

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 24 April 2013

**Public Authority:** Department for Education  
**Address:** Sanctuary Buildings  
Great Smith Street  
London  
SW1P 3BT

#### Decision (including any steps ordered)

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1. The complainant has requested information relating to the employment of a particular academy broker. The Department for Education (DfE) provided some information in response but refused one part of the request under section 36 (prejudice to the effective conduct of public affairs) and another part under sections 40(2) (third party personal data) and 43(2) (commercial interests) of FOIA. The section 36 item has been disposed of during the course of the Commissioner's investigation and so it has been left for him to consider the information withheld under sections 40(2) and 43(2). This comprises the payment rate of the academy broker. The Commissioner has decided that the DfE correctly applied section 40(2) of FOIA to this information and therefore the DfE is not required to take any steps as a result of this notice.

#### Request and response

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2. On 19 July 2012 the complainant wrote to the DfE and requested information in the following terms:

*Could you list the schools and local authorities that have been advised by [a named person] in her role as an academy broker. Could you also supply details of her contract of employment. On what basis is she employed; how much is she paid; what expenses does she get and is she directly employed by the DfE or is she on a contract."*

3. The DfE responded on 13 August 2012. It provided a list of the local authorities in which the academy broker had been deployed and a redacted copy of the contract for the supply of educational advice. The

DfE, however, refused the disclosure of the list of schools advised by the academy broker as well as the amount the academy broker was paid and the expenses she received. These categories of information were withheld under section 36(2)(c) and section 43(2) of FOIA respectively.

4. The complainant wrote to the DfE again on 22 August 2012 and challenged its decision to withhold information covered by the request, namely the list of schools and payment details. The DfE subsequently carried out an internal review, the findings of which were relayed to the complainant on 12 September 2012. This upheld the DfE's original position. It further explained that the release of payment details would involve the release of personal data about the academy broker, which in addition to section 43(2) of FOIA would also be exempt information under section 40(2).

### **Scope of the case**

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5. The complainant contacted the Commissioner on 12 October 2012 to complain about the DfE's decision to withhold information in response to her request.
6. During the course of the Commissioner's investigation, the DfE provided some clarification in respect of the information to which section 36 of FOIA had been applied. In light of this, the complainant has agreed that the Commissioner is not required to consider the DfE's application of section 36 of FOIA. The Commissioner has therefore only been required to decide whether the DfE correctly withheld the payment rate of the academy broker, which has been refused under sections 40(2) and 43(2) of FOIA. This issue is considered further in the body of this notice.

### **Reasons for decision**

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7. The Commissioner has first considered the DfE's application of section 40(2) of FOIA to the requested information.

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

8. Section 40(2) of FOIA provides an exemption to the right to access recorded information where it is the personal data of any third party. For a public authority to rely on section 40(2) of FOIA it must be satisfied that:
  - the requested information represents the personal data of a third party; and if so

- disclosure of this information would contravene a data protection principle contained in the Data Protection Act 1998 (DPA).
9. The Commissioner notes that the complainant has not disputed that the requested information is the personal data of the academy broker. Similarly, the Commissioner accepts that it is personal data because it is financial information clearly linked to an individual – the academy broker – which tells us something about that individual. The Commissioner has therefore gone on to consider whether disclosure would breach a data protection principle.
10. The relevant principle for the purposes of the request is the first. This requires the fair and lawful processing of personal data. The Commissioner's considerations here focus on the question of whether disclosure could reasonably be deemed fair in the circumstances.

*Fairness and the first data protection principle*

11. The application of the first data protection principle in respect of fairness involves striking a balance between competing interests – on the one hand, the interest that seeks to protect the right of a data subject to privacy and, on the other, the interest advocating transparency and accountability. The Commissioner has found it useful to consider the factors set out below for guidance on what is the correct balance between these interests:
- The data subject's reasonable expectations of what would happen to their personal data.
  - The consequences of disclosure.
  - The relationship between a data subject's rights and freedoms and the public's legitimate interest in disclosure.
12. It is a widely accepted principle that an individual should have the right to some degree of privacy. Yet, as demonstrated by the Information Tribunal in *The Corporate Office of the House of Commons v The Information Commissioner and Norman Baker MP* (EA/2006/0015 & 0016)<sup>1</sup>, where a data subject carries out a public function they must have the expectation that information relating to their position will be subject to greater scrutiny that would be the case in respect of their

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<sup>1</sup> <http://www.informationtribunal.gov.uk/DBFiles/Decision/i83/HoC.pdf>

private lives. Furthermore, there has been an increasing move towards transparency of the pay received by persons acting in an official capacity. This has meant that most officials now working for a public authority will expect some level of disclosure, typically a salary band if not the exact salary amount received. In this light, the onus is on a public authority to justify why it is inappropriate to disclose payment information.

13. The DfE has explained that the decision to refuse the release of the academy broker's daily payment rate, whether the specific figure or as part of payment band, must be seen in the context of her employment with the department. There was an open, national advert to appoint a number of people for fixed-term contracts. At the time the academy broker was recruited there was no standard daily rate or hours to be worked published. The daily fee received by an academy broker was therefore negotiated on an individual basis, with variances in pay a reflection of the relative experience of a broker. As such, the academy brokers do not sit within allocated pay grades like many other public sector officials. In effect, academy brokers operate as consultants – being employed through a contract with either their own business or an interim management company to supply education advice.
14. For completeness, the DfE has contacted the academy broker to seek her views about disclosure. Although this was not done within the statutory time for compliance, the Commissioner has taken the comments on consent as representative of the data subject's views that she held at the time the request was made. In response, the academy broker has explicitly refused her consent, albeit focusing on the commercial implications of disclosure. In relation to section 40(2), the Commissioner is satisfied that this refusal would strengthen the academy broker's reasonable expectations that her personal data would not be disclosed.
15. Nevertheless, while an expression of a refusal to consent will be borne in mind by the Commissioner, it is not absolutely determinative on the question of fairness. In the Commissioner's view, the fact that consent has not been given must be placed against the important role that brokers play in the academy programme and the significant level of public funds received as part of their role. These factors will further support the case that the academy broker should have expected her position to be subject to considerable public interest, which will naturally include the amounts being paid out from the public purse.
16. The Commissioner has next considered the consequences of disclosure. He recognises that the academy broker's pay rate constitutes information about her work life. As mentioned above, this would normally have the effect that any expectation to privacy is likely to be

lower than if the information related to the academy broker's private life. However, the Commissioner is also conscious that a person's income relates to their private life as well as their work life and is more private than, say, details of actions taken purely in a professional capacity. On this basis, the Commissioner considers that disclosure of the information would cause a significant level of distress to the data subject, as well as being potentially damaging to their commercial interests.

17. The Commissioner has therefore had to judge whether the legitimate interest in disclosure is sufficiently strong to countervail the distress and damage that could be caused to the data subject and her general right to privacy. In the Commissioner's view, it is not.
18. The Commissioner considers that a distinction should initially be drawn between the payments actually received by the academy broker and her daily pay rate. In his decision involving the Department for Culture, Media and Sport (FS50182413, 23 March 2009)<sup>2</sup>, the Commissioner accepted that the gross payments made by way of fees to consultants should be disclosed; being instructed by his view that the release of the information would not "reveal the actual financial circumstances of the individuals" (paragraph 27). In contrast, the complainant here is not asking for the overall fees received by an academy broker, or any agency representing an academy broker, but is seeking a specific breakdown of an academy broker's financial arrangements. The Commissioner considers that the level of this intrusion would make it unfair for the purposes of the first data protection principle. In forming this view, the Commissioner has also borne in mind the information that was already available in the public domain at the time of the request.
19. In January 2012, Chief Secretary Danny Alexander announced that the Government would hold a review into the tax arrangements of public sector employees. The review requested information from central government departments and their arm's length bodies in relation to all individuals engaged as off payroll as of 31 January 2012, where the cost to the department is in excess of £58,200 per annum (the Senior Civil Service minimum). The results of this review were published on 23 May 2012<sup>3</sup>.

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<sup>2</sup> [http://www.ico.org.uk/~media/documents/decisionnotices/2009/FS\\_50182413.ashx](http://www.ico.org.uk/~media/documents/decisionnotices/2009/FS_50182413.ashx)

<sup>3</sup> [http://www.hm-treasury.gov.uk/tax\\_pay\\_appointees\\_review.htm](http://www.hm-treasury.gov.uk/tax_pay_appointees_review.htm)

20. The data produced in relation to the DfE was made available in a spreadsheet<sup>4</sup> that, among others, included the following categories of information:
- Job title
  - Contractual Chain – ie type of organisation that payments are being made to.
  - Name of company, business or other entity to which payments are made.
  - Engagement length
  - Total cost of engaging the individual, within a range (excluding VAT). This included an upper bound, lower bound and payment method (ie daily, weekly, monthly, yearly)
21. The DfE has confirmed that the spreadsheet covered its education advisers, albeit in an anonymised form. Payment rates for the education advisers paid on a daily rate, which encompasses the academy broker in question, were broken down into bands of £99, ranging from £300 – 99 to £1,200 – 1299.
22. The Commissioner recognises that the spreadsheet will not allow the complainant to link the academy broker with her particular payment rate, meaning that she is no closer to knowing the actual cost to the public purse of employing the academy broker. However, the Commissioner also considers that the wider legitimate interest lies in knowing the extent of the engagement of off payroll contracts and the burden this has placed on the public finances. In this context, the Commissioner considers that the information in the public domain adequately satisfies that interest.
23. Placing this factor alongside the level of intrusion that would result from the release of the information, the Commissioner has decided that disclosure would be unfair to the data subject and thus could not be accommodated within the first data protection principle. The information is therefore exempt information for the purposes of section 40(2) of FOIA.

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<sup>4</sup><http://media.education.gov.uk/assets/files/xls/t/tax%20arrangements%20publication%2023%20may%202012.xls>

24. As the Commissioner has found that section 40(2) of FOIA is engaged, he has not been required to go on to consider the DfE's application of section 43(2) of FOIA to the same information.

## Right of appeal

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25. 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](mailto:informationtribunal@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm](http://www.justice.gov.uk/guidance/courts-and-tribunals/tribunals/information-rights/index.htm)

26. 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.
27. 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 .....**

**Rachael Cragg  
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