

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 30 September 2013

Public Authority: Office for Standards in Education, Children's Services and Skills (Ofsted)

Address: Aviation House
125 Kingsway
London
WC2B 6SE

Decision (including any steps ordered)

1. The complainant made a freedom of information request to Ofsted for information gathered as a result of an investigation into a complaint made against a childminders. Ofsted refused the request by relying on the exemption in section 40(2) of FOIA. Whilst the Commissioner found that the exemption was engaged he also found that the correct approach would have been for Ofsted to have refused to confirm or deny if it held the requested information in accordance with section 40(5)(b)(i) of FOIA.
2. The Commissioner requires no steps to be taken.

Request and response

3. On 9 November 2012 the complainant made a freedom of information request to Ofsted regarding its investigation into concerns he had raised about a childminders. The request read as follows:

Q1. Would you please make it clear if [the childminders] has an accident / incident policy or not, regardless if there is a legal requirement for it?

Q2. Can you provide me with a list of policies that are required for the Early Years Foundation Stage?

Q3. Can you please provide me with details of which body at which meeting and who ratified the stated policies in Q2? I.e. the minutes of the meeting.

1.2. If I walk in to [the childminders] or send some one i.e. make an anonymous enquiry / visit, then this information would clearly be available. What is the big secret? [The Commissioner understands that this question refers to the complainant's wish to see details of the age, gender and ethnic origin or heritage of the children].

1.3 Can any one second the opinion that this "qube" toy is age appropriate for what was a 15 month old child then?

2.1. Would you please provide me with this set of guidance notes?

2.3. Can you please confirm this statement that [a named individual] can care for an under 1 year old and that [a named individual] can not?

3.1. Would you please supply the evidence that you have recorded on your system

4. Ofsted responded on 27 November 2012 when it informed the complainant that it held an "investigation toolkit" which contains evidence from a visit to the childminders on 10 July 2012 (part 3.1 of the request). However it said that this information was exempt from disclosure under section 40(2) of the Act which provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. In this case Ofsted claimed that disclosure would contravene the first principle which requires that data be processed fairly and lawfully.
5. Ofsted chose to address the other parts of the complainant's request through its complaints procedure in a further response sent on 3 December 2012.
6. Ofsted subsequently carried out an internal review at which point it upheld the decision to refuse to disclose the investigations toolkit under section 40(2).

Scope of the case

7. On 30 January 2013 the complainant contacted the Commissioner to complain about the way his request for information had been handled.
8. The Commissioner subsequently agreed with the complainant that the particular requests which had been refused or were outstanding were:
 - 1.2 – details of the age, gender and ethnic origin or heritage of the children.
 - 2.1 – a copy of Ofsted's document Guidance on writing complaint and compliance action summaries
 - 3.1 – Evidence recorded on Ofsted's system. This is the 'investigation toolkit' information which Ofsted referred to in its letter of 27 November 2012 and which was refused under section 40(2).
9. During the course of his investigation Ofsted informed the Commissioner that the policy document in part 2.1 of the request had been made available on its website. The complainant was informed of this and provided with a link to where it could be found. The Commissioner considers that this part of the request has been resolved and therefore the Commissioner considers the scope of the complaint to be to consider whether Ofsted has complied with parts 1.2 and 3.1 of the request.

Reasons for decision

10. Ofsted has explained that the only information it holds on the investigation into the complaint against the Childminders is its "*Childcare Investigation Toolkit – Evidence Report*". This is a report of its investigation into the complaint made against the Childminders and is the 'investigation toolkit' referred to in its response to the complainant. Ofsted has confirmed that this report also contains the only information it holds which falls within the scope of part 1.2 of the complainant's request for information on the diversity of the children who attend the childminders. However, the Commissioner should make clear that whilst it mentions the age and gender of the children it does not contain any reference to the ethnic origin or heritage of the children.
11. Ofsted has withheld the report under section 40(2) of FOIA which provides that information is exempt if it is the personal data of someone other than the applicant and disclosure would contravene one of the data protection principles. In this case Ofsted has said that disclosure of

the information would in its view contravene the first data protection principle which requires that data be processed fairly and lawfully.

12. In order to decide if the exemption is engaged the first thing to consider is whether the information is personal data. Personal data is defined in the Data Protection Act 1998 as,

"personal data" means data which relate to a living individual who can be identified—

(a) from those data, or

(b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intentions of the data controller or any other person in respect of the individual;

13. In this case Ofsted has said that the information is primarily the personal data of the two individuals who operate the childminders. The Commissioner has reviewed the withheld information and it is clear that the information identifies these two individuals. The information focuses on these two childminders and the service they provide and includes expressions of opinion about them. Therefore the Commissioner is satisfied that the information is personal data. The Commissioner is also satisfied that where the information discusses the children attending the childminders this information is also personal data because the description of the children and the level of detail included means that it would be possible to identify them.
14. The Commissioner notes that the complainant has said that he is happy for the names of any individuals to be redacted. However, since the complainant's daughter attends the childminders and he was the person who made the complaint which prompted the investigation it would still be clear to whom the information relates even if names of individuals were redacted.
15. As the Commissioner is satisfied that the information is personal data he has gone on to consider whether disclosure would contravene the first data protection principle. In assessing whether disclosure would be unfair, and thus contravene the first principle, the ICO takes into account a number of factors such as:
- What reasonable expectations does the individual have about what will happen to their personal data?

- Has the individual named been asked whether they are willing to consent to the disclosure of their personal data?
 - What are the consequences of disclosure?
16. Ofsted has explained that in the case of complaints made against childminders Ofsted's policy is that it does not publish information where no action has been taken. In this case Ofsted found that there were no grounds to take any further action as a result of the complaint and these particular childminders were also given explicit assurances that information would not be made public. Therefore the Commissioner is of the view that they would have a reasonable expectation that details of Ofsted's investigation would not be disclosed. The Commissioner also notes that they have not given their consent to disclosure.
 17. As regards any consequences of disclosure, releasing the information would also impact on the individuals as it would reveal that a complaint had been made about the childcare they deliver and given the level of detail, could be distressing if made public. The childcare service is provided out of the home of one of the childminders and as a result the information also includes information about their domestic arrangements. It is likely this would add unwarranted distress to the individual and their family.
 18. Where the information discusses the children attending the Childminders the Commissioner is also satisfied that disclosure would be unfair as parents would expect that details of their children and their care arrangements would not be disclosed in response to a freedom of information request. It is likely that such a disclosure would be distressing and viewed as a grave infringement of privacy.
 19. However, the Commissioner's approach to cases like this is that, notwithstanding the data subjects' reasonable expectations or any damage or distress caused to him or her by disclosure, it may still be fair to disclose requested information if it can be argued that there is a more compelling public interest in releasing the information. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
 20. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. Therefore, in order to find in favour of disclosure, it would need to be shown that there is a

more compelling interest in disclosure; that is to say any public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject.

21. In its internal review Ofsted considered whether there was a condition in schedule 2 of the Data Protection Act which would allow for disclosure. In particular condition 6 allows for disclosure where the information is necessary for the legitimate interests of a third party. On this Ofsted said:

"there is some merit in the argument that the public have a legitimate interest in knowing details of the investigation. That said, the instigator of the complaint, you, have already been provided exclusive access to the outcome of this investigation and Ofsted at the time made commitments to publish such details where action needed to be taken. These aspects go a significant way towards ensuring relevant parties were kept appropriately updated on matters related to complaints. The disclosure of the remaining detailed information within the toolkit would be seen to be harmful enough to render such disclosure "unwarranted", as much of it is private information about other individuals".

22. In this case the Commissioner is satisfied that any public interest in releasing details of the investigation, given that no action was taken on the complaint, would not outweigh the public interest in protecting the rights and freedoms of the primary data subjects, the two childminders as well as the other individuals mentioned in the report. In the Commissioner's view there is little to be gained from releasing details of an investigation where Ofsted found that no action was required.
23. As the Commissioner has determined that it would be unfair to disclose the information, it has not been necessary to go on to consider whether this is lawful or whether one of the conditions in Schedule 2 of the DPA is met.

Section 40(5) – Neither Confirm nor deny

24. Both in its responses to the complainant and to the Commissioner, Ofsted said that in this case it had decided to confirm it held the requested information because the complainant was the instigator of the investigation. Therefore it had proceeded on the basis of articulating its refusal of the requested information through section 40(2) of FOIA. However, it said it had informed the complainant that it would not normally confirm the existence of a complaint in these circumstances and that were it to receive the request from anyone else it would refuse to confirm or deny if it held the requested information. This is because

revealing the existence of the information is in itself the personal data of the two childminders as it would reveal that a complaint had been made about them to Ofsted.

25. Section 40(5)(b)(i) provides that the duty to confirm or deny does not arise if the giving to a member of the public the confirmation or denial would contravene any of the data protection principles.
26. As Ofsted notes, confirming or denying if the requested information was held would make it public knowledge that a complaint had been made about them. The Commissioner has explained in relation to section 40(2) that this would be unfair because the childminders have a reasonable expectation that information about them will not be made public. Indeed they were given assurances that it would not publish any information about the complaint. Given the distress this would be likely to cause to the individuals concerned, and the lack of any compelling reasons for disclosure the Commissioner is satisfied that confirming or denying if the information is held would be in itself unfair.
27. Whilst recognising that for practical purposes Ofsted decided to rely on section 40(2) to refuse the request, the Commissioner considers that the correct approach would have been to refuse to confirm or deny if it held any information which would reveal the existence of a complaint made against the Childminders by relying on section 40(5)(b)(i). This subsection refers to giving the confirmation or denial "to a member of the public". This reflects the fact that, in general terms, FOIA is concerned with disclosure to the world, and not to the particular individual who submitted the request.
28. The Commissioner finds that in accordance with section 40(5)(b)(i) Ofsted were not obliged to confirm or deny if it held the information.

Right of appeal

29. 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

30. 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.
31. 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
Group Manager, Complaints Resolution
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF**