

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 9 June 2020

Public Authority: Langley Park Learning Trust
Address: Hawksbrook Lane
South Eden Park Road
Beckenham
Kent
BR3 3BE

Decision (including any steps ordered)

1. The complainant, on behalf of Langley Park Primary School Action Group, made four requests for information to Langley Park Learning Trust ("the Trust"). The Trust provided some information, but withheld some information falling within the scope of the requests under the following sections of the FOIA: section 40(2) – third party personal data, section 36(2) – prejudicial to the effective conduct of public affairs, and/or section 43(2) – commercial interests.
2. The Commissioner's decision is all of the withheld information which has been provided to her for consideration was correctly withheld under either section 36(2)(b)(ii) or section 40(2).
3. However, the Commissioner is not persuaded that the Trust correctly identified the scope of the complainant's request of 23 March 2019, for the reasons set out in this notice. In failing to seek clarification about this, it breached the requirements of section 16 of the FOIA.
4. The Commissioner requires the Trust to take the following step to ensure compliance with the legislation:
 - Write to the complainant seeking clarification of her request of 23 March 2019.
5. The Trust must take this step 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.

Background to the requests

6. The Trust is a multi-academy trust which came into existence on 1 September 2018, when an existing academy trust Langley Park Academies ("LPA"), which comprised three primary schools including Langley Park Primary School ("LPPS") and a secondary school Langley Park Girls' School ("LPGS"), formally joined together with the Langley Park School for Boys Academy Trust ("LPSB").
7. The complainant explained that this led to changes to the admissions arrangements for some primary school parents.

Requests and responses

Request 1: 6 February 2019

8. On 6 February 2019, the complainant wrote to the Trust and requested certain items marked as *confidential* in the minutes of meetings of the trustees of LPA, dating from 18 March 2016 to 6 November 2017 inclusive. Specifically, she requested the following items:
 - LPA minutes 18-03-16 item 6
 - LPA minutes 06-05-16 item 6
 - LPA minutes 23-09-16 item 9
 - LPA minutes 24-02-17 discussion surrounding item 6
 - LPA minutes 28-3-17 item 3
 - LPA minutes 07-09-17 items 4, 5, 7.4, 7.6, 7.11 and AOB
 - LPA minutes 06-10-17 items 9, 10 and 11
 - LPA minutes 06-11-17 items 7, 10 and 8
9. On the same date, the complainant also requested information in the following terms:

"Please also advise which LPPS staff have signed non-disclosure agreements (also known as settlement agreements with a non-disclosure clause included)."

Request 2: 10 February 2019

10. On 10 February 2019, the complainant wrote again to the Trust, requesting information in the following terms:

"Further to [request 1] please may I also request the following:

- *LPA minutes 05-02-16 Item 9 and its action: '[name redacted] to circulate to the Girls' School governing body her letter to prospective parents giving the reasons for the primary school to underline the 'community' aspect' – please provide a copy of this letter;*
- *Copies of all presentations and information (eg leaflets and advertising material) given to prospective parents in 2015, 2016 and 2017."*

Response to requests 1 and 2

11. On 6 March 2019, the Trust responded to the above two requests.

12. Regarding request 1, the Trust disclosed some of the items, but withheld some information under the following sections of the FOIA:

- section 36(2) – prejudicial to the effective conduct of public affairs;
- section 40(2) – third party personal data¹; and/or
- section 43(2) – commercial interests.

13. It also withheld the information relating to staff non-disclosure agreements under section 40(2).

14. With regard to request 2, the Trust stated that no information falling within the scope of either part of this request was held.

15. On 18 March 2019, the complainant requested an internal review into the handling of these two requests, including which searches had been carried out for information falling within the scope of request 2. The

¹ In responding to requests 1) and 3), as set out in this notice, the Trust mistakenly referred to s41 of the FOIA rather than s40(2); however, it was clear from its reasoning that the Trust considered the relevant information to be third party personal data. During the course of the investigation, the Trust confirmed that this was a mistake and that it considered the information was exempt under section 40(2).

outcome of the internal review was provided on 20 May 2019, as detailed further on in this notice.

Request 3 (14 February 2019) and request 4 (23 March 2019)

16. On 14 February 2019, the complainant wrote to the Trust and requested (request 3):

"All minutes of the LPA and LPSB merger negotiation and consultation meetings".

17. The Trust responded on 20 March 2019. It provided a link to some information already in the public domain and disclosed part of item 10 from the minutes of 6 October 2017, but stated that all other information falling within the scope of this request was exempt from disclosure under section 36(2), section 40(2) – third party personal data (see previous footnote), and/or section 43(2).

18. On 23 March 2019, the complainant requested an internal review into the above response. Referring to item 10 from the minutes of 6 October 2018, she also submitted a new request as follows (request 4):

"All minutes of all meetings of the 'working party' as referred to in the disclosed minutes, attached".

Internal review outcome and response to request 4

19. On 20 May 2019, the Trust provided its response to the various outstanding matters.

20. It provided the outcome of its internal review into the handling of the requests 1, 2 and 3 respectively:

- The Trust maintained that it had applied exemptions to the information requested on 6 February 2019 and 14 February 2019 (requests 1 and 3), correctly.
- It maintained that it did not hold the information requested on 10 February 2019 (request 2), and provided details of the searches it had carried out.

21. With regard to request 4, the Trust explained that in its view, any information falling within its scope also fell within the scope of request 3 (*"All minutes of the LPA and LPSB merger negotiation and consultation meetings"*) and stated that this information had therefore already been considered for disclosure.

22. The Trust's position, therefore, was that the information requested in request 4 had already been considered for disclosure, and was exempt from disclosure under sections 36(2), 40(2) and/or 43(2).

Scope of the case

23. The complainant contacted the Commissioner on 27 June 2019 to complain about the way her request for information had been handled. Specifically, she remained dissatisfied with the responses to requests 1, 3 and 4.
24. While the case was awaiting investigation by the Commissioner, the Trust made a further disclosure to the complainant, comprising three further items requested in request 1.
25. It also provided to the Commissioner the minutes which it said fell within the scope of request 3 and 4, and clarified that it considered they were all exempt from disclosure in their entirety under section 36(2)(b)(ii) of the FOIA – inhibition to the free and frank exchange of views for the purposes of deliberation.
26. This notice therefore covers:
- i) regarding request 1, whether the Trust correctly withheld some information under sections 36(2), 40(2) and/or 43(2) of the FOIA; specifically:
 - from the meeting of 18 March 2016 – item 6;
 - from the meeting of 7 September 2017 – items 4, 5, 7.4, 7.11 and 8.2;
 - from the meeting of 6 October 2017 – item 9, part of item 10, and item 11;
 - from the meeting of 6 November 2017 – items 7, 8 and 10; and
 - ii) whether the information relating to LPPS staff non-disclosure agreements referred to in request 1 was correctly withheld under section 40(2);
 - iii) regarding request 3 ("*all minutes of the LPA and LPSB merger negotiation and consultation meetings*"), whether the information identified by the Trust as being within the scope of this request was correctly withheld in its entirety under section 36(2)(b)(ii); and

- iv) whether the Trust correctly identified the scope of request 4 ("*All minutes of all meetings of the 'working party' as referred to in the disclosed minutes, attached*").

Reasons for decision

Section 40(2) – third party personal data

27. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
28. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ("the DP principles"), as set out in Article 5 of the General Data Protection Regulation ("GDPR").
29. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ("DPA"). If it is not personal data then section 40 of the FOIA cannot apply.
30. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

31. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

32. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
33. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
34. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

35. In this case, this exemption has been applied to two types of information:
- (1) Which LPPS staff have signed non-disclosure agreements, and
 - (2) Specific items from LPA minutes, as follows: items 7.4 and 8.2 from the meeting of 7 September 2017; part of item 10 and all of item 11 from the meeting of 6 October 2017; and items 7 and 8 from the meeting of 6 November 2017.
36. The Commissioner considers that (1) above is asking for the names of the relevant members of staff. She is satisfied that this information would, clearly, both identify and relate to those staff members, and is their personal data.
37. With regard to (2), the specified confidential items from the minutes, the Commissioner has considered the withheld information. She notes that the information relates to, respectively:
- (i) the personal circumstances of a named staff member;
 - (ii) the termination of an unnamed individual's employment;
 - (iii) the thoughts and opinions of named members of staff who were at the meeting;
 - (iv) the performance of candidates for a specific post, including a detailed discussion of the performance of one candidate;
 - (v) discussion about named senior staff.
38. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that all of the above information relates to and identifies certain individuals. Even where individuals are not identified by name, the details of their specific circumstances are such that the individuals would be identifiable by those connected with the school community.
39. The information withheld under section 40(2) and detailed above therefore falls within the definition of "personal data" in section 3(2) of the DPA.
40. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
41. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

42. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

43. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

44. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

45. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

Is the information special category data?

46. Information relating to special category data is given special status in the GDPR.

47. Article 9 of the GDPR defines "special category" as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

48. Having considered the wording of the request, and viewed the withheld information, the Commissioner finds that some of the requested information is special category data. She has reached this conclusion on the basis that it relates to an individual staff member's health.

49. Specifically, she has determined that item 7.4 from the minutes dated 7 September 2017 (described in paragraph 37 above as: *(i) the personal circumstances of a named staff member*) is special category data.

50. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.

51. The Commissioner considers that the only conditions that could be relevant to a disclosure under the FOIA are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.

52. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to this data being disclosed to the world in response to the FOIA request or that they have deliberately made this data public.
53. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure.
54. Processing this special category data would therefore breach principle (a).
55. The Commissioner has determined therefore that item 7.4 from the minutes dated 7 September 2017 is exempt from disclosure under section 40(2) of the FOIA.
56. The Commissioner is satisfied that the remainder of the information withheld under section 40(2) in this case, including both the names of staff signing non-disclosure agreements and the remainder of the items from minutes withheld under this exemption, is not special category personal data. She has therefore considered whether there is a lawful basis for processing it (disclosing it under the FOIA); that is, whether one of the lawful bases listed in Article 6(1) of the GDPR applies.

Lawful processing: Article 6(1)(f) of the GDPR

57. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the lawful bases for processing listed in the Article applies*".
58. The Commissioner considers that, when considering disclosure under the FOIA, the lawful basis most applicable is basis 6(1)(f):

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child".

59. In considering the application of this in the context of a request for information under the FOIA, it is therefore necessary to consider the following three-part test:-

- Legitimate interest test: Whether a legitimate interest is being pursued in the request for information;
- Necessity test: Whether disclosure of the information is necessary to meet the legitimate interest in question;

- Balancing test: Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

60. The Commissioner considers that the test of “necessity” under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

61. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

62. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

63. In this case the Commissioner is aware that the complainant is interested, generally, in the merger between LPA and LPSB, and any operational changes which may have resulted from it. She also notes that the complainant kept the nature of her request fairly broad, and evidently considered that the public may be entitled to access any or all of the withheld information, regardless of any specific relevance.

64. In previous cases, the Commissioner has found that there is a general legitimate interest in a public authority’s decision-making processes and actions, and in this case a number of school communities were potentially affected. She is satisfied in this case that there is a legitimate interest in the withheld information.

Is disclosure necessary?

65. “Necessary” means more than desirable but less than indispensable or of absolute necessity.

66. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.

67. In this case, the Commissioner accepts that the legitimate interests in the requested information are not likely to be met via other means.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

68. However, to establish the lawful basis for processing personal data under Article 6(1)(f) of the GDPR, it is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
69. In considering this balancing test, the Commissioner may take into account the following factors:
- the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
70. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
71. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

Request 1 – non-disclosure agreements

72. In this case, with regard to Request 1, the requester sought to know which members of staff signed non-disclosure agreements.
73. The Trust has argued that *"this is clearly personal data of the individuals involved, as it would identify an individual/individuals, and provide the public with information about the fact that they had signed an NDA with the Trust. The Trust considered that it would not be fair to release this information, because the individual(s) would have an expectation that this would be kept confidential. That would have been the basis on which the NDA was presented to the individual(s), and would have been*

the expectation of all the parties... the release would therefore not be fair or transparent”.

74. The Commissioner agrees that an individual signing a settlement agreement that contains a confidentiality clause would reasonably expect the fact that he or she had signed it to remain confidential.
75. She also considers that the circumstances surrounding the termination of employment is a largely private matter and that the relevant individuals have a right to privacy about this.
76. While there may be circumstances where there would be a significant wider interest in the details surrounding a termination of employment, for example in the case of a high-profile individual, the Commissioner has no evidence that this is the case here.
77. During any academisation process, there is likely to be re-structuring and staff changes. While the requester has not asked for the specific details of any relevant agreements, the Commissioner considers that publicly identifying the staff who signed them is likely to lead to speculation about the terms of, and reasons for, the agreements, which could lead to distress for the individuals.
78. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
79. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
80. The Commissioner has therefore decided that the Trust was entitled to withhold the information about which members of staff signed NDAs, under section 40(2), by way of section 40(3A)(a).

Requests 1 and 3 – items from minutes withheld under section 40(2)

81. The information from the minutes withheld under section 40(2) and remaining to be considered here, as described in paragraph 37 above, is described again here for ease of reference (numbered as before):
 - (ii) the termination of an unnamed individual's employment;
 - (iii) the thoughts and opinions of named members of staff who were at the meeting;

- (iv) the performance of candidates for a specific post, including a detailed discussion of the performance of one candidate;
- (v) discussion about named senior staff.
82. Regarding (ii), (iii) and (iv), the Commissioner is satisfied that the withheld information concerns private matters and/or thoughts and opinions. This is detailed below.
83. Point (ii) relates to a former employee and to the termination of their employment. The Commissioner considers that the employee would have no expectation that the withheld details would be disclosed by the Trust to the wider world, and that there would be a high risk of damage and distress to the individual following disclosure.
84. The information at point (iii) comprises thoughts and opinions of a personal nature, expressed by individuals and relating to themselves. In the Commissioner's view, the individuals would have no expectation that these would be shared outside the meeting. Again the Commissioner considers that there would be a risk of damage and distress, arising from disclosure, to the individuals.
85. Point (iv) relates to a recruitment process and to the performance of individuals, including a detailed discussion about one candidate, and the possible next steps to be taken. Such matters are not generally made public and the candidates would have no expectation of disclosure.
86. Regarding points (ii), (iii) and (iv), therefore, the Commissioner has determined that there is insufficient legitimate interest in the disclosure of this information to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
87. The Commissioner has considered point (v) separately, because the withheld information includes some salary information, which is a category of information that may in some circumstances be put into the public domain. In this case, it concerns headteachers of some of the Trust schools.
88. In some circumstances, headteachers may have some expectation that information about their salaries would be disclosed. However in this case, the Commissioner notes that the withheld information covers a wider discussion than the amount of the salaries themselves. In view of the nature of the discussion, the Commissioner is satisfied that it is not simply information about the rate of pay, but rather, a wider discussion of a personal nature.

89. She is satisfied that the data subjects would not have a reasonable expectation that this information would be disclosed and also that disclosure would be likely to lead to damage and distress for the individuals concerned.
90. Regarding point (v), therefore, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
91. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
92. The Commissioner has therefore decided that the Trust was entitled to withhold all of the information described in paragraph 81 above under section 40(2), by way of section 40(3A)(a). This comprises: from the meeting of 7 September 2017, item 8.2; from the meeting of 6 October 2017, part of item 10 and all of item 11; and from the meeting of 6 November 2017 – items 7 and 8.

Section 36(2) – prejudicial to the effective conduct of public affairs

93. The information withheld under section 36(2) comprises seven remaining items from minutes of meetings of the trustees of LPA, and all of the minutes of a steering group comprising governors of LPSB and trustees of LPA (“the steering group”).
94. Specifically, the Trust withheld under section 36(2): item 6 from the LPA meeting of 18 March 2016; items 4, 5 and 7.11 from the LPA meeting of 7 September 2017; item 9 from the LPA meeting of 6 October 2017; and items 8 and 10 from the LPA meeting of 6 November 2017. As stated above, it also withheld, in their entirety, minutes of meetings of the steering group; those minutes provided to the Commissioner for consideration are dated 11 December 2017, 11 January 2018, 25 January 2018, 8 February 2018, 22 February 2018 and 8 March 2018 respectively.
95. The Commissioner notes that the Trust considered that two of the above LPA minute items (item 5 from 7/9/17 and item 9 from 6/10/17) were also exempt from disclosure under section 43(2) of the FOIA – commercial interests. She has addressed this in paragraph 128 of this notice.
96. Section 36(2) of the FOIA states that information is exempt from disclosure under the FOIA if, in the reasonable opinion of a “qualified person”, disclosure of the information:

- (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, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
97. In order to engage section 36(2), it is necessary for a public authority to obtain the opinion of its qualified person (“QP”) as to whether inhibition or prejudice relevant to the subsection cited would be at least likely to occur as a result of disclosure of the information in question.
98. The Trust confirmed that the QP for the purposes of considering the request was Enkanah Soobadoo, Chair of Trustees for the Trust.
99. When responding to the complainant in March 2019, the Trust sought the QP’s opinion as to the application of the exemption. Specifically, it sought his opinion regarding the information being requested in request 1, and subsequently in relation to request 3. On both occasions, it described the withheld information to him. The Commissioner is aware that the QP attended some or all of the relevant meetings, and was aware of the contents of the withheld information.
100. The Trust has provided to the Commissioner two records of the QP’s opinion, one signed electronically by him on 4 March 2019 (covering request 1) and one approved by him on 19 March 2019 (covering request 3).
101. The records demonstrate that it was the QP’s opinion that section 36(2)(b)(ii), specifically, was engaged with regard to the relevant withheld information. The Commissioner accepts that the Trust identified the correct QP and the citing of section 36 was based on an opinion from that individual.
102. The QP indicated that he considered that the governing body needed to be able to have free and frank discussions and express their opinions in order to reach appropriate decisions. He considered that loss of the ability to have such discussions in a confidential space would mean that governors and trustees would not properly debate matters, and that not all relevant issues would be raised or properly considered, leading to poor decision-making.
103. In order to make a finding as to whether any of the subsections of section 36(2) are engaged, the Commissioner must consider whether the QP’s opinion was a “reasonable” opinion to hold. It is important to

highlight that it is not necessary for the Commissioner to agree with the opinion of the QP in a particular case. The opinion also does not have to be the only reasonable opinion that could be held, or the most reasonable opinion. The Commissioner only needs to satisfy herself that the opinion was reasonable; in other words, that it was an opinion that a reasonable person could hold.

104. The Commissioner will consider all relevant factors to assess whether the opinion was reasonable. These may include, but are not limited to:

- Whether the inhibition envisaged by the QP relates to the specific subsection of section 36(2) that is being claimed. If the prejudice or inhibition envisaged is not related to the specific subsection the opinion is unlikely to be reasonable.
- The nature of the information and the timing of the requests, for example, whether the requests concern an important ongoing issue requiring the free and frank provision of advice.
- The QP's knowledge of or involvement in the issue.

105. The Commissioner is satisfied that the QP envisaged inhibition to discussion and debate and to the exchange of views, and that this relates to subsection 36(2)(b)(ii), which is what the Trust cited.

106. The Commissioner is also satisfied that the QP has had knowledge of and involvement in the issues.

107. Regarding the nature of the information and the timing of the requests, having reviewed the withheld information, the Commissioner is satisfied that the minutes relate, broadly, to the working relationship between LPA and LPSB. This relationship formed the basis for the creation of the Trust, which was officially in existence from 1 September 2018. While the formation of the Trust was therefore completed at the date of the requests (February-March 2019), the Commissioner considers that it was reasonable for the QP to consider that the Trust should have sought to protect its ability to hold free and frank discussions of this nature during the first academic year of its existence.

108. The Commissioner notes that the QP indicated that he was relying on the view that disclosure of the information both "*would*" and "*would be likely*" to inhibit the free and frank exchange of views. In the absence of clarity on the QP's opinion on this point, the Commissioner has taken the approach that the QP's opinion was that inhibition would be likely to occur. This means that the Commissioner must be satisfied that it was reasonable for the QP to hold the opinion that disclosure of the information created a real and significant risk of future inhibition.

109. For the reason given above at paragraph 107, the Commissioner is satisfied that it was reasonable for the QP to hold the opinion that inhibition would be likely to occur to the free and frank exchange of views for the purposes of deliberation if the information were disclosed.
110. The Commissioner therefore accepts that the opinion of the QP was reasonable and so section 36(2)(b)(ii) is engaged. Since this is a qualified exemption, the Commissioner has considered the balance of the public interest in this case.

The balance of the public interest

111. Having accepted that the opinion of the QP was reasonable, the role of the Commissioner here is not to challenge or reconsider her conclusion on the reasonableness of that opinion. Instead, her role is to consider whether the public interest in disclosure equals or outweighs the concerns identified by the QP.
112. Having found that the QP's opinion was reasonable, appropriate weight must be given to that here. It would not be in the public interest to harm the ability of the Trust to hold free and frank discussions. As to how much weight this should carry in the balance of the public interests, the question here is what the severity, extent and frequency would be of the inhibition identified by the QP.

The complainant's view

113. The complainant considered that the Trust had not been open and honest in informing parents, in December 2018, as to its reasons for "abandoning" plans to ensure LPPS continued as a feeder school for LPSB, following the creation of the Trust. The action group which she represents considered that scrutiny of the withheld information would enable them to challenge the Trust's decision in an open and informed manner. She considered that the Trust may have been seeking to conceal "incompetence, and at worst, dishonesty".

The Trust's view

114. The Trust explained that it had disclosed information in relation to which it believed the public interest favoured disclosure. It considered that, with regard to the withheld information, the balance of the public interest lay in maintaining the exemption at section 36(2)(b)(ii).
115. The Trust, in responding to request 1, stated that there was a public interest in "allowing for a safe space to exist to debate particular issues... only limited discussions are deemed to be confidential... we consider that there is sufficient publicly available information about

decision making to meet our obligations, because only particularly sensitive information is withheld”.

116. Further, in providing the outcome of its internal review on 20 May 2019, which covered the application of section 36(2) to requests 1 and 3, the Trust stated that *“the public interest fell on withholding the information to allow for a safe space to exist to debate those particular issues. Relevant to this is the fact that the majority of the minutes are available”.*

117. In correspondence with the Commissioner, the Trust stated *“there is a public interest in understanding how decisions are reached – particularly here where the impact on the local community of the proposals is significant. However, the decision making is already transparent through the publication of non-confidential minutes, where the steering group feed back their decisions/discussion, and so there is information about the group in the public domain... the specifics within the minutes... would not aid the public’s understanding of the decision making process in such a significant way so as to outweigh the public interest in allowing trustees to have [a safe space] to discuss these issues in detail. Without this space, decisions cannot be robustly tested and considered carefully, and alternatives proposed and reviewed in a way which gives individuals the freedom to express their views without fear of what the public might think”.*

The Commissioner’s decision

118. It is the Commissioner’s well-established approach, in line with the spirit of the FOIA, that there is always a public interest in how a public authority conducts its business and reaches decisions that have an impact on the public.

119. The Commissioner has also considered the circumstances of this case. She considers that academisation (specifically the processes followed, and decisions taken, by trustees and school governors when joining, or taking part in re-structuring, academy trusts) are a matter of general interest. This is another factor lending some weight in favour of disclosure.

120. As explained previously, in cases where any or all of the exemptions at section 36(2) have been cited, it is for the Commissioner to consider the severity, extent and frequency of the inhibition that the QP has identified as being likely to occur, and to weigh this against the factors in favour of the information being disclosed.

121. In determining the severity, extent and frequency, she has taken into account the fact that, at the date of the requests (February-March

2019), the Trust was only a few months into its first academic year. The matters that were discussed in the relevant meetings, about the new structure of the Trust and its operation, were therefore still "live" in the sense that the new structures and systems of governance were still becoming established.

122. The Commissioner has not seen any evidence that the Trust is seeking to withhold evidence of wrongdoing or mistakes, such as would have lent weight in favour of disclosure.
123. She accepts that there was a need in this case for the meeting attendees to hold free and frank discussions in an atmosphere of confidentiality, in order to establish the way forward with regard to sensitive issues, such as staffing.
124. With regard to the inhibition to such discussions, as envisaged by the QP, the Commissioner notes that various issues relating to the make-up and operation of the Trust, have continued to attract attention in the local media. In her view, this is likely to lead to Trust officials feeling inhibited from having free and frank discussions about a wide range of operational matters, going forward, if they believed that all minutes would be disclosed as a matter of routine. While it may not be the case that all of the issues that are of concern to parents are covered in the withheld information, the Commissioner nevertheless agrees that the level of inhibition envisaged by the QP would be sufficiently severe as to persuade her that the balance of the public interest favours withholding the information.
125. She also notes that it is in the nature of academy trusts that their officials are necessarily expected to meet, in order to discuss the running of the Trust. This may often require free and frank discussion of sensitive matters. The Commissioner therefore considers that the inhibition and prejudice would occur frequently, and be of significant extent.
126. The Commissioner is satisfied that the severity, extent and frequency of the inhibition envisaged by the QP outweigh the factors in favour of disclosing the withheld information in this case. She is therefore satisfied that the balance of the public interest favours maintaining the exemption with regard to the information withheld under section 36(2)(b)(ii).
127. The Commissioner has determined that the seven items from the minutes detailed in paragraph 94, and all of the steering group minutes dating from 11 December 2017 to 8 March 2018 inclusive, are exempt from disclosure under section 36(2)(b)(ii), and that the balance of the public interest favours the exemption being maintained.

128. Since the Commissioner is satisfied that all of this information is exempt under section 36(2), it has not been necessary for her to consider whether item 5 from the meeting of 7 September 2017 and item 9 from the meeting of 6 October 2017 are, additionally, exempt from disclosure under section 43(2) – commercial interests.

Section 16 – duty to provide advice and assistance

129. This section of the notice relates to the Trust's handling of request 4, dated 23 March 2019. In that request, the complainant asked for:

"All minutes of all meetings of the 'working party' as referred to in the disclosed minutes, attached".

130. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled—

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him.

131. Section 16 of the FOIA states:

(1) It shall be the duty of a public authority to provide advice and assistance, so far as it would be reasonable to expect the authority to do so, to persons who propose to make, or have made, requests for information to it.

(2) Any public authority which, in relation to the provision of advice or assistance in any case, conforms with the code of practice under section 45 is to be taken to comply with the duty imposed by subsection (1) in relation to that case.

132. In this case, the Trust replied to the complainant (on 20 May 2019) that it had already considered the information which fell within the scope of request 4 for disclosure because, on 14 February 2019, she had already asked for *"All minutes of the LPA and LPSB merger negotiation and consultation meetings"* (request 3). The Trust stated it considered that the "working party" minutes she had asked for, would fall within the scope of this request.

133. The Trust has provided the Commissioner with the minutes which it considered fell within the scope of request 3. They were withheld in their entirety. The Commissioner notes that these minutes relate to meetings

dated from 11 December 2017 to 8 March 2018, inclusive, which were attended by members of a "steering group".

134. The complainant was dissatisfied with the Trust's response to request 4. Following discussions with the Trust, and from evidence provided by the complainant, it is evident to the Commissioner that in making request 4, when the complainant referred to "*the disclosed minutes, attached*" in request 4, she had attached, and was referring to, item 10 of the minutes dated 6 October 2017. This item includes the following wording:

"... [] noted the setup of the Working Party which included five from LPSB and three from LPA. There have been two meetings so far... When the initial meeting happened on 20th July, some... assurances had been given..."

135. This extract indicates that two meetings of the "working party" had been held prior to this meeting of 6 October 2017, with the first working party meeting, reportedly, having been held on 20 July (presumably 2017).

136. The Commissioner considers that the Trust may not have interpreted the scope of request 4 correctly. Confusion exists around the fact that the minutes considered for disclosure in response to request 3 cover meetings from 11 December 2017 onwards, whereas the "*disclosed minutes*" attached to request 4, to which the complainant referred in that request, potentially may require the Trust to consider whether any minutes exist of meetings held prior to that date.

137. As the Commissioner's published guidance on interpreting and clarifying requests² makes clear, where a public authority receives a request that does not have a single objective reading, it is obliged to exercise section 1(3) of the FOIA and seek clarification from the requester. Failure to do so will amount to a breach of the duty under section 16 of the FOIA to provide advice and assistance to any person making an information request.

138. In this case, the Commissioner's view is that the confusion described above about the scope of request 4 indicates that it did not have a single objective reading. The Trust was, therefore, under an obligation to seek clarification from the complainant about that request, and should not have proceeded on the basis of its own reading of it.

² <https://ico.org.uk/media/for-organisations/documents/1162/interpreting-and-clarifying-a-request-foia-eir-guidance.pdf>

139. The Commissioner has therefore determined that, in respect of request 4, the Trust breached the requirement of section 16(1) of the FOIA. At paragraph 4 above, it is now required to contact the complainant to seek clarification on request 4.

Right of appeal

140. 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@justice.gov.uk

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

141. 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.

142. 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

**Ben Tomes
Team Manager
Information Commissioner's Office
Wycliffe House
Water Lane
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Cheshire
SK9 5AF**