

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

### **Decision notice**

**Date:** 18 April 2019

**Public Authority:** Peterborough City Council  
**Address:** Town Hall  
Bridge Street  
Peterborough  
Cambridgeshire  
PE1 1HG

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

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1. The complainant requested correspondence between Peterborough City Council ("the Council") and Eye C of E Primary School ("the School") relating to a complaint of maladministration of Key Stage 2 SATs tests. The Council disclosed some information, but withheld the remainder under section 36 (prejudice to the effective conduct of public affairs) of the FOIA.
2. The Commissioner's decision is that both section 36(2)(b)(ii) and section 36(2)(c) are engaged in respect of the Notice of Visit and that the public interest lies in maintaining the exemption. In respect of the Letter of Closure, the Commissioner's decision is that both limbs are engaged in respect of two paragraphs but she finds that the public interest favours disclosure. Neither exemption is engaged in respect of the remainder of the document. The Commissioner also finds that the Council failed to discharge its section 1(1) duties within 20 working days and failed to issue a valid refusal notice. It thus breached Sections 10 and 17 of the FOIA respectively.
3. The Commissioner requires the Council to take the following steps to ensure compliance with the legislation.
  - Provide, to the complainant, a copy of the Letter of Closure. The Council may redact both the signature and the email address.

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

## Request and response

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5. On 5 April 2018, the complainant wrote to the Council and requested information in the following terms:

*"I would like to receive all correspondence between the council and Eye C of E Primary School and all internal communication at the council on Eye C of E Primary School.*

*"I would also like to receive any communication between the council and any external organisations/individuals regarding Eye C of E Primary School, as well as any documents it has on Eye C of E Primary School's Key Stage 2 results.*

*Can the correspondence and documents please be for the past two years."*

6. The Council responded on 16 May 2018. It provided some redacted information, but it withheld information which had been provided to it by both the School and the Standards and Testing Agency ("the STA"). It did not cite any exemption from the FOIA as its reason for withholding that information.
7. On 28 June 2018, the complainant contacted the Council as he was dissatisfied with the response he had received. In particular, he challenged the Council's assertion that it could not provide him with information it had received from elsewhere. The Council provided a further response on 4 July 2018 and disclosed some additional information – however it continued to withhold information it had received from the School.
8. At this point the Commissioner intervened, following the complainant bringing the matter to her attention, noting that the Council had failed to issue an adequate refusal notice covering the information it wished to withhold. She asked it to conduct a full internal review.
9. On 10 September 2018, the Council provided the outcome of its review. It now stated that the information supplied to it by the School and the STA was not information it held in its own right and was information it held *on behalf of* those bodies.

## Scope of the case

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10. The complainant contacted the Commissioner on 13 September 2018 to complain about the way his request for information had been handled. He argued that the information was held by the Council for its own purposes and should therefore be disclosed.
11. At the outset of her investigation, the Commissioner informed the Council that she considered that any correspondence between the Council and either the STA or the School would be "held" by both parties to the correspondence. She therefore instructed the Council to reconsider the request from scratch; identify all the information it held within the scope of the request and either provide that information or issue a valid refusal notice covering any information it wished to withhold.
12. The Council subsequently released a fresh batch of emails with some redactions. However it identified two documents which it wished to withhold. These documents are the Notice of Visit and the Letter of Closure. It cited section 36 (Prejudice to the Effective Conduct of Public Affairs) as its reason for doing so. It also noted that both these documents and the emails it had released contained personal information (this information was redacted in the emails).
13. The complainant has confirmed to the Commissioner that he is only interested in correspondence relating to the School's May 2017 Key Stage 2 SATs results and that he is content for appropriate redactions to be made to protect personal information.
14. The scope of the Commissioner's investigation is therefore to determine whether the claimed subsections of section 36 are engaged and, if they are, to determine whether the balance of the public interest lies in favour of disclosure or of maintaining the exemption.

## Background

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15. Having received expressions of concern relating to the School's Key Stage 2 SATs results, in January 2018, the STA asked the Council to carry out a visit to investigate the matter.
16. Having considered the outcome of that visit and other evidence, the STA took the decision to annul all the School's Key Stage 2 results for that year's Spelling, Grammar and Punctuation test.

## Reasons for decision

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### Section 36 – Prejudice to the Effective Conduct of Public Affairs

17. Section 1(1) of the FOIA states that:

*Any person making a request for information to a public authority is entitled –*

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*

18. Section 36(2) states that information is exempt from disclosure if, in the reasonable opinion of the Qualified Person, disclosure of the information:

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

*(i) the free and frank provision of advice, or*

*(ii) the free and frank exchange of views for the purposes of deliberation, or*

*(c) would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.*

19. Section 36 is a unique exemption within the FOIA in that it relies on a particular individual (the Qualified Person) within the public authority giving an opinion on the likelihood of prejudice occurring. It is not for the Commissioner to stand in the shoes of that individual and provide her own opinion: her role is to establish that an opinion has been provided by the Qualified Person, to assure herself that that opinion is “reasonable” and to make a determination as to whether there are public interest considerations which might outweigh any prejudice.

#### *The Qualified Person*

20. Section 36(5) sets out who the Qualified Person(s) should be in each public authority. In a local authority (such as a council), the Qualified Person would normally be the Chief Executive or the Monitoring Officer.

21. In this particular case, the Council’s Monitoring Officer was, at the time it began relying on section 36, on extended leave and therefore the Deputy Monitoring Officer gave the Opinion. The Council has demonstrated that this individual had been appropriately delegated to act as the Monitoring Officer in the event that the Monitoring Officer is

unable to discharge their functions. The Commissioner is therefore satisfied that the individual concerned was acting under an appropriate scheme of delegation and thus was entitled to act as the Qualified Person.

22. The Council advised the Commissioner that the Qualified Person was shown a copy of the withheld information and issued her Opinion on 22 January 2019 – prior to the Council issuing its refusal notice in which it relied on Section 36.
23. The Qualified Person's opinion was that the prejudice identified in sections 36(2)(b)(ii) and 36(2)(c) of the FOIA "would be likely" to occur if either or both documents were disclosed. The opinion advanced some arguments specific to the Letter of Closure, some to the Notice of Visit and some which were common to both documents.

#### *The Letter of Closure*

24. The Letter of Closure was sent by the STA to the School in late January 2018, following its investigation. It sets out the STA's official and settled view of the complaint that was made.
25. Specifically in relation to the Letter of Closure, the Qualified Person's opinion was that disclosure of this document would be likely to inhibit the "free and frank exchange of views for the purposes of deliberation" because it:

*"reiterates some of the early findings of the process but contains more detailed information regarding the specific findings of fact which are personal to the individuals concerned and, which if curtailed in anticipation of disclosure, could inhibit the extent/detail of the advice.*

*Whilst it is acknowledged that in this instance the process is no longer ongoing, there are important principles to uphold both in the context of this case but also in relation to other organisations going through the same process."*

26. The Qualified Person also stated that:

*"the overall integrity of the process is best served in enabling there to be a distinction between the information required for a professional assessment and the public message which follows."*

27. For Section 36(2)(c) to be engaged, a public authority must also identify some form of prejudice, not covered by any other limb of Section 36, which would or would be likely to occur in the event of disclosure. The Qualified Person also identified a number of other negative effects which

she believed would be likely to occur in the event that this document was disclosed. These included:

- The reputational impact on the School
  - The effect on the educational attainment of the pupils involved
  - The willingness of the School (and other local schools) to engage with the Council in future if they feared their correspondence would be disclosed to the world at large
  - A possibility that individuals and organisations would be more concerned about managing potential PR concerns around an issue than on resolving the issue itself.
28. When considering the Qualified Person's opinion, the Commissioner is not necessarily required to agree with it. Nor must she consider it to be the *most* reasonable opinion. The Commissioner's task is to consider whether the opinion that has been given is one that a reasonable person could hold.
29. Having reviewed the Letter of Closure carefully, the Commissioner considers that almost all of the information it contains was either in the public domain prior to the request or has been released into the public domain through the other information which has been disclosed in the course of responding to this request.
30. As this disclosure has already occurred, it would be irrational to claim that further prejudice is likely to arise from releasing information which is already publicly available. The Commissioner therefore finds that the Qualified Person's Opinion is *not* reasonable in respect of the majority of this letter. She therefore finds that, in respect of that information, neither limb of Section 36 is engaged.
31. There are two paragraphs within the letter that the Commissioner considers contain information which is not in the public domain. These paragraphs describe the nature of the complaint which was made to the STA and gives details of the nature of the evidence which was found.
32. The Commissioner has been guided on the interpretation of the phrase "would prejudice" or "would be likely to prejudice" by a number of Information Tribunal decisions. The Tribunal has been clear that this phrase means that there are two possible limbs upon which a prejudice based exemption can be engaged; either prejudice "would" occur or prejudice "would be likely to" occur.
33. With regard to "likely to prejudice", the Information Tribunal in *John Connor Press Associates Limited v The Information Commissioner*

(EA/2005/0005) confirmed that "the chance of prejudice being suffered should be more than a hypothetical possibility; there must have been a real and significant risk".

34. The Commissioner notes that the STA's process is designed with a degree of confidentiality. This allows the school involved, the relevant local education authority and the STA to investigate the complaint, identify areas of weakness and adopt a collaborative approach to addressing those weaknesses. The process therefore relies on maintaining a certain "safe space" within which the three organisations involved can discuss matters honestly and candidly without worrying that the views expressed will become public knowledge.
35. In relation to reputational damage to the School, the Commissioner takes the view that the reputational damage was done at the point that the test results were annulled. Disclosing further details of the nature of the complaint would not significantly increase any reputational damage. Equally, she notes that the School itself has assured parents that the annulled results will not affect their child's progress.
36. That being said, the Commissioner does recognise the value of schools being able to have an open and ongoing dialogue with the Council. Whilst schools do have a statutory duty to cooperate with such investigations, she acknowledges that individuals are likely to be much more forthcoming if matters are dealt with confidentially than if they have to worry about the effect on their professional reputation.
37. The Commissioner therefore considers that the loss of this safe space, the potential "chilling effect" on future conversations and the potential for reputational damage means that there is a "more than hypothetical" chance that inhibition could occur. She therefore finds that the Qualified Person's Opinion is reasonable in relation to the two paragraphs and thus both exemptions are engaged.

#### *Notice of Visit*

38. The Qualified Person's Opinion draws a particular distinction between the Notice of Visit and the Letter of Closure. This is because, at the time the document was produced, the process of investigating the complaint was still ongoing.
39. The Qualified Person's Opinion in relation to this document is worth quoting at length:

*"The Note of Visit is and was prepared following an initial visit by the Local Authority Advisors following a request from the STA. The purpose of the visit is to complete an initial fact find in accordance*



*with prescribed procedures. Following the conclusion of that process, the report provides an opportunity for the Advisors to identify any immediate action and recommendations for the School to act upon but caveats this with the possibility that the STA may take a different view or expand upon the advice that has already been given. There is also an opportunity for the school to provide a brief acknowledgement of the issues identified.*

*"This exchange takes place at a cursory/preliminary stage in the overall process and as such the expression of views at that time are in a formative stage and continue to evolve as the situation is further explored by the professionals involved. The purpose of the visit, often at short notice is to obtain a frank account of the circumstances and an initial and unimpeded/unstructured response to the situation. It is from this point that the various agencies can then formulate an action plan and put in place the necessary measures to reduce the risk of a future occurrence.*

*"The more candour that can be achieved through these early exchanges, the more meaningfully the resultant issues can be addressed both in terms of remedial action and future proofing. This is a vital stage in the process which is very much designed to enable the persons involved to express themselves 'openly, honestly and completely' and without the inhibition and restraint which could foreseeably arise as a result of concerns about subsequent disclosure."*

40. Given that the STA would not have reached a formal decision in respect of the substantive complaint at the point the Notice of Visit was drawn up, the Commissioner accepts that this document would have formed part of an ongoing dialogue between the various parties involved. She therefore accepts that disclosure of this document would be a violation of the "safe space" in which the matters involved could be discussed. Whilst some of the information is already in the public domain, the Commissioner recognises that there is still an inherent value in preserving the integrity of the process as a whole. She therefore finds that the Qualified Person's Opinion in respect of 36(2)(b)(ii) is reasonable.
41. In respect of whether the Notice of Visit would be likely to "otherwise" prejudice the effective conduct of public affairs, the Commissioner accepts that all the arguments made in respect of the Letter of Closure are equally valid here. She therefore finds that the Qualified Person's Opinion is reasonable. Thus both limbs of Section 36 are engaged.



### Balance of Public Interest

42. Whilst the Commissioner finds that Section 36 is engaged in respect of part of the Letter of Closure and all of the Notice of Visit, section 2(2) of the FOIA still requires consideration of whether the balance of the public interest lies in favour of maintaining the exemption.
43. Having accepted that the Qualified Person's Opinion is reasonable, it follows that the Commissioner has accepted that prejudice would be likely to occur in the event of disclosure. The Commissioner's task is therefore to consider whether there is a sufficiently compelling public interest which would override any prejudice.

### *Arguments in favour of disclosure*

44. The Commissioner asked the Council to identify the arguments it had considered when conducting its own assessment of the balance of the public interest. In favour of disclosure, the Council identified three main considerations:
  - Facilitating the need for openness and transparency in public services
  - Ensuring public access to information about such matters through the sharing of information.
  - Assisting the public to enable them to determine that the Council is effectively engaging and supporting education provision and standards in the local authority area.
45. The Commissioner accepts that these are valid arguments and she would add that there is always a strong public interest in ensuring that complaints about maladministration are robustly investigated and, where problems are found, robust measures put in place to prevent a recurrence.

### *Arguments in favour of maintaining the exemption*

46. The Council pointed out that the STA itself does not release details of the investigations it carries out. Indeed, when replying to a press query about this specific investigation, the STA had refused to supply details arguing that to do so would "compromise future investigations."
47. The incident is now closed (as was the case at the time the request was made), and the Council considered that further disclosure of information would not assist public understanding of the issues involved. It argued that even redacted versions of the documents "*cannot be properly*

*understood as they do not provide a balanced view due to the necessary redactions."*

48. The Council further argued that disclosure of the withheld information would risk individuals being reluctant to provide information to assist the investigation of complaints or to bring forward complaints in the first place. It argued that there was a strong public interest in individuals having the confidence to bring forward complaints and that this interest was best served by strong assurances that details of the complaint would be handled confidentially. It again highlighted the risk of individuals being identified (or misidentified) from the information.
49. The Council seemed particularly keen to stress the burden that it considered would be imposed upon itself and upon the School in terms of managing the public relations issues that would inevitably occur if further information was released. It argued that it needed to do this in a structured manner and that:

*"Good communications from the school have provided enough information into the public domain; and whilst the public or press would argue documentary evidence should be provided, it would serve little in way of helping the purpose of the investigations undertaken by the STA, but would rather potentially hinder them."*

#### *The Commissioner's View*

50. In the Commissioner's view, all the arguments above apply to both withheld documents – however it is also her view that the strength of those arguments (and hence the balance) differs between the two.
51. In the case of the Notice of Visit, the Commissioner's view is that the public interest does lie in maintaining the exemption.
52. Whilst accepting that some of the information contained within the document is already in the public domain, the Commissioner recognises that the document is produced as part of an investigation. It does not record the outcome of that investigation, nor does it record findings of fact. It is merely a preliminary view and recommendations for how the case might be moved forward.
53. The Commissioner recognises that there is a public interest in ensuring the integrity of an investigative process. Her view is that that integrity is best maintained by preserving a "safe space" in which the parties involved can exchange ideas, identify issues and exercise a degree of candour. This safe space would be removed by disclosure of the Notice of Visit.

54. It is the Commissioner's view that the STA's ability to investigate complaints and improve practices effectively would be hampered by the disclosure of the Notice of Visit and that this is not in the public interest. She therefore finds that the balance of public interest favours maintaining the exemption in respect of this document.
55. In relation to the Letter of Closure, as described above, the Commissioner's view is that Section 36 is only engaged in relation to two specific paragraphs. One of these paragraphs gives a description of the complaint which is overarching, but not in the public domain. The other paragraph gives a detailed description of the findings of the STA investigation – which is, again, not in the public domain.
56. The Letter of Closure (as the name suggests) represents the official and settled outcome of the complaint. At this point, no further deliberation between the parties can take place.
57. Having accepted that the release of the withheld information would be likely to cause prejudice, the Commissioner also considers that the severity of the prejudice caused will increase with the level of detail placed into the public domain. As more details are released, it becomes easier to trace the information back what particular individuals may have said or done.
58. The Commissioner notes that the STA has a statutory responsibility to investigate complaints which it receives. She has been keen to draw a distinction between the *process* of investigating such a complaint, where there is a strong public interest in keeping precise details confidential and the *outcome* of a complaint, where the public interest may be more likely to favour disclosure in order to aid understanding of what has happened.
59. Whilst the STA's preference not to release information it holds itself cannot and should not be determinative for the Commissioner, she does recognise that for the Council to disclose information which the STA (and, presumably, the School) does not want it to disclose, is likely to prejudice the effective operations of that organisation and its relationship with the Council.
60. The Commissioner recognises that there is a strong public interest in ensuring that any public authority is managing its affairs properly. It is also important that any complaints are investigated with an appropriate degree of impartiality and thoroughness – and that this process is *seen* to be both fair and thorough.
61. Whilst the Commissioner does not suggest that no prejudice would be likely to result as a result of disclosure, her view is that the severity of

any such additional prejudice is relatively low, compared to other information which the Council has already chosen to place into the public domain.

62. The Commissioner recognises that in cases such as this, there is always a degree of speculation about the identities of the individuals involved. That speculation is not always helpful and may focus on individuals in a manner that is unfair to them. The Council is right to urge caution in this regard, but the Commissioner notes that the speculation in this instance would have begun the moment the results were annulled. Disclosing the nature of the complaint made would, in the Commissioner's view, be unlikely to either increase or decrease the amount of speculation or lead to a particular individual being identified.
63. The Council has argued that disclosure of further information, a year on from the event itself, would necessarily mean the whole matter being "raked over" again to little or no advantage. Whilst the Commissioner accepts that disclosure will give the story further prominence, she notes that the Council should have issued its response to the complainant's request in May 2018, not January 2019 and that she has to consider the balance of the public interest at the time the request was made.
64. Key Stage 2 SATs test are an important benchmark in measuring a child's educational progress. Pupils and staff will have expended considerable effort on the tests that were annulled and that effort will not be adequately reflected.
65. The Commissioner accepts that the STA is likely to receive numerous complaints each year, that not all of these complaints will have merit. It therefore follows that prejudice would be likely to follow if the STA had to reveal the details of every complaint it received – regardless of merit. However, each request must be judged on its own individual merits and the public interest balanced accordingly.
66. It seems plain to the Commissioner that a decision to annul a set of test results suggests that the original complaint cannot have been without merit and that it warranted substantial action. She therefore considers that there must be a compelling public interest in understanding why such precipitous action has been taken.
67. The Commissioner considers it reasonable that stakeholders, such as parents of pupils at the school are provided with as much information as possible about the annulment. If stakeholders are prevented from knowing why test results have been annulled, they may be unable to hold the School to account and ensure that such an incident will not reoccur.

68. The Commissioner therefore concludes that, whilst section 36 is engaged in relation to the two paragraphs, the public interest lies in favour of disclosure. She therefore finds that the Council is required to disclose this information.

#### Procedural Matters

69. Section 10 of the FOIA requires a public authority to discharge its Section 1(1) duty *"promptly and in any event not later than the twentieth working day following the date of receipt."*
70. It is clear from the correspondence that the Commissioner has seen that the Council failed to identify all the information it held within the scope of the request and failed to communicate information to the complainant within 20 working days. It therefore breached Section 10 of the FOIA.
71. Section 17(1) requires a public authority which is withholding information to issue a refusal notice, setting out any exemptions on which it wishes to rely, to the complainant, within 20 working days.
72. The request was made on 5 April 2018, but the Council did not inform the complainant that it wished to rely on section 36 to withhold information until 25 January 2019. It therefore breached Section 17(1) of the FOIA.

## Right of appeal

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73. 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: 0300 1234504

Fax: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

74. 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.
75. 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 .....**

**Ben Tomes**  
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