

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 March 2021

Public Authority: Central Bedfordshire Council

Address: Priory House,
Monks Walk,
Chicksands,
Shefford
SG17 5TQ

Decision (including any steps ordered)

1. The complainant has requested copies of governing bodies and head teachers' responses to a consultation run by the council relating to its 'Schools for the Future' project. The council provided some information but refused to provide the majority on the basis that section 41 of the Act applied (information provided in confidence). In the internal review, the council withdrew its reliance upon section 41 and relied upon section 21 (information available to the applicant by other means), and section 43(2) (commercial interests).
2. The Commissioner's decision is that the council was not correct to apply section 43(2) to withhold information. She has however decided that it was correct to withhold other information under section 21.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - To disclose the information withheld under section 43 to the complainant.

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 22 November 2019, the complainant wrote to council and requested information in the following terms:

"Please can I formally request:

Each individual Governing Body responses in full linked to CBC proposals for Schools for the Future within LC2

I would also request each Headteacher response in full. CBC have used the statistic that 80% of HT are in favour of 2 tier conversion but as a Headteacher I am unaware how this statistic was reached. As a Headteacher myself I have never been asked my preference. I would like to understand how HT were consulted and how their preference for 2 tier or 3 tier was sought. Please can I have HT responses in full to CBC proposals. [name of individual redacted] explicitly refused to share HT opinion.

I am happy for names or schools to be redacted if appropriate."

6. The council responded on and 6 January 2020 provided some information. However, it withheld other information on the basis that the exemption in section 41 of the Act applied (information provided in confidence).
7. On the same day the complainant wrote back to the council and asked it to carry out an internal review of its decision. She said that:

"...I am not aware of Headteacher opinion of a preference of 2 or 3 tier ever being sought by CBC. I would like to know how Headteachers were consulted on this, how the statistic was reached and then communicated out."
8. The council wrote to the complainant on 10 June 2020 providing the outcome of its internal review. It withdrew its reliance upon section 41 to withhold the information. However, in its place it applied sections 21 (information available by other means) and section 43(2), (prejudice to commercial interests), and withheld the requested information.

Scope of the case

9. The complainant contacted the Commissioner on 10 February 2020 to complain about the way her request for information had been handled. Initially this related to the lack of review, however as this has now been responded to, the remaining area for the Commissioner to consider is whether the council was correct to withhold information under the exemptions it applied.

Reasons for decision

Section 21

10. Section 21(1) provides that –

"Information which is reasonably accessible to the applicant otherwise than under section 1 is exempt information."

11. The council argues that the complainant, as a headteacher herself, will have been provided with some of the information which the council issued to head teachers and schools as part of the consultation.
12. Section 21 is specific to the applicant for the information. The Commissioner accepts that the complainant is a headteacher, and notes that she was in place at the school during the relevant period. The complainant received the information sent out by the council pertinent to the general consultation which occurred with headteachers and schools governing boards. The council also provided links to the publicly available information in its initial response to the request for information.
13. The Commissioner is satisfied that this information was available to the complainant and that the council was therefore correct to apply section 21 of the Act to withhold it.
14. However, this information does not answer the complainant's main concern; that she is not aware that headteachers were consulted directly prior to the council stating that 80% of headteachers were in favour of a 2-tier system being introduced into the area. The Commissioner has therefore gone on to consider the remaining information, withheld under section 43(2) by the council.

Section 43(2)

15. Section 43(2) provides that –

"Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it)."

16. The exemption can be engaged on the basis that disclosing the information either "would" prejudice commercial interests, or the lower threshold that disclosure "would be likely" to prejudice those interests.
17. The term "likely" is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice would be more probable than not.
18. The Council considered that disclosure of the requested information "would be likely" to prejudice relevant schools' commercial interests.
19. Section 43(2) is a qualified exemption and is therefore subject to the public interest test under section 2 of the Act if the exemption is engaged.

The council's position

20. The level of likelihood of prejudice being relied upon is that disclosure would 'be likely to prejudice' some of the schools concerned in the consultation.
21. The council argues that the parties that would be affected are all current and future academies within the area. The academies compete for all resources in a directly commercial sense.
22. It argues that releasing the withheld information would give some insight to the possible future of individual schools – this would be prejudicial to their interests as no decisions have been made, consultations have not been completed and a full and comprehensive set of views have not yet been obtained.
23. The council argues that releasing this information would be likely to lead to speculation on the future of individual schools, whether that be future closure or a change to the setting. It argues that this could have a detrimental effect on the negotiating powers of schools as regards their future bids or resources.

24. It further argues that any indication that a school might be affected or that it might be closed in the future would affect the level of pupils seeking to go to the school, and the school's ability to hire the best staff and teachers.
25. The information was provided as part of the consultation process. To subsequently disclose the information would affect the school's position in the future, and the council argues that as the headteachers' responses were provided separately from that of the governing bodies of the schools, and many considered that their responses were in confidence, there is a risk that this would create issues between headteachers and their schools governing boards.
26. That being said, the Commissioner has considered the withheld information and notes that, for the vast majority of cases, headteachers views were provided alongside those of the governing bodies, as joint responses to the questions asked of them.

The Commissioner's analysis

27. For section 43(2) to be engaged three criteria must be met:
 - i. Firstly, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to commercial interests;
 - ii. Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the withheld information and the prejudice to those commercial interests; and
 - iii. Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, meaning whether there is at least a real and significant risk of the prejudice occurring.

i. Would disclosure affect 'commercial interests'

28. The term 'commercial interests' is not defined in the FOIA; however, it can be defined as:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

29. The Commissioner accepts that academy schools do compete with each other for pupils. Pupil numbers are influential in funding decisions. If there is a possibility of information being disclosed that might negatively impact on the number of children choosing a particular school as an option, this could negatively affect the schools funding levels and therefore their financial interests.
30. The Commissioner understands the argument that a disclosure of information giving an indication of the potential future of individual schools might affect the commercial and financial interests of those schools. It should be noted however that the exemption does not apply to financial interests. It relates only to the commercial interests of the parties concerned.
31. The level of funding received by a school is not necessarily a commercial interest; it relates to the financial interests of that school. In essence, the commercial interests therefore surround the ability of particular schools to draw pupils, and potential staff, to choose the school over other similar schools.
32. The Commissioner therefore accepts that there is a commercial interest at stake. She also accepts that any disclosure of information which would prejudice these interests will engage the exemption.

ii. Would a disclosure cause the prejudice identified?

33. The next step is therefore for the Commissioner to consider whether a disclosure of the information cause the prejudice foreseen.
34. The council argues that Academy schools compete for resources with each other. Funding is partially calculated using the number of children within a school. A disclosure of information suggesting that particular schools may be affected by the changes being consulted upon may deter parents from choosing these schools in their options for their children in the future.
35. A significant loss of numbers choosing a particular school as an option could be detrimental to a school's commercial interests when compared to its unaffected competitors. If less children chose particular schools, the schools' commercial interests have been negatively affected compared to their competitors. Similarly, individuals may choose not to apply to vacancies at particular schools if they are aware that the school is likely to be closed or significantly affected in the future.
36. The Commissioner accepts the argument that a disclosure of the information could potentially lead to the prejudice which the council perceived.

37. She notes however that these arguments were not supported by submissions from the schools themselves. She has considered this further below.

iii. The likelihood that schools' commercial interests would be affected

38. The final question for the Commissioner to consider is how likely it is that the prejudice foreseen would be caused by a disclosure of the withheld information.

39. The Commissioner recognises that academy schools have a minimum funding guarantee which they are guaranteed to be allocated.

40. She also recognises that the school application and placement process may mitigate the perceived prejudice to an extent. Ultimately, children are allocated places at particular schools based upon set criteria, the numbers of places available per school, the number of schools within an area taking new children, and the number of children seeking a place in a particular area or school. In effect, the level of demand, as compared to the number of places available, may ultimately be the overriding factor which would affect the likelihood for schools being prejudiced by a disclosure of the information.

41. The Commissioner has also not noted any specific 'different' sets of questions asked of headteachers. However, some headteachers did respond to the consultation alongside their governing bodies. There are records of specific headteachers views held, including the views of the headteacher from complainant's own school, dating from 2018.

42. The Commissioner considers that this further weakens the council's arguments in this respect. This would also partially explain the complainant's argument that she is not aware that head teachers were specifically asked to comment on their views of taking a 2 or 3 tier approach forward.

43. The council did not provide any arguments from the headteachers themselves arguing that a disclosure of the information would be detrimental to the school's commercial interests. Its arguments rely largely upon its own opinion on how disclosure might affect some schools. It also did not identify any particular schools where this affect might occur.

44. Academy schools have a degree of financial independence from the council. The Commissioner's guidance on section 43 highlights the case of *Derry City Council v Information Commissioner EA/2006/0014*, (11 December 2006)¹, in which the Tribunal considered that in order to justify applying section 43 where a third party's commercial interests are concerned, it is not enough to speculate on the potential prejudice.

45. The Commissioner's guidance on this issue, on the Commissioner's website at <https://ico.org.uk/for-organisations/section-43-commercial-interests/>, provides that:

"... if you propose to withhold information because the disclosure would, or would be likely to, prejudice a third party's commercial interests, you must have evidence that this accurately reflects the third party's concerns. It is not sufficient for you to simply speculate about the prejudice which might be caused to the third party's commercial interests. You need to consult them for their exact views in all but the most exceptional circumstances."

46. The Commissioner does not consider that the situation in this case is exceptional. As the council did not provide evidence from the schools themselves regarding the prejudice they perceive if the information were to be disclosed, this significantly weakens its arguments in respect of the application of section 43.

47. The Commissioner notes the council's arguments regarding headteachers' submissions. It argues that the majority considered that their responses were being provided in confidence. The council argues that the content of their submissions might offer different views to those of the governing body of the school. The council argues that this might raise issues between headteachers and their governing boards. Whilst the Commissioner understands the council's argument, these are also not issues which might directly affect the commercial activities of the school. As such, this issue is not therefore relevant to the Commissioner's consideration of the application of section 43(2).

48. Irrespective of this point, the Commissioner notes that differences of opinion and different views will consistently be voiced in school governance as a norm, but all parties would work with the school's best interests in mind, including the school's commercial interests.

¹ [https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKIT/2006/EA_2006_0014.html&query=\(Derry\)+AND+\(City\)+AND+\(Council\)+AND+\(v\)+AND+\(Information\)+AND+\(Commissioner\)+AND+\(EA/2006/0014\)](https://www.bailii.org/cgi-bin/format.cgi?doc=/uk/cases/UKIT/2006/EA_2006_0014.html&query=(Derry)+AND+(City)+AND+(Council)+AND+(v)+AND+(Information)+AND+(Commissioner)+AND+(EA/2006/0014))

The Commissioner's conclusions

49. Looking at the requirements of the exemption in detail therefore:
- i. The Commissioner accepts that, in part, the harm perceived would be to the commercial interests of some academy schools as a result of the disclosure of the information. Schools act in competition with others, and their competitiveness would be affected if a disclosure led to potentially less pupils or staff seeking a place at the school.
 - ii. However, the Commissioner has not been persuaded that there is a causal relationship between the disclosure of the withheld information and the prejudice which the council foresees. She has been provided with no evidence from the schools themselves demonstrating how they perceive that a disclosure would damage their commercial interests, and there are mitigating factors, such as the school placement system, which weaken the argument submitted by the council and undermine the strength of its arguments.
 - iii. Looking at the likelihood of prejudice occurring, the Commissioner has also not been persuaded that the arguments provide a sufficient degree of likelihood. The council has not provided evidence which demonstrates how likely the schools themselves consider that a disclosure would prejudice their commercial interests, and there are mitigating factors which have not been explored or considered by the council in its submission to the Commissioner.
50. The Commissioner is not in a position to speculate whether the prejudice perceived would be likely to occur, and she has not been convinced by the arguments submitted by the council. The council has not supported its position by providing evidence from the schools that they also consider and support the council's submissions. Following the Tribunal's decision in the case of *Derry*, without that support, the council's arguments can only be considered to have very limited strength.
51. She also considers that the council has not submitted in depth arguments considering the other factors which might affect the likelihood of prejudice to any schools' commercial interests, such as the school placement system, and overall demand for particular schools in particular areas. It is possible, if not more likely, that these factors may mitigate the effects of any parental decisions not to choose particular schools in their preferred options.
52. Given the absence of any arguments submitted by the schools which address these questions, and support the council's arguments, the Commissioner has not been persuaded that section 43(2) of the FOIA was correctly engaged by the council in this case.

53. As the council has failed to persuade the Commissioner that the exemption is engaged, her decision is that the council has failed to justify its reliance up on section 43 in this instance.

Right of appeal

54. 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

55. 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.
56. 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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