

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 November 2015

Public Authority: Wharton CE Controlled Primary School

Address: Greville Drive
Winsford
Cheshire
CW7 3EP

Decision (including any steps ordered)

1. The complainant requested various information from Wharton Primary School (the School) including reports, minutes of meetings, information about pay progression, a copy of the Headteacher's contract of employment and information relating to IT and CCTV procurement.
2. The Commissioner's decision is that, on the balance of probabilities, some of the requested information is not held. He finds that the exemption as set out in section 43(2) of FOIA (commercial interests) is not engaged in relation to the information withheld by virtue of that section. He also finds that some of the information withheld by virtue of section 40(2) of FOIA (personal information) has been withheld incorrectly and that the School applied section 40(5) incorrectly.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation:
 - disclose the withheld invoice information as requested in part 10;
 - disclose the Headteacher's contract of employment, with the details of salary redacted;
 - provide to the complainant confirmation or denial of whether information falling within the scope of part 9 of the request is held; and
 - for any information within the scope of part 9 that is held, either disclose this to the complainant or provide a refusal notice valid for

the purposes of section 17 of FOIA setting out why this information will not be disclosed.

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

Request and response

5. On 5 December 2014 the complainant wrote to the School and requested information of the following description, numbered for ease of reference:

"Please provide me with the following information:

- 1. A copy of the Headteacher's termly report to Governors for 2013/14.*
- 2. A copy of all minutes of Governing Body meetings (full and sub-committees) since September 2011.*
- 3. A copy of the Headteacher's report to Governors on the operation of performance management/appraisal arrangements for the academic years: 2010/11, 2011/12, 2012/13, and 2013/14.*
- 4. Confirmation of the decision on the Headteacher's pay progression for last appraisal cycle (2013/14).*
- 5. Copy of the Headteacher's contract of employment/role profile.*
- 6. Copies of all documents/minutes including all emails relating to the Headteacher's leave of absence to attend a wedding in June 2014.*
- 7. Number of Teachers and Teaching Assistants with a total ill health absence of one month or more for the academic years 2011/12, 2012/13, 2013/14 – please specify for each year.*
- 8. Number of Teachers and Teaching Assistants who have left the school other than for reasons of redundancy since September 2011.*
- 9. Number of staff who have left the school on the basis of compromise/settlement agreements since September 2011.*
- 10. Copies of all minutes/invoices/tendering documents relating to all IT and CCTV procurement since September 2011".*

6. The School responded on 9 January 2015. It provided some information within the scope of the request - namely information relating to points 1, 2, 7 and 8. It stated that it did not hold information relating to point 7 in respect of staff who are no longer employed at the school. It refused to provide the remainder of the requested information. It cited the following exemptions as its basis for doing so:
 - section 40(2) (personal information);
 - section 40(5) (personal information); and
 - section 43(2) (commercial interests).
7. On 19 February 2015 the complainant requested an internal review of its handling of parts 2, 3, 4, 5, 6, 9 and 10 of the request. The School sent him the outcome of its internal review on 6 May 2015.
8. It revised its position with respect to the information requested at point (9) of the request, no longer citing section 40(5). Instead, it advised the complainant to make that part of the request – relating to the number of staff who have left the school on the basis of compromise/settlement agreements since September 2011 - to Cheshire West and Chester Council.
9. The School provided the complainant with further information within the scope of the request but continued to rely on sections 40(2) and 43(2) to withhold the remainder.

Scope of the case

10. Following earlier correspondence, the complainant provided the Commissioner with the relevant documentation on 19 May 2015 to complain about the way his request for information had been handled.
11. With respect to the School's application of section 40(2), and with reference to points 4, 5 and 6 of the request, he told the Commissioner:

"My original request included information specific to the Headteacher....

In accordance with the ICO's guidance, I would submit that disclosure in relation to the above would be fair.... It relates specifically to the Headteacher in her capacity as a senior public employee".

12. In relation to point 3 of the request, the complainant told the Commissioner that if any information related to specific members of staff, those details could be redacted.
13. He also disputed the School's response to point 9 of the request and its application of section 43(2) to the information requested at point 10.
14. As is his practice, during the course of his investigation the Commissioner asked the School to revisit its handling of the request and to provide him with detailed explanations for the parts of the FOIA cited. In its response, the School stated that it did not wish to reconsider the matter.
15. There was, however, further correspondence between the Commissioner and the School, including correspondence in which the School stated that there is no recorded information relating to point 6 of the request.
16. On 23 September 2015 the Commissioner issued the School with an Information Notice in accordance with his powers under section 51 of the FOIA. By way of that Notice, the Commissioner required the School to furnish him with further information in order to progress his investigation.
17. In response to that Information Notice, the School confirmed its response to the request, the extent of the withheld information and the exemptions it considers apply. It explained that compromise agreements are entered into by the Council directly with employees. It submitted that it does not hold the information requested at part 9 for the purposes of the FOIA, arguing in the alternative that section 40(5) (personal information) applied.
18. In light of the above, the following analysis considers the School's application of exemptions as follows:
 - whether it is entitled to rely on section 40(2) of FOIA as a basis for refusing to provide the withheld information relating to points 3, 4, and 5;
 - whether it is entitled to rely on section 40(5) of FOIA as a basis for refusing to confirm or deny whether it holds the requested information relating to point 9; and
 - whether it is entitled to rely on section 43(2) of FOIA as a basis for refusing to provide the requested information relating to point 10 of the request.

19. The Commissioner has also considered whether the School is correct when it says that it does not hold information within the scope of part 6 of the request.

Reasons for decision

Section 1 general right of access to information

20. Section 1 of 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."

21. Regarding the request for information about the Headteacher's leave of absence during term time, the complainant told the Commissioner that transparency in this matter was needed:

"given that parents who had taken their children out of school during term time were being fined by the Local Authority of which this school is part (Cheshire West and Chester). As the most senior member of staff there is a reasonable public expectation that the Headteacher sets an example in terms of her conduct..."

22. In scenarios such as this one, where there is some dispute between the public authority and the complainant about the amount of information that may be held, the Commissioner, following the lead of a number of Information Rights Tribunal decisions, applies the civil standard of the balance of probabilities. In other words, he must decide whether, on the balance of probabilities, a public authority held at the time of the request any information falling within the scope of the request.
23. In deciding where the balance of probabilities lies, the Commissioner will consider the searches carried out by the public authority, in terms of the extent of the searches, the quality of the searches, their thoroughness and results the searches yielded. He will also consider any other information or explanation offered by the public authority which is relevant to his determination.
24. In progressing his investigation, the Commissioner asked the School to respond to him, including with respect to the searches it carried out for

information falling within the scope of the request and the search terms used.

25. In its substantive response, the School provided the Commissioner with details of the searches it had carried out, including searches of relevant email accounts.

26. The School told the Commissioner:

"In relation to point 6 there is no recorded information relating to the Headteacher's leave of absence We apologise that we did not make this clear in our original response to [the complainant] or our correspondence with you".

27. The Commissioner has considered the nature of the searches that have been conducted and the School's reasons for saying that no relevant information is held.

28. While appreciating the complainant's frustration in this respect and his reasons for maintaining that relevant information must be held, the Commissioner is mindful of the comments made by the Information Tribunal in the case of *Johnson / MoJ* (EA2006/0085)¹ that the FOIA:

"does not extend to what information the public authority should be collecting nor how they should be using the technical tools at their disposal, but rather it is concerned with the disclosure of the information they do hold".

29. Having considered the School's response – and on the basis of the evidence provided to him - the Commissioner is satisfied that on the balance of probabilities the School does not hold the requested information.

Section 40 personal information

30. 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 the disclosure of that personal data would be in breach of any of the data protection principles.

¹ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i90/Johnson.pdf>

31. The first step for the Commissioner to determine is whether the withheld information constitutes personal data as defined by the DPA. If it is not personal data then section 40 cannot apply.

Is the information personal data?

32. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.

33. The DPA defines personal data as:

"...data which relate to a living individual who can be identified

a) from those data, or

b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller, and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual."

34. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

35. Having viewed the withheld information, the Commissioner is satisfied that it identifies a living individual. This information is, therefore, personal data according to the definition given in section 1(1) of the DPA.

Would disclosure contravene the first data protection principle?

36. The first data protection principle states -

"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -

(a) at least one of the conditions in Schedule 2 is met, and

(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."

37. In the case of a 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 fair, lawful and meet one of

the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

Would it be fair to disclose the requested information?

38. In considering whether disclosure of personal information is fair, the Commissioner takes into account the following factors:

- the individual's reasonable expectations of what would happen to their information;
- the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual concerned); and
- the balance between the rights and freedoms of the data subject and the legitimate interests of the public.

The complainant's view

39. The complainant disputes the application of section 40 to information about the Headteacher. For example, he told the Commissioner:

"The request for the Head teacher's job description is not unfair. This is a publicly funded school and the information relates to the most senior member of staff in the exercise of her public role which will involve meeting statutory obligations and expenditure of public money. A salary range may be specified and disclosure of the range is a reasonable request given current practice and expectations. But the purpose of the request is for information relating to the role and duties of the head, not any salary details. ..."

40. Similarly, with respect to the information requested at point 4, he told the Commissioner:

"Just to clarify point 4, I have not requested information relating to a salary range. I am seeking confirmation on whether the Head teacher received pay progression following her appraisal. I am not seeking a figure or a range of figures, just confirmation on the outcome of the decision on pay progression following her appraisal"

41. With respect to the information requested at point 3 of the request, the complainant said:

"There is a legitimate public interest in disclosure to see if the school is implementing a policy in accordance with statutory obligations and the operation of the policy has implications for

spending public money given the link between performance management/appraisal and pay progression”.

42. With respect to the information within the scope of his request he told the Commissioner:

“The Headteacher’s reports should not contain information relating to specific members of staff – this is not a matter for Governors, and if they do, the details can be redacted”.

The School’s view

43. With respect to the requested information the School told the complainant:

“All employees have a reasonable expectation, and the right, for this information to be kept private and confidential and for the information not to be put into the public domain. Disclosure would be unwarranted and unlawful as it would disclose personal data to the public which the Governors have a duty to keep confidential and to which the public has no lawful right of access”.

44. During the course of the Commissioner’s investigation, the School confirmed that, reference to ‘teachers’ in its response dated 6 May 2015 to the complainant, was intended to include reference to the Headteacher.

The Commissioner’s view

45. A key issue to consider in assessing fairness is whether the individual concerned has a reasonable expectation that their information will not be disclosed.
46. The Commissioner’s view is that, when considering what information individuals should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the individual’s public or private life.
47. In that respect the Commissioner considers that public sector employees should expect some information about their roles to be disclosed, especially when they are in a senior position.
48. The Commissioner recognises that regardless of their seniority people have an expectation that an employer, in its role as a responsible data controller, will not disclose certain information and that they will respect its confidentiality.

49. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
50. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. He will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
51. Despite the reasonable expectations of individuals and the fact that damage or distress may result from disclosure, it may still be fair to disclose the requested information if it can be argued that there is a more compelling public interest in its disclosure. In considering these 'legitimate interests', such interests can include broad general principles of accountability and transparency for their own sakes as well as case specific interests.
52. The Commissioner has had the benefit of viewing the disputed information withheld by virtue of section 40(2) in this case. That information comprises information relating to the Headteacher and a number of copies of the "*Headteacher's Report to Governors*".
53. The Commissioner has considered the requested information and the arguments presented by the School that the Headteacher would have had no reasonable expectation that the information about her would be made publicly available.
54. In this case, the Commissioner considers that the requested information relates to the Headteacher's public life.
55. The Commissioner accepts that a Headteacher may not expect, for example, their specific personal performance objectives and statements of evaluation against those objectives to be placed in the public domain – albeit this does not necessarily mean that this expectation is reasonable.
56. However, the Commissioner considers it reasonable that as the most senior member of staff they would expect some details about their role to be placed in the public domain.
57. The Commissioner has considered the submissions of the public authority and in particular whether it felt that the release of the information would cause unnecessary or unjustified harm to the individual involved.
58. In making his decision the Commissioner has considered whether disclosure of the information at issue would lead to a greater

infringement of the individual's legitimate right to privacy than is outweighed by the legitimate interest in disclosure.

59. With respect to the withheld information relating to the Headteacher's contract of employment/role profile, the Commissioner considers that it comprises, for the most part, a job description, documented in a generic fashion. The arguments concerning privacy are therefore less convincing.
60. In balancing the legitimate interests with the rights of the data subject, he has not seen any evidence to indicate that there is a sufficient wider legitimate public interest in this case which would outweigh the rights and freedoms of the data subject and support further disclosure in respect of some of the withheld information. The Commissioner is satisfied that it would be unfair to the individual concerned to release that information. Disclosure would not be within their reasonable expectation and the loss of privacy could cause unwarranted distress.
61. With respect to the remainder and taking the above factors into account, the Commissioner is satisfied that the legitimate interests of the public are sufficient to justify any negative impact to the rights, freedoms and interests of the individual concerned. He therefore considers that disclosure of the remaining withheld information would be fair in the particular circumstances of this case.

Schedule 2 DPA

62. Having determined that it would be fair to disclose some of the withheld information, the Commissioner has next considered whether disclosure would meet a condition in Schedule 2 of the DPA. In relation to the conditions in Schedule 2, the Commissioner considers that the most relevant condition in this case is the sixth.
63. Schedule 2 condition 6 permits disclosure where it is:

"necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject."

64. In other words, for the condition to be met, the Commissioner considers that disclosure must satisfy a three part test:
 - there must be a legitimate interest in disclosing the information;
 - the disclosure must be necessary for that legitimate interest; and

- even where the disclosure is necessary it must not cause unwarranted interference or harm to the rights, freedoms and legitimate interests of the data subject.
65. The Commissioner is satisfied that he has considered the first and third parts of the test in concluding that disclosure is fair. This leaves the second part of the test. Accordingly, the Commissioner has considered whether it is **necessary** to disclose the requested information in order to meet the identified legitimate interests.
 66. Following the approach taken by the then Information Tribunal in *House of Commons v ICO & Leapman, Brooke, Thomas* (EA/2007/0060 etc), and approved by The High Court, the Commissioner recognises that there must be a pressing social need for any interference with privacy rights and that the interference must be proportionate
 67. In considering the 'necessity' test, the Commissioner must first establish the pressing social need – in other words, what the legitimate interests in disclosure are. In this case, he is satisfied that the legitimate interests in disclosure are transparency and the accountability of the School.
 68. The Commissioner acknowledges that disclosure of the information could augment and assist the public's understanding of the role and duties of a public sector employee with a senior position, in this case a Headteacher.
 69. Taking the above into account, the Commissioner is satisfied that disclosure is necessary to meet the pressing social need and that there is no other means of meeting it that would interfere less with the privacy of individuals.
 70. Having already established that the processing is fair, the Commissioner is also satisfied that release of the information would not cause any unnecessary interference with the rights, freedoms and legitimate interests of the data subject. He is therefore satisfied that the Schedule 2 requirement is met.

Would it be lawful to disclose the personal information?

71. For the first data protection principle to be satisfied, disclosure must be lawful, as well as fair. The approach of the Commissioner to the issue of lawfulness under the first data protection principle is that he will find that disclosure would be lawful unless the public authority has advanced convincing arguments as to why disclosure would be unlawful.
72. In this case, the School has advanced no arguments on the issue of lawfulness and the Commissioner has no reason to believe that disclosure would not be lawful.

Conclusion

73. The Commissioner has found that disclosure of the following information would be both fair and lawful and, therefore, would satisfy the first data protection principle:

- a copy of the Headteacher's contract of employment, suitably redacted – with the agreement of the complainant - to remove any details of salary.

Section 40(5)

74. The Commissioner has next considered the School's handling of that part of the request relating to the number of staff who have left the school on the basis of compromise/settlement agreements since September 2011.

75. The School argued that the request should be directed to the Council as compromise agreements are entered into directly with employees. The Commissioner accepts that compromise agreements are typically made between an employer and its employees.

76. Nevertheless, in respect of any information it may hold within the scope of the request and in support of its application of section 40(5), the School argued that the requested information, if held, is third party personal data.

77. Section 40(5) of the FOIA states 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)."

78. In this case, the School considers that section 40(5)(b)(i) applies. The consequence of section 40(5)(b)(i) is that if a public authority receives a request for information which, if it were held, would be the personal data of a third party (or parties), then it can rely on section 40(5)(b)(i), to refuse to confirm or deny whether or not it holds the requested information.
79. Consideration of section 40(5) involves two steps: first, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.
80. As above, the first step for the Commissioner to determine is whether the requested information, if held, constitutes personal data, as defined by the DPA.
81. The request in this case is for the number of staff who have left the school on the basis of compromise/settlement agreements since a given date. The complainant confirmed:

"This request does not seek information on the identity of former employees, the specific terms of any settlement agreement or when they were agreed. The request seeks information on the total number of settlement agreements".
82. In that respect, the School considered that it is possible to identify those at the school and those who have left, whether or not as a result of a settlement agreement.
83. This subsection – 40(5)(b)(i) - is about the consequences of confirming or denying whether the information is held, and not about the content of the information. The criterion for engaging it is not whether disclosing the information would contravene data protection principles or section 10 of the DPA, but whether confirming or denying that it is held would do so.
84. In the Commissioner's opinion, any information which might be held by the School in respect of such agreements, given the circumstances described and the small number of individuals this could relate to at a small primary school which is specifically named in the request, could potentially release personal information about an individual or a small number of individuals from which this individual or these individuals could be identified, either from this information alone, or a combination of this information and other information otherwise available to the

public. He is therefore satisfied that the information would be the personal data of identifiable individuals.

85. Having accepted that the request is for personal data of living individual(s), the Commissioner must go on to consider whether confirming or denying if the information is held would contravene any of the data protection principles.
86. He considers that the first data protection principle is relevant in this case.
87. In considering whether or not confirming or denying whether the requested information is held would be fair, the Commissioner has taken into account the nature of the requested information, the reasonable expectations of any potential data subjects, whether it would cause damage and distress to any of the potential data subjects, and the legitimate interests of the public at large.
88. The Commissioner appreciates that transparency and accountability can improve public trust and confidence in public authorities. On the other hand, the Commissioner recognises that this legitimate interest must be weighed against any unwarranted prejudice to the rights and freedoms or legitimate interests of any individual who would be affected by confirming or denying that the requested information is held.
89. In considering whether the exemption contained within section 40(5)(b)(i) was correctly applied, the Commissioner has taken into account that disclosure under the FOIA should be considered in its widest sense – which is disclosure to the public at large.
90. The Commissioner is mindful that the request relates to staff in general rather than to teachers specifically. He also notes that the request specifies a timeframe from 2011 onwards.
91. He has considered whether, by confirming or denying that the School holds relevant information - even if the information itself is exempt from disclosure - the confirmation or denial would contravene the first data protection principle.
92. Notwithstanding the arguments put forward by the School in support of its application of section 40(5)(b)(i), the Commissioner does not consider that there is anything unfair in confirming whether or not the School holds the requested information.
93. It follows that confirming or denying whether the requested information is held would not breach the first data protection principle.

94. The Commissioner therefore finds that the School wrongly relied on section 40(5)(b)(i) and now requires the School to issue a fresh response.

Section 43 commercial interests

95. Section 43(2) sets out an exemption from the right to know if release of the information is likely to prejudice the commercial interests of any person, including those of the public authority holding the information.
96. The term 'commercial interests' is not defined in the FOIA, however, the Commissioner has considered his guidance² on the application of section 43. This states that:

"...a commercial interest relates to a person's ability to participate competitively in a commercial activity, i.e. the purchase and sale of goods or services."

97. In order for a prejudice based exemption, such as section 43(2), to be engaged the Commissioner considers that three criteria must be met.
- First, the actual harm which the public authority alleges would, or would be likely to, occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance.
 - Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – ie, disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather, there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority.

² https://ico.org.uk/media/for-organisations/documents/1178/awareness_guidance_5_v3_07_03_08.pdf

Applicable interests

98. When identifying the applicable interests, the Commissioner must consider whether the prejudice claimed is to the interest stated in the exemption which, in the case of section 43(2), is commercial interests.
99. In this case, the School told the complainant that it considers that the exemption applies because disclosing the information at issue would be prejudicial to the School Governors' commercial interests and would impact on the activities of its ICT suppliers. It stated that ICT suppliers operate in a competitive market.
100. The Commissioner is satisfied that, in the context of the request in this case, the information relates to a commercial interest. He is also satisfied that the commercial activity involved – procurement of IT and CCTV - is conducted in a competitive environment.

Nature of the prejudice

101. The Commissioner's view is that the use of the term 'prejudice' is important to consider in the context of the exemption at section 43. It implies not just that the disclosure of information must have some effect on the applicable interest, but that this effect must be detrimental or damaging in some way.
102. Secondly, there must be what the Tribunal in the case of *Christopher Martin Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) called a 'causal link' between the disclosure and the prejudice claimed. The authority must be able to show how the disclosure of the specific information requested would, or would be likely to, lead to the prejudice.

Nature of the prejudice – third party suppliers

103. In relation to the third party suppliers' commercial interests, the School told the complainant that, as the information relates to price per unit of specific items, disclosure:

"would damage the suppliers' ability to price for and win new business opportunities for its services and to perform them in a profitable manner within a commercially competitive market".

104. The Commissioner recognises that companies compete by offering something different from their rivals. He accepts that that difference may be the price at which goods or services can be delivered.

105. When claiming that disclosure would prejudice the commercial interests of a third party, the Commissioner expects a public authority to consult the third party for its view.

106. In this case, there is no evidence that the School has consulted with relevant third parties either at the time of the request or during his investigation.

Nature of the prejudice – the Governors

107. In relation to the Governors' interests, the School said that disclosure would prejudice the Governors' ability to carry out open tendering processes:

"because the price would be available to the world at large and competitors would be able to price their goods and services by reference to the prices disclosed".

108. It also considered that not being able to carry out a competitive tendering process will harm the Governors' ability to obtain value for money services.

Likelihood of prejudice

109. Regarding the likelihood of prejudice, in correspondence with the complainant the School told him:

"The likelihood is more likely than not".

Is the exemption engaged?

110. The Commissioner considers that the prejudice test is not a weak test. In his view, an evidential burden rests with public authorities to be able to show that some causal relationship exists between the potential disclosure and the prejudice and that the prejudice is, real, actual and of substance. In the Commissioner's view, if a public authority is unable to discharge this burden satisfactorily the exemption is not engaged.

Is the exemption engaged – the Governors?

111. In determining whether or not the effect of disclosure in this case would be detrimental or damaging in some way to the commercial interests of the Governors, the Commissioner has considered the nature and likelihood of harm that would be caused.

112. The Commissioner can see some potential for the disclosure of the information to prejudice the commercial interests of the Governors. However, he finds that the School's arguments, for example that disclosure may impact the Governors' ability to achieve value-for-

money, have not been convincingly explained in terms of a causal link between disclosure of the information and prejudice to commercial interests to the extent that there is an identifiable, real and significant risk.

113. As the School has not provided the required level of detail or evidence to support its statement that disclosure would cause prejudice to the Governors commercial interests, the Commissioner is unable to conclude that the exemption is engaged.

Is the exemption engaged – third party suppliers?

114. The School did not provide any evidence that it had consulted any of the ICT providers concerned in order to establish whether they had any objection to their information being disclosed.

115. The Commissioner considers it important that, in claiming the section 43 exemption on the basis of prejudice to the commercial interests of a third party, the public authority must have evidence that this does in fact represent or reflect the view of the third party.

116. In assessing whether there is a real and significant risk, the Commissioner considers that third party companies engaging with public authorities must expect a more robust approach to the issue of commercial sensitivity than would apply in the private commercial environment. His view is that, following the implementation of FOIA, companies providing services to public authorities can reasonably expect that core information related to the services they provide, including some commercial information, will be subject to a high level of public scrutiny.

117. In this case, the School told the Commissioner that disclosure would be damaging to the suppliers. However, in the absence of evidence that that statement reflects the suppliers' view, the Commissioner cannot accept that there is a causal link between the disclosure of the withheld information and the likely prejudice to third party suppliers' commercial interests.

118. The Commissioner therefore does not consider it has been sufficiently demonstrated there would be any prejudice to the commercial interests of a third party supplier.

Conclusion

119. In light of the above, the Commissioner has concluded that the School failed to demonstrate that the exemption is engaged. As he does not consider that the exemption is engaged, the Commissioner has not gone on to consider the public interest arguments.

Other matters

120. The Commissioner experienced some difficulty with the quality of the responses provided by the School in this case. His website provides public authorities with guidance on how to handle requests for information which, in the case of any future request for information, the School may find helpful.

Right of appeal

121. 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
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

122. 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.

123. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

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