

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

### **Decision notice**

**Date:** 15 August 2022

**Public Authority:** The Governing Body of Anthony Gell School  
**Address:** Anthony Gell School  
Wirksworth  
Derbyshire  
DE4 4DX

#### **Decision (including any steps ordered)**

---

1. The complainant made a request for information relating to the results of an internal investigation at Anthony Gell School (the School), its complaints policies and procedures and for any/all complaint outcomes against a specified individual. The School provided some information, it withheld some information under section 40(2) FOIA and refused to confirm or deny whether some of the requested information was held under section 40(5B)(a)(i) FOIA.
2. The Commissioner considers that section 40(2) and 40(5B)(a)(i) FOIA were applied correctly.
3. The Commissioner requires no steps to be taken.

#### **Request and response**

---

4. The complainant made the following information request to the School on 18 December 2021:

"...I am unclear how you think GDPR prohibits you from telling me the results of the internal investigation that stemmed from my complaint or why you cannot tell me the procedures undertaken to address matters!

It would be great if I could have a full copy of what DCC policies you followed and what procedures were undertaken to address matters, I am confident none should come under the GDPR but I can always

contact the Governors or the LEA to confirm that if you would like me to?"

5. The complainant then made a follow up request on 22 December 2022 for the following information:

"...could I also request a copy of any/all complaints including outcomes made regarding [named individual] as well, again under the Freedom of Information Act 2000. Obviously complaints information can be redacted."

6. On 11 January 2022 the School confirmed it would respond to the following requests under FOIA:

"1. Your request for the results of an internal investigation that stemmed from your complaint

2. Copies of policies and procedures followed by the school in relation to your complaint

3. Copies of any/all complaints including outcomes relating to [named individual]."

7. The School's final position was that it held information in relation to the request set out at point 1 however this was exempt from disclosure under section 40(2) FOIA. It provided the information requested set out at point 2. It refused to confirm or deny whether it held the information requested at point 3 under section 40(5B)(a)(i) FOIA.

## **Reasons for decision**

---

### **Section 40 - personal information**

#### **Point 1**

8. 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.

9. In this case the relevant condition is contained in section 40(3A)(a)<sup>1</sup>. 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 UK General Data Protection Regulation ('UK GDPR').
10. 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.
11. Secondly, and only if the Commissioner is satisfied that the requested information is personal data, he must establish whether disclosure of that data would breach any of the DP principles.

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

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

"any information relating to an identified or identifiable living individual".
13. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.
14. 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.
15. 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.
16. The Commissioner is satisfied that the information requested at point 1, the results of an internal investigation following a complaint submitted to the School by the complainant about a particular member of staff, both relates to and identifies the individual who was the subject of the complaint. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.

---

<sup>1</sup> As amended by Schedule 19 Paragraph 58(3) DPA.

17. 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.
18. The most relevant DP principle in this case is principle (a).

### **Would disclosure contravene principle (a)?**

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

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

20. 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.
21. In order to be lawful, one of the lawful bases listed in Article 6(1) of the UK GDPR must apply to the processing. It must also be generally lawful.

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

22. Article 6(1) of the UK GDPR specifies the requirements for lawful processing by providing that "processing shall be lawful only if and to the extent that at least one of the" lawful bases for processing listed in the Article applies.
23. 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"<sup>2</sup>.

---

<sup>2</sup> 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".

24. In considering the application of Article 6(1)(f) of the UK 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.
25. 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**

26. In considering any legitimate interest(s) in the disclosure of the requested information under FOIA, the Commissioner recognises that 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. These interest(s) can include broad general principles of accountability and transparency for their own sakes, as well as case-specific interests. However, if the requester is pursuing a purely private concern unrelated to any broader public interest, unrestricted disclosure to the general public is unlikely to be proportionate. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.
27. The Commissioner considers that there is a legitimate interest in disclosing the outcome of an internal investigation to demonstrate that
- 

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 UK GDPR would be contravened by the disclosure of information, Article 6(1) of the UK 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".

the School is following policies and procedures when addressing complaints.

**Is disclosure necessary?**

28. 'Necessary' means more than desirable but less than indispensable or 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.
29. The Commissioner considers that disclosure of the outcome of the investigation would be necessary to meet the legitimate interests identified.

**Balance between legitimate interests and the data subject's interests or fundamental rights and freedoms**

30. It is necessary to balance the legitimate interests in disclosure against the data subject's interests or fundamental rights and freedoms. In doing so, it is necessary to consider the impact of disclosure. For example, if the data subject 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.
31. 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.
32. 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.
33. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
34. In its response to the complainant the School explained that:

"...and ICO guidance which specifically states that "there is a recognised expectation that certain information will remain private...and that in such cases the rights of the individual are likely to override the legitimate interests in disclosing the information". Therefore, as the legitimate interest in this situation does not outweigh the interests and rights of the individual, there is no lawful basis for disclosure

35. In this case the Commissioner considers that the individual who was the subject of the internal investigation would have a strong expectation of privacy and that the results of this would not be disclosed into the public domain.
36. The Commissioner has determined that there is insufficient legitimate interest 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.
37. Given the above conclusion that disclosure would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether disclosure would be fair or transparent.

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

38. The Commissioner has therefore decided that the School was entitled to withhold the information at point 1 under section 40(2), by way of section 40(3A)(a).

### **Point 3**

39. Section 40(5B)(a)(i) of FOIA provides that the duty to confirm or deny whether information is held does not arise if it would contravene any of the principles relating to the processing of personal data set out in Article 5 of the UK General Data Protection Regulation ('UK GDPR') to provide that confirmation or denial.
40. Therefore, for the School to be entitled to rely on section 40(5B) of FOIA to refuse to confirm or deny whether it holds information falling within the scope of the request the following two criteria must be met:
  - Confirming or denying whether the requested information is held would constitute the disclosure of a third party's personal data; and
  - Providing this confirmation or denial would contravene one of the data protection principles.

41. The Commissioner has already set out the definition of personal data at paragraphs 12-16 above.
42. The Commissioner considers that confirming or denying whether the School holds outcomes for any/all complaints made against a specified individual would constitute disclosure of a third party's personal data. This is because it would be confirming or denying whether any/all complaints had been made against the individual specified.
43. The Commissioner has set out the relevant data protection principles in relation to point 1 above and so has considered the set out at paragraph 24 above in the context of providing confirmation or denial of whether it holds the information requested at point 3.
44. The Commissioner considers that there is a legitimate interest in confirming or denying whether the School holds any/all complaints made against a specified individual, in the context of transparency with regards to its handling of complaints and that confirmation or denial would be necessary to meet the legitimate interests. However the Commissioner considers that the named individual would have a strong expectation of privacy that the School would not place into the public domain whether or not any complaints had been made against them.
45. The Commissioner has determined that there is insufficient legitimate interest to outweigh the data subjects' fundamental rights and freedoms. The Commissioner therefore considers that there is no Article 6 basis for processing and so confirming or denying whether the information is held would not be lawful.
46. Given the above conclusion that confirming or denying whether the requested information is held would be unlawful, the Commissioner considers that he does not need to go on to separately consider whether confirmation or denial would be fair or transparent.

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

47. The Commissioner has therefore decided that the School was entitled to refuse to confirm or deny whether the information requested at point 3 was held under section 40(5B)(a)(i) FOIA.



## **Other Matters**

---

48. The complainant has also said that she wishes to complain about the School's response to point 2 as the complainant has not been told whether the policies and procedures supplied had been used in her complaint. In the School's response dated 28 January 2022 it explained, "We do hold information relating to this request and enclose a copy of the policies that were followed by the school in relation to your complaint." The Commissioner has not therefore considered this aspect of the complaint any further.

## Right of appeal

---

49. 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](mailto:grc@Justice.gov.uk)

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

50. 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.
51. 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.....**

**Gemma Garvey**  
**Senior Case Officer**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**