

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

### **Decision notice**

**Date:** 29 March 2019

**Public Authority:** Department for Education  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

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

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1. The Standards and Testing Agency (STA) is an executive agency of the Department for Education. As such, the STA does not constitute a public authority for the purposes of the FOIA and so this notice is issued to its parent Department, the DfE. Any reference to the STA in this DN should be read as referring to the DfE.
2. The complainant has requested the results of an investigation by the Standards and Testing Agency (STA) into allegations of maladministration at a Primary School. The complainant also asked for any communications, documents or notes relating to the results and investigation. The STA identified relevant information and sought to withhold this under section 36(2), 41 and 40(2) of the FOIA.
3. The Commissioner's decision is that the STA has correctly withheld the majority of the information under section 36(2)(b) and (c) of the FOIA but in the case of one letter finds the public interest favours disclosure. The Commissioner considered if section 41 could be applied to withhold this letter and concluded the exemption was not engaged.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose the information from 'letter to close the investigation' with appropriate redactions made for any personal data.

5. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

## Request and response

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6. On 17 May 2018 the complainant made a request to the STA via WhatDoTheyKnow<sup>1</sup> in the following terms:

*"I would like to make a request regarding your investigation into last year's SATs results at Eye C of E Primary School, of which some were declared invalid due to maladministration.*

*I wanted to find out:*

- *What was the maladministration?*
  - *All external and internal communication related to the results and investigation*
  - *All documents/notes related to the results and investigation."*
7. The STA responded on 15 June 2018 confirming that following an investigation into the administration of the Key Stage 2 (KS2) tests at the School the KS2 English grammar punctuation and spelling results were annulled. The STA confirmed it held information within the scope of the request but considered this exempt on the basis of section 36(2), 41 and 40 of the FOIA.
  8. An internal review was requested on 28 June 2018. The complainant stated that the exemptions would not prevent the STA from stating what the maladministration was. For section 36, the complainant argued that people engaged with investigations regularly and this is made public so if names could be redacted he argued this would not engage section 36. The complainant also took issue with the argument that disclosure would cause reputational damage as this was considered valid. For the other exemptions the complainant queried how the prejudicial effects would

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<sup>1</sup> [https://www.whatdotheyknow.com/request/eye\\_c\\_of\\_e\\_primary\\_school\\_2#incoming-1174079](https://www.whatdotheyknow.com/request/eye_c_of_e_primary_school_2#incoming-1174079)

occur and suggested redacting names would negate the arguments presented by the STA.

9. An internal review was completed and the outcome provided to the complainant on 2 August 2018. The internal review upheld the initial decision.

### **Scope of the case**

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10. The complainant contacted the Commissioner on 13 September 2018 to complain about the way his request for information had been handled.
11. The Commissioner considers the scope of her investigation to be to determine if the DfE has correctly withheld information within the scope of the request on the basis of any of the cited exemptions – section 36(2), 41 or 40.

### **Reasons for decision**

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

12. In its responses the DfE has referred to both sections 36(2)(b) and 2(c).
13. Section 36(2)(b) of the FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure 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.
14. Section 36(2)(c) says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
15. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, qualified person for that public authority. The qualified person's opinion must also be a "reasonable" opinion, and the Commissioner may decide that the section 36 exemption has not been properly applied if she finds that the opinion given is not reasonable.
16. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.

17. To determine, first, whether DfE correctly applied the exemptions, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore in order to establish that the exemption has been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
18. The qualified person in this case was the Minister of State for the DfE, the Rt Hon Nick Gibb MP. The DfE has provided the Commissioner with the submissions provided to the qualified person which show he was provided with the relevant information and arguments for withholding the information under section 36. The opinion shows that the qualified person agreed that the information should be withheld under both sections 36(2)(b) and (c) as disclosure would be likely to
  - inhibit the free and frank provision of advice or
  - the free and frank exchange of views for the purposes of deliberation or
  - otherwise prejudice the effective conduct of public affairs.
19. The Commissioner is satisfied that the opinion was that of the appropriate qualified person for the DfE, provided at the appropriate time. She has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold. This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, she must find that the exemption is engaged.
20. With regard to both section 36(2)(b) and 36(2)(c), the qualified person's opinion in this case seems to be that prejudice *would be likely to occur* if the withheld information was to be disclosed, rather than would occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.

21. With regard to section 36(2)(b), the Commissioner considers that the exemption concerns processes that may be inhibited at the time of the request and in the future, rather than harm arising from the content or subject matter of the requested information itself. The key issue in this case is whether disclosure could inhibit the process of providing free and frank views for the purposes of deliberation and the free and frank advice in relation to STA investigations.
22. Section 36(2)(c), on the other hand, refers to the prejudice that would be likely otherwise to apply. The Commissioner considers that if section 36(2)(c) is used in conjunction with section 36(2)(b), as in this case, the prejudice envisaged must be different to that covered by section 36(2)(b).
23. The DfE is of the view that all of the withheld information engages section 36(2)(b)(i), (ii) and (c).
24. In order for the qualified person's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
25. The submissions detailed the background to the issue, in particular the STA's statutory duty to investigate any matter brought to its attention which relates to the accuracy or correctness of any child's results in the KS1 and KS2 national curriculum assessments. It was explained that investigations are carried out according to the published Maladministration Investigation Procedures<sup>2</sup> and that information specific to individual cases remains confidential to the involved parties. Once a decision has been made by the STA the School's governing body, local authority or Teaching Regulation Agency (TRA) may use the information to take any action.
26. The Commissioner accepts the STA's process involves confidentiality to allow for the School involved, the local authority and the STA to investigate the complaint and identify any failings. There is a certain degree of 'safe space' needed to allow all relevant parties to discuss matters openly and freely without fear of outside scrutiny.

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<sup>2</sup> <https://www.gov.uk/government/publications/key-stages-1-and-2-investigating-allegations-of-maladministration>

27. The DfE has argued that releasing this information could discourage people from contacting the STA to report maladministration if they thought the information provided in confidence could be released into the public domain. It was also argued that there was a possibility that the school and its teachers would be less open and honest with information during future interviews if they thought information would be released into the public domain.
28. It was also considered that by releasing information relating to the reasons for the case recommendation and outcome this could have an impact on the effectiveness of future maladministration investigations; as it could inform schools and individuals as to what evidence STA look for within their investigations (and could potentially change a school's approach to maladministration) making it harder for the STA to identify robust evidence of maladministration in future investigations.
29. The withheld information consists of case notes, review findings, the School visit report, comments from the School on the visit report, recommendations, decisions and a letter regarding the closure of the investigation. The DfE has made clear arguments for the use of section 36(2)(b)(i) and (ii) and distinguished these from the arguments presented for section 36(2)(c). In particular for section 36(2)(b)(i) it has argued that to investigate allegations sensitively and effectively there is a need to maintain a safe space to allow for the free flow of information and for internal discussions to involve the sharing of advice. There are clear examples of free and frank advice being given particularly in the case notes and the visit report. Again the STA has placed great emphasis on the collaborative nature of its investigations and the importance of exchanges and communications between the STA, Schools and other parties being confidential.
30. The Commissioner recognises this as a valid argument – open and candid dialogues are key to effective investigations and whilst there will be statutory obligations on School's to engage in STA investigation it is accepted that individuals taking part in an investigation are much more likely to be honest and frank if the investigation is confidential.
31. The Commissioner therefore considers that the loss of this safe space and the potential "chilling effect" on future conversations means that there is a more than hypothetical chance that prejudice could occur. She therefore finds that the qualified person's opinion is reasonable in relation to the application of section 36(2)(b)(i) to the withheld information.
32. The arguments for the application of section 36(2)(b)(ii) are very similar as both limbs of section 36(2) are often intertwined. The distinction is that for (ii) the exchanges should be for the purposes of deliberation.

The nature of the investigation by the STA in itself means that any views or advice given would have been done so on the understanding that this would be used to inform the outcome of the STA investigation. The STA argues that investigations of this type are a process of deliberations and disclosing the information could lead to future reports being less forthright and advice becoming diluted.

33. This seems particularly true for the investigation report but is perhaps less likely to be applicable to the outcome letter which summarises the findings but does not in itself contain any exchanges of views. However, as section 36(2)(b) relates to the process that may be inhibited by disclosure rather than the harm that might result due to the sensitivity of the information itself the Commissioner can see how even disclosing the outcome letter may have an inhibition on the future free and frank provision of advice as it is likely to make those exchanging advice and views more reluctant to engage voluntarily in the process if the outcome of investigations will be made public.
34. At the time the request was made the outcome of the STA investigation was broadly known<sup>3</sup>. Parents at the School had been informed that results in various subjects had been annulled. However, the nature of the maladministration was not known and, to the best of the Commissioner's knowledge, is still not known. It is clear that the details of the investigation, how this was conducted, the information shared and the conclusions reached were intended to remain confidential to preserve the investigation process. Whilst some information is in the public domain, the Commissioner recognises there is still inherent value in preserving the integrity of the process as a whole and she therefore finds that the qualified person's opinion in respect of section 36(2)(b)(ii) is reasonable.
35. In terms of section 36(2)(c) and the argument that disclosure would 'otherwise prejudice' the effective conduct of public affairs; the DfE argues that disclosing deliberations which are part of the investigative process including the allegations themselves would lead to renewed interest in the matter and have a negative impact on the School. This in turn could cause delays in the resolution of such issues, which could lead to further delays and uncertainty for pupils, parents and staff at other such schools in the future.

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<sup>3</sup> <https://www.peterboroughtoday.co.uk/news/education/shock-as-sats-results-at-top-performing-school-are-annulled-1-8437183>



36. The DfE also argued that releasing this information would be likely to discourage people from contacting the STA to report maladministration if they believe that the information provided in confidence would be released into the public domain and their identity could possibly be divulged. There is also the possibility that the school/teachers would be less open and honest with information during future interviews if they thought we would release this information into the public domain. This could potentially make it more difficult to fully investigate cases.
37. The Commissioner accepts the prejudice argued for section 36(2)(c) is different than that argued for section 36(2)(b) as it relates to the impact of the disclosure of the information itself based on its nature and the negative consequences of this. It is reasonable to assume that disclosing all of the investigation report, notes, allegations and conclusions in full would disrupt the flow of information to the STA and this would restrict the STA's ability to perform its public functions.
38. The Commissioner therefore considers that the opinion is reasonable, that the prejudice envisioned under sections 36(2)(b) and 36(2)(c) are different and that both section 36(2)(b) and section 36(2)(c) are therefore engaged. The Commissioner has gone on to consider the public interest arguments associated with these exemptions.

*Public interest arguments in favour of disclosing the information*

39. The DfE has acknowledged there is a public interest in the disclosure of information which leads to more openness, greater accountability and an improved standard of public debate and public trust.
40. The DfE also recognises that media interest and the interest of parents and pupils regarding the maladministration investigation and the broader subject of maladministration of KS1 and KS2 tests.
41. The complainant does not consider that there are grounds for withholding the information. He argues that individuals engage with investigations and inquiries frequently and these are often made public (subject to personal data being removed). If information was never disclosed due to possible reputational damage then this would negate the purpose of the FOIA.
42. The complainant also points to the fact that in this case some primary school children have had their hard work compromised by the annulment of the test results and the withholding of this information is preventing parents from understanding what happened.
43. The complainant considers disclosure of the information may in fact encourage people to come forward in the future as it would demonstrate that concerns would be listened to rather than ignored.



*Public interest arguments in favour of maintaining the exemption*

44. The DfE states that it relies on information provided by external stakeholders and officials to make informed decisions in order to determine the appropriate level of action to take relating to allegations of the maladministration of KS tests. These deliberations need to remain confidential to ensure they are handled sensitively.
45. The DfE further states that if it is required to disclose this information it would be likely to prejudice its ability to deal effectively with handling any current or future allegations of maladministration. This could hinder the DfE's ability to investigate maladministration as those making allegations, officials and schools would be less likely to candidly engage in such exchanges going forwards. This would not be in the public interest as it may lead to the DfE being unable to decide if allegations require a full investigation and further action.
46. Stakeholders, schools and officials must have confidence they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge issues, allegations and the interpretation of evidence as part of any investigative process. The DfE considers if it was required to put this information into the public domain then all of these parties would be likely to be inhibited from providing free and frank views for the purposes of deliberation which in turn would negatively impact on the DfE's ability to conduct public affairs effectively. Schools would also be less likely to co-operate in this way going forward and the DfE would be less sighted on any immediate progress schools are making following investigations.
47. The DfE argues that should details around the specific issues behind an investigative report be released, leading to the possibility that individuals could be identified, there is potential that individuals may not be willing to assist as fully in such investigations in the future. It is likely that such disclosure could dilute the advice the DfE receive from officials, it could also deter people coming forward with concerns and thus would be likely to prejudice the effective conduct of public affairs.
48. Finally, the DfE argues that disclosure of the information would be likely to prejudice the effective conduct of public affairs in the future, as it would remove the space within which officials are able to discuss options and outcomes freely and frankly. It would make it more difficult for the DfE to work collaboratively and cohesively with schools to deliver its core business, and ensure that schools adhere to the guidance provided by the DfE on the administration of KS tests.

*Balance of the public interest arguments*

49. The opinion of the qualified person is limited to the degree of likelihood that inhibition or prejudice would occur. In assessing the public interest arguments therefore, particularly those relating to withholding the information, the Commissioner considers the relevance of factors such as the severity, extent and frequency with which providing advice and the free and frank exchange of views, and the conduct of public affairs, might be inhibited if the information was to be disclosed.
50. The Commissioner understands from the DfE's submissions that there are several main concerns relating to disclosure of the requested information: firstly that disclosure would erode the safe space needed to investigate allegations; disclosure would undermine its relationships with various parties involved in investigations which are needed to ensure full and frank discussion of issues; disclosure could lead to changes in the ways parties interact with STA investigations; disclosure could draw negative attention to the School and; disclosure may impact on future cooperation through fear of disclosure.
51. The Commissioner acknowledges that some information about the investigation is in the public domain, mainly the outcome of the investigation. However, the majority of the information withheld by the DfE – the allegations, report, notes, visit notes and outcome letter – are not publicly available and were all produced as part of an investigation.
52. The Commissioner recognises that there is a public interest in ensuring the integrity of an investigative process. Her view is that that integrity is best maintained by preserving a "safe space" in which the parties involved can exchange ideas, identify issues and exercise a degree of candour. This safe space would be removed by disclosure of the investigation report and the documents surrounding this.
53. It is the Commissioner's view that the STA's ability to investigate complaints and improve practices effectively would be hampered by the disclosure of the information and that this is not in the public interest.
54. Having accepted that the release of the withheld information would be likely to cause prejudice, the Commissioner also considers that the severity of the prejudice caused will increase with the level of detail placed into the public domain. As more details are released, it becomes easier to trace the information back what particular individuals may have said or done.
55. The Commissioner recognises that there is a strong public interest in ensuring that any public authority is managing its affairs properly. It is also important that any complaints are investigated with an appropriate

degree of impartiality and thoroughness – and that this process is seen to be both fair and thorough. Whilst the Commissioner has accepted that there would be some prejudice likely to occur from disclosure, the investigation had concluded and the outcome was known at the time of the request. To some extent this could be seen to weaken the DfE's arguments. However, this does not change the fact that disclosure of the investigation report would be likely to impact of the STA's processes and investigations in the future. There would be an erosion of the safe space needed to deliberate and gather free and frank views and consequently there is a likely impact on the quality of the STA's investigations.

56. The DfE has argued that disclosure of further information, after the outcome has already been made public and some time has passed, would result in the whole issue being brought back to prominence. Whilst the Commissioner accepts that disclosure will give the story further prominence, she does not consider this would have been unreasonable at the time of the request as it was only a few months removed from the outcome being communicated to parents at the School.
57. Key Stage 2 SATs test are an important benchmark in measuring a child's educational progress. The Commissioner considers it highly likely that the pupils who sat the Grammar, Punctuation & Spelling test in summer of 2017 will have put a great deal of effort into preparing for that test. Staff at the School and the pupils' parents will also have had to cope with a great deal of work and stress in the weeks leading up to the test. The decision by the STA to annul the test results has meant that all that hard work will not be adequately reflected.
58. The Commissioner can accept that the STA is likely to receive numerous complaints each year, that not all of these complaints will have merit and that some may even have been made with malicious intent. It therefore follows that prejudice would be likely to follow if the STA had to reveal the details of every complaint it received – regardless of merit. However, each request must be judged on its own individual merits and the public interest balanced accordingly.
59. It seems plain to the Commissioner that a decision to annul a set of test results, whilst not unprecedented, suggests that the original complaint cannot have been without merit and that it warranted substantial action. She therefore considers that there must be a compelling public interest in understanding why such action was taken.
60. The Commissioner notes that the STA has a statutory responsibility to investigate complaints which it receives. She has been keen to draw a distinction between the process of investigating such a complaint, where

there is a strong public interest in keeping precise details confidential and the outcome of a complaint, where the public interest is more likely to be balanced towards understanding what has happened.

61. The Commissioner therefore concludes that, whilst Section 36 is engaged in relation to the vast majority of the information which formed part of the investigation and the public interest lies in preserving the safe space need to conduct investigations on a confidential basis; for the outcome letter (referred to by the DfE as the 'letter to close the investigation') the arguments for withholding are much less compelling. Disclosing this letter will not have the same impact on the STA's investigative processes in the future or on the willingness of individuals to participate in investigation freely and frankly as it only provides a summary of the STA's findings and recommendations.
62. Conversely, the outcome letter would address the public interest in parents wanting to understand precisely what the nature of the maladministration was and the public interest in this should not be underestimated.
63. The Commissioner therefore concludes that the DfE has correctly engaged the section 36(2) exemptions and the balance of the public interest lies in maintaining the exemption for all of the withheld information with the exception of the 'letter to close the investigation'. In this case the Commissioner finds the public interest favours disclosing the information. However, before concluding if this should be disclosed she has gone on to consider if the DfE has a basis under section 41 of the FOIA to withhold the information in this letter.

#### **Section 41 – information provided in confidence**

64. Section 41(1) states that information is exempt from disclosure if:
  - (a) it was obtained by the public authority from any other person (including another public authority), and
  - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
65. It is the Commissioner's established view that the exemption does not cover information the public authority has generated itself. The information in this case that the Commissioner is considering under this exemption is the letter to close the investigation. This does contain some information provided by a third party as it refers to the allegations received that triggered the STA investigation. The letter also provides some broad details about the nature of the allegations and the findings of the investigation. The majority of the information in the letter is

therefore not information the DfE obtained from another person (this would be the allegations themselves or quoted sections of the investigation report detailing information received during the investigation) but is information created by the DfE itself as it assessed the information received during the investigation and formed a conclusion.

66. The Commissioner is satisfied that although the letter comments on the investigation findings it does not itself reveal any third party information. This is with the exception of one paragraph that states the allegations that were received that triggered the investigation. The Commissioner accepts this is information obtained from another person. For this limited information it can be argued the first element of the exemption is met.
67. For this information the Commissioner will now consider whether disclosure would constitute a breach of confidence. The Commissioner uses the test of confidence set out by Judge Megarry at the High Court of Justice in *Coco v A N Clark (Engineers) Limited [1968] FSR 415* as a framework for assessing whether a disclosure would constitute a breach of confidence. Judge Megarry suggested that three elements were usually required to bring an action for a breach of confidence:
  - the information must have the necessary quality of confidence,
  - it must have been imparted in circumstances importing an obligation of confidence, and
  - there must have been an unauthorised use of the information to the detriment of the confider.
68. Dealing with the first bullet point, information will possess the necessary quality of confidence if it is more than trivial and not otherwise accessible. The Commissioner understands that this information is not otherwise accessible and the DfE and the person making the allegation are unlikely to consider this is as trivial in nature given it triggered an investigation.
69. Turning now to the second bullet point, there are two circumstances in which an obligation of confidence may apply:
  - The confider attached explicit conditions to any subsequent use or disclosure of the information, for example in the form of a contractual term or the wording of a letter; or
  - The confider hasn't set any explicit conditions but the restrictions on use are obvious or implicit from the circumstances.

70. The Commissioner is not aware of any explicit conditions attached to the information. However, she accepts in this case that there is an implied duty of confidence owed to those making allegations to the STA. The DfE has said that those making allegations to the STA would do so on the expectation this would remain confidential.
71. The Commissioner must also consider if there would be any detriment to the confider if the information were disclosed. In this case the confider is the person who first made the allegation of maladministration. Whilst they may have had an expectation of confidence the Commissioner fails to see how there would be any detriment to the confider by disclosure of the information in the letter as it does not reveal any details of the individual. In addition to this, given the fact that the outcome of the investigation was known at the time of the request the fact that an allegation lead to the investigation would also already have been known and it is only the nature of that allegation that would not have been known.
72. The Commissioner considers there has not been an explicit case for detriment put forward by the DfE that would demonstrate that section 41 would apply to the one paragraph in the letter that refers to the allegation, particularly as no individual is identified and it is difficult to envisage any detriment.
73. The Commissioner therefore requires the DfE to disclose the letter to close the investigation. This letter does contain some personal data of the individuals that sent and received the correspondence. The DfE has provided arguments for redacting personal data under section 40(2) of the FOIA but the complainant has indicated he has no objection to the redaction of personal data. Therefore the Commissioner has not gone on to consider the application of section 40(2) but requires that any personal data is redacted from the letter before it is disclosed.

## Right of appeal

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74. 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)

75. 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.
76. 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 .....**

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
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