

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 29 September 2022

Public Authority: Haberdashers' Aske's Federation Trust

Address: Haberdashers' Hatcham College
Pepys Road
London
SE14 5FS

Decision (including any steps ordered)

1. The complainant has requested information about the content of particular lessons. Haberdashers' Aske's Federation Trust ("the Trust") provided some information, denied holding some of the requested information and withheld the remainder, relying on section 41 (breach of confidence), section 43 (commercial interests) and section 40(2) of FOIA (third party personal data).
2. The Commissioner's decision is that the Trust was entitled to rely on section 41 of FOIA to withhold the information within the scope of element [1]. The Commissioner considers that the Trust was also entitled to rely on section 40(2) of FOIA to withhold the information within the scope of elements [5], [6] and [7]. Finally, the Commissioner is satisfied that the Trust does not hold any further information within the scope of element [3].
3. The Commissioner does not require any further steps.

Request and response

4. On 7 December 2021 the complainant requested information of the following description:

"[1] Please can I receive a copy of the lesson plan and accompanying slides and any other written or visual material used for the lesson on Consent that was presented to my daughter last term.

- “[2] Please may I also receive a copy of any other lesson plans, guides, slides, written or visual resources produced by the SoSE that were used in any other classes at Hatcham College since the start of this academic year.
- “[3] Please may I see all of the lesson plans and any other written or visual resources pertaining to Week 8 of the PSHE/RSE curriculum, which are detailed in this table below:
- “[4] Please may I see the PSHE/RSE curriculum lesson plans for the current term, up to Christmas.
- “[5] Please will the school inform me of which School of Sexuality Education staff members taught my daughter the lesson on Consent.
- “[6] Please will the school inform me which staff members of the School of Sexuality Education have visited Hatcham College in preparation for delivering services for the current academic year.
- “[7] Please will the school inform me which School of Sexuality Education staff members have visited the school to deliver lessons or presentations to any Hatcham College pupils so far this academic year.
- “[8] Please will the Head Teacher confirm who is responsible for the public presentation given to the Friends Forum by herself, [name] and [name]; specifically which staff member was responsible for [name]’s claim that the school had answered all parental questions.”
5. On 21 January 2022, the Trust responded. It provided some information within the scope of elements [3] and [4], but withheld the information within the scope of elements [1] and [2] relying on section 43 of FOIA in order to do so. In respect of elements [5], [6] and [7], it withheld the information as it was third party personal data. Finally, in respect of element [8], it provided the information.
6. The complainant requested an internal review on 28 January 2022. She challenged the Trust’s reliance on both section 43 and section 40. She also argued that the Trust held additional information within the scope of elements [3] and [8].
7. The Trust sent the outcome of its internal review on 4 March 2022. It upheld its original position in respect of elements [1] and [2], but also noted that section 41 would apply equally to this information. The Trust did not mention the remaining elements.

Scope of the case

8. The complainant contacted the Commissioner on 19 May 2022 to complain about the way her request for information had been handled.
9. Following correspondence with the complainant, the Commissioner understands the outstanding matters of dispute to be the withholding of the information the Trust holds within the scope of elements [1], [5], [6] and [7] of the request as well as whether any further information within the scope of element [3] is held by the Trust.

Reasons for decision

Section 41 – breach of confidence

10. Section 41(1) of the FOIA states that:

“Information is exempt information if—

- (a) it was obtained by the public authority from any other person (including another public authority), and
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.”

11. The Commissioner’s guidance states that, in order for this particular exemption to apply, four criteria must be met:

- the authority must have obtained the information from another person
- its disclosure must constitute a breach of confidence
- a legal person must be able to bring an action for the breach of confidence to court
- that court action must be likely to succeed

12. The information in question here is a set of powerpoint slides that were provided to the Trust by the School of Sexual Education (“SoSE”), they concern the topic of consent. The Trust explained that this was the only information it held within the scope of either elements [1] or [2].

13. The Commissioner considers that the first and third criteria are clearly met in this case. The request self-evidently anticipates the information having been provided to the Trust by another person (ie. SoSE) and SoSE is a legal person capable of bringing a legal action. For the purpose of this criteria it is immaterial whether SoSE would wish to bring such an action in the real world – it must merely be an entity theoretically capable of doing so.
14. Turning to the second criterion, in determining whether the conditions for a breach of confidence exist, the Commissioner applies the three-step test set out by Judge Megarry in *Coco v A N Clark (Engineers) Limited* [1968] FSR 415:
 - the information must have the necessary quality of confidence,
 - it must have been imparted in circumstances importing an obligation of confidence, and
 - there must have been an unauthorised use of the information to the detriment of the confider.
15. Information will have the necessary quality of confidence if it is not already in the public domain and it is not trivial. The Commissioner's guidance on this exemption states that:

“The information should be worthy of protection in the sense that someone has a genuine interest in the contents remaining confidential.

“It does not have to be highly sensitive, but nor should it be trivial. The preservation of confidences is recognised by the courts to be an important matter and one in which there is a strong public interest. This notion could be undermined if even trivial matters were covered.”¹
16. Having reviewed the withheld information, whilst the Commissioner recognises that the material draws from a variety of sources, it is still SoSE's intellectual property. It is not clear which material within the presentation has actually been created by SoSE, but as the Commissioner's guidance on intellectual property rights explains, the selection and collation of source material to create a new product, can in

¹ <https://ico.org.uk/media/for-organisations/documents/1432163/information-provided-in-confidence-section-41.pdf>

itself be capable of attracting intellectual property rights – especially if original content is mixed in.² Therefore, whilst the material in question is not necessarily particularly sensitive, it is certainly not trivial and SoSE certainly does not regard it as trivial.

17. Whilst some individual parts of the information may be replicated elsewhere in the public domain, the Commissioner is not aware that this work, in its entirety, can be found reproduced anywhere in the public domain. The Commissioner is therefore satisfied that the information in question has the necessary quality of confidence.
18. Next the Commissioner has looked at the second limb of Judge Megarry's test.
19. The Trust informed the Commissioner that it only held the information because of a specific set of circumstances:

“SoSE presented its materials to the College's students (and not to the public) during the Consent Lesson, for the sole purpose of delivering the RSE / PSHE Lessons and not otherwise. No hard or soft copies of materials used were provided to students or left with them following the presentation. SoSE did not share [the withheld information] with the Trust until the Trust asked SoSE to do so for its Consent Meeting with the Complainant to take place on 4 November 2021.”
20. The Trust explained that it only held the information in question because it had specifically sought it in order to allay concerns the complainant had raised, prior to making her request. The information had been provided for a specific, limited purpose and SoSE had asked that the information be deleted once the Trust had been able to meet with the complainant. Because the Trust had decided to retain the information whilst it dealt with an internal complaint from the complainant, it held it for the purposes of the FOIA at the point the request was made. Therefore, in the Trust's view, SoSE's confidence had not been breached at the point the request was made.
21. The Commissioner has been shown copies of emails exchanged between SoSE and the Trust where the conditions for providing the information were set out.

² <https://ico.org.uk/media/for-organisations/documents/2021/2619017/intellectual-property-rights-disclosures-under-foi.pdf>

22. It is clear from the correspondence that SoSE provided the information to the Trust for a specific, limited purpose. The Trust was only supposed to retain the information for a very short period of time, was not permitted to further distribute the information and was supposed to delete it immediately afterwards. The information was not provided to the Trust at the point that SoSE delivered the lesson in question.
23. In delivering his test, Judge Megarry expanded further on what he considered to be "circumstances importing an obligation of confidence." Where there was any doubt, Judge Megarry advocated that;

"...if the circumstances are such that any reasonable man standing in the shoes of the recipient of the information would have realised, that upon reasonable grounds the information was being given to him in confidence then this should suffice to impose upon him the equitable obligation of confidence."
24. Having viewed the email chains, the Commissioner is satisfied that, when SoSE actually provided the information to the Trust (as opposed to when it presented the material in the course of a lesson), it set explicit conditions of confidence which it should reasonably have expected the Trust to maintain. Any reasonable person, standing in the shoes of the Trust, should have realised that an obligation of confidence had been invoked. The second part of the test is thus met.
25. The final part of the test relies on a detriment, to the confider, resulting from disclosure.
26. Having established that the withheld information is the intellectual property of SoSE, the Commissioner must assess whether disclosure to the world at large would cause a commercial detriment to SoSE.
27. The Trust explained that:

"The harm that would be caused by disclosure under FOIA to the Complainant of the relevant information held which is responsive to this element of the Request (bearing in mind that this would also be disclosure to the world at large) would be to SoSE's commercial interests. In particular, the harm would be that disclosure would be likely to result in the SoSE's competitors having access to bespoke materials and using them for their own commercial gain, to the prejudice of SoSE...

"...The Trust, and other trusts, schools and other education institutions, pay SoSE on a commercial basis for the rights to use relevant materials / receive training and related services...the SoSE materials are essential to the delivery of the RSE / PSHE Lessons for which their customers pay them to deliver. The materials concerned

are specially developed and designed by SoSE (which involves investment of time and money by SoSE, including by the recruitment/retention of skilled staff) in order to provide SoSE with a distinct unique selling points(s) and market advantage over their competitors in an extremely competitive market for like materials/services, both in terms of time to market and quality of offering...

"By sharing the materials without charge and for unlimited use by competitors, SoSE would be likely to lose their competitor advantage of their investment, by competitors obtaining SoSE materials without waiting or paying for their design and development, and so without having to make an equivalent investment of funds and time to do so (giving them an unfair profit advantage over SoSE). The materials would then be likely to be used by competitors when competing for business against SoSE to unfairly replicate the SoSE materials and/or improve the quality of competitor's own offerings."

28. The Commissioner notes that the withheld information only constitutes part of the overall delivery of the lesson in question. SoSE's promotional material would indicate that a considerable portion of the value of each lesson comes from the manner in which it is delivered. Replicating the slides would not replicate the skills, experience and enthusiasm of SoSE's staff.
29. Nevertheless, the Commissioner still recognises that the slides do form part of the overall package and that SoSE will have spent time and resources compiling them. SoSE, like any other education provider, has a right to exploit its own intellectual property for commercial gain.
30. Making this information available to the world at large would take away SoSE's right to exploit its intellectual property. In a time of increasing pressure on school budgets, fewer schools are likely to pay SoSE to deliver the same lesson – even if that means that their students receive a lower quality product – where material is readily available for free. That in turn will impact on SoSE's revenue stream and its ability to fund its activities.
31. Given that resources are frequently shared between teachers, the Commissioner considers that, once the information was disclosed to the world at large (which is what FOIA requires), SoSE would find it difficult to enforce any remaining intellectual property rights. It would be difficult to establish the schools where the material was being used and, even if that could be established, SoSE is unlikely to have the financial resources to pursue the matter through the courts.

32. Taken together, the Commissioner is satisfied that all three steps of Judge Megarry's test are met. The information has the necessary quality of confidence, it was provided in circumstances importing a duty of confidence and breaching that confidence would cause detriment to SoSE. The Commissioner is therefore satisfied that SoSE would meet the conditions necessary to establish a confidence action in the event that the information were disclosed.
33. Having accepted in theory that the conditions for a breach of confidence action exist and that SoSE is a legal person capable of bringing such an action, the Commissioner must finally consider the fourth criterion: whether such an action would, in the real world, be likely to succeed.
34. As Lord Falconer (the promoter of FOIA as it was passing through Parliament) said during the debate on the legislation:

"the word 'actionable' does not mean arguable...It means something that would be upheld by the courts; for example, an action that is taken and won. Plainly, it would not be enough to say, 'I have an arguable breach of confidence claim at common law and, therefore, that is enough to prevent disclosure'. That is not the position. The word used in the Bill is 'actionable' which means that one can take action and win."
35. The Commissioner therefore considers that it is not sufficient to merely claim that a breach of confidence might be brought. In order to rely on this exemption, any action must be likely to succeed.
36. To determine whether an action would be likely to succeed, the Commissioner must assess whether the Trust might be able to put forward a public interest defence.
37. A public interest defence is not the same as the public interest test that would be applied in the case of a qualified exemption. The English courts have traditionally recognised a strong interest in preserving confidences and therefore there must be an even stronger public interest in disclosure in order to override the duty of confidence.
38. The Court of Appeal in *HRH Prince of Wales v Associated Newspapers Limited* [2008] Ch 57 set out its view on public interest considerations thus:

"Before the Human Rights Act came into force the circumstances in which the public interest and publication overrode a duty of confidence were very limited. The issue is whether exceptional circumstances justified disregarding the confidentiality that would otherwise prevail. Today the test is different. It is whether a fetter of

the right of freedom of expression is, in the particular circumstances, 'necessary in a democratic society'. It is a test of proportionality."

39. Having considered the arguments and the withheld information, the Commissioner is not satisfied that the Trust would be able to mount a viable public interest defence.
40. The Commissioner is aware that sex and relationship education is a topic that can provoke strong feelings on either side of the debate. What exactly should be taught to children and what level of maturity they must have reached before being taught it is something that is personal to each parent.
41. Having reviewed the withheld information in question, the Commissioner recognises that different parents will have their own views on whether they wish to receive the lesson. However, he does not consider that there is anything within the material that clearly mis-represents the law or is so obviously inappropriate as to justify over-riding the Trust's duty of confidence.
42. The Commissioner recognises that this is one of the few areas of the curriculum where parents have rights to decide what is, or is not, taught to their child. Those rights cannot be exercised in a meaningful way without parents being aware of the subject matter their children are likely to be taught.
43. However, it is equally clear that unrestricted disclosure is not necessary to provide parents with such reassurance. The Trust did, in its original response, disclose a number of lesson plans and lesson materials to the complainant (these appear to be materials the Trust had produced itself rather than being bought in from third party providers). These should go a considerable way to satisfying any interest in understanding what pupils are being taught.
44. The Trust also made arrangements for the complainant in this case to be shown a copy of the actual withheld information – albeit under restricted terms. This demonstrates that unrestricted disclosure is neither a proportionate nor a necessary means of achieving any legitimate interest in keeping parents informed.
45. Given that the specific circumstances of this case have demonstrated that it is possible to satisfy the rights of parents without breaching SoSE's confidence, the Commissioner is not satisfied that the Federation would have a viable public interest defence in the event that SoSE decided to bring an action for breach of confidence.
46. As the Commissioner is satisfied that a public interest defence would be unlikely to be viable, it follows that any action brought by SoSE would

be likely to succeed and therefore any breach would be an actionable breach. Section 41 of FOIA is thus engaged.

Element [3] – held/not held

47. 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.

48. 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 evidence and arguments. He will also consider the actions taken by the authority to check that the information is not held and any other reasons offered by the public authority to explain why the information is not held. Finally, he will consider any reason why it is inherently likely or unlikely that information is not held.

49. For clarity, the Commissioner is not expected to prove categorically whether the information is held, he is only required to make a judgement on whether the information is held on the civil standard of the balance of probabilities.

50. The complainant felt that it was suspicious that some of the lesson material for Years 11 and 12 was missing. These lessons (on "intersectionality" and "queer theory") were the ones she considered to be the most contentious.

51. The Trust argued that the lesson materials in question were not held because they had never been created. Although these lessons were on the original scheme of work for the term, a decision had been taken by the lead for Personal Health and Social Education (PHSE) that, due to the pressure of other work, the time that had been allocated for these lessons need to be allocated to other priorities instead. As such, the lessons had never been delivered and had not even been prepared. No time was available to reallocate this lesson elsewhere in the scheme of work.

52. The Trust provided a copy of an email from its PHSE lead who confirmed that the reason that no materials existed was because, before there had even been time to prepare for the lessons in question, they had been pulled from the schedule.

53. Whilst the PHSE lead noted that materials did exist from previous years, they were not delivered on the week in question and were considered unsuitable for future re-use more generally.
54. Given that the Trust has provided a plausible explanation, supported by evidence, explaining why the material in question never existed and therefore could not be held, the Commissioner is satisfied that, on the balance of probabilities, the Trust has provided all the information it holds within the scope of element [3].

Elements [5], [6] and [7] – third party personal data

55. 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.
56. 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 General Data Protection Regulation ('GDPR').
57. 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.
58. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".
59. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
60. 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.
61. 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.
62. Clearly the names of the individual SoSE representatives who attended the school would identify those representatives. Revealing the names

would also reveal their affiliation to SoSE and reveal something about their professional lives.

63. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that this information both relates to and identifies the SoSE representatives. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

Is there a lawful basis for disclosing the personal data?

64. 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.

65. The most relevant DP principle in this case is principle (a), which states that:

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

66. In the case of a 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.

67. 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.

68. 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"³.

³ 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:-

69. 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:-
- **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
70. 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

71. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
72. There is some dispute about the extent to which the information was actually in the public domain at the time of the request. The complainant provided screenshots demonstrating that SoSE previously published the names of all its representatives on its website – but no longer does.
73. The Commissioner could not establish the exact date on which this screenshot had been taken. The complainant said that it had been taken

"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".

"shortly after" the representatives in question had delivered the lesson – but it was not clear whether this was before the request had been made or responded to. The complainant also drew the Commissioner's attention to two instances of individuals whose personal websites highlighted a current association with SoSE.

74. Whilst the Commissioner has examined this material carefully, in his view it does not amount to the requested information being already in the public domain.
75. Firstly, given that there is some uncertainty about what information was actually on SoSE's website at the time of the request, the Commissioner considers that it is important to take a cautious approach and assume that, in the absence of definitive evidence, the information was not on the website at the time the request was refused.
76. Secondly, whilst there may be some information in the public domain indicating who SoSE's representatives are, the request seeks the names of the actual representatives who attended the Trust's premises. Nothing on any of the websites or screenshots identifies the particular individuals who delivered the lesson.
77. The Commissioner recognises that there is a legitimate interest in understanding which individuals are being given access to schools. Parents have a legitimate interest in ensuring that, whilst their children are at school, they are not going to come into contact with individuals who would pose a risk. There is a broader legitimate interest in ensuring that public authorities are being transparent and accountable.

Is disclosure necessary?

78. '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 to the world at large under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
79. The Commissioner is not satisfied that disclosure is necessary in this case. Firstly, as the individuals in question have already delivered the lesson, disclosing their names will not prevent that contact from taking place. If parents have concerns about the way the lessons were delivered, the Trust can raise the matter with SoSE directly or decline to invite SoSE representatives in future. Issues about suitability can also be raised with the Trust's governing body. This does not require the naming of individuals.

80. Secondly, the Trust already has a responsibility to ensure the safety of the children within its care. That would include confirming with SoSE whether any representatives have passed appropriate checks. Once again this is a less-intrusive process than disclosure to the world at large.
81. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, he has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
82. The Commissioner is thus satisfied that the Trust is entitled to rely on section 40(2) of FOIA to withhold this information.

Right of appeal

83. 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

84. 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.
85. 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

Roger Cawthorne
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