

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 July 2015

Public Authority: The Governing Body of Caergeiliog Foundation School

Address: Lon Bach
Caergeiliog
Anglesey
LL65 3NP

Decision (including any steps ordered)

1. The complainant requested minutes of a meeting held by the Governing Body of Caergeiliog Foundation School on 3 July 2013, various items of information regarding the funding of the firm of solicitor's appointed by the Governing Body to deal with a legal matter and for a copy of an email to the Governing Body. The Governing Body provided a redacted copy of the minutes but withheld some of the information by virtue of section 42(1) of the FOIA. It refused to comply with a later request regarding the funding of the solicitor's on the basis of section 14(1) of the FOIA but confirmed that it did not hold the requested email. The Commissioner's decision is that the Governing Body of Caergeiliog Foundation School has complied with its obligations under section 1(1) of the FOIA and correctly relied on section 14(1) in respect of the second request, and section 42(1) in respect of the initial request. The Commissioner does not require any steps to be taken.

Request and response

Request one

2. On 8 August 2013 the complainant wrote to the Governing Body of Caergeiliog Foundation School ('the Governing Body') and requested the following information:

"Your letter of the 16th July 2013 makes reference to a meeting of the board of governors held on 3 July 2013.

Please provide me with the minutes of this meeting by return of post."

3. The Governing Body responded on 12 September 2013, enclosing a redacted copy of the requested minutes but refusing to disclose a section of the minutes by virtue of section 42(1) of the FOIA on the grounds that the information was protected by Legal Professional Privilege (LPP).
4. Following an internal review the Governing Body wrote to the complainant on 14 March 2014 upholding its original decision to refuse information contained within a section of the minutes on the basis of section 42(1) of the FOIA.

Request two

5. On 24 February 2014 the complainant wrote to the Governing Body and requested the following information:

"Could you please answer my question regarding the funding of the solicitor's Winckworth Sherwood who are acting for the Governing Body of the school. I have asked how their services are being funded.

I have the email advising the FGB of the meeting, my removal is not an agenda item. Is there another email which was sent which did have the agenda item on it? If so, could you please email it to me: [named email address]"

6. In respect of request one, the complainant stated:

"Regarding the minutes of the meeting of the GB on the 3 July 2013 which I requested and sent to me on 12 September 2013. I am not satisfied with the redacted version I have received and do not accept that there is any public interest in withholding information especially since it may have been obtained directly or indirectly from public funds."

7. The Governing Body responded on 14 March 2014 refusing to disclose the information in respect of the funding of the solicitor's by virtue of section 43 and section 42 of the FOIA.

8. In terms of the email, the Governing Body confirmed that:

"...we are not in a position to provide copies of the email attaching the agenda or to provide a further explanation about whether items were minuted at the meeting on 22 March 2012. This is because the matter has now been investigated by the Local Authority who confirmed in their letter ...that the evidence suggests that the school followed appropriate guidelines. Accordingly, we will not be in a position to expand on the

points already raised in our correspondence with you and the Local Authority."

9. The complainant wrote to the Governing Body on 1 October 2014 expressing dissatisfaction with the Governing Body's response to both of his requests.

10. The Governing Body responded on 5 November 2014 and informed the complainant that:

"We have considered your requests and do not intend to provide a response as we consider your requests to be vexatious in nature in accordance with section 14(1) of the Freedom of Information Act 2000."

11. In respect of the emails to the Governing Body attaching the agenda, it further stated:

"Notwithstanding the above, we confirm that we do not hold any emails to the Governing Body attaching the agenda for the Governing Body meeting in March 2012. However, as you are aware the clerk and six governors have confirmed that they recall receiving the agenda seven days prior to the meeting."

Scope of the case

12. The complainant contacted the Commissioner on 11 December 2014 to complain about the way his request for information had been handled.

13. The complainant disputed the Governing Body's reliance on section 14(1) of the FOIA as it was a request for the same information which he requested in February 2014 and a request for a review as per the Governing Body's instructions and invitation.

14. In relation to the email, the complainant stated that six individuals had made written statements concerning the performance and procedure of a properly constituted public body but refused so far to supply a copy of the email which they say they received. He added that he has a copy of the email they refer to and it does not contain the information they say it does.

15. With regard to the minutes, the complainant informed the Commissioner that he suspects that the redacted contents refer to emails which are said to have been sent which is why he would like a copy of them.

16. The Governing Body has confirmed to the Commissioner that it is relying on section 14(1) in respect of both requests for information, but

maintains its reliance on section 42(1) in respect of the redacted section of the minutes and the funding of its solicitor's. It has also confirmed that it maintains its stance regarding the email attaching the agenda.

17. The Commissioner will therefore consider whether the Governing Body has complied with its obligations in respect of section 1(1) of the FOIA in relation to the email in question. Following this, the focus of his investigation will be to consider its reliance on section 14(1) in respect of both requests for information, and only if he is not satisfied that section 14(1) is engaged for either or both of these will he go on to consider the Governing Body's reliance on section 42(1).

Reasons for decision

Section 1 – general right of access to information held

18. In this particular case, the issue the Commissioner needs to consider is the Governing Body's response to the complainant's request for a copy of a possible additional email to the one in his possession which does not include an agenda item 'removal of governor'. The Commissioner notes that although the Governing Body refused the whole request by virtue of section 14(1) of the FOIA, it also informed the complainant that it does not hold any emails attaching the agenda for the Governing Body meeting in March 2012.
19. The complainant remains dissatisfied with this response and has forwarded a copy of the email he received to the Commissioner. The Commissioner notes that the email dated 9 March 2012 does not include an agenda item 'removal of Governor'. However, the hard copy agenda received from the Governing Body is not part of an email and the Commissioner notes that item 9 does contain such an item.
20. The complainant is concerned that the Governing Body cannot produce the additional email, particularly in the light of copies of statements from six individuals confirming that they received an agenda containing the disputed item.
21. The Commissioner's role is therefore to investigate whether the Governing Body has complied with its obligations under section 1(1) of the FOIA, which concerns the general right of access to information held by a public authority.
22. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.

23. Where there is a dispute regarding whether relevant information is held, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold relevant information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.
24. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
25. In this particular case, the Commissioner asked the Governing Body to provide details of its search and to clarify the reason for the discrepancy in the two copies of the agenda.
26. The Governing Body confirmed that the Clerk to the Governors has searched her email account to locate any emails that might have been sent to the Governing Body attaching the agenda for the meeting in March 2012. She confirmed that she could find no such emails and that the Governing Body understands that she has changed her email address and computer since 2012. The Clerk did not search the old computer as it reached the end of its useful life and was therefore replaced by the school, possibly in 2013.
27. The Governing Body has also informed the Commissioner that although an agenda may have been sent to the governors on 9 March 2012, it is not uncommon for an agenda for a Governing Body meeting to be amended and re-circulated to the governors up to seven days before the meeting. It added that at the time, it was considering what to do regarding press coverage which featured comments from the complainant, and this might explain the reason for the change to the agenda item in this particular case.
28. The Commissioner was also informed that the agenda and monthly accounts could possibly have been sent out as a hard copy by post. A covering letter would not generally be enclosed as the contents would be self-explanatory to the governors.
29. The Commissioner has considered the details of the search conducted by the Governing Body and its explanation regarding the different agendas. He has also considered the signed statements from the six individuals and notes that although each confirms that they received an agenda with the item 'removal of governor', none of the statements include

reference to an email. The Commissioner therefore thinks it is likely that the amended agenda was sent via hard copy to the governors and based on the balance of probabilities, he is satisfied that the Governing Body does not hold an email relevant to the complainant's request. The Commissioner has therefore concluded that the Governing Body has complied with its obligations under section 1(1) of the FOIA.

Section 14(1) – vexatious requests

30. Section 14(1) of the FOIA states that section 1(1) does not oblige a public authority to comply with a request for information if the request is vexatious. There is no public interest test.
31. The term 'vexatious' is not defined in the FOIA, however, the Upper Tribunal in the Information Commissioner vs Devon CC and Dransfield [2012] UKUT 440(AAC), (28 January 2013) took the view that the ordinary dictionary definition of the word 'vexatious' is only of limited use, because the question of whether a request is vexatious ultimately depends on the circumstances surrounding that request.
32. In further exploring the role played by circumstances and whether the request has adequate and proper justification, the Tribunal concluded that 'vexatious' could be defined as the "...*manifestly unjustified, inappropriate or improper use of a formal procedure.*" (paragraph 27)
33. Consistent with the Upper Tribunal's decision which established the concepts of 'proportionality' and 'justification' as central to any consideration of whether a request is vexatious, the Commissioner's guidance for section 14 confirms that the key question to ask when weighing up whether a request is vexatious is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress.
34. Where this not clear, the public authority should weigh the impact on the authority of complying with the request and balance this against the purpose and value of the request. In doing this, public authorities will inevitably need to take into account the wider factors such the background and history of the request.
35. Based on the internal review, the Commissioner notes that the Governing Body took the following factors into account in making its decision to refuse the requests by virtue of section 14(1) of the FOIA as:
 - That it had already spent a disproportionate amount of time responding to the complainant's requests for information and assisting the Local Authority with its investigation, to the point where the diversion of staff time and resources away from the education of young people who

attend the school is unsustainable and placing an unreasonable burden on the school.

- The Governing Body also took into account the background and history of the request and informed the complainant that it considered his failure to accept its response to requests in the past, was likely to result in any response it made leading to further requests for information, which will continue to add to the burden on its time and resources.
- The Governing Body also argued that it had endeavoured to comply with the requirements of the FOIA but considers the complainant's attempts to reopen an issue which only affects him, and which has already been independently investigated and addressed by the Local Authority, to amount to both unreasonable persistence and a futile request.

Background and history/unreasonable persistence

36. The Governing Body has provided the Commissioner with additional background and history to the request which it considers supports its decision that the complainant has demonstrated an unreasonable persistence in pursuing a matter which has been fully investigated and concluded.
37. It has explained that the complainant used to be a member of the Governing Body of the school, and also a member of a pressure group. As a spokesman for that pressure group, the Governing Body has stated that the complainant was involved in a demonstration against the holding of a Mardi Gras event at a leisure centre in the vicinity of the School.
38. The Governing Body has further stated that the complainant received media coverage of his protest, including a quote published in a local paper reading:

"We don't believe this [homosexual] lifestyle should be promoted in a public place".
39. The Governing Body has informed the Commissioner that it was the view of the remainder of the Governing Body that the complainant's opinions which received media coverage could bring the reputation of the school into disrepute and cause confusion as to whether the views expressed by the complainant were shared by the School or formed part of its operating ethos.
40. This matter was discussed in the meeting of the Governing Body in March 2012 and the complainant's appointment as a governor ended.

The Governing Body considers that the complainant resigned his appointment at that meeting, and has also informed the Commissioner that the decision that he should no longer serve as a governor was also taken following a discussion of the matter at the meeting. However, in October 2012, the Governing Body received correspondence from the complainant querying the procedures followed which resulted in his appointment as a governor ending.

41. In February 2013, the Governing Body received correspondence from the Local Authority that it was investigating a complaint regarding this matter. As a result, in May 2013, the Governing Body instructed a firm of solicitors to act on its behalf in relation to the complaint.
42. A further letter was sent to the complainant from the Governing Body on 11 June 2013 in an attempt to find a mutually agreeable way forward and address some of the complainant's concerns. However, the complainant wrote to the school on 24 June 2013, disagreeing with the proposals and outlining concerns about his removal as governor.
43. In July 2013, the Board of Governors met and discussed the developments relating to the complaint. Following the meeting, it wrote to the complainant on 16 July 2013, informing him that his concerns had been considered and the matter conclusively resolved.
44. This appears to have prompted the complainant's FOIA request for a copy of the minutes of the meeting of the Governing Body.
45. In September 2013, the Governing Body received correspondence from the Director of Lifelong Learning at Anglesey County Council ('the Council') regarding this issue. Its solicitors responded in October 2013.
46. The Governing Body has further confirmed that the Council wrote to the complainant on 18 November 2013 to say that it was satisfied that the Governing Body had followed the 'appropriate procedures' in relation to the meeting of March 2012, and as a consequence, it would not be in a position to support any further requests for support.
47. The solicitors acting for the Governing Body have confirmed that its client hoped that the intervention from a third party would help to provide some closure to this long running issue. However, despite the Council having notified the complainant of the outcome of its investigation of this matter, the solicitors acting on behalf of the Governing Body have stated that the complainant continued to write to the Governing Body in relation to this issue, and also contacted the media and the Welsh Government. The Welsh Government responded that as the matter had been investigated by the Council, it had not formed a view about what happened.

48. The Governing Body has provided evidence of the complainant's subsequent correspondence regarding this matter. For example, the complainant submitted an FOIA request on 22 December 2013 for copies of two letters referred to in the Director of Lifelong Learning's notification of the outcome of his investigation. This was responded to on or around 10 February 2014 and was followed by the complainant's subsequent FOIA request of 24 February 2014 in which he requested a copy of the email that was sent to the Governors before the meeting of March 2012.
49. The Governing Body has no confidence that it will ever be able to resolve this situation to the complainant's satisfaction, and therefore considers that complying with the requests is not an appropriate use of its time and resources, particularly when the matter had reached a conclusion at both the level of the governing body and the local authority.
50. The complainant's subsequent request for an internal review which contained dissatisfaction with the Governing Body's responses to both requests is also considered evidence by the Governing Body that the complainant is not prepared to accept the findings of the Local Authority, as he stated:

"It should be noted that the view of [named Director] was formed not as a result of any diligent enquiry... but solely on information received by him from yourselves and this view could only be held by ignoring the claims made by myself."
51. The Governing Body has informed its solicitors that it considers the requests to be unreasonably persistent, lacking a clear focus and intended to cause the Governing Body an unreasonable level of annoyance because the complainant is aggrieved with it. In support of this view, the solicitors acting for the Governing Body have referred the Commissioner to a letter from the complainant dated 24 June 2013 which states:
52. *"Such things run contrary to our history culture and the ethos of the school. These are questions I will be pursuing to their logical end regardless of how long it takes or whether the individual members of the GB present at the meeting are still on post or have resigned and become private individuals."*
53. The Commissioner has therefore taken into consideration the arguments from the complainant and the submissions from the Governing Body and its representative. He has considered both requests separately.

Request one

54. The Commissioner notes that in its original response to this request, that the Governing Body disclosed the bulk of the minutes to the complainant but withheld a section of the minutes in reliance on section 42(1) of the FOIA on the basis that it was covered by Legal Professional Privilege ('LPP'). The Commissioner also notes that the Governing Body upheld this decision in its letter of 14 March 2014.
55. The Commissioner would wish to highlight that his investigation is based on the situation at the time of the request. In this case, the request was in August 2013 before the Council had completed its investigation of the complaint and prior to the complainant's subsequent correspondence to the Governing Body and the Welsh Government.
56. Based on the situation at the time of the request, the Commissioner does not consider that there was sufficient evidence that the complainant was unreasonably persistent and has therefore concluded that the Governing Body incorrectly relied on section 14(1) in relation to this request for information. However, as the Governing Body has maintained its reliance on section 42(1) of the FOIA, the Commissioner has considered the Governing Body's original response to this request in paragraphs 2 to 4 of this notice.

Request two

57. Having considered both the complainant's argument and the background and history to this request from the Governing Body, the Commissioner considers that the complainant's request does demonstrate an unreasonable persistence in pursuing a matter that had been fully investigated and concluded. He is satisfied therefore that section 14(1) of the FOIA is engaged in respect of this request for information.

Section 42 – Legal professional privilege

58. Section 42(1) of the Act provides that information is exempt from disclosure if the information is protected by legal professional privilege.
59. Legal professional privilege (LPP) is not defined in the Act or in any other legislation. It is a common law concept shaped by the courts over time.
60. LPP is intended to protect the confidentiality of communications between a lawyer and a client. In the case of *Bellamy v the Information Commissioner and the DTI (EA/2005/0023)* the former Information Tribunal described LPP as:

"...a set of rules or principles which are designed to protect the confidentiality of legal or legally related communications and exchanges between the client and his, her or its lawyers related communications and exchanges which contain or refer to legal advice which might be

imparted to the client, and even exchanges between the clients and [third] parties if such communication or exchanges come into being for the purpose of preparing for litigation..."

61. A professional legal advisor for the purposes of LPP could be a solicitor, barrister, licensed conveyancer or a legal executive holding professional qualifications recognised by the Institute of Legal Executives (ILEX). The legal advisor can be either an external lawyer or an in-house lawyer employed by the public authority itself. This was confirmed in the former Information Tribunal's ruling in *Calland v Information Commissioner and FSA (EA/2007/0136; 8 August 2008)*.
62. There are two types of privilege – litigation privilege and legal advice privilege. Litigation privilege is available in connection with confidential communications made for the purpose of providing or obtaining legal advice in relation to proposed or contemplated litigation. Advice privilege will apply where no litigation is in progress or being contemplated.
63. The Governing Body has confirmed that it is relying on advice privilege and that the sole or dominant purpose of the information was to provide legal advice in respect of the complaints raised by the complainant. Having satisfied himself that the dominant purpose of all the communications being withheld relate to the provision of legal advice, the Commissioner has gone on to consider whether there were any circumstances in which the confidentiality of the documents had been lost.
64. The Commissioner notes that if the information has been disclosed to the public, confidentiality will have been lost. However, if the answer was no, the confidentiality would still apply and LPP would still be engaged. Additionally, a restricted disclosure to interested relevant third parties will not result in the loss of confidentiality and again, LPP will still be engaged. The Governing Body has also confirmed via its solicitor that the information remains confidential.
65. The Commissioner is therefore satisfied that the information withheld is protected by LPP and that section 42(1) of the FOIA is engaged. He has therefore gone on to consider the public interest.

Public interest in disclosure

66. The Commissioner notes that there is an inherent public interest in demonstrating transparency in the public sector.
67. The Commissioner also notes that although the Governing Body has not identified any additional factors in favour of disclosure the generic public interest in favour of accountability in the public sector.

68. The Commissioner would also point out the public interest in the disclosure of the information itself in that it would demonstrate that the Governing Body was prepared to follow procedures in matters where more specialist legal advice was required.

Public interest in maintaining the exemption

69. The Governing Body considers that there is a public interest in safeguarding openness in all communications between a client and a lawyer to ensure access to full and frank legal advice, which in turn is fundamental to the administration of justice. In support of this, the Governing Body has referred to the Commissioner's guidance that the general public interest in maintaining the exemption is strong due to the importance of the principle behind LPP itself, namely safeguarding openness in all communications between a client and lawyer to ensure full and frank legal advice.
70. The governing body has further argued that the advice relates to an on-going complaint against it by the complainant and does not consider it appropriate that the complainant should have access to its legal advice, during an on-going dispute between both parties as this would undermine its ability to freely obtain legal advice. The Governing Body has further argued that if the information was historic or uncontentious, the arguments in favour of maintaining the exemption might not be so strong.
71. The Governing Body considers that a further factor in favour of maintaining the exemption is that the complaint has already been escalated to the Local Authority which concluded that appropriate procedures had been followed.
72. In this particular case, the Governing Body does not consider there is a wider public interest in disclosure as only one individual is interested in the information.

The balance of public interest

73. The Commissioner acknowledges the general public interest factors in favour of transparency and accountability referred to in paragraphs 66 to 68 of this notice.
74. The Commissioner is also mindful of the general public interest in being able to demonstrate that the Governing Body has followed the correct procedures in matters where obtaining specialist legal advice.
75. However, the Commissioner is not persuaded by the Governing Body's argument that the issue would not be of relevance or interest to the wider population. Indeed, he considers that advice regarding a

complaint against a Governing Body of a school and its removal of a governor would be likely to represent an issue of relevance to those with an interest in the education sector and perhaps even the wider public.

76. Additionally, the Commissioner has not taken the Governing Body's argument that the complaint has been investigated and dismissed by the Local Authority into consideration, as his investigation can only consider the situation at the time of the request. As pointed out in paragraph 56 of this notice, the outcome of the complaint post-dates this request.
77. However, the Commissioner recognises the general principle that clients should be able to receive free and frank legal advice from their lawyers and acknowledges that this in itself is a strong public interest factor in maintaining the exemption, as confirmed by the Tribunal in the case of *Bellamy v the Information Commissioner and the DTI* [EA/2005/0023] which concluded that as:
- "there is a strong element of public interest inbuilt into the privilege itself. At least equally strong countervailing considerations would need to be adduced to override that inbuilt public interest."*
78. This was further reinforced in *Crawford v Information Commissioner & Lincolnshire County Council* (EA/2011/01445) in which the Tribunal states:
- "Our starting point, therefore is that the exemption is qualified, not absolute, but that ...must show clear, compelling and specific justification that at least equals the public interest in protecting the information in dispute."*
79. The Commissioner notes that factors which might suggest equally strong countervailing arguments include whether there is a large amount of money involved or a large number of people affected, lack of transparency in the public authority's actions, misrepresentation of advice given, or the selective disclosure of only part of that advice. The Commissioner notes that there is no evidence of any of these factors involved in this particular case.
80. He also notes that at the time of the request, the legal advice was very recent and directly related to a complaint by the complainant against the Governing Body itself
81. Having considered the relevant public interest factors both in favour of disclosure and maintaining the exemption, the Commissioner considers the weight of public interest is balanced in favour of maintaining the exemption.

Right of appeal

82. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.gov.uk

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

83. 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.
84. 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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