

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 23 March 2016

Public Authority: The Governing Body of Portadown College

Address: Killicomaine Road

Portadown

County Armagh

BT63 5BU

Decision (including any steps ordered)

1. This is the second decision notice referring to a request for copies of speeches made by the Chair of Governors and Principal at Portadown College (the College) on a particular speech day. In his first decision notice served under the case reference FS50573105, the Commissioner had disagreed with the College's position that any information held by the Chair and Principal would not be subject to FOIA. He therefore ordered the College to issue a fresh response that reflected this finding. The College subsequently informed the complainant that the Principal and Chairman did have hard copies of their speeches but advised that this was exempt information under the 'third party personal data' (section 40(2)) exemption in FOIA. The College further claimed that it was not in any event obliged to comply with the request on the basis that the request was vexatious in accordance with section 14(1) of FOIA. It is this revised response which forms the focus of the present notice.
2. The Commissioner's decision is that the College misapplied section 14(1) of FOIA. He has additionally decided that section 40(2) of FOIA is not engaged except where the information is the personal data of individual students. Accordingly, with these exceptions, the Commissioner requires the College to disclose the requested information.
3. The public authority 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

4. The complaint has grown out of a case previously considered by the Commissioner under the reference FS50573105¹. This concerned a request made by the complainant to the College on 14 January 2015, which asked for information in the following terms:

"[We] are very concerned about the content of the speeches made by the Chair of the Board of Governors and the Principal at [the College's Speech Day on 24 October 2014].

[We wish] to consider the text of the speeches and I am therefore writing to you through the auspices of [...] Freedom of Information (2000) to request a copy of the speeches. I would point out that as both documents were read at a public meeting and were subsequently sent to and reported in, the local newspaper, the Portadown Times, they would be considered public documents by the Information Commissioner."

5. The College explained that it did not physically hold the requested information and considered that any information held personally by the Chair and Principal would not be subject to FOIA. The Commissioner disagreed, however, and by way of a decision notice (FS50573105, 16 September 2015) ordered the College to issue a fresh response which did not state that the information was not held for the purposes of FOIA.
6. In accordance with this instruction, the College wrote to the complainant on 16 October 2015 with its revised response. The College confirmed that the Principal and Chairman of the Board of Governors had hard copies of their speeches. It explained, however, that the section 40(2) exemption to disclosure applied on the basis that the information was personal data, the release of which would breach the first data protection principle. The College further considered that the request was vexatious and therefore under section 14(1) of FOIA it was not obliged to comply with the request.

¹ https://ico.org.uk/media/action-weve-taken/decision-notices/2015/1432850/fs_50573105.pdf

Scope of the case

7. The complainant contacted the Commissioner to complain about the College's refusal to provide copies of the requested information.
8. The Commissioner's analysis of the College's position under the legislation with respect to the request is set out in the body of this notice.

Reasons for decision

Section 14(1) – vexatious requests

9. Section 14(1) of FOIA provides that a public authority is not under a duty to comply with a request if that request is vexatious. Its inclusion within the legislation is designed to protect public authorities from those who abuse, whether wittingly or not, the right to seek information.
10. The term 'vexatious' is not defined in FOIA. The Upper Tribunal in *Information Commissioner vs Devon County & Dransfield [2012] UKUT (AAC), (28 January 2013)*² found however that it should carry its ordinary, natural meaning. In this context, it has been accepted that the concepts of 'proportionality' and 'justification' are fundamental considerations when deciding whether a request can reasonably be classified as vexatious. It follows that a key question for a public authority is whether the purpose and value of a request justifies the distress, disruption or irritation that would be incurred by complying with the request.
11. The threshold for finding that a request is vexatious should not be set too high, otherwise this would weaken the efficacy of the protection that the provision provides. Equally, however, the 'right to know' is an important right and a public authority should not take lightly any decision that would prevent this right being exercised. A public authority seeking to apply section 14(1) should therefore be able to evidence persuasive grounds for refusing a request on this basis.
12. In its response to the complainant of 16 October 2015, the College stated that previous decisions of the First-tier Tribunal (Information Rights) had accepted that it was not only the request that must be

² [http://www.osspsc.gov.uk/judgmentfiles/j3680/\[2015\]%20AACR%2034ws.rtf](http://www.osspsc.gov.uk/judgmentfiles/j3680/[2015]%20AACR%2034ws.rtf)

examined but also its context and history (*David Gowers v The Information Commissioner & London Borough of Camden* (EA/2007/0114, 13 May 2008)³ and *Robert Rigby v The Information Commissioner & Blackpool, Fylde and Wyre Hospitals NHS Trust* (EA/2009/0103, 10 June 2010)⁴). Adopting this approach, the College had found that that the request was designed to cause disruption or annoyance.

13. Upon receipt of the complaint about the College's handling of the request, the Commissioner invited the College to expand on the brief explanation it had given to the complainant in support of the application of section 14(1) of FOIA. In response, the College provided the following clarification:

It may be necessary to shed further light on the history and context of the current educational regime in place in the area. There are competing ideologies and I understand certain tension between the various schools in the area. It is submitted that this request is vexatious when viewed in this context.

14. It is human nature that the making of a request will frequently be driven by a particular agenda or vested interest. Disagreement with a public authority's policy or direction of travel, however, does not necessarily connote that a related request is vexatious. Indeed, the enactment of FOIA was in part designed to encourage public participation in decision-making and informed debate may actually enrich this process.
15. There is though a thin line between persistence and obsessiveness. A request may not characterise a vexatious request when considered in isolation. This may change, however, when the request is viewed in context. For example, the vexatiousness of a request may only emerge when it is seen as part of a continuation of a wider pattern of behaviour that has had the effect of harassing the public authority or imposes a significant burden.
16. The College's submissions indicate that the intended aim of the request was to disrupt or annoy the College; in other words, to be a nuisance. This stems from conflicting 'ideologies' on the education policy in the local area. As stated, a fractious relationship between an applicant and a

³ <http://www.informationtribunal.gov.uk/DBFiles/Decision/i80/Gowers.pdf>

⁴ [http://www.informationtribunal.gov.uk/DBFiles/Decision/i397/Rigby%20v%20IC%20&%20BF&WHNHS%20-%20Determination%2010-06-2010%20\(w\).pdf](http://www.informationtribunal.gov.uk/DBFiles/Decision/i397/Rigby%20v%20IC%20&%20BF&WHNHS%20-%20Determination%2010-06-2010%20(w).pdf)

public authority does not automatically mean that a request is vexatious. It is therefore for the public authority to demonstrate that the line has been crossed between what is an appropriate use of FOIA and what is not.

17. In this case, the College has failed to support such a position. Specifically, it has not submitted any evidence, or indeed any substantial arguments of note, which justified the assertion that the request was effectively an abuse of the rights provided by the legislation and therefore should not be complied with by the College.
18. In the absence of any compelling arguments, the Commissioner has not had any problems in finding that section 14(1) is not engaged.

Section 40(2) – third party personal data

19. In addition to its application of section 14(1) of FOIA, the College has argued that the requested speech notes are exempt information under section 40(2) of FOIA.
20. There are effectively two parts to section 40(2) of FOIA. Firstly, the exemption will only cover information that constitutes the personal data of a third party. Secondly, the engagement of the exception requires that disclosure of the personal data would contravene a data protection principle in the Data Protection Act 1998 (DPA).
21. Personal data is defined by section 1 of the DPA as data which relates to a living individual who can be identified from that data, or from that data and other information. In other words, information will only be classified as personal data where it 'relates to' an 'identifiable' individual. In this case the request specifically references the Principal and the Chair. Furthermore, the notes of the speeches asked for clearly have a biographical significance to the individuals, in that they relay their views on the academic year. The Commissioner is therefore satisfied that the requested information is personal data as it relates to identifiable individuals. His next step then is to consider whether disclosure of the personal data would breach a data protection principle.
22. For the purposes of a disclosure under FOIA, it is the first data protection principle which is likely to be relevant. In accordance with this principle, personal data can only be disclosed if it would be fair, lawful and meet one of the Schedule 2 conditions (and Schedule 3 conditions if the information represents sensitive personal data). If the release of the information would fail to satisfy any of these criteria, the information will be exempt under section 40(2) of FOIA.
23. The starting point for the Commissioner is to consider whether disclosure would be fair to a data subject. The test of fairness will

invariably reflect the tension that exists between, on the one hand, safeguarding the important privacy rights of an individual and, on the other, promoting transparency and accountability. A decision must therefore balance the consequences of any disclosure and the reasonable expectations of a data subject with general principles of accountability and transparency.

24. Various factors may affect whether an individual should have a reasonable expectation that their personal data would be disclosed upon request. These will typically include whether the information relates to an individual's public or private life, the seniority of the individual and whether his or her role is public-facing. The Commissioner's guidance on section 40⁵ explains that "the expectations actually held by the individuals in a particular case do not necessarily determine whether disclosure would be fair. Instead, the public authority has to decide objectively what would be a reasonable expectation ie would it be reasonable for the individuals concerned to expect that their personal data would not be disclosed."
25. When exercising the test of fairness, it will be necessary to determine whether the information falls within one of the eight categories of 'sensitive personal data'. The disclosure of information that meets one of these descriptions is likely to be unfair as it comprises information that individuals will regard as the most private. The Commissioner's guidance explains that in the majority of cases it will be in the reasonable expectations of the individual that such information will not be disclosed. The Commissioner has examined the withheld information and has determined that it does not represent sensitive personal data. The Commissioner has therefore gone on to consider whether the data subjects could otherwise have had a reasonable expectation that their personal data would not be disclosed.
26. As mentioned previously in accordance with the application of section 14(1) of FOIA, the College considers that the request is driven by a conflicting view on the education policy and the way this should be implemented. Reflecting this consideration, the College asserts that the data subjects were entitled to be apprehensive about the way in which their personal data would be used. To illustrate the position of the data subjects with respect to the request, the College has informed the Commissioner that the Principal and the Chair have both refused to give their consent to disclosure.

⁵ <https://ico.org.uk/media/for-organisations/documents/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>

27. The Commissioner's view is that the expression of a refusal to consent is not absolutely determinative in a decision as to whether a data subject's personal data will be disclosed. He nevertheless accepts that the refusal may be helpful in terms of articulating a data subject's views on the release of his or her personal data. The critical question for the Commissioner, however, is whether the data subject's objection is reasonable in the circumstances.
28. As the regulator of both the DPA and FOIA, the Commissioner acknowledges that an organisation should always exercise caution when considering whether to place personal data in the public domain. Privacy rights do not though, nor should they, automatically bar the release of personal data. Instead, a common sense approach will often be the best way of determining whether disclosure is appropriate. Information relating to an individual's private life will, generally speaking, warrant greater protection than information referring to an individual's public life. It has also been accepted by differently constituted Tribunals that someone carrying out public functions in a senior role should expect more intense scrutiny of their actions than someone with a more junior position. This reflects the greater responsibility that a senior official will have for major policy decisions and the commensurate level of accountability that comes from this.
29. The Commissioner has found three factors particularly important in this case:
 - 1) The positions of the data subjects within the College.
 - 2) The purpose of the speeches.
 - 3) The form of the requested information.
30. With regard to 1), the Commissioner considers that the Principal and Chair of Governors are typically the most recognisable leaders of a school. A Principal, or Headteacher, will as their name suggests be the person in charge of managing a school. Although a Chair of Governors is unpaid, it is understood that the role is important for providing strategic direction and therefore the post is expected to carry significant responsibilities.
31. The Commissioner acknowledges in his guidance that the terms 'senior' and 'junior' are relative and it is not possible to set an absolute level across the public sector below which personal information will not be released. In this case the Commissioner considers that the Principal and the Chair represent the College to the outside world and will have responsibility for explaining the College's policies or actions. As such, the Commissioner considers that both post holders could have taken it

for granted that their public functions would be subject to scrutiny. Even for more senior posts, however, there may be a reasonable expectation that some information relating to them will not be disclosed. An example of this might be where the information relates to a personnel issue.

32. Turning to 2), the speeches in question were presented at a nominated Speech Date. In the decision notice served under the reference FS50573105, the Commissioner observed that this was an officially sanctioned and important event in the education year. The Principal has asserted that his speech was his own personal reflection on the previous school year and an analysis of student results and achievements. The Chair, on the other hand, explained that traditionally the role meant acting as Master of Ceremony and he had formulated notes to use on the occasion. He said that there was no specific item on the Speech Day Programme listing the Chair's speech. Instead, he indicated that his function was to welcome guests and make introductions to items on the programme and effectively act as Master of Ceremony.
33. The decision on FS50573105 solely focused on the question of whether the requested information would technically fall within the ambit of FOIA. In this context, the explanations were meant to show that a gulf existed between official school business and the making of the speeches. The argument would also have relevance to the application of section 40(2), in that if correct it could strengthen the case for finding that disclosure was unfair.
34. In FS50573105, however, the Commissioner essentially rejected the thrust of the arguments. The Commissioner said that it would seem to run contrary to the status of the occasion if it was accepted that the Principal and Chair were not acting as representatives of the College at the event. The Commissioner considered that two further considerations would strengthen this view. Firstly, it was understood that both the Principal and Chair spoke about issues directly connected to the College and its performance rather than about issues that could be considered personal to them. This is borne out by an analysis of the withheld information. Secondly, the Commissioner found it highly likely that audience members would have considered that both parties were speaking to them on behalf of the College. It might have been expected that the audience, as predominantly made up of parents or stakeholders, would have been supporters of the College and what it stood for. Even so, the Commissioner considers that the Speech Day was effectively a public forum and the Chair and Principal would have known that amongst the audience were individuals from other organisations.
35. The Commissioner considers that the factors listed at 1) and 2) lend weight to the view that the data subjects should have had a reasonable

expectation that their personal data would be disclosed. The Commissioner is also mindful though that the form of the requested information (3)) may shift this position.

36. It is accepted that notes for speeches are often used as prompts and may not provide an entirely accurate picture of the speech that was actually made. The disclosure of information that is misleading or misrepresentative in terms of an individual's views may therefore be unfair. The Commissioner has found, however, that this argument carries less weight than it might do in other situations.
37. Firstly, the notes do not simply constitute prompts or cue cards, the information in respect of which would be expanded upon by the speaker. Instead, the records are typed and, in their completeness, appear to contain the full contents of the speech that was intended to be delivered. Secondly, it is understood that the Principal and Chair forwarded a draft copy of their speeches to a local newspaper. The Commissioner has been informed that these drafts have since been revised and the original versions deleted. Yet, the Commissioner considers that this action does point towards the general contentment of the individuals' views to be made public in a way they could control. Under the headline 'Portadown College in rift with three junior high schools'⁶, the Portadown Times subsequently reported in an article of 1 December 2014 on concerns raised by junior schools about the speeches. The article finished by quoting an extract of the Chair's speech on the day.
38. On the basis of his analysis of these factors, the Commissioner has decided that disclosure would be fair. In coming to this view, the Commissioner has taken into account the data subjects' refusal of consent but has found that this refusal did not correspond with an objective consideration of what should have been their reasonable expectations about disclosure. He has further considered that any adverse effect would have originated from the making of the speeches and not only from the disclosure of the requested information.
39. The release of personal data will only be permitted, however, if it satisfies a Schedule 2 condition and the disclosure is lawful. There are six conditions in Schedule 2 but only condition 1 (consent) or condition 6 (legitimate interests) are relevant in the present situation. The data subjects' refusal to provide consent has already been cited and therefore

⁶ <http://www.portadowntimes.co.uk/news/local-news/portadown-college-in-rift-with-three-junior-high-schools-1-6448421>

condition 1 does not apply. It is therefore necessary to consider whether the disclosure is necessary for legitimate interests in accordance with condition 6. The construction of condition 6 effectively imposes a three-part test: there must be a legitimate interest in disclosure to the public; the disclosure must be necessary to meet that legitimate interest; and, the disclosure must not cause unwarranted harm to the interests of the individual.

40. The Commissioner's approach is that the first and third parts of the test have been disposed of as part of the consideration of the fairness test. It is therefore left to him to decide whether disclosure was necessary to meet the legitimate interest. The 'necessity' test in this setting means establishing that there is a pressing social need in disclosure and furthermore the disclosure is necessary to achieve this aim or whether there is another way to address the public interest that would interfere less with the privacy of individuals.
41. The Commissioner considers there is a legitimate public interest in understanding more about how key figures at the College viewed the performance of the College and the wider education climate in which the College operated. This had particular resonance because of the controversy relating to proposals to merge two grammar schools – the College is a selective grammar - with high schools. Campaigners considered the proposals would dismantle the local grammar school system and end what the BBC referred to as the 'popular' Dickson plan⁷; an education strategy in north County Armagh that covers the transfer of pupils from junior high schools at age 14 through a selection process. The Commissioner further considers that there is not an alternative mechanism by which the legitimate public interest could be satisfied. Accordingly, the disclosure would satisfy the condition 6 requirements.
42. Even where the test of fairness and a Schedule 2 condition is satisfied, however, a final question may arise concerning the lawfulness of a disclosure. The Commissioner's guidance explains that "lawful" refers to statute law and common law, whether criminal or civil. This includes industry-specific legislation or regulations. Furthermore, a disclosure that would breach an implied or explicit duty of confidence or an enforceable contractual agreement would also be unlawful.
43. The Commissioner has not received any submissions, nor is he aware of any reasons, which demonstrate that the release of the personal data would be unlawful. He has therefore concluded that there is nothing in

⁷ <http://www.bbc.co.uk/news/uk-northern-ireland-26165935>

the first data protection principle preventing disclosure which, in turn, means that section 40(2) of FOIA is not engaged.

44. This finding does not extend, however, to the entire contents of the speeches. In particular, the Commissioner notes that the speech notes make references to a number of third parties, including students. The Commissioner considers that in many cases the release of this information would not be detrimental to the parties concerned. This is because, for example, it only refers to the assumed attendance of an individual at the Speech Day or, in one case, refers to the biographical information of a guest that is publicly available. The Commissioner is of the view, however, that the students would not have had a reasonable expectation that their personal data would be disclosed.
45. It is fair to say that the references are entirely complimentary. Nevertheless, the Commissioner considers that it would be unfair to the students concerned to have their personal data placed in the public domain in this context. Accordingly, he has decided that the speech records should only be disclosed with the personal data of the individual students, including names and any biographical information, redacted.

Right of appeal

46. 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

Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

47. 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.
48. 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

Alun Johnson
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