

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 December 2023

Public Authority: Education Authority
Address: 40 Academy Street
Belfast BT1 2NQ

Decision (including any steps ordered)

1. The applicant requested information about Assistant Directors' remuneration. The Education Authority (EA) disclosed some information and relied on section 36 and 40 to withhold the remaining information. These exemptions concern prejudice to the effective conduct of public affairs and personal data respectively.
2. The Commissioner's decision is that the EA correctly applied section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) to the majority of the information to which it applied those exemptions. He also finds that the majority of the information to which the EA applied section 40(1) and 40(2) is exempt under those exemptions. However, the Commissioner finds that the EA was incorrect to rely on section 36(2) and section 40 to withhold the Assistant Director Remuneration Business Case.
3. The Commissioner requires the EA to take the following step to ensure compliance with the legislation:
 - Disclose the Assistant Director Remuneration Business Case that falls within scope of part 4 of the request.
4. The EA 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.

Request and response

5. The applicant made the following information request to the EA on 4 July 2023:

“Further to the recent grievance hearing in regard to Assistant Director’s pay I would appreciate if you can provide the following information in relation to same. I am requesting this information on behalf of [the complainant] and myself.

- [1] A copy of any and all communications, written or electronic to the Assistant Directors in regard to pay awards for each financial year 2017 – 2023.
- [2] A copy of the minutes of the remuneration committee meetings for each year where available.
- [3] A copy of the annual business case submitted to DE in respect of Assistant Director pay where available.
- [4] A copy of the Assistant Director Remuneration Business Case (as referred to in terms and conditions of employment).
- [5] A copy of terms and conditions as relates to Directors of EA.”

6. The EA responded to the request under FOIA on 31 July 2023 as follows:

- [1] The communications were exempt under sections 40(1) and 40(2) of FOIA.
- [2] and [4] The minutes and Remuneration Business Case were exempt under section 36(2)(b) and 36(2)(c), and section 40(2).
- [3] The EA disclosed annual business cases for the period 2018 to 2022, with what it considered to be personal data redacted under section 40(1) and 40(2). It withheld draft business cases for the period 2022 to 2024 under section 36(2) and section 40(2).
- [5] The contracts of employment within scope were exempt under sections 40(2).

7. The EA maintained its position following its internal review.

8. The applicant requested the above information on their own behalf and on behalf of another person. That other person – the complainant – submitted a complaint to the Commissioner
9. On 31 July 2023, the EA had provided the complainant with a separate response to the request under the data protection legislation.

Reasons for decision

10. This reasoning focusses only on the EA's handling of the request under FOIA. It covers the EA's application of section 36 and 40 to information the complainant has requested.

Section 36 – prejudice to the effective conduct of public affairs

11. EA has withheld remuneration committee meeting minutes, two draft annual business cases and an Assistant Director Remuneration Business Case under section 36 of FOIA.
12. Under section 36(2)(b) information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice (i) the free and frank provision of advice or (ii) the free and frank exchange of views for the purposes of deliberation.
13. Under section 36(2)(c) of FOIA information is exempt from disclosure if, in the reasonable opinion of a qualified person, its disclosure would otherwise prejudice or would be likely to otherwise prejudice the effective conduct of public affairs. This means that the envisioned prejudice must be something other than the provision of advice or the exchange of views being inhibited.
14. As noted, the exemptions at section 36(2) can only be engaged on the basis of the reasonable opinion of a qualified person. EA's submission to its Qualified Person (QP) shows that the QP was Sara Long, EA's Chief Executive. The Commissioner is satisfied that this individual is authorised as the QP under section 36(5) of FOIA.
15. The submission to the QP also shows that the QP's opinion was sought on 28 July 2023 and given (signed) on 31 July 2023, which was after the request was submitted and before EA responded to it later on 31 July 2023. The opinion was therefore sought at the appropriate time.
16. In the submission provided to them, the QP was given a copy of the relevant parts of the request; a description of the three exemptions under section 36(2) and why they're engaged and arguments both for

withholding and disclosing the information. The signed QP's opinion was that disclosing the information would be likely to cause the prejudice envisioned under section 36(2)(b) and section 36(c).

17. It's important to note that 'reasonableness' in relation to the QP's opinion isn't 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's a reasonable opinion, and not necessarily the most reasonable opinion.
18. The Commissioner has reviewed the QP's submission. The QP's opinion was that disclosing the information in question would be likely to inhibit the 'safe space' officials needed to discuss remuneration matters, in meetings and in business cases. Disclosing the information could inhibit advice and views and, in the case of the draft business cases, could introduce external distraction and interference [and so frustrate the decision making].
19. The Commissioner will accept the QP's opinion that sections 36(2)(b)(i) and (2)(b)(ii) are engaged in respect of the meeting minutes and the Assistant Director Remuneration Business Case and the QP's opinion about 36(2)(c) in respect of the draft business cases. He also accepts that the lower threshold – that prejudice would be likely to happen - is a credible level of likelihood ie that there's a more than a hypothetical or remote possibility of the envisioned prejudice occurring.
20. The Commissioner is therefore satisfied that the information being withheld engages section 36(2)(b)(i), section 36(2)(b)(ii) and section 36(2)(c) of FOIA. He's gone on to consider the associated public interest test.

Public interest test

21. To re-state, the information being withheld under section 36(2) is the minutes of remuneration committee meetings covering the period 1 October 2017 to 23 June 2023; draft annual business cases submitted to Department of Education (DE) covering the period 2022 to 2023 and an Assistant Director Remuneration Business Case dated 2016. The EA has provided this information to the Commissioner.
22. In their complaint to the Commissioner, the complainant has said that because the information they've requested concerns a business case funded by public money, the section 36 exemptions can't be applied and the information about remuneration should be released.
23. The EA has acknowledged the general public interest in promoting transparency and accountability.

24. However, the EA says it's not aware of any specific [wider] public interest in disclosing the information in question and considers that the information was requested because of private interests. The EA has referred to the Commissioner's advice about private interests in his published guidance and says that, given the likely prejudice identified above, there's a stronger public interest in withholding this information.

Balance of the public interest

25. The Commissioner decided that the QP's opinion that disclosing the information being withheld under section 36(2) would be likely to prejudice the effective conduct of public affairs is a reasonable opinion. Disclosing the information could cause officers to become reluctant to express themselves openly, honestly and completely, or to explore extreme options, when providing advice or giving their views as part of the process of deliberation. Inhibiting the provision of advice or the exchange of views may impair the quality of decision making. Similarly, the possibly of external distraction or interference may also frustrate final decisions about the annual business.
26. The QP in this case holds a senior role within their organisation and, as such, has the requisite knowledge of how their organisation works and the consequences of any disclosure. The Commissioner therefore gives their opinion a measure of respect. But he will consider the severity, extent and frequency of the envisioned prejudice in forming his assessment of whether the public interest test favours disclosure.
27. The Commissioner has first considered the remuneration meeting minutes and draft annual business cases. The matter of Assistant Directors' remuneration is an ongoing process in the sense that it's reviewed annually. As such, while a decision may be finalised and so the decision-making process concluded each year, the overall process remains 'live'.
28. Furthermore, he notes that the business cases for 2022-2023 and 2023-2024 were still in draft and hadn't been agreed or 'signed off' by DE – no decision about those business cases had been made at the time of the request.
29. Because he considers that the annual remuneration process is a 'live' process, the Commissioner considers that the consequences of possibly inhibiting officers from opening discussing and exploring all the associated issues in meetings and of potentially frustrating decisions about the draft business cases would therefore be serious.
30. The Commissioner also agrees with EA that, although of interest to the complainant (and the applicant) the information doesn't have a

significant amount of wider public interest. And the general public interest in the EA being transparent has been met to a satisfactory degree, in the Commissioner's view, through its disclosure of some of the requested information.

31. Regarding the meeting minutes and draft annual business cases, the Commissioner's therefore satisfied that there's greater public interest in the EA being able to make robust and well-considered decisions about remuneration based on advice and views freely given in meetings and through business cases.
32. The Commissioner has finally considered the 'Appointment of Assistant Directors to the Education Authority Remuneration Business Case' document requested in part 4.
33. This document is dated 20 December 2016 and is the 'Final Version'. In its submission to the Commissioner about this business case, the EA has said that disclosing it would be likely to inhibit EA and DE from freely considering options "in such business cases." The EA appears to be suggesting that disclosing this specific business case would negatively impact, not the ongoing remuneration process, but future business cases generally because officers would be reluctant to openly discuss all the issues in future business cases.
34. The EA was established in 2015. From information in the Remuneration Business Case, it appears that this business case was generated in response to a specific circumstance, namely Assistant Directors being proposed as a new role for the EA. As noted, it's dated 2016. The Remuneration Business Case comprises the business case and appendices. The appendices include sample job descriptions, the cost base of the EA's senior management team (at 2016) and a draft performance management framework.
35. The Commissioner doesn't consider that the EA has put forward a persuasive public interest argument that the Remuneration Business Case should be withheld. This business case appears to be a 'one off' business case, prepared for a particular situation; namely to propose the level at which the new role of Assistant Director might be remunerated. A decision was presumably made on that matter and remuneration was then subject to the ongoing review process through the annual business cases.
36. The Commissioner doesn't consider that the starting point of the remuneration of the new Assistant Director role can be considered to be a 'live' issue, at the time of the request six and a half years later. And he's not persuaded that disclosing this business case would inhibit the

preparation of other business cases, even similar ones – given the passage of time and because it's associated with a one-off circumstance.

37. In the absence of compelling public interest arguments against disclosing the Remuneration Business Case, the Commissioner finds that it should be disclosed.
38. To summarise, the Commissioner's decision is that the EA correctly applied sections 36(2)(b)(i), 36(2)(b)(ii) and 36(2)(c) to the meeting minutes and the two draft annual business cases. Because the Commissioner has found that section 36 can be applied to that information, it's not necessary for him to consider the EA's application of section 40(2) to the minutes or draft annual business cases.
39. However, the Commissioner finds that the EA incorrectly applied the exemptions under section 36(2)(b) and 36(2)(c) to the Remuneration Business Case and so the Commissioner will consider the EA's application of section 40(2) to that Business Case.

Section 40 – personal data

40. In this case, the applicant requested the information on behalf of themselves and on behalf of another person, the complainant.
41. The EA has applied both section 40(1) and 40(2) to email correspondence in its entirety (part 1) and to information in the annual business cases it disclosed (part 3).
42. The EA applied section 40(2) only to the Remuneration Business Case (part 4) and the contracts of employment (part 5).
43. Section 40(1) of FOIA provides that information is exempt from disclosure if it's the personal data of the applicant. This is because disclosure under FOIA is, in effect, disclosure to the wider world and most people would prefer that their personal data isn't put in the public domain. The correct legislation under which to handle requests for an applicant's own personal data is the data protection legislation.
44. Section 40(2) of FOIA provides that information is exempt from disclosure if it's the personal data of an individual other than the applicant and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
45. In this case the relevant condition is contained in section 40(3A)(a). This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR').

46. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it isn't personal data, then section 40 of FOIA can't apply.
47. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

48. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

49. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
50. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
51. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
52. Considering the EA's application of section 40(1) first, the Commissioner has reviewed the email correspondence requested in part 1.
53. The Commissioner is satisfied that the email correspondence can be categorised as the complainant's own personal data. Covering a period from January 2019 to July 2023, the emails about pay matters were sent from the EA's HR department to all ADs and the 'Top Management Team' who are all named in the correspondence.
54. The information is therefore exempt under section 40(1) of FOIA. The Commissioner notes that the EA provided the complainant with a separate response to the request under the DP legislation.
55. The Commissioner has next considered the redacted information in the disclosed annual business cases requested in part 3 and whether any of this information can be categorised as the complainant's personal data.
56. The annual business cases concern Assistant Director pay awards for the period 2018-2022. In its submission to the Commissioner the EA says

that the business cases constitute the personal information of the Assistant Directors that the business cases related to, which includes the complainant. The EA says that there's a relatively small number of Assistant Directors (19) and the identity of EA's Assistant Directors is in the public domain from time to time (for example the EA's current Assistant Directors are listed on EA's website).

57. The EA noted that the business cases contain spreadsheets of pay data. It considers that those spreadsheets also constitute the personal information of all the Assistant Directors the business cases related to, including the complainant. This is because it may be possible for someone with a good understanding of the information contained within them to use the information in one or more of such spreadsheets to work out what certain Assistant Directors were getting paid. In particular, the EA is concerned that the information in the spreadsheets could potentially be used to work out remuneration information about certain Assistant Director(s) in particular. The EA didn't consider it was possible to redact or extract information from such spreadsheets in a way which would enable the EA to provide meaningful information whilst also ensuring that the Assistant Directors' personal information wasn't being disclosed.
58. The redacted information in the annual business cases that the EA disclosed includes pay remit proposals, exceptional factors and pay data in relation to the Assistant Directors. They aren't named but factors associated with some of the Assistant Directors are referred to in the business cases.
59. The Commissioner is persuaded that those with knowledge about the matter – for example, people working at the EA - and who are sufficiently motivated to do so would be able to use the redacted information in the annual business case to work out what individual Assistant Directors are paid, including the complainant. He therefore finds that section 40(1) applies to some of the information in these business cases.
60. The Commissioner has next considered the EA's application of section 40(2) to the email correspondence, to information in the disclosed annual business cases, the Remuneration Business Case and the contracts of employment.
61. For the reasons discussed in relation to section 40(1), the Commissioner is satisfied that the email correspondence can also be categorised as the personal data of third parties.
62. The redacted information in the annual business cases that the EA disclosed has also been discussed above. Since the Commissioner has

found that the complainant could be identified from information in those business cases, it follows that others could also be identified. The information is therefore also the personal data of third parties.

63. Turning to the Assistant Director Remuneration Business Case, as discussed this was prepared in 2016, shortly after the EA was created, and it presents a remuneration case for the new role of Assistant Director. The Commissioner assumes that no Assistant Directors were in post at that point. By the time of the request, the Remuneration Business Case might have indicated the starting position of the role of Assistant Director, six and a half years previously. But the Commissioner doesn't consider that the Remuneration Business Case can be categorised as the current Assistant Directors' personal data. The information in the Business Case is too broad and too old. The annual business cases and the different circumstances of individual Assistant Directors will mean that what's discussed in initial Business Case for the role, doesn't sufficiently 'relate to' or identify specific Assistant Directors now. The Commissioner isn't therefore persuaded that the Remuneration Business Case can be categorised as the personal data of third parties.
64. Finally, the contracts of employment. Completed - ie including Assistant Directors names - the Commissioner is satisfied that these contracts can be categorised as the Assistant Directors' personal data. The Assistant Directors can be identified from the contracts and the contracts relate to them.
65. To summarise, the Commissioner is satisfied that the Remuneration Business Case doesn't fall within the definition of 'personal data' in section 3(2) of the DPA. The Remuneration Business Case therefore doesn't engage section 40(2) of FOIA.
66. However, the email correspondence, the information in the disclosed annual business cases and the contracts of employment both relates to and identifies the individuals concerned and therefore does fall within the DPA's definition of 'personal data' - of the complainant and of third parties.
67. The fact that information constitutes the personal data of identifiable living individuals doesn't automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
68. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

69. Article 5(1)(a) of the UK GDPR states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.

70. In the case of an FOIA request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.
71. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the UK GDPR

72. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that “processing shall be lawful only if and to the extent that at least one of the” lawful bases for processing listed in the Article applies.
73. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”¹.
74. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it is necessary to consider the following three-part test:-

¹ Article 6(1) goes on to state that:-

“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
75. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

76. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
77. The Commissioner accepts that the complainant's interest in the information that's been requested is legitimate but considers that it's a personal interest which has little wider public interest. There is, however, a wider and general public interest in public authorities demonstrating they're transparent.

Is disclosure necessary?

78. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
79. Disclosure under FOIA is disclosure to the wider world. Without going into detail the Commissioner considers that there are other, less intrusive, routes through which the complainant (and the applicant)

could obtain relevant information to pursue their legitimate aim, including through the data protection legislation.

80. As the Commissioner has decided in this case that disclosure isn't necessary to meet the legitimate interest in disclosure, he hasn't gone on to conduct the balancing test. As disclosure isn't necessary, there's no lawful basis for this processing and it's unlawful. It therefore doesn't meet the requirements of principle (a).
81. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he doesn't need to go on to consider separately whether disclosure would be fair or transparent.

The Commissioner's view

82. The Commissioner has therefore decided that the EA was entitled to withhold the email correspondence, information in the disclosed annual business cases and the contracts of employment under section 40(1) and 40(2), by way of section 40(3A)(a). But the EA has failed to demonstrate that the exemption at section 40(2) is engaged in respect of the Assistant Director Remuneration Business Case.

Right of appeal

83. 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

84. 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.
85. 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