

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 14 August 2018

**Public Authority:** Surrey County Council  
**Address:** County Hall  
Penhryn Road  
Kingston Upon Thames  
Surrey  
KT1 2DN

### Decision (including any steps ordered)

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1. The complainant has requested information about complaints from parents and child safety issues in respect of a named school from Surrey County Council (the "Council"). Having initially advised that it held no information, the Council subsequently advised that some information had been located but that it was exempt from disclosure. It cited the exemptions at sections 21 (information accessible to applicant by other means), 40(1) (personal information – the complainant) and 40(2) (personal information – third party) of the FOIA. During the Commissioner's investigation it disclosed a small amount of information but maintained reliance on section 40(2) for the remainder. The complainant complained about the time taken to deal with the request and the citing of section 40(2).
2. The Commissioner finds a breach of section 10(1) in respect of the time taken to respond to the request, and, by making a partial disclosure of information outside the time limit, she finds a further breach of section 10(1). The Commissioner finds that section 40(2) is engaged. No steps are required.

### Background

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3. The Council has advised the Commissioner that the school in question is a private preparatory school which is not publicly funded nor is it subject to the FOIA. It added that:

*"As such we have no responsibility for the School except in respect of any safeguarding issues that may be raised which would come under our responsibility for Child Protection".*

## **Request and response**

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4. On 16 December 2017 the complainant wrote to the Council and requested information in the following terms:

*"All information that Surrey County Council holds on [name removed] School, Surrey. Please include all information not previously published including, but not limited to, all emails sent or received, all complaints from parents and all child safety issues raised. This request is for the period 1st January 2014 to 15th December 2017.*

*Please note: included in the request are all emails, documentation and correspondence of all staff and all persons acting for the Surrey County Council whether this information is held on private servers and email accounts or on Surrey County Council servers and email accounts.*

*It is accepted that the Surrey County Council can block out names that may identify children or parents but the complaints themselves should still be included".*

5. The Council responded on 23 January 2018. It advised that complainant that no information was held.
6. Following an internal review, the Council wrote to the complainant on 12 March 2018. It revised its position, advising that information had been located but that it was exempt from disclosure. It cited the following exemptions: section 21 (information accessible to applicant by other means), section 40(1) (personal information – the complainant) and section 40(2) (personal information – third party).

## **Scope of the case**

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7. The complainant initially contacted the Commissioner on 7 March 2018 to complain that he had not received a response to his request for an internal review. The Council subsequently provided an internal review on 12 March 2018.
8. On 13 March 2018 the complainant wrote to the Commissioner again to complain about the way his request for information had been handled.

He was dissatisfied with the length of time taken to respond to both his initial request and his request for an internal review. In respect of the Council having initially claimed that no information was held, he stated:

*"The Council has now responded admitting that it in fact does hold records on four cases (including mine). Now that it is admitting it does hold information (which it previously claimed it did not), it is refusing to issue any information/documents the Council holds. I wish to challenge the grounds on which it is withholding all information about the three cases other than mine".*

9. He also confirmed that that he was happy for the information to be anonymised saying:

*"It is perfectly possible to comply with my request by blocking out the names of parents, children and/or any other individual (such as Council Staff member) whilst still presenting the substance of the complaint and the action taken by the Council in response to it".*

10. During the Commissioner's investigation, and taking her advice into consideration in an attempt to informally resolve the case, the Council revised its position and wrote to the complainant, advising him:

*"I am now able to write to you to confirm that there is only one other case involving [name removed] School consisting of one email chain but it is not disclosable due to it being the personal data of a third party who could be identifiable because of information already in the public domain".*

11. The Commissioner invited the complainant to withdraw his complaint but he declined, saying:

*"1. This fails to meet its duties under FOI as it does not provide any of the detailed information requested, which should include emails received and sent by the Council ... and of course this would also include the internal emails which reveal how seriously the Council was acting.*

- 2. The grounds for refusal are not appropriate, because:*
- a. Throughout I have accepted the need of the council to block out identifying personal information, however this must never allow them to block out information of legitimate public interest such as how, or whether they responded to serious complaints about child endangerment in a local School*
  - b. The manner in which [name removed] seeks to justify non-compliance is that the third party data could be identified because of 'information already in the public domain'. As the only information in the public domain concerns [details removed], she has by attempting to use this excuse, actually*

*revealed this child's personal data already. This has therefore ceased to be an excuse, though it does raise some questions about her judgement as simply redacting names/details would not have identified the child in this way. As the child's Mother is a close friend, I shall of course make her aware.*

*I find it very disturbing that the Council continues to attempt to withhold information about safety concerns in a local School (more than six months after my FOI) in this manner. They must not be allowed to withhold information simply because releasing it may prove embarrassing to them".*

12. The Commissioner will therefore consider timeliness and the citing of section 40(2) of the FOIA. She will not consider sections 21 and 40(1) as these have been cited in respect of the complainant personally and were not challenged.
13. The Commissioner has commented on the internal review in "Other matters", at the end of this notice.

## **Reasons for decision**

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### **Section 10 – time for compliance**

14. Section 10 of the FOIA states that: "*Subject to subsections (2) and (3), a public authority must comply with section 1(1) promptly and in any event not later than the twentieth working day following the date of receipt.*" The Council should therefore have issued a full refusal notice or disclosed the requested information within 20 working days of receiving the request.
15. The Council did not respond to the complainant within 20 working days thereby breaching section 10(1) of the FOIA.
16. In addition, by making a partial disclosure of information outside the time limit it made a further breach of section 10(1).

### **Section 40 – personal information**

17. The personal data of the complainant is not under consideration here as he has not raised this issue as part of his complaint. The matter for the Commissioner to consider is whether any other information could be sufficiently anonymised so as not to identify any party and therefore be disclosed under the FOIA.
18. 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 the disclosure of that personal data would be in breach of any of the data protection principles.

***Is the requested information personal data?***

19. The first step for the Commissioner to determine is whether the requested information constitutes personal data, as defined by the Data Protection Act 1998 (DPA) (the access regime for personal data which was in force at the time the request was processed). If it is not personal data, then section 40 cannot apply.
20. The definition of personal data is set out in section 1 of the DPA. This provides that, for information to be personal data, it must relate to an individual and that individual must be identifiable from that information.
21. Information will relate to a person if it is about them, linked to them, has some biographical significance for them, is used to inform decisions affecting them, has them as its main focus or impacts on them in any way.
22. The second part of the test is whether the withheld information identifies any individual.
23. The requested information in this case is any information held which relates to complaints from parents and to child safety issues, with any names redacted. The complainant has asked for this over a wide time period of almost four years.
24. The complainant has specifically not asked for names nor has he specified ages, gender, dates or the year group for any issue which has been raised.
25. At internal review the Council advised:

*"... given the low number of incidents recorded in respect of the School (less than five) and given that one of those was the incident of which [the complainant] was already aware, the Council would not have been able to sufficiently anonymise the information and the individuals concerned would be identifiable. The information held would therefore constitute the personal information of the requester and other third parties".*
26. The revised position of the school, as per paragraph 10 above, was to confirm that it holds a small amount of information about one other complaint.
27. The Commissioner notes that an internet search reveals that there was an incident at the school. As it is potentially a safeguarding matter it could be presumed that this was reported to the Council at the time.

This means that it may be the incident which is referred to by the Council when it revised its position. However, this detail has not been confirmed (or denied) by the Council as doing so would in itself involve the processing of the personal data of the party/parties concerned.

28. The Commissioner has viewed the withheld information in this case. She is satisfied that it cannot be sufficiently anonymised to provide any context which would satisfy the request and not identify any parties.
29. It is therefore clear that the withheld information 'relates' to a living person, they are the focus of the request and it is therefore their 'personal data'.

### ***The Commissioner's view***

30. Although not cited by the Council, as the regulator of the DPA the Commissioner has considered the type of personal data that has been requested. Section 2 of the DPA sets out what categories of personal data are classed as "sensitive" for the purposes of that Act. These include personal data as to the "*physical or mental health or condition*" of a data subject. As mentioned above, the Commissioner has viewed the withheld information in this case and, as it relates to a physical condition, she is satisfied that it is also "sensitive".
31. This means that the information can only be disclosed if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions and, because it is "sensitive" personal data, it must also meet one of the DPA Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
32. Having accepted that the request is for the sensitive personal data, of a living individual other than the applicant, the Commissioner must go on to consider whether disclosing that information would contravene any of the data protection principles. The Commissioner considers that the first data protection principle is relevant in the circumstances of this case.

### ***Would confirmation or denial breach the first data protection principle?***

33. The first data protection principle states -

*"Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless -  
(a) at least one of the conditions in Schedule 2 is met, and  
(b) in the case of sensitive personal data, at least one of the conditions in Schedule 3 is also met."*

34. 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 fair, lawful and would meet one of the DPA Schedule 2 conditions and, in this case, one of the Schedule 3 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.

35. The Commissioner has first considered whether disclosure would be fair.
36. In considering whether disclosure of personal information is fair the Commissioner takes into account the following factors:
  - the individual's 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 concerned);
  - any legitimate interests in the public having access to the information; and,
  - and the balance between these and the rights and freedoms of the individuals who are the data subjects.
37. The Commissioner recognises that people have an instinctive expectation that a public authority such as the Council, in its role as a responsible data controller, will not disclose certain information about them and that they will respect their confidentiality.
38. Furthermore, the Commissioner considers that, in most cases, the very nature of sensitive personal data means it is more likely that disclosing it will be unfair. The reasonable expectation of the data subject is that such information would not be disclosed and that the consequences of any disclosure could be damaging or distressing to them.
39. In light of the above, the Commissioner considers that information relating to a safeguarding matter will carry a strong general expectation of privacy for those parties concerned.
40. As to the consequences of disclosure upon a data subject, the question – in respect of fairness - is whether disclosure would be likely to result in unwarranted damage or distress to that individual.
41. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the withheld information. She will also take into account the fact that disclosure under FOIA is effectively an unlimited disclosure to the public at large, without conditions.
42. Given the nature of the request, and the sensitivity of the subject matter, the Commissioner considers that disclosure in this case could lead to an intrusion into the private lives of the individuals concerned and the consequences of any disclosure could cause damage and

distress to the parties concerned. However, she does also note that there is some information about this case already available in the public domain which could be seen as diminishing any reasonable expectations of the parties concerned, and that it is possible that this is available as a direct result of steps taken by the parties themselves.

43. Notwithstanding a data subject's reasonable expectations or any damage or distress caused, it may still be fair to disclose information if there is a more compelling public interest in doing so. Therefore the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subject against the public interest in disclosure.
44. The Commissioner would stress that this is a different balancing exercise than the normal public interest test carried out in relation to exemptions listed under section 2(3) of the FOIA. Given the importance of protecting an individual's personal data the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in disclosure must outweigh the public interest in protecting the rights and freedoms of the data subject if it is to be considered fair.
45. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
46. Although the complainant himself clearly has personal reasons for requesting the information, the Commissioner is unaware of any wider legitimate public interest in disclosure. Were there a large number of parental concerns caught within the scope of the request then this may in turn point to a wider public interest, however, other than the complainant's own concern, there is only one other in what is almost a four year period. Also, were the Council to have been unaware of the incident that is in the public domain this may also indicate that there could be wider concerns about its safeguarding role. However, there is therefore nothing apparent to the Commissioner which would indicate that there are particular concerns which need to be addressed regarding either the school in question or the Council itself, and she is unable to identify any wider public interest in disclosure of the requested information.
47. In light of the nature of the information in this case, ie that it is the sensitive personal data of a minor, the Commissioner is satisfied that disclosure would not be fair, despite information already being available in the public domain, because the data subject would not have a reasonable expectation that the information requested would be disclosed in response to a request under the FOIA. The Commissioner cannot find any legitimate interest in favour of its disclosure, and, as there is not a more compelling reason to support disclosure of the



requested information, she concludes that to do so would breach the first data protection principle and the exemption is therefore properly engaged.

48. As the Commissioner has determined that it would be unfair to disclose the information it has not been necessary to go on to consider whether it would be lawful or whether one of the schedule 2 or schedule 3 DPA conditions is met. However, her initial view is that there are no conditions in either schedule which would support disclosure.

## **Other matters**

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49. Although they do not form part of this notice the Commissioner wishes to comment on the following matters.
50. The Commissioner notes that the complainant claims that he knows who the other party is and that they are "*a close friend*". If this is the case then he may be able to obtain the information he requires from them directly, or he could advise them to contact the Council directly and make a request for a copy of their child's (and their own) personal data, under the terms of the Data Protection Act 2018. Such a disclosure would be private to the parties concerned rather than being disclosure to the world at large under FOIA.

### *Internal review*

51. The Commissioner would initially like to comment that the point of an internal review is to revisit the request. Whilst the complainant appears to be dissatisfied that the Council changed its position regarding whether or not it held any information, the Commissioner considers that this is evidence that it has properly conducted an internal review. A public authority is entitled to look at the request again and revise its position. The further information provided by the complainant allowed it to make better searches and information was located.
52. The Commissioner cannot consider the amount of time it took a public authority to complete an internal review in a decision notice because such matters are not a formal requirement of the FOIA. Rather they are matters of good practice which are addressed in the code of practice issued under section 45 of the FOIA.
53. Part VI of the section 45 Code of Practice states that it is 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. 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 considers 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 take longer but in no case should the time taken exceed 40 working days; it is expected that this will only be required in complex and voluminous cases, which this request was not.

54. The Commissioner would like to remind the Council that she routinely monitors the performance of public authorities and their compliance with the legislation. Records of procedural breaches are retained to assist the Commissioner with this process and further remedial work may be required in the future should any patterns of non-compliance emerge.

## Right of appeal

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55. 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)

56. 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.
57. 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 .....**

**Deborah Clark  
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