

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 20 March 2012

Public Authority: King's College Cambridge
Address: Cambridge
CB2 1ST

Decision (including any steps ordered)

1. The complainant made a number of requests to King's College Cambridge (the "College"). The College withheld some information under the prejudice to effective conduct of public affairs exemption (sections 36(2)(b)(i) and (ii)), and the legal professional privilege exemption (section 42(1)). In relation to some of the requests it also stated that no further information was held. During the investigation it confirmed that further information was held, some of which it was now prepared to disclose. In relation to the outstanding information it confirmed that it was also withholding it under the third party personal information exemption (section 40(2)).
2. The Commissioner's decision is that the College has correctly relied upon sections 40(2) and 42(1) to withhold some information. He is also satisfied that it does not hold any relevant information in relation to one part of the requests. However, he has also decided that some of the information is not exempt under these exemptions. Finally, the Commissioner is also not satisfied that further relevant information is not held in relation to one of the requests.
3. The Commissioner requires the College to take the following steps to ensure compliance with the legislation:
 - It should now disclose the information it has identified for disclosure to the complainant – as set out in its letter to the Commissioner dated 13 October 2011.
 - It should now disclose the information set out in paragraphs 2 and 6 of the confidential annex – subject to the redaction of third party personal information – which the Commissioner has ordered upheld under section 40(2).

- It should now confirm or deny to the complainant whether it holds any further relevant information in relation to request (xi) – that may be held by the school governors (unless an exemption from this duty applies). If further information is held it should provide this to the complainant, or provide a refusal notice under section 17 of the FOIA.
4. The College 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 (or the Court of Session in Scotland) pursuant to section 54 of the FOIA and may be dealt with as a contempt of court.

Request and response

5. For the reasons discussed in the 'Scope of the case' section below, this case is concerned with the College's handling of certain elements of requests made by the complainant on 16 March and 13 April 2010. The College's original handling of these (and other) requests was the subject of a previous case investigated by the Commissioner under case reference FS50318306.¹ In this previous case the Commissioner decided that information held by King's College School Cambridge (the "School") is held by the College for the purposes of the FOIA. This current case is concerned with the College's handling of these requests subsequent to the conclusion of this previous case.
6. The complainant made a number of requests to the College on 16 March 2010. The requests relevant to this case were for:
- (viii) *"Copy of advice (legal and professional) given to King's College School as a result of the serious failures notified to the school by the inspectors."*
 - (xi) *"What documents were seen by the Provost and each Governor prior to the Provost's letter being issued to all parents on 6 November 2009?"*

For ease of reference these will be referred to as requests (viii) and (xi) throughout the rest of this notice.

¹ The decision notices for this previous case – and a linked case FS50285876 – are available on the ICO website, at http://www.ico.gov.uk/tools_and_resources/decision_notices.aspx

7. The College responded to these requests on 30 March 2010. It stated that the issue of whether information held by the School was subject to the FOIA was sub judice, and did not comment on this any further. It also stated that the College did not, in itself, hold any information relating to these requests.

8. On 13 April 2010 the complainant wrote to the College and requested the following information:

(xv) *"May I please have a copy of the advice given to the Governors of King's College School as well as the policy recommended to Council by the Governors in relation to my FOI request."*

This was in relation to an entry in the minutes of the College Council meeting held on 24 November 2009, which stated: *"It was agreed to support the policy recommended by the King's College School Governors in relation to a Freedom of Information request."*²

9. This will be referred to as request (xv) throughout the rest of this notice.

10. The College responded on 5 May 2010. It informed the complainant that it did not hold any information relating to this request and stated,

"Specifically: (1) King's College holds no information on advice given to the Governors of King's College School; and (2) the College holds no information on advice given to the King's College Council by the King's College School Governors about handling of your FOI request(s)."

11. The complainant responded to this email on 6 May 2010 and wrote,

"In connection with your reply, you say that King's College holds no information on advice given to Council by King's College School Governors about handling my FOI request. My request was for a 'copy of the advice given to the Governors of King's College School as well as the policy recommended to Council by the Governors [complainant's emphasis] in relation to my FOI request'. Your answer may well have covered that part of my request which I have now underlined, but would you please either confirm that this is the case or let me have a copy of such policy. In addition, I would like to widen the request to include any FOI request and not just mine."

² <http://www.kings.cam.ac.uk/files/about/council-minutes-20091124.pdf>

12. The College responded to this in an email dated 20 May 2010. It confirmed that it held no copy of advice given to the Governors about handling the complainant's FOIA requests, nor any documents relating to policy on this matter recommended to the Council by the Governors. In addition to this, it also confirmed that this response also applied to other requests made under the FOIA.
13. The complainant queried this in an email dated 20 May 2010, and noted,
"The November 2009 Council minutes (Item 295) state 'it was agreed to support the policy recommended by the King's College School Governors in relation to a Freedom of Information request'. What I do not understand is how Council can have approved something that they have not seen. The policy must have been presented to Council for it to support it. May I have a copy of that policy, or are you saying that Council approved something without reviewing what they were asked to approve?"
14. The College responded in an email dated 21 May 2010, and stated,
"I have checked and the policy was reported orally to Council in November 2009 and agreed. No documents were brought to the meeting and the only record of the discussion is the minute itself."
15. Following the original complaint, the Commissioner issued a decision notice (under case reference FS50318306) in which he found that information held by the School was held by the College for the purposes of the FOIA. Therefore, the College was required to confirm or deny whether it held any relevant information and provide a copy of it, or issue a refusal notice stating which exemption(s) it believed applied.
16. Subsequently the College responded to requests (viii), (xi) and (xv) on 10 January 2011. In relation to request (viii) it confirmed that it held information, but stated that this was exempt under section 42(1). In relation to request (xi) it stated that *"no records of this survive"*. Finally, in relation to request (xv) it stated that the advice provided to the School was exempt under section 42(1).
17. The complainant wrote to the College on 7 February 2011 and requested an internal review of these responses. In relation to requests (viii) and (xv) the complainant argued that the withheld information was not exempt under section 42(1). In relation to request (xi) the complainant disputed the College's statement that no relevant information was held. In particular he stated that he believed that, *"such documents (which assisted in the drafting of the Provost's letter of 6 November 2009) did exist."*

18. On 5 April 2011 the College wrote to the complainant with the results of the internal review. In response to request (viii) it upheld its use of section 42(1), and also applied sections 36(2)(b)(i) and (ii). In relation to request (xi) it again stated that it did not hold any information. In relation to request (xv) it upheld its previous use of section 42(1).

Scope of the case

19. The complainant contacted the Commissioner to complain about the way his requests had been handled.

20. The Commissioner wrote to the complainant in emails dated 7 and 14 September 2011, and set out what he considered to be the scope of the complaint:

- In relation to **request (viii)** whether the College was correct to withhold the requested information under sections 36(2)(b)(i) and (ii), and section 42(1).
- In relation to **request (xi)** whether any relevant information was held.
- In relation to **request (xv)** whether the College was correct to withhold the information under section 42(1), and also whether it held any further relevant information (in particular, in relation to the policy referred to in the request).

21. During the investigation of the case the Commissioner put these points to the College. Subsequently, the College changed or confirmed its position in relation to these requests. Its position in relation to each of these requests is now as follows:

- In relation to **request (viii)** it provided further arguments to support its use of sections 36(2)(b)(i) and (ii), and section 42(1) to withhold the requested information.
- In relation to **request (xi)** relevant information had now been located, and it was prepared to disclose some of this to the complainant. However, it was withholding the names of third parties within this information under sections 40(2) and 40(3)(a)(i), as well as an extract from an email. In addition to this, some of this relevant information was also being withheld under section 42.
- In relation to **request (xv)** it stated that its position in relation to the policy referred to by the complainant was not held. In

relation to the advice referred to in the request, it confirmed that this information was being withheld under sections 36(2)(b)(i) and 42(1).

22. Consequently, the scope of this case has been to consider the College's position in relation to each of these requests. In addition to the above points, he has also considered whether any further relevant information is held in relation to **request (xi)**.

Reasons for decision

23. The Commissioner has considered the College's position in relation to each of these requests in turn.

Request (viii)

24. The College is relying upon sections 36(2)(b)(i) and (ii), and section 42 to withhold the requested information.
25. The Commissioner has first considered the College's application of section 42.

The legal professional privilege exemption

26. Section 42(1) provides an exemption for information in respect of which a claim to legal professional privilege ("LPP") could be maintained in legal proceedings. This exemption is subject to a public interest test.
27. There are two types of LPP; advice privilege and litigation privilege. The Commissioner considers that the College has argued that this information is subject to advice privilege.
28. For advice privilege to apply, the information must record confidential communications, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice.
29. In this instance, the College has applied this exemption to communications between it and a professional legal advisor.
30. Having considered the withheld information the Commissioner is satisfied that these communications were confidential, made between a client and professional legal adviser acting in their professional capacity, and made for the sole or dominant purpose of obtaining legal advice. As such the Commissioner considers that advice privilege applies. Therefore section 42 is engaged in relation to this information.

31. The Commissioner has gone on to consider the public interest test – namely whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
32. In respect of the public interest in disclosure, the complainant has argued that his requests arose as a result of an unannounced emergency inspection by the Independent Schools Inspectorate (the “ISI”), which resulted in several criticisms of the School, and the actions of the College and the School in informing the parents of the results of this inspection (via the letter referred to in request (xi)). The complainant has described the results of this inspection as ‘damning’ – although this is disputed by the College and the School. He has gone on to state that this inspection came about as a result of the behaviour of a teacher, and concerns raised about that behaviour. As well as being critical of the way in which the College and the School handled the results of the inspection (in particular, how it informed the parents of pupils), he also has concerns over the governance of the College and the School. Given this, he is seeking to obtain further information to increase transparency on these issues.
33. The Commissioner recognises that there is an assumption built into the FOIA that disclosure of information by public authorities on request is in the public interest in order to promote transparency and accountability in relation to their activities. He notes that the context of these requests is an ISI inspection, which did make some findings against the School. The letter which is referred to in request (xi) was the one which informed the parents of pupils of the findings of this inspection.
34. Bearing these factors in mind, the Commissioner considers that there is a public interest in increasing transparency into the events surrounding the ISI inspection, and the subsequent actions of the College and the School. The disclosure of this information would increase this transparency.
35. In regard to the public interest in maintaining the exemption the Commissioner considers that:
 - It is in the public interest to safeguard openness in all communications between client and lawyer to ensure access to full and frank legal advice.
 - It is important that a public authority is able to seek legal advice so it can make its decisions in the correct legal context.
 - There is an inbuilt public interest in the maintenance of LPP.

36. In considering the balance of the public interest in connection with this exemption, the Commissioner has in particular taken into account the inbuilt public interest in the concept of legal professional privilege.³
37. Bearing these points in mind, and having considered the withheld information in question, the Commissioner considers that the public interest in maintaining this exemption outweighs the public interest in favour of disclosure. Therefore this information should be withheld.
38. As the Commissioner has upheld the use of this exemption, he has not gone on to consider the application of sections 36(2)(b)(i) and (ii) to this information.

Request (xi)

39. The Commissioner considers that this request mirrors a separate request made by the complainant to the College, which is subject to a separate investigation under case reference FS50384608. In this other case the complainant asked for *"Details of who drafted the Provost's letter dated 6 November 2009 and the advice given on the drafting of such letter"* [Commissioner's emphasis]. This is referred to in FS50384608 as 'request (v)'. Given the wording of this other request, and the request in question here, the Commissioner is satisfied that the same information would fall under both requests. Bearing this in mind, in relation to his findings for request (xi) in this case, the Commissioner has referred to the relevant findings in FS50384608.
40. The College is relying upon sections 40(2) and 40(3)(a)(i) to withhold the names of third parties contained in the additional relevant information it has located, as well as an extract from an email. It has also sought to rely upon section 42 to withhold some of this information.
41. However, the Commissioner has first considered whether there is any additional relevant information held by the College that has not been identified.

Is any further relevant information held?

42. During the investigation of this case the Commissioner asked for details of the searches it had carried out in order to establish whether any further information was held. The College informed the Commissioner

³ *Bellamy v Information Commissioner & Secretary of State for Trade and Industry* [EA/2005/0023], para 35.

that it had now located some relevant information – some of which it was prepared to disclose to the complainant, some of which it sought to withhold under sections 40 and 42.

43. However, having considered the relevant information that the College has now located, together with the details of its response, the Commissioner has noted that there is no reference to whether the College had sought to establish whether the school governors held any relevant information. Given the wording of this request he considers that it is possible that relevant information may be (or may have been) held by school governors.
44. This is an issue that the Commissioner considered at length in the investigation of FS50384608. In this other case the Commissioner asked the College whether it had carried out searches to establish whether any relevant information was held by the governors. The College informed the Commissioner that it had not and also argued that it did not believe it was required to do so, as it did not consider that any information held by the governors was held on behalf of a public authority.
45. For the reasons set out in paragraphs 22 and 23 of the decision notice for FS50384608 the Commissioner considers that if information is held by the governors of the School, that would fall under the scope of request (xi), this information would be held by the College for the purposes of the FOIA.
46. Therefore, after taking this into account, together with the College's statement that it has not undertaken any searches to establish whether any relevant information is or was held by the school governors, the Commissioner is not satisfied that further relevant information is not held.
47. The Commissioner now requires the College to carry out searches to satisfy it whether any further relevant information is held by the School's governors. The College will then need to confirm or deny to the complainant whether further information is held (unless an exemption from the duty to do so applies), and – if further information is held – disclose a copy of this to the complainant, or issue a refusal notice in line with the requirements of section 17 of the FOIA. Further guidance on how the College should satisfy itself whether any further information is held can be found on the Commissioner's website at http://www.ico.gov.uk/news/latest_news/2011/ico-clarifies-law-on-information-held-in-private-email-accounts-15122011.aspx
48. As noted above, during the investigation of this case the College located some additional information that fell under this request. It informed the Commissioner that it was prepared to disclose some of this to the

complainant. However, it was also withholding some of this information under section 42(1). In addition to this, it was also seeking to rely upon sections 40(2) and 40(3)(a)(i) to withhold the names of individuals from all of this additional information – including the information it was now prepared to disclose to the complainant.

49. The Commissioner has gone on to consider the College's application of section 42.

The legal professional privilege exemption

50. For the same reasons as given at paragraph 27 above, the Commissioner considers that the College has argued that this information is subject to advice privilege.
51. The College has applied this exemption to two types of information:
- communications between it and an individual, who is legally qualified, and
 - communications between it and a professional legal advisor.
52. In relation to the first type of information the College has provided further arguments as to why advice privilege applies. Because of the nature of the College's arguments the Commissioner cannot discuss them freely in this notice, as to do so may give some indication as to the contents of the withheld information. Further details of those arguments, and the Commissioner's consideration of them, are contained in paragraphs 1 to 5 of the confidential annex attached to the end of this notice.
53. Having considered the College's arguments, and the withheld information in question, and for the reasons set out in the confidential annex, the Commissioner does not consider that advice privilege applies to this information. Therefore, in relation to some of the withheld information to which section 42 has been applied, the Commissioner does not consider that this exemption is engaged.
54. The College has not applied any other exemptions to this information – other than sections 40(2) and 40(3)(a)(i) to the names of individuals contained in this information. Therefore, in relation to the contents of this information the Commissioner considers that this should be disclosed. This information is identified at paragraph 2 of the confidential annex.
55. In relation to the second type of information, for the same reasons as given at paragraphs 29 and 30 above, the Commissioner is satisfied that

advice privilege applies to this information. Therefore section 42 is engaged in relation to this information.

56. The Commissioner has gone on to consider the public interest test – namely whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
57. In respect of the public interest in disclosure, the Commissioner considers that the public interest arguments in favour of disclosure are the same as listed at paragraphs 32 to 34 above.
58. In regard to the public interest in maintaining the exemption the Commissioner considers that the public interest arguments in favour of disclosure are the same as listed at paragraph 35 above.
59. Bearing these points in mind, and having considered the withheld information in question, the Commissioner considers that the public interest in maintaining this exemption outweighs the public interest in favour of disclosure. Therefore this information should be withheld.

The third party information exemption

60. The Commissioner has gone on to consider the College's application of sections 40(2) and 40(3)(a)(i) to withhold the names of third parties contained in the additional relevant information it has located, together with an extract from an email. Given his findings in relation to section 42, the Commissioner has only reached a decision on the application of this exemption in relation to:
 - the information which – other than the names contained in it – the College is now prepared to disclose to the complainant,
 - the names of individuals contained within information identified in paragraph 2 of the confidential annex, which the Commissioner does not consider to be exempt under section 42, and
 - the extract from the email.
61. Section 40(2) provides an exemption for information which is the personal data of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.
62. 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 1998 (the "DPA"). This is an absolute exemption, and is therefore not subject to a public interest test.

63. The College has sought to rely upon this exemption to withhold the names of individuals where they appear in the information that is held that falls under the scope of this request, together with an extract from an email. The College has argued that the disclosure of this information would be in breach of the first principle of the DPA.
64. In order to establish whether this exemption has been correctly applied the Commissioner has first considered whether the withheld information is the personal data of third parties.
65. 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.
66. In this case, the names of individuals clearly identify several individuals. Bearing this in mind, the Commissioner is satisfied that this withheld information is the personal data of third parties.
67. However, in relation to the extract of the email withheld under this exemption, the Commissioner does not consider that it is the personal data of a third party. In reaching this decision the Commissioner considers that this information does not, in itself, identify any individual. Nor does he consider that it is information about the third party identified by the College. Therefore, this exemption is not engaged in relation to this information.
68. The College has not applied any other exemption to this information. Therefore it should be disclosed. This information is identified in paragraph 6 of the confidential annex.
69. The Commissioner has gone on to consider whether the disclosure of the names of individuals withheld under this exemption would be in breach of the first data protection principle. This requires, amongst other things, that personal data is processed fairly.
70. As above, this is also an issue that the Commissioner considered at length in the investigation of FS50384608 in relation to the same withheld information. For the reasons set out in paragraphs 54 to 61 of the decision notice for FS50384608, the Commissioner considers that the disclosure of this information would be unfair.
71. Therefore the names of individuals where they appear in the relevant information are exempt from disclosure under this exemption.

Request (xv)

72. This request (and the matters under consideration by the Commissioner) focuses on two distinct pieces of information – the policy recommended by the School Governors and agreed by the College Council at its meeting on 24 November 2009; and any advice given to the School Governors in relation to that policy.
73. In relation to the former, the College has argued that this information is not held. In relation to the latter, this information has been withheld under sections 36(2)(b)(i) and 42(1).
74. The Commissioner has first considered whether the requested policy is held.

Is the requested information held?

75. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled –
- to be informed in writing by the public authority whether it holds information of the description specified in the request, and
 - if that is the case, to have that information communicated to him.
76. As noted above, the information in question is a copy of the policy recommended to the College Council in relation to an FOIA request (as referred to in the Council minutes of 24 November 2009).
77. In cases such as this the standard of proof to apply in determining whether a public authority holds requested information is the civil standard of the balance of probabilities.⁴ Therefore the Commissioner has considered whether, on the balance of probabilities, the College holds the requested information in question. In doing so he has particularly borne in mind any explanation as to why the requested information is not held.
78. The College has argued that it does not hold a copy of this policy, as it was reported orally to the Council. It has also stated that "*No documents were brought to the meeting and the only record of the discussion is the minute itself.*" During the course of the investigation it

⁴ *Bromley et al v Information Commissioner & Environment Agency* [EA/2006/0072], para's 10 to 13.

confirmed this position to the Commissioner, stating again that no record of the policy in question was taken.

79. The complainant has argued that this information is held by the College. He has referred to the entry in the College Council minutes, and has argued,

"Without there being an attachment to this minute, which states what the recommendation was, the minute is inarticulate. In the event of a disagreement or dispute over the recommendation, according to [the argument that the information is not held] there is no record of what the recommendation was. The minute seems incredulous and I am surprised that the College believes that a minute written without the supporting documentation can be credible, given that it relates to an institution that no doubt prides itself on keeping full and proper records."

80. The Commissioner notes the complainant's comments as to why he believes that the information in question is held. However, the FOIA focuses on recorded information that is held by a public authority, rather than what information should be held. Despite the complainant's obvious belief that this information is held, the Commissioner notes that he has not provided any evidence to support this belief.
81. Having considered the College's arguments as to why the information in question is not held, the Commissioner considers that they are reasonable and persuasive. Given this, and as the complainant has not provided any evidence to the contrary, the Commissioner is satisfied that on a balance of probabilities the College does not hold the information in question.
82. The Commissioner has gone on to consider the College's application of section 42 to the advice given to the School Governors in relation to the policy in question.

The legal professional privilege exemption

83. For the same reasons as given at paragraph 27 to 30 above, the Commissioner is satisfied that advice privilege applies to this information. Therefore section 42 is engaged in relation to this information.
84. The Commissioner has gone on to consider the public interest test – namely whether the public interest in maintaining the exemption outweighs the public interest in disclosure.
85. In respect of the public interest in disclosure, the Commissioner notes the complainant's arguments as listed at paragraph 32 above. In

addition, he also considers that there is a public interest in openness and transparency.

86. In regard to the public interest in maintaining the exemption the Commissioner considers that the public interest arguments in favour of disclosure are the same as listed at paragraph 35 above.
87. Bearing these points in mind, and having considered the withheld information in question, the Commissioner considers that the public interest in maintaining this exemption outweighs the public interest in favour of disclosure. Therefore this information should be withheld.

Other matters

88. Whilst the Commissioner acknowledges that this case is complex due to a number of reasons – in particular the unusual relationship between the College and the School, and the nature of the requests – he wishes to note his concern that additional relevant information that falls under the scope of these requests has only been located by the College after the commencement of the Commissioner's investigation. Upon the receipt of any future requests under the FOIA, the Commissioner would expect the College to take adequate steps to locate the information that it holds that would be relevant to those requests.

Right of appeal

89. 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: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

90. 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.
91. 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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