

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 October 2019

Public Authority: The Governing Body of Caistor Grammar School
Address: Church Street
Caistor
Lincolnshire
LN7 6QJ

Decision (including any steps ordered)

1. The complainant has requested information about the number of students who achieved particular grades in a particular subject, when taught by particular teachers across five years. Caistor Grammar School ('the School') initially categorised the request as vexatious under section 14(1) of the FOIA. The School subsequently complied with the request; indicating that it does not hold some of the requested information and that information it does hold is exempt information under section 40(2)(personal data) and section 36 (prejudice to effective conduct of public affairs), with the public interest favouring maintaining the section 36 exemption.
2. The Commissioner's decision is as follows:
 - The School does not hold some of the information that the complainant has requested but it breached section 1(1) and section 10(1) of the FOIA because it did not communicate this fact to the complainant within 20 working days.
 - The relevant information that the School holds is exempt from disclosure under section 40(2) of the FOIA – it is the personal data of third persons and disclosure would contravene a data protection principle. The School breached section 17(1) as it did not issue an appropriate refusal notice within the required timescale of 20 working days.

3. The Commissioner does not require the School to take any remedial steps.

Request and response

4. On 7 March 2019 the complainant wrote to the School and requested information in the following terms:

"Under the freedom of Information Act 2000 I would like to request the following information.

The A-Level [subject redacted] students are split into two classes, [name redacted] & [name redacted] and [name redacted] & [name redacted]

I would like to know the number of students who attained each grade split to show the different classes for the last five years. (see below [a table]).

I must stress I do not wish to know what pupils attained what grade, I just want to know how many students attained each grade within each year group cohort."

5. The School responded on 15 March 2019. It categorised the request as vexatious and refused to comply with it.
6. Following an internal review the School wrote to the complainant on 2 April 2019. It maintained its original position and the matter was passed to the Commissioner.
7. Having considered the School's reliance on section 14(1), the Commissioner advised the School to reconsider its response to the request and, on 12 August 2019, it provided the complainant with a fresh response.
8. The School advised it does not hold the requested information for the years 2014/2015 and 2015/2016. It said that, moreover, due to changes in staffing, it does not hold the requested data for all five years and noted that there had also been syllabus and assessment changes during this period. The school also advised it considered exemptions applied to information it holds but did not detail what these were.
9. The School proposed providing the complainant with the outcomes in the two groups in question by banding results as (A*/A/B) and (C/D/E) for the remaining years (results from 2018, 2017, 2014). It said it

would also label the groups A and B to ensure that the data remained “personal” to staff and students.

Scope of the case

10. The complainant had originally contacted the Commissioner on 24 April 2019 to complain about the way their request for information had been handled. Following the School’s response of 12 August 2019 the complainant confirmed that they remained dissatisfied.
11. In its submission to the Commissioner the School has confirmed that it does not hold some of the requested information and has indicated that certain exemptions apply to information it does hold; namely section 40(2), section 36(2)(b)(ii) and section 36(2)(c).
12. The Commissioner’s investigation has therefore focussed on: whether the School holds all the requested information and whether the information that it holds is exempt information under section 40(2) and/or section 36(2)(b)(ii) and/or 36(2)(c) and, if necessary, the balance of the public interest with regard to the section 36 exemption.
13. From the School’s submission to the Commissioner it appears that the School still considers that the request is vexatious. The matter of vexatious requests is dealt with under ‘Other Matters’.

Reasons for decision

Section 1 - general right of access to information held by public authorities / section 10 – time for compliance / section 17 – refusing a request

14. Under section 1(1) of the FOIA anyone who requests information from a public authority is entitled under subsection (i) to be told if the authority holds the information and, under subsection (ii) to have the information communicated to him or her if it is held and is not exempt information.
15. Under section 10(1) an authority must comply with section 1(1) promptly and within 20 working days following the date of receipt of the request.
16. Under section 17(1) a public authority that is relying on a claim that the requested information is exempt information must issue an appropriate refusal notice to the applicant within the time for complying with section 1(1) ie 20 working days.

17. The request, submitted on 7 March 2019, is for information for the last five (calendar) years – 2014 to 2018 – for particular combinations of teachers. The School advised the complainant that the particular combinations of teachers were not in place for two of the (academic) years: 2014/2015 and 2015/2016. It said it therefore does not hold the request information for two of the years but indicated it could provide the complainant with certain information for three years: 2014, 2017 and 2018.
18. Given the specifics of the request and the circumstances at the School - ie how classes were taught in particular years – the Commissioner is satisfied the School does not hold the information the complainant has requested for two of the years.
19. The School did not comply with section 1(1)(a) with regard to this particular information within 20 working days, however, and therefore breached section 1(1)(a) and section 10(1) of the FOIA with regard to that information.
20. The School did not advise the complainant of its reliance on section 40(2) until 12 August 2019. The School therefore also breached section 17(1).

Section 40 - personal information

21. Section 40(2) of the FOIA says that information is exempt from disclosure if it is the personal data of third persons, ie someone other than the applicant, and a condition under either section 40(3A), 40(3B) or 40(4A) is also satisfied.
22. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 (DPA18).

Is the information personal data?

23. Section 3(2) of the DPA18 defines personal data as: 'any information relating to an identified or identifiable living individual'.
24. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. 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.
25. The requested information in this case is for the grades that students in a particular subject class, taught by one of two groups of teachers, achieved across a number of years. The named teachers are the clear

focus and subject of the requested information. As such, the Commissioner is satisfied that this information can be said to relate to those teachers; that the teachers, and the outcomes students they taught achieved, can be identified from the information and that, therefore, the withheld information falls within the definition of 'personal data' under section 3(2) of the DPA18.

Is a condition under section 40(3A) satisfied?

26. The condition under section 40(3A)(a) of the FOIA is that disclosure would contravene any of the data protection principles. The principle under Article 5(1)(a) of the General Data Protection Regulation (GDPR) states that: "*Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject*".
27. In the case of a FOIA request, 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. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.
28. In its submission, which the Commissioner considers is weak on its reliance on section 40(2), the School has not referred to the GDPR. As the regulator of the data protection legislation, it has therefore fallen on the Commissioner to consider whether Article 6(1)(f) of the GDPR provides a lawful basis for disclosing any or all of the requested information.
29. Article 6(1)(f) states that processing shall be lawful only if:

"...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".
30. In considering the application of Article 6(1)(f) in the context of a request for information under the FOIA it is necessary to consider the following three-part test:
 - (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 – the teachers concerned in this case.
31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.
- (i) Is a legitimate interest being pursued?*
32. In considering any legitimate interest(s) in disclosing the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests.
33. Further, 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. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
34. The complainant has concerns about the quality of the teaching in a particular subject, and at a particular level. The Commissioner considers that this is a case-specific interest but is nonetheless satisfied that it is a legitimate interest for the complainant.
- (ii) Is disclosure necessary to meet the legitimate interests?*
35. '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.
36. As above, the complainant has a specific interest and concern about an aspect of the teaching at the School. They have requested information on the grades students achieved in a particular subject, across a number of years, when being taught by one of two teaching arrangements. He considers that this information would be likely to show that students achieved better grades under one arrangement than the other. If so, this would confirm that their concern is legitimate.
37. In its section 14(1) submission the School has said that steps have already been taken to address the complainant's concerns (steps which the Commissioner does not intend to detail here). This indicates that it considers that disclosing the requested information is not therefore necessary to meet the complainant's legitimate interest. However, the School has not told the Commissioner whether those steps had been

taken at the time of the request. As such, she finds that disclosure would be necessary to meet the complainant's legitimate interests and she has gone on to consider the third test; the balancing test.

(iii) Do the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subjects?

38. Through this test the Commissioner will balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects 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.
39. 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 individuals expressed concern to the disclosure; and
 - the reasonable expectations of the individuals.
40. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as the individuals' general expectation of privacy, whether the information relates to employees in their professional role or to them as individuals, and the purpose for which they provided their personal data.
41. The School says that the requested information is used, with additional data, for the purpose of carrying out the teachers' performance reviews. It considers the information is personal and confidential and if it was disclosed the confidentiality of this information would be compromised. Although the information concerns individuals in their professional capacity, in the circumstances the Commissioner is satisfied that those teachers would reasonably expect that this information would not be put into the public domain as the result of a request for information under the FOIA.
42. In its submission the School also said that the complainant is seeking to draw conclusions from raw data (such as A level outcomes) but that this is inconclusive without additional data, for example GCSE outcomes. It considers that it may therefore be misleading [and so unfair] to analyse

the success or otherwise of the teaching at the School on raw A level outcomes alone.

43. The Commissioner agrees with the School's view that, in the circumstances, the teaching staff in question would be likely to be distressed if the requested information was to be released. It is likely they would feel that their individual professionalism and competency was being unfairly scrutinised in the public domain.
44. The Commissioner considers that such interest as there is in the adequacy or otherwise of the teaching at the School is met through other channels such as staff performance reviews, its Governing Body and Ofsted inspections.
45. Having considered all the circumstances the Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so disclosing the information would not be lawful.
46. The Commissioner has decided that the School is entitled to withhold the information requested under section 40(2), by way of section 40(3A)(a). Since a condition under section 40(3A) has been satisfied it has not been necessary to consider the conditions under section 40(3B) or 40(4A). As the section 40(2) exemption is engaged, it has not been necessary for the Commissioner to consider the section 36 exemptions that the School also applied to the requested information.

Other matters

Section 14 – vexatious and repeat requests

47. Despite the Commissioner's advice on this matter, the School's submission to the Commissioner suggested that it still considers that the request is vexatious.
48. Under section 14(1) of the FOIA a public authority is not obliged to comply with a request if the request is vexatious.
49. The term 'vexatious' is not defined in the FOIA but the Commissioner has identified a number of 'indicators' which may be useful in identifying vexatious requests. These are set out in her published guidance and, in short, they include:
 - Abusive or aggressive language

- Burden on the authority – the guidance allows for public authorities to claim redaction as part of the burden
 - Personal grudges
 - Unreasonable persistence
 - Unfounded accusations
 - Intransigence
 - Frequent or overlapping requests
 - Deliberate intention to cause annoyance.
50. The fact that a request contains one or more of these indicators will not necessarily mean that it must be vexatious. All the circumstances of a case will need to be considered in reaching a judgement as to whether a request is vexatious.
51. The Commissioner's guidance goes on to suggest that, if a request is not patently vexatious, the key question the public authority must ask itself is whether the request is likely to cause a disproportionate or unjustified level of disruption, irritation or distress. In doing this the Commissioner considers that a public authority should weigh the impact of the request on it and balance this against the purpose and value of the request.
52. Where relevant, public authorities also need to take into account wider factors such as the background and history of the request.
53. Having assessed the request and the circumstances behind it, the Commissioner did not consider that the request met any of the criteria above. As noted, she wrote to the School on 24 July 2019 and advised that she did not consider that the request could be considered to be vexatious. The School went on to provide the complainant with a response to their request; advising that it does not hold some of the information and that information it does hold is exempt. Because it had, in effect, complied with the request, the Commissioner assumed that the School had withdrawn its reliance on section 14(1).
54. However, in its submission to the Commissioner the School has put forward a case as to why the request is vexatious.
55. It says the request is vexatious because releasing the information would have a disproportionately detrimental impact on the School. This is because it would cause disruption to the teaching within the department in question, and unjustified distress to the teaching staff, students and parents. The School says staff members may feel that their individual professionalism and competency was being unfairly scrutinised in the public domain, while students and parents may be led to believe that there were deficiencies in teaching standards that were not being adequately addressed.

56. The School goes on to argue that resources would be diverted to manage the concerns of all parties, which would impact on the teaching resources of the department. It says that the complainant has previously sought to draw conclusions from the results of the department in question. The School argues that the raw data (ie A level outcomes) is inconclusive without additional data eg GCSE outcomes. The School considers it may be misleading to analyse the success of the teaching at the School on raw A level outcomes alone.
57. The School says the complainant has raised concerns about the effectiveness of the teaching of one teacher in respect of their own child, and that steps have already been taken to address this. According to the School, this means that any information derived from the request would not impact on that student's success and so it is unreasonably persistent of the complainant (the parent) to continue to request this information as their concerns have been resolved.
58. The School acknowledges that the complainant had a serious purpose in requesting the data, but believes this does not provide sufficient grounds to justify disrupting the department's teaching, and staff, student and parental wellbeing that publishing the information would cause (since disclosure is disclosure 'to the world').
59. The Commissioner notes the School's concerns but is satisfied that, in this case, those concerns do not make the request a vexatious request. The complainant has a serious purpose in making the request and the requested information (if held and if released) would possibly provide them with information associated with their concerns. In addition, identifying what relevant information is held would not be a burden to the School, still less a disproportionate burden, in the Commissioner's view.
60. As above, the Commissioner does not consider the criteria detailed above have been met. However, the School's concerns – which are certainly valid concerns – can be addressed through the application of one or more exemptions to the requested information and the School has, correctly, relied on section 40(2). For these reasons the Commissioner is satisfied the request in this case cannot be considered to be a vexatious request.

Right of appeal

61. 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

62. 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.
63. 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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