

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 October 2022

Public Authority: The Governing Body of Colchester Royal Grammar School

Address: 6 Lexden Road
Colchester
Essex
CO3 3ND

Decision (including any steps ordered)

1. The complainant has requested information on spending. The above public authority ("the public authority") relied on section 43 of FOIA (commercial interests) to withhold some information.
2. The Commissioner's decision is that the public authority has not demonstrated why section 43 was engaged and consequently is not entitled to rely on this exemption. The Commissioner also finds that the public authority breached section 10 and section 17 of FOIA in responding to the request.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose, to the complainant, the information it relied on section 43 of FOIA to withhold.
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 19 March 2022, the complainant wrote to the public authority and made a nine-part request for information which broadly related to steps the public authority had taken following an Ofsted inspection which rated elements of its offering as "inadequate."
6. The public authority responded to most of the request on 26 May 2022 and the remainder on 7 June 2022. It provided information within the scope of elements [1] to [7], but relied on section 43 of FOIA to withhold information within the scope of the following elements:
 - "[8] The total spend on the PR company referenced in minutes released under my previous FOIA request over the period 13 May 2021 to date.
 - [9] The total spend on legal fees over the period 13 May 2021 to date and separately over the financial year 2019 to 2020 as a comparison point."
7. The complainant asked for a review on the same day in respect of the above elements. Despite specifically being asked to do so by the Commissioner, the public authority failed to carry out an internal review – although it did issue a response of sorts on 5 July 2022 stating that although it had "noted" the complainant's challenges to its use of section 43, the "ongoing correspondence" was "becoming vexatious" and that it would not respond further.

Reasons for decision

8. The Commissioner does not consider that the public authority's correspondence of 5 July 2022 represented a change of the public authority's stance to relying on section 14(1) of FOIA to refuse the request as vexatious. Even if it were, for the reasons set out in "Other Matters", the Commissioner would not have upheld that position.
9. The Commissioner understands the Public Authority's final position to be that it has relied on section 43 of FOIA to withhold information and he considers that it has had two opportunities to explain why the exemption applies.
10. In its refusal notice, the public authority merely informed the complainant that "this information is withheld under exemption 43 [sic], trade secrets and prejudice to commercial interests." The Commissioner

will consider the adequacy of this response further under "Procedural Matters"

11. On the basis that literally no arguments have been put forward by the public authority to explain why the exemption is engaged or what public interest obligations have been taken into account, the Commissioner considers that the exemption should be overturned on this basis alone. However, for the sake of thoroughness, he has considered whether a case could be made for applying the exemption. He has concluded that it could not.
12. Firstly, the information will be and, in respect of the second part of element [9], already is, in the public domain via the public authority's annual accounts. The 2020/21 accounts have been filed with Companies House for almost a year and the previous filing pattern would suggest that the 2021/22 accounts are likely to be published within a matter of weeks. It seems unlikely that commercial prejudice would flow from the disclosure of information that will shortly be published anyway.
13. Secondly, revealing the total figure spent, without revealing the work carried out, would not reveal the hourly rate agreed between the parties and so is much less likely to harm the ability of any of the parties concerned to negotiate in the future. Without knowledge of the work carried out, it is impossible for any competitor to judge whether the amount paid represents the "going rate" for such work, or whether it is significantly above, or below, that rate.
14. The public authority's published accounts show a significant difference in legal costs between 2019/20 and 2020/21 – which would suggest that the public authority's annual needs can fluctuate significantly. The Commissioner also considers that the particular circumstances prevailing around the time of the request are unlikely to occur again. That suggests that the withheld information (especially when divorced from information about the actual work carried out) would be a poor predictor of the costs the public authority might be expected to incur in future years.
15. The Commissioner does not therefore consider that the public authority is entitled to rely on section 43 of FOIA to withhold this information.

Procedural Matters

16. Section 10 of FOIA sets the deadline by which a public authority must provide information that is not otherwise exempt from disclosure. Sub-section (1) requires a public authority, in most circumstances, to do this promptly and within 20 working days. However, sub-section (3) allows a

public authority to take additional time to disclose non-exempt information in circumstances where it believes a qualified exemption applies and where it needs more time to consider the balance of the public interest. Sub-section (4) allows the Minister for the Cabinet Office to set longer response deadlines for particular public authorities which might need longer to provide responses.

17. Secondary legislation allows schools to respond to information requests within either 20 school days or 60 working days of receiving the request – whichever occurs sooner. This is to take account of the fact that schools take a long break in the summer when they may have very few staff around.
18. The request would have been received on 19 March 2022 and thus the ordinary 20 working day deadline would have fallen on 13 April 2022 – however the Commissioner notes that this was Easter week. The Commissioner has been unable to locate the public authority's term dates, but notes that most schools in England traditionally take two weeks off either side of Easter Sunday. Precisely when the public authority's own easter holiday started and finished is not relevant as, assuming it ran for two weeks and included Easter Sunday, the 20th school day would still have been 27 April 2022 – and the public authority did not disclose any information until 26 May 2022.
19. Finally, the Commissioner has considered whether the public authority was entitled to extend the time for considering the balance of the public interest. He has concluded that it was not. Firstly, the public authority failed to inform the complainant of the specific qualified exemption that it considered to apply – which is a specific requirement of FOIA. Secondly, although the public authority did consider that some information engaged section 43, this clearly did not apply to all the information and, as the Commissioner has noted above, it did not even apply to the information to which the public authority applied it.
20. A public authority is not permitted, under FOIA, to extend the time for complying simply because the amount of information requested is significant or complex. It may **only** extend the time for complying with a FOIA request in situations where it needs more time to consider the balance of the public interest in respect of a qualified exemption. If a request cannot be dealt with within 18 hours, a public authority may be entitled to rely on section 12 of FOIA to refuse it.
21. As the non-exempt information was not provided within 20 school days, the Commissioner finds that the public authority breached section 10 of FOIA.

22. Section 17 of FOIA requires a public authority to state why any exemptions which it is relying on would apply to the information in question. The public authority's refusal notice was both issued late and failed to explain why section 43 applied. The Commissioner therefore finds that the public authority breached section 17 of FOIA in responding to the request.

Other matters

23. As the Commissioner has noted above, he does not consider the public authority to have relied on section 14(1) of FOIA. However, had it done so, he would likely have found that the exemption did not apply.
24. Once again, the public authority failed to provide a proper explanation of why it considered the request to be vexatious. However, the Commissioner notes that it did refer to the complainant's "ongoing correspondence."
25. The Commissioner is aware of one other request, besides this one, that the complainant has submitted. Whilst both requests did involve a number of emails from the complainant, it is clear from the evidence that this extra correspondence came about because of the public authority's failure to either correctly identify the information within scope or to adhere to the time limits set out in the legislation.
26. The Commissioner does not consider it unreasonable for a requester to chase a public authority that has failed to respond in time, nor to prompt a public authority that has demonstrably failed to identify information that has been requested, nor to seek an internal review when an exemption has been relied upon to withhold information.
27. Therefore the Commissioner is not satisfied that responding to this request would have imposed a disproportionate burden upon the public authority. The additional burden in responding came about because of the public authority's failure to comply with its obligations under FOIA.
28. Finally, when issuing refusal notices and carrying out internal reviews, the Commissioner would encourage all public authorities to use his Key Questions for Public Authorities (FOIA)¹ or Key Questions for Public Authorities (EIR)² to structure their arguments. Firstly, because is this more likely to dissuade requesters from pursuing their request further. Secondly, in the event of a complaint, the Commissioner is very unlikely to require a public authority to re-submit responses to questions it has already answered comprehensively at an earlier stage.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-foi-act-2000/>

² <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/key-questions-for-public-authorities-eir-2004/>

Right of appeal

29. 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

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

30. 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.
31. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
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