

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 12 August 2022

**Public Authority:** Department for Education  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

#### **Decision (including any steps ordered)**

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1. In an 11 part request, the complainant has requested information about St Mary's College, Blackburn. The Department for Education (DfE) advised it does not hold the information requested in seven parts of the request. It disclosed information relevant to three parts, withholding some under section 36(2) and 40(2) of FOIA, which concern prejudice to the effective conduct of public affairs and personal data respectively. Finally, DfE withheld information relevant to the remaining part under section 21(1) of FOIA as it considered this information was already reasonably accessible to the complainant.
2. The Commissioner's decision is as follows:
  - DfE is entitled to withhold some of the information the complainant has requested under sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) of FOIA. In each case the public interest favours maintaining the exemption.
  - DfE breached section 10(1) and section 17(1) with regard to the refined request of 9 April 2021 as its response and refusal were provided outside the 20 working day requirement.
3. The Commissioner does not require DfE to take any corrective steps.

## **Background**

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4. In its submission to the Commissioner, DfE has provided the following background and context.
5. A decision was made to close St Mary's College (SMC) in Blackburn due to the falling number of students attending the college. This was because no suitable merger partner could be found through the Further Education (FE) Commissioner-led structure and prospects appraisal (SPA) process.
6. SMC was a small sixth form college which, until November 2020, was a Catholic sixth form college, but changed its faith status due to the low proportion of Catholic learners and staff. The college was financially unviable due to declining learner numbers over several years and it has been under a Financial Notice to Improve since February 2017.
7. However, attempts were made to secure the college's future. First, it entered into a federation with Cheadle and Marple Sixth Form College (CAMSF). The federation was never formally enacted and ceased in 2019 when CAMSF had its own financial difficulties. Second, one of the department's deputy FE Commissioners led an SPA during 2020, with the aim of finding a merger partner by approaching local academies, schools and colleges. No suitable partner was identified and the recommendation then was to close the college. This was accepted by the college corporation which announced in November 2020 its plans to close.
8. Ministers agreed to a 'teach-out' of the college's existing learners as being in their best interests, supported by up to £5 million emergency funding from the DfE. Under the 'teach-out' strategy the college recruited no new learners in 2021/22 and concentrated on teaching its existing year 13 learners. Part of the agreement with the appointed liquidator is to provide a 'post exams results service' to these learners on receipt of their GCSE/A level results.

## **Request and response**

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9. On 22 January 2021 the complainant wrote to DfE and requested information in the following terms:  
  
"Please provide me with the following information or documents relevant to your role as FE Commissioner in relation to St Mary's College (SMC), Blackburn.

- 1 A copy of the SMC Trust Deed received and accepted by the Secretary of State when designating SMC as an FE Institution under SI 1993 No.435, *The Education (Designated Institutions in Further Education) Order 1993*.
- 2 A copy of the FE Commissioner's final report arising from and concluding the Structure and Prospects Appraisal (SPA) upon which the decision to close SMC is based.
- 3 Description of the Marist Fathers' specific governance responsibilities as Trustees of SMC 1993-2020 and of their potential liabilities in the event of SMC's insolvency and dissolution.
- 4 If not the Marist Fathers as Trustees, where will the liability legally sit for the recovery of public funds lost due to SMC's insolvency and/or from any potential governance incompetence, negligence or fraud? Would this be non-Marist Trustees, Governors or another source? If another source, please specify.
- 5 Copies of the SMC business cases submitted either for Government capital grants or in support of bank loan applications in relation to investment in the following facilities:
  - Finley Stokes Centre (c. 2005)
  - Graystone Science Centre (c. 2008)
  - O'Neill Academy for Performing Arts (c. 2008)
  - Enterprise Centre (c. 2011)
- 6 Copies of Departmental evaluation and approval documentation, including grant conditions, in relation to capital grants awarded for all relevant investment projects listed at 4 above.
- 7 Copies of bank due diligence reports and loan term sheets in relation to all relevant investment projects listed at 4 above, and/or to the balance of SMC's bank loan outstanding.
- 8 Precise descriptions and quantification of the property against which the bank loans currently outstanding per SMC's 2019 accounts are secured.
- 9 Current Departmental proposals for the recovery of any capital grant or other public funds advanced but unutilised for voted educational purposes as at the dissolution of SMC in 2022.
- 10 The amount of additional public funding support projected to be given to SMC between now and its closure in 2022 or beyond, ie

funding above and beyond normal revenue grant linked to student numbers.

- 11 Source of future pension scheme funding for SMC staff retired or made redundant as at College closure.
  - 12 The FE Commissioner's view on the appropriateness of the *Going Concern* assumption under which SMC's 2018/2019 annual financial statements were compiled, audited and published, particularly given the findings from the 2016 Lancashire Area Review described on page 5 of the Commissioner's November 2019 Intervention Summary.
  - 13 The statutory framework, and any related Departmental protocols and guidance for the insolvency and dissolution of FE colleges such as SMC."
10. The Commissioner understands that in correspondence to the complainant on 9 April 2021 DfE refused parts 5 and 6 of the request (and, as such, the entire request) under section 12 of FOIA.
  11. The complainant submitted what was effectively a new request on 9 April 2021. The request was for the same information as in the 22 January 2021 request but without parts 5 and 6.
  12. DfE responded to the new, 11 part request on 8 June 2021. It advised it does not hold information within scope of parts 1, 3, 4, 7, 8, 9, 10 and 11 of the request. DfE disclosed information within scope of parts 2, 12 and 13, having redacted some information from the report disclosed in response to part 2 of the request under section 36(2) and 40(2) of FOIA.
  13. Following an internal review DfE wrote to the complainant on 21 September 2021. It upheld its application of section 36 but disclosed a little of the information it had previously withheld under section 40(2).
  14. DfE also advised that, on reconsideration, the information the complainant requested in part 10 of the request is exempt under section 21 of FOIA as it is already accessible to them.

### **Scope of the case**

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15. The complainant contacted the Commissioner on 6 September 2021 to complain about the way their request for information had been handled.
16. On 20 July 2022 DfE provided the complainant with a fresh response to their request in which it released more of the information it had

previously withheld. However, DfE continued to withhold some of the requested information under section 36(2) and section 40(2) of FOIA.

17. Based on correspondence with the complainant on 25 May 2022 and 21 July 2022 about the scope of their request, the Commissioner's investigation has focussed on DfE's application of sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to information contained in the report identified in part 2 of the request.
18. The Commissioner has noted how long it took DfE to respond to the original request of 22 January 2021. However, the focus here is the refined request of 9 April 2021 and the Commissioner has finally considered the timeliness of DfE's response to that request.

## **Reasons for decision**

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### **Section 36 – prejudice to effective conduct of public affairs**

19. Section 36 of the FOIA is an exemption that differs from all other prejudice exemptions in that, in most cases, the judgement about prejudice must be made by the legally authorised, qualified person for that public authority.
20. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person (QP) considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
21. DfE has provided the Commissioner with a copy of the information it redacted from the report it released.

### **Section 36(2)(b) – provision of advice / exchange of views**

22. Section 36(2)(b)(i) of FOIA says that information is exempt if its disclosure would or would be likely to inhibit the free and frank provision of advice. Section 36(2)(b)(ii) of FOIA says that information is exempt if its disclosure would or would be likely to inhibit the free and frank exchange of views for the purposes of deliberation.
23. To determine, first, whether DfE correctly applied the exemptions under section 36(2)(b), the Commissioner must consider the QP's opinion as well as the reasoning that informed the opinion.
24. Therefore, in order to establish whether the exemptions have been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons

- establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
25. In this case, the QP was Gillian Keegan, then the Parliamentary Under-Secretary of State for Apprenticeships and Skills. The Commissioner is satisfied that, under sub-section 36(5)(a) of FOIA, Gillian Keegan was an appropriate QP at the time of the request.
  26. DfE has provided the Commissioner with copies of two submissions it sent to the Minister, the first is dated 22 February 2021 and the second is dated 26 April 2022. The second submission is described as "identical" to the first but takes account of the fact that, by that point, two parts of the request had been withdrawn (the parts to which DfE had applied section 12). The submission of 26 April 2021, on which the Commissioner will focus, seeks the Minister's opinion on DfE's proposed approach to the complainant's request. The submission shows that the Minister confirmed that, in her opinion, disclosing the withheld information would be likely to have the effect set out under section 36(2). The Commissioner is therefore satisfied that an opinion was given by the QP.
  27. The request was submitted on 9 April 2021. The Minister's opinion in the 26 April 2021 submission is dated 4 May 2021. This pre-dates DfE's response to the remaining 11 parts of the request on 8 June 2021. As such, the Commissioner is satisfied that the opinion was given at an appropriate time.
  28. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that 'reasonableness' is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion.
  29. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
  30. The QP's opinion in this case is that the prejudice envisioned under section 36(2)(b)(i) and section 36(2)(b)(ii) would be likely to occur if DfE disclosed the withheld information. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
  31. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the inhibition may arise. In his published guidance on

section 36 the Commissioner notes that it is in public authority's interests to provide him with all the evidence and arguments that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.

32. In the submission it provided to the Minister, DfE provided: a background to, and copy of, the request, a description of the section 36(2)(b) exemptions, reasoning as to why the information should be withheld under these exemptions and a recommendation. Of relevance to section 36(2)(b), DfE's reasoning included an explanation of why disclosing information being withheld could inhibit the provision of views and advice in future SPA processes. The Commissioner has considered that explanation but does not intend to reproduce it in this notice.
33. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the section 36(2)(b) exemptions to form an opinion on the matter of whether reliance on those exemptions with regard to the requested information was appropriate.
34. The Commissioner has noted the evidence at paragraph 32 and, since he is satisfied that the remaining points at paragraph 24 have also been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that DfE can rely on section 36(2)(b)(i) and section 36(2)(b)(ii) to withhold the information. The Commissioner will go on to consider the public interest test associated with these exemptions.

### **Public interest test**

#### **Public interest in disclosing the information**

35. DfE has presented the following arguments:
  - There is a responsibility for DfE to be open and transparent, to assure the public that there is good decision making between public bodies, and that standards of integrity and fair treatment have been upheld.
  - Disclosing the information would also show that the advice provided by the FE Commissioner's team, and considered by officials and ministers, provides an effective basis for DfE to make informed decisions regarding the future of struggling educational institutions



36. In their request for an internal review, the complainant argued that full and open reporting ensures proper accountability and effective organisational learning.
37. The complainant also argued that the imminent closure of SMC was public knowledge and that all college activities were being conducted on the basis that the college will close. The complainant considered it was reasonable to assume that in that transitional phase all professional steps were being taken to maintain the standard of education being provided. The complainant did not consider that those professional endeavours would be jeopardised by openness about the SPA process in this case. In their view, openness and accountability would provide assurance to all stakeholders that the steps leading to closure were logical, reasonable, proper and inevitable. The complainant did not consider that disclosing the information would make matters any worse for SMC students and staff than they already were.

### **Public interest in maintaining the exemptions**

38. **For section 36(2)(b)(i)** DfE has presented the following arguments:

- Good government depends on good decision-making and this needs to be based on the best intelligence, advice, data and metrics available. It also requires full consideration of any colleges applying to become partners to struggling educational institutions, based on the expertise of the FE Commissioner's team, and the associated reports and evidence made available by them. The information being withheld in the disclosed report includes advice from the FE Commissioner, advising on their position regarding the suitability of potential partners to SMC.
- Although DfE does not consider that the FE Commissioner's team would be completely reticent when providing their professional and expert opinions, it is likely that advice and evidence provided by them to the department would be less free and frank in future. This would lead to the parties involved not being fully abreast of the information and evidence that should have been made available. In turn this would be likely to lead to the decision-making role in such instances being impaired.
- The FE Commissioner's team should be able to share advice and their expert, professional views within these reports. This allows further discussion, consideration and, where necessary, questioning and challenge from departmental officials and ministers, as part of a free, frank and constructive process of deliberation.



- It is clear from the withheld information, that the FE Commissioner's team feels able to provide free and frank views due to the fact that its advice and professional opinion was not intended to go into the public domain. However, should such reports be made public, the likely result is that future advice given by the FE Commissioner's team to DfE, as well as any issues and concerns raised within the SPA process, would be less open and forthright in the future.
- The redacted information contains the FE Commissioner's advice, professional views and opinions about the suitability of potential partners to SMC. Non-disclosure allows the FE Commissioner to present and provide free and frank views, opinions and advice (as well as exchange views for the purposes of deliberation) within a 'safe space'.
- The FE Commissioner team's professional expertise plays an important role in ensuring the approval of appropriate partners for struggling educational institutions. The ability of such professionals to provide DfE with candid and, at times, sensitive information, views and advice, and for there to be free and frank discussion on such cases, is essential. It allows DfE and ministers to undertake an informed assessment of proposed educational institutions. This results in the best and most appropriate decision being made as to the future of such colleges.

39. **For section 36(2)(b)(ii)** DfE has presented the following arguments

- The FE Commissioner's team and DfE officials must have confidence that they can share views with one another and that there is an opportunity to understand and, where appropriate, challenge each other's assumptions. For example about proposed partners for struggling institutions and any associated reports as part of a process of assessment, deliberation and resolution. The withheld information contains some frank comments regarding the suitability of specific institutions to take on the college in question.
- This is in the context of DfE requiring candid information to be provided in these associated reports. This allows those concerned to be able to come to an informed decision on whether proposed partners are suitable to take on such educational institutions. If DfE is required to put this information into the public domain, the FE Commissioner's team would be likely to be inhibited from providing such fully free and frank views in its SPA reports. This would in turn have a negative impact on DfE's ability to make an informed decision on the suitability, or otherwise, of potential partners.

- Disclosing the information outlined above would be likely to remove the space within which the DfE, particularly its officials and the FE Commissioner's team, are able to discuss the capacity, capability and appropriateness of potential partners, both freely and frankly. The FE Commissioner's team would also be more likely to dilute its views/opinions and advice, if it were concerned that this would make it into the public domain. This is because it would possibly jeopardise the relationships it and DfE have fostered with potential partners. It would also limit DfE's ability to provide advice to ministers effectively and efficiently, ensuring that an appropriate solution is put in place as quickly as possible.
- In his decisions in FS50587396<sup>1</sup> and IC-76510-R3L8 the Commissioner accepted that, in similar circumstances involving final decision-making, the balance of the public interest favoured maintaining the section 36(2)(b)(ii) exemption.

### **Balance of the public interest**

40. The Commissioner has considered the information that DfE is withholding. And he notes that at the time of the request in April 2021 the matter of the possible closure of St Mary's College was still 'live'.
41. The Commissioner has taken account of the complainant's arguments but he notes that these are more focussed on a specific college and a specific SPA process that was ongoing at the time of their request. The issue here is that the Commissioner has found that disclosing what are sensitive advice and views during a live SPA process would be likely to prejudice the effective conduct of public affairs in future SPA processes, not necessarily the one that is the focus of the complainant's interest. While he appreciates the complainant's concerns, in the Commissioner's view there is greater public interest in the FE Commissioner's team being content to advise on and discuss all options in future SPA processes openly and with candour, particularly while the process is 'live'. This is so that the SPA process is more likely to secure the best possible outcome, for the educational institution, including its staff and students.
42. The Commissioner considers that the information that DfE has disclosed that it holds and that falls within scope of three parts of the request satisfies the public interest in this case to an adequate degree and that

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1560340/fs\\_50587396.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2015/1560340/fs_50587396.pdf)

the balance of the public interest favours maintaining the section 36(2)(b)(i) and section 36(2)(b)(ii) exemptions.

43. The Commissioner's decision is that the information that DfE has withheld is exempt from disclosure under the section 36(2)(b) exemptions and the public interest in both cases favours maintaining the exemption. In the interests of completeness he has nonetheless gone on to consider DfE's application of section 36(2)(c) to the same information.

### **Section 36(2)(c) – otherwise prejudice effective conduct of public affairs**

44. Section 36(2)(c) of FOIA says that information is exempt information if, in the reasonable opinion of a qualified person, disclosure of the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
45. In terms of the reasonableness of the QP's opinion the Commissioner has again considered DfE's submission to the Minister of 26 April 2021. The QP's opinion is again that the prejudice envisioned under section 36(2)(c) be likely to occur if DfE disclosed the withheld information. Again 'would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
46. In addition to the background to, and copy of, the request and a recommendation, the submission also describes the section 36(2)(c) exemption and provides reasoning as to why the information should be withheld under this exemption. Of relevance to section 36(2)(c), DfE's reasoning included an explanation of why disclosing the information being withheld could otherwise prejudice the effective conduct of public affairs. Again, the Commissioner has considered that explanation but does not intend to reproduce it in this notice.
47. The Commissioner is satisfied that the Minister had sufficient appropriate information about the request and the section 36(2)(c) exemption to form an opinion on the matter of whether reliance on this exemption with regard to the requested information was appropriate.
48. The Commissioner has noted the evidence at paragraph 32 and, since he is again satisfied that the remaining points at paragraph 24 have also been addressed, he must accept that the QP's opinion about withholding the information is one a reasonable person might hold. He therefore finds that DfE can rely on section 36(2)(c) to withhold the information. The Commissioner will go on to consider the public interest test associated with this exemption.

## **Public interest test**

### **Public interest in disclosing the information**

49. DfE's and the complainant's arguments are those presented under the section 36(2)(b) analysis.

### **Public interest in maintaining the exemption**

50. DfE has presented the following arguments:
- Officials and external experts engaged by DfE, in this instance the FE Commissioner's team, need a 'safe space' to debate live issues, away from external interference and distraction. If this were to be inhibited the involved parties would be less likely to fully document risks, issues and concerns. Disclosing the information may lead to the FE Commissioner's team and DfE officials being more reticent in providing and/or formally documenting their views and advice which would, in turn, impact on the quality of decision making and hence engages section 36(2)(c).
  - The information presented by the FE Commissioner's team contains reflections about the suitability of potential partners and their capacity, capability and appropriateness to take on a struggling institution. To release this information could be detrimental to the FE Commissioner and DfE's relationships with such settings, as they may want their relationship status with public bodies to remain private. Officials need space to develop their thinking, carry out candid risk assessments, and explore options and potential implications. If this type of free and frank discussion were to be in the public domain, this would also reduce the effectiveness of advice given to officials and ministers in the future.
  - DfE relies on information provided by its key external partners, in this instance the FE Commissioner's team, to help make informed decisions. This ensures that excellent educational settings are successful in taking on and supporting struggling colleges. These types of deliberations need to remain confidential to ensure they are handled sensitively and appropriately.
  - If DfE is required to disclose the requested information, it would be likely to prejudice its ability to manage and deliver its working relationship with its educational partners and to provide support to struggling colleges. Release could hinder the FE Commissioner team's ability to provide professional advice to DfE. Provision of advice to DfE allows the best and most suitable settings to take on a struggling college. Such settings would be less likely to candidly

engage in the process, given that the views and opinions of the FE Commissioner's team, if made public, could have a potential negative reputational impact on their institution. This is particularly in cases where the FE Commissioner may be critical of the capacity and/or capability of specific institutions. This could lead to DfE being unable to find suitable partners for unsustainable colleges and lead to more college closures with additional financial cost to DfE. This would not be in the public interest and would certainly not be in the interest of the students involved.

- The FE Commissioner's team must have confidence that it can share its professional views with DfE via such reports, and that there is an opportunity to understand and, where appropriate, challenge assessments and assumptions presented by the Team. If DfE is required to put this information into the public domain, the FE Commissioner's team would be likely to be inhibited from providing free and frank exchange of views for the purposes of deliberation. This in turn would have a negative impact on DfE's ability to conduct public affairs effectively. Potential partners would also be less likely to engage in the process, for fear of public criticism, and DfE would be less likely to make effective progress when coming to a final decision as to the future of struggling colleges.
- Disclosing the information would be likely to prejudice the effective conduct of public affairs in the future. This is because it would remove the space within which the FE Commissioner's team can present to officials its advice and evidence-based opinions about potential partners, freely and frankly. It would make it more difficult for DfE to work collaboratively and cohesively with the relevant parties to ensure that a solution can be found.
- In addition to the arguments above, DfE provided two further arguments which the Commissioner does not intend to reproduce in this notice. Broadly, they concern DfE's relationship with institutions in the future.

### **Balance of the public interest**

51. As for the section 36(2)(b) exemptions, the Commissioner has taken account of the withheld information, the complainant's arguments and the timing of the request.
52. The Commissioner has also considered DfE's section 36(2)(c) arguments and notes that several of them are more relevant to the section 36(2)(b) exemptions as they concern providing advice and exchanging views.

53. However, he considers that DfE's argument that potential partners may be less willing to engage in a future SPA process at all, if they considered that participation in such a process could lead to reputational damage, is a valid section 36(2)(c) argument.
54. The Commissioner has again decided that the information that DfE has disclosed that it holds and that falls within scope of three parts of the request satisfies the public interest in this case to an adequate degree. In the Commissioner's view there is greater public interest in as many bodies as possible being willing to engage in future SPA processes and to put themselves forward as potential partners to other institutions. This is again so that the SPA process is more likely to secure the best possible outcome, for the educational institution, including its staff and students.
55. As such, the Commissioner finds that the balance of the public interest also favours maintaining the section 36(2)(c) exemption.

#### **Section 10 / Section 17 – timeliness of response**

56. Under section 1(1) of FOIA anyone who requests information from a public authority is entitled to be told if the authority holds the information and to have the information communicated to them if it is held and is not exempt information.
57. Under section 10(1) a public authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of a request.
58. Under section 17(1) a public authority which, in relation to any request for information, is to any extent relying on a claim that information is exempt information must, within the time for complying with section 1(1), give the applicant a refusal notice.
59. In this case, the complainant submitted their refined request on 9 April 2021 and DfE did not provide a response, including a refusal to disclose some information, until 8 June 2021. DfE therefore breached section 10(1) and section 17(1) on this occasion.

## **Right of appeal**

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60. 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: 0203 936 8963

Fax: 0870 739 5836

Email: [grc@justice.gov.uk](mailto:grc@justice.gov.uk)

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

61. 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.
62. 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**

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