

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

### **Decision notice**

**Date:** 8 October 2015

**Public Authority:** Education Authority

**Address:** North Eastern Region  
Antrim Board Centre  
17 Lough Road  
Antrim  
BT41 4DH

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

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1. The complainant has requested information from the Education Authority (EANI) regarding a fatal road traffic accident which occurred in November 2014. The EANI disclosed some of the requested information to the complainant but refused to disclose the remainder, citing the exemptions under sections 36(2) and 40(2) as a basis for non-disclosure.
2. The Commissioner's decision is that the EANI has correctly applied the above exemptions to the information not disclosed to the complainant.
3. Therefore the Commissioner requires no steps to be taken.

### **Request and response**

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4. On 16 December 2014, the complainant wrote to the EANI (formerly the NEELB) and requested information in the following terms:
  1. "Copies of all material held by the NEELB in relation to the request for the [name redacted] family to be collected for school at their home.
  2. Copies of all material held by NEELB in relation to the accident last month in which [name redacted] was killed.

3. A copy of every email and text message sent or received by the NEELB Chief Executive on November 11 and November 12."
5. The EANI responded on 27 January 2015. It provided some information in relation to part 3 of the complainant's request and stated that the some information relating to part 3 (specifically records of text messages) was not held, and the remaining information in parts 1, 2 and 3 of the request ("the withheld information") was not disclosed and the EANI cited sections 36 and 40(2) of FOIA as a basis for non-disclosure.
6. Following an internal review the EANI wrote to the complainant on 18 February 2015. It reiterated that it did not hold records of text messages and upheld the original decision to apply sections 36 and 40(2) of FOIA to the withheld information.

### **Scope of the case**

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7. The complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner has considered whether the EANI has correctly applied sections 36 and 40(2) to the withheld information.

### **Reasons for decision**

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9. The School sought to rely on section 40(2) to withhold information which it believed would identify individuals, i.e. members of the family involved in the road traffic accident.
10. 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.
11. 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."*

12. 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*

13. 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").

14. The Commissioner therefore considered:

- whether the withheld information constitutes personal data; and if so
- whether disclosure would breach one of the data protection principles.

### **Does the withheld information constitute personal data?**

15. The definition of personal data is given in section 1(1) of the Data Protection Act 1998 (DPA):

*"personal data" means data which relate to a living individual who can be identified-*

*(a) from those data, or*

*(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller.*

16. 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.

17. 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.

18. The EANI identified to the Commissioner the information that it considered constituted personal data.
19. 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.
20. 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.
21. The Commissioner accepts that the withheld information constitutes personal data, as it identifies living individuals.

**Would disclosure breach the first data protection principle?**

22. The EANI claimed that disclosure would be unfair and therefore would breach the first data protection principle.
23. When considering the first data protection principle the Commissioner will generally look to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.
24. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.
25. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
  - the individual's or individuals' reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual or individuals concerned); and

- the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.
26. The Commissioner has considered whether disclosure would cause any unnecessary or unjustified damage or distress. Having seen the withheld information, he has concluded that the portion of it to which EANI has applied section 40(2) is personal information regarding the family members, who would be distressed if that information was placed in the public domain.
  27. However, as always, it remains important to consider all the circumstances of the case. In particular it is important to consider both the reasonable expectations of the data subjects regarding their personal information and whether some or all of that information has already been put into the public domain with the knowledge of the data subjects. The Commissioner has considered whether any of these factors are relevant in this case.
  28. The withheld information constitutes details of the EANI's interaction with the family prior to the accident in relation to attempting to resolve the issue of transport for the family to and from school. Both the EANI and the school attended by the child killed in the accident put out press releases in the immediate aftermath of the accident. However, these only state that the accident occurred and express the condolences from the child's school. Therefore the Commissioner does not consider that the press releases place any of the withheld personal information in the public domain.
  29. The Commissioner has also 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 the individuals' general expectation of privacy and also the purpose for which they provided their personal data.
  30. The Commissioner is of the view that the mother, who provided information on behalf of her family would have a reasonable expectation that the personal information of the family members would not be disclosed to the public. The withheld information contains personal data e.g. in application forms and in e-mail exchanges regarding the family's ongoing transport issues. In the view of the EANI the individual family members concerned would have had a strong expectation that such data would be kept confidential and would not have expected personal information relating to their private lives to be disclosed. The Commissioner agrees with this view.

31. The complainant also enquired as to whether the EANI had sought the consent of the mother to disclosure of the personal data of her family members. The EANI stated that it did not feel this appropriate in the circumstances and the Commissioner accepts this.
32. Notwithstanding a data subject's reasonable expectations or any damage or distress caused to them by disclosure, the Commissioner believes that it may still be fair to disclose personal data if it can be argued that the legitimate interest in the public accessing the material is compelling. Therefore, when assessing fairness the Commissioner will also balance the rights and freedoms of the data subject with the legitimate interests in disclosing the information into the public domain. The EANI considers that that the press releases and other disclosed information should be sufficient to inform the public without need to disclose further personal information. The EANI is also of the view that, once the PSNI investigation and the inquest have been concluded, the public will be presented with a balanced view of the entire situation.
33. The Commissioner has considered whether there is a legitimate interest in the public accessing the withheld information. The Commissioner accepts that there is a public interest in transparency of public sector organisations, which are funded by the public purse. Those interests would be served by the disclosure of the withheld information. There would also be a legitimate public interest in how the EANI handles issues such as transport and how decisions are made regarding this, also in how the EANI handles matters in the aftermath of such a tragic incident. However, the Commissioner does not believe that any legitimate interest in the public accessing the withheld information would outweigh the potential damage and distress caused by disclosure of that information and agrees with the EANI's point in paragraph 32 above. Therefore the Commissioner is unable to conclude that disclosure of the withheld information is necessary to meet a legitimate public, rather than personal, interest.
34. In view of all of the above, the Commissioner is satisfied that the withheld information is personal data and that disclosure of any of it would breach the first data protection principle as it would be unfair.

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

35. Section 36(2) 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, the EANI refused to disclose the information, citing section 36(2) of FOIA.

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

36. 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.
37. The EANI confirmed that the opinion in relation to the application of section 36(2) was given by Mr Shane McCurdy, the Chief Executive of the EANI. The Commissioner is satisfied that he was the appropriate qualified person.
38. The EANI also confirmed to the Commissioner the dates on which the qualified person's opinion was sought and given. It also confirmed that he was provided with all records within the scope of the complainant's request and with full submissions regarding the application of section 36(2), including arguments for and against its application.
39. The qualified person was of the opinion that section 36(2) was engaged as the prejudice in that section would be likely to occur should the withheld information be disclosed. This would be likely to occur for the following reasons:-
  - The information constitutes professional advice from the EANI to a school regarding dealing with a serious incident. The ability of the educational psychologist involved to discuss professional concerns within a safe space is paramount in order for the psychologist to discharge his or her professional duties.
  - The EANI has a responsibility and duty of care to ensure support to schools in times of crisis. It is important that advice and support can be provided without fear of this being conducted in the public domain as this could hinder the ability of the schools to express their concerns and receive advice and support.
  - The EANI's officers require the ability to communicate and agree approaches to a rapidly changing and sensitive situation. If this were

to be in the public domain the officers would not have that ability to think and respond appropriately.

40. 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)
41. 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.
42. After reviewing the withheld information, the Commissioner has concluded that it was reasonable for the qualified person to conclude that section 36(2) applied to it.
43. The qualified person's opinion was that all 3 limbs of section 36(2) applied to that part of the information withheld under section 36(2). The Commissioner is of the view that section 36(2)(b)(ii) applies to the entirety of that part of the information so he has not considered the application of the other limbs.
44. As section 36 is a qualified exemption, it is necessary to consider the public interest test. Section 2(2)(b) of the Act states that a public authority may refuse to disclose information requested if in all the circumstances of the case the public interest in maintaining the exemption outweighs the public interest in disclosing the information.
45. The Tribunal in *Guardian & Brooke*<sup>1</sup> indicated the distinction between consideration of the public interest under section 36 and consideration of the public interest under the other qualified exemptions contained within FOIA.
- "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*

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<sup>1</sup> EA/2006/0011 and EA/2006/2013



*independent view on the likelihood of inhibition under s36(2)(b), or indeed of prejudice under s 36(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 judgment without forming a view on the likelihood of inhibition or prejudice.”*

46. The Commissioner agrees with the view of the Tribunal in paragraph 26 above. The fact that it is “not for the Commissioner to form an independent view...” does not prevent him from considering the severity, extent and frequency of any prejudice or inhibition which might occur when he is assessing the public interest. Whilst the Commissioner can and should give due weight to the reasonable opinion of the qualified person when assessing the public interest, he can and should also consider the severity, extent and frequency of the likely prejudice or inhibition which would be likely to be caused by disclosure of the information withheld under section 36 and any relevant subsections.

#### **Public interest arguments in favour of disclosing the withheld information**

47. The EANI acknowledged that there are several factors which favour disclosure, including openness and transparency in relation to the EANI’s role, informing public debate and increase in public confidence in the EANI’s ability to deal with this type of situation.
48. The EANI believes that there is a strong public interest in openness and transparency in relation to this matter regarding the EANI’s role in responding to the situation and in discussing the provision of transport for the family involved. It also considers that disclosure of information to the public which contains free and frank advice arising from candid discussions would inform the public as to the nature and quality of those discussions. This would be of interest to the media and the public in general, who have an interest in this particular story. It would also inform families in a similar situation with regard to transport and inform the public about the EANI’s transport policy in light of the recent Home to School Transport Review. This would facilitate an informed public debate on significant issues and may improve the quality of the discussions which take place when preparing advice and lead to greater transparency of decisions taken by the EANI.
49. The EANI believes that it has already acknowledged and gone some way towards meeting the public interest considerations above in this matter through its press releases and the information it has disclosed. It also believes that those members of the public who have a particular interest or concern regarding how the EANI deals with transport issues,

and those who wish to present issues as a result of this case, have a mechanism for doing so already, by application to the transport sections. Disclosure of the withheld information would not improve this mechanism.

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

50. The EANI has informed the Commissioner that, at the time of the request, and now, the PSNI investigation into the accident is not complete and an inquest has not yet been held. Disclosure of the withheld information into the public domain could at best misinform the public and at worst potentially prejudice the investigation. The EANI has also informed the Commissioner that there is the potential for legal proceedings to be brought and disclosure into the public domain may be prejudicial to these.
51. The EANI also stated to the Commissioner that it needs the ability to respond to such critical interests and have the space to think and react without fear that their thoughts, opinions and reactions may appear in the public domain at a later date. This may be prejudicial to the effective conduct of public affairs as EANI officers may not communicate as freely in any such future situation.

### **Balance of the public interest arguments**

52. The Commissioner considers that there is a public interest in furthering understanding of the process of discussion which leads ultimately to decision-making within public authorities such as the EANI. Disclosure of the withheld information may increase public confidence in the EANI and its decision-making processes.
53. The Commissioner also considers that disclosure of information relating to discussions behind the EANI's decision-making processes may help to improve the quality of those discussions and lead to greater transparency of the decisions made within the EANI.
54. Whilst there are strong arguments in favour of disclosing the withheld information, the Commissioner considers that there is a strong public interest in the EANI being able to discuss high-level and sensitive issues freely and frankly and to be able to have the space to think and react to sensitive situations without fear of public scrutiny, as this may inhibit free and frank deliberations. It is in the public interest to ensure that every aspect of these issues is considered frankly and candidly with a view to making a full and informed decision.

55. The Commissioner considers that the public interest in favour of disclosure of the withheld information is outweighed by the public interest in maintaining the exemption contained at section 36(2)(b)(ii) of the Act. He is particularly persuaded in this decision by the fact that the EANI has already put out press releases and that there is already a mechanism in place whereby those having an interest in the issue of transport to and from school can voice their concerns. These issues are also subject to scrutiny through the Northern Ireland Assembly and the Minister for Education. This would go considerably towards meeting the public interest in being informed and having confidence in the EANI's decision-making processes.
56. As the Commissioner has found that section 36(2)(b)(ii) is engaged in respect of the withheld information, he has not gone on to consider the application of section 36(2)(b) (i) or 36(2)(c).

## Right of appeal

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57. 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)

58. 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.
59. 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**  
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