

**Freedom of Information Act 2000 (FOIA)
Environmental Information Regulations 2004 (EIR)**

Decision notice

Date: 22 October 2020

Public Authority: University of Brighton Academies Trust

Address: University of Brighton
Checkland Building
Falmer Campus
Village Way
Brighton
BN1 9PH

Decision (including any steps ordered)

1. The complainant has requested a range of information from the Academies Trust ("the Trust") relating to budget planning, costs saving, staffing and other subjects. The Trust responded to several parts of the request but withheld information from a financial recovery plan on the basis of section 36 and 43 of the FOIA. The complainant also considered part 8 of the request had not been fully responded to.
2. The Commissioner's decision is that section 36 is engaged but the public interest favours disclosure of the information in the recovery plan. The Commissioner did not find the section 43 exemption to be engaged. In terms of the information requested at part 8 of the request, the Commissioner finds that the Trust has not explicitly confirmed if this information is held and has therefore failed to comply with section 1(1)(a) of the FOIA.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the information from the recovery plan referred to in part 2 of the request; and

- Confirm if the information requested and clarified in part 8 of the request is held and, if so disclose this or issue a refusal notice clearly explaining the reasons for withholding the information.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 7 June 2019 the complainant made a request to the Trust regarding information over the last three years for Burgess Hill Academy. The request was in the following terms:

- 1) Annual budget plan and financial statements*
- 2) The Academy recovery plan for the time period and any audits, reviews and reports relating to these or any other documentation that exists*
- 3) Any minutes of meetings or other documentation regarding agreed actions relating to cost saving but particularly those relating to cost savings at leadership level*
- 4) Any documentation related to the decision or plans to offer voluntary redundancy to identified members of staff with particular focus on the leadership team*
- 5) Any documents relating to the decision to expand the leadership team at any point in the given time period or the future, particularly in relation to the decision to appoint a vice principal in May 2018*
- 6) Any minutes of meetings, discussions, reviews and plans relating to restructuring and redundancy processes either planned or that have actually taken place or any other documentation that is available*
- 7) All versions of an proposed timetabling for September 2019 that are currently being worked on giving specific details of staffing and allocations, whilst identifying staff shortages and also where departments are overstaffed*
- 8) Any documentation relating to a decision to reduce the number of GCSE Business Groups from two to one given that it is one of the most successful subjects in the Academy. Could you please provide the number of students who opted for the subject and also all other subjects.*
- 9) Checklists, guidance and any other documentation for internal use regarding the application of the correct procedures for restructure and redundancy situations.*

10) Any model notices of termination of contract along with timescales by which such notices must be served for teaching staff

11) Any documentation relating to complaints made under GDPR in particular the number, type and outcome including any fines and recommendations made. Please include any complaints that have been referred to the ICO and any action they have taken or recommendations made.

12) The minutes from the redundancy panel of 17th May 2019 and any documentation relating to the decision to have [name redacted] and [name redacted] as part of that panel. Any internal documentation or guidance/advice on the composition of redundancy panels and for appointing the chair of an appeal."

6. The Trust sent an 'interim' response on 18 June 2019. For part 1 the Trust provided links to financial statements and attached budget documents. For 2 and 3 the Trust considered the information exempt under sections 36 and 43 of the FOIA. For part 4 the Trust provided numbers of redundancies and some documents relating to the decisions with personal data redacted under section 40(2) of the FOIA. For 5 and 6 the Trust stated it was still seeking information. For 7, 8, 9 and 10 documents were provided and for 11 the Trust stated the number of complaints and briefly the reasons for the complaint(s). For 12 the Trust stated no minutes were held and provided a document on restructure and redundancy policy.
7. On 19 June the complainant sent further correspondence in response; in particular regarding request 2 and 3 he argued the public interest would be in favour of disclosure and for request 8 the complainant stated he wanted the number of students who actually listed each subject on their guided choices form. For request 12 the complainant asked for the email trails relating to the request and confirmation there was no convening of a redundancy panel.
8. The Trust provided its full response on 5 July 2019. For request 3 it provided further explanation for its use of the exemptions and for requests 4, 5, 6 and 12 further documents were provided.
9. On 8 July the complainant wrote to the Trust stating he was challenging the decision to withhold information from the recovery plan (request 2). He also stated requests 7 and 8 had not been satisfied as has had clarified in an earlier email what was required. The complainant also stated he wanted all versions of the timetable currently being compiled along with staffing allocations for each member of staff relating to contact hours, as well as details of staff shortages in departments and where departments were overstaffed. The complainant also referred to a request for a complete set of correspondence for a recent voluntary

redundancy within the Trust which he stated he had asked for in an email dated 26 June 2019.

10. On 18 October 2019 the Trust responded with outcome of its internal review. The internal review went through the numbered requests and follow-up requests:

- Request 1: The internal review provided a document containing budget information for three years
- Request 2/3: The internal review found that information in the recovery plan was correctly withheld under section 36 and some financial information was correctly withheld from the report.
- Request 4: The Trust stated no further information had been located and maintained the section 40(2) redactions from the provided documents were correct.
- Request 5/6: The internal review concluded all information had been provided.
- Request 7: The Trust located additional documents that were provided and provided some further information about vacancies.
- Request 8: The internal review provided some additional information that the Trust considered was outside the scope of the FOI request but it clarified the position regarding guided choices and gave some numbers.
- Request 9/10/11/12: The Trust stated these requests had been answered in full.

Scope of the case

11. The complainant contacted the Commissioner following the internal review on 12 September 2019 to complain about the way his request for information had been handled.
12. The Commissioner considers the scope of her investigation to be to determine if the Trust has correctly withheld information within the scope requests 2 and 3 on the basis of either section 36 or 43 of the FOIA and whether any additional information is held that has not already been located.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

13. The requests where the Trust has cited exemptions to withhold information are requests 2) and 3). Request 2 asked for the recovery plan and any reports/audits relating to this and the Trust withheld information under section 36 and 43 where it was financial information. Request 3 asked for meeting minutes or other documents that related to actions on cost saving.
14. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the qualified person, disclosure of the information
 - (b) would, or would be likely to, prejudice-
 - (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.
15. The Trust confirmed the qualified person for the purposes of section 36 is the Chair of the Board of Trustees. It stated that his opinion was requested on 4 July 2019 and obtained on the same date. The opinion given that section 36(2)(b)(ii) and (c) of the FOIA applies was based on the qualified person considering the recovery plan and arguments for and against disclosure of the information withheld from the plan.
16. The Commissioner must first consider whether this opinion is a reasonable opinion to hold. It is important to highlight that it is not necessary for the Commissioner to agree with the opinion of the qualified person in a particular case. The opinion also does not have to be the only reasonable opinion that could be held or the 'most' reasonable opinion. The Commissioner only needs to satisfy herself that the opinion is reasonable or, in other words, it is an opinion that a reasonable person could hold.
17. In order for the opinion to be reasonable, it must be clear as to precisely how the envisioned prejudice may arise. In her published guidance on section 36 the Commissioner notes that it is in the public authority's interests to provide her with all the evidence and arguments that led to the opinion, in order to show that it was reasonable.
18. In its submission to her, the Trust has explained that qualified person had seen the full information that had been requested and not simply a summary of the information. As well as the documentary evidence provided showing the information given to the qualified person to inform

their opinion the Trust also stated verbal discussions took place with the qualified person to ensure all relevant facts and information were known.

19. The qualified person's opinion was that the information consists of suggestions and recommendations as well as detailed discussions about savings. These discussions were very much live at the time of the request and would be relevant going into the next few financial years. The qualified person considered releasing this information there would be scope for the suggested strategies to be misinterpreted and the discussions took place on the basis that they would be in a safe space to enable free and frank deliberations.
20. More specifically, the qualified person considered that the proposals could have specific consequences for recruiting and retaining staff and whether parents enrol their children at the school. Disclosing the information when it is still being considered and discussed could result in an impact on the running of the academy.
21. 'Would be likely to prejudice...' is a lower standard; it means that the chance of prejudice must still be significant and weighty, and certainly more than hypothetical or remote, but it does not have to be more likely than not that it would occur. The qualified person in this case had reviewed all the information being withheld and had discussed the matter - that is, the request, the circumstances of the request and the withheld information - with appropriate individuals.
22. The Commissioner therefore considers it was reasonable for the qualified person to form the opinion that disclosing the full recovery plan may have an impact on the free and frank exchange of views for the purposes of deliberation and on the effective conduct of public affairs and that the section 36(2)(b)(ii) and (c) exemptions are engaged.
23. Having found the has found that the QP's opinion was reasonable the Commissioner will go on to consider the weight of that opinion in the public interest test. This means that she accepts that a reasonable opinion has been expressed that prejudice would be likely to occur, but she will go on to consider the severity, extent and frequency of that prejudice in forming her own assessment of whether the public interest test weighs in favour of disclosure.

Public interest in disclosure

24. The Trust acknowledges there is a general public interest in the terms of public authorities being open and transparent to enable the public to understand how the school and the Academy makes decisions impacting on the school community.

25. In addition to this the Trust recognises there is a public interest in ensuring that public money is used appropriately.
26. The complainant argued there was no valid reasons to withhold specific information relating to cost savings, particularly when the costs savings have already been made. He further argued it was in the public interest to understand why public money was offered to several members of staff to cut leadership costs in 2018 whilst increasing leadership costs by the appointing more senior staff.

Public interest in maintaining the exemption

27. The Trust argues that the information contains advice and recommendations on free and frank discussions of those who did not consider these would be disclosed publicly.
28. The prejudice identified is exacerbated by the fact the information requested includes strategies for cost savings which the Trust have not yet had the opportunity to consider internally or with other in the school community before making any further decisions.
29. The Trust argues that by releasing the information containing cost saving strategies that may or may not be taken forward in the form they are set out, it may lead to individuals misinterpreting the information. This in turn could result in actions based on incorrect beliefs which may then impact on the Trust and have an adverse impact on the running of the school.

Balance of the public interest arguments

30. The Commissioner firstly notes that the public interest arguments for section 36(2)(b)(ii) and (c) are distinct and separate. Section 36(2)(c) relates to the prejudice to the effective conduct of public affairs and arguments relevant to this exemption are those which relate to the prejudice to the Trust's ability to effectively run and manage its schools and Academy's. The arguments more relevant to section 36(2)(b)(ii) are those relating to the effect caused by any prejudice to the free and frank exchange of views, for example the undermining of the safe space required to be able to deliberate and discuss issues without fear of outside influence or scrutiny.
31. In terms of section 36(2)(b)(ii) the arguments presented by the Trust relate to the idea that disclosure of the information may lead to misinformation; this is not an argument that the Commissioner attributes much weight to as the accuracy of information or how information may be perceived by the public are not factors she would consider as a public authority is always able to provide contextual information when making a disclosure.

32. The Commissioner understands that the recovery plan was created by an adviser as part of an Education & Skills Funding Agency (Department for Education) scheme to help Academy Trusts with their budgets and was something the Trust approached the ESFA about.
33. The Commissioner does recognise the 'safe space' argument that the Trust needed time to deliberate and discuss the options and strategies set out in the plan. However, balanced against this is the fact the plan was devised between February and March 2018 and contained a plan for the next few financial years. By the time the request was made the first year of this had already passed and whilst there is an argument for stating the information was still live, it is also reasonable to assume that discussions regarding which recommendations to take forwards would have occurred when the plan was first devised and during the first year of the recovery plan.
34. The Commissioner therefore considers the arguments in relation to section 36(2)(b)(ii) to be weak and not very compelling. That being said she also does not consider the arguments in relation to the public interest in disclosure to be particularly strong. There is a clear interest in the issue from the complainant but this does not necessarily equate to a wider public interest. However, there is a recognised public interest in transparency and openness and in understanding how Academy Trusts operate – this information is of interest to those who want to understand how public money is spent and those who live in local communities who want to understand how school's are performing. It is possible that information in a recovery plan could be seen to generate negative attention which is the Trust's concern in this case but it is also equally possible that it could be viewed in a positive light as demonstrating a cogent strategy for recovery and, beyond that, prosperity.
35. Turning to section 36(2)(c); the arguments presented by the Trust relate to the impact of disclosure on the school's relationship with staff and parents and how this might affect the Trust's effective management of the school. The Trust had concerns that disclosure could affect the financial viability of the school and the maintenance of educational quality as disclosure could impact on the relationships with staff and management. Again, the Commissioner considers these arguments have lost some strength as there was a year between the production of the plan and the request – suggesting many of the major suggestions and strategies would have been discussed and implemented. In fact the Commissioner notes from reviewing the plan that every one of the recommended actions had an actionable date preceding the date of the request. In addition to this, the Commissioner must also stress that this financial recovery plan was a series of suggested actions and strategies with no requirement for all of the suggestions to be taken up; as such disclosure would allow for much greater transparency, even after any

actions are taken, in showing what the Trust considered and what actually then was actioned and how the Trust is committed to turning round the financial situation at the school by considering all available options, no matter how difficult some of these may be.

36. The Commissioner, as with section 36(2)(b)(ii), does not find there is sufficient weight to the arguments for withholding the information based on the analysis above. The arguments on either side are not particularly strong but there is always going to be weight given to arguments that relate to transparency and accountability, particularly where it relates to financial issues at schools or other public bodies where local communities have a vested interest in them succeeding and flourishing.
37. The Commissioner has therefore concluded that the weight of the public interest favours disclosing the information in the recovery plan. However, the Trust has also stated that the financial information in the plan should be withheld under section 43(2) of the FOIA and the Commissioner has next gone on to consider this.

Section 43 – commercial interests

38. Section 43 of the FOIA states that a public authority is entitled to refuse to disclose the requested information if disclosure would, or would be likely to, prejudice its own commercial interests or the commercial interests of a third party.
39. This is a qualified exemption. So, in addition to demonstrating that the exemption is engaged, a public authority needs to consider the public interest arguments for and against disclosure and demonstrate that the public interest in favour of disclosure is outweighed by the public interest in favour of maintaining the exemption.
40. The Trust has indicated the disclosure of the financial information in the plan would be likely to prejudice its own commercial interests. The Trust has argued, as with section 36, that the report is live and without careful consideration of the proposals with specific individuals in advance of its release, it could result in the information being misinterpreted and individuals reconsidering their placement at the school which in turn will impact on the running of the Academy and funding levels. The remaining arguments advanced by the Trust are the same as argued for the section 36 exemptions.
41. The Commissioner accepts that there is information in the plan which consists of projected figures and costings. However, financial information is not always automatically commercial information as well. For section 43 to apply there must be some indication that the information in question, if it were disclosed, would cause some type of

commercial detriment to the public authority and there should be a clear causal link between the specific information and the proposed prejudice.

42. In this case, the Commissioner is not wholly convinced that disclosing the projected figures and cost savings in the plan would have a prejudicial effect on the Trust. It is not clear that this information would have such a widespread impact on enrolment or staffing so as to jeopardise the school's financial future, or that of the wider Academy Trust. There is always a small possibility that disclosing information that is frank and honest about finances and provides scenarios for recovery that may involve cuts and budget reductions will cause some unrest with parents and staff but the Commissioner does not think there is sufficient evidence that this would damage the Trust's ability to retain staff and the enrolment numbers at the school, particularly as the information relates to a plan to help financial recovery. Therefore, she has decided in this case that section 43 is not engaged. As the exemption is not engaged, there is no need to go on to consider the public interest test. As no further exemptions have been applied to withhold information in the recovery plan the Commissioner now requires the Trust to disclose this information.

Section 1 – information held

43. Section 1(1)(a) of the FOIA states that *"Any person making a request for information to a public authority is entitled – to be informed in writing by the public authority whether it holds information of the description specified in the request."*
44. Section 1(1)(b) of the FOIA states that, *"If that is the case, to have that communicated to him."*
45. The complainant had raised specific concerns that he did not think the Trust had fully answered part of this request. This was for:
- 8) Any documentation relating to a decision to reduce the number of GCSE Business Groups from two to one given that it is one of the most successful subjects in the Academy. Could you please provide the number of students who opted for the subject and also all other subjects.*
46. The Trust did provide the complainant with a document entitled 'Option blocks not quite finished' which it stated was the latest draft information relevant to request 8.
47. The complainant, in response, clarified he was also seeking the number of students who actually listed each subject on their guided choices form not just the current option numbers with an explanation for any differences.

48. Following the internal review, the Trust advised the Principal was able to provide further information which it considered was outside of the FOI request. It confirmed there were three GCSE business groups, two in Year 11 and one in Year 10. The Principal also provided some explanation as to how the options process works and the size of year groups and how this all influences the number of groups in each options year.
49. The issue is therefore whether the information given by the Trust is sufficient to meet the information requested at part 8. In determining this the Commissioner must first establish if the complainant's clarification is a reasonable interpretation of the request as worded.
50. It seems clear to the Commissioner that the complainant was looking to understand the decision to reduce the number of business groups given his belief it was a popular options choice for students taking GCSE's. In order to understand this the complainant asked for the 'number of students who opted for the subject and all other subjects' as it stands to reason the decision to reduce classes may not be just based on demand for one subject but on the demand for other subjects.
51. Whilst it seems the Trust did attempt to provide explanations to the complainant and did give some figures it does not seem that the actual numbers the complainant was seeking were provided. The request is clear in wanting to know the numbers of students who actually listed GCSE Business as a preferred option and not just the number of students currently taking it as an option.
52. The Commissioner did ask the Trust questions around how information was identified in relation to this part of the request and the Trust explained that it consulted with the Principal and there was no documentation relating to decisions to reduce group sizes but this was informed by option choices, group sizes and an intent to keep a balance in the curriculum.
53. It is therefore the view of the Commissioner that part 8 of the request has not been fulfilled and it has not explicitly been stated by the Trust that the numbers requested are not held; as such the Trust has failed to comply with section 1(1)(a) of the FOIA. The Trust must now confirm if it holds the requested information and if so either provide this to the complainant in compliance with section 1(1)(b) of the FOIA or issue a refusal notice setting out the reasons why this information cannot be provided.

Other matters

54. One of the main areas of complaint from the complainant was the timeliness of the internal review.
55. The complainant requested an internal review on 18 June 2019 and the response to this request was not sent until 18 October 2019. The Commissioner notes there is an email from the Trust that confirms the internal review process was only commenced on 2 October 2019.
56. Whilst the FOIA does not provide an obligation for a public authority to provide a complaints process it is good practice to do so under the section 45 code of practice.
57. In this case the internal review took nearly four months to complete. Such delays are excessive and unacceptable. The section 45 code of practice recommends that public authorities complete the internal review process and notify the complainant of its findings within 20 working days, and certainly no later than 40 working days from the receipt.
58. The Commissioner would therefore like to remind the Trust of the requirements and importance of the code and the need to ensure that future internal review requests are processed in a timely manner.

Right of appeal

59. 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@justice.gov.uk

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

60. 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.
61. 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

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Jill Hulley
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