

**Freedom of Information Act 2000 (FOIA)**  
**Environmental Information Regulations 2004 (EIR)**  
**Decision notice**

**Date:** 19 September 2019

**Public Authority:** The Governing Body of Kendrick School  
**Address:** London Road  
Reading  
RG1 5BN

**Decision (including any steps ordered)**

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1. The complainant has requested a copy of the bid submitted by Kendrick School (the School) to the Department for Education (DfE) for the Selective Schools Expansion Fund. The request was initially dealt with under the FOIA and refused under section 22 on the basis that the school intended to publish the bid at a later date. However during her investigation the Commissioner advised the School that, as the information related to development of a new school building, the request should have been considered under the EIR.
2. The School therefore reconsidered the request and applied a combination of regulation 13 – personal information and regulation 12(5)(e) – adverse effect on the confidentiality of commercial information, to withhold the majority of the information. It did however disclose some information.
3. In respect of regulation 12(5)(e) the Commissioner finds that it applies to some but not all the withheld information. Similarly, the Commissioner finds that regulation 13 does not apply to all the information to which it has been applied.
4. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
  - To disclose the information which she finds is not exempt under either regulation 12(5)(e), or regulation 13. The Commissioner has identified the information that can be withheld in a confidential

annex supplied exclusively to the School. Therefore the School is required to disclose all the other withheld information.

5. 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**

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6. On 14 October 2018 the complainant requested information of the following description, via the WhatDoTheyKnow website:

"Please advise whether Kendrick School has applied for funding under the Selective Schools Expansion Fund and if so provide a copy of the submission to the DfE."

7. On 19 November 2018 the School responded. It was clear from the response that it held the requested information, but the School explained that it was unable to provide the information because the application document was still being considered by the DfE. However the School did not cite any of the exemptions contained in the FOIA, or exceptions under the EIR as a basis for refusing the request.
8. The complainant asked the School to carry out an internal review the same day, 19 November 2018, and on 22 November the School confirmed that it was still refusing to provide the information. It now cited section 22 of the FOIA, information intended for future publication, as the basis for refusing the request.
9. The Commissioner wrote to the School and obtained a copy of the withheld information. In very broad terms, it included plans and costings to develop new school buildings. The Commissioner therefore advised the School that the information related to a measure that was likely to affect the elements of the environment and therefore should have been considered under the EIR.
10. On 10 July 2019 the School withdrew its application of section 22 of the EIR and advised the Commissioner that it was now intending to disclose some of the information to the complainant. However it would be refusing to disclose the remaining information under the exceptions provided by regulation 12(5)(e) of the EIR and regulation 13.
11. On 16 July 2019 the School provided the complainant with copies of the information it was not withholding under those exceptions.

## Scope of the case

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12. The complainant contacted the Commissioner on 8 April 2019 to complain about the way his request for information had been handled. At that time the information was being withheld under section 22 of the FOIA.
13. However in light of the School's revised position, the Commissioner considers the matter to be decided is whether the exceptions provided by regulations 13 and 12(5)(e) are engaged in respect of any of the information to which they have been applied.
14. The Commissioner will start by explaining why she considers the request to fall within the EIR.

## Reasons for decision

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### Environmental Information

15. As already touched on, the information that the School still wishes to withhold is contained in an application, or bid, submitted to the DfE for a share of the Selective Schools Expansion Fund. It is in the public domain that the School was seeking the funding so that it could construct new school buildings on its current site. Very briefly, the definition of environmental information under regulation 2(1) of the EIR includes any information on -
  - (a) the elements of the environment, including the landscape
  - (b) factors such as substances, noise etc. affecting or likely to affect the elements of the environment,
  - (c) measures such as plans and activities affecting or likely to affect the factors referred to in (a) or (b). The Commissioner is satisfied that the construction of such buildings would be a measure that affects
16. The Commissioner considers that the construction of new school buildings would have an impact on the built landscape and the process of constructing the new buildings would involve factors likely to affect the environment. The School's plans to develop its site is a measure likely to impact on the environment, the actual information submitted as part of the bid includes details of the plans to develop the site. Furthermore, as the financing of the proposed development is an integral part of the project, the application for funding would directly relate to that development. Therefore the Commissioner is satisfied that the requested information is environmental information under the definition provided by regulation 2(1)(c).

17. The Commissioner will now consider the exceptions that have been applied to the withheld information.

**Regulation 12(5)(e) - confidentiality of commercial information**

18. Regulation 12(5)(e) of the EIR states that information can be withheld to the extent that its disclosure would adversely affect the confidentiality of commercial or industrial information where such confidentiality is provided by law.
19. The exception creates a number of tests which have to be satisfied before it is engaged. Briefly these are:
- The information has to be commercial or industrial in nature;
  - The information has to be subject to a duty of confidence provided by law;
  - The confidentiality has to be required to protect an economic interest; and
  - That confidentiality has to be adversely affect by disclosure of information.
20. The request is for information contained in the School's bid for money from the DfE's Selective School's Expansion Fund. The School proposes to use any money it is awarded from the fund to build new class rooms which will allow it to enrol more pupils and the intention is to provide additional places for disadvantaged pupils. The School has applied the exception provided by regulation 12(5)(e) to all the withheld information. In broad terms, this is on the basis that bidding for money from the Selective Schools Expansion Fund is a competitive process. Not only do bids have to match specific criteria to qualify, but due the fund always being oversubscribed, applications are scored and only a limited number are ultimately awarded funds. The School argues that the bid impacts on its financial position and that the competitive nature of the bidding process gives a commercial character to the application process.
21. The School has explained that at the time of the request the bid was still being considered by the DfE and although ultimately its bid was successful, the DfE had not taken that decision by the time of the request. If the bid had not been successful, the School would have submitted a bid in the future, using similar information to that contained in the existing application. Therefore the School argues that the disclosure of any information that would have undermined the competitiveness of its bid, and so prejudiced its ability to attract funds, should be regarded as an adverse effect on its economic interests.

22. The School had engaged consultants to help put its bid together and manage the proposed expansion. The School therefore argues that disclosure of some of the information would not only undermine the overall competitiveness of the bid, but would undermine the economic interests of consultants who have a commercial interest in the contents and presentation of bid.
23. Furthermore, although a building contractor had been identified and appointed by the time of the request, no actual contract had been signed at that time. Therefore the School argues that to disclose details of its estimates of costs would undermine its ability to negotiate contracts with either the appointed contractor, or any other if it became necessary to look for an alternative developer.

*Commercial information*

24. The first test when applying regulation 12(5)(e) is whether the information itself is of a commercial or industrial nature. Having viewed the information the Commissioner finds that much of it is not of that character. The overall purpose behind the bid is to secure funds to allow the School to expand. The Commissioner does not consider the funding of public services to be a commercial or industrial activity. Much of the actual information that has been withheld relates to the justification for expanding the school, based on the educational infrastructure, how this matches the educational needs of the children and the steps the school is taking, or would be able to take to improve the educational standards for disadvantaged children. The Commissioner does not accept that such information is of a commercial or industrial nature.
25. One argument put forward by the School for the information being of a commercial nature is that, in effect, it represents the commercial product of the consultants who, it is understood, has a track record in successfully supporting schools apply for funds and managing expansion programmes. The School maintains that the consultant's professional strength lies in the presentation, detail and clarity of their cost planning, project proposal and risk analysis. It has stated that the consultants hold the copyright of the documentation that has been produced in support of the bid and own other, unspecified, intellectual property rights in the information. However although the Commissioner follows the logic of the School's argument, the Commissioner does not consider that the fact that consultant considers it has invested time and effort in developing its approach to bid submissions mean the actual information presented in accordance with that methodology is commercial information. Whether information is of a commercial nature depends on the subject matter, not its presentation.
26. The Commissioner notes that there is a separate exception (regulation 12(5)(c)) which protects intellectual property rights where there are

grounds for doing so. However it is far from clear to the Commissioner that that exception would apply. Although the manner in which the bid is presented is certainly polished, the Commissioner is not aware that the approach taken is unique or significantly different to that which might be adopted by other consultants within the industry. Furthermore, to some extent the presentational qualities of the bid has been revealed by the information that has already been disclosed. Finally, if a business rival attempted to adopt the consultant's style of presentation, the consultants could assert their copyright in any material which was disclosed in order to mitigate any adverse effect.

27. In light of the above the Commissioner will not consider the School's arguments regarding the presentational style, or methodology adopted by the consultants any further under regulation 12(5)(e).
28. However the withheld information does set out details of the proposed expansion. This includes the actual plans for the new class rooms, the programme of works that are required and obviously the estimated building costs. Alternative solutions are also considered. On the basis that the actual construction works would be carried out under a commercial contract with a private developer, the Commissioner is satisfied that this information is of a commercial nature.

*Confidentiality provided by law*

29. The next test to be considered under regulation 12(5)(e) is whether the information that is of a commercial nature, is protected by a duty of confidence. The information under consideration is limited to that of the type described in paragraph 28 above; the estimates of building costs, and programme of works. The majority of this information is contained in Form 5 - Options Appraisal and Risk Assessment and Form 6 - Quotations/Tenders Summary and Cost Assessments. Both of these have been withheld in full. However there is also information contained in Form 3 – the Application Form, Form 9 – Feasibility Report, Form 11 – Design and Cost Proposal which is of a similar, commercial, nature.
30. The School has also applied the exception to Form 12 – Donation Letter. The 'Donation Letter' sets out the amount of its own funds that it is able to contribute to the cost of the expansion project. This money was secured to fund the development of the School, i.e. it is money that will ultimately be used to pay a private building contractor to develop the site. It is information that directly relates to that commercial activity and therefore the Commissioner is satisfied that it is of a commercial nature.
31. The School has presented arguments relating to how the information described in the two paragraphs above is protected by a duty of confidence. Those arguments include a duty of confidence in respect of personal data imposed by the application of General Data Protection

Regulations (GDPR) and the Data Protection (DP) principles, as well as a contractual duty of confidence imposed under its contract with the consultants in respect of their work. However, as already explained, the Commissioner is not satisfied that the presentational, and methodologies etc adopted by the consultants are, in themselves, commercial information. Similarly, much of the personal data does not form part of the information which the Commissioner has identified as being commercial in nature. However the Commissioner will consider the School's arguments in respect of personal data under the exception provided by regulation 13.

32. Therefore the Commissioner has gone on to consider whether the information attracts a common law duty of confidence. Under common law information will be confidential if it has the necessary quality of confidence. This in turn involves considering whether the information is, or is not, trivial and whether it is in the public domain.
33. The information in question relates to plans for constructing new premises at the School, the costs and estimates involved together with the proportion of those costs that the School can meet out of its own finances. This is a major project and involves a substantial sum of money. The Commissioner is therefore satisfied the information is not trivial.
34. The Commissioner is also satisfied that although it has been shared with the DfE for the sole purpose of considering the bid, and that the costings have been worked up in conjunction with the consultants, the information has not been shared more widely. Importantly, although the appointed contractor has also had some input to the process, the information on costs had not been shared with the appointed building contractor. In light of this the Commissioner finds that the information does have the necessary quality of confidence.

*Confidentiality is required to protect an economic interest*

35. The third test established by regulation 12(5)(e) is whether the duty of confidence is required to protect an economic interest. The School obviously has an economic interest in both securing its future through expansion and ensuring that it obtains best value for money when developing its site. Therefore when considering the third test the question is whether those interests would be harmed by disclosing the information. As already touched on, although the School had identified a firm of building contractors to develop the site should its bid be successful, it had not entered into a contract with that party at the time of the request.
36. The School argues that if information relating to costs and estimates were disclosed at that time, i.e. before any contract with the developer



had been negotiated, its negotiating position would be undermined.

Disclosing the information would give the contractor access to details of how much finance the School hoped to have available and its estimates of the costs for particular elements of the development, including the amounts the School anticipated would be available for various contingencies. The Commissioner is satisfied that the disclosure of such information would seriously undermine the School's position if and when it did negotiate a contract for these works, whether this was with the contractor it had already identified, or any other developer.

37. Although the appointed contractor has not had access to the School's estimates in respect of the funding that might be available or costs, it has clearly had some involvement in the bid process and submitted information relating to its involvement. If this information was released it might undermine the School's position should the need arise for it to negotiate a contractor with an alternative developer.
38. However included in the information being withheld under regulation 12(5)(e) is that which although is of a commercial nature as it relates to the actual building project, is of a more general nature. This includes, for example, information setting out alternative options which were considered and explanations of why the preferred option was decided upon. Other information relates to the life cycle of the planning and development process. The Commissioner is not convinced that some of this information would be of any assistance to a contractor in tendering, or negotiating a contract for the planned development. Such information does not engage the exception.
39. The School has also withheld the name of the appointed contractor. The Commissioner is not satisfied that releasing this information would undermine either the School's own economic interests, or those of its consultants, or the contractor itself. This information cannot be withheld under regulation 12(5)(e). However some of the details of the contractor includes the personal data of its project team. Access to this information will be considered under the analysis of regulation 13 – personal information.
40. In respect of Form 12 – The Donation Letter, the Commissioner is not satisfied that disclosing the amount of money the School was contributing towards the development would assist a developer in contract negotiations or provide any disincentive to it offering a truly competitive price for the work.
41. However the School's economic interests are not limited to obtaining best value for money in contract negotiations, it can include the School's ability to secure the money it has bid for through the Selective Schools Expansion Fund. The School has explained the competitive nature of the bidding process for this fund. It has also explained that one element on



which competing bids are scored is the contribution which the schools themselves could afford to make. The School therefore argues that disclosing the amount it was prepared to contribute would reveal its strategy in respect of this element of its bid to other schools. Had it been unsuccessful in its current bid, the School would most likely have resubmitted a bid the following year, at which time rival schools would have the benefit of knowing the level of the School's contribution. The Commissioner accepts this argument.

*Adverse effect on the confidentiality of the information*

42. Having determined that some of the commercial information withheld under regulation 12(5)(e) is protected by a duty of confidence and that its disclosure would harm the economic interests of the School it is necessary to consider the fourth test set out in paragraph 84. However as explained in the Commissioner's guidance 'Confidentiality of commercial or industrial information (regulation 12(5)(e))'<sup>1</sup>, once the first three elements are established the Commissioner considers it is inevitable that this element will be satisfied. Disclosure of truly confidential information into the public domain would inevitably harm the confidential nature of that information and would also harm the legitimate economic interests that have already been identified.

**Public interest test**

43. Regulation 12(5)(e) is subject to the public interest test as set out in regulation 12(1)(b). Under the public interest test information can only be withheld if, in all the circumstances of the case, the public interest in maintaining the exception outweighs the public interest in disclosure.
44. When considering the public interest in favour of disclosure the School acknowledged that disclosure would improve transparency of the future plans. It has also said that disclosure would be consistent with its commitment to be proactive when publishing data on matters of a wider public interest.
45. The Commissioner recognises that there is a legitimate public debate about the role of selective schools within the education system. This debate focusses on the quality of the education they provide, whether they represent value for money and the extent to which the opportunities they provide are available for children from all strands of society and therefore their impact on social mobility. Strong views are held by some on both sides of the debate. The Commissioner considers that disclosure of the requested information would shed light on how

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<sup>1</sup> [https://ico.org.uk/media/for-organisations/documents/1624/eir\\_confidentiality\\_of\\_commercial\\_or\\_industrial\\_information.pdf](https://ico.org.uk/media/for-organisations/documents/1624/eir_confidentiality_of_commercial_or_industrial_information.pdf)

selective schools access funds and that this would help inform that debate.

46. The information would also allow the public to understand this particular school's plans for expansion and the costs of those plans. This would allow the local community to take an informed view on whether the plans represented value for money and to better understand the role of the private sector in such developments.
47. However there are strong public interest arguments in favour of maintaining the exception. The School had not negotiated a contract for the actual development of its site. In respect of the vast majority of the information that engages the exception, the Commissioner is satisfied that its disclosure would seriously undermine the School's negotiating position when the time came to negotiate that contract. There is a significant public interest in protecting the School's negotiating position in order that it can obtain the best value for the, mainly, public money it will be spending to implement its expansion plans.
48. Ultimately the School's bid was successful, however this was not a foregone conclusion at the time the request was made. If it not been successful the School would have utilised the information in a future bid. It is therefore possible that rival schools would have benefitted from an understanding of the School's bid when competing against the School for the limited funds available. This means that at the time of the request there was an increased risk of the School's economic interests being harmed by disclosure and therefore an increased public interest in withholding the information.
49. The School has also explained that when it first received the request it sought the advice of the DfE which advised that the bid process was commercially sensitive. The School therefore argues that if had disclosed information against that advice at the time the DfE was still considering its application, it may have adversely affected the DfE's consideration of the bid. The Commissioner is not persuaded that the DfE would react this way and so gives no weight to this argument.
50. Nevertheless, the Commissioner finds that the public interest in protecting both the School's negotiation position with any contractor, or, if the School had had to submit a future bid, in protecting the confidentiality of the information from rival schools, does outweigh the public interest in disclosing the information. The Commissioner finds that the School is entitled to rely on regulation 12(5)(e) to withhold the information. The information is identified in a confidential annex which has been available exclusively to the School.
51. Before ordering the disclosure of any of the remaining information, i.e. that which the Commissioner has found is not covered by regulation

12(5)(e), it is necessary to consider whether any of it is exempt by virtue of regulation 13 - personal information.

### **Regulation 13 - Personal information**

52. Regulation 13(1) of the EIR provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in regulation 13(2A), 13(2B) or 13(3A) is satisfied.
53. In this case the relevant condition is contained in regulation 13(2A)(a)<sup>2</sup>. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
54. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then regulation 13 of the EIR cannot apply.
55. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

### ***Is the information personal data?***

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

*"any information relating to an identified or identifiable living individual".*

57. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
58. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
59. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.

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<sup>2</sup> As amended by Schedule 19 Paragraph 307(3) DPA.

60. In its submissions to the Commissioner the School has dealt with the application of regulation 13 within its arguments for applying the commercial interest exception provided by regulation 12(5)(e). The School set out the information it was withholding from each of the thirteen documents which made up its bid submission. Forms 1 and 2 were disclosed in full as was the final form, Form 13. The remaining Forms were either withheld in full, or in part.
61. The personal data withheld from Form 3, the Expansion Fund Application Form consists of the names of senior staff and governors and details of their experience. The signatures of senior members of staff has also been withheld. This information very clearly identifies the individual and relates to them. The Commissioner is satisfied this constitutes their personal data.
62. In addition the School has withheld information relating to its 'Fair Access Partnership Plan (FAPP)'. The Commissioner understands that the FAPP was developed using information on the needs of schools and pupils obtained from the Local Authority under a data sharing agreement. It is not clear from the School's submission whether it has applied regulation 13 to this information, but for completeness the Commissioner has considered the matter. It may be that the information on which the FAPP is based included personal data. However the Commissioner is satisfied that no individuals can be identified from the information contained in the actual Application Form. The references to the FAPP cannot be withheld under regulation 13.
63. Form 4, described as 'Supporting documentation', has been partially disclosed. The information that has been withheld includes photographs of students. The Commissioner is satisfied that the pupils could be identified from these photographs and that therefore the information is their personal data. Letters and emails of support for the expansion plans provided by politicians and the Student Body have also been withheld. Although it is not clear that the School intended to apply the exception to these letters, the Commissioner has considered the matter for completeness. The letters do contain the opinions of the individuals in respect of the expansion plan. The individuals are clearly identified as the authors of those letters/emails. The Commissioner finds it is their personal data. The exceptions to this are letters provided on behalf of a particular organisation rather than an individual and the letter from the School's Student Body. The contents of these letters are not personal data. However the names of the authors of letters and any direct contact details of the author or recipients are personal data.
64. None of the information withheld from Forms 5 or 6 is personal data.
65. Some personal data has been withheld from Form 7 which is described as 'Supporting Evidence – Part 2'. The withheld personal data includes a

report relating to the future of the School (Governor Report March 2018) and is identified as being produced by a named individual. The School contends that it contains the personal opinions of the author. The Commissioner has considered the report, which presents its discussion of the issues in a professional, objective manner. The author's name is clearly their personal data, and Commissioner considers that any concerns over the disclosure of personal data could be resolved by redacting the author's name. Therefore the Commissioner will consider whether the name of the author can be withheld under regulation 13, but will not consider the application of the regulation to the remainder of the report.

66. Copies of the same letters of support that were withheld from Form 4 have also been withheld from Form 7 and the Commissioner's findings as to the extent this information constitutes personal data have already been set out. In addition to this information the signatures of the head teacher and the chair of the governing body have been redacted from an open letter about the expansion programme. The Commissioner is satisfied that this is the personal data of these two individuals.
67. The School is withholding information about the dialogue it had with a third party over its expansion plans. This is in part on the basis that the members of staff involved are identified. Having reviewed the information the Commissioner does not accept that any individuals can be identified apart from one member of staff and one other person who are referred to in the final exchange. The Commissioner accepts this limited information is the personal data of the individuals concerned, but not the remainder of the information on the exchanges.
68. The School has also withheld the details of a Skills Audit it conducted of its Governors and Senior Leadership Team. The Commissioner is satisfied that the majority of this information relates to the skills, competencies and experience of identifiable individuals and so constitutes their personal data. However the information is presented in the form of a table and the column listing the skills considered, whether those skills are essential or desirable, together with the column listing the overall performance of the senior leadership team and governors, is not personal data. These columns cannot be withheld under regulation 13 of the EIR.
69. A table showing the ability of staff to dedicate time to managing the expansion plan has also been withheld under regulation 13 of the EIR. The Commissioner is satisfied that this information both identifies individuals and contains details of their contractual arrangements. This is their personal data.
70. The final information withheld from Form 7 is contained in a number of the columns from table 2X – Historical Student Growth Trends. The

columns relate to the number of students that are eligible for bursary funding, have special educational needs and the percentage of students for whom English is their first language. The Commissioner finds that only where the values relate to a group containing five or less students is there a risk of individuals being identified. She will consider whether this very limited information can be withheld under the exception, however she does not accept that the remainder of the withheld is personal data and that therefore it cannot be withheld under regulation 13 of the EIR

71. Form 8 is titled Supporting Evidence – Part 3. The School has removed information it obtained for the purpose of producing its Fair Access Partnership Plan (FAPP). Much of the withheld information is descriptive, explaining the principles and approach of the School's FAPP. The Commissioner is satisfied that no individual pupils could be identified from it. However there are a number of tables which contain information on how many students attract the pupil premium at different schools and statistics on the academic achievement and progress of those pupils. Where the cells in those tables relate to a group of students of five or less the Commissioner considers there is a risk individual students could be identified. These cells do contain personal data.
72. Form 9 is the Feasibility Report. It contains photographs of the school which capture images of pupils. The Commissioner is satisfied that the pupils could be identified from those photographs and that therefore the information is their personal data. The Feasibility report also contains details of the personnel from the consultancy firm engaged to manage the bid process and the details of the project team of the appointed contractor. The Commissioner is satisfied that this information is their personal data.
73. In summary the Commissioner finds that the following information constitutes personal data:
  - From Form 3 - Application Form – information on the names and experience of senior staff and governors and the signatures on the form,
  - From Form 4- Supporting Documentation – photographs of pupils and most letters of support, but only the names and signatures from others,
  - From Form 7 – Supporting Evidence Part 2 - name of the author of a report, the same letters of support etc as are contained in Form 4, signatures on an open letter, a very limited amount of the information recording the School's dialogue with a third party, the majority of the information contained in the Skills Audit, information on the time staff would have to dedicate to the



planned expansion and information from those cells within table 2X Historical Student Growth Trends, where the values relate to a group consisting of five or less pupils.

- From Form 8 – Supporting Evidence Part 3 – information from tables relating the FAPP report where the cells contain values relating to a group consisting of five or less pupils.
- From Form 9 – Feasibility Report – photographs of the pupils and the details of the personnel of the School's consultants and appointed building contractor.

74. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the EIR. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

75. The most relevant DP principle in this case is principle (a).

**Would disclosure contravene principle (a)?**

76. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

77. In the case of an EIR request, the personal data is processed when it is disclosed in response to the request. This means that the information can only be disclosed if to do so would be lawful, fair and transparent.

78. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

79. In addition, if the requested data is special category data, in order for disclosure to be lawful and compliant with principle (a), it also requires an Article 9 condition for processing.

***Is any of the information special category data?***

80. Information relating to special category data is given special status in the GDPR.

81. Article 9 of the GDPR defines 'special category' as being personal data which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation.

82. Having viewed the withheld information, the Commissioner finds that a very limited amount of the requested information does constitute special

category data. The information in question is that contained in table 2X of Form 7 – Supporting Evidence – Part 2. One of the columns to that table relates to pupils who have special educational needs. The Commissioner is satisfied as such it would be special category data, but only where an individual could be identified from that data. As explained above, where the information relates to a group consisting of five or less pupils, the Commissioner considers there is a risk of individual pupils being identified. This is the case in respect of at least one of the cells in that table.

83. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it can only be processed, which includes disclosure in response to an information request, if one of the stringent conditions of Article 9 can be met.
84. The Commissioner considers that the only conditions that could be relevant to a disclosure under the EIR are conditions (a) (explicit consent from the data subject) or (e) (data made manifestly public by the data subject) in Article 9.
85. The Commissioner has seen no evidence or indication that the individuals concerned have specifically consented to this data being disclosed to the world in response to the EIR request or that they have deliberately made this data public.
86. As none of the conditions required for processing special category data are satisfied there is no legal basis for its disclosure. Processing this special category data would therefore breach principle (a) and so the information contained in the cells is exempt under regulation 13(1) of the EIR.
87. In respect of the remaining information the Commissioner will now go on to consider whether one of the lawful bases listed in Article 6(1) of the GDPR can be satisfied and whether the disclosure would also be generally lawful.

### **Lawful processing: Article 6(1)(f) of the GDPR**

88. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that “*processing shall be lawful only if and to the extent that at least one of the*” lawful bases for processing listed in the Article applies.
89. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

*“processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and*

*freedoms of the data subject which require protection of personal data, in particular where the data subject is a child”<sup>3</sup>.*

90. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the EIR, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
- ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
- iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.

91. The Commissioner considers that the test of ‘necessity’ under stage (ii) must be met before the balancing test under stage (iii) is applied.

#### *Legitimate interests*

92. In considering any legitimate interest(s) in the disclosure of the requested information under the EIR, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.

93. Further, a wide range of interests may be legitimate interests. They can be the requester’s own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

94. The Commissioner finds that there is a legitimate interest in disclosing the majority of remaining personal data. The policy of providing

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<sup>3</sup> Article 6(1) goes on to state that:-

*“Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks”.*

However, regulation 13(6) EIR (as amended by Schedule 19 Paragraph 307(7) DPA) provides that:-

*“In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted”.*

education through selective schools is not without controversy. There is a legitimate interest in understanding how such schools are funded including through their bids for money from Selective Schools Expansion Fund. That legitimate interest extends to understanding, for example the skills and time that can be dedicated to implementing a planned expansion, the evidence of the need to expand and cater for pupils from disadvantaged backgrounds, the extent to which politicians support the submission, the details of the consultants and of the appointed building contractor working with the School. There is far less of a legitimate interest disclosing signatures of those signing the bid. Nevertheless an argument can be constructed that there is a legitimate interest in ensuring the bid was signed by the appropriate people.

95. In respect of photographs of pupils, these were incorporated for purely presentational purposes. Their disclosure would add nothing to one's understanding of the School's bid or to inform views on the policies on selective schools. As there is no legitimate interest in the disclosure of these photographs the Commissioner finds there is no legal basis for their disclosure and that they can be withheld under regulation 13 of the EIR.

*Is disclosure necessary?*

96. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the EIR must therefore be the least intrusive means of achieving the legitimate aim in question.
97. The Commissioner will look at each piece of personal data in turn. The personal data withheld from Form 3 – the Application Form includes details of the experience of the senior staff and governors who would be managing the proposed expansion. The Commissioner is not aware of any alternative information that has been made available on the qualities of these individuals, therefore disclosure is necessary. Signatures have also been withheld from Form 3. The Commissioner is satisfied that the Department for Education's (DfE) would have means of establishing the authenticity of the documents submitted to it and that there is in reality little likelihood in fraudulent bids being submitted. Therefore the Commissioner is satisfied that the DfE's own checks can be relied on and there is no need to disclose the signatures to the application form. These signatures can be withheld under regulation 13 of the EIR.
98. The personal data that has been withheld from Form 4 – Supporting documentation, includes photographs of pupils and letters of support. The Commissioner has already found that the photographs can be

withheld. In respect of the letters of support, the Commissioner notes that the identities of some of the authors have already been disclosed to the complainant. However the content of the letters and signatures are still being withheld. The Commissioner finds in order to properly understand the extent of the support which the school was able to solicit and to get some sense of the influence such letters would have on the DfE's consideration of the School's bid, it would be necessary to disclose those letters. Given the position of those politicians and that they were acting in their capacity as holders of public office, the Commissioner does not consider their disclosure would be particularly intrusive. The same rationale obviously applies to where these letters appear in Form 7.

99. The name of the author of a report has been withheld from Form 7 – Supporting Evidence Part 2. To get a feel for the seniority of the individual producing that report it would be necessary to identify them.
100. Signatures have been withheld from an open letter. As this letter is described as an 'open letter' the Commissioner assumes that the signatures have already been disclosed and therefore their disclosure in response to this information request is not necessary. The flip side of this argument would be that, as they have already been disclosed, there can be no grounds for withholding them. However, in the circumstances of the case the Commissioner sees little value in pursuing the disclosure of information which is likely to already be in the public domain.
101. Information relating to the school's dialogue with a third party has also been withheld from Form 7, and limited amount of which the Commissioner has found to be personal data. To fully understand that dialogue and its outcome it is necessary to disclose this personal data. To appreciate the skill sets of the Senior Leadership Team and Governors, which would be an important component of a successful expansion programme, it would be necessary to disclose the skills audit. Similarly there are grounds for arguing that there is a need to disclose information on the time available to that senior team.
102. The remaining personal data that has been withheld from Form 7 is that from table 2X. The Commissioner has already determined that this constitutes special category data and can be withheld under regulation 13 of the EIR.
103. The personal data withheld from Form 8 – Supporting Evidence Part 3, is that from tables regarding the Fair Access Partnership Plan (FAPP) where the information relates to groups consisting of five or less students. As the need for expansion is justified in part by the provision of places for pupils from disadvantaged backgrounds, disclosing the withheld information would allow the arguments presented by the school to be examined with greater rigour. Therefore to fully understand the

FAPP, it remains necessary to disclose the personal data from the Form 8. In reaching this decision the Commissioner has considered whether this is the least intrusive means of achieving the aim. Account has been taken of the fact that the Commissioner has already found that a great deal of the information on the FAPP is not personal data and therefore should be released. Also the Commissioner notes that since the request was made the DfE has published some details of the School's application, including some details of the FAPP. Notwithstanding that such disclosures go a long way to meeting the need to understand the FAPP, the Commissioner remains of the view that in order to fully understand the plan it would be necessary to disclose this personal data.

104. Apart from the photographs of pupils which the Commissioner has already found there to be no legitimate interest in disclosing, the personal data withheld from Form 9 – Feasibility Report consists of details of staff from the consultants engaged by the school and from the project team of the appointed building contractor. The Commissioner is satisfied that to begin to assess the strength of the teams assembled to support the School's expansion programme it would be necessary to disclose the personal data in question.

*Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms*

105. Having found that it would be necessary to disclose some of the personal data in order to meet a legitimate interest, it is now necessary to balance those legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject would not reasonably expect that the information would be disclosed to the public under the EIR in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.

106. In considering this balancing test, the Commissioner has taken into account the following factors:

- the potential harm or distress that disclosure may cause;
- whether the information is already in the public domain;
- whether the information is already known to some individuals;
- whether the individual expressed concern to the disclosure; and
- the reasonable expectations of the individual.

107. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information



relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

108. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
109. Form 3 – The Application Form contains details of the experience or length of service of senior staff and governors. The Commissioner is not aware that these details are in the public domain. Nor is it the sort of information that the individuals would expect to be made public. It is the sort of information that one would generally expect to remain private within the School and only divulged to third parties on a confidential basis for specific purposes. Disclosing it to the world at large in response to an environmental information request would be intrusive. Therefore although there is a legitimate interest in disclosing this information in order to allow scrutiny of both the bid process and to allow an informed view on the School's ability to manage its expansion plans, the Commissioner finds that data subjects' interests and fundamental rights outweigh the value in disclosing this information. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. These details can be withheld under regulation 13 of the EIR.
110. Similarly Form 7 – Supporting Evidence Part 2, also contains personal data of the staff and governors. This relates both to an analysis of their skills and the time they could dedicate to the expansion plans. The details of their time commitments contains some information relating to the terms of employment. This information is far more detailed than that contained in Form 3 and so would be far more intrusive if released. It is clear to the Commissioner that some of it would have been collected on the understanding that it would remain confidential between the School, its consultants and the DfE. Therefore although this information is more significant in terms of being able to understand the strength of the School's bid, the Commissioner finds that the legitimate interest in its disclosure is insufficient to outweigh the data subjects' fundamental rights and freedoms. There is no Article 6 basis for its disclosure and therefore to do so would be unlawful. This information can also be withheld under regulation 13 of the EIR.
111. In addition Form 7 – Supporting Evidence Part 2, also contains personal data within the information relating to the dialogue the School had with a third party. Although this personal data is important to the overall understanding of that dialogue and its outcome, the Commissioner considers the data subject would have no expectation that their personal views on the matter would be made public when sharing his thoughts with the School. It would be intrusive to disclose that information. The Commissioner therefore considers that there is no Article 6 basis for

processing and so the disclosure of the information would not be lawful. These details can be withheld under regulation 13 of the EIR.

112. The only remaining personal data of the School's staff is that contained in Form 4 – Supporting Documentation. This consists of the name of the author of a report. The individual concerned is not a member of the School's Senior Leadership Team and this would shape their expectations as to how their information would be processed. The report was produced by the individual in their professional capacity and is presented in an objective manner. In some respects therefore, naming the author would not seem particularly intrusive. However, although there is some legitimate interest in disclosing information that may allow a view to be taken on the authority of that report, the Commissioner finds that this is insufficient to outweigh the data subject's fundamental rights and freedoms as they would have had no expectation of being named. There is no Article 6 basis for its disclosure and therefore to do so would be unlawful. This information can also be withheld under regulation 13 of the EIR.
113. Form 8 contains personal data within the tables relating to the School's Fair Access Partnership Plan (FAPP). The Commissioner is satisfied that where the cells within the tables relate to a small group of pupils, there is a risk of individual pupils being identified. The information relates to pupils who attract a pupil premium. The pupil premium is paid by government based on an assessment of whether the pupil is disadvantaged. To disclose information that would identify a child as being disadvantaged would clearly be very intrusive. The Commissioner is satisfied that there would be no lawful basis under Article 6 for disclosing this type of information. It can be withheld under regulation 13 of the EIR.
114. Both Form 4 – Supporting Evidence and Form 7 – Supporting Evidence Part 2 contain letters of support from Members of Parliament and an external organisation and Student Body. The information already released by the School lists some of those who provided these letters of support. The contents of the letters are as one might expect such letters to be. With the exception of the Student Body letter, they were produced by their authors in their capacity of holders of public office. It would be unrealistic for these individuals to expect those letters to remain confidential. There is a strong legitimate interest in disclosing the letters to better understand the influence that such letters may have on the bid process. Therefore in respect of the majority of these letters the Commissioner finds that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful. The Commissioner will go on to consider whether the disclosure would satisfy the fairness and transparency requirements of Article 6 shortly.

115. However before doing so she will consider the lawfulness of disclosing one email from a person from another organisation (the external party) which the School has included in its letters of support and the details of the pupils signed the Student Body letter. The email from the external party is of a different character to that of the other far more formal letters received by the School. The opinions expressed represent a more personal view. The Commissioner is satisfied that the author would not have expected this email to be disclosed and that its disclosure would be more intrusive than is the case with the more formal responses. In respect of this one email the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. As for the names of authors to the Student Body letter the Commissioner finds that the students would have no expectation that their names or signatures would be disclosed, and that to do so would be intrusive given their status as pupils. The Commissioner therefore considers that there is no Article 6 basis for the processing and so the disclosure of the external party's email and details of the students would not be lawful. This information can be withheld under regulation 13 of the EIR.
116. The final pieces of personal data that have been withheld under regulation 13 of the EIR are those relating to the employees of the consultants engaged by the School and of the appointed building contractor. This is contained in Form 9 – Feasibility Report. The information relating to the consultant's staff simply lists the members of its project team, with photographs, and their disciplines. The name of the consultant is already in the public domain and the Commissioner has looked at its website to get a better sense of the seniority and public profile of those team members. Two of the individuals' names appear on the website due to their seniority, together with their photographs. The Commissioner therefore can see no grounds for believing that these individuals would have any concerns over being associated with the expansion plans for the School. Given that the information relates purely to their professional lives, the Commissioner finds that there is sufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is an Article 6 basis for processing and so the disclosure of the information would be lawful. The Commissioner will go onto consider whether the disclosure would satisfy the fairness and transparency requirements of Article 6 shortly.
117. However in respect of the personal data of the other team members the Commissioner considers that the fact their positions are not promoted on the company's website is indicative that they held less senior roles and this would shape their expectations of the circumstances in which their personal data would be disclosed. The Commissioner is not satisfied that they would necessarily expect their employment details to be made public in response to an information request. In light of this the

Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. This information can be withheld under regulation 13 of the EIR.

118. In respect of the personal data of the building contractors' project team, the Commissioner has found there is very limited information about the composition of the company's staff available from its website. The Commissioner considers this is indicative that staff would have no expectation that their personal data would be made available beyond their direct business relationships. In light of this the Commissioner is satisfied that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful. This information can be withheld under regulation 13 of the EIR.

119. Where the Commissioner has concluded that the disclosure of personal data would not be lawful she has not needed to go on to separately consider whether disclosure would be fair or transparent. She has simply concluded that the information can be withheld under regulation 13 of the EIR. However she has found that there is a lawful basis for disclosing some of the personal data to which that exception has been applied. The information in question is all but one of the letters of support received by the School and the details of three members of the consultant's project team. It is now necessary to consider whether as well as being lawful the disclosure of this information would also meet the requirement to be fair and transparent under principle a.

### **Fairness and transparency**

120. In relation to fairness, the Commissioner considers that if the disclosure passes the legitimate interest test for lawful processing, it is highly likely that disclosure will be fair for the same reasons.

121. The requirement for transparency is met because as a public authority, the School is subject to the EIR.

122. The Commissioner has therefore decided that the School has failed to demonstrate that the exception at regulation 13(1) is engaged in respect of these letters of support and the details of the two members of the consultant's project team. The School is required to disclose this information.

## **Right of appeal**

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123. 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@justice.gov.uk](mailto:grc@justice.gov.uk)

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

124. 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.

125. 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**

**Rob Mechan**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**