

Freedom of Information Act 2000 (FOIA)
Decision notice

Date: 6 January 2020

Public Authority: King Edward VI Academy Trust
Address: Foundation Office
Edgbaston Park Road
Birmingham
B15 2UD

Decision (including any steps ordered)

1. The complainant has requested information from King Edward VI Academy Trust, Birmingham ("the Trust") regarding responses from a public consultation about catchment areas. The Trust provided some information but stated that other information either was not held, or was exempt from disclosure under section 40(2) of the FOIA – third party personal data.
2. The Commissioner's decision is that the Trust has correctly applied section 40(2) of FOIA to the withheld information. She also considers that the Trust has complied with its obligations under section 1(1) (general right of access to information) of the FOIA
3. The Commissioner does not require the Trust to take any steps as a result of this decision notice.

Request and response

4. On 8 March 2019, the complainant wrote to the Trust and requested information in the following terms:

"I would like to make a request for information as per the Freedom of Information Act 2000.

*I would like to see the raw data for the results of the recent public consultation upon the imposition of catchment areas in Birmingham.
(Request 1)*

I would like to have the very earliest records for the plans for the catchment areas. For example it would be very useful to know who came up with the idea, whether a person, a group of people, a particular trust, etc. If you do not have this information on record, then just the three or four earliest records of the proposition would be very helpful. These records should include the reasons for imposing catchment areas in the first place. (Request 2)

I would like to have any records, (eg transcriptions) about the final decision to go ahead with the changes despite the consultation results, including the reasons for doing so. (Request 3)

I would also like any records of the decision to not publish the results of the consultation publicly, if there are such things. (Request 4)"

5. The Trust responded on 4 April 2019. It provided a response to each of the requests as follows:
 - Request 1: The Trust advised that it was applying section 40 of the FOIA – Personal Information – to this request.
 - Request 2: The Trust advised that no data was held.
 - Request 3: The Trust provided an extract of meeting minutes, which it considered fell within the scope of the request.
 - Request 4: The Trust advised that no data was held.
6. The complainant contacted the Trust on 4 April 2019 requesting an internal review into the handling of all parts of his request. With regard to request 3, he queried why he had not been provided with all of the meeting minutes.
7. On 5 April 2019, the complainant contacted the Commissioner to complain about how his request had been handled. The Commissioner advised the complainant to allow the Trust to complete its internal review.
8. The Trust provided the internal review response on 16 May 2019. Within the internal review, it responded as follows:

- Request 1: The Trust advised that it had reconsidered the request and determined that it could provide some information. However, it would need to redact the personal information from it.
 - Request 3: The Trust explained that it had provided the information that was relevant to the request and that the complainant could make a further FOIA request for the entire document. It also advised that some amendments had been made to the information originally provided and that it was providing a copy of the updated version.
9. The Trust did not address parts 2 and 4 of the complainant's request within the internal review. However, it did respond to further questions asked by the complainant within the request for an internal review.

Scope of the case

10. The complainant contacted the Commissioner on 5 April 2019 to complain about the way his request for information had been handled. As explained above, the Commissioner advised that an internal review would need to be completed before the case could be accepted.
11. During the course of the internal review, the Trust disclosed some more information in response to request 1. It explained that third party personal data had been redacted.
12. Following the internal review being completed, the complainant queried the redactions to the information disclosed in response to request 1. He also queried whether he could be provided with the remainder of the meeting minutes without making a new request for information (request 3). The complainant explained that he was not satisfied that the Trust had not responded to request 2 and 4 within the internal review and believed that the Trust may hold more information than it had provided in relation to the request.
13. The Commissioner considers the scope of this case to be to determine if the Trust correctly applied section 40(2) of the FOIA to the withheld information. She will also consider if the Trust correctly excluded part of the meeting minutes from the scope of the request, and if it correctly stated that it does not hold any further information relevant to requests 2 and 4.
14. During the course of the investigation, the complainant queried the fact that he had at times received correspondence from *The Schools of King Edward VI in Birmingham and King Edward VI Academy Trust*

Birmingham, and at other times from The Schools of King Edward VI in Birmingham.

15. The Commissioner understands that the Trust is part of a wider charity, *The Schools of King Edward VI in Birmingham*, which includes both independent and publicly-funded schools. As the FOIA applies only to public authorities, this decision notice covers information held by the Trust.

Reasons for decision

Section 40 personal information

16. 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 one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
17. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
18. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
19. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, she must establish whether disclosure of that data would breach any of the DP principles.

Is the information personal data?

20. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

¹ As amended by Schedule 19 Paragraph 58(3) DPA

21. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable. The Commissioner's guidance on what is personal data² states that if information 'relates to' an 'identifiable individual' it is 'personal data' regulated by the DPA.
22. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
23. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
24. In this case, the Commissioner notes that the withheld information includes the names and email addresses of individuals responding to the consultation, as well as information contained within the responses which relates to the individuals themselves and/or to children at the relevant schools, including at times their names and year groups.
25. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to several living data subjects. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
26. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
27. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

28. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

² <https://ico.org.uk/media/for-organisations/documents/1554/determining-what-is-personal-data.pdf> & https://ico.org.uk/media/fororganisations/documents/1549/determining_what_is_personal_data_quick_reference_guide.pdf

29. In the case of an 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 lawful, fair and transparent.
30. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

31. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which states:

"processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, in particular where the data subject is a child"³.

32. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-
 - i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
33. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

³ Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

34. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case specific interests.
35. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
36. The Commissioner is aware that the complainant has made the same request of a council and evidently has some interest in the topic of the Trust's catchment area and how decisions were reached. While the Commissioner is not aware of any specific interest of the requester in the information requested in this case, this is not usually a bar to there being a legitimate interest, since the FOIA is, in most cases, deemed to be motive-blind.
37. In addition, there is a general public interest in openness and transparency with regard to decisions being taken by public authorities. The Commissioner is satisfied that there are legitimate interests in the disclosure of the information in this case.

Is disclosure necessary?

38. 'Necessary' means more than desirable but less than indispensable or of absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
39. The Commissioner notes that some of the personal data is that of children at the relevant schools. Since Article 6(1)(f), set out previously, makes clear that children's data requires particular protection, she has considered this separately.
40. The information relating to children is contained within redacted parts of the consultation responses. At times children are identifiable by name, and at other times they are identifiable from references to number of siblings, school and/or year group.
41. The Commissioner considers that it is unnecessary for this information to be disclosed to meet the legitimate interests in disclosure in this case. The requester is not likely, in any event, to have expected to receive information from which specific children are identifiable.

42. Since the disclosure of the information relating to children is unnecessary, the Commissioner has not gone on to conduct the balancing test with regard to this information. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).
43. The Commissioner has therefore decided that the Trust was entitled to withhold the information that is the personal data of children under section 40(2), by way of section 40(3A)(a).
44. However, with regard to the remainder of the redacted information, which relates to adults, the Commissioner is satisfied in this case that, since it has not otherwise been made available to the public, there are no less intrusive means of achieving the legitimate aims identified and disclosure would therefore be necessary. She has therefore gone on to consider the balancing test.

Balance between legitimate interests and the data subjects' interests or fundamental rights and freedoms

45. It is necessary to balance the legitimate interests in disclosure against the data subjects' interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subjects would not reasonably expect that the information would be disclosed to the public under the FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override legitimate interests in disclosure.
46. In considering this balancing test, the Commissioner has taken into account the following factors:
 - the potential harm or distress that disclosure may cause;
 - whether the information is already in the public domain;
 - whether the information is already known to some individuals;
 - whether the individual expressed concern to the disclosure; and
 - the reasonable expectations of the individual.
47. In the Commissioner's view, a key issue is whether the individuals concerned have a reasonable expectation that their information will not be disclosed. These expectations can be shaped by factors such as an individual's general expectation of privacy, whether the information relates to an employee in their professional role or to them as individuals, and the purpose for which they provided their personal data.

48. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
49. The Commissioner considers that the individuals concerned in this case would have a reasonable expectation that the documents constituting personal data in the withheld information would not be made public. While the Commissioner has no evidence that the individuals were explicitly told that their responses would remain confidential, the consultation related to what for some respondents was an essentially personal matter, and in any event offered an opportunity to express personal views. Disclosure under the FOIA would confirm to the world at large information of a personal or private nature: that is, the respondents' views relating to children's admission to schools. The Commissioner considers this would be an unwarranted intrusion into the lives of the data subjects.
50. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in the disclosure of the information to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so the disclosure of the information would not be lawful.
51. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that she does not need to go on to separately consider whether disclosure would be fair or transparent.

Section 1 - Information held by public authorities

52. Section 1 of the FOIA states that:

"(1) Any person making a request for information to a public authority is entitled-

(a) to be informed in writing by the public authority whether it holds information of the description specified in the request, and

(b) if that is the case, to have that information communicated to him."

53. A public authority is therefore required to consider what information is held at the date of the request. It should also seek to identify all information which it holds at the date of the request and which falls within the scope of the request.

Request 3: information outside the scope of the request

54. The complainant considers that he should have been provided with the entire minutes of a meeting dated 18 March 2019, in response to his request. The Trust provided an extract which it determined fell within the scope of the complainant's request.
55. The Commissioner has therefore considered whether the Trust correctly identified the information falling within the scope of the request. She has considered the withheld sections of the meeting minutes in relation to the scope of the request and whether the Trust should have considered them for disclosure.
56. The Commissioner notes that the meeting minutes that have been withheld do not relate to the Trust's "*plans for catchment areas*", which was what the request asked for.
57. She has therefore determined that the remaining meeting minutes fall outside the scope of the complainant's request and did not need to be considered for disclosure.

Requests 2 and 4: is any information held?

58. Where there is some dispute between the amount of information identified by a public authority and the amount of information that a complainant believes may be held, the Commissioner, following the lead of a number of First-tier Tribunal decisions must decide whether, on the civil standard of the balance of probabilities, the public authority holds any information within the scope of the request (or was held at the time of the request).
59. For clarity, the Commissioner is not expected to prove categorically whether the information was held, she is only required to make a judgement on whether the information was held on the civil standard of the balance of probabilities.
60. The complainant has explained that he expected the Trust to hold information which would fall within the scope of his requests 2 and 4.
61. The Commissioner has sought to determine whether, on the balance of probabilities, the Trust holds any information falling within the scope of these requests.
62. The Commissioner asked the Trust questions about the searches it had made to locate the information which the complainant seeks, and questions about the possible deletion/destruction of information which might be relevant to the complainant's request.

63. The Trust explained that with regard to request 2, it had directed the complainant to the publicly available documents on catchment areas. It advised that a draft consultation paper had been sent to the Local Governing Bodies of the Academies, which was finalised and published on 19 November 2018, and as it was fundamentally the same as the draft document, they understood that reflected the sum total of information it held. The Commissioner understands that no information used in the drafting or finalising of the documents is held.
64. With regard to request 4, the Trust explained that no decision had been taken to not publish the results, as it is not standard practice to do so for these consultations. It advised that the first time publication was considered was when it received the FOIA request.
65. Having considered the Trust's response, and on the basis of the evidence provided to her, the Commissioner is satisfied that on the balance of probabilities, the Trust does not hold any information in relation to these requests, and has complied with the requirements of section 1(1) of the FOIA.

Right of appeal

66. 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@justice.gov.uk
Website: www.justice.gov.uk/tribunals/general-regulatory-chamber

67. 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.

68. 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

Pamela Clements
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