

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 29 June 2011

Public Authority: Calday Grange Grammar School
Address: Grammar School Lane
West Kirby
Wirral
CH48 8GG

Summary

The complainant made a number of requests under the Freedom of Information Act 2000 (the "Act") for various sets of minutes from the school. The school ultimately provided the complainant with some of the information he requested but made some redactions to the information provided. The complainant was dissatisfied with the redactions made to two sets of the minutes he had requested. The redactions were made under sections 40(2) and 22 of the Act. The Commissioner has concluded that section 22 was incorrectly applied to both sets of minutes. However he finds that the school was correct to make the redactions under section 40(2) to one of the sets of minutes but was incorrect in applying this exemption to make the redactions to the other set of minutes.

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. The complainant made a request to Calday Grange Grammar School ('the school') on 24 May 2010 for:

- Minutes (approved or unapproved) of the Strategy Group meeting held on 16 September 2009.
- Minutes (approved or unapproved) of the Governing Body meeting held on 17 September 2009.

Further to this, the complainant made an additional request on 8 June 2010 for:

- Minutes of all meetings since January 2009 of the following sub-committees:
 - Premises and Grounds.
 - Finance.
 - Personnel and Appointments.

3. The school responded to these requests (and a number of additional requests which are not the subject of this complaint) on 9 July 2010. In relation to the request made on 24 May 2010 it informed the complainant that it did not hold any minutes of the Strategy Group meeting held on 16 September 2009. It also stated that the minutes of the Governing Body meeting held on 17 September 2009 were exempt from disclosure under sections 22, 30, 40, 41 and 42. In relation to the request made on 8 June 2010 it provided the complainant with a copy of the relevant minutes of the Premises and Grounds sub-committee. However, in relation to the minutes of the Finance sub-committee, and the Personnel and Appointments sub-committees, it stated that these were exempt from disclosure 'for the reasons set out above'.

4. The complainant wrote to the school on 12 July 2010 and expressed his dissatisfaction with this response. In particular, he queried the application of sections 22, 30, 40, 41 and 42 in relation to the minutes of the Finance, and the Personnel and Appointments sub-committees. In addition, he argued that the minutes of the Governing Body meeting held on 17 September 2009 should be disclosed.

5. The school responded to the complainant on 15 October 2010 and stated,

"In relation to your requests for minutes, the Governors have determined that all minutes, save for confidential minutes, will be published on the school's website as and when they are approved. Until they are published they will not otherwise be made available and therefore the exemptions under s21 and s22 apply. The confidential minutes are exempt under either s41 or 42 (as appropriate) of the act."

The Investigation

Scope of the case

6. On 16 September the complainant contacted the Commissioner to complain about the way his request for information had been handled. The complainant specifically asked the Commissioner to consider whether the school had dealt with his request in accordance with the Act.
7. During the course of the Commissioner's investigation the complainant confirmed that the minutes which contained the redactions with which he was dissatisfied were those dated 17 September 2009 and 8 February 2010. The Commissioner has only therefore considered the redactions made to these two sets of minutes.

Chronology

8. On 9 December 2010 the Commissioner wrote to the school to ask for a copy of the withheld information as well as further supporting arguments in relation to the exemptions it had applied.
9. On 18 February 2011 the school responded to the Commissioner. It provided the Commissioner with copies of the withheld information. It explained that the information provided to the complainant had been redacted under section 22 as it was intended for future publication and section 40(2) as it was the head teacher's personal data and it would be unfair to disclose it into the public domain. It did not pursue its application of sections 30, 41 and 42 and therefore the Commissioner

considers that the school no longer wished to rely upon these exemptions.

Analysis

Exemptions

Section 22

10. Section 22(1) provides that –
“Information is exempt information if-
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - (a) the information was already held with a view to such publication at the time when the request for information was made, and
 - (b) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).”
11. In this case, in the school’s response of 9 July 2010, in relation to the application of all of the exemptions applied at the time (including section 22), it stated that *“this will be kept under review and it may well be in time that all or parts of these minutes can be released if the exemptions cease to apply.”*
12. During the course of the Commissioner’s investigation the school told the Commissioner that it intended to disclose the requested information by the end of April 2011.
13. The Commissioner must look at the school’s intention in relation to future publication at the time of the request. At the time of the request the school did not state that it intended the requested information to be published at a later date. It only stated that it would keep it under review and that some or all of the requested information may be disclosed at a later date.
14. The Commissioner does not consider that there is evidence of an intention existing at the time of the request to publicise the

requested information at a later date. Furthermore in relation to the school's submission that the information would be disclosed in April 2011 the Commissioner notes that the requested information was not disclosed by the school by this date.

15. As there is no evidence of a clear intention to publish the requested information at a later date at the time of the request, the Commissioner considers that section 22 was incorrectly applied in this case.

Section 40(2)

16. Section 40(2) of the Act provides an exemption for information that constitutes the personal data of third parties:

"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."

17. Section 40(3)(a)(i) of the Act states 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),"

Minutes of 17 September 2009

18. The Commissioner will determine whether or not the school correctly applied section 40(2) in order to make the redactions to the minutes of 17 September 2009.
19. In this case the school has explained that redactions were made to information which details the breakdown of the relationship between the head teacher and the Governing Body which ultimately led to the head teacher's suspension and disciplinary proceedings. It has said that this constituted the personal data of the head teacher and is exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i). It stated that to release this information would breach the data protection principles.
20. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - a. from that data, or
 - b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
21. The Commissioner considers that the information redacted under section 40(2) would constitute information from which the data subject would be identifiable.
22. Such information is exempt if either of the conditions set out in sections 40(3) and 40(4) of the Act are met. The relevant condition in this case is at section 40(3)(a)(i) of the Act, where disclosure would breach any of the data protection principles. The DfE has argued that disclosure of the personal data would breach the first data protection principle, which states that "Personal data shall be processed fairly and lawfully". Furthermore at least one of the conditions in Schedule 2 should be met.
23. In reaching a decision as to whether disclosure of the requested information would contravene the first data protection principle the Commissioner has considered the following: -

Likely Expectation of the Data Subject

24. The school has explained that the Governors have approached the head teacher to request permission to disclose the redacted information and permission has not been forthcoming.
25. Furthermore it reiterated that as the redacted information is relevant to the head teacher's suspension and disciplinary hearing and because the disciplinary hearing had not, at the time of the request taken place, the head teacher would not have expected this information to be disclosed into the public domain.
26. The Commissioner considers as the head teacher did not consent to the redacted information being disclosed and because the information relates to his suspension and disciplinary proceedings which at the time of the request had not taken place, the head teacher would not have expected that the redacted information would be disclosed.

The effect disclosure would have on the Data Subject

27. The Commissioner considers that as the disciplinary proceedings relating to the head teacher's suspension had not taken place at the time of the request, disclosure may have caused the data subject significant damage and distress. This is because at that stage the reasons behind the suspension had not been formally dealt with at the disciplinary hearing and therefore they had not as yet been proved or disproved. To disclose this information may therefore have caused stress to the data subject as well as potentially damage the data subject's position during the subsequent disciplinary hearing.

The Legitimate Public Interest

28. The Commissioner does not consider that there is a legitimate public interest in this case in disclosing information relating to the suspension of the head teacher of the school prior to the disciplinary proceedings taking place.
29. The Commissioner therefore considers that section 40(2) was correctly engaged in relation to the redactions made to the minutes of 17 September 2009.

Minutes of 8 February 2010

30. The Commissioner will determine whether or not the school correctly applied section 40(2) in order to make the redactions to the minutes of 17 September 2009.
31. The school again said that the redactions were made to information which relates to the head teacher and may prejudice the head teacher's position. It stated it also contained information relating to the legal expenses incurred by the school in relation to the issues with the head teacher. It has said that this constituted the personal data of the head teacher and is exempt under section 40(2) of the Act by virtue of section 40(3)(a)(i). It said that this was because to release this information would breach the data protection principles.
32. Section 1 of the DPA defines personal data as information which relates to a living individual who can be identified:
 - a. from that data, or
 - b. from that data and other information which is in the possession of, or is likely to come into the possession of, the data controller.
33. The Commissioner has viewed the redacted information and it is not apparent as to how it relates to the head teacher's suspension, it appears to relate to other school matters. Furthermore in relation to the legal costs, there is only an estimate of legal expenses contained within the minutes which appears to relate to other school matters as well as the issues with the head teacher. There is no legal costs estimate specifically for the issues relating to the head teacher. He does not consider that the redacted information would constitute the head teacher's personal data.
34. The Commissioner considers that section 40(2) was incorrectly applied to the information redacted from the minutes dated 8 February 2010.

Procedural Requirements

Section 1(1)

35. Section 1(1) 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."
36. In relation to the minutes of 17 September 2009, as the school did not comply with section 1(1)(a) within the statutory time for compliance it breached section 1(1)(a) when dealing with this request.
37. In relation to the minutes of 8 February 2010, as the school did not comply with section 1(1)(a) or (b) within the statutory time for compliance it breached section 1(1)(a) and (b) when dealing with this request.

Section 10

38. Section 10(1) of the Act provides that:-
"Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt."
39. The school failed to comply with section 1(1)(a) and section 1(1)(b) within the statutory time for compliance, therefore it breached section 10(1) of the Act in its handling of the requests.

Section 17(1)

40. Section 17(1) of the Act provides that:-
"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt

information must, within the time for complying with section 1(1), give the applicant a notice which –

- (a) states that fact,
- (b) specifies the exemption in question, and
- (c) states (if that would not otherwise be apparent) why the exemption applies.”

41. In this case the school did not give sufficient explanation as to why the exemptions were applied and therefore breached section 17(1)(c) in its handling of this request.

The Decision

42. The Commissioner’s decision is that the school correctly applied section 40(2) to the redactions made to the minutes of 17 September 2009.
43. The Commissioner’s decision is that the school incorrectly applied section 40(2) to the redactions made to the minutes of 8 February 2010.
44. The Commissioner considers that the school breached section 1(1)(a), section 1(1)(b), section 10(1) and section 17(1)(c) in its handling of the request.

Steps Required

45. The Commissioner requires the school to take the following steps to ensure compliance with the Act:
- Disclose the redactions made to the minutes of 8 February 2010.

Failure to comply

46. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to

section 54 of the Act and may be dealt with as a contempt of court.

Other matters

47. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:

Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, published in February 2007, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the Act, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 40 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of Appeal

48. 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,
Arnhem House,
31, Waterloo Way,
LEICESTER,
LE1 8DJ

Tel: 0845 600 0877

Fax: 0116 249 4253

Email: informationtribunal@tribunals.gsi.gov.uk.

Website: www.informationtribunal.gov.uk

49. 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.
50. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this Decision Notice is sent.

Dated the 29th day of June 2011

Signed

Pamela Clements

Group Manager, Complaints Resolution

Information Commissioner's Office

Wycliffe House

Water Lane

Wilmslow

Cheshire

SK9 5AF

Legal Annex

General Right of Access

Section 1(1) provides that -

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

- (d) to be informed in writing by the public authority whether it holds information of the description specified in the request, and
- (e) if that is the case, to have that information communicated to him."

Section 2(3) provides that –

"For the purposes of this section, the following provisions of Part II (and no others) are to be regarded as conferring absolute exemption –

- (a) section 21
- (b) section 23
- (c) section 32
- (d) section 34
- (e) section 36 so far as relating to information held by the House of Commons or the House of Lords
- (f) in section 40 –
 - (i) subsection (1), and
 - (ii) subsection (2) so far as relating to cases where the first condition referred to in that subsection is satisfied by virtue of subsection (3)(a)(i) or (b) of that section,
 - (iii) section 41, and
 - (iv) section 44"

Time for Compliance

Section 10(1) provides that –

“Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.”

Section 10(2) provides that –

“Where the authority has given a fees notice to the applicant and the fee paid is in accordance with section 9(2), the working days in the period beginning with the day on which the fees notice is given to the applicant and ending with the day on which the fee is received by the authority are to be disregarded in calculating for the purposes of subsection (1) the twentieth working day following the date of receipt.”

Section 10(3) provides that –

“If, and to the extent that –

(g) section 1(1)(a) would not apply if the condition in section 2(1)(b) were satisfied, or

(h) section 1(1)(b) would not apply if the condition in section 2(2)(b) were satisfied,

the public authority need not comply with section 1(1)(a) or (b) until such time as is reasonable in the circumstances; but this subsection does not affect the time by which any notice under section 17(1) must be given.”

Section 10(4) provides that –

“The Secretary of State may by regulations provide that subsections (1) and (2) are to have effect as if any reference to the twentieth working day following the date of receipt were a reference to such other day, not later than the sixtieth working day following the date of receipt, as may be specified in, or determined in accordance with the regulations.”

Section 10(5) provides that –

“Regulations under subsection (4) may –

- (a) prescribe different days in relation to different cases, and
- (b) confer a discretion on the Commissioner."

Section 10(6) provides that –

"In this section –

"the date of receipt" means –

- (a) the day on which the public authority receives the request for information, or
- (b) if later, the day on which it receives the information referred to in section 1(3);

"working day" means any day other than a Saturday, a Sunday, Christmas Day, Good Friday or a day which is a bank holiday under the Banking and Financial Dealings Act 1971 in any part of the United Kingdom."

Refusal of Request

Section 17(1) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that any provision of Part II relating to the duty to confirm or deny is relevant to the request or on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a notice which -

- (i) (a) states that fact,
- (j) (b) specifies the exemption in question, and
- (k) states (if that would not otherwise be apparent) why the exemption applies."

Section 17(2) states –

"Where–

- (a) in relation to any request for information, a public authority is, as respects any information, relying on a claim-

i. that any provision of part II which relates to the duty to confirm or deny and is not specified in section 2(3) is relevant to the request, or

ii. that the information is exempt information only by virtue of a provision not specified in section 2(3), and

(b) at the time when the notice under subsection (1) is given to the applicant, the public authority (or, in a case falling within section 66(3) or (4), the responsible authority) has not yet reached a decision as to the application of subsection (1)(b) or (2)(b) of section 2,

the notice under subsection (1) must indicate that no decision as to the application of that provision has yet been reached and must contain an estimate of the date by which the authority expects that such a decision will have been reached."

Section 17(3) provides that -

"A public authority which, in relation to any request for information, is to any extent relying on a claim that subsection (1)(b) or (2)(b) of section 2 applies must, either in the notice under subsection (1) or in a separate notice given within such time as is reasonable in the circumstances, state the reasons for claiming -

(a) that, in all the circumstances of the case, the public interest in maintaining the exclusion of the duty to confirm or deny outweighs the public interest in disclosing whether the authority holds the information, or

(b) that, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosing the information."

Section 17(4) provides that -

"A public authority is not obliged to make a statement under subsection (1)(c) or (3) if, or to the extent that, the statement would involve the disclosure of information which would itself be exempt information.

Section 17(5) provides that –

“A public authority which, in relation to any request for information, is relying on a claim that section 12 or 14 applies must, within the time for complying with section 1(1), give the applicant a notice stating that fact.”

Section 17(6) provides that –

“Subsection (5) does not apply where –

(a) the public authority is relying on a claim that section 14 applies,

(b) the authority has given the applicant a notice, in relation to a previous request for information, stating that it is relying on such a claim, and

(c) it would in all the circumstances be unreasonable to expect the authority to serve a further notice under subsection (5) in relation to the current request.”

Section 17(7) provides that –

“A notice under section (1), (3) or (5) must –

(a) contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and

(b) contain particulars of the right conferred by section 50.”

Information intended for future publication

Section 22(1) provides that –

“Information is exempt information if-

(a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),

(b) the information was already held with a view to such publication at the time when the request for information was made, and

(c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a)."

Section 22(2) provides that –

"The duty to confirm or deny does not arise if, or to the extent that, compliance with section 1(1)(a) would involve the disclosure of any information (whether or not already recorded) which falls within subsection (1)."

Personal information.

Section 40(1) provides that –

"Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject."

Section 40(2) provides 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."

Section 40(3) provides that –

"The first condition is-

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

- (ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and
- (b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded."

Section 40(4) provides that –

"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."

Section 40(5) provides that –

"The duty to confirm or deny-

- (a) does not arise in relation to information which is (or if it were held by the public authority would be) exempt information by virtue of subsection (1), and
- (b) does not arise in relation to other information if or to the extent that either-
 - (i) the giving to a member of the public of the confirmation or denial that would have to be given to comply with section 1(1)(a) would (apart from this Act) contravene any of the data protection principles or section 10 of the Data Protection Act 1998 or would do so if the exemptions in section 33A(1) of that Act were disregarded, or
 - (ii) by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(a) of that Act (data subject's right to be informed whether personal data being processed)."

Section 40(6) provides that –

"In determining for the purposes of this section whether anything done before 24th October 2007 would contravene any

of the data protection principles, the exemptions in Part III of Schedule 8 to the Data Protection Act 1998 shall be disregarded."

Section 40(7) provides that –
In this section-

"the data protection principles" means the principles set out in Part I of Schedule 1 to the Data Protection Act 1998, as read subject to Part II of that Schedule and section 27(1) of that Act;

"data subject" has the same meaning as in section 1(1) of that Act;

"personal data" has the same meaning as in section 1(1) of that Act.