

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 1 December 2016

Public Authority: The Governing Body of Baverstock Academy

Address: 501 Bells Lane
Druids Heath
Birmingham
B14 5TL

Decision (including any steps ordered)

1. The complainant has requested from Baverstock Academy (the Academy) copies of minutes of different committees, along with communications with the Education Funding Agency (EFA) on financial matters. The Academy has provided some information in response to the request but withheld the remaining records under variously sections 22 (information intended for future publication), 30 (investigations and proceedings), 31 (law enforcement), 38 (health and safety), 40 (personal data), 41 (information provided in confidence), 42 (legal professional privilege) and 43 (commercial interests) of FOIA. The Commissioner's decision is that, with the exception of information contained in two documents to which section 22 was incorrectly applied, the withheld information is subject to one of sections 40, 41, 42 or 43 of FOIA. In light of her findings, the Commissioner requires the Academy to disclose a complete copy of the EFA's letter of 10 August and a redacted version of the EFA's letter of 2 October 2015.
2. The public authority must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

3. On 18 November 2015 the complainant wrote to the Academy and requested information in the following terms:

This is a request under the FOI legislation. I would be grateful if you could send me the minutes of the governors' meetings that have taken place this year. Could you also send the minutes of the finance committee and the staffing committee for this year. Could you also send copies of any communications with the Education Funding Agency on financial matters.

4. The complainant wrote to the Academy again on 30 November 2015 and asked it to acknowledge her request. This was done on 1 December 2015, with the Academy stating its intention to reply to the request by 15 December 2015.
5. The Academy provided its substantive response on 14 December 2015 and enclosed a number of the documents caught by the request that it had decided could be released. A limited amount of information contained in the records had been redacted, although the Academy did not cite the relevant exemption to disclosure in FOIA it considered applied. The Academy did, however, clarify that it held further relevant documents which were being withheld under the 'information intended for future publication' (section 22) exemption in FOIA.
6. On 17 December 2015 the complainant asked the Academy to reconsider its decision to withhold material that had been requested. Accordingly, the Academy carried out an internal review, the outcome of which was sent to the complainant on 7 January 2016. The reviewer said that legal advice had been obtained and provided the following explanation:

For clarity, under the Freedom of Information Act 2000, there is an obligation on the Leap Academy Trust (on request) to confirm whether it holds information of the description specified in the request, and if that is the case, to disclose that information to the party who has made the request.

However, the Academy Trust is not obliged to disclose information, or confirm or deny whether such information exists and is held by them, if one or more of the absolute statutory exemptions applies to the requested information, and the disclosure of that information does not meet the public interest test, again the Academy Trust is not obliged to confirm or deny that they hold such information, or disclose it.

These exemptions cover a number of grounds, which include, but are not limited to confidential matters.

As such, we are not obliged to explain why we believe that section 22 applies, (that some of the information requested

relates to information intended for future publication) as to do so would involve discussion.

7. The reviewer concluded that upon review of the requested documents all the non-exempt information had been provided.

Scope of the case

8. The complainant contacted the Commissioner to complain about the Academy's decision to withhold information captured by her information request.
9. During the course of the Commissioner's investigation the Academy confirmed that it continued to rely on section 22 of FOIA to withhold parts of the disputed information. However, it has also introduced a number of additional exemptions as grounds for withholding the remaining material. The Commissioner's analysis of the application of each of these exemptions is set out in the body of this decision notice.
10. The Commissioner notes however that the complainant has not required the investigation to cover the Academy's decision to redact the personal data contained in copies of correspondence that had been disclosed prior to the complaint made to the Commissioner. This information is not therefore considered further here.

Reasons for decision

Section 22 – information intended for future publication

11. Section 22(1) of FOIA states that information is exempt information if –
 - (a) the information is held by the public authority with a view to its publication, by the authority or any other person, at some future date (whether determined or not),
 - (b) the information was already held with a view to such publication at the time when the request for information was made, and
 - (c) it is reasonable in all the circumstances that the information should be withheld from disclosure until the date referred to in paragraph (a).

12. The exemption will only be engaged if, and only if, the three conditions listed at (a) – (c) are satisfied. As a qualified exemption, section 22 of FOIA is also subject to the public interest test.
13. The Academy has applied section 22 to the following documents:
 - a) A draft initial Fact Finding Report of the Education Funding Agency (EFA).
 - b) A letter from the EFA detailing the scope of its enquiries – 10 August 2015.
 - c) A paragraph redacted in minutes of Trust Board – 19 October 2015.
 - d) An email sent from the EFA to the Academy – 2 October 2015
14. The Academy has explained that its use of section 22(1) of FOIA is predicated on the understanding that the EFA intended to publish a report that would contain the information in question. To support this position, the Academy has provided the Commissioner with a copy of a letter from EFA which suggested the potential applicability of section 22.
15. The Commissioner's guidance¹ on the exemption explains that for section 22 to apply, the public authority must, at the time of the request, hold the information and intend that it or 'any other person' will publish it in future. This means that the public authority must have a settled expectation that the information will be published at some future date (paragraph 5). Later on in the guidance (paragraph 9), the Commissioner explains that a general intention to publish some information is not sufficient to engage the exemption - it is not enough for the public authority to note that it will identify some, but not all, of the information within the scope of the request for future publication.
16. It is not disputed that the information was held by the Academy at the time of the request. However, the Commissioner does not accept that it was reasonable for the Academy to conclude there was a settled intention that this version of the information would be published. In reaching this view, the Commissioner is aware that the EFA will often publish a report following an investigation (although even this would not appear to be guaranteed). However, there is no certainty, and indeed it

¹ <https://ico.org.uk/media/for-organisations/documents/1172/information-intended-for-future-publication-and-research-information-sections-22-and-22a-foi.pdf>

seems unlikely, that the information made available would be exactly the same information held by the Academy at the time of the request. The reasons for this are three-fold.

17. Firstly, some of the records are in draft form and therefore may be subject to revision. Secondly, while a report may refer to the material that was used for analysis, there is no indication that all the supporting evidence (ie those records outside of the draft report) would be made available. Thirdly, it has been noted that sensitive information contained in the EFA's reports may be redacted in preparation for publication. In the Commissioner's view, the combination of these factors means that it was not reasonable for the Academy to conclude that the information in its possession would be published. Consequently, section 22 of FOIA cannot be found to be engaged.
18. It should be noted that the Academy has argued that this reading of the application of section 22 of FOIA misrepresents the situation. Firstly, with regard to the report, the Academy has explained that the purpose of the EFA sending a copy of the draft was to confirm its factual accuracy. This confirmation was subsequently provided and the Academy considers that the approval would not have been required if the EFA was not intending to publish the entirety of the report. Secondly, the Academy had a reasonable belief that all of the information would be published on the basis of the assurances provided by the EFA. Thirdly, the Academy argues that in the absence of the final report, neither the Academy nor the Commissioner is in a position to conclude that the exemption should not have been applied at the time the request was made.
19. The Commissioner has reflected on these arguments but has decided that ultimately they do not alter her view that the exemption has been misapplied. The Commissioner recognises that it is not possible for a public authority to guarantee what will eventually be published by a third party. The absence of such certainty would not however prevent the Commissioner from making a decision on whether the exemption was correctly applied. Instead, the test will be whether it was reasonable in the circumstances for the public authority to conclude that the requested information would be published at a future date.
20. For the reasons previously mentioned, the Commissioner considers that there was sufficient doubt over what information would be made available for the Academy to find that the exemption was not engaged. It should be noted that the Academy has applied further exemptions to documents a) and c), which are considered by the Commissioner below. The Commissioner has also considered further document d) under the part of the decision notice dealing with section 40(2) below.

Section 30 – investigations and proceedings

21. The Academy considers that parts of the requested information fall within sections 30(1)(a) and, elsewhere, 30(2) of FOIA. In the view of the Commissioner, these exemptions are unlikely to be engaged. However, as explained in the relevant section below, she has found that in any event the information in question would be covered by section 40(2) of FOIA. She has therefore not had to make a formal determination on the application of the exemptions in section 30.

Section 31- law enforcement

22. The Academy has relied on section 31(1)(h) to withhold elements of the EFA fact finding draft report. For the reasons set out below, the Commissioner has found that section 41 of FOIA covers the entirety of the draft report. She has not therefore been required to consider the application of this particular exemption.

Section 38 – health and safety

23. Section 38(1)(a) of FOIA provides that information is exempt information if its disclosure under the legislation would, or would be likely to, endanger the physical or mental health of any individual.
24. The Commissioner's guidance² on section 38 explains at paragraph 6 that information involving living individuals will be covered by section 40 (personal information). The focus of section 38 is on other information that might pose a risk, if disclosed. The guidance gives examples of what the information may be about, including: areas of controversial research where there is a risk to the physical safety of staff; where someone who has died and disclosure might endanger the mental health of surviving relatives; and, an issue where disclosure might have a wider adverse effect on public health.
25. The Commissioner has informed the Academy that the items of information to which the exemption has been applied, and the supporting arguments which have been presented, are ones that would be more properly suited to section 40 of FOIA.
26. In response, the Academy has stated its disagreement with the way in which the exemption has been interpreted by the Commissioner. While

² <https://ico.org.uk/media/for-organisations/documents/1624339/health-and-safety-section-38-foia.pdf>

not denying that section 40 might also apply, it argues that the Commissioner's reading of section 38 does not preclude its use in these circumstances. The critical point, in the Academy's view, is that there was a real, present and continuing danger to the mental health of a person or persons.

27. The Commissioner considers that FOIA was designed in such a way that each of the exemptions has a discrete use and application. While more than one exemption could potentially apply to the same information, a public authority must be able to present separate arguments that correspond with each exemption cited. In this case, the Commissioner remains of the view that the concerns raised by the Academy are ones that would be covered by section 40 and has not made a distinct case which would require the Commissioner to find that section 38 is engaged.

Section 40 – personal information

28. The Academy considers that a significant part of the withheld information is covered by section 40(2) of FOIA.
29. 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)
30. 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. The Commissioner's guidance, 'Determining what is personal data'³, explains that an individual is 'identified' if it is possible to distinguish that individual from other members of a group. In most cases an individual's name together with some other information will be sufficient to identify them.
31. While a name is the most common means of identifying someone, whether any potential identifier actually identifies an individual depends on the context. By itself, a name may not be sufficient to link information to a particular person – for example, the name 'John Smith'

³ <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf>

may not pick out the relevant one of the many individuals who have that name. Equally, however, it may still be possible to link information to an individual in the absence of a name by giving specific contextual details that pick out the person. The risk of identification will likely increase where the context in which an individual is referenced relates to an event or incident that is particularly noteworthy or memorable.

32. The Commissioner is satisfied that the information to which section 40(2) has been applied relates to an identifiable individual and therefore falls within the definition of personal data. It is therefore for the Commissioner to decide whether disclosure of the personal data would be in accordance with a data protection principle.
33. When considering the application of section 40(2), the Commissioner has also been mindful of her twin role as the regulator of the DPA and the importance of ensuring that personal data is properly protected. In some cases this may mean that the Commissioner may unilaterally decide to apply section 40(2), even where it has not been specifically cited by the public authority. As explained previously, the Commissioner has found that the information and arguments presented in relation to the application of section 38 were better suited to section 40(2). In some instances, the Academy has also applied both exemptions to the same information. Where this is not the case, however, the Commissioner has gone on to consider whether section 40(2) would nevertheless apply. For the same principal reasons, the Commissioner has also considered under section 40(2) the information to which sections 30 or 31 of FOIA have been cited and the EFA letter of 2 October 2015 (referred to as document d) in the analysis of the application of section 22 above).
34. 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.
35. 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.

36. 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 40 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?

37. In *Lownie v Information Commissioner* (EA/2015/0282, 6 September 2016)⁴, the Tribunal explained how the application of the exemption should be approached:

11. The Tribunal agrees with the Commissioner that where section 40(2) of FOIA is engaged, the Tribunal is required to undertake a different from when it deals with other FOIA exemptions. Whilst FOIA in general promotes the right to information, where section 40(2) is under consideration, the proper approach is for the interest of data subjects to receive a high degree of protection. Whilst this does not mean that disclosure cannot be justified, it does mean that the Tribunal must be careful not to start from the position presuming disclosure should occur.

38. For the release of personal data to be permitted, the Commissioner must also have regard to the sixth condition of schedule 2 of the DPA, as well as to the question of whether disclosure would be lawful.

39. When deciding whether the disclosure of the personal data would be fair, the Commissioner has taken into account the relevant circumstances of the case. This includes the seniority of a data subject and the nature of the information. The Commissioner recognises that a data subject should expect some degree of scrutiny where it comes to his or her work role. This may be contrasted with information relating to the data subject's private life. The Commissioner also considers, however, that placing the personal data in the public domain would be distressing.

⁴<http://informationrights.decisions.tribunals.gov.uk/DBFiles/Decision/i1873/014%20060916%20Decision%20.pdf>

40. In determining which of these competing factors carry more weight, the Commissioner has found critical the sensitive nature of the information. In the view of the Commissioner, these factors strongly support the position that a data subject would have had a reasonable expectation that the information about them would not be made available. In light of this reasoning, she has concluded that disclosure would breach the first data protection principle which, in turn, means section 40(2) of FOIA is engaged. For completeness, this finding extends to the license plate numbers listed in the EFA's letter of 2 October 2015 but not the remaining contents of that document.

Section 41 – information provided in confidence

41. Section 41(1) of FOIA states that information is exempt information if –
- (a) it was obtained by the public authority from any other person (including another public authority), and
 - (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.
42. The exemption has been applied to the draft report referred to in the context of the application of section 22 of FOIA. This was provided to the Academy by the EFA and the Commissioner is therefore satisfied that the requirement in section 41(1)(a) is met. She has therefore gone on to consider whether section 41(1) is engaged on the basis that the next limb of the exemptions is also satisfied.
43. For the purposes of section 41(1)(b), the Commissioner will consider a breach to be actionable where the following conditions are satisfied:
- The information has the necessary quality of confidence. (information will have the necessary quality of confidence if it is not otherwise accessible and if it is more than trivial).
 - The information was communicated in circumstances importing an obligation of confidence. (An obligation of confidence can be expressed explicitly or implicitly. Whether there is an implied obligation of confidence will depend upon the nature of the information itself and, or the relationship between the parties).
 - Unauthorised disclosure would cause a specific detriment either to the party which provided it or to any other party. (Case law has, however, established that information about an individual's private and personal life can be protected by the law of confidence, even if disclosure would not result in any tangible loss to the confider).

44. The Commissioner addresses each of these conditions in turn.
45. Does the report have the necessary quality of confidence? The Academy has explained that the contents of the report are not available from any other source. Although a previously published Financial Notice to Improve⁵ (FNI) did contain recommendations for action, this did not reveal the detailed findings of the EFA. The Academy also considers that the report is clearly not trivial. For these reasons, the Commissioner accepts that the report does have the necessary quality of confidence.
46. Was the report communicated in circumstances importing an obligation of confidence? The Academy has informed the Commissioner that the information contained within the draft report is only known to a limited number of people within the EFA and the Academy Trust. Furthermore, the Academy has stated that the report was marked as confidential, with the draft document stating that it was not for publication. Taking into account the purpose for which the report would be used and the circumstances in which the EFA shared it with the Academy, the Commissioner is satisfied that an obligation of confidence did exist.
47. Would disclosure cause a specific detriment? In its correspondence with the Academy, the EFA has explained that disclosure would hinder the investigation of the concerns that had been raised. The Academy has also argued that premature disclosure of the draft would represent an invasion of privacy of staff and breach the duty and confidence the Academy owes to its employees. The Commissioner has found that the disclosure of the report, which at the date of the request was unfinished, would have had a detrimental effect.
48. As stated previously, in addition to the three tests built into the exemption, section 41(b) also provides that it must be likely that the action for breach of confidence is likely to succeed. Section 41 is an absolute exemption and consequently not subject to the public interest test referred to in section 2 of FOIA. However, the common law of confidence indicates that a breach of confidence will not be actionable in circumstances where a public interest defence can be made out for the breach of confidence.
49. The Commissioner's guidance explains that the public interest test in section 41 does not function in the same way as the public interest for qualified exemptions in FOIA. In reverse to the way that the public

⁵https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/475177/financial_notice_to_improve_LEAP_academy_trust.pdf

interest test operates for qualified exemptions, the test in section 41 assumes that the public interest in maintaining confidentiality will prevail unless the public interest in disclosure outweighs the public interest in maintaining the confidence.

50. With regard to the exercising of the public interest test, the guidance goes on to say that some weight should always be afforded to the general public interest in ensuring that public authorities remain transparent, accountable and open to scrutiny. Examples of where a public interest defence could succeed include where disclosure would further public understanding of, and participation in, important issues of the day and facilitate accountability and transparency in the spending of public money.
51. It is evident from the FNI that the issues investigated by the EFA were not only serious but are ones that would be of considerable interest to the public. These included financial irregularities and general weaknesses in the Academy's performance, with the FNI requiring the Academy to improve its financial management, control and governance.
52. What this means is that there is a relatively strong public interest defence. However, the Commissioner has ultimately found that the public interest favours maintaining the confidence. The principal factor underpinning this position is the awareness that the report in the possession of the Academy was not the completed version. As the Academy has argued, disclosure of an unfinished report into serious concerns would not only potentially harm ongoing enquiries but also call into question the EFA's reputation and efficacy. In the view of the Academy, placing information in the public domain that did not necessarily represent the EFA's final position – particularly when the finished report was still awaiting completion – risked undermining trust and confidence in the EFA and could prejudice investigations in other schools.
53. The Commissioner is of the view that the weight of these considerations is such that the public interest in disclosure does not outweigh the public interest in maintaining the trust between confider and confidant. This means in turn that the Academy would not have a public interest defence for breaching the duty of confidence and therefore section 41 of FOIA applies.

Section 42(1) – legal professional privilege

54. The Academy has withheld two paragraphs contained in separate meeting minutes under section 42(1) of FOIA. This provides an exemption to disclosure for information which is subject to legal

professional privilege (LPP). The exemption is qualified by the public interest test.

55. The concept of LPP protects advice given by a lawyer to a client and confidential communications between them about that advice and exists to ensure complete fairness in legal proceedings. There are two types of privilege within the concept of LPP; litigation privilege and advice privilege.
56. Litigation privilege applies to confidential communications made for the purpose of providing or obtaining legal advice about proposed or contemplated litigation, rather than just a fear or possibility. For information to be covered by litigation privilege, it must have been created for the dominant purpose of giving or obtaining legal advice, or for lawyers to use in preparing a case for litigation. Advice privilege applies where no litigation is in progress or contemplated. It covers confidential communications between the client and lawyer, made for the dominant purpose of seeking or giving legal advice. This must be done in a legal context – for example, in relation to issues concerning legal rights, liabilities, obligations or remedies. The Academy has claimed that both litigation and advice privilege would apply in the circumstances.
57. The withheld information in this case is not legal advice itself but paragraphs making reference to the legal advice. LPP may still apply, however, if the information reveals the substance of the legal advice. The Commissioner is satisfied in this case that the contents of the paragraphs can reasonably be said to disclose a significant essence of the underpinning legal position and therefore they would be subject to advice privilege. The Commissioner must next consider whether privilege was still intact at the time the request was made.
58. Information may no longer be protected by legal professional privilege where its quality of confidence is lost owing to an unrestricted disclosure. In her guidance on section 42 of FOIA, the Commissioner explains at paragraph 29 what constitutes an unrestricted disclosure:

This refers to a disclosure of information made to the world at large or without any restriction on its future use. This would mean that it is capable of entering the public domain [...]. As a result, the original holder or owner of the information (eg the legal advice) can no longer expect it to remain confidential. [...] Where confidentiality is lost, the authority cannot claim that s42 applies.
59. The Academy has informed the Commissioner that the legal advice referred to in the minutes has only been shared with a limited number of

individuals, each of which would have had a legitimate interest in being apprised of the situation. It therefore considers that the disclosure was not to the world at large but only on a restricted basis.

60. The Commissioner allows (see, for example, paragraph 33 of her guidance) that a disclosure to a limited audience may in reality mean information remains confidential in relation to the world at large. As such, the information shared in the context would retain its legally privileged status. In this case the Commissioner is satisfied, based on the explanations provided, that the Academy has not 'lost control' of the information.
61. The effect of this finding is that the Commissioner has decided LPP applied to the disputed information and was still intact at the time of the request. She has therefore found that section 42(1) of FOIA is engaged, which means that the Commissioner is next required to assess the public interest test.

The balance of the public interest

62. The degree of importance attached to the concept of LPP in respect of the administration of justice is extremely strong. In reality, this means that in many cases it will be only proper to conclude that information captured by section 42 of FOIA should not be disclosed. The Commissioner also recognises, however, that the authors of the legislation did not intend to rule out the very possibility of accessing legal privileged information. This is evidenced by the fact that section 42 is a qualified exemption, which is subject to the public interest test, rather than an absolute exemption, which is not. The Commissioner would though expect that there is some clear, compelling, and specific justification in order for disclosure to occur.
63. In previous instances, factors that have helped sway the public interest in favour of disclosure have included occasions where a large number of people are affected by the issue at hand, significant public funds are involved or the advice itself has been misrepresented. The Commissioner appreciates that the subject of the legal advice is important, not least because it goes to the heart of an issue that could have a substantial impact on the running of the school. The Commissioner has also found however that there would be relatively little value to the public in disclosing the paragraphs in question because they would give only a limited insight into the issues at hand. Taking this into account, the Commissioner has concluded that the strength of the arguments for disclosure ultimately suffer in comparison to the weight invested in LPP, which is reliant on the faith that a client and legal adviser have that their frank discussions will be kept confidential. In other words, the Commissioner considers there is not a clear,

compelling and specific justification for disclosure that would warrant breaching privilege.

Section 43(2) – commercial interests

64. The Academy has redacted one paragraph in the minutes of the Trust Board meeting of 16 November 2016 under section 43(2) of FOIA.
65. Section 43(2) of FOIA states that information is exempt information if its disclosure would, or would be likely to, prejudice the commercial interests of any party (including the public authority holding it). Section 43(2) is a qualified exemption and therefore subject to the public interest test.
66. FOIA does not define specifically what is meant by a 'commercial interest'. However, in her guidance, the Commissioner considers it relates to a person's ability to participate competitively in a commercial activity, ie the purchase and sale of goods or services. Significantly for the purposes of the present case, the underlying motive for the transactions is not necessarily profit – for instance, where a charge for goods or the provision of a service is made simply to cover costs. The successful application of section 43(2) is dependent on a public authority's ability to demonstrate a clear link between disclosure and harm to the commercial interests of a party. The test of prejudice is not a weak test – there must be a significant risk of the prejudice described in the exemption occurring and the prejudice must be real, actual or of substance and therefore capable of harming the interest.
67. The Academy has explained that disclosure of the paragraph in question would damage its commercial reputation, the effect of which would be to harm its ability to secure funding.
68. Previous decisions of the Commissioner and differently constituted Information Tribunals have agreed that the prejudice test requires a public authority seeking to apply section 43(2) to demonstrate that three conditions are satisfied. First, the harm that is envisaged would, or would be likely to, occur should relate to the applicable factor described in the exemption. Second, there is a causal relationship between the potential disclosure of the withheld information and the prejudice that the exemption is designed to protect against. Third, there is a real risk of prejudice arising through disclosure, with a public authority able to demonstrate that either disclosure 'would' or 'would be likely to' have a prejudicial effect.
69. The Commissioner's guidance observes that there may be circumstances where the release of information held by a public authority could damage a company's reputation or the confidence that customers,

suppliers or investors may have in a company. The guidance continues by saying it may be that releasing such information has a significant impact on revenue or threatens its ability to secure finance.

70. From her analysis of the arguments provided and the withheld information itself, the Commissioner is satisfied the prejudice cited is applicable to section 43(2) and further that there is a causal link between the disclosure and the harm. The first two conditions are therefore met. With regard to the third and final condition in the prejudice test, the Academy has not specifically stated the likelihood – either ‘would’ or ‘would be likely’ – of the prejudice occurring. In the absence of this clarification, the Commissioner will find that the ‘would be likely’ threshold is being applied. While ‘would be likely’ refers to a lower level of probability than ‘would’, there must still be a real and significant risk of the prejudice occurring.
71. Having reviewed the Academy’s arguments alongside the withheld information, the Commissioner is satisfied that there is a real and significant risk of prejudice to the Academy’s commercial interests. She has therefore found that section 43(2) is engaged and gone on to consider the public interest test.

The balance of the public interest

72. The Commissioner recognises that the public interest in disclosure will always attract some weight because of the importance of the twin concepts of transparency and accountability. The importance of schools in society also means that invariably there will be greater scrutiny of issues and decisions that affect how they operate.
73. In order to reach a determination on where the balance of the public interest lies, the Commissioner has had regard to the following factors; the nature of the information, the timing of the request, and the extent to which disclosure would stimulate public debate.
74. The Commissioner has observed that the information to which section 43(2) has been applied is limited and with it the description of the relevant issue. Nevertheless, the Commissioner is satisfied that the information was, and remained at the time of the request, commercially sensitive. Against this, the Commissioner recognises that there would a legitimate public interest in the information because of its importance to the future running of the Academy. On balance, however, the Commissioner has found that the severity of the prejudice she has accepted would be likely to occur is such that the public interest lies in maintaining the exemption.

Conclusion

75. In summary, the Commissioner has found that, with the two exceptions mentioned, each of the records caught by the request are subject to an exemption in FOIA and should not therefore be disclosed. This finding does not extend however to the EFA letter dated 10 August 2015 and, apart from the license plate numbers, the letter dated 2 October 2015, both of which were incorrectly withheld under section 22 of FOIA.

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: 0300 1234504

Fax: 0870 739 5836

Email: GRC@hmcts.gsi.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.

Signed

Alun Johnson
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