

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

### **Decision notice**

**Date:** 16 October 2018

**Public Authority:** Ofsted  
**Address:** Piccadilly Gate  
Store Street  
Manchester  
M1 2WD

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

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1. The complainant has requested all information Ofsted holds in relation to a particular school in Surrey between specified dates. The complainant asked for this to include (but not be limited by) all emails sent or received, all complaints and all child safety issues raised. Initially Ofsted refused to confirm or deny whether it holds the requested information under section 31(3) of the FOIA. However, at the internal review stage it changed its stance, disclosed some information and withheld other information under section 40(2) of the FOIA.
2. The Commissioner's decision is that Ofsted is entitled to withhold the remaining withheld information under section 40(2) of the FOIA. No steps are therefore required.

#### **Request and response**

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3. On 16 December 2017, the complainant wrote to Ofsted and requested information in the following terms:

"All information that Ofsted holds on [name redacted] 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 Ofsted whether this information is held on private servers and email accounts or on Ofsted servers and email accounts.

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

4. Ofsted responded on 10 January 2018. It applied section 21 of the FOIA to some information and refused to confirm or deny whether other information is held under section 31(3) of the FOIA.
5. The complainant requested an internal review on 19 February 2018.
6. Ofsted carried out an internal review and notified the complainant of its findings on 19 March 2018. It upheld its application of section 21 of the FOIA but withdrew its reliance on 31(3). It decided to release some information to the complainant but with personal data redacted under section 40(2) of the FOIA.

### **Scope of the case**

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7. The complainant contacted the Commissioner on 28 March 2018 to complain about the way his request for information had been handled. Specifically, the complainant remains dissatisfied with the application of section 40(2) of the FOIA. He believes further information can be disclosed about the substance of complaints and concerns raised without information being disclosed which would enable the third parties to be identified. He stated that he does not consider it is acceptable to interpret section 40(2) of the FOIA in such a way as to block out all meaning from the correspondence.
8. The Commissioner considers the scope of her investigation to therefore be to determine whether Ofsted is entitled to rely on section 40(2) of the FOIA in this case. The complainant has raised no issues with the application of section 21 so the Commissioner has not considered this.

### **Reasons for decision**

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9. Section 40(2) of the FOIA states that a public authority may refuse to disclose information if it constitutes the personal data of a third party and the disclosure of that information would breach any of the data

protection principles outlined in the Data Protection Act 1998 (DPA 1998).

10. It must be noted first of all that the Data Protection Act 1998 has been superseded by the Data Protection Act 2018. However, as this request was made whilst the 1998 Act was in force and Ofsted considered the application of section 40 of the FOIA in conjunction with the 1998 Act because this was the Act in force at that time, it is the 1998 Act the Commissioner will also consider in this notice.
11. In the DPA 1998 personal data is defined 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 the possession of, the data controller,  
  
And includes any expression of opinion about that individual and any indication of the intentions of the data controller or any other person in respect of the individual...”
12. The Commissioner considers the first data protection principle outlined in the DPA 1998 is most relevant in this case. 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.”
13. The Commissioner must first consider whether the requested information is personal data. If she is satisfied that it is, she then needs to consider whether disclosure of this information would be unfair and unlawful. If she finds that disclosure would be unfair and unlawful the information should not be disclosed and the consideration of section 40 of the FOIA ends here. However, if she decides that disclosure would be fair and lawful on the data subject(s) concerned, the Commissioner then needs to go on to consider whether any of the conditions listed in schedule 2 and 3, (sensitive personal data) if appropriate, of the DPA are also met.

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

14. Ofsted explained that it received complaints about the school in 2014 and 2016. It has examined the information it holds in relation to these and considers the names and contact details of staff and those which contacted Ofsted constitutes personal data. It is information from which those individuals can be identified. It also considers the information redacted about the complaints themselves constitutes the personal data of the complainant and any child or staff mentioned. The redacted information contains descriptions of the circumstances surrounding the concerns raised and it considers this information can be used to identify the individuals concerned. This information combined with other information available to or known to those in the local community would be likely to lead to those that complained and those complained about, in addition to any children involved, being identified.
15. The Commissioner has reviewed the contents of the withheld information. She is satisfied that the withheld information falls within the definition of personal data. The withheld information contains the names and contact details of staff. These data subjects can easily be identified from this information.
16. The withheld information also contains the names and contact details of those that have complained and a description of the concerns they wished to raise. The descriptions contain information about specific concerns, children and staff and the Commissioner is satisfied that it would be possible for those within the local community with knowledge of the school, the parents and its pupils to identify those mentioned. Although not cited by Ofsted, 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. Paragraph 46 of the Commissioner guidance (which can be accessed via the following link) lists those categories:  
  
<https://ico.org.uk/media/1213/personal-information-section-40-and-regulation-13-foia-and-eir-guidance.pdf>
17. The Commissioner does not consider the names and contact details of staff is sensitive personal data. However, she is satisfied that the remaining withheld information falls within two categories of sensitive personal data. The Commissioner does not consider it is appropriate to specifically name which categories of sensitive personal data apply in this case. She is of the opinion that to do so would potentially reveal information which would allow those interested in the information and which already have some knowledge of matters at the school to pinpoint particular events.

18. In terms of redaction and the complainant's assertion that Ofsted has taken an overly cautious approach to the application of section 40(2), the Commissioner agrees with Ofsted that it is sometimes possible to redact information in order to prevent the data subjects being identified. But it is not simply the data subject's name and contact details that can make them identifiable. In a complaint situation or in a child safety scenario, the details of that complaint or safety scenario could lead to the data subjects being identified. As Ofsted has stated the local community (staff at the school, parents and pupils) could link the withheld information to other information available to them and identify those involved. The Commissioner is therefore satisfied in this case that it is not possible to release the withheld information with less redaction.

**Would disclosure be unfair and in breach of the first data protection principle?**

19. Firstly the Commissioner considers it is important to highlight what disclosure under FOIA effectively means. Disclosure under FOIA is to the world at large for anyone to see and without conditions. The relevant consideration is not whether the information can be disclosed to the applicant but whether the information is suitable for public disclosure.
20. Dealing with the names and contact details of staff first, Ofsted clarified that it has redacted the personal data of junior staff and the direct contact details of staff in general and stated that disclosure of this information would be unfair. It argued that junior staff hold the reasonable expectation that their personal data will remain private and confidential and will not be disclosed to the world at large. Concerning the direct contact details of staff in general, Ofsted again argued that staff do not expect such information to be released into the public domain and therefore disclosure would be unfair.
21. Concerning the personal data of junior staff, the Commissioner is of the view that junior staff do not hold roles within the organisation of sufficient seniority to warrant public disclosure. Generally they will not be responsible for high level decision making, the expenditure of public money, staff or the public authority's functions; responsibilities and functions for which one can argue there is a need for openness and transparency and for those responsible for such functions to be held to account. Junior staff will generally hold the reasonable expectation that their personal data will remain private and confidential and will not be disclosed to the world at large. For these reasons, the Commissioner considers disclosure of the personal data of junior staff would be unfair and would cause those involved some distress and upset as a result.
22. Regarding the direct contact details of staff in general, the Commissioner accepts that if it is Ofsted's policy not to disclose such

information in response to a FOIA request but instead provide members of the public with more departmental/topic related contact details, it would be unfair to release this information under the FOIA. Staff will not hold the expectation that this information could be disclosed to the world at large and therefore to do so would cause the staff involved distress and upset. It would also lead to disruption. Specific departmental or topic related contact details are generally provided to enable a public authority to channel enquiries to the right area of its business from the outset and to then manage those enquiries efficiently. If direct contact details of staff in general was routinely disclosed under the FOIA, Ofsted would find members of the public directing their enquiries and issues to staff or areas which are not potentially equipped to deal with it. Generally, staff will expect to disclose their direct contact details on a piece-meal basis and in connection with a specific matter or issue they are assisting a member of the public with.

23. Turning now to the individuals that contacted Ofsted about their concerns and complaints and those data subjects mentioned within that correspondence (whether a child, a member of staff or both), the Commissioner has already decided that this information is sensitive personal data. It is the Commissioner's view 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 subjects concerned is that such information will not be disclosed to the world at large and will remain private and confidential. The consequences of public disclosure could be damaging or distressing for them and would constitute an unwarranted intrusion into their private lives. Information of the nature specified in the request will often be sensitive and very personal and information relating to safeguarding issues will carry a strong general expectation of privacy for those parties concerned.
24. As the Commissioner has decided that disclosure would be unfair on all data subjects concerned, she now needs to consider whether there are any legitimate and compelling public interest arguments that would outweigh the prejudice disclosure would cause to the rights and freedoms of these data subjects.
25. Dealing with the personal data of junior staff, the Commissioner considers there is a legitimate public interest in knowing who is making important decisions on behalf of a public authority and the wider public and them being held accountable for the decisions and actions they take. However, the Commissioner considers such interests are already met by Ofsted's existing policy of disclosing the personal data of senior members of staff where this is required and fair. Junior staff are generally not responsible for important decision making or the public authority's functions. The Commissioner therefore considers there is little public interest in the disclosure of their personal details and

certainly no overwhelming public interest that would warrant overriding the rights and freedoms of these data subjects. As stated previously, Ofsted's policy is to withhold such information and this is the clear and reasonable expectation of such staff.

26. Concerning the direct contact details of staff in general, again the Commissioner can see that there is a legitimate public interest in members of the public being able to freely and speedily contact public authorities. However, the Commissioner considers this public interest is already met by the more general contact details that are published. Ofsted has a system in place for receiving and directing enquiries to the relevant department and staff. This enables the public authority to manage and deal with enquiries efficiently and effectively. If the direct contact details of staff in general were made available instead or as well this would cause disruption and would result in enquiries being directed anywhere. It would be much harder to manage and to address enquiries in a timely fashion. Direct contact details may be released on a piece-meal basis; between a member of staff and a customer for a specific purpose. However, it would generally be expected that once that particular issue or matter is resolved that the customer will use the more general contact details in future for other enquiries to again enable Ofsted to direct that new issue to the right staff. Disclosure would cause disruption and potentially irritation and distress to staff. There is no overwhelming public interest again in the disclosure of this information that would warrant overriding the rights and freedoms (and current operating system of Ofsted) of the data subjects.
27. Finally, with regards to the personal data of those that raised matters with Ofsted and any pupil or staff member mentioned within its contents, the Commissioner considers the complainant has a personal interest in the disclosure of this information. However, the Commissioner does not consider there is any wider public interest in this case that would warrant disclosure and overriding the clear and apparent distress and upset such actions would cause to the data subjects. The Commissioner has accepted that some of the withheld information constitutes sensitive personal data. To override the rights and freedoms of the data subjects concerned there would have to be an overwhelming public interest in the disclosure of this information. The Commissioner is not aware and has not identified for herself any overwhelming public interest that would support disclosure.
28. For the above reasons the Commissioner is satisfied that disclosure would be unfair, in breach of the first data protection principle and therefore that section 40(2) of the FOIA applies.

## 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

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