

## **Freedom of Information Act 2000 (FOIA)**

### **Decision notice**

**Date:** 7 September 2015

**Public Authority:** Department for Education (DfE)

**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 referrals of specific teachers to the National College for Teaching and Leadership (NCTL). Initially, the DfE refused the requests under section 40(2) and 40(5) of the FOIA.
2. The Commissioner decided to consider the application of section 40(5)(b)(i) of the FOIA to both requests, as he considered this was the most appropriate exemption to cite to such circumstances. The Commissioner's overall decision is that section 40(5)(b)(i) of the FOIA applies to both requests and therefore the DfE was not required to confirm or deny whether the requested information is held.
3. The Commissioner requires no further action to be taken.

#### **Request and response**

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4. On 10 February 2015, the complainant wrote to the DfE and requested information in the following terms:

"Could I please have the reasons why case [case reference and name of individual redacted] was stopped in October 2013.

And the list of reasons of which she was reported to yourselves and if proceeded would have been the basis of the case against her."

5. On 12 February 2015, the complainant also requested the following information:

"Would it be possible if this also could supply a list of anybody else reported to yourself from, and the reasons for reporting, January 2012 to the present day

Broom Cottages Pupil Referral Unit  
Broom Road  
Ferryhill  
Co Durham DL17 8AN"

6. The DfE responded on 6 March 2015. With regards to the complainant's first request the DfE stated that the requested information is exempt from disclosure under section 40(2) of the FOIA. In relation to the complainant's second request the DfE confirmed that it refuses to confirm or deny whether it holds information of the description specified in this request by virtue of section 40(5) of the FOIA.
7. The complainant requested an internal review on 6 March 2015.
8. The DfE carried out an internal review on 25 March 2015 and notified the complainant of its findings. It confirmed that it remained of the opinion that sections 40(2) and 40(5) of the FOIA applied to the complainant's request. It also stated that it now wished to rely on a further exemption; section 38 of the FOIA.

### **Scope of the case**

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9. The complainant contacted the Commissioner on 30 March 2015 to complain about the way his request for information had been handled. He stated that he does not agree with the DfE's application of the exemptions cited and is concerned that Durham County Council has shared personal information about him with the DfE without his consent.
10. With regards to the complainant's concerns regarding the potential sharing of information between Durham County Council and the DfE, these issues have already been considered under the Data Protection Act under case reference RFA0576874.
11. This notice will only address the information requests made under the FOIA on 10 and 12 February 2015. The Commissioner has decided that the most appropriate exemption to be considered for both requests is section 40(5) of the FOIA. Section 40(5) of the FOIA was applied by the DfE to the second request but not the first.

12. As the Commissioner is also the regulator of the Data Protection Act he is of the view that he is permitted to consider section 40 and its relevant subsections on behalf of a public authority if the need arises.

## **Reasons for decision**

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13. Under section 1(1)(a) of the FOIA, a public authority is obliged to advise an applicant whether or not it holds the requested information. This is known as the "*duty to confirm or deny*". However, the duty to confirm or deny does not always apply and authorities may refuse to confirm or deny through reliance on certain exemptions under the FOIA.

## **Section 40 – personal information**

14. Generally, the provisions in section 40 subsections 1 to 4 FOIA exempt personal data from disclosure. Section 40(5) of FOIA states that the duty to confirm or deny whether information is held does not arise if providing the public with that confirmation or denial would contravene any of the data protection principles set out in the Data Protection Act 1988 (the 'DPA').
15. In this case, the DfE considers section 40(5) of the FOIA applies. It has argued that confirming whether or not it holds the requested information would breach the data protection rights of the individual named in the first request and any individuals that may or may not be caught by the second request, as it would reveal under FOIA whether or not they had been the subject of a referral to the NCTL. The Commissioner considers that such an argument is relevant to the exemption contained at section 40(5)(b)(i) of the FOIA.
16. The consideration of section 40(5) involves two steps: firstly, whether providing the confirmation or denial would involve the disclosure of personal data, and secondly, whether disclosure of that personal data would be in breach of any of the data protection principles.

## ***Would confirmation or denial disclose personal data?***

17. The definition of personal data is given in section 1(1) of the DPA:

*"personal data' means data which relate to a living individual who can be identified:*

*(a) from those data, or*

*(b) from those data and any other information which is in the possession of, or is likely to come into the possession of, the data controller".*

18. The Commissioner considers that the way in which the requests are worded clearly indicates that the complainant is seeking information which can be linked with one named individual and any other individuals which may or may not be caught by the second request.
19. As the complainant has requested information specifically about one named individual and potentially any number of others by their nature the requests identify those individuals and that information, if held, would constitute their personal data. Confirmation or denial as to whether or not the named individual and any others have been subject to a referral to the NCTL would reveal something of a personal nature about those individuals and would therefore constitute their personal data.

***Would disclosure breach any of the data protection principles?***

20. The DfE confirmed that it considered confirming or denying whether it holds the requested information would breach the first data protection principle. It argued that seeking to find out whether or not certain individuals have or have not been referred to the NCTL would be a breach of their rights to privacy.
21. When considering the first data protection principle the Commissioner will generally look to balance the reasonable expectations of the data subject(s) with the consequences of compliance with the request, and general principles of accountability and transparency.
22. The first data protection principle requires that personal data is processed fairly and lawfully and that one of the conditions in schedule 2 of the DPA is met in order to disclose personal data.
23. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
  - the individual's or individuals' reasonable expectations of what would happen to their information;
  - the consequences of disclosure (if it would cause any unnecessary or unjustified damage or distress to the individual or individuals concerned); and
  - the balance between the rights and freedoms of the data subject(s) and the legitimate interests of the public.
24. The DfE explained how generally referrals to NCTL are considered and at which point, if any, any information about those individuals referred is released into the public domain. It advised that if a referral for possible

misconduct is received there are three stages which are considered before the hearing stage. At each stage of the process the case may be discontinued due to various reasons – for example no jurisdiction to consider the complaint, insufficient evidence or not meeting the criteria for prohibition. Where a case is discontinued both the teacher referred and the referrer are informed but no information is made available to the public and no other parties are informed.

25. The DfE explained further that if a case proceeds to a hearing a public notice is published on the gov.uk website one week before the hearing date. This generally provides the name of the teacher, the geographic area in which they taught and the date of the hearing but no other details. This notice is published because the Teachers' Disciplinary (England) Regulations 2012 (the regulations) require all professional conduct panel hearings to take place in public. If the panel makes a finding of professional misconduct, conduct that may bring the profession into disrepute, or conviction of a relevant offence, the Secretary of State is required to decide whether to prohibit the teacher. The regulations require the publication of all decisions made by the Secretary of State following the determination of a professional conduct panel. These decisions are then published on gov.uk approximately two weeks after the end of the hearing. If the professional conduct panel does not find the case against the teacher proved, the regulations require the Secretary of State to publish a statement to that effect if the teacher requests such publication.
26. The DfE confirmed again that the NCTL does not publish any information about an individual case other than that required by the regulations as outlined above.
27. The DfE confirmed that teachers quite clearly have the expectation that if a referral to the NCTL is made that it will not be published or released into the public domain unless the matter proceeds to a full conduct panel hearing. And then, if a statement is released, this is done so in accordance with the regulations described above. Up until this point in the process teachers expect privacy and for the referral to be treated in a confidential manner only being communicated to those party to the referral.
28. The Commissioner has considered the DfE arguments and he is satisfied that if recorded information is held falling within the scope of the requests (and he is making no statement if it is or not) the data subjects concerned would hold the expectation that the referral would remain private and confidential and details would *only* be released in accordance with the regulations described above for this specific purpose. The data subjects would hold no expectation that this sort of information could be disclosed under the FOIA.

29. Referring to the second bullet point outlined in paragraph 24 above, the DfE stated that disclosure of this type of information in general would be deeply distressing on those concerned and would potentially damage their future careers. It reiterated again that there is a formal procedure in place to deal with the full range of allegations made against teachers, as already explained above and clear guidance on if and when information should be made public.
30. The Commissioner agrees with the DfE that disclosure of this type of information in general under the FOIA would cause those concerned considerable distress and upset. It could also damage their professional reputation and future careers. If information is published by NCTL this is only when a referral proceeds to a conduct panel hearing and the matter is concluded this way. The Commissioner considers such publications are for a specific purpose and take place in a controlled environment. Disclosure under the FOIA is essentially disclosure to the world at large and once the information is released in this way there is little control over how it is used and for how long. Such consequences would again cause any teacher referred to the NCTL distress and personal damage and would be unfair and in clear breach of the first data protection principle. This would be even more so in cases where malicious and unfounded allegations are raised against teachers.
31. Considering the third bullet point outlined in paragraph 24 above, both the DfE and the Commissioner accepts there is a clear legitimate public interest in the professional conduct of teachers, particularly in those cases where allegations of misconduct have been made. However, it is Commissioner's view that any legitimate public interest in this sort of information is already met by the regulations described in paragraph 26 above. He considers there is already a clear and firm formal procedure in place for the consideration of such referrals and clear guidelines on the publication of any information and at what stage. Accountability and transparency are already met by the guidelines in place under these regulations.
32. Any further legitimate public interest in this type of information is therefore limited and must be weighed up against the rights and freedoms of the teachers that are referred and any unwarranted intrusion and prejudice to their rights to privacy. As he has already confirmed above, the Commissioner considers disclosure of this type of information in general under the FOIA would cause considerable distress and personal damage to those involved and, considering the fact that there are already clear guidelines in place governing when information should be published and at what stage under the regulations, any further public interest in disclosure is outweighed by these factors.

***Conclusion***

33. The Commissioner considers the information requested, if held, constitutes the personal data of the named individuals and any other individual that may or may not be caught by the complainant's second request. He finds that if held it would be unfair to disclose it and in breach of the first data protection principle outlined in the DPA. All information would accordingly be exempt from disclosure under section 40(2) and therefore, under section 40(5)(b)(i). Therefore, the DfE is not required to confirm or deny whether or not it holds the requested information under the terms of the FOIA.

## Right of appeal

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34. 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: 0870 739 5836

Email: [GRC@hmcts.gsi.gov.uk](mailto:GRC@hmcts.gsi.gov.uk)

Website: [www.justice.gov.uk/tribunals/general-regulatory-chamber](http://www.justice.gov.uk/tribunals/general-regulatory-chamber)

35. 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.
36. 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**  
**Group Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**