

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 26 July 2021

Public Authority: Governing Body of Cotham School
Address: Cotham Lawn Road
Bristol
BS6 6DT

Decision (including any steps ordered)

1. The complainant requested papers relating to meetings of the governing body. The Governing Body of Cotham School ("the School") relied on section 22 of the FOIA to withhold some information and stated that it could only provide the remaining information in hard copy.
2. The Commissioner's decision is that the complainant did not express a preference for the form in which she wished to receive the information at the point of making her request. The School therefore did not breach section 11 of the FOIA in responding to the request.
3. As the School has since provided an acceptable copy of the information, the Commissioner does not require any steps to be taken.

Nomenclature

4. Paragraph 52A of Schedule 1 of the FOIA states that "the proprietor of an academy" will be a public authority for the purposes of the Act. The term "proprietor" in this context is defined by section 579(1) of the Education Act 1996 as being the governing body of the academy. Whilst it is the governing body that must comply with FOIA obligations, the Commissioner recognises that, in practice – as has happened in this case – requests will be dealt with by the administrative staff of that academy.

5. In this particular case, the request seeks details of meetings of the academy's governing body itself. To avoid confusion, the Commissioner will refer to "the School" when referring to the public authority responding to the request and "the governing body" when referring to specific meetings of the board of governors.

Request and response

6. On 15 June 2020, the complainant contacted the School via an electronic form on its website and requested information in the following terms:

"Please send me a copy of the minutes of all meetings of the Academy Governing Body since 11 September 2019. Please provide copies of reports and other documents that we issued for discussion etc at the meeting. You should include any minutes that have not yet been agreed by the Governors."

7. The School responded on 16 June 2020. It directed the complainant to approved minutes that were already available on its website. It stated that it was unable to provide any minutes that had not been formally approved by a meeting of the governing body.
8. The complainant contacted the School again on 23 June 2020 as she was dissatisfied with the School's decision to withhold unapproved or draft minutes.
9. The School issued a further response on 30 June 2020. It now relied on section 22 of the FOIA to withhold draft material from disclosure and stated that the balance of the public interest favoured maintaining the exemption. However it noted that the outstanding minutes were due to be approved at a meeting of the governing body on 7 July and would therefore be available for disclosure on 10 July 2020 – within 20 working days of the request having been submitted.
10. The School then contacted the complainant again on 10 July 2020, noting that the requested information (in its entirety) was now ready for dispatch and that the complainant could either collect it from the School reception or could provide a postal address to which the School would dispatch the information.
11. The complainant responded to that correspondence on 11 July 2020 to say that:

"Email is my preferred communication route"

12. The School completed an internal review on 17 July 2020. It stated that:

"The documents have been made available to you using the current method of delivery available to the school at this time, by post or collection."

Scope of the case

13. The complainant contacted the Commissioner on 24 September 2020 to complain about the way her request for information had been handled. She was unhappy that the School had withheld draft documents and that it had failed to provide the information by email.
14. The Commissioner was unable to begin her investigation until 8 January 2021. Given the passage of time, she commenced proceedings by asking the School whether it had since published the information it had previously relied on section 22 of the FOIA to withhold.
15. The School responded on 11 January 2021, it informed the Commissioner that it had now published some of the information on its website. It also explained to the Commissioner that it remained willing to disclose the remaining information in hard copy, but that it had been unable to convert the information to an electronic format in June 2020 and that that remained the case at the present time.
16. At that point in time (January 2021), the UK was once again subject to a "stay at home" order – issued to deal with escalating cases of Covid-19. In view of the circumstances that prevailed – and seemed likely to prevail for some time – the Commissioner therefore attempted to persuade the complainant to accept the information in hard copy instead.
17. The complainant eventually agreed to the Commissioner's suggestion, but asked for a decision notice to be issued considering the School's procedural compliance with the FOIA. The Commissioner agreed in principle to issue a decision notice, but stated that she would only issue a procedural decision notice once she was satisfied that the School had complied with its main section 1(1) duty – to identify and communicate information. She therefore asked the complainant to consider the information the School provided and to confirm whether or not she (the complainant) considered she had received all the information to which she was entitled.
18. Unfortunately a key email, sent in March 2021, did not reach the Commissioner and caused her to close the complaint prematurely. The complainant contacted the Commissioner again on 21 July 2021, to

complain that she was yet to receive a decision notice. As the Commissioner was satisfied that the error lay on her side, she agreed to re-open the complaint and issue a decision notice.

19. As the School both withdrew its reliance on section 22 and made the information available to the complainant (albeit not in her preferred format) within 20 working days of the request, the Commissioner will not consider whether the School complied with section 10(1) of the FOIA (timeliness) or whether it was entitled to rely on section 22 at the point that it did so.
20. The “missing email” of March 2021 contained the complainant’s confirmation that she was satisfied that the School had provided all the information she sought. The Commissioner therefore considers that the only outstanding matter for her to address is whether the School was obliged to provide the information electronically.
21. The Commissioner considers that the scope of his analysis is to consider whether or not the School complied with section 11 of the FOIA.

Reasons for decision

22. Section 11 of the FOIA states that:

(1) Where, on making his request for information, the applicant expresses a preference for communication by any one or more of the following means, namely—

- (a) the provision to the applicant of a copy of the information in permanent form or in another form acceptable to the applicant,*
- (b) the provision to the applicant of a reasonable opportunity to inspect a record containing the information, and*
- (c) the provision to the applicant of a digest or summary of the information in permanent form or in another form acceptable to the applicant,*

the public authority shall so far as reasonably practicable give effect to that preference.

(1A) Where—

- (a) an applicant makes a request for information to a public authority in respect of information that is, or forms part of, a dataset held by the public authority, and*

(b) on making the request for information, the applicant expresses a preference for communication by means of the provision to the applicant of a copy of the information in electronic form,

the public authority must, so far as reasonably practicable, provide the information to the applicant in an electronic form which is capable of re-use.

(2) In determining for the purposes of this section whether it is reasonably practicable to communicate information by particular means, the public authority may have regard to all the circumstances, including the cost of doing so.

(3) Where the public authority determines that it is not reasonably practicable to comply with any preference expressed by the applicant in making his request, the authority shall notify the applicant of the reasons for its determination.

(4) Subject to subsections (1) and (1A), a public authority may comply with a request by communicating information by any means which are reasonable in the circumstances.

23. For section 11 considerations to come in to play, the Commissioner considers that two criteria must be met: firstly, a preference for a particular format must have been expressed and secondly it must be reasonably practicable for the public authority to provide the information in that format.

Was a preference expressed?

24. It is clear from the text of the complainant's request that she did not explicitly express a preference to receive the information in electronic form. However, the request was submitted via an electronic form and the complainant only included her email address – not a postal address. She argued that it was therefore implicit that she wished the information to be provided to her electronically.

25. Whilst the Commissioner accepts the complainant may have implied that she wished to have the information provided electronically, she does not consider that this amounts to preference having been "expressed."

26. The Cambridge English Dictionary defines the word "express" as:

*"to communicate what you think or feel, by speaking or writing, or in some other way."*¹

27. The Merriam-Webster definition is:

*"to represent in words; to make known the opinions or feelings of (oneself); to give expression to the artistic or creative impulses or abilities of (oneself); to give or convey a true impression of; to represent by a sign or symbol"*²

28. Dictionary.com defines the word as meaning:

*to put (thought) into words; utter or state; to show, manifest, or reveal; clearly indicated; distinctly stated; definite; explicit; plain.*³

29. The Commissioner considers that the natural meaning of the word "express" in the context of section 11(1) implies that the requestor needs to take some additional form of positive action when submitting their request. It does not point toward assumptions needing to be made, by the public authority, as to whether or not a preference has been implied.
30. The Court of Appeal in *Innes v Information Commissioner & Buckinghamshire County Council* [2014] EWCA Civ 1086, found that, in order to be valid, a preference for information to be provided in a particular form or format must be expressed at the point the request is made. Underhill LJ wrote in the judgement that he "saw no need to strive for a looser meaning" – although the Commissioner's guidance states that, where a preference is expressed at a later stage, the public authority can choose to treat such correspondence as a clarification of the original request, thus re-setting the 20 working days.
31. In this case, the requestor did not "express" a preference until after the point at which the School had informed her that it was in a position to communicate the information.
32. The Commissioner will usually consider it reasonable to respond to a request submitted electronically by communicating information in electronic form. However, in order for the specific obligations of section

¹ <https://dictionary.cambridge.org/dictionary/english/express>

² <https://www.merriam-webster.com/dictionary/express>

³ <https://www.dictionary.com/browse/express>

11 to be imposed upon the public authority, the Commissioner considers that a requestor must do more than merely communicate in a particular form. They must state or clearly indicate that they wish to have the information communicated in a particular way.

33. Whilst the School might have clarified at the outset that it was unable to provide the information electronically, the Commissioner does recognise that the overall outcome would have been the same.
34. As the requestor did not express a preference for the format in which she wished to receive her information at the point she made her request, the Commissioner does not consider that the School was obliged to provide the information in a particular form.

Was it "reasonable in the circumstances" for the School to provide the information in hard copy?

35. Whilst the complainant did not express a preference, the School was still obliged by section 11(4) to provide the information in a form that was "reasonable in the circumstances."
36. The Commissioner's guidance on section 11(4) states that, unless there is a specific instruction to the contrary, a public authority should normally assume that, where a requestor submits a request via electronic means, it is reasonable for the information to be communicated to them in that way. Equally, if a request is received in the form of a letter, it is reasonable (in the absence of contrary instructions) for the public authority to provide the information in such a way.⁴
37. Even though the complainant had submitted her request electronically, the Commissioner still considers that it was reasonable for the information to be provided in hard copy.
38. Firstly, according to the School, this was the form in which it held the information. The more manipulation that a public authority is required to do to its existing records in order to communicate them in a particular form, the less likely it is that supplying it in that form will be "reasonable." The fact that the School was apparently ready to comply with the request within 20 working days suggests that this was a reasonable means of communicating information.

⁴ <https://ico.org.uk/media/1163/means-of-communicating-information-foia-guidance.pdf>

39. Secondly, the fact that the request was received electronically, should not automatically indicate that the complainant had a preference to receive the information in hard copy. Especially given the restrictions in place at the time of the request, a requestor may take the view that if they were to make their request by post, it might not be seen by the staff for a considerable time – or at all. Equally, a requestor might be unaware of their right to receive electronically-created information in hard copy – even though that may have been their preference.
40. The Commissioner therefore concludes that it was not unreasonable in the circumstances for the School to provide the information in hard copy.

Other matters

Was it "reasonably practicable" to comply with the complainant's preference?

41. Had the Commissioner found that the complainant *had* expressed a preference to receive the information electronically, she may well have found that it was "reasonably practicable" for the School to have given effect to that preference.
42. A public authority is only obliged to comply with a preference where it is "reasonably practicable" to do so. Section 11(2) states that a public authority may take account of "all the circumstances" of the request.
43. The School explained to the Commissioner that, at the time it had responded to the request, most of its staff were working from home – in line with national government guidelines. It stated that staff "do not have access to the means to provide this electronically [sic] as it has been manually redacted and would need to be scanned in." In later correspondence, it noted that:

"[we] hope the commissioner will remember that the directive at the time of the FOI request from [the complainant] was that all staff wherever possible should work from home. Therefore making it impossible for staff to scan documents in following redaction to send to [the complainant]."

"The only staff on the school site during the pandemic were those working with students who were vulnerable or the children of key workers, no administration staff had access to equipment to do anything other than manually process the request."

44. The complainant, for her part, pointed to corporate information issued by the School in which it had quoted a figure of 85% of staff being

available – although this appeared to reflect the situation as of November 2020 – and noted that, by January 2021, the School had had ample time to scan any information and provide it to her.

45. The Commissioner is conscious that many public authorities have, since March 2020, been struggling to comply with all their FOIA obligations in a timely manner – either due to the availability of staff or because of restrictions on access to certain records and equipment. These are not normal circumstances and therefore what might be ordinarily be considered “reasonable” may not be so in these circumstances.
46. In July 2020 (the point at which the School said it could comply with the request), schools in England had begun a phased return. Non-essential shops had been allowed to re-open and some of the social distancing laws had been relaxed. However, the guidance that those who could work from home should continue to do so remained in place.
47. The Commissioner has some sympathy for the situation the School found itself in. However, some of the answers it provided did not indicate that it was wholly impracticable to comply with the request.
48. Firstly, it was not clear to the Commissioner why the information was only held in hard copy. Minutes uploaded to the School’s website indicated that they had been created digitally – not scanned. Whilst the Commissioner appreciates that the School may not have its own dedicated redaction software, there are “lo-tech” workarounds (such as replacing all sections requiring redaction with “[redacted]” and then pasting the information into a fresh document) which, whilst more time-consuming, would have allowed the School to redact sensitive information in an electronic document – without requiring the documents to be printed, redacted and re-scanned.
49. Secondly (and even if some of the documents did not exist electronically), the School’s argument that staff could not access the school buildings was somewhat inconsistent with its assertion that it could have made the documents available for collection from reception.
50. In order to make the documents available in this way, a member of staff would be required to either transport the documents to the School’s reception or be present at the School to take delivery of the documents by post from another colleague. Thus requiring a member of staff to be present on the school premises.
51. It also seems unlikely to the Commissioner that the complainant would have been permitted to enter the school building and collect documents unsupervised – which would again suggest that a member of staff (presumably a non-teaching member, since the School was only open

during ordinary school hours) would have needed to be present to ensure that the correct documents were provided to the correct person.

52. If the School considered it reasonably practicable to have a member of its staff present on the premises to co-ordinate the collection of these documents, the Commissioner has some difficulty understanding why it would not have been reasonably practicable to ask that member of staff to enter the premises in order to digitise the information – especially when it was a task that would not be complex and could not be done from home.
53. The School did not put forward any other arguments (such as the volume of information that would require digitisation) that would have rendered complying with the requestor's preference impractical.
54. Given the findings set in the main body of this notice, the Commissioner did not consider it proportionate to probe the School's assertions on this point further and therefore makes no formal finding on the matter either way. It is not her role to second-guess the steps necessary to keep the school premises covid-secure or its staff safe. These reflections are included for completeness.

General FOIA compliance

55. In her correspondence, the complainant was critical of the School's willingness to supply information and of its broader compliance with its FOIA obligations.
56. The Commissioner has not seen any evidence that the School is unaware of its obligations or that it fails to take them seriously. The School responded quickly to the complainant's request and, had she been prepared to accept the documents in hard copy, she would have received them within 20 working days. The School's responses to the Commissioner stressed, at each opportunity, that it had already prepared the hard copy documents and could have provided them immediately. The Commissioner does not consider this indicative of a public authority attempting to avoid its legal obligations.

Right of appeal

57. Either party has the right to appeal against this decision notice to the First-tier Tribunal (Information Rights). Information about the appeals process may be obtained from:

First-tier Tribunal (Information Rights)
GRC & GRP Tribunals,
PO Box 9300,
LEICESTER,
LE1 8DJ

Tel: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

58. 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.
59. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Signed

Roger Cawthorne
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