

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 6 April 2017

Public Authority: Delta Academies Trust (DAT)
(formerly School Partnership Trust Academies)

Address: Education House
Spawd Bone Lane
Knottingley
WF11 0EP

Decision (including any steps ordered)

1. The complainant requested information relating to a disciplinary investigation of a former staff member.
2. DAT provided the complainant with some of the requested information but refused to disclose the remainder, citing the exemption under section 40(2) of the FOIA as its basis for doing so. DAT also cited the exemptions under section 31 and 43(2) of the FOIA in its reasons for refusing some of the requested information.
3. The Commissioner's decision is that DAT correctly withheld information by virtue of section 40(2) of the FOIA and therefore did not go on to consider the application of sections 31 and 43(2).
4. The Commissioner does not require DAT to take any steps.

Request and response

5. On 10 August 2016, the complainant wrote to DAT and requested information in the following terms:

"I would ask you to supply me with the following information and documentation regarding the events listed below.. the occurrence and details of which were specifically referred to by the Vice Chair at that meeting as I can verify from referring to my contemporaneous notes of the meeting.

- 1. Record of discussions or phone calls between members of the SPTA Board's investigation committee and the company CEO, [redacted], on or around the 16th. October 2015 which led to [redacted] being suspended from duty and informed he was being investigated for gross misconduct.*
- 2. Any correspondence, e mails relating to 1.*
- 3. Records of all meetings held between the Chair, Vice Chair and CEO of the company on or about 20th and 21st October 2016 at which the [redacted] suspension was annulled and he was initially reinstated. Shortly afterwards during this series of meetings he resigned his positions as [redacted] but was redeployed to a post as [redacted] on full previous salary on the condition he resigned form the company fully on 31.12.15*
- 4. Any correspondence, e mails relating to 3.*
- 5. Any correspondence, e mails, record of meetings between any board members and the Education Funding Agency regarding the matters at 1 to 4 above.."*
6. DAT responded on 15 September 2016. It provided the complainant with some of the requested information, however withheld some information, either by making redactions or withholding documents in their entirety, on the basis that it had applied sections 31, 40(2) and 43(2) of the FOIA. It informed the complainant that it required additional time to take a decision as to where the balance of public interest lies in relation to those exemptions which were qualified (sections 31 and 43(2) of the FOIA). On 22 September 2016 DAT wrote to the complainant with its decision in relation to the public interest test. DAT maintained its position that information withheld under section 31 and 43(2) of the FOIA should continue to be withheld in the public interest.
7. On 27 September 2016 the complainant wrote to DAT, when he disagreed with DAT's application of exemptions under the FOIA. He further went on to explain that he did not consider that a response had been provided to part 5 of his request and clarified that he required communications of any kind with the Education Funding Agency (EFA). He asked DAT to confirm whether or not any communications took place and whether any records of any type existed. He also asked DAT to review its decision to withhold information from its response.
8. DAT responded on 30 September 2016 advising the complainant that if he was dissatisfied with its response then the most appropriate course of action would be to refer the matter to the Commissioner.

9. The complainant then entered into further correspondence with DAT regarding part 5 of his request. DAT informed the complainant on 21 October 2016 that it had dealt with this part of his request in its previous letters. On 3 November 2016 the complainant explained to DAT that the redacted documents he had been provided with related only to internal correspondence and were not specific about his request for any communications in relation to the EFA. He asked DAT to confirm whether it held such information and whether, and if so on what grounds, it was being withheld.
10. After further communication from the complainant chasing a response, DAT wrote to him on 14 December 2016 providing redacted correspondence with the EFA. After the complainant asked DAT on 16 December 2016 to explain why it had not previously sent this additional information to him, DAT responded on 11 January 2017 and explained that following his email of 3 November 2016 DAT carried out a search for any further correspondence with the EFA using systems other than DAT's ICT system and those documents which had been supplied on 14 December 2016 were those documents identified by the additional search.
11. The Commissioner considers that the communications which took place between the complainant and DAT subsequent to 30 September 2016 constituted DAT's internal review of its initial response.

Scope of the case

12. The complainant initially contacted the Commissioner in October 2016 to complain about the way his request for information had been handled and asked the Commissioner to encourage DAT to respond to his request fully, arguing that he had only been provided with redacted information and reiterating his complaint to DAT of 27 September 2016 that a response had not been issued to part 5 of his request.
13. Following provision by DAT on 14 December 2016 of the information relating to part 5 of his request, the complainant again contacted the Commissioner in which he detailed the reasons for his complaint. He explained that the context of the case related to an investigation into the alleged misconduct of a member of DAT and that as a charitable organisation, DAT had a responsibility to ensure probity within the charity. He believed that it was entirely within the public interest, to the extent to which it outweighs any requirement to observe personal confidentiality, to release full details of the investigation of the matters referred to. Without disclosure of the full information as requested the

complainant stated he would not be able to take up his concerns properly with the appropriate regulatory bodies.

14. The Commissioner considers that the scope of the case is whether the exemptions contained in sections 31, 40(2) and 43(2) of the FOIA have been applied correctly by DAT to the withheld information. The Commissioner will first consider the application of section 40(2) of the FOIA. She will only go on to consider sections 31 and 43(2) if she finds that section 40(2) does not apply to some or all the withheld information.

Reasons for decision

15. The Commissioner commenced her investigation by contacting DAT on 31 January 2017. DAT responded on 17 March 2017 providing the Commissioner with a copy of the withheld information and further arguments in support of its case.

Section 40(2)

16. Section 40(2) of the FOIA states that information is exempt from disclosure if it constitutes the personal data of a third party and, by virtue of section 40(3)(a)(i), its disclosure under the FOIA would breach any of the data protection principles of the Data Protection Act 1998 (DPA).
17. In order to rely on the exemption provided by section 40(2), the requested information must therefore constitute personal data as defined by the DPA. Section 1 of the DPA defines personal data as follows:

“personal data” means data which relate to a living individual who can be identified –

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 the individual and any indication of the intentions of the data controller or any other person in respect of the individual.”

18. 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 data protection principles under the

DPA. The Commissioner notes that DAT considers the first data protection principle to be relevant in this case.

Is the information personal data?

19. The Commissioner has considered the information withheld from the complainant, and notes that some information has been withheld by way of redaction and some withheld in its entirety.
20. In the Commissioner's view the withheld information constitutes the personal data of third parties, being the personal data of the individual subject to the investigation, and also the personal data of other employees who have been involved in the investigatory process. The very fact that the information has been generated in the overarching context of an investigation into the conduct of an individual is significant in her findings. In particular the information relates to the subject of the investigation, together with directors and members of staff at DAT who were involved in the investigative process as well as employees of the EFA who were consulted as a result of the investigative process.
21. The Commissioner notes that some of the personal data withheld relates directly to a third party, for instance by name or position. In other instances the information is significantly biographical and/or was such that the data subject was the focus of attention. The Commissioner agrees that the latter is personal data as, when coupled with other information that a motivated party could find out about the data subject, disclosure could still provide sufficient clues as to the data subject's identity.
22. The Commissioner has considered information which has been withheld in its entirety and in those instances agrees that the extent to which significant personal data is embedded within it would prevent the meaningful disclosure of an anonymised version of the information.

Would disclosure contravene any of the data protection principles?

23. DAT has informed the Commissioner that it considers disclosure of the information would contravene the first data protection principle.
24. The first data protection principle states that:

"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."*

25. Under the first principle the disclosure of the information must be fair to the data subject, but assessing fairness involves balancing their rights and freedoms against the legitimate interest in disclosure to the public.
26. In considering whether disclosure of personal information is fair the Commissioner has taken into account the following factors:
 - The data subject's reasonable expectations of what would happen to their information;
 - The consequences of disclosure on the data subject (if it would cause unnecessary or unjustified damage or distress to the individual concerned); and
 - The balance between the rights and freedoms of the data subject and the legitimate interests of the public.
27. The Commissioner has considered in turn the personal data of the subject of the investigation, and the personal data relating to other members and employees of DAT and the EFA.

Reasonable expectations

28. The Commissioner has considered the expectation of privacy held by the reasonably balanced and resilient individual holding the position of the subject of the investigation and also those involved within the investigative process. She notes that DAT do not have the consent of the data subjects to disclose their information.
29. In this case the Commissioner has had regard to her guidance on requests for personal data about public authority employees. In that guidance she recognises that it is reasonable to expect that a public authority would disclose more information relating to senior employees than more junior ones but that it is always necessary to consider the nature of the information and the responsibilities of the employees in question.
30. The Commissioner recognises that people generally have an expectation that a public authority, in its role as a responsible data controller, will not disclose certain information, such as personnel matters, and that it will respect their confidentiality. The Commissioner accepts that personnel matters are generally dealt with in confidence regardless of the seniority of the data subject. She accepts that the subject of a disciplinary investigation would have an expectation that information relating to that investigation would not be disclosed and particularly in circumstances where no disciplinary findings or outcomes have been reached.

31. The Commissioner agrees with the position adopted by DAT that even if the role of the subject of the investigation (including temporary appointments) were to be disclosed it would be possible for members of the public to identify who the individual is, on the basis of publicly available information. DAT has explained to the Commissioner that information already in the public domain does not extend to the subject of the complainant's request. Although matters relating to the subject of the request were reported in a local newspaper, the individual/s at the centre of the investigation were not identified. The Commissioner agrees that as the information has not previously been in the public domain, the subject of the investigation could reasonably expect that such information would remain confidential and not made public.
32. DAT acknowledges that a small group of people, including the complainant, would be able to identify the subject of the investigation because of their personal knowledge of the data subject and the circumstances surrounding the investigation. The complainant already has significant knowledge of the information he has requested and DAT has explained to the Commissioner that *"it is highly unlikely that [the complainant] will not recall all material points arising from these matters, whilst acknowledging that [the complainant] may not, given the passage of time, recall every single aspect or minute detail, which alone is not sufficient to justify disclosure."* Despite this, the Commissioner accepts that a member of the general public would not be able to identify the individual/s involved.
33. In relation to the personal data of other individuals (members and staff of DAT and employees of the EFA) the redacted information includes names and certain contact details including email addresses and telephone numbers of individuals incidentally mentioned in the documents.
34. DAT has informed the Commissioner that it does not have consent of those individuals to disclose their personal data. It has explained that given the sensitive nature and the facts of this matter it considers that a reasonably balanced and resilient individual holding the same positions that the individuals concerned held at DAT and/or the EFA would reasonably expect that information about themselves relating to those incidents would be kept confidential. As some of the information relates to individual's involvement in the investigative process the high expectation of privacy also applies to their personal data as well as the subject of the investigation.

Consequences of disclosure

35. DAT has explained to the Commissioner that it considers the potential consequences of disclosure of the withheld information relating to the

subject of the investigation to include damage to reputation, damage to business interests and prospects in the future, and restriction and/or harm to future employment prospects. The fact that the complainant may be able to identify the data subject is irrelevant. As disclosure is to the public at large, the potential consequences highlighted above could occur if the withheld information were to be disclosed.

36. The Commissioner accepts that given the nature of the information and the level of damage and/or distress that disclosure on the data subject may cause, disclosure of the information is likely to have unjustified adverse effects on the data subject. Disclosure would therefore be unfair and in breach of the first data protection principle.
37. In relation to other individuals (members and employees of DAT and employees of the EFA), DAT considers that the potential consequences of disclosure include damage to reputation, damage to future career prospects and harm to their standing within the organisations that they currently operate.
38. Due to the nature of the circumstances of their involvement and the sensitive overarching nature of the information the Commissioner accepts that the above are likely consequences of disclosure. Again, she is therefore satisfied that disclosure would be unfair and in breach of the first data protection principle.

The legitimate public interest

39. Assessing fairness also involves balancing the individual's rights and freedoms against the legitimate interest in disclosure to the public.
40. Even though disclosure may cause distress to the individual concerned, and they may have a reasonable expectation that the information will not be disclosed, this does not necessarily mean that disclosure would necessarily be unfair. In this case the Commissioner has considered the legitimate public interest in disclosure and balanced this against the rights of the data subjects.
41. The interest in disclosure must be a public interest, not the private interest of the individual requester. The requester's interests are only relevant insofar as they reflect a wider public interest.
42. The Commissioner accepts the legitimate interests in disclosure include the general public interest in transparency of public bodies, and in particular the expenditure of public money and performance of public bodies, including in relation to alleged mismanagement by senior staff. An informed and involved public helps to promote good decision making by public bodies and ensures trust and confidence in the governance and processes within those bodies.

43. In that respect, the complainant argued that DAT is a company limited by guarantee with charitable objectives regulated by the Charity Commission. The context of this case relates to an investigation into the alleged misconduct of a member or employee of DAT which in part relates to expenditure of public funds. Founding members and directors/trustees have a responsibility to ensure probity within that charity. The complainant believes it is entirely within the public's legitimate interests, to the extent that it outweighs any requirement to observe personal confidentiality, to release the full details of how the investigation of this matter was carried out (and who was held responsible and how) by the board of directors/trustees of the company/charity and by its educational regulator, the EFA. Without disclosure of the full information recorded in the board minutes and associated e mails and correspondence between board members and the CEO and with the EFA it is impossible for concerns to be properly brought with the Charities Commission and the EFA and its sponsor, the Department for Education, if necessary.
44. DAT agrees that the legitimate interests of the public favours disclosure for reasons listed in paragraph 44, however contends that the request has been made based upon the complainant's private interests and that disclosure should not be based solely on these private interests. DAT does not agree that disclosure would serve the wider public interest. It contends that disclosure based upon the complainant's private concerns would be disproportionate and would constitute an unwarranted level of interference with the data subject's rights and freedoms.
45. The Commissioner has taken into account her guidance with regard to balancing rights and freedoms with legitimate interests when dealing with a request for personal data about public authority staff and in particular notes that in the case of section 40(2) of the FOIA the general presumption in favour of disclosure is reversed so that a justification is needed for disclosure of personal data.
46. The Commissioner considers that a distinction can be drawn between instances where a public authority needs to be transparent about public expenditure and information relating to internal investigations about its members or staff which should rightly be viewed as personal data. DAT as a charitable organisation is subject to its own internal processes and procedures for handling matters of a disciplinary nature and is subject to review by regulatory bodies such as the Charities Commission and the EFA. The Commissioner does not consider that disclosure of personal information relating to a particular investigation will better serve the wider public interest in transparency of those processes.
47. Having regard to all of the considerations above it is the Commissioner's view in this case that disclosure of the withheld information would cause

significant distress and intrusion and any legitimate interest in this type of information is outweighed by these effects.

Conclusion

48. The Commissioner has concluded that to disclose the information would be unfair and in breach of the first principle of the DPA. The Commissioner therefore finds that DAT has correctly applied section 40(2) of the FOIA to the withheld information by virtue of section 40(3)(a)(i). Accordingly she does not require DAT to take any steps.
49. In view of her findings above, the Commissioner has not gone on to consider DAT's application of sections 31 and 43(2) of the FOIA to the withheld information.

Right of appeal

50. 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

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

51. 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.
52. 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
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF