

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 24 April 2014

Public Authority: Hampshire County Council
Address: Ell Court South
The Castle
Winchester
Hampshire
SO23 8UJ

Decision (including any steps ordered)

1. The complainant requested copies of inspection reports between 2005 and 2013 for Freegrounds Junior School in Southampton.
2. The Commissioner's decision is that:
 - the public authority was not entitled to withhold the information redacted from some of the reports on the basis of the exemption at section 36(2)(b)(ii) FOIA.
 - the public authority was not entitled to withhold the following information redacted from some of the reports on the basis of 40(2) FOIA:
 - Information redacted from inspection report dated 1 December 2008
 - Information redacted from the inspection report dated 18 March 2009
 - Inspection report dated 21 October 2009 (information redacted from the 5th paragraph on page 2 only)
 - Inspection report dated 25 January 2012 (information redacted from the 1st and 2nd line in the 4th paragraph on page 3 and information redacted on page 4 only)
 - Information redacted from the Newly Qualified Teachers Induction report dated 9 May 2012.

- the public authority was entitled to withhold the remaining information redacted from the reports on the basis of section 40(2) FOIA.
 - the public authority breached section 10(1) FOIA for not responding to the request within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
- Disclose the information that the Commissioner has found the authority was not entitled to withhold on the basis of sections 36(2)(b)(ii) and 40(2) FOIA.
 - Rather than disclosing the information on its own, the public authority should provide the complainant with fresh copies of the relevant inspection reports with the information unredacted.
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 1 March 2013 the complainant requested information of the following description from the public authority:
- 'Hampshire Inspection and Advisory Service Inspection Reports of Freegrounds Junior School DfE No.: 2267 and Hampshire LEA inspection reports of Freegrounds Junior School dated between 2005 & 2013.'*
6. On 29 May 2013 the public authority responded. It claimed that the information requested was exempt from disclosure on the basis of section 41 FOIA.
7. On 29 May 2013 the complainant requested an internal review. She challenged the application of section 41 and also queried the timeliness of the public authority's response to her request.
8. On 8 July 2013 the public authority wrote to the complainant with details of the outcome of the review. The public authority revised the original decision to withhold the information requested on the basis of section 41. It claimed that the information was instead exempt on the basis of section 36(2)(b)(ii) FOIA.

Scope of the case

9. The complainant initially contacted the Commissioner's office on 8 May 2013 to complain about the public authority's delay in responding to her request. Following the public authority's response and the completion of the internal review, the complainant wrote to the Commissioner's office on 11 July 2013 to challenge the application of the exemption at section 36(2)(b)(ii).
10. During the course of the Commissioner's investigation, the public authority disclosed most of the inspection reports save small sets of information in some of the reports it considered were exempt on the basis of sections 36(2)(b)(ii) and 40(2) FOIA. The public authority provided the Commissioner with unredacted copies of the reports. The information redacted from some of the reports was highlighted in the copies of the relevant reports sent to him and the exemption relied upon (ie section 36(2)(b)(ii) or section 40(2)) to withhold the redacted information was cited next to the highlighted information.
11. In response to the Commissioner's queries, the public authority explained to the complainant that although she requested copies of Inspection and Advisory Services Reports and Hampshire LEA Inspection Reports as separate items, there was only one set of reports in the context of her request and there was no difference between the Advisory and Inspection Service and the Local Authority.
12. The public authority also clarified to the Commissioner that it no longer held inspection reports from 2005 to 2007 as these had been destroyed in line with its retention schedule. However, the Commissioner noted that two 2007 inspection reports had been included in the reports provided to the complainant. The public authority explained that the 2007 reports should have been deleted 5 years from the time they were declared as a final document in *Hantsfile* (the public authority-wide electronic document system). Hantsfile has the capacity to automatically bring records forward for review and deletion at the end of the relevant retention period. However, the system was only introduced into the relevant department (which held the inspection reports) in 2011, so documents, including school inspection reports were migrated into the system in bulk during this period. Large volumes of documents were migrated as the new system was introduced across the public authority and it is likely that some anomalies occurred.
13. The Commissioner is satisfied with the public authority's explanation as to why it was able to provide the 2007 reports even though they should have been destroyed in line with the authority's retention schedule.

14. The scope of the Commissioner's investigation therefore was to determine whether the public authority was entitled to withhold the information redacted from the inspection reports provided to the complainant on the basis of the exemptions at sections 36(2)(b)(ii) and 40(2) FOIA.

Reasons for decision

Section 36(2)(b)(ii)

15. Information is exempt from disclosure on the basis of section 36(2)(b)(ii) if in the reasonable opinion of a qualified person, disclosing the information would prejudice, or would be likely to prejudice, the free and frank exchange of views for the purposes of deliberation.

Was the qualified person's opinion reasonable?

16. The decision to engage section 36(2)(b)(ii) must be made by a *qualified person*. Section 36(5) FOIA describes a qualified person for the purposes of FOIA. The public authority explained that the decision to withhold the inspection reports on the basis of section 36(2)(b)(ii) was taken by the authority's Monitoring Officer. A local authority's Monitoring Officer is a designated qualified person for the purposes of section 36 FOIA.¹ The Commissioner is satisfied that the decision to rely on section 36(2)(b)(ii) was taken by a qualified person within the meaning of section 36(5)(o) FOIA.
17. As mentioned, the exemption at section 36(2)(b)(ii) can only be engaged on the basis of the *reasonable* opinion of the qualified person. Therefore, the Commissioner must consider whether the Monitoring Officer's opinion was reasonable or not. In deciding whether an opinion is reasonable, the Commissioner will consider the plain meaning of the word. The most relevant definition of *reasonable* in the *Shorter Oxford English Dictionary* is '*In accordance with reason; not irrational or absurd*'.
18. The Commissioner understands that the Deputy Monitoring Officer referred the request to the Monitoring Officer on 2 July 2013 for a

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<http://webarchive.nationalarchives.gov.uk/20100512160448/http://www.foi.gov.uk/guidance/exguide/sec36/annex-d.htm#part2>

decision on the application of section 36(2)(b)(ii). The public authority could not provide a written record of the qualified person's opinion. It was however able to confirm in writing to the Commissioner that the opinion was given on 4 July 2013. The qualified person's opinion was that disclosing the inspection reports would be likely to inhibit the free and frank exchange of views for the purpose of deliberation. The reports are confidential to the Head Teacher and the Governing Body of the school and *'contain support/challenge information that is not intended for public consumption. If reports such as these are released it will significantly hamper the public authority's ability to challenge schools as their potential publication will prevent a full and frank exchange of views'*.

19. However, as mentioned, the public authority subsequently disclosed most of the inspection reports to the complainant during the course of the Commissioner's investigation save the small amount of information redacted from some of the reports.
20. The Commissioner therefore considered whether section 36(2)(b)(ii) was correctly engaged in relation to the information redacted from some of the reports on that basis.

Commissioner's position

21. In the Commissioner's view, the term *'would be likely to prejudice'* means that the possibility of prejudice should be real and significant, and certainly more than hypothetical or remote.
22. The Commissioner accepts that it is reasonable for the qualified person to hold the view that disclosing the information redacted from the reports on the basis of section 36(2)(b)(ii) would be likely to inhibit the free and frank exchange of views between teachers at the school and the public authority's officers in future. In the circumstances, it was not an irrational or absurd view to hold however limited the prejudicial effect that disclosure would be likely to actually have on the quality of inspections.
23. The Commissioner therefore finds that the exemption at section 36(2)(b)(ii) was correctly engaged.

Public Interest Test

24. The exemption at section 36(2)(b)(ii) is qualified. Therefore, the Commissioner must also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighed the public interest in disclosing the disputed information.

25. The public authority's arguments in support of its position are reproduced below. The arguments reflect the fact that at the time they were submitted to the Commissioner, the public authority had not agreed to disclose the reports (save the redacted information) to the complainant. The authority did not submit additional public interest arguments specifically in relation to the information subsequently redacted on the basis of section 36(2)(b)(ii).
26. The public authority acknowledged that there is a public interest in openness and transparency about the performance of schools and the maintenance of educational standards. The authority however argued that there are many other measures of schools performance already available in the public domain, including OFSTED² inspections and schools league tables which address these general requirements. The reports are considerably more specific in addressing the school's performance and proposing strategies for improving standards than an OFSTED report which is undertaken as an outward facing report.
27. In contrast, the public authority explained that inspection reports bear greater similarity to internal management information. They contain information that seeks to both challenge and support schools. Disclosure 'would' inhibit the free and frank relationships that inspectors are able to maintain with schools, the quality of reports and advice provided would suffer as a result. Schools would be less open and co-operative in their approach to the inspection and advisory service. It is not in the public interest that schools should not participate fully and frankly in the process. If school staff do not have the expectation that the process of discussion would take place in a confidential safe space they will be less open and the process is likely to be impaired.

Balance of the public interest

28. The Commissioner has already accepted as reasonable the view that disclosing the redacted information would be likely to inhibit free and frank discussions between the school's staff and the public authority's inspectors. However, in order to determine where the balance of the public interest lies, he has considered the severity, extent and frequency of the likely prejudicial effect on the relationship between inspectors and schools staff in the event of disclosure. Needless to say, the starting point must always be the withheld information in any particular case.

² Office for Standards in Education, Children's Services and Skills.

29. The Commissioner has considered the latest OFSTED report³ for the school in question, Freegrounds Junior School. In his view, the broad premise of the redacted information is reflected in a portion of the OFSTED report. However, he accepts that the OFSTED report he has considered does not go into as much detail as parts of the redacted information. Nevertheless, in the Commissioner's view, the general nature and tone of the redacted information is not significantly different from the information published in OFSTED reports such that the likely prejudicial effect on the professional relationship between schools staff and inspectors in the event of disclosure would be severe.
30. Furthermore, it is ultimately in the best interest of schools for staff to provide inspectors with necessary information to enable them conduct inspections which meet the required standards. If inspectors cannot conduct effective inspections due to a lack of cooperation from staff, the schools concerned are unlikely to command the confidence of the local community. The reputation of staff could also suffer as a result. The Commissioner is not suggesting that in future, cooperation might not prove difficult. However, he is satisfied in the circumstances that those cases are likely to be rare and he takes the view that, even if or when they did occur, the public authority would be well placed to require the cooperation needed to conduct effective inspections.
31. The Commissioner accepts that discussions during inspections should take place in a safe space so that schools staff and inspectors are able to exchange views in a free and frank manner. However, the redacted information relates to inspections which have already taken place. In addition, since the introduction of the FOIA, public officials are well aware that there can be no expectation that official information will not be made publicly available. There is, as the public authority has acknowledged, a public interest in openness and transparency in relation to the performance of schools so that they can be held accountable not just by regulators like OFSTED or local authority inspectors but also by parents and indeed the public at large. The redacted information is very much relevant in that respect and there is therefore a strong public interest in disclosing it.
32. The Commissioner therefore finds that, on balance, in all the circumstances of the case, the public interest in maintaining the

³ <http://www.ofsted.gov.uk/inspection-reports/find-inspection-report/provider/ELS/116000>

exemption at section 36(2)(b)(ii) does not outweigh the public interest in disclosing the information redacted from the reports on that basis.

Section 40(2)

33. The Commissioner next considered the information redacted from the reports on the basis of section 40(2).
34. Information is exempt from disclosure on the basis of section 40(2) if it constitutes third party personal data (ie the personal data of an individual other than the person making the request) and either the first or second condition at section 40(3) is satisfied.

Information not exempt on the basis of section 40(2)

35. For reasons explained further below, the Commissioner finds that the following information should not have been withheld on the basis of section 40(2):
 - Information redacted from inspection report dated 1 December 2008
 - Information redacted from inspection report dated 18 March 2009
 - Inspection report dated 21 October 2009 (information redacted from the 5th paragraph on page 2 only)
 - Inspection report dated 25 January 2012 (information redacted from the 1st and 2nd line in the 4th paragraph on page 3 and information redacted on page 4 only)
 - Information redacted from the Newly Qualified Teachers Induction report dated 9 May 2012.

Is the redacted information described above personal data?

36. Personal data is defined in section 1 of the Data Protection Act 1998 (DPA) as:

'.....data which relate to a living individual who can be identified from those data or from those data and other information which is in the possession of, or likely to come into the possession of, the data controller; and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any person in respect of the individual.'

37. The Commissioner finds that the redacted information is personal data within the meaning of the DPA. It is information which relates to the data subjects, from which they can be identified.

Would the disclosure of the redacted information contravene any of the data protection principles?

38. As mentioned, for section 40(2) to apply, either the first or second condition in section 40(3) must be satisfied. The first condition in section 40(3) states that disclosure of personal data would contravene any of the data protection principles or section 10 of the DPA.

39. The first data protection principle states:

'Personal data shall be processed fairly and lawfully and, in particular shall not be processed unless-

At least one of the conditions in schedule 2 [DPA] is met, and

in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met.'

40. In deciding whether disclosure of personal data would be unfair, and thus breach the first data protection principle, the Commissioner takes into account a range of factors including:

- The reasonable expectations of the individual in terms of what would happen to their personal data. Such expectations could be shaped by:
 - Whether the information relates to their professional (ie public) or private life. It is more likely to be fair to disclose information that relates to the professional life of an individual.
- The consequences of disclosing the information, ie what damage or distress would the individual suffer if the information was disclosed?

41. Furthermore, notwithstanding the data subject's reasonable expectations or any damage or distress caused to them by disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in disclosure.

42. The redacted information primarily consists of the professional qualifications of, and training programmes undertaken by, some staff at the school in relation to their roles. With regards to the reasonable expectations of the individuals, the Commissioner considers that professional qualifications and training information relating to staff at the school is likely to carry a reasonable expectation that it could be

revealed in the context of accounting for the schools performance. It is information which relates to the performance of their roles. For instance, universities routinely publish the qualifications of their lecturers including achievements in their area of expertise.

43. With regards to the consequences of disclosure, the Commissioner does not consider that the redacted information is such that its disclosure is likely to be damaging or distressing to the individuals concerned. In any event, he considers that there is a legitimate public interest in making the information public. It makes the school more transparent and accountable.
44. The Commissioner therefore finds that disclosing the redacted information would not be unfair to the individuals concerned and therefore not in contravention of the first data protection principle.

Would disclosure meet any of the conditions in Schedule 2?

45. As mentioned, the first data protection principle also stipulates that personal data shall not be processed unless at least one of the conditions in schedule 2 is met.
46. The Commissioner considers the relevant condition in the circumstances of this case is at paragraph 6(1). It states:

'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 or legitimate interests of the data subject.'

47. The sixth condition therefore establishes a three part test which must be satisfied. There must be legitimate interests in disclosing the information, the disclosure must be necessary for a legitimate interest of the public and, it must not cause unwarranted interference to the rights, freedoms and legitimate interests of the data subject.
48. The Commissioner has already noted that disclosing the disputed information would enhance the transparency and accountability of the public authority. That is a legitimate public interest. Furthermore, in the circumstances, the individuals should reasonably expect details of their professional qualifications and any relevant training undertaken to be disclosed. The Commissioner is therefore satisfied that disclosure would not have caused unwarranted interference to the rights, freedoms and legitimate interests of the data subjects.

49. The final requirement to satisfy Schedule 2 Condition 6(1) is that the disclosure of the disputed information must be *necessary* for a legitimate interest of the public. The Commissioner shares the Information Tribunal's view in *Guardian Newspapers v IC*⁴ that the presumption of disclosure under FOIA alone will not satisfy the requirement of necessity in condition 6(1). However, it is also his view that disclosure could be still be *necessary* under Schedule 2 Condition 6(1) to meet the general public interest in transparency;
- where there is no significant interference with the data subject's privacy, and
 - even where there is no significant public interest in disclosure.
50. The Commissioner has already explained that disclosing the redacted information would be unlikely to significantly interfere with the data subjects' privacy. It is information which relates to their professional rather than private life. Disclosure would enhance transparency in relation to the schools performance. The Commissioner is satisfied that in the circumstances, disclosure was necessary to meet the legitimate public interest in transparency.
51. The Commissioner therefore finds that disclosure would meet condition 6(1), the relevant Schedule 2 condition in the circumstances of this case.

Would the disclosure be lawful?

52. As mentioned, the first data protection principle states that '*Personal data shall be processed fairly and lawfully.....*' The Commissioner must therefore also consider whether disclosing the disputed information would be lawful.
53. In the Commissioner's view, it is likely that disclosure would be unlawful under FOIA if it can be established that the disclosure would be a breach of a statutory bar, an enforceable contractual agreement or an obligation of confidence. In the circumstances of this case, the

⁴ EA/2010/0070 at paragraph 36

Commissioner is satisfied that none of these would apply. Therefore, he has no reason to consider that disclosing the redacted information would not be lawful.

54. The Commissioner therefore finds that the public authority was also not entitled to withhold the redacted information described above at paragraph 35 on the basis of section 40(2).

Information exempt on the basis of section 40(2)

55. For reasons explained further below, the Commissioner finds that the following information was correctly withheld on the basis of section 40(2):

- Information redacted from inspection report dated 17 January 2007
- Information redacted from inspection report dated 21 October 2009 (save the information redacted from the 5th paragraph on page 2)
- Inspection report dated 25 January 2012 (save the information redacted from the 1st and 2nd line in the 4th paragraph on page 3 and the information redacted on page 4)
- Information redacted from inspection report dated 27 February 2013

Is the redacted information described above personal data?

56. The Commissioner finds that the redacted information is personal data within the meaning of the DPA. It is information which relates to the data subjects, from which they can be identified.

Would the disclosure of the redacted information contravene any of the data protection principles?

57. The redacted information primarily consists of references to vulnerable children and the fact that a member of staff was on sick leave. The Commissioner is satisfied the information is likely to carry a reasonable expectation that it would not be made public. Information relating to health or medical records of a data subject carries with it an expectation that it would not be made publicly available. Disclosure could be both damaging and distressful. Information relating to family life of a data subject, and in this case, specifically in connection with vulnerable children, would also carry the same expectation.

58. The Commissioner therefore finds that disclosing the redacted information would be unfair to the individuals concerned and therefore in contravention of the first data protection principle.
59. The Commissioner consequently finds that the redacted information described above at paragraph 56 was correctly withheld on the basis of section 40(2).

Procedural issues

60. Under section 10(1) FOIA, a public authority is required to respond to a request within 20 working days.
61. The Commissioner finds the public authority in breach of section 10(1) for issuing a response to the request outside the statutory time limit.

Right of appeal

62. 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: 0116 249 4253

Email: GRC@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

63. 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.
64. 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

**Gerrard Tracey
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SK9 5AF**