

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 July 2016

**Public Authority:** **Caerphilly County Borough Council**

**Address:** **Penalta House**  
**Tredomen Park**  
**Ystrad Mynach**  
**Hengoed**  
**CF82 7PG**

#### Decision (including any steps ordered)

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1. The complainant has requested various items of information in three separate requests but all in respect of an on-going Council investigation, of which she was the focus. The Council provided some information, confirmed that it did not hold information in respect of some items of her request and withheld the remaining items by virtue of section 40(1) and section 40(2) of the FOIA. The Commissioner's decision is that Caerphilly County Borough Council has complied with its obligations under section 1(1) of the FOIA and that it has correctly relied on section 40(1) and 40(2) to the withheld information. However, due to delays in providing its initial response or some limited information the Council has breached sections 10(1) and 17(1) of the FOIA. The Commissioner does not require the public authority to take any steps.

#### Request and response

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##### Request one

2. On 3 September 2014, the complainant wrote to the Council to request various items of information in respect of the Council's on-going investigation about her, which she had previously requested in three separate lists. The letter made reference to 61 items in total and confirmed that out of these, 56 remained outstanding. The five items that she had received were numbers 5, 9, 11, 16 and 17 from List 1.

3. The Council responded on 2 October 2014 which did not follow the same format as the complainant's and appeared to have addressed 39 of the 56 items. It provided information in respect of some items of the request, confirmed that it did not hold information in respect of items other items suggesting that she contacted Hendre Infants School ('the school') for some of these, and withheld other items by virtue of section 40(1) and 40(2) of the FOIA. For further details of each item, see the Commissioner's analysis of section 1(1) and section 40 of the FOIA, paragraphs 24 and 132 respectively.
4. Following an internal review the Council wrote to the complainant on 26 February 2015. The letter adopted the format used by the complainant, following her three lists, item by item. The letter informed the complainant that since she had also confirmed that she had received item 14 of list 3, that it had scoped this, and the previous five items out of its review.
5. The Council further informed the complainant that as she had indicated that Hendre Infants School would hold information in respect of items 1, 3, 4, 10, 14, 16, 17, 18, 19, 20 and 21 of List 2, that she should contact the school directly for these items.
6. The Council also provided a further explanation in respect of its reliance on section 40 to withhold some information relevant to the request.

## **Request 2**

7. On 9 November 2014, the complainant wrote to the Council to clarify parts of her previous request and to request the following information:
8. In terms of the clarification she confirmed that she wanted home access to her professional email account and, in particular:

*"...all incoming and outgoing e-mails, sent to and sent from my  
...professional email account between the following dates:*

- *1 September 2010 to 31 July 2011*
- *1 September 2011 to 31 July 2012*
- *1 September 2012 to 5 December 2012*

9. The complainant also requested the following three items:

### *Item 1*

*" A copy of the photographs attached to the anonymous letter dated 8 November 2012." [Complainant's emphasis]*

*Item 2*

*The exact date that a female child [named child] (age 5 at the time) returned to Hendre Infants School from a period of time spent at the 'Nurture Unit' located at Tyn-Y-Wern Primary School."*

*Item 3*

*Confirmation from [named individual A] Local Authority Health and Safety Officer, that she attended Hendre Infants School on the morning of Tuesday 3 July 2012. [Complainant's emphasis]*

*Confirmation from [named individual A]...that she provided the following advice to [named individual B] and me."*

10. On 27 November, the Council sent the complainant its response in relation to the clarification of her request for home access to her professional email account. It informed her that it was unable to grant her request as it contained third party personal information and was refused on the basis of section 40(2).
11. It further informed the complainant that it also contained her own personal data which it was refusing by virtue of section 40(1), adding that she could request her own personal information under the Data Protection Act 1998 ('the DPA'). She was further informed that whilst there would normally be a £10 charge, the fee is waived for current employees, and that she would need to provide proof of identity.
12. Finally, the Council confirmed that it would write to her separately regarding items one to three of her request. The promised response was sent on 19 December 2014.
13. In respect of item one, the Council informed the complainant that the anonymous letter did not make reference to any photographs and did not have an attachment.
14. With regard to item two, the Council refused the request by virtue of section 40(2) of the FOIA.
15. The Council confirmed the attendance of [named individual A] on 3 July 2012 but informed the complainant that the only record held was the risk assessment completed following the visit which did not make reference to any general advice which may have been given.
16. Following an internal review, the Council wrote to the complainant on 2 March 2015. Whilst it upheld its decision in respect of home access to the requested email address, the Commissioner notes that it does not

appear to have addressed the issue of the photographs attached to the anonymous letter.

### **Request 3**

17. On 17 December 2014, the complainant requested the following information from the Council:

*"In your response letters to me of 2 October 2014 and 27 November 2014 regarding my ... formal Freedom of Information Access Requests, we note the following statement made by Mr John Rogers, Principal Solicitor, Caerphilly County Borough Council:*

*"Under the powers delegated to me by Caerphilly county borough council [sic] and having considered representation made to me by officers and third parties whose interests appear to be potentially affected or prejudiced, I have the following decision"...*

*...Consequently, I am requesting the names of the Caerphilly County Borough Council officers' and 'the third parties', who made 'representations' to Mr Rogers, Principal Solicitor regarding my ...formal Freedom of Information Access Requests."*

18. The Council provided its response on 3 February 2015, refusing the information by virtue of section 40(2) of the FOIA. The Commissioner notes that the complainant does not appear to have requested an internal review of this particular request.

### **Scope of the case**

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19. The complainant contacted the Commissioner to complain about the way her requests for information had been handled. She was not satisfied with the Council's information not held response and reliance on either sections 40(1) or 40(2) of the FOIA to withhold some of the information. The complainant also raised concerns regarding the Council's procedural handling of her requests.
20. The scope of the Commissioner's investigation is therefore to consider whether the Council has complied with its obligations under section 1(1), whether it was correct to withhold information by virtue of sections 40(1) and 40(2) of the FOIA, and its procedural handling of the requests.

## Reasons for decision

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### Section 1(1) – General right of access to information held

21. Under section 1(1) of the FOIA, in response to a request for information a public authority is only required to provide recorded information it holds and is not therefore required to create new information in order to respond to a request.
22. Where there is a dispute regarding whether relevant information is held, the Commissioner is mindful of the former Information Tribunal's ruling in EA/2006/0072 (Bromley) that there can seldom be absolute certainty that information relevant to the request does not remain undiscovered somewhere within the public authority's records. When considering whether a public authority does hold any relevant information therefore, the normal standard of proof to apply is the civil standard of the balance of probabilities.
23. The Commissioner's judgement in such cases is based on the complainant's arguments and the public authority's submissions and where relevant, details of any searches undertaken. The Commissioner expects the public authority to conduct a reasonable and proportionate search in all cases.
24. In this particular case, the Council has stated that it either it does not hold, or that it does not hold additional information in respect off the following items of the complainant's first and second requests:

#### ***Request one***

- List 1 – items 3,6,7, 10 and 13.
- List 2 – items 2, 5, 6, 7, 8, 9 and 22, 23.
- List 3 items 1(a), 1(b) 1(c), 2(a), 2(b), 2(c) 3, 4, 5, 5(a), 7, 11(a) 13, 16 and 17.

#### ***Request two***

- Item 1
- Item 3(b)

***Request 1, List 1***

***Item 3***

25. The Commissioner notes that this item concerns a record of the days named individual C worked at the school and has stated that named individual D, the school business manager will hold this information.
26. The Council has confirmed that there is no operational need for it to have copies of signing in books for any of the schools within its boundaries. It has added that the school itself is likely to hold this information and the Council's response to the complainant confirms that she has been informed of this.

***Item 6***

27. This item was in relation to named individual E, (Learning Assistant)'s account of an incident taking place at the school on a specified date.
28. The Council has confirmed that it does not hold this information, adding that schools are not required by Health and Safety legislation to record such incidents in writing. It further informed the Commissioner that it checked with its Health and Safety section just in case the school had reported it. The records for the specified year of the incident were searched and did not return any document for the specified date or dates or for nearby dates relating to the school.

***Item 7***

29. The Commissioner notes that this item was regarding a copy of an accident report for a specified date from named individual F, (Learning Assistant). The complainant stated in her request that the report was sent from the school to the Local Authority.
30. Whilst the Council maintains that it does not hold this information, the complainant has argued that named individual F had shown her a copy of the completed form and that named individual D, School Business Manager confirmed that a copy had been sent to the Council's Health and Safety section. The Council has carried out a further search and is satisfied that it does not hold the requested information.
31. The Council has further confirmed that ordinarily, completed accident forms would be sent to its Health and Safety section. However, an officer searched through each individual hard copy archived accident form for 2012 looking for the named employee, but found nothing. The Council further informed the Commissioner that whilst it would expect to hold this information, it would be reliant on the school submitting the completed accident report as and when an incident occurs. There is no

record of it on file, and there is no record of the Council ever receiving one for this incident.

32. Additionally, the Council's Human Resources section has confirmed in a signed statement obtained as part of the investigatory process relating to the complainant, by named individual F that although she was told to complete a form, nothing was ever completed. As the Health and Safety search did not yield any results, and the HR department confirmed that they have a signed statement saying the accident form was never completed, the Council remains satisfied that it does not hold this information. A copy of this evidence was attached for the Commissioner with the Council's response.

### ***Item 10***

33. Item 10 of List 1 concerned a copy of the school's "Encouraging Positive Behaviour Policy" which named individual B wrote in 2007-8, the reviewed version in 2010 and the latest version in 2011-2012 where both the complainant and named individual B worked on the anti-bullying section. The complainant informed the Council that named individual B will have the original version of all three.
34. The Council provided the complainant with a copy of the policies it held and informed her that it did not hold other versions but should there be any in existence, they may be held by the school.
35. The complainant was not satisfied with these documents, however the Council confirmed in its internal review correspondence that they were the only versions it holds.
36. The Council informed the Commissioner that it may provide template guidance and/or model policies for schools to consider, but the completed documents are school policies and would not normally be held by the Council, however in this instance they held the versions supplied to the complainant in the course of their investigation relating to the complainant.

### ***Item 13***

37. The specific information under this item was for a copy of named individual E's statement provided in regard to named individual G, Caretaker and taken by named individual H, (Council Education Officer) on Friday 23 November 2012.
38. The Council has maintained that this information is not held as witness statements were never completed. At the Council's internal review, the complainant was informed that witness statements had not been completed and further investigation had shown that while the Council do

not hold a copy of a statement provided by named individual E, they do hold an incomplete statement which records the introductions made at the start of the meeting. The complainant was informed that the case did not progress, therefore the notes of the meeting were never completed.

39. The complainant however has argued that named individual H informed her that statements were taken from all staff present during the afternoon and completed that same day.
40. The Council has informed the Commissioner that on receipt of the request, electronic files were searched, as was the investigation file relating to named individual G. A brief handwritten note of the meeting referred to was located, however as the investigation did not progress, there would be no expectation that any further information would be held.
41. The Commissioner was further informed that during the Council's investigation, it has been identified that the member of staff who was supporting this investigation is no longer employed by the Authority, therefore it was unable to consult with them regarding this matter.

### ***Request 1, List 2***

#### ***Item 2***

42. The Commissioner notes that this request was for a copy of named individual B's level 4 job description (March 2012), from which she directly quotes her daily hours of employment in her statement.
43. The Council provided the complainant with a generic job description for the role of named individual B and explained that it may not include the daily hours of employment.
44. The Council informed the Commissioner that an individual's daily hours would not be included in the job descriptions. It further informed the Commissioner that it is unknown whether this information is added to copies of job descriptions held by the school for individual members of staff.

#### ***Item 5***

45. The Commissioner notes that this item of the request is for a text message from named individual D dated 7 December 2012 sent to the complainant, regarding named individuals I and B. She has added that she has a copy of this text but that it needs to be confirmed by the sender.

46. The Council maintains that it does not hold this information and has stated that whilst information regarding council business held on the personal devices of members of staff would be considered information held by it for the purposes of FOIA, it considers it is highly unlikely that the information contained in the text message would relate to Council business as the named individuals are school based staff. It has added, that if this information is held at all, it is therefore more likely that it would be held on behalf of the school.

***Item 6***

47. List two, item six refers to named individual D's alleged text messages and record of alleged telephone calls from the complainant, referred to in named individual D's statement in regard to named individual B on the 21 December 2012.
48. The Council has informed the Commissioner that named individual D gave a signed statement confirming she had received text messages from the complainant (extract from statement provided). However, as these related to school business there would be no expectation that the Council would hold them. The Council has further confirmed that while the text messages were mentioned in the investigatory interview, it does not have a copy of them.

***Item 7***

49. This item concerns a request for the signed statement of named individual D in relation to named individual G (former Caretaker) and taken by named individual H on 23 November 2012.
50. The Commissioner notes that this item of the request relates to List one, item 13 discussed in paragraphs 37 to 41 of this notice and the Council has maintained the same stance and explanation it provided in respect of this item as it did for list one, item 13.

***Item 8***

51. This item from list two is in respect of the silver 'monitor' fire log from 2009 onwards.
52. The Council advised the complainant that it did not hold this item and explained that the silver Monitor fire log books are delivered to each individual school. Duplicate hard copies are not held by the Council.
53. The Council has further explained that the fire logs are the property of the school and although attempts have been made to locate a copy from another service area within the authority who were managing the project at the time, that it has also advised that a copy is not held.

54. As the Monitor fire log is the legal property of each individual school and copies would not normally be held by the Council, it is satisfied with its response to the complainant of 26 February 2015.

***Item 9***

55. Item nine of list two was in relation to a copy of the 'written feedback' by the complainant which named individual B referenced in her signed statement of 13 December 2013 appertaining to an application for promotion session observation lesson.
56. The Council informed the complainant that it does not hold a copy of this information but suggested that it may be held by the school.
57. The Council has confirmed to the Commissioner that as part of the investigation process the Council has a signed statement from named individual B which confirms the complainant observed her in a lesson prior to the formal interview. Named individual B also refers to receiving positive feedback on the same lesson which was "*written up in the school plan as an exemplar of a good lesson.*" The Council has attached an extract from that statement, but confirmed that it did not receive a copy of the written feedback itself.
58. The Commissioner has been further informed that lesson observation plans relate to the business of the school and the Council would not be expected to hold copies of such documents.

***Item 22***

59. Item 22 of list two requested the exact date/year of the staff Christmas party that name individual B alleged she was not invited.
60. The Council informed the complainant on 2 October 2014 that it does not hold this information and confirmed that it would not hold any information relating to social events organised or attended by staff at the school.
61. The Council further confirmed to the Commissioner that information relating to social events organised by the school would not be passed to the Local Authority as they would have no operational need for it. The Council further stated that if the information is recorded, it would be held by the school, possibly in school diaries, or minutes of its staff meetings.

***Item 23***

62. This item requested a copy of the A4 landscape document which named individuals P and K showed to named individual Q on 3 December 2012.

At the time, the complainant states that they were told it was a draft and dates needed to be added. The complainant further states that named individual K promised she would receive a copy by the end of the following school day.

63. The Council provided the complainant with a copy of the document in its original response. However, the complainant stated that the Health and Safety report received on 9 May 2014 contains the title "*H & S Intervention ... (3)*". The complainant therefore considers that as this document was version three, there must be two earlier versions.
64. The Council confirmed in its internal review that it had provided a copy of the final version of the document, which is the only version held. However, the complainant has stated to the Commissioner that she was shown version 1 by named individuals K and P on 3 December 2012.
65. In response, the Council has informed the Commissioner that versions one and two were draft documents and the version control reference changed with each update. The Council added that the complainant was provided with a copy of an email which explains why the dates may have been different, and confirming that there is only one version of the presentation in existence.

***Request 1, List 3***

***Items 1(a) and (b)***

66. The Commissioner notes that these items concerned a request for a copy of the teaching job advertisement and accompanying person specification for which named individual J applied.
67. The Council has stated that it provided this information to the complainant with its original response dated 2 October 2014. It stands by its response in the internal review that the information has already been provided.

***Item 1(c)***

68. This item concerns a request for a copy of the job application form completed by named individual J.
69. On 2 October 2014 the Council advised the complainant that it does not hold this information, but that it may be held by the school.
70. However, the complainant has provided an email from the Council's payroll system requesting the completed application form and bank details so that she, and two other specified individuals can be set up on its payroll system. She adds that very clearly a copy of the application

must have been received as named individual J was set up to receive payment.

71. At the internal review stage, the complainant was advised that the school would have managed the recruitment exercise, and while the email trail confirms that the Council requested a copy, there is no trail to confirm it was ever received.
72. The Commissioner was further informed that at the time, the Council would have relied on the school to provide it with the information required to set staff up on the payroll system and carry out relevant employment checks, but did not insist that they provided it with copies of the associate documentation. It has added that the Council would have trusted the information provided by the school without actually seeing copies of the relevant paperwork, and has confirmed that there would not have been any expectation that it would hold this information.
73. The Council has informed the Commissioner that its procedure has now been revised so that copies of all relevant paperwork relating to staff appointments are held on file. In respect of the information subject to this request, the Council has further added, that in the event that it held this information, it would have likely been refused under section 40(2) of the FOIA.

***Items 2(a) and (b)***

74. This request was for the start and end dates that named individual F worked at the school.
75. The Council provided the start and end dates to the complainant on both the 2 October 2014 and 26 February 2015. It has informed the Commissioner that it has provided the requested information, nothing has been withheld, and it has nothing to add in respect of this item.

***Item 3***

76. The Commissioner notes that List three, item three concerns evidence that named individual C was at the school on a specified date.
77. The Council informed the complainant that it does not hold this information, but advised that it may be held by the school. It confirmed this again on 26 February at the internal review stage. However, the Council has informed the Commissioner that during the Council's investigation, the complainant provided a copy of an invoice received from the supply agency which shows that payment was made for named individual C's engagement on the day in question. The Council has stated that this constitutes evidence that named individual C was in

school that day as the school would not have made a payment for her services if she had not been.

78. The Council has further informed the Commissioner that the Council would not ordinarily have any expectation that it would hold such information, and it only holds it in this case due to it being provided during the investigation process. As it was provided by the complainant, there is nothing to be gained from providing a further copy.

***Item 5***

79. This request asked for the exact date which a specified event occurred involving named individual F as per list 1, item 7.
80. The Commissioner notes that the complainant was informed of the week which the incident occurred. The Council confirmed at internal review that it does not hold information regarding the exact date as it does not hold an Accident Report which would contain this information, referring the Commissioner to List one, item 7.

***Item 5(a)***

81. This item was regarding a copy of a violent incident report involving named individual F and relates to item 5 above. It also included a request for a copy of the accompanying school email which would be sent with it.
82. The Council informed the complainant on 2 October 2014 that it does not hold the requested form as one was not completed. However, in her request for an internal review, the complainant advised that named individual F stated there was not an accident report and the matter came to the Council as a violent incident report.
83. In response to this, the Council informed the Commissioner that at the internal review stage, further checks were carried out with the relevant officer who confirmed that they did not say the matter had been reported on a violence at work or a violent incident form, but they were referring to the content of a witness testimony which referred to a 'violent incident' rather than an 'accident'.
84. The complainant has alleged to the Commissioner that as the Council is unable to provide a copy of the report, that named individual F falsified or 'invented' evidence against her. However, the Commissioner would point out that such allegations are beyond his remit to investigate or comment.
85. With regard to the email, the Council has further confirmed that its response to this item has already been provided in its reply to List one,

Item 7, but added that the complainant is referring to an email in connection to the information she was requesting as part of the Council's on-going investigation. The spreadsheet referred to by her was attached to an email dated 8 May 2015 (copy supplied to the Commissioner) where the author of the email advised her that:

*"this was not reported as an accident, rather a violent incident..."*

86. The Council further explained that as the accounts given by the complainant and other members of staff contradicted each other, the HR Manager asked the complainant if she had completed and submitted an accident report form as no other person had admitted to completing one. Additionally, the Council confirmed that while it would normally have expected the school to have completed the said paperwork, it would appear that on this occasion it was not carried out.

### ***Item 7***

87. This item concerned a request for a copy of the Higher Level Teaching Assistant (HLTA) records of named individuals E and L and relates to List One, item 10 and referred to three different versions from 2007-2008, reviewed in 2010, with the latest version in 2011-2012. The complainant asserted that named individual B will have the latest versions of all three.
88. The Council informed the complainant in its original response that it does not hold this information, but that it might be held by the school. The complainant has stated that she is requesting the sections of the records that she completed, and added that this information had to be provided to the Council before the two individuals could be accredited with their Higher Level Teaching Assistant qualification.
89. The Commissioner queried this with the Council which confirmed that the appointment of HLTA staff would be authorised by the Head Teacher, who informs the Council of the appointment. It further confirmed that the Council is not involved in the process of awarding the HLTA qualification to Teaching Assistants, as it is the Welsh Government which awards HLTA status annually via an assessment route and the assessment programme is carried out by consortiums on behalf of the Welsh Government. The South East Wales Consortium carries out the assessment process for schools within the Council's boundaries.

### ***Item 11(a)***

90. Item 11 requested a full list of dates in October and November 2012 where named individual B was not in school for any reason excluding Autumn half term week.

91. The Council informed the complainant that it does not hold this information and suggested it may be held by the school. The Council has confirmed to the Commissioner that while it would expect to receive information relating to absences such as sickness or approved leave of absence, it would not hold information for all absences for example any absence for training. The Council has further informed the Commissioner that if it did hold this information, it would consider it exempt from disclosure under section 40 of the FOIA.

***Item 13***

92. Item 13, List 3 requested a copy of version two of the Health and Safety Intervention document.
93. The Council has confirmed that it provided the complainant with a copy of the only version of this document it holds. She was further informed that the version shown at the meeting held on 3 December 2012 was unfinished and was subsequently finalised prior to being presented to the Governors.
94. However, the complainant considers that there three versions of the above document and that she has been provided with version three as opposed to her requested version two. The Council explained in its internal review correspondence that this issue had already been dealt with under List 2, Item 23.
95. The Council has repeated its stance, as per List 2, Item 23, that the original copy was updated and overwritten as modifications were made, and that once completed, the final document was presented to the Governing Body and it has confirmed to the Commissioner that it has nothing further to add in respect of this item.

***Item 14***

96. Item 14 of list 3 requested a copy of the report of named individual S (the Council's Building Control Officer and Structural Engineer who unexpectedly visited the school with named individual T (Health and Safety Officer) on a specified date.
97. The Council informed the complainant that a report was not submitted following the visit. However the complainant alleges that a report was ordered by the Health and Safety Manager and provided to named individual M. The complainant has also alleged that the Building Control Officer stated he would let Health and Safety have his written report to be passed on to the school. However, this did not happen. The complainant does not accept that a report was not written.

98. The Commissioner therefore queried this with the Council which confirmed that the Building Control Manager requested that an officer from Building Control visit the School to assess the safety of the wooden structures which had been built at the school. Following the visit, named individual S telephoned the Health and Safety Manager and advised that there were no concerns with regards to the structural stability of the wooden structures. As there were no concerns, a report was not prepared, however a full report, with recommendations would have been provided by named individual S had any concerns been identified.

***Item 16***

99. This item of the complainant's request asked for a list of dates following 5 December 2012 where named individual R from the Council's Human Resources Section, addressed the entire staff of the school as groups of individuals.

100. The Council informed the complainant that it has no record of any such visits taking place. However, the complainant stated that a copy of the minutes of the School and certain staff statements state otherwise. In its internal review correspondence, the Council reiterated its original position that its HR Manager did not address entire staff groups.

101. The Council has confirmed to the Commissioner that it does not have copies of the minutes of meetings referred to by the complainant as they would not be provided to it since relate to the business of the school, not the Council. It has further confirmed that in an attempt to locate the information requested, the HR Manager was consulted and she has confirmed that she did not address staff as suggested by the complainant. The Council has provided evidence of this response from the HR Manager.

***Item 17***

102. The Commissioner notes that this item concerns a request for a list of dates following 5 December 2012 when named individual M (Health and Safety Officer from the Council attended the school and spoke to her staff.

103. The complainant was provided with a list of dates on 26 February 2015, along with the purpose of the visits. The Council confirmed they were as part of its on-going investigation and not for specific meetings to speak with staff. It was further confirmed that he would probably have spoken to individual members of staff while at the school out of courtesy or to reply to a question, but he did not address the staff as a whole or as individuals in any formal type of meeting.

104. The Council has further informed the Commissioner that the Health and Safety Officer has checked through his electronic diary and email entries which indicate confirmation of dates of meetings attended and has extracted relevant information which has already been provided to the complainant. It has nothing further to add.

***Item 18***

105. Item 18 of List 3 was regarding a 'dossier' that the complainant believes was kept about her at the school by named individual Y, which she stated she knew was lodged with the Council's Human Resources section prior to named individual Y leaving the employment of the school in 2010.

106. The Council informed the complainant in its internal review correspondence that checks had been carried out, but the Council has no record of receiving a 'dossier' from named individual Y.

107. The Commissioner queried this with the Council who the Council has no record of receiving a 'dossier' from named individual Y. The Council further informed the Commissioner that if there is any relevant information, it is likely to be held by the named individual Y's Union, the NAHT.

***Request two -item 1***

108. The Commissioner notes that this item asked for a copy of the photographs attached to an anonymous letter dated 8 November 2012.

109. The Council's original response informed the complainant that the anonymous letter did not make reference to any photographs, and did not have anything attached to it.

110. The complainant informed the Council that she did not ask whether the anonymous letter made reference to any photographs, as she had read the contents of the letter in a meeting on 15 November 2013 and knew that it did not. She added that named individual K made reference to "*the photographs attached to the anonymous letter*" The complainant also referred the Council to item one of named individual K's disclosure file which was a copy of the anonymous letter, and stated that it can clearly be seen in the top left hand corner that the letter does have attachments.

111. The Council informed the complainant that at the above meeting, she was offered full disclosure of the investigation documentation of relevance which included a document explaining why each document was included. This document made no reference to photographs, but stated that:

*" this is an anonymous complaint that instigated H & S's attendance at the School in November 2012 and references a number of concerns that are relevant to the above."*

112. The Council informed the Commissioner that the complainant pointed out that there is what looks like a staple mark on the anonymous letter suggesting that there had been something attached to it. The Council explained that it is standard practice for the envelope to be attached to an anonymous letter just in case it is needed in the future. The Council again confirmed to the complainant that there was no photographs attached to the letter and went on to confirm that there were photographs included in a presentation that the H & S Manager gave to the Board of Governors, but these were not originally attached to the anonymous letter. The Council further informed the complainant that the photographs were taken by officers during their visits to the school to assess the situation following receipt of the anonymous letter.
113. Additionally, the Council provided the complainant with the time period over which the visits took place and the reason. It also provided a copy of the presentation to the Commissioner containing the photographs referred to.
114. The Council further confirmed to the Commissioner that it is standard practice for all anonymous letters to be passed to the Audit Section who hold the original file. The letter is then scanned and sent electronically to the service area able to deal with the matter. As part of the search, the original letter was viewed and there were no photographs attached to it.

***Item 3(b)***

115. Item 3(b) of request two asked for confirmation from named individual A (Health and Safety Officer), that she provided advice to named individual B and herself regarding a Health and Safety audit of the school, which both individuals had wanted carried out in readiness for its ESTYN inspections.
116. The Council confirmed to the complainant that named individual A attended the school on a specific date and that the only record of this visit was the risk assessment which was completed following the visit referred to above. The risk assessment was specific to an individual pupil and does not make reference to any general advice which may have been given.
117. The complainant responded and made reference to contemporaneous notes regarding the above advice given to her and named individual B. She added that the advice given by named individual A was verbal and valuable, therefore she had made the note of what was being advised in

regards to the H & S audit about which she was requesting advice. She asked that named individual read her comments and confirms that she provided the advice to which she refers.

118. The Council's internal review correspondence confirmed that the only recorded information it holds regarding the visit is the risk assessment referred to in paragraph 116 of this notice. It added that it is not required to create new information or find the answer to a question from staff who may happen to know it.
119. The Council informed the Commissioner that it has nothing to add to this response.
120. The Commissioner has considered the arguments presented by the complainant in respect of each item of her requests, the explanation provided by the Council, and where relevant the details and evidence of any searches undertaken. He does not consider it necessary to respond to each item individually, as a more generic approach seems reasonable based on whether it is the type of information that the Council would have no expectation of holding, or where one might reasonably expect the Council would hold relevant information.
121. The Commissioner considers that there is clearly much information which the Council would have no expectation of holding, and that its response in these circumstances to contact the school is both reasonable and proportionate.
122. The Commissioner also acknowledges that there is other information where the expectation that the Council would hold relevant information is perfectly reasonable. However, he accepts the Council's explanations, (and evidence where relevant) regarding each item and considers that it has conducted a reasonable and proportionate search of its records.
123. The Commissioner has therefore concluded that based on the balance of probabilities, that the Council has provided all relevant information it holds which does not engage an exemption, and in so doing, has complied with its obligations under section 1(1) of the FOIA.

#### **Section 40 – personal information**

124. Section 40 of the FOIA states that information is exempt from disclosure if it constitutes the personal data of either the applicant or a third party and its disclosure under the FOIA would breach any of the data protection principles.
125. In order to reach a view regarding the application of this exemption, the Commissioner has firstly considered whether or not the requested

information does in fact constitute personal data as defined by section 1(1) of the Data Protection Act 1998 ('the DPA').

### **Is the requested information personal data?**

126. Personal data is defined at section 1(1) of the DPA as:

*"personal data means data which relate to a living individual who can be identified-*

*(a) from those data,*

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

127. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data"*.<sup>1</sup>

128. On the basis of this guidance, there are two questions that need to be considered when deciding whether disclosure of information into the public domain would constitute the disclosure of personal data:

*(i) "Can a living individual be identified from the data, or, from the data and other information in the possession of, or likely to come into the possession of, the members of the public?"*

*(ii) "Does the data 'relate to' the identifiable living individual, whether in personal or family life, business or profession?"*

129. The Commissioner notes that the information withheld under this exemption contains details of the complainant, other members of staff, pupils and their parents of Hendre Infants School, and that they could be identified from disclosure of the data. He is therefore satisfied that the information withheld does constitute personal information. Additionally, he also notes that some of the data requested would in fact constitute sensitive personal data as defined by section 2 of the DPA.

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[http://www.ico.gov.uk/upload/documents/library/data\\_protection/detailed\\_specialist\\_guides/what\\_is\\_data\\_for\\_the\\_purposes\\_of\\_the\\_dpa.pdf](http://www.ico.gov.uk/upload/documents/library/data_protection/detailed_specialist_guides/what_is_data_for_the_purposes_of_the_dpa.pdf)

130. In relation to the information comprising the complainant's own personal data, the Commissioner notes that the Council has refused this by virtue of section 40(1) of the FOIA, whilst the third party personal data has been refused in reliance on section 40(2) of the FOIA.

### **Section 40(1) – personal information of the applicant**

131. Section 40(1) states that any information which constitutes the personal data of which the applicant is the data subject will be exempt under section 40(1) of the FOIA. As section 40(1) is an absolute exemption, there is no need to consider the data protection principles or conduct a public interest test.

132. The Commissioner notes that Council has refused the following items on the basis of section 40(1) of the FOIA:

#### ***Request 1***

- List 1, Item 15.
- List 2, Item 24.

#### **Request 2**

- Access to complainant's professional email account

133. In this case, as stated in paragraph 129 of this notice, the Commissioner is satisfied that some of the information the complainant is requesting will be her own personal data. The Commissioner has reached this conclusion on the basis that the information requested was in relation to the Council's (then) on-going investigation of which the complainant was the focus. The Commissioner is therefore satisfied that some of the withheld information is the personal data of the complainant and is exempt under section 40(1) of the FOIA.

### **Section 40(2) – personal data which is not that of the applicant**

134. Section 40(2) provides an exemption from the disclosure of personal information which is not that of the applicant's and where such disclosure would breach one of the principles of the DPA.

135. The Council is relying on section 40(2) in respect of the following items of the complainant's first request:

- List 1, Items 1, 2, 8, 12, 14, 18.
- List 3, Items 6 (duplicate of List 1, Item 8)
- List 3, Item 8 (duplicate of List 1, Item 12)

- List 3, Item 9.

136. It is also relying on section 40(2) in respect of item 2 of the complainant's second request and the whole of her third request as it considers that disclosure of the information falling within the scope of these items would breach the first data protection principle.

**Would disclosure contravene the first data protection principle?**

137. The first data protection principle requires that the processing of personal data be fair and lawful and,

- 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 met.

138. In the case of personal data, both requirements (fair and lawful processing, and a schedule 2 condition) must be satisfied to ensure compliance with the first data protection principle. If even one requirement cannot be satisfied, processing will not be in accordance with the first data principle.

*Would disclosure be fair?*

139. In his consideration of whether disclosure of the withheld information would be fair, the Commissioner has taken the following factors into account:

- a. The reasonable expectations of the data subjects.
- b. Consequences of disclosure.
- c. The legitimate interests of the public

*The reasonable expectations of the data subject*

140. The Commissioner's guidance regarding section 40 suggests that when considering what information third parties should expect to have disclosed about them, a distinction should be drawn as to whether the information relates to the third party's public or private life.<sup>2</sup> Although the guidance acknowledges that there are no hard and fast rules it states that:

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<sup>2</sup>[http://www.ico.gov.uk/~media/documents/library/Freedom\\_of\\_Information/Detailed\\_speci alist\\_guides/PERSONAL\\_INFORMATION.ashx](http://www.ico.gov.uk/~media/documents/library/Freedom_of_Information/Detailed_speci alist_guides/PERSONAL_INFORMATION.ashx)

*“Information which is about the home or family life of an individual, his or her personal finances, or consists of personal references, is likely to deserve protection. By contrast, information which is about someone acting in an official or work capacity should normally be provided on request unless there is some risk to the individual concerned.”*

141. The Commissioner's guidance therefore makes it clear that where the information relates to the individual's private life (i.e. their home, family, social life or finances) it will deserve more protection than information about them acting in an official or work capacity (i.e. their public life). However, not all information relating to an individuals' professional or public role is automatically suitable for disclosure.
142. The Commissioner considers the seniority of the data subject is an important factor when considering their reasonable expectations, and in his view, the more senior a person is, the less likely it will be unfair to disclose information about him or her acting in an official capacity.
143. The Commissioner also recognises that there is a widespread and general expectation that details of a person's employment, such as is contained within their HR (Human Resources) file should be considered confidential.
144. In this particular case, the complainant requested the following information, the disclosure of which in the Council's view, would not be within the reasonable expectations of the data subjects:

***Request 1, List 1***

***Item 1***

145. The Commissioner notes that this item asked for the complete NQT (Newly Qualified Teacher) / EPD (Early Professional Development School File).
146. The Council has informed the Commissioner that it contains information relating to the personal/professional development of individual members of staff who work or have worked at the school. As such, living individuals can be identified from the file, and in accordance with the Commissioner's guidance, would reasonably expect that this information is kept confidential.

***Item 2***

147. Item 2, List 1, asked for a complete record of "Restraint Use" employed at the school. Whilst the Council refused this request under section 40(2) of the FOIA, it provided a summary of the records of restraints so that individual pupils could not be identified.

148. The Council explained to the Commissioner that the information relates to the behaviour of individual pupils requiring the use of restraining techniques. The Commissioner notes that in addition to the name of the pupil, their date of birth and the date and time of the incident, the record contains the reason for the intervention, details of the incident itself and the level of risk.

***Item 8***

149. List 1, item 8 requested a complete record of dates and reports regarding [named individual N], the Council's Behaviour Support Adviser visits to the school from 2010 to 2012, and the respective exact dates that she provided behaviour management training to the NQT teachers and Learning Assistants as part of a school closure training day.

150. The Commissioner notes that the Council provided a summary of dates and reasons for visits, but refused to provide copies of the reports on the basis that they contain information relating to pupils. The reports contain the behavioural plans of individual children who were pupils at the school and the Council has argued that even if their names were redacted, they could still be identified from other information contained in their records and local knowledge.

***Item 12***

151. The information requested under list 1, item 12 was for a copy of the complete record of named [individual V], Educational Psychologist's visits and subsequent report to the school for 2010 to 2012.

152. The Council informed the Commissioner, that as with list 1, item 8, the information falling within the scope of this request contains sensitive personal information of pupils and their families. The Council further explained that whilst the complainant stated that she would accept this information with the children's names redacted, it still considers that individual pupils could be identified for the reasons stated in paragraph 149 of this notice.

***List 14***

153. The Commissioner notes that this item requested a complete record of all exclusions listed for the schools from 2008 to 2012 and each accompanying e-mailed report which the complainant sent to the Council's Exclusions Officer and Behavioural Support.

154. As with items 8 and 12 from list 1, the Council considers that the reasonable expectations of the data subjects, and those responsible for them, would be that the confidentiality of this sensitive personal information should be maintained.

***Item 18***

155. Item 18 of list 1 requested a copy of [named individual W's] (teacher) class monitoring report from specified dates when two Council Advisors reviewed the school.
156. The Council has informed the Commissioner that as the report contains the personal information of the named individual, relating to his performance as a teacher, and would feed into his personal professional development review, that it considers the reasonable expectations of the data subject would be that this information is not disclosed into the public domain.

***List 3, items 6, 8 and 9***

157. The Council considers that list 3, item 6 of the complainant's request is a duplicate of list 1, item 8; that list 3, item 8 is a duplicate of list 1, item 12; and that list 3, item 9 is a duplicate of list 1, item 14. The Commissioner is satisfied that this is the case and would refer the reader to paragraphs 149 and 150 in respect of list 3, item 6; paragraphs 151 and 152 regarding list 3, item 8; and paragraphs 153 and 154 for list 3, item 9.

***Request 2,***

***Request for access to complainant's professional email account***

158. The complainant clarified in her second request for information that she wanted home access to her professional email account so view both incoming and outgoing messages.
159. The Council has refused the complainant this access on the basis that it contains third party personal information regarding pupils and their families, staff employed by the Council and other third parties involved in the education profession. It considers that the reasonable expectations of the data subjects in this case would be that the information remains confidential.

***Item 2***

160. This request was regarding the exact date that a female child [named individual X] returned to the school from a period spent at a Nurture Unit within the Council's boundaries.
161. The Council confirmed to the Commissioner that the information relates to an individual pupil who attended the special resource base nurture class which caters for children with special identified needs. The Commissioner agrees with the Council that this constitutes sensitive

personal information with the expectation from the child's parents or carers that it would remain confidential.

### **Request 3**

162. The Commissioner notes that this request relates to the Council's responses to the complainant dated 2 October 2014 and 27 November 2014 in respect of her FOIA requests of 3 September 2014 and 9 November 2014 which stated:

*"Under the powers delegated to me by Caerphilly County Borough Council and having considered representation made to me by officers and third parties whose interests appear to be potentially affected or prejudiced, I have made the following decision..."*

163. The Council explained to the Commissioner that the complainant is referring to the wording it used in the exemption forms which were provided to explain the section 40(2) exemption. It further explained that when an exemption from disclosure is being considered under the FOIA, the Exemption Panel meet, and officers make representations to ensure that all the facts are available to enable the Exemption Panel to make an informed decision. If an exemption is agreed, the exemption form is signed by the Principal Solicitor, which is what happened in respect of these two requests.

164. The Commissioner notes that the complainant requested the names of the officers who made representations to the Exemption Panel.

165. The Council has informed the Commissioner that any consideration of whether to release information about its employees includes an assessment of their role within the Council, and factors such as their grade (whether senior or junior position), and whether it is a public facing role are considered relevant. It further informed the Commissioner that it does not take an absolute stance, but also considers the nature of the personal information itself, and the responsibilities the employees in question have. It added that it is less likely to release information about more junior employees or those who do not deal directly with the public in an operational capacity.

166. In its consideration of the disclosure of the names of the officers concerned, the Council noted that their individual roles are relatively junior, in that they were below third tier, that they are not public facing, and the officers themselves were not ultimately responsible for the decision to apply the exemption, which was certified by the Principal Solicitor. As such, the Council has argued that they would not have had any expectation that their names would be released into the public domain.

167. Having considered the withheld information and the arguments put forward by the Council in respect of the reasonable expectations of the data subjects, the Commissioner is satisfied that the pupils, their families, the Council employees would reasonably expect that the personal information outlined above would remain confidential.

### ***Consequences of disclosure***

168. Having already outlined the nature of the withheld information within his analysis of the reasonable expectations of the data subjects in paragraphs 145 to 167 of this notice, the Commissioner does not consider there is anything further to gain from repeating it in this part of his analysis. His approach is therefore to consider the information either as relating to the pupils and their families, or to information regarding the Council's employees.

### ***Information regarding pupils and their families***

169. The Commissioner has no hesitation in concluding that the consequences of the disclosure of information regarding the pupils and their families, whether in respect of exclusions, physical restraint, behavioural plans, psychologist's reports or special identified needs, would undoubtedly be distressing to the data subjects' and their families.

### ***Information regarding employees***

170. The Commissioner's guidance regarding the disclosure of information about employees states that:

*"Disclosure is unlikely to be fair if it would have unjustified adverse effects on the employees concerned. Although employees may regard the disclosure of personal information about them as an intrusion into their privacy, this may often not be a persuasive factor on its own, particularly if the information relates to their public role rather than their private life."*

171. The Commissioner notes that the nature of the information regarding the Council's staff either concerns their personal professional development and performance, or the names of relatively junior employees contributing to an FOIA Exemption Panel.

172. In terms of the former, and consistent with his approach to the disclosure of this type of personal information, he considers that the data subjects are highly likely to view the disclosure of this personal information regarding them as unnecessarily intrusive and distressing.

With regard to the individual officers contributing to the Exemption Panel, he acknowledges that they too, are likely to view the disclosure of their names as intrusive which they may also find distressing.

*The legitimate public interest in disclosure*

173. Notwithstanding the data subjects' reasonable expectations, or any damage or distress caused to them by 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 disclosure.
174. The Commissioner notes that the complainant has a personal interest in obtaining this information as she considers it relevant to the Council's investigation of which she was the focus. However, whilst the Commissioner acknowledges the complainant's personal interest in obtaining this information, he is mindful that any disclosure under the FOIA is to the world at large. Additionally, the Commissioner can see no compelling legitimate public interest in the disclosure of this information.
175. In weighing the balance between the reasonable expectations of the data subjects' and the consequences of disclosure of the disputed information, against a lack of perceived legitimate public interest in disclosure, the Commissioner considers that the case for protecting the confidentiality of this information is significant. Indeed, he has no hesitation in concluding that disclosure of this information would not be fair as the balance in his view, is weighted heavily in favour of non-disclosure. Consequently, he is satisfied that the Council appropriately withheld the disputed information on the basis of section 40(2) of the FOIA.

**Procedural matters**

**Section 10 – timescale for compliance with the request**

176. The Complainant has raised concerns regarding the Council's procedural handling of her three requests for information. She considers that the Council has intentionally withheld, delayed and purposely obstructed provision of the information which prevented her from being able to properly defend herself during the Council's investigation of which she was the focus.
177. Section 10 of the FOIA sets out the timescales for responding to an FOIA request and states 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.

178. The complainant has referred to having initially requested this information in January 2014 from the Council, however as the complainant has confirmed in her letter to the Commissioner dated 2 September 2015:

*"The requested information was not being requested by a member of the public or for the release into the public domain."*

179. The Commissioner would point out that he cannot investigate the procedural handling of requests for information which were made as part of the (then) on-going investigative process, as it exceeds his remit. The Commissioner can only consider the procedural handling of the three FOIA requests.

180. Having considered the Council's procedural handling of each of the requests separately, he notes that request one was submitted on 3 September 2014 and substantively responded to on 2 October 2014 which is 20 working days from the date of receipt if the request was received the day after it was posted. He has found no breach of section 10 of the FOIA for information which was provided to the complainant as part of its initial response.

181. However, he notes that the Council has subsequently provided a limited amount of information at its internal review stage and during the course of the Commissioner's investigation. He has therefore recorded a breach of section 1(1) of the FOIA in respect of this request for information.

## **Section 17 – refusal of the request**

182. Section 17 of the FOIA concerns the refusal of the request and section 17(1) states that:

*"A public authority which, in relation to any request for information, is to any extent relying on a claim ... that information is exempt information must, within the time for complying with section 1(1) give the applicant a notice..."*

183. The complainant's her second request for information was dated 9 November 2014 with the Council providing its substantive response on 19 December 2014. The Commissioner notes that the 9 November 2014 was in fact a Sunday, therefore the earliest the request could have been received by the Council was 11 November 2014. The deadline for compliance with the required timescale would therefore have been 9 December. As the Council either stated that it did not hold relevant information, or withheld information by virtue of section 40 of the FOIA, the Council breached section 17(1) of the FOIA.

184. The Commissioner notes that the complainant's third request was dated 17 December 2014, with the Council providing its substantive response on 3 February 2015. The Council refused this request by virtue of section 40(2) of the FOIA and has not subsequently disclosed any information relevant to the request to the complainant. This is clearly in excess of the required timescale and is therefore a breach of section 10 of the FOIA.
185. Whilst the Commissioner acknowledges that there were delays with the Council's procedural handling, of the complainant's requests for information, he can find no evidence to support the complainant's allegations that the Council intentionally withheld, delayed and purposely obstructed provision of the information.

## **Other matters**

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### **Internal review**

186. The Commissioner acknowledges that it is not a formal requirement for a public authority to conduct an internal review under the FOIA. However, the Section 45 Code of Practice recommends that public authorities do undertake an internal review and that it should be done promptly. The Commissioner has also produced guidance in relation to this matter which recommends that it takes no longer than 20 working days in most cases, and in exceptional circumstances, no longer than 40 working days.
187. The Commissioner notes that the complainant requested an internal review of request one on 8 November 2014. However, the Council did not send the complainant details of its internal review until 26 February 2015.
188. With regard to request two, the complainant requested an internal review on 12 January 2015 with the Council providing correspondence in respect of the internal review on 2 March 2015.
189. The Commissioner expects the Council to deal with requests for an internal review within the recommended timescales in future.

## Right of appeal

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190. 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)

191. 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.

192. 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** .....

**Andrew White**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**