

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 February 2012

Public Authority: Bamford Academy Trust
Address: Belgium Street
Rochdale
Lancashire
OL11 5PS

Decision (including any steps ordered)

1. The complainant has requested all the staffing policies that were in operation at the Academy on a set date. The Academy Trust originally issued no response. After the Commissioner's intervention, it issued a Fees Notice that did not comply with the FOIA, despite the Commissioner informing it what should be included in such a notice.
2. The Commissioner finds that the Academy Trust has failed to comply with FOIA. He finds it failed to respond in time and breached section 10(1) of the FOIA. He also finds that its Fees Notice does not comply with section 9(3) and thus cannot be relied upon. He further finds that it breached sections 16(1) and 11(3) in its handling of the request.
3. He requires the following remedial steps to be taken to ensure compliance with FOIA. The Academy Trust should take one of the following steps:
 1. It should confirm or deny for each policy specified in the request whether it holds recorded information of that description and if so, disclose it in full to the complainant. It should then consider which other policies it has, confirm the titles to the complainant and disclose them too; or
 2. It should confirm or deny for each policy specified in the request whether it holds relevant recorded information of that description. It should also consider which other policies it has and confirm the titles of them. It must then issue a fees notice that complies with FOIA. This fees notice must specify the number of pages contained in each of the policies, charge a maximum of 5 pence per page for photocopying and only

charge cost price for postage. It **cannot** charge for anything else, or purport to do so.

4. He has provided more detail about these steps in paragraphs 76 to 84 of this decision notice and the Academy Trust must take one of these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of FOIA and may be dealt with as a contempt of court.

Request and response

5. On 3 October 2011 the complainant requested the following information from the Academy Trust:

"Copies of all the Academy Trust's staffing policies, procedures and guidance."

It is anticipated these will include but not to the exclusion of others:

Those containing minimum legal requirements:

1. *A specimen employment contract*
2. *Discipline/dismissal and grievance*
3. *Maternity/paternity/adoption*
4. *Working time and time off*
5. *Equality and diversity*
6. *Health and safety*
7. *Whistleblowing/protected disclosures*
8. *Redundancy*
9. *Smoking, drugs and alcohol*
10. *Pay*
11. *Bullying and harassment*

Those not containing minimum legal requirements:

12. *Rewards, benefits and expenses*
13. *Trade Union Recognition*
14. *Measures to improve performance or manage*
15. *change*
16. *Bribery*
17. *Use of company facilities, eg email, internet and*
18. *phone use*
19. *Training and development*

- 20. *Right of search*
- 21. *Working for another employer*
- 22. *Patents and copyrights*
- 23. *Confidential Information*
- 24. *Use of CCTV*

These may be contained within a staffing handbook or offered separately.

Where no policy exists we would ask for confirmation of such. This is a formal request made under the Freedom of Information Act 2000.

Section 10 of the same requires that a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.

Under further provision of Section 11 a preference is expressed that this request is satisfied through electronic communication to the address provided. Where this is not possible an explanation is required.'

- 6. The Academy Trust's representative acknowledged its receipt on 4 October 2011. It asked the complainant 'what interest do you have in making the application'. It explained that it did not consider that it was covered by FOIA in any event, and advised the complainant to make the request to the local authority that used to run it.
- 7. The complainant responded to explain that the Academy Trust was indeed covered by FOIA and why. She asked for the information to now be provided.
- 8. On 10 October 2011 the Academy Trust's representative explained that it still wanted to know 'details of interest in making the application i.e. what interest does your application serve' and explained that without this confirmation it may determine the request as being vexatious.
- 9. The complainant responded to confirm that FOIA was applicant blind and asked for the request to be appropriately processed.
- 10. On 17 October 2011 the Academy Trust's representative again explained that the Academy Trust may consider the request vexatious and asked again for information about the complainant's motivation.
- 11. After not receiving an appropriate response, the complainant referred the case to the Commissioner on 10 November 2011.

12. The Commissioner explained to the Academy Trust that a response must be issued. As a result of the Commissioner's intervention, the Academy Trust wrote to the complainant on 22 November 2011. It asked for the complainant to specify the policies that she wanted and asked her to provide a postal address because it could not send them electronically.
13. The Commissioner discussed this case with the Academy Trust on 1 December 2011. It explained that the policies were the same as it used when it was a local authority school because it was not allowed to change its policies since changing into an Academy for at least 90 days. This was a consequence of its staff being transferred to the new Academy through the Transfer of Undertakings (Protection of Employment) Regulations (TUPE). It agreed with the Commissioner to confirm the same with the complainant and did so on the same day.
14. Despite being informed of the above, the complainant confirmed that she still wanted all the policies that she had requested and provided a postal address to the Academy Trust through the Commissioner.
15. On 6 December 2011 the Commissioner explained to the Academy Trust what was required to issue an appropriate response to the request dated 3 October 2011.
16. On the same day, the Academy Trust explained that it was worried about the time that it would take and asked whether it could charge for any of that time.
17. The Commissioner responded on the same day to explain that the Academy Trust could issue a Fees Notice under section 9, but that the costs regulations only allowed it to charge for photocopying and for postage. He advised the Academy Trust that he may have to substantively consider the reasonableness of the charges should it choose to issue a fees notice.
18. The Academy Trust asked the Commissioner to reconsider his position and the Commissioner told the Academy Trust that his position was set out in statute and could not be varied.
19. On 23 December 2011 the Academy Trust then purported to issue a new response to the complainant. It confirmed that it held some policies, but not whether the ones it confirmed it held were a complete list. It purported to charge:
 - 5p a page photocopying;
 - Postage on a disbursements basis; **and**
 - £20 for two hours' administration time.

20. On the same day, the Commissioner wrote to the Academy Trust to explain that it hadn't fully processed the request and was trying to charge for activities that were not allowed to be charged for. He asked the Academy Trust to rectify its position by 9 January 2012 at the latest.
21. He received a partial response on the same day, explaining that the extra charges were made with the consent of its Board and that it now considered the request was too vague to answer.
22. The Commissioner did not receive a further substantive response by 9 January 2012 and decided that it was appropriate to consider the Academy Trust's substantive compliance with the legislation without further delay.

Scope of the case

23. The complainant contacted the Commissioner to complain about the way his request for information had been handled. In particular, she complained about the Academy Trust's failure to respond to her request and the way it handled it.
24. The Commissioner considers it is necessary to make a formal decision about the following points:
 - is the Academy Trust a public authority for the kind of information that has been requested;
 - is the request a valid request for relevant recorded information or is it too vague as the Academy Trust has claimed;
 - whether the Academy Trust's requests for further information from the complainant were appropriate or a breach of section 16(1);
 - does the purported Fees Notice comply with the requirements set out in section 9 of the FOIA;
 - is the complainant's request for the format to be electronic copies reasonably practicable in this case;
 - the Academy Trust's procedural compliance with FOIA.; and
 - what is required by the remedial steps in this case in order to rectify the breaches of the FOIA.

Reasons for decision

The Commissioner's view about when an Academy Trust holds information under FOIA

25. It is noted that the Academy Trust originally argued that it wasn't covered by the FOIA. The Commissioner has used this formal notice to explain when the Academy Trust is covered. This should enable it to ensure compliance in the future.
26. Section 1(1) of the FOIA states that:
- “Any person making a request for information to a **public authority** is entitled –*
- i. to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- ii. if that is the case, to have that information communicated to him.*
27. The issue in dispute in this case was whether the Academy Trust was a public authority in relation to the information that was requested on 3 October 2011.
28. The FOIA is prescriptive about what constitutes a public authority. Schools converting to academy status on or after 1 September 2010 were covered with immediate effect. Academies existing prior to 1 September 2010 were added to FOIA on 1 January 2011 (through the Academies Act 2010, Schedule 2 paragraph 10), however, the legislation explained that they were only covered for recorded information that was held by them *‘for the purposes of the proprietor’s functions under Academy arrangements’*. This means that the Academy Trust only has an obligation to comply with Part I to V of FOIA where information is held for the set purposes.
29. The Commissioner considers that he can issue a decision notice to establish whether or not a public authority holds information for set purposes. This follows the House of Lords’ decision in *Sugar v BBC* [2009] UKHL 9 which confirmed that in a similar situation the Commissioner did have the jurisdiction to issue a decision notice. The Commissioner considers that the Academies Act 2010 was passed on the understanding that the Commissioner would have the same power.
30. The Commissioner will now explain his view of the circumstances when he considers that an Academy Trust holds information for the purposes

of FOIA. In doing so he is setting out his view of what the clause '*for the purposes of the proprietor's functions under Academy arrangements*' means. 'Proprietor' has the same meaning as in section 579(1) of the Education Act 1996.

31. The Commissioner's view is determined by a number of sections of the Academies Act 2010. The first is section 1(2) that defines the term 'Academy arrangements':

"Academy arrangements" are arrangements that take the form of—

(a) an Academy agreement, or

(b) arrangements for Academy financial assistance."

32. An Academy agreement is an agreement between the Secretary of State (SoS) and the Academy proprietors whereby the proprietors give the undertakings set out at section 1(5) in return for the SoS agreeing to provide financial assistance. The relevant undertakings that are set out in 1(5) are:

i. to establish and maintain an independent school in England which –

1. has characteristics that include those in subsection (6); and

ii. to carry on, or provide for the carrying on of, the school.

33. For completeness subsection 1(6) sets out those characteristics:

(a) the school has a curriculum satisfying the requirements of section 78 of EA 2002 (balanced and broadly based curriculum);

(b) if the school provides secondary education, its curriculum for the secondary education has an emphasis on a particular subject or particular subject areas specified in the arrangements;

(c) the school provides education for pupils of different abilities; and

(d) the school provides education for pupils who are wholly or mainly drawn from the area in which the school is situated.'

34. The Commissioner considers that whether the information held is caught by FOIA will be a matter of fact and it is likely to be necessary to consider the nature of the request, the nature of the withheld information and, of course, the purpose and or reason for which the information is being held when making such a determination.
35. The Commissioner's position is that it is likely the majority, if not all, of the information previously held by a school and covered by FOIA will be held by the Academy for the purposes of the proprietor's functions, that is, the establishing and maintaining of a school or the carrying on or providing for the carrying on of a school and therefore subject to FOIA. He considers that the information is held for the purposes of the proprietor's functions unless the Academy Trust can demonstrate otherwise.
36. In this case, the information requested was the key information that was used by the Academy when considering the performance and conduct of its staff. This information was essential when the Academy was set up, the Academy has confirmed that it cannot change this information for 90 days from becoming an Academy and thus the information must have been used on 3 October 2011 in the carrying on of the Academy.
37. The Commissioner therefore determines the information requested fell within the scope of FOIA and therefore the Academy Trust as a public authority had a duty to consider it under FOIA.

Is the request dated 3 October 2011 a valid request for information for the purposes of FOIA?

38. The Academy Trust raised further grounds that the request was too vague to be answered and that it needed further clarification from the complainant before it could do anything further.
39. The Commissioner considers that the request dated 3 October 2011 is both clear and a valid request for information under FOIA.
40. Section 8 of FOIA explains what is required for a request to be valid. It must contain:
 1. The name of a requestor;
 2. The address – an email address is adequate [section 8(2)]; and
 3. A 'description of the information requested'.
41. In relation to the first condition, the Academy Trust has implied to the Commissioner that it considers that the complainant may not be who

she said she is. The Commissioner considers that all the evidence he has points to the request being made by the complainant who is a genuine person. He does not consider that the Academy Trust has offered any evidence beyond speculation that this is not so. He reminds the Academy Trust that the move to Academy status has attracted controversy and therefore it ought to expect requests from those who are interested about what happens once Academy status is granted.

42. In relation to the second condition, the complainant provided the Academy Trust with an email address which is sufficient. After being advised that the information couldn't be emailed, the complainant also provided the Academy Trust with a postal address. Furthermore, the complainant provided the Commissioner with their postal address when making a complaint.

43. The third condition appears to be most contentious. To reiterate, the request asked for:

"Copies of all the Academy Trust's staffing policies, procedures and guidance."

44. The Academy Trust appeared to suggest that the request did not constitute a description of the information, because it did not specify directly what policies were required and was too vague.

45. Following **FS50298572**, the Commissioner considers that the purpose of section 8(1)(c) is to provide sufficient detail to allow the public authority to identify relevant recorded information that the complainant is interested in. In this case the complainant is interested in all 'policies, procedures and protocols' about the Academy Trust's staffing.

46. The Commissioner considers this constitutes a clear description about what has been requested. He is satisfied that in cases such as this one it is reasonable for the complainant to request all policies in an area of interest, because an individual outside the Academy will not know what policies are on offer. It follows that in the Commissioner's view the request is a valid request for recorded information and should be considered under FOIA.

47. The Commissioner understands that the Academy Trust considers that the request is onerous and this appears to be its main concern in this case. He notes that Section 1(3) does allow the public authority to require further information from an applicant where it cannot identify and locate the information. In accordance with good request handling, it would have been able to have provided a list of all the policies, procedures and protocols and asked the complainant what she wanted

from the list. However, it cannot use section 1(3) without providing the complainant with a sufficient description of the information that it holds.

Were the requests for further information about the complainant's motivations appropriate?

48. FOIA is a public disclosure regime which means that information disclosed under its provisions must be made available to the public at large.
49. Aside from limited circumstances (such as information being first party personal data and/or whether the complainant already had the information), FOIA is applicant blind. In essence, the request acts as a catalyst to enable disclosure to be made to the public.
50. There has been a Code of Practice issued about how to provide advice and assistance in handling requests for information. This was issued under section 45 of FOIA and paragraph 9 is most relevant and states:

'Authorities should be aware that the aim of providing assistance is to clarify the nature of the information sought, not to determine the aims or motivation of the applicant. Care should be taken not to give the applicant the impression that he or she is obliged to disclose the nature of his or her interest as a precondition to exercising the rights of access, or that he or she will be treated differently if he or she does (or does not). Public authorities should be prepared to explain to the applicant why they are asking for more information. It is important that the applicant is contacted as soon as possible, preferably by telephone, fax or e-mail, where more information is needed to clarify what is sought.'

51. In its original handling of the request, the Academy Trust was doing the exact opposite of what the Code of Practice says in this case and was not therefore acting in an appropriate manner. The Commissioner notes that this is not an isolated incident as he has raised concerns about this matter in decision notice **FS50424099** that was answered at a similar time.
52. Section 16(1) of FOIA specifically requires the Academy Trust to offer reasonable advice and assistance when it receives requests. Section 16(2) states that a public authority is to be taken to have complied with its section 16 duty in any particular case if it has conformed with the provisions in the Section 45 Code of Practice in relation to the provision of advice and assistance.

53. As noted above, the Academy Trust failed to conform with the Section 45 Code of Practice and the Commissioner considers that this constitutes a breach of section 16(1).
54. The approach the Commissioner has outlined in paragraph 47 would have been the appropriate advice and assistance that could have been provided by the Academy Trust at the time of request. The Commissioner considers that the Academy Trust has not showed the inclination to provide appropriate advice and assistance in this case and he has therefore ordered the Academy Trust to comply with the request in full.

Was the Fees Notice valid?

55. The Academy Trust sought the Commissioner's advice when considering whether to issue a Fees Notice and received that advice on 6 December 2011. He explained the way the provision worked in summary and provided a link to his guidance below:

http://www.ico.gov.uk/for_organisations/guidance_index/freedom_of_information_and_environmental_information.aspx&sa=U&ei=Ff7dTSL2FsmksgapwsDxCA&ved=0CBgQFjAD&usg=AFQjCNFg7IWJjEb9qJzhfKD9iXuxfPlwow

56. The Academy Trust then issued a Fees Notice to the complainant on 23 December 2011. It did not correspond with the Commissioner's advice.
57. The Commissioner explained to the Academy Trust that the Fees Notice was incorrect and told it either to provide the disputed information to the complainant or issue an appropriate Fees Notice. The Academy Trust did neither of those things.
58. The Commissioner considers that the Fees Notice that was issued was not valid because it did not comply with the provisions of FOIA that allow Fees Notices – section 9.
59. The material parts of section 9 of FOIA provide:

'(1) A public authority to whom a request for information is made may, within the period for complying with section 1(1), give the applicant a notice in writing (in this Act referred to as a 'fees notice') stating that a fee of an amount specified in the notice is to be charged by the authority for complying with section 1(1)

...

(3) Subject to subsection (5), any fee under this section must be determined by the public authority in accordance with regulations made by the Secretary of State

...

(5) Subsection (3) does not apply where provision is made by or under any enactment as to the fee that may be prescribed by the regulations.'

60. The first point to note is that the Academy Trust failed to issue its Fees Notice in 20 working days and thus already had breached section 9(1). The Commissioner's view is that it remains possible to issue a valid Fees Notice outside the time limit, providing the substantial requirements are satisfied by the public authority. He considers this is so because FOIA must be read to maintain the balance between accountability and practicability.
61. However, in this case the Academy Trust's purported Fees Notice failed to comply with the requirements specified in section 9(3).
62. Section 9(3) refers to regulations made by the Secretary of State. The Regulations that were enacted were *The Freedom of Information and Data Protection (Appropriate Limit and Fees) Regulations 2004* (the "Regulations"). The relevant Regulation that discusses what can and cannot be charged for is Regulation 6 which states:

'Maximum fee for complying with section 1(1) of the 2000 Act

6.—(1) Any fee to be charged under section 9 of the 2000 Act by a public authority to whom a request for information is made is not to exceed the maximum determined by the public authority in accordance with this regulation.

(2) Subject to paragraph (4), the maximum fee is a sum equivalent to the total costs the public authority reasonably expects to incur in relation to the request in—

(a) informing the person making the request whether it holds the information, and

(b) communicating the information to the person making the request.

(3) Costs which may be taken into account by a public authority for the purposes of this regulation include, but are not limited to, the costs of—

(a) complying with any obligation under section 11(1) of the 2000 Act as to the means or form of communicating the information,

(b) reproducing any document containing the information, and

(c) postage and other forms of transmitting the information.

(4) But a public authority may not take into account for the purposes of this regulation any costs which are attributable to the time which persons undertaking activities mentioned in paragraph (2) on behalf of the authority are expected to spend on those activities.'

63. The Regulations make it clear that the Academy Trust can only charge for photocopying and postage on a cost recovery basis. It cannot charge for anything else. It specifically forbids the Academy Trust for charging staff time and the attempt to do so is a breach of section 9(3) that renders the Fees Notice invalid. In addition, the Academy failed to outline **all** the policies, protocols and procedures it had to enable the complainant to pay the right amount. This failure also meant the fees notice was not valid.
64. It follows that the Commissioner finds that the Academy Trust breached section 9, as the purported Fees Notice did not comply with FOIA and cannot be enforced by the Academy Trust.
65. The Commissioner has provided the Academy Trust with the option to issue a proper Fees Notice as one potential remedial step in this case. He has done this to take into account the balance between transparency and practicality. He will explain his reasons in more detail in the last section of this decision notice.

Electronic copies

66. The original request asks for the information to be provided electronically.
67. Section 11 of FOIA is a provision that enables the means of communication to be specified by a complainant where reasonably practicable. The complainant reiterated to the Commissioner that she desired the information to be provided in electronic form to save the environment.
68. The Academy Trust explained to the Commissioner that it did not have electronic copies of the policies. It explained that it used paper copies of the same and did not have the technology to digitise all the information.
69. Furthermore it explained that it still used the Local Authority's policies and procedures due to the operation of TUPE. However, as it was an Academy it no longer had the Local Authority's supervision or assistance and could not request electronic copies of the policies without incurring further cost.

70. The Commissioner considers that the arguments favour the Academy Trust's position in this case and it was not reasonably practicable for it to provide the information in an electronic format in this case. He concludes that its current position now complies with section 11 of FOIA.

Procedural compliance with FOIA

71. Section 10(1) requires that a public authority complies with section 1(1) in 20 working days. Section 1(1) requires the Academy Trust to confirm or deny whether it has relevant recorded information, and either provide it or rely on an appropriate exemption.
72. In this case, the Academy Trust has failed to properly engage with the request, or communicate any of the relevant recorded information. It has also not relied appropriately on any exemption. The Academy Trust therefore breached section 10(1) of FOIA.
73. Section 11(3) requires that a public authority explains **why** it does not consider that it is practicable to provide the information in a set format when it considers this is so. The public authority failed to provide such an explanation to the complainant and so also breached section 11(3) of FOIA.

Remedial steps

74. Section 50(4) allows the Commissioner to specify the steps that need to be done to comply with FOIA.
75. The Commissioner has taken the unusual position of specifying two options for the Academy Trust. He will detail what they are and his reasons below.

Option one

76. The first option is to disclose all the information that has been requested by the complainant to her through the post.
77. The Commissioner has not been satisfied by the quality of the responses that have been issued so far.
78. To ensure compliance with section 1(1)(a):
1. It should explain for each of the 24 specified areas: whether or not it has 'policies, procedures or guidelines'; and
 2. It should explain whether or not it has any further 'policies, procedures or guidelines' that are not specified and relate to the way it handles its staff.

79. To ensure compliance with section 1(1)(b):

1. It should provide all the information that has been located that is relevant to paragraph 78 above.

80. For the avoidance of doubt, disclosure of less information and/or ambiguity in the new response will not satisfy this decision notice.

Option two

81. The second option is to issue an appropriate Fees Notice. The Commissioner has considered the size of the public authority and that he must encourage responsible use of FOIA.

82. However, he has been far from satisfied with the quality of the Fees Notice issued so far.

83. A valid Fees Notice must:

1. Explain whether or not it has 'policies, procedures or guidelines' for each of the 24 specified areas specified in the request;
2. Whether or not it has any further 'policies, procedures or guidelines' that are not specified and relate to the way it handles its staff and what they are;
3. How many pages are in each of the 'policies, procedures or guidelines' that it has identified;
4. Charge a fee of no more than 5 pence per page for photocopying plus the actual costs of postage; and
5. Charge for no other activities.

84. For the avoidance of doubt, any Fees Notice issued that fails to comply with the requirements of paragraph 82 will not satisfy this decision Notice.

Right of appeal

85. 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: 0116 249 4253

Email: informationtribunal@hmcts.gsi.gov.uk

Website: www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm

86. 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.
87. 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

Pamela Clements
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