

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

### **Decision notice**

**Date:** 18 April 2023

**Public Authority:** St Peter's CofE Aided School  
**Address:** Quarry Lane  
Exeter  
EX2 5AP

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

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1. The complainant has requested information with regards to an alleged assault. The Commissioner's decision is that St Peter's CofE Aided School (the school) should have neither confirmed nor denied holding the information under section 40(5B) of the FOIA. He also finds the school breached section 17(1) of the FOIA as it did not provide its response, refusing the request under 40(5B) of the FOIA, within the required 20 working days.
2. As the Commissioner has proactively applied section 40(5B) of the FOIA in this case, he does not require any steps.

## Request and response

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3. On 23 November 2022 the complainant, made the following information request to the school:

"During the week commencing Monday 17th January 2022 emails were exchanged between [named redacted] a Devon County Council Social Worker and St Peters School staff concerning an alleged assault on [name redacted] by [name redacted]...

1. I require a copy of all emails exchanged with [name redacted], MASH or Devon and Cornwall Police during the week of 17th January 2022, relating to the alleged assault.
  2. I also require all internal emails sent concerning [name redacted] during that week. This includes emails to the School Social Worker.
  3. I also require a copy of the log entry where this incident was recorded.
  4. Finally I require confirmation that no body map images, or photographs were sent to anyone at Devon County Council in the three months from 17th January 2022."
4. The school responded on 8 December 2022 and it explained the differences between the FOIA and a Subject Access Request (SAR) and asked whether the complainant still wanted his request dealt with under the FOIA.
5. The complainant clarified that he wanted his request dealt with both as a FOIA and as a SAR.
6. The school provided its response on 16 December 2022. An internal review was requested on 16 January 2023 and responded to on 17 January 2023.

## Scope of the case

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7. The complainant contacted the Commissioner dissatisfied with the school's response and the time it took to respond.
8. The Commissioner is only able to consider the school's FOI response within this decision notice.
9. The Commissioner has used his discretion in this decision notice to determine whether the school should have relied on section 40(5B) of the FOIA to neither confirm nor deny holding the requested information.

## Reasons for decision

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### Section 40(5B) of the FOIA – neither confirm nor deny

10. Section 1(1)(a) of FOIA provides that where a public authority receives a request for information, it is obliged to tell the applicant whether it holds that information. This is commonly known as the 'duty to confirm or deny'.
11. However, section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation EU2016/679 ('UK GDPR') to provide that confirmation or denial
12. The decision to use a 'neither confirm nor deny' response will not be affected by whether a public authority does or does not in fact hold the requested information. The starting point, and main focus for a 'neither confirm nor deny' response in most cases, will be theoretical considerations about the consequences of confirming or denying whether or not particular information is held. The Commissioner's guidance explains that there may be circumstances in which merely confirming or denying whether or not a public authority holds information about an individual can itself reveal something about that individual.

13. Therefore, for a public authority to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles

**Would the confirmation or denial that the requested information is held constitute the disclosure of a third party's personal data?**

14. Section 3(2) of the DPA 2018 defines personal data as:

“any information relating to an identified or identifiable living individual”.
15. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
16. 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.
17. The Commissioner is satisfied, from reviewing the request, that if the school were to either confirm or deny it held the information, it would, in effect, publicly confirm whether or not the person named in the request was involved in an alleged assault.
18. The fact that confirming or denying whether the requested information is held would reveal the personal data of a third party (or parties) does not automatically prevent a public authority from refusing to confirm whether it holds this information. The second element of the test is to determine whether such a confirmation or denial would contravene any of the data protection principles.
19. The Commissioner is satisfied that confirming or denying holding information in relation to the request could lead to the named third party having information released about them.
20. The Commissioner recognises that individuals have a clear and strong expectation that their personal data will be held in accordance with data protection laws. In this case, the Commissioner is satisfied that the individual concerned, would not reasonably expect the school to confirm to the world at large whether or not it held particular personal information about them in response to a FOIA request.

21. He has also determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms, and that confirming whether or not the requested information is held would not be lawful.
22. As there is no lawful basis for doing so, confirming or denying would be unlawful and therefore the Commissioner finds that section 40(5B) of FOIA to neither confirm nor deny that the requested information is held is engaged, and it should have been applied by the school in response to the request.

**Section 17 of the FOIA – refusal of a request**

23. Under section 17(1) of the FOIA a public authority must issue a refusal notice within 20 working days of the request, if it is relying on an exemption to neither confirm nor deny that information is held.
24. As the Commissioner found that the school should have refused the request under section 40(5B) of the FOIA, he finds that the school breached section 17(1) of the FOIA as it did not apply the correct exemption within the required 20 working days.

## Right of appeal

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25. 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](mailto:grc@justice.gov.uk)

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

26. 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.
27. 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 .....**

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