

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 2 August 2024

Public Authority: The Governing Body of Bidborough Church of England Primary School

Address: Spring Lane
Bidborough
Tunbridge Wells TN3 0UE

Decision (including any steps ordered)

1. The complainant has requested correspondence about a safeguarding concern. Bidborough Church of England Primary School ('the School') withheld the information under section 36 and section 40 of FOIA. These exemptions concern prejudice to the effective conduct of public affairs and personal data, respectively.
2. The Commissioner's decision is as follows:
 - The School hasn't demonstrated that section 36(2)(b)(ii) of FOIA is engaged.
 - However, the School is entitled to withhold some of the information under section 40(1) of FOIA as it's the complainant's own personal data and is entitled to withhold the remaining information under section 40(2) as it's other people's personal data and disclosing it would be unlawful.
 - The School didn't comply with section 17(1) of FOIA as its refusal notice was inadequate.
3. It's not necessary for the School to take any corrective steps.

Request and response

4. On 30 January 2024, the complainant wrote to the School and requested information in the following terms:

“Please provide copies of all communications between any Bidborough School representative and Rochester Diocese Board of Education (RDBE), but particularly Headteacher Ms Burton and Ms Leitch, related to a Safeguarding concern raised on 18th September 2023, and any other communication between 18th September 2023 and 30th January 2024.”
5. The second part of the request isn't quite clear, but the Commissioner considers that a reasonable interpretation of “any other communication” would be any other communication about the safeguarding concern referred to in the first part of the request.
6. The School responded on 1 February 2024. It refused the request under “section 36”, mentioning inhibition to the free and frank exchange of views. The School also advised it was relying on “section 40” of FOIA. However, the School concluded its response by indicating that it was relying on section 14(1) of FOIA to refuse the request. Section 14(1) concerns vexatious requests.
7. The complainant requested an internal review on 5 February 2024. On 12 February 2024 the School wrote to the complainant and said it didn't offer an internal review process. But the School also said that, in any case, the complainant's repeated requests and complaints had caused the School a disproportionate level of disruption and distress “for all involved.” The School said it would decline to respond to the complainant any further on the matter that's the focus of their concern.

Scope of the case

8. The complainant contacted the Commissioner on 3 March 2024 to complain about the way their request for information had been handled.
9. The Commissioner considers that the scope of his investigation is to consider whether the School is entitled to rely on section 36 or section 40 of FOIA, or both, to information within scope of the request. He'll also consider a procedural aspect of the School's handling of the request. Finally, under 'Other matters' the Commissioner will note his experience of dealing with the School through its Data Protection

Officer (DPO), which is an external organisation, and the matter of internal reviews.

Reasons for decision

Section 36 – prejudice to the effective conduct of public affairs

10. The request is for correspondence between RDBE and any Bidborough School representative, particularly Julie Burton (Head Teacher) and Emma Leitch (Co-Vice Chair of Governors), about a safeguarding concern raised on 18 September 2023, and any other communication [about the safeguarding concern] between 18 September 2023 and 30 January 2024.
11. In a telephone conversation with the School on Tuesday 23 July 2024, the School confirmed to the Commissioner what information it considered to be in scope of the request, which is listed at paragraph 27 of this notice. The School has confirmed that it has applied exemptions to that information in its entirety.
12. As will be discussed in the section 40 analysis, the Commissioner considers that some of the information the School has applied exemptions to is out of scope of the request. He's considering the School's application of section 36 to the remaining information.
13. In its original response to the request, the School had advised the complainant that it was relying on "section 36" to withhold the information. The Commissioner assumed the School was referring to section 36(2), under which there are three exemptions and he's noted the reference in its response to inhibition to the free and frank exchange of views.
14. Section 36(2)(b)(i) concerns prejudice to the provision of advice, section 36(2)(b)(ii) concerns prejudice to the exchange of views and section 36(2)(c) concerns otherwise prejudice to the effective conduct of public affairs.
15. All three exemptions at section 36(2) can only be engaged on the basis of the reasonable opinion of a qualified person (QP). Who the appropriate QP is in particular circumstances is defined under section 36(5) of FOIA. In relation to the School, the QP is defined under section 36(5)(o)(iii) as:

"any officer or employee of the public authority who is authorised for the purposes of this section by a Minister of the Crown."

16. In his initial correspondence to the School dated 30 May 2024, the Commissioner asked the School to clarify the section 36(2) exemption(s) on which it was relying. He also asked it to provide him with a copy of any submission that had been provided to the School's QP along with the QP's opinion, and to address his standard key questions about the relevant section 36(2) exemption and associated public interest test(s). The Commissioner instructed the School to provide its submission by close of 13 June 2024. The Commissioner considers that his correspondence of 30 May 2024 was quite clear in terms of what information he expected the School to provide to him.
17. Through its DPO, on 7 June 2024 the School provided the Commissioner a submission, however this submission concerned section 40 only and was scant. On 10 June 2024 the Commissioner advised the DPO that if the School was still relying on section 36 the DPO should also address the points he'd raised in this letter of 30 May 2024, by the 13 June 2024 deadline.
18. In correspondence to the Commissioner dated 12 June 2024, the DPO advised only that "We believe that 36(b)(ii) [sic] should apply in this instance..."
19. Since this was still inadequate, it therefore became necessary for the Commissioner to serve an Information Notice on the School in order to receive an appropriate submission for both section 36(2)(b)(ii) and section 40, and on which he could base his decision.
20. The DPO provided a further submission on 27 June 2024 but this was, again, unsatisfactory. The submission comprised internal correspondence, the School's correspondence with its DPO and correspondence with the complainant about the substantive matter and earlier requests for information from the complainant. None of the questions and instructions about section 36 that the Commissioner had sent to the School on 30 May 2024 had been addressed or been addressed in a way that was at all clear to the Commissioner.
21. Correspondence that the School subsequently provided in 'Doc 8' and 'Doc 9' of a further submission show the School asking its DPO for advice about how to handle the current request, and the DPO providing advice (some of which the Commissioner considers to have been questionable).
22. It's not clear from its various submissions but it may be that the School considers its DPO is its QP. However, the QP for a school is

generally its head teacher or the chair of the school's governing body; the DPO wouldn't be an appropriate QP.

23. Through its DPO the School has now confirmed to the Commissioner that it's relying on section 36(2)(b)(ii). However, the School has been given three opportunities to provide the Commissioner with a submission that clearly explains and justifies that section 36 position. The School hasn't provided one, and its original refusal of the request to the complainant is thin.
24. At the point of this decision therefore, neither the School nor its DPO have explained who the School's QP is or provided the Commissioner with what could be categorised as the opinion of its QP that 36(2)(b)(ii) was exemption was engaged, or a copy of a submission that the School or DPO provided to its QP to help the QP form their opinion, or a submission to the Commissioner that discussed and explained its section 36 position and outlined the public interest associated with that exemption.
25. In the absence of any meaningful submission from the School, the Commissioner cannot find that section 36(2)(b)(ii) of FOIA is engaged.
26. Since section 36 isn't engaged in this case, the Commissioner has gone on to consider the School's application of section 40(2) to the information within scope of the request, that it's withholding.

Section 40 – personal data

27. The information to which the School has applied section 40 of FOIA comprises the following:
 - Doc 1 – a letter sent by email from Emma Leitch to the RDBE Director of Education dated 16 January 2024
 - Doc 2 - emails dated 9 and 10 January 2024 which include views on sharing the above letter with the complainant. In one of the emails dated 9 January 2024 from Emma Leitch to the Clerk to the Governors, reference is made to the complainant's name.
 - Doc 3 – a letter from the School to the complainant dated 16 January 2024
 - Doc 4 - a letter from the School to the complainant dated 30 January 2024

- Doc 5 – email correspondence between the School and the complainant dated between 18 September 2023 and 26 September 2023
 - Doc 6 – email correspondence from the complainant to the School dated 15 November 2023 and an email from RDBE to the School dated 16 November 2023
 - Doc 6a – a series of emails chronicling the School’s interactions with the complainant and its DPO and dated from 6 October 2023 and 29 November 2023. These emails include correspondence to and from the complainant and includes the information in Doc 6.
 - Doc 7 – a response from RDBE to the letter of 16 January 2024, dated 22 January 2024, the School’s covering email to its 16 January 2024 letter, dated 19 January 2024 and an internal email dated 21 January 2024, passing on RDBE’s response
28. Doc 6a also includes emails in which the School seeks and is given advice from its DPO about separate requests for information from the complainant. Although the requests may have been generated by the substantive safeguarding concern, the Commissioner considers that the focus of these communications is those separate requests for information. As such, he doesn’t consider these emails to fall in scope of the request, which is for correspondence about the safeguarding concern. The emails are ‘one step removed’ from that matter. The Commissioner has therefore taken those emails out of the scope of his investigation.
29. Other information the School has sent to the Commissioner – Doc 8 and Doc 9 discussed in the section 36 analysis - also falls outside the scope of the request – and therefore this investigation. This is because it’s correspondence dated after 30 January 2024 and broadly concerns the request of 30 January 2024 that this decision notice is considering.

Section 40(1) – the applicant’s personal data

30. Disclosure under FOIA is, in effect, disclosure to the wider world. Most people don’t want their personal data disclosed to the world and so under section 40(1) of FOIA, information is exempt from disclosure if it’s the personal data of the applicant themselves. The correct legislation under which to handle requests for an applicant’s own personal data is as a subject access request under the data protection legislation.

31. The Commissioner has considered the terms of the request – which includes “...and any other communication [about the safeguarding concern] between 18th September 2023 and 30th January 2024.”
32. Some of the information the School is withholding, and which falls within scope of the request, is correspondence that was sent to and from the complainant or in which the complainant is named or referred to. This information is in the email from Emma Leitch of 9 January 2024 in Doc 2, information in Doc 3, Doc 4, Doc 5, the email of 15 November 2023 in Doc 6 (and which is also in Doc 6a) and the emails to and from the complainant in Doc 6a.
33. This information is therefore clearly exempt under section 40(1) as it’s the complainant’s own personal data; they can be identified from the information and the information relates to them.
34. If it didn’t do so, the School should consider the request for this particular information under the data protection legislation.

Section 40(2) – their party personal data

35. The Commissioner has gone on to consider the remaining information in scope of the request; that is, the information in Doc 1, the remaining information in Doc 2, the email of 16 November 2023 in Doc 6 (and which is also in Doc 6a) and Doc 7.
36. Under section 40(2), 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.
37. In this case the relevant condition is contained in section 40(3A)(a)¹. 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).
38. 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 cannot apply.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

39. 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?

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

“any information relating to an identified or identifiable living individual”.

41. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
42. 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.
43. 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.
44. The correspondence in question doesn't discuss the complainant directly but discusses their safeguarding concern more broadly. The Commissioner is satisfied that this information can be categorised as the personal data of those who wrote the correspondence. Even if the individuals' names were redacted, given the terms of the request and the content of the correspondence, the Commissioner considers it would still be possible to identify who'd written the correspondence. He's also satisfied that the information relates to those individuals – the 'data subjects' – as they wrote the correspondence. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
45. 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.
46. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

47. 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”.

48. 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.
49. 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

50. 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.
51. 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”².

52. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under FOIA, it’s necessary to consider the following three-part test:

² 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
53. 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

54. 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.
55. The complainant had a safeguarding concern about the School and the information they've requested is about that concern. The Commissioner has noted the nature of the complainant's safeguarding concern and considers that this interest is an entirely legitimate interest for the complainant to have. However, the Commissioner considers the complainant's safeguarding concern is more of a private concern for them. There is, however, a broader legitimate interest in public authorities such as the School demonstrating they're open and transparent.

Is disclosure necessary?

56. '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.

57. In the Commissioner's view, the principal information in scope here is the School's letter to the RDBE (Doc 1) and the RDBE's response (Doc 7). However, in its letter to the complainant dated 16 January 2024 (Doc 3), the School summarised the content of its letter to the RBDE. This was in order to complete actions that had been set out in a decision letter dated 14 December 2023 that was associated with the complainant's Stage 2 complaint to the School's Governors.
58. The Commissioner is conscious that the complainant hasn't been provided with a summary of the RDBE's response to the School's letter, or the other information being considered, in Doc 2, Doc 6 and Doc 6a.
59. The Commissioner therefore accepts that that it would be necessary to disclose the information in order to fully meet the complainant's legitimate interest. The information would show how the School addressed the complainant's concerns and the internal advice and discussions that took place - this is not otherwise known.
60. The Commissioner has gone on to balance the legitimate interests in disclosing the information against the data subjects' rights and freedoms. In doing so, it's necessary to consider the impact of disclosure. For example, if the data subjects wouldn't reasonably expect that the information would be disclosed to the public under FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
61. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause
 - whether the information is already in the public domain
 - whether the information is already known to some individuals
 - whether the individual expressed concern to the disclosure; and
 - the individuals' reasonable expectations.
62. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.
63. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.

64. The information relates to people in their professional capacity, and, in most instances, at quite a senior level. This might lead to an expectation that their personal data could be disclosed under FOIA.
65. However, the safeguarding concern, while legitimate, is a localised concern with little wider public interest. The Commissioner considers that the data subjects would therefore reasonably expect that their personal data wouldn't be disclosed to the world at large, under FOIA. Disclosing the information would therefore be likely to cause them harm and distress, and the School's DPO has indicated that this would be the consequence.
66. The Commissioner is satisfied that the summary the School provided to the complainant goes a long way to satisfying the complainant's legitimate interest and the general interest in the School demonstrating it's transparent. The summary was provided as part of the formal complaint process the complainant has been pursuing against the School about their safeguarding concern. The Commissioner considers that's an appropriate route for them to take to resolve their concern. And as he's indicated, the complainant can also request their own personal data under the data protection legislation. In addition, some of the information in question is more administrative in nature and doesn't address substantive safeguarding concern that's the focus of the complainant's interest.
67. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest in disclosure to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there's no Article 6 basis for processing and so disclosing the information wouldn't be lawful.
68. 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.
69. The Commissioner has therefore decided that the School is entitled to withhold the information in Doc 1, the remaining information in Doc 2, the email of 16 November 2023 in Doc 6 (and which is also in Doc 6a) and Doc 7 under section 40(2) of FOIA, by way of section 40(3A)(a).

Procedural matters

70. Section 17(1) of FOIA sets out what should be in a refusal notice, in cases where a public authority is refusing to disclose information it considers is exempt. Section 17(1) states that the refusal notice should be provided within 20 working days of the request, should state that the authority has applied an exemption to the information, specify what that exemption(s) is and explain why it considers the exemption(s) applies.
71. The Commissioner considers that the School's refusal didn't comply with the requirements of section 17(1) as it didn't make clear the specific exemptions under section 36 and 40 on which it was relying including not making any reference to section 40(1). In addition, the School applied exemptions to information that the Commissioner considers was out of scope of the request.

Other matters

72. As has been recorded in the above decision, the Commissioner has found it difficult to obtain satisfactory information from the School, through its DPO, which is an external organisation. Investigating the complaint has therefore been more time consuming than it needed to be, for both the School and the Commissioner.
73. The Commissioner reminds the School that he has published guidance about dealing with requests for information under FOIA³ and all the exemptions⁴, including the section 36 and 40 exemptions. The Commissioner also offers public authorities other sources of help, guidance⁵ and training materials⁶ about dealing with FOIA requests. If

³ <https://ico.org.uk/for-organisations/foi/>

⁴ <https://ico.org.uk/for-organisations/foi/freedom-of-information-and-environmental-information-regulations/>

⁵ <https://ico.org.uk/global/contact-us/contact-us-sme/>

⁶ <https://ico.org.uk/for-organisations/foi/learning-resources-and-training-videos/>

it needs to, the School can refer to this guidance or training, or both, in relation to any future requests it might receive.

74. Finally, the School advised the complainant that it doesn't offer an internal review process and the Commissioner asked the School to explain that position. He notes that amongst its various submissions to the Commissioner, the School has suggested it intends to "apply a review policy" in the future.
75. Provision of an internal review isn't a requirement of FOIA but is a matter of good practice set out in section 5 of the FOIA Code of Practice⁷. Internal reviews offer the opportunity for a public authority to reconsider its response to a request and to address the applicant's concerns. In most cases, this prevents the matter escalating to a complaint to the Commissioner.

7

https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf

Right of appeal

76. 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

77. 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.
78. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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