

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 16 September 2021

Public Authority: Howden Junior School

Address: Hailgate
Howden
DN14 7SL

Decision (including any steps ordered)

1. The complainant has requested any emails sent or received about the renaming of Howden Junior School's school houses. Howden Junior School withheld the requested information under section 40(2) FOIA.
2. The Commissioner's decision is that Howden Junior School (the 'School') has correctly withheld the requested information under section 40(2) FOIA. However, the School did not comply with Section 17(7) FOIA.
3. The Commissioner requires no further steps to be taken.

Background

4. From the Commissioner's own research into the background of this matter, it is clear there has been significant press, social media, and public interest in this matter.
5. There is already a considerable amount of information in the public domain about this case, including the fact the Headteacher received one email from an ex-pupil around the time of the Black Lives Matter protests, a brief summary of the email's contents and its impact, and the actions the School took as a result to review and then facilitate a change to the School house names - from Lord Nelson, Sir Walter Raleigh and Sir Francis Drake to names chosen by current pupils of the School of Greta Thunberg, Marcus Rashford and Malala Yousafzai.
6. The Commissioner is aware that the first name of the ex-pupil has been disclosed by the School with her consent. The Commissioner notes that the ex-pupil is referred to by the Headmaster of the School in press reports as a 'child'.

7. The Commissioner recognises that recently buildings, streets and statutes have been renamed and that this has led to accusations of rewriting history to deal with any historical legacies or associations the names may have.

Request and response

8. On 22 February 2021, the complainant wrote to the School and requested information in the following terms:

"Any email sent or received by the Chair of Governors, Headteacher, Deputy Head, in relation to the renaming of the school houses."

9. The School responded on 5 March 2021. It refused to confirm or deny that the requested information was held. It then went on to cite section 40(2) – personal data – and used it as an exemption to withhold the requested information.
10. Following an internal review the School wrote to the complainant on 22 March 2021. It amended its position by denying that the School held any relevant internal emails but confirmed its original position that it was withholding 'any other relevant data' on the basis of the exemption in section 40 FOIA for personal data.

Scope of the case

11. The complainant contacted the Commissioner on 4 April 2021 to complain about the way his request for information had been handled. He suggested that external emails had been withheld and that any personal data contained in the requested information the School did hold - external emails - could be redacted before disclosure. He also complained about the School's procedural failings when dealing with his request.
12. On 5 August 2021, the Commissioner wrote to the School asking it to review its position and asking it a number of questions regarding the information held by the School and about the s40(2) FOIA exemption it had applied.
13. The School replied to the Commissioner on 23 August 2021. It advised the Commissioner that only one email was held by the School that fell within the scope of the request. It was an email sent to the Headteacher by an ex-pupil. The School confirmed to the Commissioner that this email had been withheld from the complainant under section 40(2) FOIA.

14. The Commissioner considers the scope of her investigation to be to establish the extent of the recorded information held by the School and whether the School is entitled to withhold the information it has already identified under section 40(2) of the FOIA. The School's procedural handling of the request is also dealt with below.

Reasons for decision

Section 1 - information held

15. Section 1(1) of the FOIA states that:

Any person making a request for information to a public authority is entitled –

- (a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and*
- (b) if that is the case, to have that information communicated to him.*
16. In cases where a dispute arises over the extent of the recorded information that was held by a public authority at the time of a request, the Commissioner will consider the complainant's arguments. She will also consider the actions taken by the authority to check that the information is held or not held and any other reasons offered by the public authority to explain why the information is not held.
17. For clarity, the Commissioner is not expected to prove categorically whether the information is held, she is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.
18. The complainant has suggested that there are more external emails that have not been provided to him.
19. The Commissioner asked the School to describe searches for the requested information had been undertaken. It advised that two separate examinations for information falling within the scope of the request had been undertaken of the School's electronic records using appropriate search terms. The School confirmed that no recorded information that was in scope of the request had been deleted or destroyed.
20. The School confirmed to the Commissioner that only one email had been received by the School in relation to the renaming of the school houses. It was an email sent to the Headteacher by an ex-pupil. In this case the Commissioner is satisfied that the School undertook appropriate

searches for the information requested and has confirmed that no information was deleted.

21. Having considered the School's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that, on the balance of probabilities, the School does not hold any further information within the scope of the request, whether external emails or otherwise.
22. The Commissioner therefore considers that the School complied with its obligations under section 1(1) of the FOIA.

Section 40 - personal information

23. 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
24. In this case the relevant condition is contained in section 40(3A)(a)¹. 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').
25. 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.
26. 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?

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

"any information relating to an identified or identifiable living individual".

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

¹ As amended by Schedule 19 Paragraph 58(3) DPA

29. 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.
30. 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.
31. In the circumstances of this case, after having considered the withheld information, the Commissioner is satisfied that the information relates to the ex-pupil who wrote the email. There is the obvious personal data, such as the data subject's name and contact details, from which they can be easily identified. In respect of the contents, due to the events under discussion and the subsequent media coverage, the Commissioner is satisfied that it would be possible to identify the data subject concerned from the contents of the withheld information and other information otherwise available.
32. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individual covered by the withheld information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner looks to see how such a person would go about identifying the individuals involved.
33. Given the withheld information only relates to one individual and the Commissioner is aware that that individual's first name is already in the public domain via press and social media reports, the Commissioner accepts that this increases the possibility that the ex-pupil could be identified by a motivated individual. In particular there is a reasonable chance that the sender of the email could be identified by her ex-classmates.
34. The Commissioner does accept that, if the ex-pupil's personal data was redacted from the email (as the complaint has suggested), the chances of a general member of the public being able to cross-reference the information to identify a specific individual is not high but, there is still a risk that the ex-pupil could be identified by a person with knowledge of the School or local area. Because the information would be disclosed under FOIA to the world at large, there is a distinct possibility that it would come into the hands of people who would be able to "de-anonymise" the data.

35. Through media reports, the ex-pupil's first name and their association with the School is already in the public domain. By describing the ex-pupil as a "child", the School has also effectively provided an approximate age range and the theme of the email indicates something about the ex-pupil's interests and beliefs. The Commissioner therefore considers that this information creates a profile of the sender of the email which is specific enough to allow former classmates to work out who that individual was.
36. Therefore, the Commissioner accepts that the withheld information falls within the definition of 'personal data' in section 3(2) of the DPA.
37. 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.
38. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

39. 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".

40. 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.
41. 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.
42. Please also note that the UK GDPR contains provisions intended to enhance the protection of children's personal data.

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

43. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that "*processing shall be lawful only if and to the extent that at least one of the*" lawful bases for processing listed in the Article applies.
44. 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*².

45. Article 6(1)(f) places particular emphasis on the need to protect the interests and fundamental freedoms of data subjects when they are children. This recognises Recital 38 of the UK GDPR which says that children require specific protection with regard to their personal data because they may be less aware of the risks and consequences of the processing, the safeguards that could be put in place to guard against these, and the rights they have.
46. 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.
47. 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

48. 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.

² 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".

49. 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.
50. The Commissioner understands the complainant is pursuing a legitimate interest in making enquiries about matters that have received widespread media attention and that disclosure would promote overall openness, transparency and accountability. He has said that he considers that it is a matter of public interest for the School to provide more specific information than is currently in the public domain relating to the content of the ex-pupil's email to the School which prompted the change in house names.
51. The Commissioner recognises that there is a clear legitimate interest in the public understanding how schools are run and how they deal with any uncomfortable historical legacies or associations they may have.
52. The Commissioner does therefore consider that there is a legitimate interest in disclosure of information, especially as the events described have attracted press coverage, which may hold the School to account and promote openness, accountability and transparency in relation to its decision to change the house names.

Is disclosure necessary?

53. '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.
54. The School suggests that it does not consider it is necessary to disclose the requested information in order to aid public debate. It is of the opinion that the significant media coverage and the information already available to the public is sufficient to further public debate.
55. The Commissioner considers the information already publicly available does go some way to meeting the legitimate interests identified. However, in this case the Commissioner accepts that disclosure would further public debate and give the public more insight into the issues and is therefore necessary to fully address and meet the legitimate interests identified. She does not consider there are any alternative measures which may make disclosure of the requested information unnecessary.

56. Despite the amount of information already in the public domain, as far as the Commissioner is aware, there is nothing available in the public domain which reveals the more detailed information being sought here that is contained in the email. The withheld email includes historical information about the former house names, the personal opinions of the ex-pupil, her experiences at the school, and information about the ex-pupil's family and family history.
57. The head teacher has highlighted the importance of this email to the School's decision. Therefore it is not just the theme but the specific contents of the email that are relevant.
58. The Commissioner is therefore satisfied in this case that there are no less intrusive means of achieving the legitimate aims identified.

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

59. It is necessary to balance the legitimate interests in disclosure of the withheld email against the data subject's (the ex-pupil'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.
60. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the need to protect the interests and fundamental freedoms of data subjects when they are children;
 - 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 to the disclosure; and
 - the reasonable expectations of the individual.
61. In the Commissioner's view, a key issue is whether the ex-pupil – a child - had a reasonable expectation that their email will not be disclosed. In the case of a child, it must be considered what the child might reasonably expect an authority to do with their personal data, in the context of their relationship with the authority. These expectations can

be shaped by factors such as an individual's general expectation of privacy, and the purpose for which they provided their personal data.

62. The Commissioner considers that when using 'legitimate interests' as a lawful basis for processing children's personal data, public authorities have a responsibility to protect them from risks that they may not fully appreciate and from consequences that they may not envisage. It is up to the School, therefore, not the child, to think about these issues and to identify appropriate safeguards. It should be able to demonstrate that it has sufficiently protected the rights and fundamental freedoms of the child and that it has prioritised their interests when this is needed.
63. Schools have a duty of care to pupils to protect their health, safety and welfare. In addition, the concept of the 'best interests of the child' comes from Article 3 of the United Nations Convention on the Rights of the Child. Although it is not specifically referenced in the UK GDPR it is something that the Commissioner takes into account when considering compliance, and public authorities should consider when making decisions about the processing of children's personal data. It states that:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."
64. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
65. There has already been a high level of interest on social media and in the press. The Commissioner considers that the individual or her family, would not have any expectation that her personal data, in this context, would be disclosed to the world at large. Disclosure could cause unnecessary distress to the individuals involved.
66. Given the current controversy over the way certain historical figures are recognised, the Commissioner considers that there is a strong likelihood that disclosure would make the ex-pupil and their family a target for online abuse. Given the ex-pupil's age, that is something that the Commissioner cannot afford to ignore.
67. The Commissioner has seen no evidence or indication that the individual concerned has specifically consented to the full contents of her email being disclosed to the world in response to the FOIA request or that she has deliberately made this data public. She considers that the email would have been sent to the head teacher with the reasonable expectation that its contents would remain confidential.

68. Based on the above factors, the Commissioner has determined that, there is insufficient legitimate interest to outweigh the ex-pupil's rights and freedoms.
69. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information (the full email) would not be lawful.
70. 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.

Procedural Matters – refusal notice

71. Section 17(7) of the FOIA states that when a public authority wishes to withhold information it must give the applicant a refusal notice which:
 - (a) *contain particulars of any procedure provided by the public authority for dealing with complaints about the handling of requests for information or state that the authority does not provide such a procedure, and*
 - (b) *contain particulars of the right conferred by section 50 [the right to complain to the Commissioner and to include the relevant contact details for the ICO].*
72. The Commissioner notes that the School's refusal notice dated 5 March 2021 did not contain the information set out above. The Commissioner therefore finds that the School did not comply with section 17(7) FOIA.
73. The Commissioner does not require any further steps to be taken, however, as once alerted to these failings by the complainant in his request for internal review, the School provided this information to the complainant on 9 March 2021.

Right of appeal

74. 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

75. 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.

76. 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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