

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 20 August 2015

**Public Authority:** Oswald Road Primary School

**Address:** Oswald Road  
Chorlton  
Manchester  
M21 9PL

#### **Decision (including any steps ordered)**

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1. The complainant has requested information relating to communications and correspondence between Oswald Road Primary School ("the School") and its senior staff and governors regarding proposed changes to flexi-schooling arrangements. The School disclosed the requested information in a redacted format, citing sections 36(2)(b)(ii) and 40(2) of FOIA as a basis for the application of the redactions to the information. The complainant also asked the Commissioner to investigate whether the School held any further information within the scope of her request which it had not provided to her.
2. The Commissioner's decision is that the School has correctly applied section 40(2) to some of the requested information but has incorrectly applied it to other parts of that information. In relation to section 36(2)(b)(ii) the Commissioner's decision is that the School has incorrectly applied it. In relation to whether further information within the scope of the request is held by the School, the Commissioner's decision is that, on the balance of probabilities, the School does not hold any further information within the scope of the complainant's request.
3. The Commissioner requires the School to take the following steps to ensure compliance with the legislation.
  - To disclose to the complainant the withheld information which the Commissioner has outlined in the confidential annex to this Notice.
4. The School 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**

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5. On 12 November 2014 and 29 November 2014, the complainant wrote to the School and requested information in the following terms:
  - (1) A copy of the Flexi schooling document you presented to Governors as referenced in the minutes of the Extra-Ordinary Meeting Minute on 24th September 2014.
  - (2) All communications between yourself (and any members of your senior leadership team) with the Governing Body members regarding flexi schooling at Oswald Road.
  - (3) All correspondence between yourself and the LA regarding flexi schooling changes in the school.
  - (4) All correspondence between yourself and your senior Leadership Team regarding flexi schooling changes in the school.
6. The School responded on 10 November 2014. It provided the complainant with some information in relation to her request but had redacted some of the details from that information ("the withheld information").
7. Following an internal review the School wrote to the complainant. It stated that it had located some further information within the scope of her request, which it provided to her in a redacted format. It maintained its original position in relation to the redactions in the information sent to the complainant on 10 November 2014. It stated that, in the case of both the original information sent and the further information which would be sent, it had redacted some details as disclosure of these would be unfair to the individuals concerned.
8. Following correspondence with the Commissioner, the School informed the Commissioner that it was applying section 40(2) of FOIA to the entirety of the withheld information and section 36(2)(b)(ii) to part of the withheld information.

## **Scope of the case**

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9. The complainant contacted the Commissioner to complain about the way her request for information had been handled. She considered

that sections 36(2) and 40(2) of FOIA had been incorrectly applied to the withheld information. She further considered that the School held more information within the scope of her request which it had not provided to her.

10. The Commissioner considered whether the School had correctly applied section 40(2) to all of the withheld information and section 36 (2) to parts of the withheld information. He also considered whether or not the School held any more information within the scope of the complainant's request other than that the information which had already been disclosed to the complainant with redactions. The Commissioner found that some of the withheld information (outlined in the confidential annex to this Notice) was outside the scope of the complainant's request and he has therefore not considered that information in this Notice.

### **Section 40(2) – Personal information**

11. The School sought to rely on section 40(2) to withhold information which it believed would identify individuals, i.e. members of staff, individual governors and Local Authority Advisors.

12. Section 40(2) provides an exemption for information which is the personal information of an individual other than the applicant, and where one of the conditions listed in sections 40(3) or 40(4) is satisfied.

13. Section 40(2) states that –

*"Any information to which a request for information relates is also exempt information if-*

*a. it constitutes personal data which do not fall within subsection (1), and*

*b. either the first or the second condition below is satisfied."*

14. Section 40(3) provides that –

*"The first condition is-*

*a. in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene-*

- (i) any of the data protection principles, or*
- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*
- b. in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."*
15. 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 ("DPA").
16. The Commissioner therefore considered:
- (1) whether the withheld information constitutes personal data; and if so
  - (2) whether disclosure would breach one of the data protection principles.

**(1) Does the withheld information constitute personal data?**

17. In order to establish whether section 40(2) had been correctly applied, the Commissioner first considered whether the withheld information is the personal data of parties other than the complainant.
18. 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.
19. The School identified to the Commissioner the information that it considered constituted personal data. This constituted the names and contact details of individual governors, members of the School's senior Leadership Team and names and contact details of Local Authority advisors. There was also some further information relating to general opinions and observations and an e-mail of a factual nature.
20. In the Commissioner's view the two main elements necessary for information to be personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some

biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in some way.

21. The Commissioner accepts that, to the extent that the withheld information can be related to a specific identifiable individual, the withheld information will constitute their personal data. However, where it does not relate to a specific identifiable individual, he would not accept that it constitutes personal data.
22. The Commissioner accepts that the majority of the withheld information constitutes personal data, however he has identified some parts of it which he does not consider to be personal data as they do not identify individuals. Therefore section 40(2) does not apply to some parts of the withheld information, which are outlined in the confidential annex to this Notice.
23. However, the fact that information constitutes the personal data of individuals does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the data protection principles. The Commissioner therefore went on to consider whether disclosure of the withheld information which constituted individuals' personal data would breach one of the data protection principles.

## **(2) Would disclosure breach one of the data protection principles?**

24. The School informed the Commissioner that it believed that disclosure of the information to which it had applied section 40(2) would breach the first data protection principle. The first data protection principle requires that any disclosure of personal data is fair and lawful and that at least one of the conditions in schedule 2 of the DPA is met.
25. The Commissioner firstly gave consideration to whether the disclosure of the withheld information – specifically names and contact details of individual governors, members of the School's senior Leadership Team and names and contact details of Local Authority advisors-would be fair. In doing so, he took into account the following factors:
  - (i) the individuals' reasonable expectations of what would happen to their information;
  - (ii) whether disclosure would cause any unnecessary or unjustified damage or distress to the individuals concerned; and
  - (iii) whether the legitimate interests of the public in disclosure were sufficient to justify any negative impact to the rights and freedoms of the individuals concerned.

**(i) Reasonable expectations of the individuals concerned**

26. The Commissioner considered the reasonable expectations of the individuals in terms of what would happen to their personal data. These expectations can be shaped by factors such as an individual's general expectation of privacy and also the purpose for which they provided their personal data.
27. The Commissioner considers that employees of public authorities should be open to scrutiny and accountability. They should expect that some personal data about them may be released because their jobs are funded by the public purse. When considering what information an individual should expect to have disclosed about them, the Commissioner considers that a distinction should be drawn as to whether the information relates to their public or private life. The Commissioner's view is that information which relates to an individual's private life (i.e. their home, family, social life or finances) will deserve more protection than information about them acting in an official or work capacity (i.e. their public life).
28. The Commissioner has considered the reasonable expectations of the individuals concerned in relation to the different individuals whose personal data is included in the withheld information.

**Names and contact details of staff in the School's Senior Leadership Team**

29. The Commissioner notes that the personal data withheld by the School concerns its senior staff acting in a work related capacity. In light of this, the Commissioner's view is that the information may not attract the same level of protection as information which relates to their private lives.
30. The School argued that although the withheld information related to individuals' public (or professional) life, the context in which the information was supplied suggested that it would be unfair to release it to any third party.
31. The School informed the Commissioner that its senior staff were engaging in discussions with Local Authority advisors, governors and ultimately parents in trying to reach the best possible decision for everyone concerned regarding the future of Flexi-Schooling arrangements within the School. The School argued that, although the names and contact details of the School's Senior Leadership Team were known to the school community and the public, in this context it would be unfair to disclose them as it may lead to individual staff

members being targeted or singled out by parents unfairly if they do not agree with the outcome of what is to be a collective decision.

### **Names and contact details of Local Authority Advisors**

32. The School argued that, although the names and contact details of these advisors would be in the public domain, they would not reasonably expect this information to be disclosed to the public, as they are participating in and providing advice in relation to internal discussions between the School's senior staff and governors regarding the School's flexi-schooling arrangements and would not expect their details in relation to this decision to become known to the wider public.
33. To the extent that the withheld information relates to identifiable senior members of staff at the School, the Commissioner's view is that senior staff within a public authority should expect that it would disclose more information about them than junior staff. This is because senior staff should expect their posts to carry a greater level of accountability, since they are likely to have a greater responsibility for policy decisions such as flexi-schooling arrangements and the expenditure of public funds than more junior staff.
34. To the extent that it relates to details of Local Authority advisors, the Commissioner's view is that, as senior Local Authority employees who were providing advice in their professional capacity, they should expect that information may be disclosed about them, as they are accountable to the public for advice they provide which could have an impact on educational policy decisions. As a consequence, the Commissioner believes that, to the extent that any information to which the School has applied section 40(2) constitutes the personal data of senior school staff and Local Authority advisors, it might be disclosed to the public.

### **Names and contact details of individual governors**

35. The School has explained to the Commissioner that the Governors of Oswald Road School abide by a Code of Practice which is supported by the NGA (National Governor's Association) This is annually reviewed and signed by all members of the Governing Body and sets out the role and responsibilities of a school Governor. Within this code is a commitment to accepting a 'collective responsibility for all decisions made by the governing body or its delegated agents' that they 'will not speak against a majority decision outside a governing body meeting nor reveal the details of any governing body vote' There is therefore an expectation from School Governors that personal identity remains such as they act as a collective and as such, although



their names and contact details are in the public domain as school Governors, they would not expect their names and contact details to be disclosed to the public as part of disclosure of information regarding discussion and debate about an important policy issue such as flexi-schooling, which would require collective, not individual, decision-making.

## **(ii) Consequences of disclosure**

36. The Commissioner does not believe that, in relation to the personal information of senior staff and Local Authority advisors, its disclosure would be likely to cause any damage or distress to the individuals concerned. Those individuals were acting in a purely professional capacity and were engaged in discussions regarding the provision of flexi-schooling within the School and the legislation and policies relating to this. The Commissioner does not consider that disclosure of that information would be unfair or would disclose anything to the public which might cause such damage and distress. The identities of the individual senior staff would already be known to the school community and it would be expected that all senior staff had participated in the decision-making process.
37. As regards the School's assertion that it wishes to protect individual members of staff from being targeted and harassed, the Commissioner considers that, from the reading of the e-mails in the information which has already been disclosed to the complainant, it will be obvious which ones are e-mail exchanges between the head teacher and senior staff. The parents are already aware that any decision made on how to proceed with flexi-schooling will be at the head teacher's discretion and would expect that she would discuss the matter with and seek advice from her Senior Leadership team. Therefore the Commissioner does not consider that disclosure of the names and contact details of senior staff members in this instance would make it any more likely that any one of these would be singled out in respect of whatever final decision is made.
38. In relation to the names and contact details of governors, however, the Commissioner accepts that they would not expect their individual names and contact details to be disclosed in this instance as this would make it easy to identify which opinions and advice were provided by which individual governor. In the event of the final decision being contentious, which the Commissioner agrees is inevitable, disgruntled parents may target individual governors as they may perceived them as having been 'for' or 'against' certain aspects of the decision. The



fear of such occurrences would be likely to cause damage or distress to the individual governors.

**(iii) General principles of accountability and transparency**

39. The Commissioner notes that, notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, depending on the circumstances of the case, it may still be fair to disclose information if there is a more compelling public interest in disclosure.
40. In considering 'legitimate interests', the Commissioner's view is that such interests can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests. The Commissioner notes that there is likely to be a significant public interest in the disclosure of information which may help to shed light on the quality of educational provision in schools and how effectively schools are being managed in terms of the decision making process regarding different educational methods such as flexi-schooling.
41. The Commissioner believes that any public interest in disclosure must be weighed against the potential prejudices to the rights, freedoms and legitimate interests of the staff whose personal data is contained within the withheld information. However, taking into account all of the points discussed above, the Commissioner has concluded that the strength of the legitimate interest in disclosure is sufficient to outweigh the rights of any data subjects to privacy. He has therefore concluded that it would be fair and lawful to disclose the personal data of staff and Local Authority Advisors contained in the withheld information.
42. Having determined that this would be fair and lawful to disclose the personal data of staff and Local Authority Advisors, the Commissioner went on to consider whether a condition in Schedule 2 of the DPA was met. In relation to the conditions in Schedule 2, the Commissioner believes that the most relevant one is Condition 6. This states that:  
  
*"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 of legitimate interests of the data subject"*
43. The Commissioner has explained above why he believes that the disclosure of the personal data of staff and Local Authority advisors would serve a legitimate public interest. He is of the view that disclosure is necessary to meet that legitimate public interest. As a

result, he is satisfied that the sixth condition in Schedule 2 is met and that section 40(2) is not applicable to that personal data.

### **Section 36 – Prejudice to the effective conduct of public affairs**

44. Section 36(2)(b)(ii) of FOIA provides that:-

Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information under the FOIA-

- (b) would, or would be likely to, inhibit –
  - (i) the free and frank provision of advice, or
  - (ii) the free and frank exchange of views for the purposes of deliberation

In relation to part of the withheld information, i.e. the names of governors and Local Authority advisors, the School refused to disclose the information, citing section 36(2)(b)(ii). As the Commissioner has determined that the names of governors have been correctly withheld under section 40(2) he has not considered the application of section 36(2)(b)(ii) to these names. Therefore, he has considered the application of this section solely in relation to the names of the Local Authority advisors.

### **The engagement of section 36**

- 45. For a public authority to cite section 36 of the FOIA the qualified person must give their reasonable opinion that the exemption is engaged. For the Commissioner to determine that the exemption is engaged it must be demonstrated that the designated qualified person has given their opinion, and that the opinion is reasonable.
- 46. The School confirmed that the opinion in relation to the application of section 36(2)(b)(ii) was given by a parent governor, to which its Chair of Governors had designated the role of qualified person. The Commissioner is satisfied that she was the appropriate qualified person for these purposes.
- 47. The Commissioner notes that the qualified person is familiar with the withheld information and has participated in the discussions regarding changes to the flexi-schooling arrangements. She provided her opinion on the basis that she believed that disclosure of some of the withheld information would be likely to have the effects set out in section

36(2)(b)(ii). She accepted that section 36(2)(b)(ii) was engaged for the following reasons:

- the naming of individual Local Authority advisors in the discussions that were taking place regarding the future of flexi-schooling, would be likely to hinder future discussions between them and the school governors and staff.
- Disclosure may therefore have an impact on these individuals being able to openly express themselves, honestly and completely, now and during future discussions. This would be likely to undermine the decision-making process.

48. The Commissioner notes that his guidance on section 36 makes clear that:

*"The qualified person's opinion is not rendered unreasonable simply because other people may have come to a different (and equally reasonable) conclusion. It is only unreasonable if it is an opinion that **no** reasonable person in the qualified person's position could hold. The qualified person's opinion does not even have to be the **most** reasonable opinion that could be held; it only has to be a reasonable opinion."* (para. 21)

49. Provided that the Commissioner is satisfied that the opinion is in accordance with reason and not irrational or absurd, in short, that it is an opinion that a reasonable person could hold, then he will regard it as a reasonable opinion for the purposes of section 36.

50. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to conclude that section 36(2)(b)(ii) applied to it.

51. As section 36 is a qualified exemption, it is subject to a public interest test. The Commissioner therefore went on to consider whether the public interest in maintaining the exemption outweighed that in disclosure of the remaining withheld information.

52. In *Guardian Newspapers & Brooke v Information Commissioner & BBC*<sup>1</sup>, the Tribunal noted the distinction between consideration of the

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<sup>1</sup> EA/2006/0011 & EA/2006/0013

public interest under section 36 and under the other qualified exemptions contained within the Act:

*'The application of the public interest test to the s 36(2) exemption involves a particular conundrum. Since under s 36(2) the existence of the exemption depends upon the reasonable opinion of the qualified person, it is not for the Commissioner or the Tribunal to form an independent view on the likelihood of inhibition under s 36(2)(b), or indeed of prejudice under s36(2)(a) or (c). But when it comes to weighing the balance of public interest under s 2(2)(b), it is impossible to make the required judgement without forming a view on the likelihood of inhibition or prejudice'.*

The Tribunal indicated that the reasonable opinion is limited to the degree of likelihood that inhibition or prejudice may occur and so

*"...does not necessarily imply any particular view as to the severity or extent of such inhibition (or prejudice) or the frequency with which it will or may occur, save that it will not be so trivial, minor or occasional as to be insignificant."*

53. Therefore, in the Commissioner's opinion, this means that while due weight should be given to the reasonable opinion of the qualified person when assessing the public interest, the Commissioner can and should consider the severity, extent and frequency of the inhibition on the free and frank exchanges of views for the purposes of deliberation.

### **Public interest arguments in favour of maintaining the exemption**

54. The Commissioner considers that there is a strong public interest in transparency and accountability and in the disclosure of information which enables members of the public to scrutinise decisions made by public authorities. In relation to schools, there is likely to be a significant public interest in the disclosure of information which may help to shed light on the quality of educational provision and how effectively schools are being managed. This is closely linked to the public interest in ensuring that the large amounts of public money being invested in schools are being spent in appropriate ways.
55. The Commissioner further considers that there is a particular public interest in this case in disclosing the identities of the Local Authority Advisors with whom changes in flexi-schooling arrangements were discussed. These advisors are senior staff in the Local Authority and provided extremely valuable advice regarding the flexi-schooling policy. There is a public interest in knowing that advice on such an important

educational issue was provided by individuals with an important and relevant role and a level of seniority within the Local Authority.

**Public interest arguments in favour of disclosure of the information withheld under section 36(2)(b)(ii)**

56. The School considers that there is also a strong public interest in ensuring effective decision making and ensuring the process is one in which deliberation can occur in a free and frank way, with a view to securing best decisions. The School is concerned that disclosure of the withheld information would be likely to inhibit the individuals involved from such a free, frank and open discussion in the future, which would render any future decision-making process less effective.

**Balance of the public interest arguments**

57. As the Commissioner has previously noted, the qualified person's opinion is limited to the degree of likelihood that the relevant prejudice may occur. Consequently, in his view, this means that while he must give due weight the opinion when assessing the public interest, he needs to consider the severity, extent and frequency of that likely prejudice. The Commissioner has considered the arguments for and against disclosure and the severity and frequency of the prejudice and inhibition the School has provided.
59. The Commissioner considers that the public interest in transparency and accountability in the decision-making processes of public authorities carries significant weight. The School accepts that transparency and accountability are important to demonstrate a fair, informed and unbiased decision-making process.
59. The School is concerned about the possible inhibition on free and frank exchanges of views in future discussions. The Commissioner is not convinced, given the nature of the information, that any prejudice that might occur from disclosure would be likely to be particularly severe, extensive or of a frequent nature. The School has already disclosed large parts of the information, including advice provided. The Commissioner is not of the view that the attribution of that advice to particular individuals within the Local Authority would be likely to cause severe or extensive prejudice to future discussions as their advice was sought and provided solely in relation to this particular issue. As far as the Commissioner is aware, this advice was provided willingly and there is no suggestion that the individuals asked for their identities to remain confidential in relation to it.
60. With regard to the public interest in disclosure, the Commissioner considers that the disclosure of the information at the time that the

request was made would have helped to increase the transparency and accountability with regard to various aspects of the flexi-schooling provisions at the School. He considers that the public interest in maintaining the exemption does not outweigh the public interest in disclosure and that, consequently, section 36(2)(b)(ii) does not apply to the relevant withheld information.

**Is any further information within the scope of the complainant's request held by the School?**

61. The Commissioner's published guidance states that when considering whether information is held, the Commissioner uses the civil standard of proof, i.e. whether it is likely or unlikely on the balance of probabilities. In assessing such cases the Commissioner will consider the extent and quality of the authority's search for the requested information, any other explanations provided, and the complainant's reasons for believing that the information is held.
62. The complainant informed the Commissioner that she would have expected further information within the scope of her request to be held by the School, given the importance of the issues involved and the length of time taken to deliberate and form a decision.
63. The Commissioner asked the School whether it had conducted a search for further relevant information. The School confirmed that The Head Teacher and Business School Manager upon receipt of this information request worked together to search through the Head Teacher's email account. They began by searching the phrase 'flexi -school', and then other variations of the term likely to maintain any communication in relation to this topic including 'wood school' and 'alternative provision'. They then searched individual email addresses of the Governing Body members. All the findings of the searches were then printed off and put into date order.
64. Following this they were read over and then further searches were undertaken to look for any possible communications that may have been relevant and fell within the scope of this request. The Head Teacher said there was no communication between other members of the Senior Leadership team and the Governing Body with regard to flexi schooling as she was dealing with this issue alone.
65. The Commissioner is satisfied that the School has provided the complainant with an explanation and clarification of its position, i.e. that it does not hold any further information within the scope of the complainant's request.

66. On the balance of probabilities the Commissioner is satisfied that the School does not hold any further recorded information which is relevant to the complainant's request.



## Right of appeal

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67. 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](mailto:GRC@hmcts.gsi.gov.uk)  
Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

68. 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.
69. 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 .....**

**Rachael Cragg**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**