

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 28 March 2018

**Public Authority:** ESSA Foundation Academies Trust

**Address:** Lever Edge Lane  
Bolton  
BL3 3HH

#### Decision (including any steps ordered)

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1. The complainant has requested information related to the employment of a named individual by ESSA Foundation Academies Trust (ESSA Academy). The request contained 6 questions. ESSA Academy provided the information requested by the first question, while for the rest of the request it neither confirmed nor denied holding information by virtue of section 40(5) (personal information) of FOIA.
2. The Commissioner's decision is that ESSA Academy has correctly applied the exemption provided by section 40(5).
3. The Commissioner does not require any steps to be taken.

#### Request and response

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4. On 20 October 2017, the complainant wrote to ESSA Academy and requested information in the following terms:

*"Please can you disclose the following information as part of a freedom of information request:*

1. *The number and names of people present as part of the panel who recruited [name redacted] for [position redacted]*
2. *Was the relationship between [name redacted] and [name redacted] disclosed*
3. *If so what is the relationship?*

4. *Is the ESSA academy trust aware of allegations against [name redacted] links to [allegation redacted] and [allegation redacted]?*
5. *Is the ESSA academy trust aware of allegations against [name redacted] [allegation redacted]*
6. *Is the ESSA academy trust aware of allegations against [name redacted] [allegation redacted]. "*

5. ESSA Academy responded on 30 October 2017 providing the information requested under the first question. However, it refused to confirm or deny holding the information requested in the other questions. It stated that *"Having considered the other questions within your request, they relate to third party personal data. We can also neither confirm nor deny if the Trust has the information requested"*.
6. Remaining dissatisfied with the response, on 6 November 2017, the complainant asked ESSA Academy to conduct an internal review on the handling of his information request.
7. Following an internal review the ESSA Academy wrote to the complainant on 10 November 2017. It upheld the application of section 40(5).

### **Scope of the case**

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8. The complainant contacted the Commissioner on 23 November 2017 to complain about the way his request for information had been handled.
9. The Commissioner has focused her investigation on whether ESSA Academy is correct to refuse to confirm or deny holding the information requested in questions 2 to 6 under 40(5) of the FOIA.

### **Reasons for decision**

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10. When a public authority receives a request for information under FOIA, it normally has a duty under section 1(1)(a) to tell the requester whether it holds the information. This is called "the duty to confirm or deny". However, in certain circumstances, this duty does not apply and the public authority is not obliged to declare whether or not it holds the information; instead, it can give a "neither confirm nor deny" response.

### **Section 40(5) – exemption from the duty to confirm or deny.**

11. Section 40(5) of FOIA provides that a public authority is not required to confirm or deny whether it holds information if to do so would breach the Data Protection Act 1998 (the DPA).

12. Consideration of section 40(5) involves two steps: first, 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.

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

13. The first step for the Commissioner is to determine whether confirming or denying whether the requested information is held would represent a disclosure of personal data as defined by the DPA. If it is not personal data, then section 40 cannot apply.

14. Personal data is defined in section 1(1) of the Data Protection Act 1998 (DPA) 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 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."*

15. The two main elements of personal data are that the information must 'relate' to a living person and that the person must be identifiable. 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 or has them as its main focus.
16. The requested information in the present case is clearly related to identifiable individuals, namely the individual that has been recruited by ESSA Academy currently exercising a role within this public authority and at least one other individual. Therefore, the Commissioner considers that confirming or denying whether the information is held would constitute a disclosure of personal data.

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

17. 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."*

18. 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 disclosure, i.e. the confirmation or denial in this case, can only be given if to do so would be fair, lawful and would meet one of the DPA Schedule 2 conditions. If disclosure would fail to satisfy any one of these criteria, then the information is exempt from disclosure.
19. When 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 interest in the public having access to the information; and
  - the balance between these and the rights and freedoms of the individuals who are the data subjects.
20. Disclosure under FOIA is in effect disclosure to the world; the test in section 40(5)(b)(i) is whether giving the confirmation or denial to "a member of the public" would contravene data protection principles.
21. When considering the consequences of disclosure on a data subject, the Commissioner will take into account the nature of the information in question. She will also take into account the fact that disclosure under FOIA is as stated effectively an unlimited disclosure to the public at large, without conditions.
22. The Commissioner accepts that an individual would be likely to feel a degree of distress if ESSA Academy confirmed whether or not it held the information given the nature of the request and the sensitivity of the subject matter.
23. Regardless of the reasonable expectations of the data subjects and the fact that damage or distress may result from disclosure, it may still be fair to disclose information, or in this case to confirm or deny whether the information is held, when there is a more compelling legitimate public interest to do so. With that in mind, the Commissioner will carry out a balancing exercise, balancing the rights and freedoms of the data subjects against the public interest in confirming or denying whether the information is held.
24. The Commissioner reiterates 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. Taking into account the importance of protecting personal data of individuals, the Commissioner's 'default position' is in favour of protecting the privacy of the individual. The public interest in confirming or denying whether or not information is held must outweigh the public interest in protecting the rights and freedoms of data subjects if providing confirmation or denial is to be considered fair.

25. The interest in disclosure must be a public interest, not the private interest of an individual requester. The requester's interests are only relevant in so far as they reflect a wider public interest.
26. The Commissioner appreciates that the complainant has concerns about the named individuals and that there would be some interest in being able to hold the ESSA Academy accountable for the staff that it employs. However, in the circumstances of this case, the Commissioner considers that confirming or denying whether the individuals were the subject of the serious allegations would be an unwarranted privacy intrusion.
27. In the light of the nature of the information requested and the reasonable expectations of the data subjects, the Commissioner is satisfied that confirming or denying whether it holds information could potentially cause unnecessary and unjustified distress to the data subjects. Therefore, she considers that these arguments outweigh any legitimate interest in disclosure and has concluded that confirmation or denial in this case would breach the first data protection principle.
28. In conclusion, the Commissioner considers the exemption provided in section 40(5) is engaged and the duty to confirm or deny does not arise.

## Right of appeal

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29. 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)

30. 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.

31. 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 .....**

**Alun Johnson**  
**Team Manager**  
**Information Commissioner's Office**  
**Wycliffe House**  
**Water Lane**  
**Wilmslow**  
**Cheshire**  
**SK9 5AF**