

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

### **Decision notice**

**Date:** 22 November 2024

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

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

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1. The complainant has requested a copy of the minutes of a particular meeting. The above public authority ("the public authority") disclosed a heavily redacted version of the minutes and relied on section 36 (prejudice to the effective conduct of public affairs) 40 (personal information) and 41 of FOIA (breach of confidence) to withhold the remainder.
2. The Commissioner's decision is that section 36 of FOIA is engaged but the balance of the public interest favours disclosure. Neither section 41 nor section 40(2) of FOIA is engaged. The public authority also breached section 17 of FOIA because it failed to issue a refusal notice within 20 working days.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - Disclose an unredacted copy of the minutes.
4. The public authority must take these steps within 30 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**

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5. On 23 January 2024 the complainant requested information of the following description:

“In relation to Southfield Primary School:

  - The closure proposal
  - Value for money/viability assessment
  - Equality Impact Assessment
  - Also the request to terminate the funding agreement by mutual consent for Southfield along with the documentary evidence supplied by the trust.”
6. On 4 April 2024, the public authority responded. It refused to provide the requested information. It relied on sections 36 (prejudice to the effective conduct of public affairs) 40 (third party personal data) and 42 (legal professional privilege) of FOIA to withhold the requested information.
7. The complainant requested an internal review on 8 April 2024 in respect of a set of minutes. The public authority sent the outcome of its internal review on 3 May 2024. It upheld its original position but relied additionally on section 41 (breach of confidence) to withhold the information.

## **Scope of the case**

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8. The complainant’s original grounds of complaint referred only to a copy of the minutes of the school’s governing board. The substance of the meeting was entirely redacted apart from a single sentence confirming that the trustees had agreed to seek consent, from the Secretary of State for Education, to close the school. The public authority relied only on sections 36, 40(2) and 41 to withhold this particular information.
9. The Commissioner made clear at the outset of his investigation that he only proposed to look at the minutes. The complainant raised no objection to the scope of the investigation.
10. Having received a copy of the withheld information and submissions from the public authority, the Commissioner wrote to the complainant advising that he was minded to agree that the exemption was engaged because of the timing of the request. He suggested that the complainant might wish to make a fresh request instead – thus taking advantage of

the passage of time. The complainant did not accept the Commissioner's provisional view and asked for a decision notice.

11. Having given the matter further consideration and, in particular, carried out additional research into the school closure process, the Commissioner now accepts that his provisional view did not weight the public interest test correctly. The analysis in his decision therefore reaches a very different conclusion.
12. The Commissioner considers that the scope of his investigation is to determine whether the public authority was entitled to rely on either section 36 or section 41 of FOIA to withhold the requested information.
13. The withheld information is a set of minutes from a meeting of the School's Governing Board. The Board is made up of individuals who are known as the "trustees" of the School. The Commissioner has used the term "Governing Board" within this decision notice to refer to the trustees acting collectively in their capacity as the highest decision-making body in the School. He has used the term "the trustees" when referring to one or more trustees acting individually. The Commissioner has also referred to "the School", though it is in fact an academy.

## Reasons for decision

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14. Section 36 of FOIA allows a public authority to withhold information that would harm the free and frank provision of advice, the free and frank exchange of views for the purposes of deliberation or would otherwise prejudice the effective conduct of public affairs.
15. In order for the exemption to be engaged, a very senior individual within the organisation, known as the qualified person, must provide an opinion stating either that these harms would be caused by disclosure or that they would be likely to be caused. That opinion must be a reasonable one.
16. The public authority provided the Commissioner with a copy of a statement signed by Baroness Barran and dated 8 March 2024. The statement was included as an annex to a submission that was presented to the Baroness for the purpose of seeking her opinion.
17. At that time, Baroness Barran was the Parliamentary Under Secretary of State for the School System and School Finance. As a minister of the crown, Baroness Barran was entitled to act as the Qualified Person and, in signing her statement, the Commissioner accepts that she provided her opinion on 8 March 2024.

## **What was the opinion and was it reasonable?**

18. The statement signed by the Qualified Person was short. It simply said:

"I confirm that, in my reasonable opinion as a qualified person, disclosure of the information under the Freedom of Information Act 2000 would (or would be likely to) have the effect set out in section 36 (2)(b)(i), (ii) and section 36(2)(c) of the Act"

19. The public authority also provided a copy of the submission it had provided to the Qualified Person for the purpose of seeking her opinion. That submission set out the background to the withheld information and some reasoning to support the use of the exemption. Whilst it would have been helpful if the Qualified Person could have explicitly stated that she was relying on the arguments presented in the submission (or, if she disagreed, provided her own arguments), the Commissioner accepts that the submission will have been in the mind of the Qualified Person when she provided her opinion. He has therefore treated the arguments in the submission as having been adopted by the Qualified Person (though he will comment further on this point under "Other Matters").

20. In its submission to the Qualified Person, the public authority stated that disclosure of the withheld information:

"could have a prejudicial effect as it exposes the way in which we provide advice to Ministers and releasing it could have a negative impact on the free and frank provision of advice, exchange of views and affect the conduct of public affairs. This a complex school closure and releasing the detail of one submission, in the absence of context provided through the numerous conversations and other documentation in relation to this closure, but outside of the scope of this request, could lead to false assumptions about the level of detail upon which this decision is based. This could be damaging both to our ability to deliver this school closure, but also to the way that future advice is presented to the Minister."

21. The Qualified Person's opinion did not identify the likelihood of the harm occurring. Despite them being separate tests, the opinion itself stated that disclosure "would (or would be likely to)" cause harm. There was nothing in the submission to the Qualified Person that stated definitively whether disclosure "would" cause harm (meaning the harm is more likely than not to occur) or whether it only "would be likely to" cause harm. The submission used the word "could" throughout.

22. The Commissioner has therefore assessed the likelihood of harm at the lower bar of "would be likely to". This means that the chance of harm is lower than 50%, but is nevertheless substantial.

23. When deciding whether an opinion is reasonable, the Commissioner must not substitute his own opinion for that of the Qualified Person. The opinion does not have to be the most reasonable opinion a person could hold – it simply has to be reasonable.
24. An opinion will not be reasonable if it is irrational, absurd or if it fails to identify an applicable interest.
25. The Commissioner does not consider it irrational or absurd to think that officials or the trustees of the School might feel inhibited from providing free and frank advice, or from freely and frankly exchanging their views, if they were concerned that those views might be published. That is sufficient to engage the exemption.
26. The Commissioner does not believe that the qualified person's opinion was reasonable in stating that disclosure would "otherwise prejudice" the effective conduct of public affairs.
27. In order to engage this particular part of the exemption, the qualified person must identify some form of harm that would be caused by disclosure and which would not be covered by any other exemption.
28. The statement the Qualified Person signed does not identify any harm other than to the free and frank exchange of views or the free and frank provision of advice. That has already been covered.
29. The submission provided to the Qualified Person does not identify any harm that would be caused by disclosure of this particular information other than to the free and frank exchange of views or the free and frank provision of advice. It did identify other harms that might be caused by the disclosure of other information (because the scope of the original request was wider), but none of those harms are applicable to the particular information being withheld.
30. The submissions provided to the Commissioner did identify some harms that might result from the disclosure of the information. These included the effect on the relationship the public authority has with schools and trustees generally, as well as the effect on individual trustees.
31. However, the Commissioner does not consider that he can accept these arguments, as he is not persuaded that they formed part of the Qualified Person's opinion.
32. Firstly, the arguments the public authority has now provided to the Commissioner do not match those put forward in the original submission to the Qualified Person. Although that submission was lacking in detail, the arguments put forward were qualitatively different to those now

presented to the Commissioner – not least because they apply to different information.

33. Secondly, the Commissioner notes that the submission provided to him was sent in November 2024 – eight months after the opinion was produced and four months after Baroness Barran left her role as a result of the change of government. It would be difficult for the public authority to have known what was in the Qualified Person's mind when she provided her opinion – and it is no longer in a position to check.
34. Only the Qualified Person can engage section 36 of FOIA. The Commissioner is not persuaded that the submission the public authority has provided to him represents the Qualified Person's opinion and no other document has been provided to him that would identify the harm that the Qualified Person envisaged as being likely to arise from disclosure.
35. Therefore the Qualified Person's opinion is not reasonable in this respect ("otherwise prejudice") as it fails to identify an applicable interest that could be harmed by disclosure.
36. The Commissioner will therefore only consider the exemption as it applies to the free and frank provision of advice and the free and frank exchange of views for the purposes of deliberation.

### **Public interest test**

37. Even where the disclosure of information might inhibit the free and frank provision of advice or the free and frank exchange of views (or both), the information must still be disclosed unless the balance of the public interest favours maintaining the exemption.
38. Given that the Qualified Person, who is better placed than the Commissioner to know, has stated that disclosure carries the possibility of harm, there is an inherent public interest in preventing that harm from occurring. However the weight to be assigned to that interest will depend on the likelihood of the harm and the severity of the harm if it did occur.
39. In assessing where the balance of the public interest should lie, the Commissioner has had particular regard to the timing of the request.
40. [Closing a school or academy](#) can be a lengthy process and cannot happen unilaterally. For an academy, the trust that runs it must first decide that it wishes to apply for permission to terminate its funding agreement and explain the reasons to the Secretary of State for Education.

41. If the Secretary of State accepts the reasoning presented to them, they will announce that "in principle" they agree that the academy should close. The public authority then works with the trust to put together plans to transfer pupils to alternative providers of education and to communicate with parents about the closure.
42. Once that work is complete, the trust may then apply for a substantive closure decision from the Secretary of State – which is the final decision that the school will (or will not) close.
43. There must then be a "listening period" in which various stakeholders such as parents, the local education authority and others can have their say about the closure process.
44. Once the listening period has concluded and the Secretary of State has had the opportunity to consider the representations, they then approve the closure plan. Formal closure will usually take effect at the end of the current academic year.
45. In its submission to the Commissioner, the public authority explained that:

"Ministers agreed to the **substantive decision for the closure** of Southfield Primary School (SPS) on 26 June 2023, and the listening period associated with this closure ran from 9 October 2023 and ended on 10 November 2023, which involved a series of presentations from the trust and the LA to the local community, which made clear the reasons and rationale for the proposed closure, which illustrates that appropriate information was in the public domain. Following this, the minister went on to consider the outcome of the listening period and the plans for pupil placement and, on 25 March 2024, made the final decision to close this school." [emphasis added]
46. Based on this wording, the Commissioner understands that the Secretary of State had made a final decision to close the school on 26 June 2023 – given that, according to the published process, the listening period does not begin until a substantive decision to close has been made. Although the public authority referred to a "final decision" being made on 25 March 2024, the Commissioner now understands this to be a decision to approve the programme for implementing the already-agreed closure, rather than a decision to close or not to close.
47. Consequently, at the date the request should have been responded to, the Secretary of State had already made a decision to close the school but had yet to agree the fine details of how the closure would take place.

48. This matters because, once a decision has been taken, officials no longer require a safe space in which to provide advice or discuss ideas. Therefore, to the extent that the withheld information relates to matters still under consideration at the time of the request, there may be a public interest in preserving that safe space by maintaining the exemption. Conversely, if (and to the extent that) the withheld information relates to matters that have already been decided, the need for a safe space will be considerably diminished.
49. The Commissioner has considered the withheld information carefully. It is a candid reflection of the discussions that took place at the meeting at which the Governing Board took the decision to apply for a closure of the School.
50. Whilst the material under consideration does not actually have to contain candid views for the exemption to apply, the Commissioner will usually proceed more cautiously where views are both candid and can be assigned to particular individuals – as is the case here.
51. In its submission, the public authority argued that the information needed to be withheld in order to protect the ability of the Governing Board to provide frank and candid advice to the Secretary of State.
52. If the Secretary of State did not receive good quality advice or was unable to debate matters candidly with their officials, it was likely to result in a poorer quality of decision-making.
53. The public authority argued that school closures are inherently contentious and that it was important that both itself and the Governing Board be able to provide clear communication to those affected. Sharing information too early in the closure process could result in an exodus of pupils – potentially destabilising the School.
54. Finally, the public authority argued that some of the trustees were volunteers and that people might be dissuaded from putting themselves forward if they were concerned about their views being made public.
55. In support of disclosure, the complainant argued that there was a public interest in understanding how the decision had been reached.

### **The Commissioner's view**

56. The Commissioner has considered the public authority's arguments carefully, but does not find them persuasive.
57. At the point at which the request should have been responded to, the Secretary of State had already made a final decision to close the School and that decision had been communicated to parents and staff. The only



part of the closure process yet to conclude, in the Commissioner's understanding, was the exact mechanism for closure. The School was going to close, it was just a matter of agreeing how and when.

58. The withheld information only relates to the decision to apply for a voluntary closure. It contains very little about the exact process for transferring pupils and staff – except in the vaguest or most generic of terms.
59. The Commissioner does not therefore accept that the public authority still required a safe space in which to debate the decision of **whether to close the school at all**. It may have required a safe space to discuss the **mechanism** for closure, but disclosure of the withheld information would not impinge upon that safe space.
60. In respect of the effect upon the trustees, the Commissioner recognises that there are many people across the country that volunteer their time to take part in the governance of schools. They make a significant and valuable contribution to upholding standards of education.
61. That being said, if someone assumes a post that brings with it decision-making responsibilities, that person should expect to be held accountable for the way in which they exercise those responsibilities – regardless of whether they are a volunteer or not. The level of scrutiny will depend on their seniority and the level of decision-making they take on.
62. In this case, the public authority has noted that the individuals concerned hold senior roles in other public authorities. They should therefore be well aware of the levels of scrutiny and accountability that come with such roles. They should also be robust individuals not easily dissuaded from providing candid advice.
63. It is not for the Commissioner to offer any opinion on the decision to close the School. However, he recognises that the closure of any school can have a significant impact on the pupils and the staff. There is therefore a strong public interest in allowing all those involved to better understand the rationale for the School's closure.
64. The Commissioner is not persuaded that the disclosure of this information would dissuade other boards of trustees from submitting information to the public authority. Academies cannot close without the permission of the Secretary of State. Permission will presumably not be forthcoming if the Secretary of State does not feel that they have sufficient information to justify closure – therefore there is a strong incentive for boards to provide accurate, candid and timely information, even if that information may subsequently be disclosed.

65. The Commissioner is therefore of the opinion that the balance of the public interest should favour disclosure of the information.

### **Section 41 – breach of confidence**

66. Section 41 allows a public authority to withhold information that has been provided to it by another person and whose publication would be an actionable breach of confidence.

67. The information in question has self-evidently been provided to the public authority by another “person”: the Governing Board. It is neither trivial nor in the public domain so has the necessary quality of confidence.

68. The Commissioner accepts that, at the point at which the information was shared with the public authority, no decision had been made by the Secretary of State. The closure process states very clearly that no communication of the closure proposal should be made until such times as the Secretary of State has made a substantive closure decision. Therefore, the Commissioner accepts that there is an implication that such material would be kept confidential prior to the announcement of a substantive closure decision. The information has therefore been provided in circumstances implying a duty of confidence.

69. The Commissioner is less persuaded that any implied duty of confidence would extend beyond the point at which the substantive closure decision is announced – however, given his analysis of detriment and the public interest defence, he will assume that the duty of confidence did still apply at the point the request was made.

70. The final test to establish a breach of confidence is that the confider of the information would have to suffer some form of detriment if the information were published.

71. The public authority did not identify any detriment to the Governing Board, but did argue that the individual trustees may suffer reputational damage if the information were published “especially if such individuals become the target of any campaigns against school closures.” It also noted that those trustees who held positions in other public authorities may be inhibited from expressing their views if they encounter similar situations.

### **The Commissioner’s view**

72. In the Commissioner’s view, the public authority has failed to establish that the prospect of detriment is either likely or substantial.

73. It is already in the public domain that the individuals concerned were trustees at the point the application for closure was made. It is also in the public domain that the Governing Board made an application and that the Secretary of State has approved that application.
74. Therefore, in the Commissioner's view, if any individual did wish to make any of the trustees the target of a campaign, they could already do so, based on the information in the public domain. It is not clear to the Commissioner (and the public authority has not explained) why disclosure of the withheld information would make any trustee more likely to be targeted.
75. Furthermore, the Commissioner notes that, at the point the request was made, the decision to close the school had already been taken. It would have been pointless to have "targeted" any trustee with the intent of persuading them to change a decision that had irrevocably been taken. No evidence was put forward to support such an assertion and the Commissioner considers that it was speculative at best.
76. Nor is the Commissioner persuaded that disclosure would cause any trustee to suffer reputational damage. He has seen nothing in the withheld information that would lead to such a conclusion, nor has the public authority highlighted any matters that might be damaging. As noted above, he would expect the individuals involved to be robust and not easily dissuaded from giving their opinion.
77. Even if the Commissioner were persuaded that there would be detriment, he is of the view that the public authority would have a public interest defence.
78. Disclosure of the minutes would assist parents, pupils and staff (as well as the public more generally) of the School in understanding why the Governing Board had applied to close it. In the Commissioner's view, publication would be a proportionate means of achieving a legitimate aim.
79. The Commissioner is therefore of the view that publishing the information would not be an actionable breach of confidence. Consequently section 41 of FOIA is not engaged.

#### **Section 40 – personal information**

80. Whilst the Commissioner accepts that the withheld information does contain the personal information of the members of the Governing Board, he does not consider section 40(2) applies as the legitimate interest in publishing this information outweighs the rights of the data subjects concerned.

81. The Commissioner has reached this conclusion based largely on the same assessments of the balancing of legitimate interest and potential harm that he has made in respect of the other two exemptions. In particular the Commissioner has taken into account that:
- the individuals concerned hold senior roles on the Governing Board and in other organisations; and
  - the information contains nothing about the private or personal life of any individual; and
  - all the individuals were contributing to the meeting in their professional capacity; and
  - the School routinely publishes the same information, in respect of other meetings of the Governing Board, that has been withheld here.
82. The Commissioner therefore sees no reason why the trustees should have a reasonable expectation that their names would be withheld from this set of minutes. Consequently disclosure would not be contrary to their reasonable expectations and should thus not cause unwarranted damage or distress. As such, the legitimate interest outweighs the rights of the data subjects, disclosure would be lawful and so section 40(2) of FOIA does not apply.
83. Given that none of the cited exemptions applies the information must be disclosed.

### **Procedural matters**

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84. Section 17 requires a public authority, that is relying on an exemption to withhold information, to issue a refusal notice to the requester, stating the exemption being relied upon and why that exemption applies. The public authority must usually provide this within 20 working days.
85. Section 17(3) allows a public authority to extend the time for providing a refusal notice until such time "as is reasonable in the circumstances" if it needs additional time to consider where the balance of the public interest should lie.
86. The public authority did not need to issue a refusal notice in respect of the minutes because, as the Commissioner has found, they should have been disclosed. However, he accepts that exemptions were applied to other documents.

87. Although a public authority can delay its refusal notice, this is only where it needs more time to consider the balance of the public interest. It should have decided which exemptions are engaged within 20 working days.
88. The Commissioner notes in this case that the public authority did not seek the opinion of its qualified person until 8 March 2024. As section 36 cannot be engaged until the qualified person has provided their opinion it follows that the public authority had not engaged with the exemption within 20 working days and consequently it was unreasonable to delay issuing its refusal notice.
89. The Commissioner therefore finds a breach of section 17 of FOIA.

### Other matters

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90. Given the circumstances described above, the Commissioner considers it desirable to provide some further commentary on the process for seeking and recording the qualified person's opinion.
91. The Commissioner notes that the qualified person does not have to demonstrate that their opinion is both reasonable on its face **and** has been reasonably arrived at. An opinion that is reasonable on its face is a reasonable opinion – regardless of the process by which it was formed.
92. Nevertheless, where there is a lack of evidence to show what matters the qualified person has considered, a public authority will have more difficulty convincing the Commissioner that the opinion is reasonable.
93. The Commissioner recognises that ministers are busy people and will rarely have time to produce detailed assessments of information that is to be withheld. They will generally rely heavily on the advice of officials and, in the Commissioner's experience, will often adopt the arguments presented to them as their own. There is nothing wrong with that, but it is helpful for the qualified person to agree explicitly that they wish to adopt the arguments made in the submission as their own opinion. The submission should also be clear in setting out why the harm could occur so that, if the qualified person does adopt the submission as their opinion, it will be clear to the Commissioner why the exemption is engaged.
94. An opinion does not need to provide a separate rationale for withholding each individual document, but it should address the different types of information to which the exemption is being applied. It will be much more difficult to demonstrate that an opinion is reasonable if it fails to

explain why the disclosure of a particular piece, or type, of information may be harmful.

95. Finally, the qualified person's opinion should provide their assessment of the likelihood of the harm they have identified occurring. Either prejudice "would occur" or it "would be likely to occur." It is the qualified person's responsibility to distinguish these tests.
96. The Commissioner would recommend that all public authorities use his [published template for recording the opinion of the qualified person](#).

## **Right of appeal**

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97. 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)

98. 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.
99. 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**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**