

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 October 2014

Public Authority: The Governing Body of King Edward VI Handsworth School for Girls

Address: King Edward VI Handsworth School for Girls
Rose Hill Road
Handsworth
Birmingham
B21 9AR

Decision (including any steps ordered)

1. The complainant requested from King Edward VI Handsworth School for Girls ("the School") copies of collated results of pupil, parent and staff surveys conducted in 2013. The School withheld the information under section 36(2)(c) (prejudice to the effective conduct of public affairs). During the course of the Commissioner's investigation, it also applied section 40(2) (personal data) to some of the information.
2. The Commissioner's decision is that the School has incorrectly applied sections 36(2)(c) and 40(2) to the withheld information.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - To disclose to the complainant all of the information withheld under sections 36(2)(c) and 40(2).
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 January 2014 the complainant requested the following information related to a comprehensive survey undertaken by the School in the Summer Term 2013:
 - "1) The collated pupil survey results.
 - 2) The collated parent survey results.
 - 3) The collated staff survey results."
6. The School responded on 4 February 2014. It refused to provide the requested information citing the exemption in section 36(2)(c) of FOIA.
7. The complainant requested an internal review on 10 February 2014. On 4 April 2014, the School informed her that, whilst it had no internal review process under its FoI policy, a review had taken place and this had upheld the original decision.

Scope of the case

8. The complainant initially contacted the Commissioner on 17 March 2014 to complain about the way her request for information had been handled. Specifically, she complained about the Schools application of section 36(2)(c) to the information that she requested. The complainant also complained about the School application of section 40(2) to some of the withheld information during the course of the Commissioner's investigation.
9. The Commissioner considered whether the School had correctly applied section 36(2)(c) to all of the withheld information and section 40(2) to parts of the withheld information.

Reasons for decision

Section 36 – Prejudice the effective conduct of public affairs

10. The School applied section 36(2)(c) to all of the withheld information.
11. Section 36(2)(c) 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 -

...(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs."

12. In order to determine whether section 36(2)(c) has been correctly applied the Commissioner has:
 - (i) ascertained who the qualified person was for the public authority;
 - (ii) established that an opinion was given;
 - (iii) ascertained when the opinion was given; and
 - (iv) considered whether the opinion given was reasonable.

The engagement of section 36

13. The School confirmed that the opinion in relation to the application of section 36 was given by its Chair of Governors. The Commissioner is satisfied that she was the appropriate qualified person for these purposes.
14. In support of the application of section 36, the School has provided the Commissioner with details of the submissions to the qualified person, which identifies the information to which it is suggested that section 36(2)(c) should be applied.
15. The Commissioner notes that the qualified person's opinion was provided on 29 January 2014 on the basis that she believed that disclosure of the withheld information would be likely to have the effects set out in section 36(2)(c). She accepted that section 36(2)(c) was engaged for the following reasons:
 - The disclosure of the surveys would leave the school vulnerable to qualified or part onward disclosure of the surveys which may result in a distorted picture of the provision of teaching and learning in the School and, further, a distorted picture of overall parent, pupil and staff engagement with the School. The reports are set in tabular format and are based on personal opinions which are a snapshot in time and may not necessarily reflect the individual's accurate view.

- Furthermore the publication of the surveys may well lead to the undermining of individuals in their subject areas in the eyes of the pupils and parents to the detriment of overall teaching and learning in those subjects, the undermining of authority and prejudice to the effective education, efficient use of resources and effective management and control.
16. The Commissioner notes that his guidance on section 36 makes clear that:
- "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 unreasonable 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."* (para. 21)
17. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.
18. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to conclude that section 36(2)(c) applied to it.
19. As section 36 is a qualified exemption, it is subject to a public interest test. The Commissioner therefore went on to consider whether the public interest in maintaining the exemption outweighed the public interest in disclosure of the information.

Public interest test

20. The Commissioner notes that the qualified person's opinion was that disclosure of the withheld information "would be likely" to have the effects set out in section 36(2)(c), as opposed to that it "would" have those effects. In his view this means that there is a real and significant chance of the prejudice occurring, even though the probability may be less than fifty per cent. The Commissioner has taken this into account in assessing the public interest arguments in favour of maintaining the exemption.
21. In *Guardian Newspapers & Brooke v Information Commissioner & BBC* (EA/2006/0011 & EA/2006/0013), the Tribunal noted the distinction

between consideration of the public interest under section 36 and under the other qualified exemptions contained within the Act:

"The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(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 s 36(2)(b), or indeed of prejudice under s 36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice."

22. The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so

"...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."

23. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the likely prejudice to the effective conduct of public affairs.

Public interest arguments in favour of maintaining the exemption

24. The School confirmed to the Commissioner that the nature of the prejudice that it believed was likely to occur from disclosure was set out in the qualified person's opinion. In summary, it considered that the information contained in the survey results did not represent an accurate and representative view, as was the case with all surveys of this kind.
25. The School informed the Commissioner that it could not predict which information would be repeated or taken out of context to support a particular view or statement. However, it maintained that, if taken out of context, some information could be extremely misleading and damaging to the School.
26. The School acknowledged that there was an argument that disclosure of the requested information could assist the public to understand the areas of strength and weakness in the School, as perceived by the individuals who took the time to fill out the survey. However, given that the information showed a selection of opinions (ie. not those of the

whole student/teacher/parent base) taken at a particular moment in time, it believed that the data itself had limited value to the public and that there was a very real danger of misinterpretation leading to confusion.

27. The School went on to explain that it also took into account the potential for harm that could be caused to individual subject teachers if some of the information was released without qualification or proper explanation. In its view, some criticisms would have been unfounded, and others would not. Those which were not unfounded would already have been dealt with by School internally and it would have been inappropriate for any matters of internal staffing and management to be available to the public, particularly where there was no ability to discern which concerns were unfounded, and which were not.
28. The School also informed the Commissioner that it had considered the potential harm to the School and the individual teachers if the information were to be released and published in a reduced/selective format. It believed that the potential level of harm outweighed the limited public interest in the information itself.
29. The Commissioner is generally reluctant to accept arguments from public authorities that it is not in the public interest to disclose information because it may be inaccurate or misleading. He would normally expect public authorities to publish information and, where appropriate, provide some relevant context or explanation with the information. It would therefore have been open to the School in this case to have released the survey results with an explanation setting them in context, including details of any reservations it may have had about those results.
30. The Commissioner notes that the parent, pupil and staff surveys all generally produced very positive results as regards the various aspects of provision that were covered. As is to be expected with surveys of this nature, they identify a few areas where it was thought that the School might be able to improve on existing provision. In terms of the overwhelming majority of the survey results that have positive things to say about the School, the Commissioner cannot see how the release of this information would cause any real harm to the School. As regards, the small number of areas which are identified as being able to be improved upon, the Commissioner does not believe that any issues raised are sufficiently serious to cause any significant harm to the School. In addition, as noted above, the School would be free to provide any explanation it wishes in respect of any information that it feels may be misunderstood or needs to be placed in a wider context.

31. The School also argued that there was limited "public interest" in the information because the general public would not learn anything useful or illuminating as to how public funds were spent, or the way in which the School was run that could not already be obtained through the School's website, Ofsted reports and the School's accounts, all of which were widely available.
32. The Commissioner notes from the Ofsted website that it appears that, prior to the request being made, no detailed Ofsted reports covering a broad spectrum of the School's provision had been published since it became an Academy in August 2011. An Ofsted inspection did take place on 4 February 2014 and a report was published on 28 February 2014 (for which the School received an "Outstanding" rating). However, as these events took place after the request had been made, they are not matters that the Commissioner can take into account in carrying out the public interest test. The Commissioner therefore considers that the withheld information would allow parents and the public some insight into a wide range of areas of provision at the School at the time that the surveys were carried out. This type of detailed information would not have been available to them from the School's website or its accounts.

Public interest arguments in favour of disclosing the requested information

33. The Commissioner believes that there is a strong public interest in openness, transparency and accountability with regard to the operation of public authorities. As a result, in relation to schools, there is likely to be a significant public interest in the disclosure of information which may help to shed light on the quality of educational provision and how effectively schools are being managed. This is closely linked to the public interest in ensuring that the large amounts of public money being invested in schools are being spent in appropriate ways.
34. The School informed the Commissioner that it did not consider that there were any clear and exceptional reasons why there was a public interest in the information contained in what was, essentially, a collection of statistics to be used in conjunction with other material as a management tool. In its view, whilst it accepted that general public interest arguments about transparency and accountability applied, the information itself was of limited value.
35. The Commissioner notes that the survey was completed by 442 parents, 750 pupils and 84 staff. He understands that this translates to approximately 49% of parents, 83% of pupils and 95% of staff completing their respective surveys. There is clearly a public interest in those people who take the time and trouble to complete surveys of this type being able to see the overall results of those surveys. This is

particularly the case where it involves, as in this case, a considerable number of people.

36. The Commissioner has already noted that, at the time of the request, there was a very limited amount of detailed information available to parents and the public commenting on the quality of the various aspects of provision at the School, particularly since it had converted to an Academy. The surveys sought the views of parents, pupils and staff on a considerable numbers of aspects of academic and other provision within the School. Whilst the views of parents, pupils and staff are clearly not determinative in assessing the quality of provision at a school, their views clearly have an important role to play. This is particularly the case where, as here, there appears to the Commissioner to have been a very good response rate to surveys.
37. Consequently, the Commissioner believes that, at the time of the request, there was a significant public interest in the publication of the survey results to provide parents and other members of the public with information with regard to the School's performance. In his view, the disclosure of the survey results would therefore have aided transparency and accountability in relation to the School.

Balance of the public interest arguments

38. As the Commissioner has previously noted, the qualified person's opinion is limited to the degree of likelihood that the relevant prejudice may occur. Consequently, in his view, this means that while he must give due weight the opinion when assessing the public interest, he needs to consider the severity, extent and frequency of that likely prejudice. He is not convinced, given the nature of the information, particularly given the positive nature of much of what is contained in the survey results, that any prejudice that might occur from disclosure would be likely to be particularly severe, extensive or of a frequent nature.
39. With regard to the public interest in disclosure, the Commissioner considers that the disclosure of the information at the time that the request was made would have helped to increase the transparency and accountability with regard to various aspects of provision at the School. He considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and that, consequently, section 36(2)(c) does not apply to the withheld information.
40. The School had argued that a small amount of the information, if not exempt from disclosure under section 36, is exempt from disclosure under section 40(2). The Commissioner therefore went on to consider whether this section was applicable to any of the withheld information

Section 40(2) – Personal information

41. The School sought to rely on section 40(2) to withhold information which it believed would identify individual members of staff.

42. Section 40(2) provides an exemption for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.

43. Section 40(2) states that –

"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."*

44. Section 40(3) provides that –

"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."*

45. In this case the relevant condition is contained in section 40(3)(a)(i). This applies where the disclosure of the information to any member of the public would contravene any of the principles of the Data Protection Act ("DPA").

46. The Commissioner therefore considered:

- (1) whether the withheld information constitutes personal data; and if so
- (2) whether disclosure would breach one of the data protection principles.

(1) Does the withheld information constitute personal data?

47. In order to establish whether section 40(2) had been correctly applied, the Commissioner first considered whether the withheld information is the personal data of parties other than the complainant.
48. Personal data is defined in the DPA as information about a living individual who can be identified from that information, or from that information and other information in the possession of, or likely to come into the possession of, the data controller.
49. The School identified to the Commissioner the information that it considered constituted personal data. This was made up of information about particular subject areas or departments and other information related to the management of the School. The Commissioner understands from the School that responsibility for teaching the identified subject areas at the time that the surveys were carried out lay with a particular individual or a small number of staff.
50. In the Commissioner's view the two main elements necessary for information to be personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in some way.
51. The Commissioner accepts that, to the extent that the withheld information can be related to a specific identifiable individual, the withheld information will constitute their personal data. However, where it does not relate to a specific identifiable individual, for example the School's Senior Management Team, he would not accept that it constitutes personal data.
52. However, the fact that information constitutes the personal data of individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The Commissioner therefore went on to consider whether disclosure of the withheld information which constituted individuals' personal data would breach one of the data protection principles.

(2) Would disclosure breach one of the data protection principles?

53. The School informed the Commissioner that it believed that disclosure of the information to which it had applied section 40(2) would breach the first data protection principle. The first data protection principle requires that any disclosure of personal data is fair and lawful and that at least one of the conditions in schedule 2 of the DPA is met.
54. The Commissioner firstly gave consideration to whether the disclosure of the withheld information would be fair. In doing so, he took into account the following factors:
- (i) the individuals' reasonable expectations of what would happen to their information;
 - (ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned; and
 - (iii) whether the legitimate interests of the public in disclosure were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

(i) Reasonable expectations of the individuals concerned

55. The Commissioner considered the reasonable expectations of the individuals in terms of what would happen to their personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
56. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability. They should expect that some personal data about them may be released because their jobs are funded by the public purse. When considering what information an individual should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to their public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
57. The Commissioner notes that the personal data withheld by the School concerns its staff acting in a work related capacity. In light of this, the Commissioner's view is that the information may not attract the same level of protection as information which relates to their private lives.

58. The School argued that although the withheld information related to individuals' public (or professional) life, the context in which the information was supplied suggested that it would be unfair to release it to any third party. The information related to the perceptions of pupils, staff and parents as to individual teachers' abilities and performance, which was not necessarily based upon any evidence or fact, and could be coloured by personal opinions and views that were irrelevant to an assessment of performance. As such, the School believed that it would be unfair to release this information to the public at large, who might make judgments based on that information, without an understanding of any underlying or additional circumstances that may be relevant.
59. The School informed the Commissioner that the expectation of its staff was that the results of the survey would be anonymised if made public, for the reasons given above. It explained that individual staff members had not been approached and asked for their consent to release their personal information because this would have taken a considerable amount of time and would have placed a disproportionate burden on the School.
60. The Commissioner notes that the surveys were undertaken on behalf of the School by a well-known company that carries out similar surveys for many other schools. He also notes that the outcomes of surveys in respect of other schools, including details of areas of provision which have been identified in the survey results as areas for improvement, are often available on the schools' websites.
61. In addition, the Commissioner notes that other information about the performance of Schools is often available to the public. For example, Ofsted reports may contain very detailed comments about particular aspects of provision within schools, some of which may be critical, even where the responsibility for that provision may lie with a small number or individual members of staff. There is also a significant amount of data in the public domain, often placed there by schools themselves, regarding examination results which can be used to as a basis for forming judgements about a school's performance in particular subject areas.
62. To the extent that the withheld information relates to identifiable senior member of staff at the School, the Commissioner's view is that senior staff within a public authority should expect that it would disclose more information about them than junior staff. This is because senior staff should expect their posts to carry a greater level of accountability, since they are likely to have a greater responsibility for policy decisions and the expenditure of public funds than more junior staff. As a consequence, the Commissioner believes that to the extent that any information to which the School has applied section 40(2) constitutes

the personal data of any members of the School's senior management team, there must be a greater expectation that this information may be disclosed to the public.

63. In light of the above, the Commissioner believes that there should have been some expectation on the part of the School's staff that details of the results of the surveys, to the extent that they constituted their personal data, might be disclosed to the public.

(ii) Consequences of disclosure

64. The Commissioner does not believe that, to the extent that the withheld personal data about staff contains positive feedback about particular aspects of provision within the School, its disclosure would be likely to cause any damage or distress to the individuals concerned.
65. As regards aspects of provision which are identified as areas for possible improvement, the Commissioner accepts that disclosure of this information, as it can be linked to a specific individual, has the potential to cause them some concern. However, in his view, any concerns that could arise from disclosure could, to some extent, be offset by the School providing appropriate explanations and context to accompany the release of the survey results.

(iii) General principles of accountability and transparency

66. The Commissioner notes that, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case, it may still be fair to disclose information if there is a more compelling public interest in disclosure.
67. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests. As the Commissioner has previously noted in his consideration of the application of section 36, there is likely to be a significant public interest in the disclosure of information which may help to shed light on the quality of educational provision in schools and how effectively schools are being managed.
68. The Commissioner has already noted that prior to the publication of the Ofsted inspection report after the request had been made, there was a very limited amount of information available with regard to the quality of the various aspects of provision at the School, particularly since it had converted to an Academy. The disclosure of the information contained in the survey results, including where it constituted the personal data of

staff, would have provided details of feedback on a considerable number of aspects of academic and other provision within the School and so would have been helpful in that regard. This would have been particularly relevant to the large proportion of parents, pupils and staff that completed and submitted responses to the survey.

69. Consequently, the Commissioner believes that, at the time of the request, there was a significant public interest in the disclosure of the personal data contained in the survey results to provide parents and other members of the public with information with regard to the School's performance and, consequently, to aid transparency and accountability in relation to the School.
70. The Commissioner believes that any public interest in disclosure must be weighed against the potential prejudices to the rights, freedoms and legitimate interests of the staff whose personal data is contained within the withheld information. However, taking into account all of the points discussed above, the Commissioner has concluded that the strength of the legitimate interest in disclosure is sufficient to outweigh the rights of any data subjects to privacy. He has therefore concluded that it would be fair and lawful to disclose the personal data of staff contained in the withheld information.
71. Having determined that this would be fair and lawful to disclose staff's personal data, the Commissioner went on to consider whether a condition in Schedule 2 of the DPA was met. In relation to the conditions in Schedule 2, the Commissioner believes that the most relevant one is the sixth condition. This states that:

"The processing is necessary for the purposes of legitimate interests pursued by the data controller or by the third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms of legitimate interests of the data subject".
72. The Commissioner has explained above why he believes that the disclosure of the staff's personal data would serve a legitimate public interest. He is of the view that disclosure is necessary to meet that legitimate public interest. As a result, he is satisfied that the sixth condition in Schedule 2 is met and that section 40(2) is not applicable to that personal data.
73. As the Commissioner has determined that neither section 36(2) nor section 40(2) are applicable, he requires the School to disclose to the complainant all of the requested information to which it applied these exemptions.

Right of appeal

74. 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

75. 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.
76. 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

Rachael Cragg
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