

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 18 September 2018

Public Authority: Shaw Education Trust

Address: The Lodge, Wolstanton High School
Newcastle Under Lyme,
Staffordshire,
ST5 9JU

Decision (including any steps ordered)

1. The complainant has requested information relating to staff appointments and redundancies, along with plans for a new school building.
2. The Commissioner's decision is that Shaw Education Trust (the Trust) has correctly applied section 40(2) to part of the withheld information. The Commissioner also finds that the Trust has correctly applied section 43(2) to the remaining withheld information.
3. The Commissioner does not require the Trust to take any steps as a result of this decision notice.

Request and response

4. On 8 September 2017, the complainant wrote to the Trust and requested information in the following terms:
"Any and all documents and correspondence held regarding Shaw Educational Trust's takeover of Castlebrook High School. Including all documentation and correspondence relating to; the appointment of Sue Armstrong as principal, the plans to cut costs by making front line teaching staff redundant and the plans for the new school building. Please supply all materials by electronically by email."
5. The Trust responded on 27 September 2017 and provided some of the information within the scope of the request but refused to provide the remainder citing section 12 and section 40(2) of the FOIA.

6. The complainant responded and stated that the Trust had not provided any correspondence relating to; the appointment of the principal, the plans to cut costs by making front line teaching staff redundant and the plans for the new school building.
7. In further correspondence with the Trust the complainant acknowledged that section 40(2) may be applicable to some of the information, although did consider it could be applied to whole documents.
8. Following an internal review the Trust wrote to the complainant on 30 November 2017. It acknowledged that it had not provided adequate explanations with regard to any applicable exemptions and withdrew its reliance on section 12 (costs). However, it maintained that section 40(2) applied and further cited sections 43 and 36(2)(b) and (c).

Scope of the case

9. The complainant contacted the Commissioner on 30 November 2017 to complain about the way his request for information had been handled.
10. The Commissioner considers the scope of this case will be to determine whether the Trust has correctly applied section 40(2), sections 43 and 36(2)(b) and (c).

Reasons for decision

Section 40 – personal data

11. The exemption at section 40(2) of the FOIA 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).
12. The Commissioner will therefore consider whether the withheld information is personal data. If so, she considers that the most relevant data protection principle in this case is the first: that the processing (in this case the disclosure) of personal data would need to be fair and lawful. Her considerations will primarily concentrate on the issue of fairness.

Is the requested information personal data?

13. 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."*

14. When considering whether the information is personal data, the Commissioner has taken into consideration his published guidance: *"Determining what is personal data".¹*
15. On the basis of this guidance, there are two questions 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?"*
16. The Trust provided the Commissioner with copies of all the information in question. Having reviewed this information it is clear that it relates to living individuals that could be identified from that data if it were disclosed. Therefore the Commissioner accepts that it is personal data.

Would disclosure contravene the first data protection principle?

17. 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.
18. 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

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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

requirement cannot be satisfied, processing will not be in accordance with the first data principle.

Would disclosure be fair?

19. In her 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

20. 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.
21. Although the guidance acknowledges that there are no hard and fast rules it states that:

"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."
22. 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.
23. In this case the personal data relates to a recruitment exercise, along with details of redundancies being considered and possible posts 'at risk' through the conversion process. Furthermore, it details individual redundancy payment calculations. Clearly, there would be no reasonable expectation that any of that information would be put into the public domain. Similarly, candidates involved in a recruitment exercise would have no expectation that their details would be made public.

Consequences of disclosure

24. The Commissioner's guidance states:

"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."

25. The Commissioner acknowledges that although some of the information may have been disclosed by the individuals concerned, this does not negate the obligations of the Trust under the DPA. Even if staff cannot be directly identified, the Trust consider that individuals could still be identified in light of other information which might already be available to third parties
26. The Commissioner is therefore satisfied that if the information was in the public domain there is a likelihood that it would cause the data subjects some degree of damage or distress.

The legitimate public interest in disclosure

27. 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.
28. The complainant has not made any representations to the Commissioner as to why he considers there to be a compelling public interest in disclosing the requested information.
29. The Commissioner has reviewed the withheld information and notes that a considerable amount of personal data has already been disclosed in response to the request where it was considered that it was reasonable to do so.
30. As the regulator of the DPA 1998 and the subsequent GDPR and DPA 2018, the Commissioner is conscious of her responsibility to ensure that this legislation is not breached. It is the Commissioner's view that there are no compelling arguments to disclose this personal data and therefore considers the Trust has correctly applied section 40(2) to part of the withheld information.
31. The remaining information has been withheld by virtue of section 43(2) and 36(2). The Commissioner has next gone on to consider the application of section 43(2).

Section 43 – prejudice to commercial interests

32. Section 43(2) of the FOIA provides an exemption from disclosure of information which would or would be likely to prejudice the commercial interests of any person (including the public authority holding it).
33. Broadly speaking, section 43(2) protects the ability of a party to participate competitively in a commercial activity, for example the purchase and sale of goods or services. The successful application of section 43(2) is dependent on a public authority being able to demonstrate that the following conditions are satisfied –
- Disclosure of the requested information would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it).
 - In all the circumstances, the weight of the public interest in maintaining the exemption outweighs the public interest in disclosure.
34. The term 'commercial interests' is not defined in the FOIA. However, the Commissioner has considered the meaning of the term in her guidance on the application of Section 43. This comments 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."*
35. Due to the commercial nature of the conversion of schools to academies the Commissioner is satisfied that it falls within the meaning of commercial interests.

Is the exemption engaged?

36. In order for a prejudice based exemption such as section 43(2) to be engaged the Commissioner considers that three criteria must be met:
- Firstly, the actual harm which the public authority alleges would – or would be likely – to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption;
 - Secondly, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice which is alleged must be real, actual or of substance; 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.

disclosure 'would be likely' to result in prejudice or disclosure 'would result in prejudice.

37. In relation to the lower threshold the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority to discharge.
38. The Trust explained that part of the redacted information related to an issue about the school's pay policy. It stated that this was redacted because the local authority had mistakenly attempted to set the salary range for the role when the Trust exercised its own freedoms to do so. It was therefore concerned that disclosing this would be likely to prejudice the commercial interests of the Trust in accordance with section 43(2) in light of the recruitment process that was conducted at the school and it took the view that it was not in the public interest to disclose it.
39. The Trust has argued that disclosure of the withheld information would be likely to prejudice both itself, and Castlebrook School.
40. Some information has been redacted where it relates to financial information about Castlebrook School. The Trust considered that disclosure would be likely to prejudice the commercial interests of the school as it could undermine any steps that may have been taken to improve the school's overall financial position.
41. The Trust provided the Commissioner with some further information about why it considered section 43(2) was engaged. However, not all of it is detailed in this decision notice, as to do so may in itself prejudice the Trust's commercial interests.
42. It went on to explain that the Trust is a charitable company limited by guarantee. It is a growing multi academy trust which places school improvement and the high achievement of pupils at the heart of all it does. It currently has 10 academies within the Trust and is recognised by the Department for Education and the Regional Schools Commissioner ('RSC') as being an effective organisation that can work with schools to give youngsters the best start in life. Most of its schools are based in Staffordshire and the North West; Castlebrook School is based in Bury.
43. The Trust explained that in its experience, it is not unusual for schools that it works with to be facing a number challenges and sometimes difficult and unpopular decisions need to be considered in order to ensure the long term viability of the school and also to discharge its regulatory responsibilities.

44. It also noted that it is aware of the sensitivities in any local community at the perception of a multi academy trust becoming involved in a school, especially if difficult decisions have to be made.
45. The Trust stated that it has always sought to engage with the stakeholders of the schools that it works with to show them that it is acting in the best interests of the school and it believes that it has generally been successful in gaining support and trust from local communities.
46. However, it considered that it would be likely to prejudice the Trust's commercial interests if some of the information relating to the restructuring exercise at Castlebrook School was made publicly available as it could cause harm in the communities it is seeking to work with and impact on its strategic growth plans for the area.
47. With regard to the first criterion of the three limb test described above, the Commissioner accepts that the potential prejudice described by the public authority clearly relates to the interests which the exemption contained at section 43(2) is designed to protect.
48. The Commissioner is satisfied that the prejudice alleged by the public authority is real and of substance, and there is a causal relationship between the disclosure of the requested information and the prejudice which the exemption is designed to protect. She must however establish whether disclosure would, or would be likely to result in the prejudice alleged (ie the third criterion).
49. The Commissioner accepts that the withheld information provides insights into the Trust's operations, financial relationships, strategies and plans that could prejudice its own commercial interests.
50. She is further persuaded that disclosure in the circumstances of this case would undermine confidence in the Trust to maintain confidences in respect of commercially sensitive information. This would clearly have a negative effect on relationships with current and prospective partners, and consequently on their ability to achieve their commercial objectives.
51. The Trust also considered that disclosure would be likely to prejudice its commercial interests (its reputation for school improvement and its ability to expand) if correspondence discussing the proposals and the draft business cases are made publicly available, especially as some of the proposals or suggestions may not have been carried forward.
52. As the Trust is in the process of negotiating with other schools in the area about the prospect of joining the Shaw Education Trust family, the Trust consider that the public interest argument in maintaining the exemption still applies.

53. The Commissioner accepts that there is a real chance that other schools would be less willing to engage in commercial collaborative undertakings with the Trust if there is a risk that in doing so it could be placing its own commercial interests at significant risk. This would undoubtedly prejudice the Trust's commercial interests.
54. Therefore, the Commissioner has concluded that disclosure would present a real risk of prejudice to the commercial interests of the Trust. Consequently, she finds that the exemption was correctly engaged.

Public interest

55. The exemption is however subject to the public interest test set out in section 2(2)(b) FOIA. The Commissioner must therefore also consider whether in all the circumstances of the case, the public interest in maintaining the exemption outweighs that in disclosing the requested information.
56. The Trust provided the Commissioner with its public interest considerations. However, again due to the nature of some of those arguments it has not been appropriate to provide all of them in this decision notice. Those that the Commissioner deems appropriate to disclose are provided below.

Arguments in favour of disclosing the requested information

57. The Trust accepts that there is an expectation that public authorities should be open and transparent with the public and, in the case of information about restructuring at Castlebrook High School, it accepts that stakeholders may wish to know why certain decisions are being made which may impact on the school; whether its parents who are concerned about educational standards or members of staff who may have concerns about job security. Disclosure of the information may also give members of the public more understanding about the rationale for changes made to the staffing structure.

Arguments in favour of maintaining the exemption

58. The Trust explained that the reason it concluded that it is in the public interest to maintain the exemption is that it is likely that its ability to continue to expand in the local area would be prejudiced if commercially sensitive information relating to the school is made publicly available.
59. It considers there is a strong public interest in preserving a strong reputation for school improvement and giving schools and their stakeholders the confidence that standards can be raised.
60. The Trust further explained that it has a commercial interest in the reputation and improvement of standards at Castlebrook High School

and it is likely that the disclosure of the information about a process that has been concluded would be an unhelpful distraction for staff and students at a school which has made great strides to improve and is looking to the future. Furthermore the Trust considered that other schools in the area are likely to be reluctant to engage with the Trust and be prepared to have full and frank conversations about the challenges they are facing during a due diligence exercise if they perceive that details about a confidential and sensitive process involving members of staff or their draft business case could be put in the public domain, even if personal data relating to individual members of staff is redacted.

61. It is important that senior leaders and governors have confidence in the Trust and this is a key part of establishing important relationships for a successful collaboration. It is also likely that many schools will not want deliberations about how to save money (if this is required in a particular school) to be made publicly available in case it impacts on staff morale and destabilises the school; once the principles have been decided, the process then needs to be managed properly from a HR point of view.
62. Finally, the Trust considered that it had discharged its legal duties with regard to informing and consulting with those affected by the restructuring exercise. In addition, the fact that there has been a restructuring exercise at Castlebrook High School is commonly known and it considered there is a public interest in stakeholders being generally aware about the steps that are being taken to address the issues at the school, for example, it has disclosed some of information relating to the restructuring exercise where the Trust was of the view that it would not prejudice its commercial interests by doing so.
63. The Trust also conducted a statutory consultation process and participated in a public consultation meeting before Castlebrook High School converted to academy status so there have been opportunities for stakeholders to engage with the Trust about the conversion process.

Balance of the public interest

64. The Commissioner has considered the arguments presented to her. It is clear from the 2016 Ofsted report that improvements were required at Castlebrook High School, and the Commissioner agrees that disclosing this information now could destabilise any progress made to date. This would clearly have an impact on the Trust's reputation and subsequent commercial interests.
65. The Commissioner is also satisfied that the public interest in transparency is partially met during the consultation process which is a legal obligation. The fact that there has been a restructuring exercise at Castlebrook High School is commonly known and the Trust has disclosed

some information relating to the restructuring exercise where it was of the view that it would not prejudice its commercial interests by doing so.

66. The Trust also conducted a statutory consultation process and participated in a public consultation meeting before Castlebrook High School converted to academy status so there have been opportunities for stakeholders to engage with the Trust about the conversion process.
67. Therefore, on balance, she has concluded that the public interest in maintaining the exemption outweighs that in disclosing the requested information.
68. In light of her decision, the Commissioner has not considered the applicability of section 36 to the withheld information.

Other matters

69. In correspondence with the Commissioner, the complainant highlighted his dissatisfaction with the Trust's response in a number of areas:
 - Shaw Education Trust failed to reply to my FOI request correctly when first made;
 - They have incorrectly applied exemptions and redactions to what information they have released;
 - They have been obstructive to my request, initially providing no documentation before then erroneously refusing my request based on section 12;
 - They have not provided all information within the scope of my request, redacted or otherwise.
70. The Trust accepted that the initial response to the request dated 8 September 2017 was not fully compliant with the requirements of the FOIA. It stated that there was no intention to wilfully disregard the legislation and it considered that its subsequent responses have sought to address this. The Trust explained that it is a relatively new organisation and whilst it acknowledged that it is still required to comply with the Act, it stated it has learned from this to ensure that all requests for information are dealt with in accordance with the Act in future.
71. In addition, the Trust accepted in its internal review letter dated 30 November 2017 that it should have been clearer about the exemptions it was relying on when it disclosed the information on 10 November 2017.
72. The Trust considered that fuller explanations about the relevant exemptions was not provided at the time due to the volume of

information that was disclosed, which meant that it did not have the capacity or resources to do so.

73. With hindsight, given that the Trust spent approximately 40 hours responding to the request, it considered that it could have refused to respond to the request on the basis of section 12 of the Act, instead of disclosing information without providing a full explanation about the exemptions it was relying on. Despite initially refusing to respond to the request based on section 12 of the Act, the Trust subsequently decided to provide information in response to the requests in the interests of transparency and in order to comply with the spirit of the Act but it accepted that it should handle similar requests differently in future to reduce the risk of causing any confusion about information that is being withheld.
74. The Trust disagreed with the assertion that it was wrong to initially refuse to respond to the request based on section 12, because it took the Trust approximately 40 hours to compile the information in response. It therefore considered that it could have lawfully refused to respond to the request on the basis that it exceeded the appropriate limit. However, in the interests of trying to facilitate the request, the Trust decided to provide the information that he requested, subject to the exemptions outlined above.
75. The Trust stated that it had carried out a comprehensive search for the documentation requested and, to the best of its knowledge, all of the relevant information has been disclosed. The only information withheld, is due to the application of one of the exemptions.
76. The Commissioner has considered the Trust's representations and is notes that it has acknowledged that it could have dealt with the request differently. With regard to the complainant's view that the Trust has incorrectly applied exemptions, the Commissioner is satisfied that withheld information has been done so correctly, as explained in the body of this decision notice.
77. The complainant also stated that he had concerns that the Trust and/or Castlebrook High School had deleted or destroyed information that was within the scope of his request, after he requested it. However, the complainant has not provided any details or evidence of what information that may be or that an offence has taken place.

Right of appeal

78. 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

79. 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.

80. 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

**Pamela Clements
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