

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 2 August 2019

**Public Authority:** Westacre Middle School  
**Address:** Ombersley Way  
Droitwich  
Worcestershire  
WR9 0AA

#### Decision (including any steps ordered)

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1. The complainant requested information from Westacre Middle School (the School) relating to the EGM (Extraordinary Governor's Meeting) of 5 February 2018. The School withheld the information under section 40(2) (third party personal data) of the FOIA.
2. The Commissioner's decision is that the School correctly withheld the information under section 40(2) of the FOIA. Therefore, the Commissioner does not require the School to take any steps as a result of this decision.

#### Request and response

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3. On 9 November 2018 the complainant wrote to the School and requested information in the following terms:  
*"Under the freedom of information act 2000, I formally request a copy of the agenda, minutes and any supporting paperwork pertaining to the EGM that took place on the 05/02/2018."*
4. On the same day the School acknowledged the request.
5. On 6 December 2018 the School responded and refused the request under section 40(2) (third party personal data) of the FOIA.
6. On 7 December 2018 the complainant asked the School for an internal review.

7. On 21 December 2018 following an internal review, the School upheld its decision not to disclose the information requested for the reasons set out in the School's original response.

### **Scope of the case**

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8. The complainant contacted the Commissioner on 18 January 2019 to complain about the way his request for information had been handled.
9. During the Commissioner's investigation, the School was asked if it was relying on section 40(2) for all of the request and not just the "*minutes*". The School confirmed that a copy of "*the agenda*" had already been provided to the complainant and that this information consisted of just one sentence and also the date. With regards to "*any supporting paperwork*", the School confirmed that it did not hold any such information.
10. The following analysis concerns whether the School correctly withheld the minutes under the exemption at section 40(2) of the FOIA.

### **Reasons for decision**

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#### **Section 40(2) – third party personal data**

11. Section 40(2) of the FOIA provides 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 40(4A) is satisfied.
12. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 General Data Protection Regulation ("GDPR").
13. 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 the FOIA cannot apply.

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<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

14. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

**Is the information personal data?**

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

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

16. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
17. 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.
18. 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.
19. In this case the School confirmed that the personal data held is that of school staff, Governors, and members of the public, including a child. The School said that not all of the requested information is personal data, but it considered *“the document would be very difficult to redact.”* The Commissioner notes that the argument is that the personal data is indivisibly interlinked with the remaining information. Separating the personal data from the remaining information would render the remaining information meaningless.
20. The School provided the Commissioner with the withheld information. The minutes contain the details of a discussion between identifiable individuals regarding another specific individual.
21. The School considers that the withheld information constitutes personal data because the data relates to identifiable living individuals.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to the individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of “personal data” in section 3(2) of the DPA.

23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

25. Article 5(1)(a) of the GDPR states that:

*"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".*

26. 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.
27. 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.

### **Lawful processing: Article 6(1)(f) of the GDPR**

28. 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"<sup>2</sup>.*

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<sup>2</sup> Article 6(1) goes on to state that:-

*"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".*

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

*"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".*

29. In considering the application of Article 6(1)(f) of the GDPR 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.
30. 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**

31. In considering any legitimate interest(s) in the disclosure of 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.
32. 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.
33. In this case, the complainant has not provided the Commissioner with any arguments to support his view. However, the Commissioner accepts that there is a legitimate interest in the disclosure of the requested information because it relates to school governance. She also recognises the broad general legitimate interest in accountability and transparency, particularly in relation to questions governing boards can ask and issues that arise from meetings.

### **Is disclosure necessary?**

34. “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.

35. The Commissioner considers that disclosure of the withheld information would be necessary to meet the legitimate interests set out above.

**Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

36. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.

37. 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 individual expressed concern about the disclosure; and
- the reasonable expectations of the individual.

38. 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 an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

39. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.

40. The School explained that, at the time of the request, the information was deemed to be confidential due to the sensitive nature of the content. It maintained that this document should not be made public.

41. Disclosure under the FOIA is tantamount to publication to the world at large. The Commissioner must therefore balance the legitimate interests with the data subject's interests when determining whether the information can be disclosed into the public domain and not just to the complainant.

42. The School believed that the content of the document could cause reputational damage to Governors that are cited in it.
43. The School stated that one individual identified in the requested information is a child. The School explained that it has to ensure rigorous and vigilant attention is paid to the safeguarding of individuals, when sharing documentation that references any children and families. It argues that all children and families working with the School would expect that to be the case.
44. Whilst recognising the general requirement for transparency in public life, the School said that it believed that in this particular case, releasing the information would cause unnecessary harm to the data subjects, and the School has a legal duty to safeguard their interests.
45. The Commissioner considers that the data subjects in this case are unlikely to expect that this information would be disclosed into the public domain.
46. Whilst there is a general legitimate interest in transparency with regard to school governance, the Commissioner does not consider that this justifies the disclosure of these minutes.
47. Based on the above factors, 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 the disclosure of the information would not be lawful.
48. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.
49. The Commissioner has therefore decided that the School was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

## Right of appeal

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50. 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)

51. 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.
52. 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 .....**

**Ben Tomes**  
**Team Manager**  
**Information Commissioner's Office**  
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