

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 January 2022

**Public Authority:** The Governing Body of  
Overton Grange School

**Address:** 36 Stanley Road  
Sutton  
SM2 6TQ

#### **Decision (including any steps ordered)**

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1. The complainant has requested information associated with an incident during an assessment, including the qualifications of an invigilator and a mark scheme. Overton Grange School ('the School') withheld some of the information the complainant requested under section 36(2)(c) of the FOIA (prejudice to effective conduct of public affairs) and withheld some under section 40(2) (personal data).
2. The Commissioner's decision is as follows:
  - The School is entitled to withhold the information requested in part 3 of the request under section 36(2)(c) of the FOIA and the public interest favours withholding the information.
  - The School is entitled to withhold information within scope of part 1 of the request under section 40(2) of the FOIA because it is the personal data of a third person and disclosing it would be unlawful.
  - The School's refusal of the request was inadequate and did not comply with the requirements of section 17(1) or section 17(3) of the FOIA.
3. The Commissioner does not require the School to take any remedial steps.

## Request and response

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4. As part of wider correspondence to the School dated 20 May 2021, the complainant requested information in the following terms:

"...[1] Please provide me with written evidence that [redacted] is a trained 'invigilator' to JCQ requirements, as set out in the guidance...

...[2] It is also examination malpractice to disrupt an examination in this way. Please advise how you have reported this disruption to the awarding body?...

...[3] Please provide me with a copy of all the mark schemes that school is to use for all GCSE subjects for determining grades/levels for 2021..."

5. The School responded on 17 June 2021. It addressed the concerns raised in the complainant's letter, including advising that the invigilator concerned was appropriately trained. With regard to part [3] of the request the School advised that it was refusing this part under section 36 of the FOIA. It did not provide any associated public interest arguments. Neither did the School advise the complainant that they could request an internal review if they were not satisfied with the response; instead it advised the complainant to contact the Commissioner.
6. In response to further correspondence from the complainant, the School wrote to them on 8 July 2021. It addressed concerns the complainant had raised but did not address the matter of its FOIA response to their request of 20 May 2021. The Commissioner does not consider that this correspondence can be categorised as an internal review.

## Scope of the case

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7. The complainant contacted the Commissioner on 24 June 2021 to complain about the way their request for information had been handled.
8. Having consulted the complainant, the Commissioner's investigation has focussed on the School's response to parts 1 and 3 of the request.
9. The Commissioner instructed the School to confirm its final position with regard to those two parts. In its submission to the Commissioner, the School confirmed that it is relying on section 36(2)(c) of the FOIA to withhold information within scope of part 3 of the request, and on section 40(2) to withhold the information requested in part 1.

10. The Commissioner's investigation has therefore focussed on the School's reliance on section 36(2)(c) and 40(2) to withhold the information requested in the above two parts of the request.
11. He has also considered whether the School's handling of procedural aspects of the request complied with section 17 of the FOIA. Finally, the Commissioner has discussed the matter of the internal review under 'Other Matters'.

## **Reasons for decision**

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### **Section 36 – prejudice to effective conduct of public affairs**

12. Section 36 of the FOIA is an exemption that differs from all other prejudice exemptions in that, in most cases, the judgement about prejudice must be made by the legally authorised, qualified person for that public authority.
13. Other than for information held by Parliament, section 36 is a qualified exemption. This means that even if the qualified person considers that disclosure would cause harm, or would be likely to cause harm, the public interest must still be considered.
14. Section 36(2)(c) says that information held by a public authority is exempt information if, in the reasonable opinion of a qualified person, disclosing the information would otherwise prejudice, or would be likely otherwise to prejudice, the effective conduct of public affairs.
15. The information to which the School has applied section 36(2)(c) to is the GCSE mark schemes that the complainant requested in part 3 of their request. Broadly, exam boards produce mark schemes to show how marks are allocated for each question in an examination.
16. To determine, first, whether the School correctly applied the exemption under section 36(2)(c), the Commissioner must consider the qualified person's opinion as well as the reasoning that informed the opinion. Therefore, in order to establish that the exemption has been applied correctly the Commissioner must:
  - ascertain who was the qualified person or persons
  - establish that an opinion was given by the qualified person
  - ascertain when the opinion was given; and
  - consider whether the opinion was reasonable.
17. In this case, the qualified person (QP) was Keith Stride, the School's Headteacher. The Commissioner is satisfied that, under sub-section 36(5)(o) of the FOIA, the Headteacher is an appropriate QP.

18. Keith Stride provided and signed the response to the request of 17 June 2021 in which he advised the complainant that the School was withholding some information under section 36 having sought advice from the awarding bodies. As such, the Commissioner is satisfied that the QP provided an opinion and provided it at an appropriate time.
19. The Commissioner has gone on to consider whether that opinion is reasonable. It is important to note that this is not determined by whether the Commissioner agrees with the opinion provided but whether the opinion is in accordance with reason. In other words, is it an opinion that a reasonable person could hold? This only requires that it is a reasonable opinion, and not necessarily the most reasonable opinion. The test of reasonableness is not meant to be a high hurdle and if the Commissioner accepts that the opinion is one that a reasonable person could hold, he must find that the exemption is engaged.
20. The level of likeliness of the envisioned prejudice occurring is not clear from the QP's opinion/response to the request.
21. In order for the QP's opinion to be reasonable, it must be clear as to precisely how the prejudice or inhibition may arise. In his published guidance on section 36 the Commissioner notes that it is in public authority's interests to provide him with all the evidence and argument that led to the opinion, in order to show that it was reasonable. If this is not done, then there is a greater risk that the Commissioner may find that the opinion is not reasonable.
22. In his response to the request, the QP simply advised that the School was relying on "S.36" which concerns prejudice to the effective conduct of public affairs, and which had been applied following the advice of "the awarding bodies". The School said the awarding bodies had advised that: the mark schemes might need to be used again in the future; that some of the mark schemes were protected and would not be in the public domain for at least six months; and that the complainant could access the unprotected awarding body mark schemes from their individual websites.
23. As framed in the response, the Commissioner considers that this opinion is lacking. It does not describe *the nature of* the envisioned prejudice that disclosing the mark schemes would be likely to cause, or *how* this prejudice would be likely to occur.
24. In its submission to the Commissioner, the School has said that it considers the decision to rely on section 36 was a reasonable one because it was based on both generic requirements that mark schemes were not to be shared before and during the exam period, and because of specific advice the School had sought [from the awarding bodies].

25. The School has directed the Commissioner to specific guidance issued by an awarding body which requires a declaration that the Head of Centre and their staff have noted Ofqual guidance on making objective judgements [on grades awarded], judgements that have not been influenced by pressure from students or parents/carers and that they are confident that the judgements are fair.
26. The School has gone on to explain that, in its view, releasing details of the marking schemes "would" have led to pressure from the complainant [and, in the Commissioner's view, other parents and caregivers, potentially] to award preferred grades. The awarding body was clear that there was a process where, once grades had been awarded, appeals could be made if students or parents felt that the grades were incorrect or if there was an issue with the Teacher Assessed Grades process, which would have included the invigilating procedure. The School notes that it had informed the complainant of the process for making appeals against grades as part of the exams appeals process and that the complainant had not instigated that process.
27. In addition, the School has noted that, in a discussion of malpractice, the awarding body's guidance also advises that malpractice would include deliberate disclosure of mark schemes.
28. The QP is the School's Headteacher who appeared to be fully cognisant with the circumstances of the complainant's wider concerns. The QP had also had sight of the request, had a sound understanding of the information to which section 36 was being applied and responded to the request directly, himself. The School has also confirmed to the Commissioner, if not the complainant, what it considers the envisioned prejudice to be if the mark schemes were to be disclosed – that disclosure "would" lead to staff being pressured by parents or others to award particular grades. In the Commissioner's view, disclosure before or during an exam period, as in this case, would also be likely to strain the relationship between the School and the awarding bodies.
29. On the matter of the likelihood of the above prejudice occurring, the School's submission indicates that it considers the prejudice 'would' occur. However, the Commissioner does not consider that the School has made a compelling case that the prejudice would – definitely – occur. A parent may pressure the School or staff to award a particular grade, but the School or staff member would not necessarily acquiesce to that demand. The Commissioner considers it more reasonable that the prejudice the School envisions through disclosure would be likely to occur. 'Would be likely' imposes a less strong evidential burden than the higher threshold of 'would occur'.
30. Having considered the circumstances, the Commissioner is satisfied that the QP had sufficient appropriate information about the request and the

section 36(2)(c) exemption in order to form an opinion on the matter of whether reliance on section 36(2)(c) with regard to the information in question was appropriate.

31. The Commissioner has noted the evidence at paragraph 24 to 29 and, since he is satisfied that the remaining points at paragraph 16 have also been addressed, he must accept that the QP's opinion about disclosing the information is one a reasonable person might hold. He therefore finds that the School can rely on section 36(2)(c) to withhold the information to which it has applied this exemption.
32. The Commissioner has gone on to consider the public interest test associated with the exemption. As noted, the School did not discuss the public interest in its correspondence to the complainant; that matter is discussed under the section 17 analysis.

### **Public interest test**

#### *Public interest in disclosing the information*

33. The School has not put forward any public interest arguments for disclosure in its submission to the Commissioner. There is always, however, a public interest in a public authority being open and transparent about the decisions it makes.

#### *Public interest in maintaining the exemption*

34. In its submission to the Commissioner, the School has reiterated that disclosing mark schemes could lead to pressure on teachers to award grades that they may not have otherwise done. The School argues that this would not deliver the effective public service of providing independently marked and consistent and accurate grades for students; affecting not only the particular student in this case but all other students whose grade ranking would be compromised. This in turn would have an effect on university entrants' selection and employers' ability to rely on awarded grades.
35. The School has referred to the Commissioner's decisions in previous cases that concerned similar information: FS50451690<sup>1</sup> and

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<sup>1</sup> [https://ico.org.uk/media/action-weve-taken/decision-notice/2012/770478/fs\\_50451690.pdf](https://ico.org.uk/media/action-weve-taken/decision-notice/2012/770478/fs_50451690.pdf)

FS50699511<sup>2</sup>. In both these cases the Commissioner decided that the university and government department concerned were entitled to rely on section 36(2)(c) with the balance of the public interest favouring withholding the information.

*Balance of the public interest*

36. The Commissioner considers there is considerable public interest in examinations being awarded impartially, fairly and robustly. He appreciates that the disputed information is of interest to the complainant, but he does not consider it is of sufficient wider public interest such that it outweighs the interest in maintaining the exemption.
37. The complainant is not satisfied with the way the School carried out a particular assessment and the grade their child was subsequently awarded. As the School has noted, there is a process in place through which parents or others can appeal against a grade. The Commissioner is satisfied that the public interest in the School being open and transparent is met though that process and its internal complaints process. In line with his decision in previous cases, the Commissioner finds the public interest in this case favours maintaining the section 36(2)(c) exemption.

**Section 40 personal information**

38. Section 40(2) of the FOIA 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 section 40(3A)(3B) or 40(4A) is satisfied.
39. In this case the relevant condition is contained in section 40(3A)(a)<sup>3</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 UK General Data Protection Regulation ('UK GDPR').
40. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection

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<sup>2</sup> <https://ico.org.uk/media/action-weve-taken/decision-notices/2017/2172940/fs50699511.pdf>

<sup>3</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

Act 2018 ('DPA'). If it is not personal data, then section 40 of the FOIA cannot apply.

41. Second, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

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

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

43. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
44. 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.
45. 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.
46. In this case, the information being withheld is that requested in part 1 of the request; written evidence of the suitability of a named individual to invigilate a particular assessment. The School has interpreted "written evidence" as that individual's qualifications and the Commissioner considers that is a reasonable interpretation.
47. In the circumstances of this case and because the individual concerned is referenced in the request, the Commissioner is satisfied that the information both relates to and identifies the individual. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
48. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
49. The most relevant DP principle in this case is principle (a).

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

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



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

51. In the case of an FOIA 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.
52. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

53. Article 6(1) of the UK 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.

54. 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>4</sup>.*

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

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<sup>4</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, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA and by Schedule 3, Part 2, paragraph 20 the Data Protection, Privacy and Electronic Communications (Amendments etc) (EU Exit) Regulations 2019) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".*

- 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.
56. 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*

57. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
58. In this case, the complainant has concerns about a specific incident that took place during an assessment, and the School's response to that incident. Part of their concern is whether the person named in their request was appropriately trained as an invigilator. The Commissioner considers that is a legitimate interest for the complainant to have.

*Is disclosure necessary?*

59. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
60. The School has assured the complainant that the individual named in their request was appropriately trained as an invigilator. However, disclosing that individual's relevant training and qualifications would be necessary to evidence the School's assurance.

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

61. It is necessary to balance the legitimate interests in disclosure against the data subject's 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 FOIA 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.
62. 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.
63. In the Commissioner's view, a key issue is whether the individual concerned has 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.
64. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
65. Information disclosed under the FOIA is, in effect, disclosed to the world at large. Although the information in question relates to the invigilator in their professional role, the Commissioner does not consider that they would reasonably expect details of their qualifications and training to be placed in the public domain as the result of a FOI request. The School has confirmed that the individual has not consented to this information's release. The Commissioner therefore considers that disclosure would be likely to cause that individual a degree of distress.
66. The complainant's legitimate interest in the disputed information – and the specific incident that is their wider concern – has been met, in the Commissioner's view, through the assurance the School gave to the complainant and its detailed correspondence to the complainant in which their concern is discussed more widely. In its correspondence to the complainant of 8 July 2021 the School pointed out that their complaint could be progressed through its complaints procedure and that there is also a national appeals process in place regarding grades that were

awarded. These would seem to be appropriate ways forward for the complainant to consider.

67. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subject's fundamental rights and freedoms – that is, those of the invigilator. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
68. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.
69. The Commissioner has therefore decided that the School was entitled to withhold the information it holds that is relevant to part 1 of the request under section 40(2) of the FOIA, by way of section 40(3A)(a).

### **Section 17 – refusal of request**

70. Section 17(1) of the FOIA requires a public authority to inform a complainant of any exemptions it wishes to apply either to withhold information, or to neither confirm nor deny holding information. This should include the section, subsection and wording of the exemption concerned.
71. In its response to the request of 17 June 2021 the School referred simply to "S.36". There are a number of exemptions under section 36 and the School failed to confirm exactly which of these it was relying on – section 36(2)(c) - the wording of that specific exemption, or the prejudice it envisioned would occur through disclosure.
72. Section 17(3) of the FOIA obliges a public authority to include, where it is applicable, a breakdown of the public interest factors which were taken into account and the reasoning behind the authority's conclusion that the public interest lay in maintaining the exemption.
73. As noted, section 36 is a qualified exemption which means even if the exemption is engaged, the public interest test must be considered. The School's response to the request does not refer to any public interest arguments, either for disclosure or for maintaining the section 36(2)(c) exemption.
74. In view of these omissions, the Commissioner finds that the School's response to the request did not meet the requirements of section 17(1) or section 17(3) of the FOIA.

## Other matters

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75. Public authorities should have in place a procedure to handle any disputes or complaints arising from the outcome or handling of a request for information. This procedure is known as an internal review and demonstrates a commitment to openness and transparency.
76. As noted, the School's response to the request did not invite the complainant to request an internal review if they were not satisfied with the response. The response directed the complainant straight to the Commissioner if they were dissatisfied.
77. While provision of an internal review is not a formal requirement of the FOIA, it is a matter of good practice. The Commissioner therefore expects public authorities to have an internal review procedure in place and, in their response to a request, to advise the applicant to request a review if they are not satisfied with that response. The Freedom of Information Code of Practice <sup>5</sup>discusses internal reviews in part 5.

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[https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment\\_data/file/744071/CoP\\_FOI\\_Code\\_of\\_Practice\\_-\\_Minor\\_Amendments\\_20180926\\_.pdf](https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/744071/CoP_FOI_Code_of_Practice_-_Minor_Amendments_20180926_.pdf)

## **Right of appeal**

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

79. 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.

80. 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**

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