

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 March 2023

Public Authority: The Governing Body of Lavington School
Address: The Spring Market
Lavington
Devizes
Wiltshire
SN10 4EB

Decision (including any steps ordered)

1. The complainant has requested information from Lavington School ('the School') about its change in IT provider.
2. The School provided some information in response to the request but withheld the rest, citing section 43(2) (commercial interests) and section 36(2)(b)(ii) (prejudice to the effective conduct of public affairs) of FOIA.
3. The Commissioner's decision is that:
 - The majority of the withheld information engages either section 43(2) or section 36(2)(b)(ii) and the public interest lies in maintaining the exemption.
 - The name of 'provider C' does not engage section 43(2).
 - In failing to disclose all non-exempt information, and provide a valid refusal notice, within twenty working days of receipt of the request, the School has breached section 10(1) (timescale for compliance) and section 17 (refusal of request) of FOIA.
4. The Commissioner requires the School to take the following steps:
 - Disclose the name of provider C.

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

Background information

6. The School decided to appoint a new IT provider in March 2022. The number of IT providers that provide on-site support for secondary schools in Wiltshire is small and the School worried that its current IT provider, with access to all of the School's systems, would have access to commercially sensitive information from competitors during this tender process.
7. The School originally considered refusing the request as vexatious, on the basis that it believes the complainant is actually a representative of the School's now previous IT provider, using a pseudonym. Anyone is entitled to make an FOI request but they have to use their real name. The School notes that the provider in question had been given its notice weeks before the request was made but it hadn't yet been announced publicly that the School was going to change IT providers.
8. Whether or not it had been officially announced that the School was changing IT providers, this is a logical connection to make if the current provider has been informed that its services are no longer required. Nevertheless, the School ultimately chose not to rely upon section 14 (vexatious requests) or pursue its concern about the requestor's identity and so the Commissioner also won't consider that matter any further.

Request and response

9. On 7 April 2022 the complainant requested:
 - "This request relates to the selection of any IT support provider that could be providing services to the school within the next 6 months...
 - a) Copies of any business case for the selection of the ICT support provider
 - b) Copies of all quotations for ICT support received including full details on contract lengths, costs, what is provided with each proposal including any terms and conditions and any presentations or other information to allow a full understanding of the different proposals

- c) Copies of documents, emails and any other media that demonstrates how the final selection of the ICT provider was made including any analysis of the pros and cons of the selection
 - d) Copies of any evidence to support any assumptions used in the selection process
 - e) Copies of Senior Management Team or Governor minutes discussing the selection of the ICT provider including any emails or other documents relating to how the decision was made
 - f) All emails within the past 6 months (from the date of this letter) relating to the selection of the ICT provider. I am, of course, happy for you to redact any PII as provided for under the GDPR legislation."
10. On 17 May 2022 the School responded and disclosed information that fell within the scope of the request, including the minutes requested and the business case for three IT providers.
 11. On 8 June 2022 the complainant requested an internal review.
 12. On 8 July 2022 the School provided the outcome to its internal review. It disclosed the names of two out of the three companies. It withheld the remainder of the information requested including: the terms and conditions of the three providers, the name of the third provider and the proof of assumptions and associated evidence, under section 43(2). It confirmed it didn't hold any emails between the providers and the School.
 13. During this investigation, the School identified that it did hold relevant emails and disclosed these to the complainant. It also revised its position; the School is now relying upon section 36(2)(b)(ii) to withhold the proof of assumptions and associated evidence and section 43(2) to withhold the rest.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

14. Section 36(2) of FOIA states that:

"Information to which this section applies is exempt information if, in the reasonable opinion of a qualified person, disclosure of this information under this Act –

(b) would, or would be likely to inhibit-

(ii) the free and frank exchange of views for the purposes of deliberation”

15. Section 36 differs from all other prejudice exemptions in that the judgement about prejudice must be made by the legally authorised, Qualified Person (QP) for that public authority. The Commissioner doesn't need to necessarily agree with the QP's opinion, but it must be a 'reasonable' opinion; if the Commissioner decides that the opinion is an unreasonable one, he may find that the section 36 exemption has been applied inappropriately.

Who is the qualified person and how was their opinion sought?

16. The QP in this instance is the Chair of Trustees of the Equa Trust ('the Trust'), which the School is part of. Their opinion was sought on 22 November 2022, after the Commissioner's investigation commenced. Their opinion was recorded using the template provided on page 24 of the Commissioner's guidance¹ on 'Prejudice to the effective conduct of public affairs (section 36)'. The QP was provided with arguments both for and against the application of section 36.

Is the qualified person's opinion reasonable?

17. Yes. The QP's opinion states that disclosing the proof of assumptions, and associated evidence would be likely to inhibit the free and frank exchange of views within the School. Having looked at the withheld information, the Commissioner agrees that it contains honest, frank and robust assessments of the IT provider (at the time) and discusses next steps.
18. The withheld information discusses the problems the School is encountering with a specific provider and the ramifications these problems have for the day-to-day running of the School. The QP is concerned that, if disclosed, 'it would be likely to inhibit the free and frank exchange of views in relation to services provided to the Trust by external service providers, and in turn impact upon the Trust's deliberations in relation to appropriate steps to take to rectify such problems going forwards.'
19. Furthermore, the QP is concerned that, at the time that the request was made, the tender for IT services was ongoing and, had the information

¹ [section 36 prejudice to effective conduct of public affairs.pdf \(ico.org.uk\)](https://ico.org.uk/section-36-prejudice-to-effective-conduct-of-public-affairs.pdf)

been disclosed, it would have inhibited discussions and decision-making in relation to that ongoing tendering process.

20. The Commissioner considers this opinion reasonable – therefore section 36(2)(b)(ii) is engaged, although the Commissioner notes its been cited during the investigation and not from the outset. As a qualified exemption the public interest test must be considered.

Public interest test

21. The School has identified the 'general principles of transparency and openness' that FOIA underpin. It's also identified that there's an interest in seeing how the School makes its decisions regarding its IT providers, including how it handles any shortcomings in its services.
22. However, the School did not consider that this public interest outweighed the need to protect the safe space needed to allow employees to 'express themselves candidly in relation to important issues and risks affecting their IT systems (upon which important pupil and staff data is processed, including special category data), particularly when this contributes to a process of deliberation relating to an external (private) provider of contracted services. Doing so will contribute to the quality of that deliberation and the Trust's decision-making.'
23. On balance, the Commissioner agrees that the public interest lies in maintaining the exemption and the School was correct not to disclose the withheld information.

Section 43(2) – commercial interests

24. Section 43(2) of FOIA states:

'Information is exempt information if its disclosure under this Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).'

25. The Commissioner's guidance² 'Section 43 - Commercial interests' states 'A commercial interest relates to a legal person's ability to participate competitively in a commercial activity. The underlying aim will usually be to make a profit. However, it could also be to cover costs or to simply remain solvent.'
26. To reiterate, the Commissioner understands that the School is withholding the terms and conditions of the contracts of the three

² [Section 43 - Commercial interests | ICO](#)

providers (having disclosed the total value of each contract) and the name of one of the providers.

27. The Commissioner will consider the terms and conditions of the contract first. This is clearly commercial information. The School is concerned that disclosure would undermine the ability of the three providers (providers A, B and C) to compete in the marketplace because:
- (i) "It would be likely to limit the extent to which such companies are in a position to deviate from the terms and conditions offered to the School going forwards;
 - (ii) It would also provide those organisations with whom such companies currently hold a contract, information on terms and conditions which may not be as advantageous as their own and thereby would be likely to undermine their ability to maintain their contract terms with them.
 - (iii) It would provide their competitors with information not publicly available thereby would be likely to provide companies offering a similar service within the education sector a competitive advantage when competing for other contracts."
28. The Commissioner isn't persuaded by argument (i). The providers may feel that they are unable to deviate in the future from the terms and conditions offered to the School; however, this is because it has already offered such terms to the School and not because the information is in the public domain.
29. However, and bearing in mind the School's suspicions, the Commissioner does accept arguments (ii) and (iii) and considers the exemption engaged on the basis that disclosure would be likely to prejudice the commercial interests of the third parties, and the School itself.
30. The Commissioner will now consider the name of the outstanding provider ('provider C'). The School has explained that the names of providers A and B are already in the public domain, however, provider C is not. The School is withholding the name of provider C since it 'would disclose to competitors which companies are active competition.' The School has reemphasised that 'the number of companies who operate within the education sector offering on-site IT support is very small and this therefore increases the value of the disclosure to competitors and increases the extent of the prejudice.'
31. The Commissioner is not convinced by this argument. If businesses are operating in a small geographical area; it's likely they will already be aware of their own competitors.

32. The School has also argued that disclosing provider C would 'inhibit future contractors from wishing to submit tenders to schools in the Trust, or the Trust as a whole, going forwards.' Again, the Commissioner rejects this argument. If businesses wish to provide services to public authorities, it should be aware of the possibility of its information – including the name of the business at the very least – being made public.
33. Finally, when applying section 43(2) on the basis that disclosure would, or would be likely to, prejudice the commercial interests of a third party – it is not enough for a public authority to assert any prejudice. It must consult with all third parties to obtain their view in all but the most exceptional of circumstances. The Commissioner notes that provider C objected to the disclosure of all information 'other than our company name.' On that basis, the Commissioner does not agree that any prejudice has been identified and therefore the identity of provider C doesn't engage section 43(2) and must be disclosed.
34. He'll now go onto consider the public interest for the information that engages section 43(2).

The public interest test

35. The School has identified the same arguments as in paragraph 21.
36. However, the School has identified 'In this current extremely concerning economic climate, which has implications on the funding available for state sector schools, higher prices resulting from decreased market competition is particularly concerning. This in turn would be likely to deprive the public purse of funds, impairing its ability to meet its core functions. Further, the quality of such provision may suffer due to lack of choice in the market. Moreover, providers of IT services may not invest the time and funds necessary into improving and developing their provision of services as the incentive to do so is reduced. This would ultimately have a negative impact on the Trust as a whole and children studying at Trust academies.'
37. The Commissioner concurs with the School that the public interest lies in maintaining the exemption in this instance. The motive behind the request appears to be questioning whether the School has obtained value for money. The Commissioner is mindful that the School has disclosed its business case (and the total cost of each provider) for the contract in question, as well as meeting minutes where the contract was discussed. This meets the public interest in transparency about the School's procurement of IT services without compromising the commercial interests of any third party, or the School.

Procedural matters

38. Section 10(1) of FOIA states that any non-exempt information must be disclosed, in response to a request, within twenty working days of receipt of the request.
39. Section 17 states that any refusal notice (which must include the exemption under which any information is withheld and details of bringing a complaint to the Commissioner) must also be issued within twenty working days of receipt of the request.
40. In failing to do so, the School has breached section 10(1) and section 17 of FOIA.

Right of appeal

41. 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

42. 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.
43. 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

Alice Gradwell
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