

Freedom of Information Act 2000 (Section 50)

Decision Notice

Date: 24 September 2008

Public Authority: Ofsted
Address: Alexandra House
33 Kingsway
London
WC2B 6SE

Summary

The complainant requested copies of Evidence Forms completed during an inspection of St Patrick's Primary School, Bristol. The public authority refused the request, citing sections 33 and 41. The Commissioner finds that section 33 is not engaged, primarily as a result of the public authority having previously notified participants in inspections that their contributions may be subject to disclosure through the Act. In respect of some of the information the Commissioner further finds that section 41 is not engaged. Having reached these conclusions on the exemptions cited by the public authority, the Commissioner has also considered section 40 and has concluded that some of the information in question constitutes personal data of various individuals, including teachers. The Commissioner finds that the exemptions provided by sections 40(1) and 40(2) are engaged in respect of some of the information constituting personal data. The public authority is required to disclose to the complainant the information identified to the public authority separately from this notice

The Commissioner's Role

1. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the Freedom of Information Act 2000 (the "Act"). This Notice sets out his decision.

The Request

2. On 23 February 2006, the complainant made the following information request:

"...St Patrick's Primary School was inspected by Tribal Education, on behalf of Ofsted, on 5 and 6 December 2005"

We would be grateful if, under the Freedom of Information Act, copies of the inspector's evidence forms could be made available to the school."

3. The public authority responded to this on 23 March 2006. This response refused the request, with sections 33 (audit functions) and 41 (information provided in confidence) cited.
4. Following this refusal, the complainant requested that the public authority carry out an internal review of its handling of his request. The public authority responded with the outcome to the review on 11 April 2006. The initial refusal of the request was upheld.

The Investigation

Scope of the case

5. The complainant contacted the Commissioner initially on 16 June 2006. The complainant specified the refusal of his request as the grounds for his complaint.

Chronology

6. The Commissioner contacted the public authority on 9 October 2007. The basis for the complaint was set out and the public authority was asked firstly to detail the process through which the initial notes made by an inspector whilst visiting a school would influence the final report, including how closely the final report would reflect the contents of the notes. The public authority was also asked to confirm how widely available the final report would be, for instance publicly available, or only available to the school in question.
7. Secondly, the public authority was asked to respond with further details concerning the exemptions cited. It was noted that the public authority had cited subsection 33(1)(b) in the refusal notice. In connection with this, the public authority was asked to describe why it considered that disclosure would prejudice the functions set out in this subsection and why it considered that the public interest favoured the maintenance of this exemption.
8. In connection with section 41, the public authority was asked to respond confirming that the information to which this exemption was considered to relate had been provided to it by a third party and what guarantee or expectation of confidence existed. The public authority was also asked to confirm why it believed that disclosure of this information would constitute an actionable breach of confidence. The public authority was further asked to provide to the Commissioner a copy of the information withheld from the complainant.
9. The public authority responded on 30 November 2007. With this response, the public authority included the information withheld from the complainant and, in response to the request for an explanation of the school inspections process,

various documents relating to this process.

10. The public authority confirmed that evidence forms ("EFs") contain handwritten notes made by schools inspectors during visits to schools. These notes may reflect the first impressions of the inspector which are not always fully considered judgements. The EFs are the 'immediate support' for the judgements in the published report.
11. The public authority went on to describe how the EFs are 'moderated', through which the evidence recorded is assessed as to whether it is of a sufficient quality to influence the final report. Some of the evidence recorded on the EFs will not be relied upon and will not influence the final report
12. The public authority also stated that the EFs may include the initial conclusion formed by the inspector at the time of the inspections. Whilst these conclusions may influence the final report, they also may be omitted from the report and the initial conclusion formed would then not influence the findings of the report. The public authority also stated the following on how closely the content of the report reflects the contents of the notes:

"There is usually no schedule, or index, of the evidence base which enables the EFs to be mapped against the final report."

13. The public authority indicated that the final report is the agreed view of the inspection team. Recorded within the EFs may be a large quantity of evidence that is not referenced in the report and that has not influenced the conclusions of the report. The evidence not included in the report may be insufficiently significant, relevant or accurate to justify inclusion in or influence on the final report. Apart from the report itself, the EFs contain no indication as to whether the evidence recorded within has influenced the final report.
14. The public authority confirmed that the report is made publicly available within 15 working days of the date of the inspection. The report is published on the website of the public authority and the public authority is also obliged to ensure that the parents of every child at the school receive a copy of the report.
15. The public authority went on to give its arguments as to why it believed that the exemption provided by section 33(1)(b) was engaged in respect to the information withheld in this case. The public authority firstly addressed whether the inspection covered the processes outlined in the wording of section 33(1)(b), namely the examination of economy, efficiency and effectiveness. To this end, the public authority referred to section 5 of the Education Act 2005, which states that an inspection should report on:

"(a) the quality of education provided in the school, (b) how far the education in the school meets the needs of a range of pupils, (c) the educational standards achieved in the school, (d) the quality of the leadership in and management of the school, including whether the financial resources made available to the school are managed effectively."

16. The public authority also quoted the following finding from the published report:

"This is an effective school that gives satisfactory value for money."

17. The public authority went on to give its arguments as to the prejudice that it believed would result from disclosure. The arguments of the public authority concerning the prejudice that would result from disclosure were as follows:

- The conclusion of the report would be undermined through disclosure of contents of the EFs not considered of sufficient validity or weight to be included within the report.
- Participants in future schools inspections may be less forthcoming if they are aware that their contributions may later be subject to disclosure.
- School inspectors may be less willing to record their observations with full frankness if they are concerned that their observations will be subject to later disclosure.
- Relationships between the public authority and schools may be harmed and cooperation lessened if schools are concerned that critical comments recorded on EFs may be disclosed.
- The public authority also believed that the time taken to conduct inspections would be increased as a result of disclosure. The public authority believed that this would occur as notes would have to be written with disclosure in mind. The public authority also believed that a request made between the time of the inspection and the publication of the report could lead to delays in publication of the report as the school would wish to discuss the contents of the EFs prior to publication of the report.

18. The public authority gave detailed arguments concerning each of the above points and stated that the risk of prejudice resulting from these factors was at the very least real and significant. Whilst the detailed arguments of the public authority have been considered by the Commissioner, for reasons of brevity these arguments are not set out in full here.

19. The public authority went on to detail why it considered that the public interest favoured the maintenance of the exemption here. The public authority recognised a public interest argument in favour of disclosure to the extent that transparency would be improved through placing more information about the inspection process into the public domain. The public authority also recognised that a particular interest in disclosure may be held by teachers, school governors and parents.

20. The public authority considered the strength of this argument to be reduced by the substantial volume of information concerning school inspections that is already in the public domain, primarily the published reports. The public authority argued that the small number of requests it had received for further information beyond that included within published reports indicated the high level of satisfaction with the information disclosed through the reports and through the general information available about the inspections process.

21. The public authority also recognised a public interest in disclosure on the grounds

that this would demonstrate that inspections are carried out in accordance with the processes and mechanisms designed to ensure the quality of the inspections. The public authority felt that this would be a strong argument in favour of disclosure if there were no independent measures already in place to ensure the quality of inspections. The public authority described the various measures that are in place to ensure that schools inspections are conducted to an appropriate standard and provided to the Commissioner documentation covering these procedures.

22. The public authority went on to give its reasoning for why the public interest favoured the maintenance of the exemption. In brief, these arguments were as follows:
- The public authority argued that its role is to interpret the notes taken during an inspection and form a final report from these; it is able to do this to a high standard based on its professional judgments. Where others outside the public authority view the notes taken during an inspection, they may form a different conclusion which is not based on the same level of professional judgment that the public authority is able to bring to bear. The public authority believed that this would reduce the clarity and authority of its reports.
 - The public authority believed that disclosure of notes in the period between the inspection and the publication of the report would be counter to the public interest as it would delay publication of the report and prejudice the process of feedback between the public authority and school that takes place prior to publication of the report.
 - The public authority referred to the link between the inspection process and improvements in schools and argued that this would be prejudiced through disclosure. It considered that this could result through a straining of the relationship between schools and the public authority and also through distracting a school from the work required in responding to findings of the published report as it would have to cope with complaints from parents and ex staff. Current staff may also be demoralised through disclosure of harsh judgments recorded in notes that would not have been included within the final report.
 - The public authority argued that the inspection process would be harmed through inhibition to the inspectors' note taking resulting from concern that the contents of the notes may be subject to later disclosure.
 - The public authority argued that disclosure would result in removal of the 'private space' in which schools can question the outcome to the inspection. It also believed that teachers would be less likely to give a true representation of their teaching ability during the inspection due to nervousness stemming from prior knowledge of the possibility of disclosure.
 - The public authority believed that public confidence in the school inspection process would be lessened as a result of changes being made to an already effective process.
 - The public authority felt that disclosure would require it to change its processes in such a way that they would work less well, such as through making the note taking procedure more formal leading to delays in

- publication of the final report.
 - Finally, the public authority argued that disclosure would lead to a greater use of resources owing to the increased amount of time devoted to writing notes that would result from prior knowledge of the possibility of disclosure of these notes.
23. The public authority went on to give its arguments as to why it believed that the exemption provided by section 41 is engaged here. It specified firstly that this exemption is considered to apply only to that information included within the withheld information that had been obtained from the school staff, parents and pupils. This information had been obtained through interviews and discussions with school staff, pupils and parents and, specifically for information obtained from teachers, through lesson observations.
24. The public authority went on to give its arguments as to why the information in question would hold the requisite quality of confidence, stating that teachers were observed on the understanding that specific and attributable details of this observation would not be disclosed. Interviews with school staff, parents and pupils would also take place with an expectation of confidence. The public authority stated that the information gathered from these sources would be non trivial and would not otherwise be in the public domain.
25. The Commissioner contacted the complainant on 6 December 2007. The complainant was asked to respond confirming firstly whether he was in receipt of the published report at the time of his information request. Secondly, the complainant was asked to respond confirming whether he considered there to be any controversy or dispute surrounding the inspection or report in this case.
26. The complainant responded to this on 13 December 2007. Firstly, the complainant confirmed that he was in receipt of the final report at the time of his request. Secondly, the complainant confirmed that the conduct of the inspection had been a source of 'disquiet' within the school and that amendments had been made to the draft copy of the inspection report prior to publication. The complainant further indicated that the school was dissatisfied with some aspects of the published report.
26. The Commissioner contacted the public authority again on 3 January 2008 and asked it to respond to the complainant's comments concerning the level of controversy associated with the inspection and report. The public authority responded to this on 9 January 2008, stating that it was not unusual for schools and particularly head teachers to be dissatisfied with the outcome of an inspection and to make a formal complaint about this as a result. The public authority confirmed that a formal complaint had been made in this case about the inspection and the report, but that it had not been upheld. The public authority questioned whether the inspection and report could be fairly characterised as controversial solely on the basis of the dissatisfaction of certain interested parties.

Findings of fact

27. The information falling within the scope of the request consists of forms

completed by hand during the inspection visit to the school in question.

28. The published report is distinct from these forms. Whilst it is based on the findings made during the inspection, none of the detail of the handwritten forms is included within the published, publicly available, report.

Analysis

Exemption

Section 33: audit functions

29. Section 33(1) provides that this exemption can be cited only by those public authorities with functions in relation to-

“(a) the audits of accounts of other public authorities, or

(b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

Section 33(2) provides:

“Information held by a public authority to which this section applies is exempt information if its disclosure would, or would be likely to, prejudice the exercise of any of the authority’s functions in relation to any of the matters referred to in subsection (1).”

30. The first step when considering whether this exemption has been applied correctly is to consider whether the public authority does have functions in relation to either of the processes described above.
31. In its response to the Commissioner, the public authority described inspections as examining the economy, efficiency and effectiveness of the way schools use their resources and included a quote from the published report that commented on both the educational and economic performance of the school. Further detail is included in a document about the framework for school inspections published by the public authority. This states that section 5 of the Education Act 2005, as also referred to above at paragraph 15, requires that inspectors must report on:
- the quality of education provided in the school
 - how far the education meets the needs of the range of pupils at the school
 - the educational standards achieved in the school
 - the quality of leadership and management of the school, including whether the financial resources made available to the school are managed efficiently.
32. This indicates that through the school inspection process the public authority does have functions relating to *“economy, efficiency and effectiveness”* with

which other public authorities use their resources and the Commissioner accepts that the public authority has functions relevant to section 33(1)(b) and can, therefore, cite this exemption. However, only part of the inspection focuses on the use of the financial resources of the school. Without this financial aspect of the inspection, the Commissioner may have concluded that this exemption is not engaged. The withheld information was recorded in the course of a school inspection and the Commissioner further accepts that this information was generated in the course of the public authority carrying out the functions described in section 33(1)(b).

33. In this case the inspection was carried out on the behalf of the public authority by Tribal Education. This company is contracted by the public authority to carry out inspections in south and central England. If it were the case that the information in question was held by Tribal Education, it would be necessary to examine more closely the relationship between Ofsted and this company in order to ascertain whether this information is held on the behalf of the public authority. However, whilst this information was physically generated by inspectors retained by Tribal Education, it is clear that, at the time of the request, this information was held by the public authority.
34. The next step is to consider whether prejudice would be likely to result to the functions described in section 33(1)(b) performed by the public authority. In this case, this means considering whether the school inspection process would or would be likely to be prejudiced through disclosure. When assessing the likelihood of prejudice the Commissioner has firstly considered harm in connection with the inspection of the school in question and also whether prejudice would result more widely to the school inspection process were EFs disclosed regularly.
35. Consideration has been given to how closely the published report of the inspection relates to the contents of the EFs and to what extent the contents of the EFs have largely been disclosed through the publication of this report. The EFs are a means to record the immediate observations of the inspectors and are used as an aid when the report is compiled, but are not a 'rough' version of the final report and include much that is not referenced in the final report. The Commissioner does not consider that the existence of the published report can be taken as an indication that much of the content of the EFs has been previously disclosed or that any prejudice resulting from disclosure of the EFs would be reduced as a result of the existence of the report.
36. The public authority has stated that the inspection process to which the withheld information relates is still 'live' in that recommendations made in the report are still being implemented. It believes that the public authority may react to the negative contents of the EFs by withdrawing its cooperation in this ongoing process. On this issue, the Commissioner notes that the school is aware through the conclusions within the final report that the views of the inspectors were not wholly positive. Aside from this, it appears likely that a school would wish to engage with the improvements identified as necessary in order to work towards a positive outcome to future inspections. The Commissioner does not consider that significant prejudice to the implementation of improvements recommended in the

2005 report is likely to result or have resulted from disclosure, either at this stage or at the time of the initial refusal.

37. Further to this issue, only prejudice resulting to the audit process will be relevant in connection with this exemption. It is not clear whether the implementation of improvements identified in the inspection process could be accurately characterised as part of the audit process. If it is not part of the inspection process, any argument about prejudice caused to the process of implementing improvements would not be relevant to this exemption.
38. Further to this issue is whether the willingness of this school to cooperate fully in future inspections would be likely to be reduced through disclosure. Included within the EFs are frank comments that are critical of the school. Given that the EFs record observations made during an inspection with the purpose of appraising the performance of the school, it is reasonable to expect that these observations would be of both a positive and negative nature. The Commissioner would expect that any person viewing these forms would appreciate this and considers it unlikely that the level of cooperation of a school in an inspection would be altered significantly as a result of disclosure of negative comments. Aside from this, the Commissioner notes that, whilst it would no doubt be easier to inspect a fully cooperative school, this process is based on statute and does not rely on acquiescence.
39. The public authority has argued that the authority of the report would be lessened through the disclosure of those contents of the EFs that were not incorporated into the published report. As noted above at paragraph 35, the report clearly differs from the EFs. The public authority has been clear to the Commissioner that only conclusions based on the EFs that are of an appropriate weight and validity are incorporated into the final report and sees no reason why the public authority could not also explain this in any circumstance where the authority of a final report is questioned following the disclosure of EFs.
40. The public authority has argued that a request resulting in disclosure of EFs in the period between the inspection and the publication of the final report would delay the publication of the final report whilst the content of the EFs were debated. In this case the request followed the publication of the final report and this argument is not, therefore, relevant. In the wider context, the Commissioner accepts the possibility that prejudice to the inspection process could result from disclosure made in the period between inspection and publication. However, it is notable that the period between inspection and publication is short, 15 working days, and that this reduces the likelihood that such prejudice would occur.
41. Included within the document produced by the public authority titled "Guidance on the use of evidence forms" is the following statement:

"Inspection evidence may be subject to disclosure to the public if requested under the Freedom of Information Act. Interviewees cannot expect that evidence recorded on EFs will always remain confidential."

This document is dated July 2005.

42. The central argument of the public authority is that there is a likelihood of participants in an inspection modifying their contributions if they thought that there was a possibility of disclosure. In addition, the public authority has argued that inspectors may be discouraged from commenting fully and frankly within their notes and that the inspection process may be delayed as a result of inspectors taking longer to write notes that they are aware may be disclosed. The public authority has also stated that interviewees may be inhibited in their responses.
43. These arguments are made on the basis that disclosure in this case would be the first indication to participants in the inspection process that EFs may be disclosed through the Act. However, as the above excerpt shows, inspectors are made aware of the possibility of disclosure. This excerpt also suggests that inspectors should make interviewees aware of the possibility of disclosure. The document containing the notification of possible disclosure is dated July 2005. In the period since, the inspection process appears to have continued to function despite the participants in this process having been aware of the potential for disclosure. On the basis of the evidence of this continued functioning of the inspection process, the Commissioner does not accept that prejudice would be likely to result through participants in the inspection process being aware of the possibility of disclosure.
44. Further to the arguments about inhibition to interviewees, it is notable that the EFs do not record the identity of individual interviewees. Although this notice recognises below that there are examples where it may be possible to identify individuals through the contents of some of the EFs, any inhibition that an interviewee feels as a result of the possibility of disclosure should be reduced through the awareness that their comments will not be directly attributable to them. The Commissioner therefore believes that this reduces the likelihood of such prejudice occurring.
45. The public authority has referred to section 151 of the Education and Inspections Act 2006. This provides protection from defamation actions for published school inspection reports. Whilst the public authority acknowledges that this provision does not apply to EFs, it has suggested that this provision shows the intention for reports to be challenging where necessary and that inhibition to inspectors in their note taking resulting through the expectation of possible disclosure may lead to weakened conclusions where a challenging conclusion would be appropriate. In response to this argument, the Commissioner would note again that the evidence of the continued functioning of the inspection process suggests that inspectors have not been inhibited in their note taking in the period since the July 2005 notification of possible disclosure.
46. This exemption will be engaged where the function referred to in subsection 33(1)(b) would be likely to be prejudiced through disclosure. In order for the Commissioner to conclude that prejudice would be likely, the possibility of prejudice must be real and significant. In this case, the Commissioner does not consider that the possibility of prejudice would be real or significant. In coming to this conclusion, the Commissioner has noted the emphasis given within the arguments of the public authority to the results of the creation of an expectation of

future disclosure through disclosure in this case. The expectation of disclosure has, however, been created previously through the existing notification about disclosure given by the public authority. In addition, the Commissioner's decision has been influenced by the timing of the request and specifically the stage that the inspection had reached when it was made. The Commissioner concludes that this exemption is not engaged. It has therefore not been necessary to go on to consider where the balance of the public interest lies.

Section 40: personal information

47. Although the public authority has not at any stage cited section 40, having viewed the contents of the EFs and given the conclusions within this notice about sections 33 and 41, the Commissioner considers it appropriate to consider this exemption. The Commissioner will not proactively seek to consider exemptions in all cases, but in cases where personal data is involved the Commissioner believes he has duty to consider the rights of data subjects. These rights, set out in the Data Protection Act are closely linked to article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information without having considered these rights, even if the public authority has not cited the exemption.
48. Section 1 of the Data Protection Act 1998 provides that:
- “personal data” means data which relate to a living individual who can be identified—
- (a) from those data, or
- (b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,
49. The exemption provided by section 40(2) in conjunction with section 40(3)(a)(i) will be engaged where:
- the information in question constitutes personal data, and
 - the disclosure of this information would contravene any of the data protection principles.
50. The Commissioner has firstly considered whether the contents of the EFs constitute personal data, even though they do not directly identify any individuals. However, if there is sufficient detail within the EFs combined with other information in the public domain, so that identification of individuals would be possible, this information would constitute personal data within the definition of section 1 of the Data Protection Act. The Commissioner has considered whether any of the withheld information could constitute personal data were it combined with information in the public domain.
51. The Commissioner finds that included within the withheld information is personal data relating to the following individuals:
- the headteacher
 - teachers

- non teaching staff
- pupils
- a staff member from another school

52. In relation to the following groups, the Commissioner finds that the exemption provided by section 40(2) in conjunction with section 40(3)(a)(i) is engaged:

- teachers
- pupils

In relation to pupils specific individuals are identified. As the individuals concerned would hold no expectation that their personal data would be recorded within the EFs, neither would they hold any reasonable expectation of disclosure. The Commissioner concludes that the disclosure of the personal data relating to pupils of the school would be unfair and in breach of the first data protection principle.

53. In relation to teachers, this issue is less clear given that the teachers clearly would hold an expectation that information relating to them would be recorded within the EFs. Whilst this information is recorded with the intention that it be anonymised and not possible to link to any individual, the Commissioner considers that it is clear from the content of the EFs relating to lessons that other individuals with knowledge of the school would be able to relate the forms to individual teachers.

54. The conclusion here is based on the expectation of disclosure that would be held by the teachers. Whilst teachers hold an expectation that they will be assessed through inspections carried out by the public authority, their expectation of the outcome of this assessment would be that this would be in the form of the final published report, which relates to the school as a whole and does not make reference to the performance of individual teachers. Teachers would hold no reasonable expectation that information recording their individual performance would be disclosed.

55. A notification of the possibility of the disclosure of EFs via the Act is referred to elsewhere in this notice. However, the Commissioner does not believe that this notification would be sufficient to suggest that teachers would hold a reasonable expectation that information recording their individual performance would be disclosed. In the absence of such an expectation, the Commissioner concludes that the disclosure of this information would be unfair and in breach of the first data protection principle.

56. In relation to the following groups, the conclusion of the Commissioner is two fold:

- non teaching staff
- a staff member from another school

In relation to some of the information that constitutes personal data relating to these individuals, the Commissioner has concluded that this information should

not be disclosed. Those parts of this information that the Commissioner has concluded should be redacted record comments made by the data subjects which go beyond commenting in general on the school and instead refer to specific individuals. The Commissioner concludes that the disclosure of this information would be unfair and in breach of the first data protection principle.

57. In relation to the remainder of the information that constitutes personal data relating to these individuals, the Commissioner concludes that disclosure of this information would not be in breach of the first data protection principle. This information relates to the school as a whole and so the Commissioner considers that the expectation of confidentiality held by the data subjects is less strong than it would be in relation to comments made by the data subjects about other individuals.
58. In order for the processing to be compliant with the first data protection principle it must meet at least one of the conditions listed in schedule 2 of the Data Protection Act. Schedule 2, paragraph 6(1) provides a condition for processing personal data where;

“The processing is necessary for the purposes of the legitimate interests pursued by the data controller or by a third party or parties to whom the data are disclosed, except where the processing is unwarranted in any particular case by reason of prejudice to the rights and freedoms or legitimate interests of the data subject.”

The Commissioner has adopted the approach taken by the Tribunal in the House of Commons v ICO & Leapman, Brooke, Thomas (EA/2007/0060 etc) In this decision the Tribunal set out that the first issue when applying the sixth condition was to establish whether the disclosure was necessary for the legitimate purposes of the recipient (the public) and then go on to consider whether, even if the disclosure was necessary, it would nevertheless cause unwarranted prejudice to the rights & freedoms of the data subject.

59. The information in this case would add to public knowledge and understanding about the performance of the school and about the outcome of this inspection. As the school is publicly funded and accountable, the Commissioner believes that disclosure that increases public knowledge and understanding about the performance of the school is in the public interest. The Commissioner is satisfied that this legitimate public interest cannot be met by means that involve less interference and the disclosure would not have an excessive or disproportionate adverse effect on the legitimate interests of the data subjects. He has reached this finding on basis of the general nature of the information and reasonable expectations of the data subjects. He has concluded that the sixth condition of Schedule 2 of the Data Protection Act 1998 is satisfied. This finding in combination with his finding above about expectations in respect of the remaining information leads the Commissioner to also conclude that this processing would not be unfair. Disclosure of this remaining personal data would, therefore, constitute processing of personal data that is compliant with the first data protection principle and does not engage section 40(2).

60. The Commissioner finds that information falling within the following category is subject to the exemption provided by section 40(1):

- information relating to a specific staff member

Section 40(1) provides an exemption for information that constitutes the personal data of the applicant. At the time of the inspection, the complainant was a member of staff at the school. Personal data of this staff member is, therefore, personal data of the applicant and the exemption provided by section 40(1) is engaged in respect to this information.

Section 41

61. This exemption applies to information *obtained* in confidence, meaning that before any consideration is given to whether the information has the requisite quality of confidence, it should be established that the information in question was provided to the public authority from another source. Where the information was not provided to the public authority from a third party, this exemption will not be engaged regardless of the strength of the arguments that this information does hold the quality of confidence. This process of a third party providing information to a public authority is referred to here as an A to B transfer.
62. As referred to above at paragraph 23, the public authority believes that this exemption applies to information it obtained from school staff, parents and pupils. According to the public authority this information was provided to it through lesson inspections and through interviews.
63. In respect to information that the public authority states was obtained from teachers through the inspection process, the Commissioner considers it clear that this process would not constitute an A to B transfer for the purposes of the Act. Rather than the information in question here having been generated by a third party and subsequently provided to the public authority, this information is a product of the public authority.
64. In respect to the information obtained through interviews, the Commissioner does accept that this interview process constituted an A to B transfer of information. The arguments of the public authority as to why it believed that the information in question was subject to the requisite quality of confidence focussed on the nature of the information, rather than on any specific guarantee of confidence that had been made in relation to this information.
65. Whilst section 41 may apply where there has been no specific guarantee of confidentiality in a case where the nature of the information alone makes it clear that a strong expectation of confidentiality would be associated with that information, in the majority of cases a public authority should consider what specific guarantee of confidentiality has been made when considering whether to cite section 41. In this case, aside from the information for which it has been concluded above that the exemptions provided by sections 40(1) and (2) are engaged, the Commissioner does not believe that it is sufficiently clear solely from the nature of the information in question or the circumstances in which it was

recorded that it would carry with it a strong expectation of confidentiality and concludes, therefore, that this exemption is not engaged for the information not exempt under section 40. In reaching this conclusion he has again taken into account the public authority guidance about the possibility of disclosure of EFs.

The Decision

66. The Commissioner's decision is that the public authority did not deal with the request for information in accordance with the Act in that it applied the exemptions provided by section 33(2) incorrectly to all the information and section 41 incorrectly to some of the information. The Commissioner also finds that the exemptions provided by sections 40(1) and 40(2) are engaged in respect to some of the withheld information.

Steps Required

67. The Commissioner requires the public authority to take the following steps to ensure compliance with the Act:
68. Disclose to the complainant the information falling within the scope of his request that was previously withheld, aside from that information identified to the public authority separately from this notice that should be withheld as it is subject to the exemption provided by section 40(1) or 40(2).

Other matters

69. Although they do not form part of this Decision Notice the Commissioner wishes to highlight the following matters of concern:
70. The public authority stated that it 'reserved the right' to cite section 36 if and where the Commissioner did not agree that the exemptions cited previously had been applied correctly. Whilst the Commissioner will generally allow a public authority to cite an exemption during the case handling process that was not cited at the time of the initial refusal, this should be cited at the first opportunity whilst corresponding with the Commissioner. The Commissioner will not generally offer a public authority a second opportunity to cite further exemptions if he concludes that the exemptions cited previously do not apply. Instead, the Commissioner will issue a Decision Notice on the basis of the exemptions and attendant arguments cited previously by the public authority.
71. The Commissioner has concluded that part of the information constitutes personal data of the complainant and that the exemption provided by section 40(1) is engaged in respect to this information. The complainant is entitled to make a request under section 7 of the Data Protection Act 1998 for his personal

data. The Commissioner expects the public authority to consider disclosing the personal data of complainant directly to him, as would have been required by the authority on receipt of a subject access request.

Failure to comply

72. Failure to comply with the steps described above may result in the Commissioner making written certification of this fact to the High Court (or the Court of Session in Scotland) pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Right of Appeal

73. Either party has the right to appeal against this Decision Notice to the Information Tribunal. Information about the appeals process may be obtained from:

Information Tribunal
Arnhem House Support Centre
PO Box 6987
Leicester
LE1 6ZX

Tel: 0845 600 0877
Fax: 0116 249 4253
Email: informationtribunal@tribunals.gsi.gov.uk.
Website: www.informationtribunal.gov.uk

74. If you wish to appeal against a decision notice, you can obtain information on how to appeal along with the relevant forms from the Information Tribunal website.
75. Any Notice of Appeal should be served on the Tribunal within 28 calendar days of the date on which this Decision Notice is served.

Dated the 24th day of September 2008

Signed

Steve Wood
Assistant Commissioner

Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF

Legal Annex

Section 33

Section 33(1) provides that –

“This section applies to any public authority which has functions in relation to-

- (a) the audit of the accounts of other public authorities, or
- (b) the examination of the economy, efficiency and effectiveness with which other public authorities use their resources in discharging their functions.”

Section 40

Section 40(1) provides that –

“Any information to which a request for information relates is exempt information if it constitutes personal data of which the applicant is the data subject.”

Section 40(2) provides that –

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and
- (b) either the first or the second condition below is satisfied.”

Section 41

Section 41(1) provides 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.”