

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 November 2013

Public Authority: Her Majesty's Chief Inspector for Education and Training in Wales (Estyn)

Address: Anchor Court
Keen Road
Cardiff
CF24 5JW

Decision (including any steps ordered)

1. The complainant requested information about an internal investigation following an inspection at a particular school. Estyn initially claimed that the information was exempt under sections 40 and 36. At the time of the internal review, Estyn maintained reliance on sections 40 and 36 and introduced reliance on sections 21 and 42. The Commissioner has investigated and finds that the exemption that should have been cited was section 40(5) and that Estyn should have neither confirmed nor denied whether it held the requested information. He requires no steps to be taken.

Request and response

2. On 11 January 2013, the complainant wrote to Estyn and requested information in the following terms:

"We would appreciate being fully informed of the nature and scope of the investigation and would request, under the FOIA, sight of all documents pertaining to the internal investigation as it affects the school – how it started, who is involved, the current stage of the investigation and, if it has been concluded, the results. We would also request under the FOIA copies of all emails, memoranda, letters and notes passed between yourself [the Chief Inspector of Education and Training in Wales], [names of three individuals redacted] and anyone else involved in the post-inspection investigation".

3. On 8 February 2013 Estyn responded stating it was refusing the request under sections 40 and 36 of the FOIA.
4. On 8 March 2013 the complainant wrote to Estyn expressing dissatisfaction with its refusal to disclose the information requested.
5. Estyn responded on 3 April 2013 and stated that "The reasons for not disclosing this information as outlined in the investigating officer's letter to you remain. It is therefore not possible for me to disclose this information to you."
6. Following the complaint to the Commissioner, Estyn carried out a formal internal review of its handling of the request. It provided the outcome of its internal review on 12 July 2013 and maintained reliance on sections 40 and 36 and stated it was also relying on sections 21 and 42 of the FOIA.

Scope of the case

7. The complainant is acting on behalf of the school at which the inspection referred to in the request was carried out. He contacted the Commissioner on 15 April 2013 to complain about the way his request for information had been handled. He asked the Commissioner to consider whether information relating to the school inspection, including the final evidence base and a log of who worked on the inspection report could be disclosed to the Headteacher of the school in her capacity as a member of the inspection team.
8. A number of exchanges of correspondence have taken place between the school and Estyn regarding the issue of the inspection at the school in question, including requests for information about the inspection, which Estyn appear to have handled as normal course of business correspondence.
9. The Commissioner explained to the complainant that he can only consider the compliance of a public authority with regard to a specific request for information. This is because the obligation is to provide information after a request had been received to that request. As such, the Commissioner confirmed that he considered each request on its own merits. In light of the fact that the FOIA request to Estyn of 11 January 2013 related to an internal investigation, the Commissioner advised that he would only be unable to consider matters associated with requests for information relating to the school inspection, ie the evidence base and log. He also confirmed that as information disclosed under FOIA is essentially disclosed into the public domain he would be unable to

consider whether any information should be disclosed to the Headteacher only.

10. In view of the above, the Commissioner's investigation is to consider Estyn's handling of the request for information 11 January 2013, as detailed in paragraph 2 above.

Reasons for decision

11. The Commissioner's duty is to decide whether a request for information made to a public authority has been dealt with in accordance with the requirements of Part 1 of the FOIA. In considering such matters, the Commissioner is mindful that whilst an individual may be aware that information does or does not exist because of their involvement in events, it does not follow that the general public is also aware of the existence of that information.
12. In considering whether the exemptions are valid in this case, the Commissioner has taken into account that the FOIA is designed to be applicant blind and that disclosure should be considered in its widest sense, which is to the public at large. If information were to be disclosed it would, in principle, be available to any member of the public.
13. Estyn did not apply section 40(5)(b)(i) in this case, however, it did rely on the fact that it considered the information to be the personal data of third parties as a reason not to disclose it. The Commissioner has decided that citing section 40(5) was in fact the correct course for the public authority to have taken, for the following reasons:

Section 40(5)

14. Section 40(5) provides an exemption from the duty to confirm or deny where to do so would involve the disclosure of the personal data of any individual aside from the requester and where the disclosure of that personal data would breach any of the data protection principles contained within the Data Protection Act 1998 ('the DPA'). The Commissioner will not proactively seek to consider exemptions in all cases before him, but in cases where personal data is involved the Commissioner believes he has a duty to consider the rights of data subjects. These rights, set out in the DPA, are closely linked to article 8 of the Human Rights Act and the Commissioner would be in breach of his obligations under the Human Rights Act if he ordered disclosure of information or confirmation/denial as to whether information is held without having considered these rights, even if the public authority has not cited the specific exemption.

15. Generally, the provisions of section 40(1) to (4) exempt 'personal data' from disclosure under the FOIA if to do so would breach the data protection principles. In relation to a request which constitutes the personal data of individual(s) other than the applicant, section 40(5)(b)(i) further excludes a public authority from confirming or denying whether it holds information if to do so would itself contravene any of the data protection principles. Section 40(5) is a class-based exemption; if the confirmation or denial in question has the effect described in section 40(5)(b)(i), the exemption is engaged. Consideration of this exemption is a two-stage process: first, confirmation or denial in response to the request must disclose personal data; and secondly, this disclosure must be in breach of at least one of the data protection principles.

16. The DPA defines personal information as:

'...data which relate to a living individual who can be identified

- a) from those data, or
- b) from those data and other information which is in the possession of, or is likely to come into the possession of, the data controller,

and includes any expression of opinion about the individual and any indication of the intention of the data controller or any other person in respect of the individual'.

17. The Commissioner is of the view that any information which may or may not be held by Estyn, as a result of an internal investigation which may or may not have been carried out into an inspection carried out at a particular school, would constitute the personal data of the individuals involved in any internal investigation.

18. The Commissioner must therefore decide whether or not Estyn is excluded from the duty to confirm or deny that it holds the requested information (the duty imposed by section 1(1)(a) of the FOIA).

19. In line with the provisions of section 40(5)(b)(i), the Commissioner has first considered whether or not confirming or denying it holds the requested information would contravene any of the data protection principles.

Would complying with section 1(1)(a) contravene the first data protection principle?

20. The first data protection principle states in part; 'Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless at least one of the conditions in Schedule 2 is met...'

21. In considering whether or not confirming or denying whether the requested information was held would be fair, the Commissioner took into account what might be the reasonable expectations of any relevant data subjects who would be identifiable from any information which may be held, whether it would cause damage and distress to any of the relevant data subjects and the legitimate interests of the public at large.
22. Without disclosing any more detail than is necessary in order not to defeat the intention of section 40(5), the Commissioner is satisfied that in the context and background of this request, any relevant data subjects would have had a reasonable expectation of privacy and would not expect Estyn to confirm or deny if this information was held. The Commissioner also considers that confirming or denying whether the requested information was held would be unwarranted by reason of prejudice to the rights and freedoms of any relevant data subjects. The Commissioner has provided further detail of his considerations in a confidential annex attached to this notice. This will be provided to Estyn, but not for obvious reasons to the complainant.
23. The Commissioner does accept that the public has a legitimate interest in knowing whether any internal investigations conducted by public authorities are undertaken appropriately.
24. Taking into account all the circumstances of this case, the Commissioner finds that confirmation or denial would constitute disclosure of personal data of an individual(s) other than the complainant. He also considers that confirming or denying whether the requested information is held would breach the first data protection principle. In conclusion, therefore, the Commissioner is satisfied that the exemption provided by section 40(5) of the FOIA is engaged and Estyn should have neither confirmed nor denied whether the requested information was held.

Right of appeal

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

Website: 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

Anne Jones
Assistant Commissioner
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF