

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 15 July 2019

Public Authority: The Governing Body of Downsvew Community Primary School

Address: Beech Avenue
Swanley
Kent
BR8 8AU

Decision (including any steps ordered)

1. The complainant has requested minutes and reports from Governor's meetings. Downsvew Community Primary School ("the School") disclosed some information but withheld information from the minutes and reports on the basis of section 36(2)(b)(ii) and section 40(2) of the FOIA.
2. The Commissioner's decision is that the School has correctly applied section 40(2) to withhold personal data from the minutes and reports. However, the Commissioner finds that whilst the section 36(2)(b)(ii) exemption has been correctly applied the balance of the public interest favours disclosure.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose all information identified by the School as exempt under section 36(2)(b)(ii).
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 13 June 2018 the complainant made a request to the School in the following terms:

"All governors' meetings minutes from 22/06/17 to 22/06/18

All governors' monitoring reports from 22/06/17 to 22/07/18"
6. The School responded on 8 July 2018 providing copies of some minutes and monitoring reports but withholding information from other full governing board confidential minutes and reports on the basis of section 36(2) of the FOIA. It was also stated that some of the information would constitute personal data so would breach the Data Protection Act 2018 (DPA) if it were disclosed; therefore section 40(2) of the FOIA was applied.
7. The complainant requested an internal review on 17 July 2018 as he considered the information had been withheld from the minutes incorrectly. The School conducted an internal review and responded on 23 July 2018 and upheld its decision.

Scope of the case

8. The complainant contacted the Commissioner on 20 August 2018 to complain about the way his request for information had been handled.
9. The Commissioner considers the scope of her investigation to be to determine if the School has correctly withheld information from the minutes on the basis of section 40 and 36 of the FOIA.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

10. The School has redacted information from the minutes and reports that it considers engages section 36(2)(b)(ii).
11. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would, or would be likely to inhibit (ii) the free and frank exchange of views for the purposes of deliberation.

12. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
13. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
14. To determine first whether the School correctly applied the exemption, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
 - ascertain who was the qualified person or persons
 - establish that an opinion was given by the qualified person
 - ascertain when the opinion was given; and
 - consider whether the opinion was reasonable.
15. The qualified person for Schools will be the Chair of the Governing body. However, in this case the opinion was originally given by the Interim Head teacher and later reiterated by the current Head teacher. The Commissioner provided advice to the School on the qualified person and following this an opinion was provided by the Chair of Governors. The Chair had access to supporting arguments for the decision and background to the request.
16. The qualified person concluded that, in his opinion, section 36(2)(b)(ii) was applicable and engaged and that disclosure would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
17. The Commissioner is satisfied that the opinion was that of the appropriate qualified person for the School. Whilst this was not provided at the time the request was received it is clear that the opinion has now been provided by the qualified person and that the qualified person was fully aware of the request prior to offering his opinion. She has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion, and not

necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.

18. For section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank advice for the purposes of deliberation, in relation to decision making.
19. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
20. The School provided the qualified person with the responses sent to the request, including the supporting arguments. It is not clear if the qualified person also had sight of the withheld information when providing his opinion. However, the qualified person was fully aware of the nature and context of the request as part of the School's governing body.
21. The information withheld under this exemption is discussions on a potential federation agreement, the possibility of this agreement is mentioned in the parts of the minutes already disclosed. These discussions and negotiations were in the early stages. It was put to the qualified person that this information may cause undue stress to staff and anxiety about a potential significant change to the school and its future. The School considered that the discussions were confidential and the Governors should have the ability to discuss options for the school freely without fear that their views and opinions would be disclosed.
22. The Commissioner has considered the qualified person's opinion, which has been supported by the School's reasoning. The Commissioner is prepared to accept that the opinion is reasonable and that section 36(2)(b)(ii) is therefore engaged. The Commissioner has gone on to consider the public interest arguments associated with these exemptions.

Public interest arguments in favour of disclosing the information

23. The complainant argues that governors are bound by rules of professionalism and not protected by privilege; as such minutes of governors meetings should not be withheld because there may be opinions in them which could cause embarrassment or damage.

Public interest arguments in favour of maintaining the exemption

24. The School argues that disclosing this information could cause undue stress to staff. Given the timing of the request disclosure could cause staff undue stress and anxiety about a potential change to the school and its future. It is argued that the Governors, as employers, should have the ability to discuss options for the School freely without fear that their view and opinions would be disclosed. Similarly the Governing Body needs to be able to have full and frank conversations in relation to organisations it engages with without fear that this would be disclosable.

Balance of the public interest arguments

25. The opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice would occur. In assessing the public interest arguments therefore, particularly those relating to withholding the information, the Commissioner considers the relevance of factors such as the severity, extent and frequency with which the free and frank exchange of views might be inhibited if the information was to be disclosed.
26. From its submissions the School has argued that disclosing the information withheld under this exemption would diminish the likelihood of free and frank exchanges between Governors. The School did not go on to describe the impact of this i.e. that this may lead to less informed decisions being made, but the Commissioner notes that if there is a real risk to free and frank exchanges then this may be a consequence.
27. That being said the School has pointed to Regulation 15 and 26 of the School Governance (Rules, Procedures and Allowances)(England) Regulations 2013¹ as the basis for the decisions it has made on what can be withheld from minutes. Regulation 15 states that Governing Body minutes should be made available for inspection as soon as possible. However, it does state that:

(3) The governing body may exclude from any item required to be made available in pursuance of paragraph (2) any material relating to—

¹ <http://www.legislation.gov.uk/ukxi/2013/1624/contents/made>

(a) a named person who works, or who it is proposed should work, at the school;

*(b) a named pupil at, or candidate for admission to, the school;
or*

(c) any other matter that, by reason of its nature, the governing body is satisfied should remain confidential.

28. It appears to be this part of Regulation 15 which has informed the decision to withhold information which the School considers may cause distress to staff or inhibit Governors from free and frank discussions.
29. Whilst this does show that there are clear guidelines around Governor's meetings and minutes and it does give Governor's some degree of control over the information that is in the minutes that is confidential; this does not override the FOIA. It is not simply sufficient to state that information is confidential. In this case the reasons for considering the information confidential relate to the potential chilling effect on future engagement.
30. The Commissioner considers that the timing of a request and the continuing relevance of the information will have some bearing on whether it can be accepted there is a potential chilling effect on future engagement.
31. It is clear to the Commissioner that at the time the request was made there were still decisions to be made on any potential federation agreement and discussions were still ongoing and then later on hold.
32. However, this does not mean that it has to be accepted there would be a chilling effect i.e. an unwillingness by various parties to engage with discussions, or an impact on the School's ability to conduct its functions if the information were to be disclosed.
33. As discussed in the Commissioner's published guidance on section 36, chilling effect arguments operate at various levels. If the issue in question is still live, arguments about a chilling effect on those ongoing discussions are likely to be most convincing. Arguments about the effect on closely related live issues may also be relevant. However, once the decision in question is finalised, chilling effect arguments become more and more speculative as time passes. It will be more difficult to make reasonable arguments about a generalised chilling effect on all future discussions.
34. At the time of the request any decision had been put on hold. The School have not indicated if this was likely to be on hold for a long time or it may be discussed again in the near future. In addition to this, the

Commissioner does not consider the information in the minutes to be particularly detailed so there is a lesser argument for saying there may be a chilling effect on future exchanges if it were to be disclosed. It is also clear from the School Governance Regulations that Governor's meetings are required to be minuted and it is likely Governor's will still want to and need to engage and input into discussions at meetings to ensure the effective operation of the School and the best future.

35. The Commissioner therefore does not consider there is much likelihood of a chilling effect occurring as a result of disclosure. As previously mentioned, the section 36(2)(b) exemption concerns processes that may be inhibited rather than harm arising from the content or subject matter of the requested information itself. The lack of any substantive chilling effect being a likely result of disclosure leads the Commissioner to conclude that disclosure would be unlikely to inhibit the process of providing free and frank advice for the purposes of deliberation.
36. The Commissioner does recognise the public interest in transparency and accountability and the importance of Governor's minutes being published in full, as much as this is appropriate, to assist in aiding transparency and community engagement with the School. The need for transparency to aid engagement and debate and to show the decision making going on which impacts on pupils, parents and staff does carry weight here and the Commissioner considers that, given the lack of weight given to the chilling effect arguments, this is enough to outweigh the public interest in maintaining the exemption.
37. Therefore, the Commissioner has concluded the section 36(2)(b)(ii) exemption is engaged in relation to the information the School has identified but the public interest favours disclosing the information.
38. The Commissioner has now gone on to consider the information withheld from the minutes and reports under section 40(2) of the FOIA.

Section 40(2)

39. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
40. In this case the relevant condition is contained in section 40(3A)(a)². This applies where the disclosure of the information to any member of

² As amended by Schedule 19 Paragraph 58(3) DPA.

the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').

41. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
42. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

43. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

44. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
45. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
46. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
47. The information withheld within the minutes under section 40(2) is information which refers to employees, ex-employees and pupils by name and with reference to incidents, positions, employment statuses and salary details.
48. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to several data subjects. She is satisfied that this information both relates to and identifies the data subjects concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
49. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

50. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

51. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

52. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

53. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

54. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

55. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³.

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

56. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
57. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

58. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
59. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
60. The Commissioner understands that the complainant is concerned the Governors of the School may be acting unprofessionally in their duties and attempting to cover this up with the redactions made in the minutes. The complainant also has concerns unprofessional statements made about him may have been made. The Commissioner also recognises there are legitimate interests in transparency and accountability.

Is disclosure necessary?

61. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under

the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

62. The Commissioner, having viewed the information withheld under this exemption, notes that it is information about staff at the School, past, present and prospective, and some pupils. This information exists as Governor's will have discussions on employment and how to handle issues and the minutes and reports serve as a record of this.
63. It is not clear how disclosure of the withheld information would be necessary to meet the complainant's legitimate interests. The information is information that would be expected to be documents in minutes and reports as the function of a Governing Body is to discuss issues involving staffing and pupils. The complainant's legitimate interest in the information stems from the belief that the Governing Body have conducted themselves in an unprofessional manner and are attempting to hide this. Disclosing the withheld information would seem to be disproportionately intrusive to meet this interest as it would reveal detail about staff and pupils which is not otherwise in the public domain.
64. If there were information on the complainant contained within the withheld information there would be a less intrusive method of obtaining this as it would be exempt under section 40(1) of the FOIA and considered under the subject access provisions of the DPA.
65. However, the Commissioner cannot dismiss the complainant's legitimate interest in the information and it does seem that disclosure would allow for the complainant to properly scrutinise if there is any unprofessional conduct on the part of the School's Governors. Disclosure of the withheld information is therefore 'necessary' to meet the legitimate interests already identified.

Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms

66. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
67. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;

- whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
68. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
69. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
70. The Commissioner considers that the individuals concerned would have a reasonable expectation that the personal data documents in the withheld information would not be made public.
71. The Commissioner accepts that it is the general expectation of the data subjects concerned that their personal data will remain private and confidential and will not be disclosed to the world at large. Disclosure under the FOIA would confirm to the world at large information of a personal or private nature and the Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects.
72. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
73. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

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@justice.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

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