wales and is not exempt information by virtue of section 35, and
- (b) information which is held by any other public authority.

Section 36(2) provides that –

“Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under this Act-

- (a) would, or would be likely to, prejudice-

- (i) the maintenance of the convention of the collective responsibility of Ministers of the Crown, or
 - (i) the work of the Executive Committee of the Northern Ireland Assembly, or
 - (ii) the work of the executive committee of the National Assembly for Wales,
- (b) would, or would be likely to, inhibit-
- (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
- (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.

Section 36(3) provides that –

"The duty to confirm or deny does not arise in relation to information to which this section applies (or would apply if held by the public authority) if, or to the extent that, in the reasonable opinion of a qualified person, compliance with section 1(1)(a) would, or would be likely to, have any of the effects mentioned in subsection (2)."

Section 36(4) provides that –

"In relation to statistical information, subsections (2) and (3) shall have effect with the omission of the words "in the reasonable opinion of a qualified person".

Section 36(5) provides that –

"In subsections (2) and (3) "qualified person"-

- (a) in relation to information held by a government department in the charge of a Minister of the Crown, means any Minister of the Crown,
- (b) in relation to information held by a Northern Ireland department, means the Northern Ireland Minister in charge of the department,
- (c) in relation to information held by any other government department, means the commissioners or other person in charge of that department,

- (d) in relation to information held by the House of Commons, means the Speaker of that House,
- (e) in relation to information held by the House of Lords, means the Clerk of the Parliaments,
- (f) in relation to information held by the Northern Ireland Assembly, means the Presiding Officer,
- (g) in relation to information held by the National Assembly for Wales, means the Assembly First Secretary,
- (h) in relation to information held by any Welsh public authority other than the Auditor General for Wales, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the Assembly First Secretary,
- (i) in relation to information held by the National Audit Office, means the Comptroller and Auditor General,
- (j) in relation to information held by the Northern Ireland Audit Office, means the Comptroller and Auditor General for Northern Ireland,
- (k) in relation to information held by the Auditor General for Wales, means the Auditor General for Wales,
- (l) in relation to information held by any Northern Ireland public authority other than the Northern Ireland Audit Office, means-
 - (i) the public authority, or
 - (ii) any officer or employee of the authority authorised by the First Minister and deputy First Minister in Northern Ireland acting jointly,
- (m) in relation to information held by the Greater London Authority, means the Mayor of London,
- (n) in relation to information held by a functional body within the meaning of the Greater London Authority Act 1999, means the chairman of that functional body, and
- (o) in relation to information held by any public authority not falling within any of paragraphs (a) to (n), means-

- (i) a Minister of the Crown
- (ii) the public authority, if authorised for the purposes of this section by a Minister of the Crown, or
- (iii) any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

Section 36(6) provides that –

"Any authorisation for the purposes of this section-

- (a) may relate to a specified person or to persons falling within a specified class,
- (b) may be general or limited to particular classes of case, and
- (c) may be granted subject to conditions."

Section 36(7) provides that –

A certificate signed by the qualified person referred to in subsection (5)(d) or (e) above certifying that in his reasonable opinion-

- (a) disclosure of information held by either House of Parliament, or
- (b) compliance with section 1(1)(a) by either House, would, or would be likely to, have any of the effects mentioned in subsection (2) shall be conclusive evidence of that fact.