

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 11 July 2019

Public Authority: Selly Park Girls' School
Address: 5 Selly Park Road
Birmingham
B29 7PH

Decision (including any steps ordered)

1. The complainant has requested from Selly Park Girls' School ('the School') a detailed list of maths topics that students in a particular year group will be taught. Having originally advised the complainant that it did not hold the requested information, the School's revised position is that it holds relevant information but it is exempt from disclosure under section 43(2) of the FOIA (commercial interests), and that the public interest favours withholding this information.
2. The Commissioner's decision is as follows:
 - The information the school holds is exempt information under section 43(2) and the public interest favours maintaining the exemption.
 - At the time of the request the School breached section 1(1)(a) of the FOIA as it holds information falling within the scope of the complainant's request but advised the complainant that it did not.
 - The School breached section 17(1) as it did not issue a valid refusal notice within 20 working days following the date of receipt of the request.
3. The Commissioner requires the School to take the following step to ensure compliance with the legislation:

- If it has not already done so, issue the complainant with a refusal notice that complies with section 17 of the FOIA.
4. The School must take this step within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 1 October 2018, the complainant wrote to the School and requested information in the following terms:

"...I would be in gratitude to you if they could provide ...as well as the Maths syllabus please"
6. On 10 October 2018 they provided further information about the request as follows:

"We require a list of topics that the school intends to cover in maths over the following terms"
7. The School had directed the complainant to its website where information about the maths curriculum it is following is published. The complainant did not consider this information addressed their specific request.
8. As a result of the Commissioner's intervention, the School reconsidered its response and in correspondence to the complainant dated 3 December 2018 it maintained its position that all the information it holds that is relevant to the complainant's request is already published on its website.
9. During the course of the Commissioner's investigation the School confirmed that it does, in fact, hold other information that falls within the scope of the complainant's request but that this information is exempt from release under section 43(2) as disclosing it would be likely to prejudice its commercial interests. On 26 June 2019 the Commissioner instructed the School to communicate its new position to the complainant.

Scope of the case

10. The complainant contacted the Commissioner on 2 November 2018 to complain about the way their request for information had been handled.

She disputed that the School did not hold information falling within the scope of her request.

11. The Commissioner's investigation has first focussed on the School's compliance with section 1(1) of the FOIA. She has gone on to consider whether the School can rely on section 43(2) to refuse to disclose the information it holds and its compliance with section 17(1) (refusal of a request).

Reasons for decision

Section 1 – general right of access to information held by a public authority

12. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (a) to be told if the authority holds the information and, under subsection (b), to have the information communicated to him or her if it is held and is not exempt information.
13. The complainant had advised the School on 23 May 2019 that they had received the requested information – maths syllabus topics, as well as science and English syllabus topics – from '*subject teachers*'. On 6 June 2019 the complainant confirmed to the Commissioner that they disputed that the School does not hold the information they have requested because at a private tuition "*parents meeting*" they had been given that information ie a 'maths syllabus'.
14. The Commissioner next considered the School's submissions to her. With regard to the above information that had been provided to the complainant, the School told the Commissioner that this was a list that more or less reproduced what is published on its website. It explained that it follows the National Curriculum in maths and an outline of the National Curriculum topics in maths that it would be following was (and is) published on its website. The Commissioner has reviewed the website and notes that a broad overview of the maths topics that will be covered across year groups is published there. However, the complainant is seeking a more granular breakdown of those topics.
15. In its initial submission the School confirmed that, in October 2018, it did not hold a more detailed list of the maths topics it would be covering than that published on its website. It said it was not obliged to hold such a list, a more detailed programme of study or a 'maths syllabus'. The School explained that the specifics of what precisely would be covered in maths lessons would be assessed by the teacher of a class at individual student level, as the school terms progress.

16. In subsequent correspondence dated 24 June 2018 the School confirmed to the Commissioner that the maths curriculum information published on its website includes a list of topics that students will cover and when they will cover the topics during their five years at school.
17. However the School went on to say that the curriculum outlines the course content that will be covered by students "*and comprises of specific lesson plans*", and explained why it was reluctant to release this work in response to an FOIA request.
18. The Commissioner queried this statement with the School. The School then explained to her that in addition to the broad maths national curriculum topics published on its website, the School holds a series of lesson plans – prepared by teachers, over time – that go into more specific detail as to how and when the national curriculum topics will be delivered, across each School year group.
19. The School acknowledged that this information falls within the scope of the complainant's request, and that it held this information at the time the request was submitted. As such, the Commissioner has decided that the School breached section 1(1)(a) of the FOIA as, at the time of the request and for the majority of this investigation, its position was that it holds no further information relevant to the complainant's request, when it does.
20. On 26 June 2019 the Commissioner instructed the School to communicate its new position to the complainant.

Section 43 – commercial interests

21. On 26 June 2019 the complainant sent to the Commissioner a copy of the maths topic information that was provided to them by who they have described as a "*former*" teacher. The complainant appears to have been given this information by a third party ie this information was not provided to them by the School. The School's position is that the maths lesson plans it holds are exempt from disclosure under section 43(2) of the FOIA.
22. Section 43(2) of the FOIA says that information is exempt information if its disclosure under the Act would, or would be likely to, prejudice the commercial interests of any person (including the public authority holding it).
23. In order for section 43(2) to be engaged the Commissioner considers that three criteria must be met. First, the actual harm that the public authority alleges would, or would be likely, to occur if the withheld information was disclosed has to relate to the applicable interests within the relevant exemption.

24. Second, the public authority must be able to demonstrate that some causal relationship exists between the potential disclosure of the information being withheld and the prejudice which the exemption is designed to protect. Furthermore, the resultant prejudice that is alleged must be real, actual or of substance.
25. Third, it is necessary to establish whether the level of likelihood of prejudice being relied upon by the public authority is met – eg disclosure 'would be likely' to result in prejudice or disclosure 'would' result in prejudice. In relation to the lower threshold, the Commissioner considers that the chance of prejudice occurring must be more than a hypothetical possibility; rather there must be a real and significant risk. With regard to the higher threshold, in the Commissioner's view this places a stronger evidential burden on the public authority. The anticipated prejudice must be more likely than not.
26. Section 43 is subject to the public interest test.
27. In the 24 June 2019 submission the School told the Commissioner that course content, ie the lesson plans that it holds, is work that sets it apart from other schools and education providers, both public and private. It said that it considers that releasing this information as part of a FOI request opens it up to the possibility of this content being shared for commercial gain. It explained that schools exist in a competitive environment and that its curriculum content is what sets it apart from its competition when attracting potential students to study at the School.
28. In addition the School said that its curriculum and the specific content that it teaches is the bedrock of its function and is one of the major elements that it is held accountable for by its inspection authority: Ofsted. One of the fundamental Ofsted requirements of the School's curriculum is that it is relevant and specific to the students of Selly Park Girls' School. The School argues that if the content/lesson plans are used incorrectly or out of context by a third party this would likely result in damage to students' education.
29. The Commissioner is satisfied the first of the three criteria has been met because the actual harm that the School alleges would, or would be likely, to occur if the withheld information was disclosed relates to the commercial interests within section 43(2).
30. The School's position is that releasing the disputed information would harm its commercial interests as it would potentially advantage other schools and education providers. These third parties would be able to review and possibly use the lesson plans to promote their own institutions, which are in competition with the School for students. As

such the Commissioner considers that the necessary causal link exists and that the alleged prejudice is of substance.

31. As to the matter of likelihood, the School's position is not clear and, in the absence of clarity, the Commissioner will assume that the School's position is that prejudice to its commercial interests would be likely to occur, rather than *would* occur. Nonetheless, the Commissioner considers that it is more than a hypothetical possibility and is a real risk.
32. Since the three criteria above have been met, the Commissioner finds that the exemption at section 43(2) is engaged to the information the complainant has requested. She has gone on to consider the public interest test. Even though the disputed information is exempt information under section 43(2) it may still be released if there is sufficient public interest to justify doing so.

Public interest test

Public interest in releasing the information

33. The School has told the Commissioner that it does not believe there is general public interest in the information being made available. It considers the interest lies purely with someone who wishes to use the material to further their own business interests. It has however also noted the complainant's interest in this information, which is a personal rather than a commercial interest.
34. The Commissioner notes a further public interest argument for disclosure however; namely the general public interest in public authorities demonstrating they are open and transparent.

Public interest in maintaining the exemption

35. The School argues that the public interest favours withholding the information in order to protect students from the risk of the information being used out of context (and therefore potentially harming their education). This is because the material was developed solely for use with the School's students and takes into account the values, ethos, culture and diversity of its particular environment. The School says it is not intended for use outside of that environment and disclosure of the information would mean it has no control over how and where it was used. The School confirmed that it would not make this material available commercially for exactly the same reason ie to protect the wider interests of students locally and elsewhere.

Balance of the public interest

36. In the Commissioner's view the public interest favours maintaining the exemption. Such wider public interest as there may be in the School's maths provision is met by the information published on its website and through Ofsted inspections and published reports. She has not been persuaded that the specific information the complainant has requested is of wider public interest.
37. The Commissioner has noted the School's argument that disclosure is necessary to protect students' education. Section 43(2) concerns commercial interests, however, and the public interest arguments associated with those interests will therefore carry more weight. In this case, the Commissioner considers that the ability of the School to operate effectively within a competitive environment by not disclosing information that competitors could use to the School's commercial disadvantage outweighs any public interest arguments for the information's disclosure.

Section 17 – refusal of a request

38. Under section 17(1) of the FOIA a public authority that is relying on a Part II exemption - such as section 43(2) - to withhold requested information must give the applicant a valid refusal notice within 20 working days following the date of receipt of the request.
39. The complainant submitted their request on 1 October 2018 and, at 26 June 2019, had not received a refusal notice. The School has therefore breached section 17(1) in that regard.

Right of appeal

40. 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

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

41. 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.
42. 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

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