

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 22 January 2018

Public Authority: St Thomas More Catholic Primary School

Address: Appleton Road
Eltham
London
SE9 6NS

Decision (including any steps ordered)

1. The complainant has requested information from St Thomas More Catholic Primary School, Eltham ("the School") relating to a Memorandum of Understanding.
2. Some information was provided within the scope of the request, but the School withheld sections from three sets of minutes of meetings of the School's Governing Body. The Commissioner's decision is that the School has correctly withheld this information under section 36(2) of the FOIA – Prejudicial to the effective conduct of public affairs. In addition, some items from the Costs column of the School Action Plan, which fell within the scope of the request, were withheld. The Commissioner's decision is that the school correctly withheld some of these items under section 40(2) of the FOIA – Third party personal data – and correctly withheld one item under section 43(2) – Commercial interests. However, the Commissioner has determined that the disclosure of row 4.2 of the Costs column of the School Action Plan for the academic year 2015-2016, which was withheld under section 40(2), would not breach any principle of the Data Protection Act 1998, and should be disclosed to the complainant.
3. The Commissioner requires the public authority to take the following step to ensure compliance with the legislation:
 - Provide the complainant with row 4.2 of the School Action Plan for the academic year 2015-2016, unredacted.

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

Request and response

5. On 28 September 2016, the complainant wrote to the School and requested information in the following terms (numbers have been added for ease of reference):

"The documents that I am asking for under the Act are as follows:

1. The full unredacted minutes of all Board of Governor meetings for the last 18 months and especially those talking about the Memorandum of Trust.

2. Appendix 1. 2 and 3 of the Memorandum of Trust dated 7th October 2015 which you failed to include in your response to me.

3. The minutes and agenda of the meeting that happened on 29/2/16 and the document that grew from this.

4. The four review records as are mandated for in the Memorandum of Trust at Part 5- 1 per term.

5. The name of the person or persons if they are different people who represented the London Borough of Greenwich in the proposals, reviews, etc of the Memorandum of Trust.

6. The name of the person or persons if they are different people who represented the Archdiocese of Southwark Education Commission in the proposals, reviews, etc of the Memorandum of Trust.

7. A copy of the School Improvement Plan referred to in the Memorandum.

8. A copy of the Action Plan that covered 1st July 2015-31st August 2016."

6. The School responded on 20 October 2016. Some information was enclosed with the response, as follows:
 - With regard to request 1 (minutes), the School disclosed partially redacted minutes from two meetings of the School's governing body dated 15 June 2015 and 16 November 2015 respectively. The final

section of each was withheld under section 40(2) of the FOIA; the school explained they contained "*confidential personal material issues.*"

- With regard to request 2, it provided the Appendices, with the exception of some parts of Appendix 3 ("*third party details*") which were redacted under section 40(2) of the FOIA.
 - With regard to request 3, the School explained that it was unsure what was being requested and asked for clarification.
 - No information was provided in respect of requests 4, 5 and 6.
 - With regard to requests 7 and 8, the School explained that the School Action Plan and School Improvement Plan were the same document as Appendix 3, which had been provided in a redacted form (above).
7. Following an internal review, the School wrote to the complainant on 13 June 2017. It upheld its position.

Scope of the case

8. The complainant contacted the Commissioner on 13 March 2017 to complain about the way her request for information had been handled, at which stage an internal review had not been requested. She also raised a concern about a separate request for information previously made on 23 May 2016, which is the subject of a separate ICO decision notice. After some confusion around the nature of the complaint to the ICO, due to a related matter between the complainant and the local authority, the Commissioner advised the complainant to ask the School to conduct an internal review.
9. After the internal review, it became apparent that the complainant had not received the School's response of 20 October 2016 nor the accompanying documents. These were re-sent to the complainant on 12 July 2017 by recorded delivery.
10. It subsequently emerged that, when re-sending the documents on 12 July 2017, the School had provided the full set of minutes dated 15 June 2015 to the complainant including the previously withheld section. However, the 'confidential' section of the minutes dated 16 November 2015 was still withheld.
11. The Commissioner then asked the School for further explanations as to what had been withheld, and which exemptions under the FOIA were being applied.

12. The School stated that it wished to apply section 36(2) of the FOIA – Prejudicial to the effective conduct of public affairs – to the 'confidential' section of the minutes dated 16 November 2015.
13. In addition, it wished to apply section 40(2) – Third party personal data – to the whole of the Costs column of the School Action Plan, which had been withheld.
14. The School provided some information with regard to requests 5 and 6.
15. The Commissioner then returned to the School to ask whether, with regard to request 1, there were any other minutes of meetings falling within the scope of the request, which covered the period of 18 months leading up to the request.
16. The School advised the Commissioner that there had been five governors' meetings in total during the relevant period. It subsequently provided copies of the remaining three sets of minutes, from meetings dated 2 March 2015, 29 February 2016 and 20 June 2016 respectively.
17. Of these, the School withheld 'confidential' sections from the minutes of 29 February 2016 and 20 June 2016 respectively, under section 36(2) of the FOIA. There was no 'confidential' part of the minutes of 2 March 2015.
18. The Commissioner then returned to the School again to explain that, in her view, some of the Costs column of the School Action Plan could be disclosed to the complainant, since the withheld information did not all appear to fall within the exemption at section 40(2).
19. The School agreed that some of the rows could be disclosed; however, it continued to withhold some rows under section 40(2). In addition, the School stated that it now considered that one of the withheld rows would be exempt from disclosure under section 43(2) of the FOIA – Commercial interests.
20. The complainant was, accordingly, provided with a fresh copy of the School Action Plan, from which only twelve items had been redacted from the Costs column.
21. The complainant asked the Commissioner to continue to investigate the School's handling of her request for the withheld items in the Costs column of the School Action Plan, and the withheld sections of the three sets of minutes.
22. The Commissioner considers that the remaining scope of the case has been to consider whether the School has correctly withheld those sections marked 'confidential' from the minutes of three meetings of the

School's governing body, which took place on 16 November 2015, 29 February 2016 and 20 June 2016 respectively, under section 36(2) of the FOIA. She has also considered whether the School was correct to withhold some rows from the Costs column of the School Action Plan under section 40(2) of the FOIA. She has also considered whether one row of the Costs column was correctly withheld under section 43(2) of the FOIA.

Reasons for decision

The withheld sections of the minutes of meetings of the governing body

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

23. Section 36(2) provides that information is exempt if in the reasonable opinion of the qualified person, disclosure-
 - (b) would, or would be likely to inhibit-
 - (i) the free and frank provision of advice, or
 - (ii) the free and frank exchange of views for the purposes of deliberation, or
 - (c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
24. In this case, the School has withheld part of the information requested by the complainant under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c); specifically, sections from three sets of minutes of meetings of the School's governing body.
25. For the exemption to be engaged, the proper qualified person for the public authority must have given his or her opinion on the application of the exemption.
26. In this case, the School's Chair of Governors, Mrs Christine Grice provided the opinion. The Commissioner is satisfied that she is the qualified person for the purposes of section 36.
27. Mrs Grice gave her opinion that sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) were engaged on 15 September 2017.
28. The School has provided the Commissioner with a Record of the Qualified Person's Opinion which is dated 15 September 2017.

29. Although this record incorrectly summarises the information about which the opinion was sought, it is apparent from the arguments considered by the qualified person that she considered the correct withheld information; that is, the confidential sections of the minutes.
30. The qualified person is familiar with the withheld information since she attended the three governors' meetings in question and had received the minutes in the normal course of business.
31. The qualified person gave her opinion that disclosing this information would be likely to inhibit the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation, and would be likely to prejudice the effective conduct of public affairs.
32. The Commissioner is satisfied that the Council has obtained the opinion of the proper qualified person and so this element of the exemption is met.
33. In order to determine whether the exemption is engaged, the Commissioner must then go on to consider whether the opinion was reasonable with regard to the following:
 - whether the prejudice claimed relates to the specific subsections of section 36(2) that the Council is relying upon;
 - the nature of the information and the timing of the request; and
 - the qualified person's knowledge of or involvement in the issue.
34. The Commissioner has recently issued guidance on section 36 of the FOIA. With regard to what can be considered a 'reasonable opinion' it states the following:

"The most relevant definition of 'reasonable' in the Shorter Oxford English Dictionary is 'In accordance with reason; not irrational or absurd'. If the opinion is in accordance with reason and not irrational or absurd – in short, if it is an opinion that a reasonable person could hold – then it is reasonable."
35. It is important to note that, when considering whether section 36 is engaged, the Commissioner is making a decision not on whether she agrees with the opinion of the qualified person, but whether it was reasonable for him or her to reach that opinion.
36. Having reviewed the information placed before the qualified person, the Commissioner is satisfied that the qualified person considered relevant arguments. The qualified person had access to the withheld information,

being the 'confidential' sections of the minutes, and had indeed attended the meetings at which the minutes were taken.

37. By way of background, the School was, at the date of the request, taking part in discussions regarding the amalgamation of school services in the local area and a number of options were being considered.
38. The qualified person has argued that discussions around this should be treated with sensitivity, and that, at the time of the request, the issues under consideration at the governors' meetings were still 'live' since consideration was being given as to the best way of sharing services between schools.
39. The qualified person has explained that she considers that disclosure of the information would *"potentially impact similar future discussions in relation to education provision."* She argues that it is *"not unreasonable to conclude that information would be less descriptive and couched in a more cautious manner, and that this would have a harmful effect on the deliberation process in relation to the provision of education."* The qualified person also asserts that *"disclosure would potentially impact similar future discussions not solely in relation to education provision but in other areas of the School,"* relating to the concept of the *"chilling effect."*
40. The Commissioner's guidance¹ on the application of section 36 sets out that *"arguments under s36(2)(b)(i) and (ii) are usually based on the concept of a 'chilling effect'. The chilling effect argument is that disclosure of discussions would inhibit free and frank discussions in the future, and that the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision making."* However, the Commissioner notes that *"Civil servants and other public officials are expected to be impartial and robust when giving advice, and not easily deterred from expressing their views by the possibility of future disclosure."*
41. The qualified person considers that the School needs *"a safe space to develop ideas, debate live issues, and reach decisions away from external interference and distraction."*

¹ https://ico.org.uk/media/for-organisations/documents/1175/section_36_prejudice_to_effective_conduct_of_public_affairs.pdf

42. In the Commissioner's view, whether it is reasonable to think that a chilling effect would occur will depend on the circumstances of each case, including the timing of the request, whether the issue is still live, and the actual content and sensitivity of the information in question.
43. In this case, the withheld information records some of the discussions by the governing body of the School, in addition to other persons connected to the School who were in attendance during the confidential discussions, regarding the formalising of arrangements between the School and other local education providers.
44. As was made public, the discussions resulted in a partnership being formed between the School and the local secondary school, St Thomas More Catholic Comprehensive School ("the secondary school"), which came into operation at the beginning of the academic year 2015-2016.
45. The withheld information is from minutes which cover a timeframe of just over seven months during the academic year 2015-2016. During this time, the School sought to establish the best way to continue to provide sharing services going forward. The School advised parents in a letter dated 9 March 2016 that the partnership between the two schools would be continuing for a further year, and may become permanent.
46. The request under consideration in this notice was made at the beginning of the academic year 2016-2017.
47. The Commissioner notes that, while the decision had been made to continue the partnership for a further year by the date of the request, the discussions that had taken place (which gave rise to the withheld sections of the minutes) referred to various possible scenarios which were explored and considered, for that present time and going forward, and, concerned education providers other than just the School. These options were discussed freely, and with reference to meetings that had taken place with other interested parties.
48. Returning to the wording of the FOIA, for the exemptions at section 36(2)(b)(i) and 36(2)(b)(ii) to be engaged, it is not necessary that the withheld information contains either advice and/or the exchange of views; the question is whether it is reasonable for the qualified person to have the opinion that the *processes* of the free and frank provision of advice, and the free and frank exchange of views, would be (or would be likely to be) prejudiced if the information was disclosed.
49. The Commissioner is aware that, like many education providers, the School regularly conducts investigations and has discussions regarding the future provision of its services, and she considers that it is reasonable for the qualified person to consider that disclosure of the

withheld information may lead to an understanding that all future discussions and investigations would be made public, which in turn may affect the nature of them.

50. The Commissioner considers that it is, therefore, reasonable for the qualified person to consider that disclosure of the withheld information would be likely to prejudice these processes going forward and would have a chilling effect.
51. As noted in the Commissioner's guidance, referenced previously, the exemption at section 36(2)(c) – otherwise prejudicial to the effective conduct of public affairs - is concerned with the other effects on the public authority of making the information public; for example, in the diversion of resources necessary to deal with the information being made public.
52. In this case, the qualified person's opinion focused primarily on sections 36(2)(b)(i) and 36(2)(b)(ii), rather than on section 36(2)(c). However, she states that *"the School should have the ability to disclose such information publicly in the appropriate manner at the appropriate time... as has happened with the various update letters and consultations with the parents."*
53. The Commissioner considers that this is relevant to the conduct of public affairs, since it explains that, in the qualified person's opinion, the School is conducting its affairs effectively by choosing when and how to inform parents of decisions that have been taken.
54. The Commissioner considers that, in all the circumstances of the case, it is reasonable for the qualified person to hold the view that this could be prejudiced were the withheld information to be released.
55. The Commissioner is therefore satisfied that section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) of the FOIA are engaged, and has now gone on to consider the public interest test, balancing the public interest in disclosure against the public interest in maintaining the exemption.

The public interest test

56. Section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) of the FOIA are qualified by the public interest test as set out in section 2(2) of the FOIA. This means that even though the exemptions are engaged, it is necessary to consider whether the public interest in favour of maintaining the exemptions outweighs the public interest in disclosure. The exemptions can only be relied on if it does.
57. When considering complaints about the application of section 36 in cases where the Commissioner finds that the qualified person's opinion

is reasonable, she will also consider the weight of that opinion in applying the public interest test. She will consider the severity, extent and frequency of that inhibition in assessing whether the public interest test dictates disclosure.

Arguments in favour of disclosure

58. There is always a public interest in ensuring that a public authority's statutory obligations are carried out in a transparent manner and consistently with its published policies.
59. The complainant has stated that she is seeking a "*clearer picture of what decisions have been made on behalf of the Parent Body.*" In an email to the local authority dated 7 November 2016, which also concerned her related complaint, she stated that: "*I believe there has been no transparency with the parents at all in relation to numerous decisions. There has been no genuine consultation... [there has been] complete lack of information sharing and transparency in relation to the sharing of staff and finance as well as other matters.*"
60. The School itself has also acknowledged that "*there is a general public interest in disclosure of information to the public to demonstrate openness and transparency. It also accepts that there is an argument that more openness about the process and delivery of its work may lead to greater accountability, an improved standard of public debate and improved trust.*"

Arguments in favour of maintaining the exemptions

61. In the School's view, the public interest in maintaining the exemptions outweighs the arguments in favour of disclosing the information.
62. The qualified person's view on this overlaps with the School's reasons for applying the exemptions initially. That is, it considers that it is a matter of public interest that a public authority should be able to conduct investigations and hold discussions freely, frankly, and in confidence. This is because "*the loss of frankness and candour would damage the quality of advice and deliberation and lead to poorer decision-making.*"
63. The School also considers that it has fulfilled its public duty to conduct its affairs in a transparent manner by informing parents and interested parties at various times. Specifically, it wrote to parents at the beginning of the academic year 2015-2016, and organised a meeting to take place during the first half of the autumn term. After the meeting, the discussions that had taken place were summarised in a further letter to parents, in which it was explained that the partnership arrangement

between the School and the secondary school had been formalised in a Memorandum of Understanding.

64. The School provided a copy of the Memorandum of Understanding to the complainant in redacted form the following September: the redactions are the subject of a separate ICO decision notice.
65. The qualified person's opinion records that, in the School's view, "*there is no public interest in the information from the confidential section [sic] being disclosed unless it assists those who wish to challenge the decision to amalgamate services*" and further explains that there is an appeals process and the opportunity to appeal to the Secretary of State for those who are unhappy with the decision to amalgamate services.

Balance of the public interest

66. In cases where a public authority has withheld information under section 36(2) of the FOIA, the Commissioner, as explained in the ICO guidance referenced previously, considers that the qualified person's opinion, if found to be reasonable, will affect the weight of the public interest arguments, but will also go on to consider the severity, extent and frequency of that prejudice or inhibition in forming her own assessment of whether the public interest test dictates disclosure.
67. The Commissioner has already determined in this case that the qualified person's opinion that the information should not be disclosed is a reasonable opinion. This lends some weight to the arguments in favour of maintaining the exemptions, but the Commissioner will still go on to consider all the circumstances of the case.
68. The Commissioner is aware that the complainant is seeking to understand the School's decision to enter into a partnership with the secondary school, to understand the details of the agreement, and specifically to understand the financial arrangements between the schools.
69. The complainant's specific concerns surrounding the nature of the financial arrangements between the schools is the subject of a separate ICO decision notice, since this forms part of the redacted section of the Memorandum of Understanding which was requested separately.
70. The Commissioner has considered the withheld information in this case, which is essentially a record of discussions that took place at meetings of the School's governing body in November 2015, February 2016 and June 2016 respectively, regarding issues relevant to the partnership agreement. The agreement had already been entered into by the dates of these meetings; however this does not affect the potential sensitivity of the withheld information.

71. The Commissioner is aware that the complainant considers that the school community, including parents, were not adequately consulted regarding the decision to form a partnership. However, the information that has been withheld would not address or resolve this issue, since the minutes were recorded subsequent to the partnership having been formed.
72. The Commissioner understands that the complainant would also prefer the school community, including parents, to be consulted regarding the sharing of services going forward.
73. However, the Commissioner considers that there is very little wider public interest in disclosing the withheld sections of the minutes. She notes that from September 2015 onwards, the existence of the partnership between the schools had been a matter of public record, and that the discussions which followed were of a general nature.
74. The Commissioner considers that there is a strong public interest in public authorities being able to exchange views freely and frankly.
75. She agrees that disclosure of the information which has been withheld under section 36(2) of the FOIA in this case would be likely to have an effect on the nature of discussions at meetings of the School's governing body going forward, being likely to affect their frankness and candour.
76. The Commissioner has therefore determined that the balance of the public interest arguments is in favour of maintaining the exemptions, and that the withheld sections of the three sets of minutes should not be disclosed.

The withheld items from the Costs column of the School Action Plan

Section 40(2) – Third party personal data

77. This exemption provides that any third party personal data is exempt if its disclosure would contravene any of the Data Protection Principles set out in Schedule 1 of the Data Protection Act (DPA).

Is the withheld information personal data?

78. Personal data is defined by the DPA as any information relating to a living and identifiable individual.
79. 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, has them as its main focus, or impacts on them in any way.

80. Twelve items have been redacted from the Costs column of the School Action Plan in total. Of these, the School has explained it considers that eleven are the personal data of supply teachers in the School. The twelfth has been withheld under section 43(2) of the FOIA, as explained further on.
81. The eleven items redacted under section 40(2) are in rows 1.1, 2 (three items), 2.9, 3, 4.1, 4.2, 5.3 and 15 (two items) of the School Action Plan.
82. The eleven items, which have been provided to the Commissioner for consideration, chiefly comprise amounts of money, sometimes shown as part of a calculation eg £X x 2. The School has explained that these amounts of money represent the cost of providing cover for class teachers while the teachers carry out other activities, such as carrying out learning walks around the School or attending training. They are the amounts of money which the School is budgeting to be paid to a supply teacher, shown either as an hourly rate of pay, multiplied in some cases by the number of hours' work required, or a daily or part-daily rate.
83. The School has explained that, generally, only two supply teachers are used within the School and that their identity is therefore well-known within the school community.
84. From the figures given, it is possible to calculate the hourly and/or daily rate of pay of the individual supply teachers.
85. The Commissioner is satisfied that the rows which specify amounts of money relate to living individuals and agrees with the School that, even though they are not named on the School Action Plan, the individuals are identifiable from the withheld data.
86. The Commissioner notes that one of the eleven rows of the Costs column redacted under this exemption, row 4.2, does not specify an amount of money, but rather is a phrase indicating the amount of time that a supply teacher will be required for. However this is still information from which an individual might be identified and is therefore personal data.
87. She will therefore consider whether disclosure of the eleven items would breach any of the data protection principles.

Would disclosure breach the Data Protection Principles?

88. The Data Protection Principles are set out in Schedule 1 of the DPA. The first principle and the most relevant in this case states that personal data should only be disclosed in fair and lawful circumstances. The Commissioner's considerations below have focused on the issue of fairness.
89. In considering fairness, the Commissioner finds it useful to balance the reasonable expectations of the individuals, the potential consequences of the disclosure and whether there is legitimate public interest in the disclosure of the information in question.

Reasonable expectations

90. Whether an individual might reasonably expect to have his or her personal data released depends on a number of factors. These include whether the information relates to an employee in their professional role or to them as individuals, the individual's seniority or whether they are in a public facing role.
91. The School has explained that, in its view, the personal data relates to "*various individual's [sic] public life within the school*" but has also stated that "*information relating to salary matters is information of a personal and private nature.*" The School argues that "*the staff have a reasonable expectation that information about their salaries and otherwise be kept confidential.*"
92. The Commissioner notes that the withheld information, relating as it does to rates of pay, clearly relates to the supply teachers' public role.
93. However, she notes that the School does not routinely make public the hourly and/or daily rates of pay received by supply staff, which lends weight to the view that the individuals would have a reasonable expectation that it would not be disclosed.

Consequences of disclosure/Damage and distress

94. Disclosure is unlikely to be fair if it would have unjustified adverse effects on the named individuals.
95. In this case, the School has stated that "*there exists the possibility that one or more of the individuals concerned may be distressed if they were to learn that their personal data had been disclosed to a third person and to the world at large.*"
96. The Commissioner accepts that the level of detail in the withheld information, being the breakdown of the School's budget for specific

cover for specific lessons/days, is high, and would enable scrutiny of the individuals' pay. Disclosure would potentially be an invasion of their privacy and could be distressing for the two supply teachers.

97. However, there is an exception, with regard to row 4.2 of the Costs column. This is simply a phrase explaining that cover will be needed for part of a day and does not specify any amount of money. Accordingly, the Commissioner has determined that it would not be unfair to disclose this item and that it should be disclosed to the complainant.

Balancing the rights and freedoms of the individuals with the legitimate interests in disclosure

98. With regard to the ten remaining rows under consideration in this section, given the importance of protecting an individual's personal data, the Commissioner's 'default' position in cases where section 40(2) has been cited is in favour of protecting the privacy of the individuals. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a more compelling interest in disclosure which would make it fair to do so.
99. There is always a public interest in a public authority's expenditure, and for this reason there is already much information regarding salaries of public officials in the public domain.
100. The Commissioner has issued guidance² on dealing with requests for salary information at a public authority. This makes it clear that seniority of staff is a key factor in deciding whether or not precise salary information should be disclosed.
101. The guidance also explains that: "*exceptional circumstances are needed to justify the disclosure of exact salaries when they are not routinely published.*"
102. The Commissioner is aware that some general information is in the public domain regarding rates of pay for supply staff in primary schools, but that it is quite non-specific and reveals quite significant variation depending on age and experience, and whether or not individuals are paid through an agency.

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https://ico.org.uk/media/1187/section_40_requests_for_personal_data_about_employees.pdf

103. Taking into account the circumstances of the case and the fact that supply teachers are not considered to hold senior posts within a public authority, the Commissioner does not consider that it would be fair to disclose rows 1.1, 2 (3 items), 2.9, 3, 4.1, 5.3 and 15 (2 items) of the School Action Plan.

104. Accordingly the Commissioner has determined that these rows have been correctly withheld under section 40(2) of the FOIA.

Section 43(2) – commercial interests

105. One item from the Costs column of the School Action Plan has been withheld by the School. It appears next to the entry in the Resource column: "*Link to RA SALT EP,*" being a resource which is required for the Action: "*Share Resources and Projects to support inclusion.*"

106. The School considers that the item, which specifies an amount of money, is exempt under section 43(2) of the FOIA – Commercial interests.

107. Section 43(2) of the FOIA states that information is exempt if its disclosure would, or would be likely to, prejudice the commercial interests of any person, including the public authority holding it. The exemption is subject to the public interest test, which means that even if it is engaged, account must be taken of the public interest in releasing the information.

108. The exemption can be engaged on the basis that disclosing the information either 'would' prejudice someone's commercial interests, or, the lower threshold, that disclosure is only 'likely' to prejudice those interests. The term 'likely' is taken to mean that there has to be a real and significant risk of the prejudice arising, even if it cannot be said that the occurrence of prejudice is more probable than not.

109. For section 43(2) to be engaged the Commissioner considers that three criteria must be met:

- Firstly, the actual harm which the School alleges would be likely to occur if the withheld information was disclosed has to relate to the commercial interests;
- Secondly, the School must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice to those commercial interests; and
- Thirdly, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met, i.e.

whether there is a real and significant risk of the prejudice occurring.

Commercial interests

110. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her guidance³ on the application of Section 43. This explains 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."

111. The School has explained that the entry relates to the amount of money payable to the local authority, the Royal Borough of Greenwich, for support with restorative approaches ('RA'), speech and language teaching ('SALT') and for the services of an Educational Psychologist ('EP') within the School.

112. It considers that *"the fees the Royal Borough of Greenwich charges schools per day is in the public domain, however, how much the school pays the council is a private matter between the supplier and the school."*

113. The Commissioner is satisfied that the actual harm alleged by the School relates to the commercial interests of both itself and the local authority. Accordingly, she is satisfied that the first criterion is met.

Causal link

114. When investigating complaints which involve a consideration of prejudice arguments, the Commissioner considers that the relevant test is not a weak one and a public authority must be able to point to prejudice which is *"real, actual or of substance"* and to show some causal link between the potential disclosure and the prejudice.

115. The School has explained that the risk of prejudice, to the School and the local authority, relates to *"the conduct of future bids for the service and the ability to obtain a competitive rate for the service."*

116. The Commissioner agrees that the disclosure of a fee paid for the provision of services to a school by a local authority has a direct link to

³ <https://ico.org.uk/media/for-organisations/documents/1178/commercial-interests-section-43-foia-guidance.pdf>

the possibility that prejudice could occur to the school or the relevant local authority with regard to negotiations over the fee to be paid on other occasions.

Likelihood of prejudice

117. In *Hogan and Oxford City Council v the Information Commissioner* (EA/2005/0026 and 0030) the Tribunal said: "*there are two possible limbs on which a prejudice-based exemption might be engaged. Firstly the occurrence of prejudice to the specified interest is more probable than not, and secondly there is a real and significant risk of prejudice, even if it cannot be said that the occurrence of prejudice is more probable than not.*" (paragraph 33)
118. The School has explained that, having consulted with the local authority, it is satisfied that the information is confidential and that its disclosure to the world at large, under the FOIA, would be likely to put the local authority at a commercial disadvantage. This is because disclosure of the information would give the local authority's competitors confidential information about their fee pricing. This would give competitors an unfair advantage as it would potentially enable a competitor to undercut the fees charged by the local authority.
119. The School also believes that its own commercial interests would be likely to be prejudiced if the withheld information was released into the public domain. This is because it considered that businesses would be less willing to contract with it if it was believed that it may be required to routinely disclose information under FOIA which was considered to be commercially sensitive.
120. The Commissioner has considered the information in the context of the remainder of the document as it has been disclosed.
121. Despite the non-explicit description of the item being costed ("*Link to RA SALT EP*"), which does not refer directly to the local authority, she is aware that the abbreviations – particularly 'EP' with reference to an Educational Psychologist – are in common usage by people in and connected to educational establishments, and that it is reasonably common knowledge that the services of an Educational Psychologist would be sourced externally.
122. The Commissioner accepts the School's explanation that the amount that it paid is confidential and was the outcome of negotiations between it and the local authority. The School expects itself and the local authority to be able to negotiate freely for the provision of these services and to "*obtain a competitive rate.*"

123. A school may wish to source the provision of support services from elsewhere, such as from other local authorities, or from the private sector. The provision of such services can therefore be regarded as a competitive market.
124. She therefore considers that the disclosure of the figure paid to the local authority for additional services would create a real and significant risk of prejudice to the commercial interests of both the local authority and the School.
125. For all of these reasons the Commissioner has found that the section 43(2) exemption is engaged and therefore has now gone on to consider the public interest test.

The public interest test

126. Section 43(2) is a qualified exemption, which means that even where the exemption is engaged, information can only be withheld where the public interest in maintaining that exemption outweighs the public interest in disclosure.

Public interest arguments in favour of disclosure

127. There is always a public interest in public authorities conducting their business in an open and transparent manner, and enabling the scrutiny of how public money is spent.
128. The Commissioner also accepts that it may be of interest in the school community to be informed of the amount the School had allocated to the provision of additional support services.

Public interest arguments against disclosure

129. In her guidance on section 43(2), referenced previously, the Commissioner notes that *"there is a public interest in allowing public authorities to withhold information which, if disclosed, would reduce its ability to negotiate or compete in a commercial environment."*
130. With particular reference to the commercial interests of the local authority in this case, the Commissioner has considered the following extract from her guidance: *"it is not always in the public interest to place information which explains how.... income is generated [by public authorities] into the public domain. This could inform potential competitors and may lessen any competitive advantage held by the public authority. This may have a significant impact upon the ability of the public authority to operate in the relevant marketplace."*

131. As referred to in the guidance, in the case of *Council of the Borough and County of the Town of Poole v IC* (EA/2016/0074), which concerned a case where a local authority had to compete for the provision of services to a school with other local authorities and private sector providers, the Tribunal accepted that *"the Council was acting here in the competitive market for the provision of services to others."*
132. The public interest arguments against the disclosure of the information can therefore be said to be strong with regard to the commercial interests of the local authority.

Balance of the public interest arguments

133. The Commissioner understands that release of the information into the public domain would undermine the ability of the School and the local authority to negotiate freely in a competitive environment.
134. Therefore, the Commissioner has decided that in all the circumstances of the case, the public interest in maintaining the section 43(2) exemption outweighs the public interest in disclosure, and that the withheld item should not be disclosed.

Right of appeal

135. 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

136. 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.

137. 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

Alun Johnson
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Wycliffe House
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SK9 5AF