

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 17 January 2023

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested information from the Department for Education (DFE) about a particular Multi-Academy Trust (MAT). DFE redacted some information in accordance with section 40(2) (third party personal information) of FOIA.
2. The Commissioner's decision is that DFE was entitled to withhold the redacted information under section 40(2) of FOIA as it is personal data of a third party and its disclosure would be unlawful. However, the Commissioner finds that DFE breached section 10(1) of FOIA as it did not provide its response to the complainant within the statutory timeframe.
3. The Commissioner does not require DFE to take any further steps as a result of this decision notice.

Request and response

4. On 22 July 2022, the complainant wrote to DFE and requested information in the following terms (in response to a previous email from the DFE):

"Within the attachment letter, regarding my Information Acts concerns, it states:

"I have also sought assurances from the trust's CEO on how the ICO findings would be implemented and how future practice would be monitored."

Under the Freedom of Information Act, please could you advise me as follows:

- (a) Has the CEO since responded on how the ICO findings will be implemented and how future practice will be monitored?
 - (b) Please could you provide me with any documentary evidence that the CEO (or the Ormiston Academies Trust) has provided to support the assurances."
5. DFE responded on 9 September 2022. It provided some information within the scope of the request, and explained that other related information was not disclosed as it did not consider it to be part of the documentary evidence which was being requested.
 6. Following an internal review DFE wrote to the complainant on 10 October 2022. It revised its original position and disclosed the related information which it had previously considered to be outside of the scope of the request, but redacted some parts of the document by virtue of section 40(2) of FOIA.

Reasons for decision

7. Section 40(2) of FOIA states 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 (4A) is satisfied.
8. In this case the relevant condition is contained in section 40(3A)(a). 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').
9. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data, then section 40 of FOIA cannot apply.
10. Secondly, 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?

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

“any information relating to an identified or identifiable living individual.”

12. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

13. 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.

14. 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.

15. In the circumstances of this case, having viewed and considered the redacted information, the Commissioner is satisfied that it clearly relates to identifiable individuals, and therefore it is third party personal data. The Commissioner is mindful to not provide further description of the nature of the withheld information within this decision notice in order that he himself does not disclose third party personal data to the world at large.

16. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.

17. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

18. 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.”

19. 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.

20. 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

21. 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”.

22. In considering the application of Article 6(1)(f) of the UK GDPR in the context of a request for information under 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.

23. 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

24. In considering any legitimate interest(s) in the disclosure of the requested information under 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.

25. 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.

26. In this case, it is clear that the complainant has a personal interest in the requested information, due to concerns which they have raised regarding the MAT’s recording of safeguarding matters. The requested information is the documented intentions and assurances which the MAT has provided to the DFE regarding how it will manage its practices surrounding the recording of safeguarding matters going forwards.

27. The Commissioner is satisfied that, in this case, there is a legitimate interest in ensuring that the MAT is recording safeguarding matters correctly and addressing any associated concerns with its practices.

Is disclosure necessary?

28. '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 FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
29. Having viewed the withheld information, the Commissioner is satisfied that its redaction in no way alters the details surrounding the MAT's intentions and assurances set out within the disclosed documents, and that the legitimate interest has therefore been satisfied.
30. The Commissioner finds that it is not necessary to disclose the small amount of redacted third party personal information in order to satisfy the legitimate interest.
31. As the Commissioner has found in this case that disclosure of the withheld information is not necessary to achieve the identified legitimate interests, he has not gone on to consider the balance of the legitimate interests against the data subject's interests, fundamental rights and freedoms. There is no lawful basis for processing, and it therefore does not meet the requirements of principle (a)
32. Given the conclusion the Commissioner has reached above on lawfulness, the Commissioner considers that he does not need to go on to separately consider whether disclosure of the information would be fair and/or transparent.
33. The Commissioner has determined that disclosure to the world at large, of the redacted third party personal information, is not a necessary or proportionate step to take. Therefore, DFE was correct to refuse to disclose it, in accordance with section 40(2) of FOIA.

Other matters

34. The Commissioner notes the complainants arguments regarding DFE not providing them with advice and assistance in accordance with section 16 of FOIA. The Commissioner's published guidance¹ on the duty to provide advice and assistance clearly sets out the circumstances in which a public authority should provide advice and assistance, so far as it would be reasonable to do so. It is clear that none of those circumstances apply in this case. Further, there is no reason why the DFE would need to provide advice and assistance regarding this particular request for information, where it has disclosed the information it holds within the scope of the request, apart from a very small amount of redactions in order to protect third party personal information.

¹ <https://ico.org.uk/for-organisations/guidance-index/freedom-of-information-and-environmental-information-regulations/section-16-advice-and-assistance/>

Right of appeal

35. 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

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

36. 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.
37. 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

Catherine Fletcher
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Wycliffe House
Water Lane
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SK9 5AF