

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 July 2012

Public Authority: Foreign and Commonwealth Office
Address: King Charles Street
London
SW1A 2AH

Decision (including any steps ordered)

1. The complainant requested information about the children of Foreign and Commonwealth ('FCO') employees in relation to their private schooling and the associated costs. Part of his request was for the numbers of pupils attending named private schools whose fees were being paid for by the Foreign and Commonwealth Office, which was refused on the basis of the exemption in section 38(1)(b) (endangerment to safety). During the Commissioner's investigation the FCO also sought to rely on section 40(2) (personal information).
2. The Commissioner's decision is that neither exemption engaged.
3. The Commissioner requires the public authority to take the following steps to ensure compliance with the legislation.
 - Disclose the numbers of FCO's employees' children being paid for by the FCO at each of the named private schools in the 2010/11 financial year.
4. The public authority must take these steps within 35 calendar days of the date of this decision notice. Failure to comply may result in the Commissioner making written certification of this fact to the High Court pursuant to section 54 of the Act and may be dealt with as a contempt of court.

Request and response

5. On 24 June 2011 the complainant wrote to the Foreign and Commonwealth Office (the 'FCO') and requested the following information:
 - "1. *In the 2010/11 financial year how much money was spent on private school fees for the children of Foreign Office staff who were attending private schools in (i) the UK and (ii) outside the UK?*
 2. *What was the number of pupils paid for by this arrangement in relation to children privately educated in (i) the UK and (ii) outside the UK?*
 3. *How many pupils were paid for by the Foreign Office to attend each of the following schools: Eton, Winchester, St Pauls, Roedean, Wellington, Radley and Gordonstoun?"*
6. The FCO responded to parts 1 and 2 of the request on 9 August 2011, disclosing the relevant information. However, it refused to provide the information requested under part 3 on the basis of the exemption for Health and Safety (section 38(1)(b)), explaining that the public interest test it had carried out favoured withholding this part of the requested information.
7. On 31 August 2011 the complainant requested an internal review of the refusal of part 3 of his request, explaining that he had requested the same information from the FCO in 2009 and it had been disclosed to him. Following an internal review the FCO wrote to the complainant on 10 October 2011. It acknowledged that the FCO had previously disclosed this information to him in 2009, but explained that it had since changed its policy of releasing data in cases where relatively small numbers of individuals are involved and where, consequently, there is a greater risk of identifying individuals which would breach the DPA. The review upheld the FCO's decision to engage the Health and Safety exemption.

Scope of the case

8. The complainant contacted the Commissioner to complain about the way his request for information had been handled. He asked the Commissioner to consider that the withheld information had been provided to him two years previously, and to consider his disagreement with the contention that *"revealing the fact that a small number of pupils are the children of FCO staff would place them at any greater risk,*

especially given the number of pupils at each school and the age ranges”.

9. The Commissioner initially set out to determine whether the FCO had properly applied the exemption for Health and Safety to part 3 of the request; however, as the FCO also applied section 40(2) during the Commissioner’s investigation, he has first considered this exemption.

Reasons for decision

10. The FCO has provided the Commissioner with the withheld information and has explained its reasons for applying both exemptions and for claiming that the public interest in maintaining the exemptions outweighs that in disclosure, given all the circumstances of this case.

Section 40(2) - exemption for personal information

11. Section 40(2) provides that:

“Any information to which a request for information relates is also exempt information if-

- (a) it constitutes personal data which do not fall within subsection (1), and*
- (b) either the first or the second condition below is satisfied”.*

12. The exemption provided by section 40(2) is an absolute exemption in combination with section 40(3)(a)(i) or 40(3)(b). This is where disclosure of information which falls under the definition of ‘personal data’ contained in section 1(1) of the Data Protection Act 1998 (the “DPA”) would breach any of the data protection principles.
13. In order to decide whether or not this exemption is engaged, the Commissioner shall first consider whether the requested information is the personal data of one or more third parties and whether the release of this information would be fair and lawful.

Is the information personal data?

14. Section 1(1) of the DPA provides two criteria that must be fulfilled for information to constitute ‘personal data’. The information must relate to an individual, and that individual must be identifiable either from that information directly, or from that information combined with other information available to the holder of that information.

15. The Commissioner has viewed the withheld information. It consists of the numbers of FCO's employees' children at each of the schools named in the request whose fees are being paid for by the FCO .
16. The question in this case is whether disclosure of the requested information, either on its own or in conjunction with other available information, would itself give rise to the identification of any of the children concerned. If it would not, then following the rationale of the High Court in the case of *Department of Health v Information Commissioner*¹, disclosure will not amount to a disclosure of personal data for the purposes of the FOIA.
17. One of the principal reasons for the public authority's withholding of the information is the low numbers of pupils concerned which it argued could, when combined with information already in the public domain, lead to individual pupils (or some of them) being identified. The FCO contended that disclosure of the withheld information would therefore amount to the disclosure of personal data and that the information in question would be the personal data of the pupils and could also amount to the personal data of their parents or guardians.
18. The FCO also argued that, given that parents also contributed to the costs of their children's schooling, and that children have to meet the entrance criteria of the school, the *choice* of school constitutes the personal data of both the parents and the children.
19. In respect of this request, the Commissioner fails to see how confirming the numbers of FCO's employees' children receiving schooling paid for by the FCO could increase the likelihood of their identification. The FCO has argued that information on children, including those of FCO staff, is publically accessible through school and social networking sites and may well be identifiable from travel bookings. Added to this is the information about FCO staff available on staff lists via FCO local embassy websites and country diplomatic lists. It contended that providing school details could enable specific schools to be targeted with the intention of identifying the children of diplomats.
20. The FCO has argued that information in the public domain as outlined above could be combined with the withheld information to identify the relevant pupils. The Commissioner does not accept that the additional

¹ *Department of Health (DoH) –v- Information Commissioner CO/13544/2009*

disclosure of the withheld information (the numbers of the relevant pupils at each school) would lead to that outcome.

21. The Commissioner has therefore concluded that the withheld information is not personal data. Accordingly he finds that the exemption under section 40(2) is not engaged.

Section 38(1)(b) - endangering health and safety

22. The Commissioner considered whether the withheld information is exempt from disclosure under section 38.
23. This exemption allows public authorities not to disclose information if such disclosure would endanger *any* individual (including the applicant, the supplier of the information or anyone else). The exemption does not necessarily deal with what are commonly thought of as health and safety matters such as the process of ascertaining the cause of an accident under health and safety legislation. Section 38(1) provides that information is exempt if its disclosure under the FOIA would, or would be likely to:
 - endanger the physical or mental health of any individual, or
 - endanger the safety of any individual.

In this case the FCO has relied upon section 38(1)(b), the endangerment of the safety of an individual or individuals.

24. The Commissioner considers that the term "endanger" under section 38 should be interpreted in much the same way as the term "prejudice" in other FOIA exemptions. Therefore, in order to engage this exemption, the public authority must demonstrate that disclosure of the information in question would or would be likely to have a detrimental effect upon the physical or mental health of any individual, or the safety of any individual, that is more than trivial or insignificant; that is, the chance of prejudice being suffered should be more than a hypothetical possibility; there must be a real and significant risk.
25. The FCO confirmed that it was relying on the lower threshold contained in the exemption, that disclosure 'would be likely to' endanger the safety of the children of FCO staff at the named schools when it is combined with information already in the public domain, which could lead to children or the schools being targeted.
26. The Commissioner recognises that in previous years the FCO has released information of the type requested here and has not sought to apply exemptions. The absence of evidence of any harm actually

occurring as a result of a past disclosure of such information is a significant factor in the Commissioner's decision.

27. In this case the Commissioner's view is that the FCO has not provided cogent evidence or arguments to demonstrate that section 38(1)(b) is engaged. The Commissioner is not convinced that disclosure of the numbers of pupils at the named schools whose fees are paid for by the FCO would be likely to endanger the safety of those pupils, specifically because he is unpersuaded that any such pupil could be identified by disclosure of that information.
28. For completeness, the Commissioner would add that he does not accept that all the pupils at these schools would in any way be put at risk by the disclosure of the withheld information.
29. He has consequently determined that the exemption under section 38(1) is not engaged. The numbers of FCO's employees' children being paid for by the FCO during in the 2010/11 financial year should therefore be disclosed.

Other matters

30. Part VI of the section 45 Code of Practice makes it desirable practice that a public authority should have a procedure in place for dealing with complaints about its handling of requests for information, and that the procedure should encourage a prompt determination of the complaint. As he has made clear in his *'Good Practice Guidance No 5'*, the Commissioner considers that these internal reviews should be completed as promptly as possible. While no explicit timescale is laid down by the FOIA, the Commissioner has decided that a reasonable time for completing an internal review is 20 working days from the date of the request for review. In exceptional circumstances it may be reasonable to take longer but in no case should the time taken exceed 40 working days. The Commissioner is concerned that in this case, it took over 29 working days for an internal review to be completed, despite the publication of his guidance on the matter.

Right of appeal

31. 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

32. 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.
33. 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

Graham Smith
Deputy Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF