

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 11 August 2016

**Public Authority:** Walsall Metropolitan Borough Council  
**Address:** The Civic Centre  
Walsall  
WS1 1TP

#### Decision (including any steps ordered)

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1. The complainant has requested information on performance bands assigned to primary schools in his local area. Walsall Metropolitan Borough Council ("the Council") considered the information exempt from disclosure on the basis of section 36(2)(b)(ii) and (c).
2. The Commissioner's decision is that the Council has correctly engaged section 36(2)(b)(ii) and the public interest favours maintaining the exemption. She requires no steps to be taken.

#### Request and response

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3. On 6 August 2015, the complainant wrote to the Council and requested information in the following terms:

*"I refer to the Minute 395/14 of the 25<sup>th</sup> February, 2014, meeting of the Children's and Young People Scrutiny and Performance Panel. The Briefing Note relating to this minute states that "all primary schools, including academies are allocated to one of four bands according to performance" and indicates these bands are determined as A, B, C and D.*

*In accordance with Freedom of Information legislation, I would request the names of schools within these bands, both as at the date of the Briefing Note and at today's date."*

4. After considerable delays, the Council responded on 27 November 2015. It stated that it considered this information exempt on the basis of sections 36(2)(b)(ii) and (c) of the FOIA.
5. Following an internal review the Council wrote to the complainant on 8 March 2016. It stated that it upheld its decision to withhold the information on the basis of section 36.

### **Scope of the case**

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6. The complainant contacted the Commissioner on 23 March 2016 to complain about the way his request for information had been handled.
7. The Commissioner considers the scope of her investigation to be to determine if the Council has correctly applied the provisions of section 36 to withhold the requested information.

### **Reasons for decision**

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8. Section 36(2)(b)(ii) states that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
9. Section 36(2)(c) states that information is exempt if, in the reasonable opinion of the qualified person, its disclosure would, or would be likely to prejudice the effective conduct of public affairs.
10. In determining whether either of the two limbs of the exemption was correctly engaged, the Commissioner is required to consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore the Commissioner must:
  - Ascertain who the qualified person is,
  - Establish that they gave an opinion,
  - Ascertain when the opinion was given, and
  - Consider whether the opinion was reasonable.
11. The Council has explained that for the purposes of section 36 its qualified person is its head of legal services. The Council has explained that the qualified person was provided with the withheld information i.e. the names of the schools and the internal performance band assigned to

it. This was discussed at a meeting with several other Council employees where the qualified person also had access to documents showing the context to the banding. The Council has stated that following this meeting the qualified person then gave his opinion on 25 November 2015 which is supported by a signed document the Commissioner has had sight of.

12. The qualified person may apply the exemption on the basis that the inhibition to the free and frank exchange or the prejudice to the effective conduct of public affairs either 'would' occur or would only be 'likely' to occur. This means that there are two possible limbs upon which the exemption can be engaged.
13. The term 'likely' to inhibit is interpreted as meaning that the chance of any inhibition or prejudice should be more than a hypothetical possibility; there must be a real and significant risk. The alternative limb of 'would' inhibit is interpreted as meaning that the qualified person considers it is more likely than not that the inhibition or prejudice would occur.
14. The qualified person has clearly stated that his opinion is that the prejudice 'would be likely' to occur. It is on this basis that the Commissioner will consider whether the qualified person's opinion is reasonable.
15. When considering whether the opinion is reasonable the Commissioner is not required to determine whether it is the only reasonable opinion that can be held on the subject. It is quite possible for two people to hold differing views on the same issue, both of which are reasonable. Nor is it necessary for the Commissioner to agree with the qualified person's opinion.
16. The Commissioner understands that all primary schools in Walsall are allocated to one of four bands according to school performance. The Council has previously stated the number of schools in each band and indicated that schools in bands C and D are a cause for concern. It is the matching of the names of the schools to the bands which the Council considers would be likely to inhibit the free and frank exchange of views and would be likely to prejudice the effective conduct of public affairs.
17. In order to determine the banding for each school, the Council relies heavily on data being provided by the schools themselves and these communications and sharing of information are conducted in a free and frank manner. The Council argues that disclosing the bandings would be likely to impact on the willingness of schools to participate in future discussions with the Council. The Council does acknowledge that the Local Authority has some powers to compel schools to provide

information but this is limited and would undermine the spirit of cooperation which leads to more open and fruitful discussions. The Council considers that compelling schools to supply limited information would be unlikely to provide for an accurate representation of the school or its requirements for support.

18. The Commissioner considers it important to clarify, particularly for the consideration of section 36(2)(b)(ii), that there is a deliberation which takes place once the views of the schools and the Council are formulated. This deliberation process results in the banding for each school. It is therefore the view of the qualified person that disclosing the bandings would be likely to inhibit the free and frank exchange of views for the purposes of these deliberations.
19. The qualified person considered the nature of the agreement between the Local Education Authority (LEA) and individual schools. In doing so he examined the School Improvement Strategy 2014-2016 and a document prepared by the School Improvement service setting out the 'Core Offer' provided by the service in relation to the support provided to individual schools. The qualified person found that both documents make clear that a school's banding is confidential to the school and to the School Improvement service.
20. Therefore, the qualified person determined that schools would reasonably expect their own banding to be treated in confidence and not made public. The banding of a school is also not known widely within the schools and is more often than not restricted to the head teacher, the leadership team and the Chair of Governors. For this reason, the qualified person considered that disclosure of the identity of the names of schools in each band would be likely to have inhibited the free and frank exchange of views as schools would be less willing to engage in the exchange of information which would result in this banding.
21. The Commissioner understands the banding have been established to focus the resources available to the School Improvement Team on the local schools most in need of improvement support. The criteria for the four bands include a range of factors with information gathered from different sources. Whilst some of these sources are factual, publicly available information such as SATS results, other information is gathered from the schools through discussions and information gathering so that future risks can be assessed and factored in to the banding decision. The Commissioner also understands that the banding allocation is reviewed and revised on a termly basis so that improvement support can be allocated to the most in-need schools based on current conditions.

22. In light of the above the Commissioner is satisfied that the opinion of the qualified person is a reasonable one and that therefore the exemption provided by section 36(2)(b)(ii) is engaged.
23. Section 36 is subject to the public interest test. This means that the requested information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exemption outweighs the public interest in disclosure. In assessing the public interest in maintaining the exemption the Commissioner will consider the impact on the Council's ability to determine bandings and therefore allocate appropriate support to schools.

*Public interest arguments in favour of disclosure*

24. The complainant has argued that as all schools are subject to Ofsted inspections with the results being made public, there is no reason why disclosing the names of schools in each banding would be any different.
25. In addition to this the complainant considers that the fact that local authorities have some statutory powers to ask for information undermines the Council's arguments because if schools were more reluctant to cooperate voluntarily following disclosure of their banding, the local authority could require a school to provide information. The complainant also points out that he asked for the names of schools in each banding but did not ask for any other information on how the bandings are decided which may be more sensitive.
26. The Council acknowledges that the information is about publicly funded services and relates to the standard of service provided by schools. Disclosure of the information would provide the public with information on the assessment of schools in relation to support by the Council and demonstrate openness and transparency about how resources are deployed.
27. The Council recognises there is a public interest in the disclosure of information about schools performance or related information to enable parents and students to make informed choices.

*Public interest arguments in favour of maintaining the exemption*

28. The Council believes that if schools are compelled to provide information then the engagement may not be as open and fruitful as that provided voluntarily and consequently the bandings based on future assessments may be less likely to be an accurate representation of the school or its requirements for support. A failure to deliver support to schools which need it would be likely to have a prejudicial impact on school performance and impact on their ability to provide the best service to pupils.

29. The Council has also pointed out that local authorities have a statutory duty to “ensure the good quality of education across the settings” and if discussions on bandings are impacted by disclosure this could inhibit the local authorities in achieving this. The Council is also concerned that disclosure of this information without any context to how the bandings are determined would lead to the assumption that it is solely performance based, impacting on schools being able to attract candidates for vacancies and attract students.
30. The Council has also examined the extent to which schools might disengage from the support provided by the LEA through the School Improvement service were their own banding to be disclosed. The Council believes there would be a significant impact on the level of trust between the schools and the LEA if the bandings were disclosed and this would lead to a less willing and open relationship. As a result, the Council believes the breadth of criteria which the bandings are based on will be reduced and the bandings will become more performance based and less useful as a means of prioritising school improvement resources and ensuring better quality education for pupils.
31. Further, the Council believes that academies could choose to completely disengage from the LEA making the LEAs task of supporting all local schools for the benefit of all local children much more difficult as they would not have a dialogue with a number of schools in the area.

*Balance of the public interest test arguments*

32. As explained earlier, the Commissioner does not have to agree with the qualified person's opinion to accept the exemption is engaged. However in this case, by accepting the opinion is reasonable, the Commissioner does recognise there is the potential for the disclosure of the banding for each school to cause schools to be more cautious when sharing information and discussing the various factors which determine this banding, resulting in the potential impact on the effectiveness of the allocation of school improvement resources. The question is one of whether this inhibition is likely to be severe and frequent enough to outweigh any public interest in disclosure.
33. The Commissioner feels she must firstly address the matter of any misinterpretation or misconceptions that could result from disclosure of the schools names with their bandings. The Council has explained that the bandings are not purely based on performance figures and statistics; there are a number of considerations which factor into this and information will be obtained from schools and discussions will take place before a banding is determined. These bandings then indicate the amount of school improvement resources allotted to each school for that term. However, the Council argues that disclosing this information

without any context could lead to the assumption that schools are placed into a band based solely on their performance. The Commissioner does not accept this is a reason for withholding this information as the public authority can provide contextual information to put the bandings into perspective.

34. The Commissioner has already acknowledged that the bandings are under continuous review and discussions take place each term with schools and the School Improvement Team to determine what support is needed. The information requested in this case is likely to still have been relevant at the time of the request as the names of schools in each banding was requested for the time of the briefing note and at the date of the request. The severity and extent of the inhibition to the free and frank exchange of views that would be caused by disclosure of the bandings and schools has to be considered in this context. Disclosure would make discussions with schools more difficult as well as having wider implications for school improvement across the local area.
35. If information which was intended to be an internal measure for the benefit of the schools and the School Improvement Team is released it would well result in schools being more guarded in expressing their views for fear that being awarded a lower banding, whilst resulting in a greater level of support from the LEA, may negatively influence prospective parents. This would have to be weighed up by each school, but the Commissioner recognises that there is a strong chance that some schools would rather not have their public perception tarnished even if this meant they received greater LEA support and would lead to a reluctance, if not a complete refusal, to engage in meaningful discussions and information sharing with the School Improvement Team.
36. The Commissioner recognises that the situation for maintained schools and academies is slightly different, and their relationships with the LEA will also be different. Whilst the Council has indicated the LEA has some statutory powers to request information from schools this will not necessarily apply to academies and the arguments from the Council that disclosure could lead to the withdrawal of some schools entirely from engaging with the LEA do hold some weight as a result of this. For maintained schools which have an ongoing relationship with the LEA there is the possibility the LEA could require information to be provided but the Commissioner still recognises that voluntary cooperation will lead to better results and will continue to allow for constructive dialogue between the schools and the School Improvement team.
37. It also cannot be ignored that the School Improvement Strategy and other internal documents, in the view of the qualified person, make clear that the banding attributed to each school is intended to be confidential to the school and the School Improvement team. The Commissioner

considers the fact that the banding will not even be widely known within the school to be a key point. To disclose the bandings for each school in the face of such assurances would undermine the trust between the parties in the school improvement service and process.

38. In light of the above, the Commissioner finds that disclosing the bandings for each school would have an impact on the ability of the School Improvement team to gather information and openly discuss future risks with schools in order to allocate its resources appropriately each term. This impact would likely be felt by the LEA in that it would undermine its relationships with schools, not just in this regard but in general, and by the schools if they do not want to engage as fully in the process for fear of the public perception of their banding and as a consequence do not receive the support they need.
39. There is clearly a public interest in maintaining the exemption provided by section 36(2)(b)(ii) in order to prevent this level of harm. It is now necessary to consider the public interest factors in favour of disclosure.
40. The Commissioner does recognise that there is a genuine public interest in the disclosure of information about schools and their performance (both academic performance and other issues which affect school performance) so that parents can make fully informed decisions about schools in their local area.
41. That being said, the Council argue this is balanced against the fact that substantial information is already publicly available on school performance, specifically from Ofsted reports. Releasing the banding for each school would be likely to be detrimental to those schools in lower bandings when in fact this means they may receive a greater amount of support and see improvements in many areas including, but not limited to, performance.
42. Having considered this, the Commissioner accepts this goes some way to meeting the public interest but does not extinguish altogether the public interest in disclosure of information which will provide a greater insight into a school and assist in parents making informed decisions. As well as this the performance of schools is of a more wider general public interest and greater transparency around the issues facing schools and the resources allocated to support schools by public authorities will carry some weight.
43. In conclusion, the Commissioner finds there is a public interest in disclosing the requested information. However, disclosing the bandings for each school would have a significant chilling effect on the willingness of schools to provide full and frank information to LEAs and to discuss and deliberate with the School Improvement team on future issues and



risks that might require additional support. Such a chilling effect would undermine the ability of the School Improvement service from carrying out its role and allocating its resources to schools most in need. The Commissioner is satisfied that this harm outweighs the value in disclosing the bandings for each school and she therefore finds that the public interest favours maintaining the exemption. She does not require the public authority to take any steps.

## Right of appeal

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44. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)  
GRC & GRP Tribunals,  
PO Box 9300,  
LEICESTER,  
LE1 8DJ

Tel: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

45. 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.
46. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

**Signed** .....

**Jill Hulley**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**