

## Freedom of Information Act 2000 (FOIA)

### Decision notice

**Date:** 19 December 2018

**Public Authority:** All Saints Catholic High School

**Address:** Granville Road  
Sheffield  
S2 2RJ

#### Decision (including any steps ordered)

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1. The complainant has requested copies of lesson observations carried out within a defined period of time.
2. The Commissioner's decision is that All Saints Catholic High School ("the School") is entitled to rely on Section 40(2) of the FOIA to withhold all of the requested information.
3. The Commissioner does not require any further steps to be taken.

#### Request and response

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4. On 21 November 2017 the complainant contacted the School via [whatdotheyknow.com](http://whatdotheyknow.com) and requested information of the following description:

*"Can you please provide your observation policy in addition to the following:*

- [1] All of the observation feedback for the last 6 weeks for all staff*
- [2] Detail on the timeframes of when this was passed on to your members of staff.*
- [3] Clearly identified observation reports from people that give observations (If a HOD gives an observations, His/Her observations own observations highlighted)*
- [4] The amount of people that are allowed to give observations.*

*[5] Any appeals/feedback from members of staff who have had observations."*

5. On 7 December 2017, the School responded. It provided information within the scope of elements [2] and [4] of the request, stated that it did not hold information in respect of element [5] of the request and refused to provide the remainder. It stated that it was relying on Section 40(2) of the FOIA (Third Party Personal Data) to withhold information.
6. The complainant requested an internal review on the same day. The School provided the outcome of its internal review on 9 January 2018. The School revised its position and refused the request as vexatious due to the grossly oppressive burden that answering the request would have (Section 14 of FOIA).

### **Scope of the case**

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7. The complainant contacted the Commissioner on 4 June 2018 to complain about the way her request for information had been handled. She felt that the documents involved could be sufficiently anonymised as to allow them to be disclosed.
8. During discussions with the Commissioner it became apparent that the School had overestimated the volume of information which came within the scope of the request. It therefore withdrew its reliance on Section 14 and stated that it could provide redacted copies of some of the information but again cited Section 40(2) to withhold the remainder.
9. The analysis that follows covers the information that was withheld within the scope of [1] and [3] of the request. Having viewed the withheld information, the Commissioner is of the view that there is, in practice, no difference between the scope of these two elements.
10. On receipt of the unredacted version of the withheld information, the Commissioner (who is also the regulator of Data Protection laws) took the view that the redactions which the school proposed to make were not sufficient to anonymise the information. The Commissioner has therefore reserved the matter to herself for consideration. The issue of whether the withheld information could be disclosed in redacted form is covered in the analysis below.
11. The scope of the Commissioner's investigation was therefore to consider whether the information could be sufficiently anonymised and whether the information that could not be anonymised would be exempt under section 40(2).

## Reasons for decision

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12. Section 1(1) of the FOIA states that:

*"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."*

13. Section 40 of the FOIA<sup>1</sup> states that information which is the personal data of any individual other than the requestor is exempt from disclosure if any of the following conditions is satisfied:

*"The first condition is—*

*(a) in a case where the information falls within any of paragraphs (a) to (d) of the definition of "data" in section 1(1) of the Data Protection Act 1998, that the disclosure of the information to a member of the public otherwise than under this Act would contravene—*

*(i) any of the data protection principles, or*

*(ii) section 10 of that Act (right to prevent processing likely to cause damage or distress), and*

*(b) in any other case, that the disclosure of the information to a member of the public otherwise than under this Act would contravene any of the data protection principles if the exemptions in section 33A(1) of the Data Protection Act 1998 (which relate to manual data held by public authorities) were disregarded.*

*"The second condition is that by virtue of any provision of Part IV of the Data Protection Act 1998 the information is exempt from section 7(1)(c) of that Act (data subject's right of access to personal data)."*

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<sup>1</sup> The Commissioner has assessed this complaint in relation to the 1998 Data Protection Act – which was the law in force at the time the request was responded to.

14. The first step for the Commissioner in determining whether the exemption is engaged is therefore to determine whether the information in question is personal data.
15. The definition of personal data is set out in section 1 of the Data Protection Act 1998:

*"...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 the individual and any indication of the intention of the data controller or any other person in respect of the individual."*

16. The key starting point for the School is therefore to demonstrate that an individual can be *identified* from the withheld information.

*Is the withheld the personal data of a third party?*

17. The Commissioner has been provided with unredacted copies of the withheld information. It comprises two completed Formal Lesson Observation forms and five handwritten pages which constitute a third Formal Lesson Observation report.
18. The withheld information also includes four forms recording the outcome of "Personalised Feedback Sessions". The School explained that whilst its Newly Qualified Teachers (NQTs) were required to have regular *formal* lesson observations, more experienced teachers could request a more senior member of staff to observe a lesson and provide feedback. It is common ground between all parties that this latter category of document would fall within the scope of the request.
19. From the content of the Formal Lesson Observation sheets, it is clear that these are different to the Personalised Feedback Session sheets. The layout of the form is different and this would be immediately obvious, even from a brief review.
20. In its initial response, the School provided a template copy of the Personalised Feedback Session form. Therefore the complainant knows what that form looks like and would know that a different form would relate to a different type of activity.

21. When considering anonymisation,<sup>2</sup> the Commissioner considers the “Motivated Intruder” test. Put simply, this test assumes that a particular individual (not necessarily the requestor) would have a desire to de-anonymise the information and would combine any information released under the FOIA with other information they may have in their possession (or other publicly available information) to identify the data subject(s).
22. The Commissioner takes the view that, taken together with information already released, the release of the two Formal Lesson Observation forms (even with substantial redactions) would enable them to be linked to an NQT. Given that only two NQTs had Observations within the specified period, either of those NQTs would be able to identify their own feedback and hence, by process of elimination, identify the feedback which was provided to the other NQT. The same issue arises in relation to the handwritten sheets.
23. The position in respect of the Personalised Feedback Session sheets is slightly more nuanced. Three of the observations were carried out by the same individual. Many of the comments are the same or similar across all three sheets.
24. The fourth feedback sheet was completed by a different individual. It is immediately obvious, from a visual inspection of the document, that this observation has been carried out by a different individual.
25. At the time the request was made, the Commissioner considers there to have been a reasonable probability that staff at the School would have been aware of the identities of the staff members who were carrying out observations. She also considers it likely that, at the time the request was made, it would have been known amongst staff at the School that only two individuals had carried out observations during the period in question. Given that this particular Observer only appears to have carried out a single observation during that period, the Commissioner takes the view that it would have been possible for staff at the School to identify that the particular Observer had only undertaken one observation during that period and hence, by reference to the other three observation forms, identify the one that was different to all the rest.
26. The Commissioner also takes the view that, at the time the request was made, other staff at the school (and, potentially, those close to the

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<sup>2</sup> <https://ico.org.uk/media/for-organisations/documents/1061/anonymisation-code.pdf>

particular teacher involved) may have known which teacher was observed by which Observer. By identifying the Observer who completed the form, it is then possible to identify the teacher who is the subject of that form and hence the entire form is that teacher's personal data – regardless of how many redactions were applied.

27. Turning finally to the three remaining forms, the Commissioner considers that disclosing these forms could identify the teachers who were observed.
28. The forms contain numerous references by which the subject matter of the lesson could be either identified or inferred. In the Commissioner's view, staff at the School would be able to identify, from the unredacted version, which subject was being taught in the particular lesson. Having identified the subject being taught, staff would then be able to identify the teacher, teaching that subject, who was observed during the period in question. Therefore, the *unredacted* version of each form would be the personal data of the particular teacher.
29. The Commissioner takes the view that these three forms can be redacted in such a way as to remove any references, within each form, to the subject matter of the lesson. However, she also considers that, even if this were done, because the forms only relate to three teachers, the possibility of two of those teachers, having identified their own feedback, comparing notes and thereby identifying the third teacher, is not sufficiently remote. She has therefore taken the view that these documents cannot be redacted sufficiently to reduce the risk of de-anonymisation to an acceptable level.
30. Whilst the Commissioner accepts that, given the passage of time since the request was first made, the chances of being able to piece together the scraps of information to identify the particular lessons, Observers and teachers have diminished. However, the Commissioner is required to consider the circumstances as they existed at the time the request was made. She also notes that, whilst the risk of de-anonymisation has diminished over time, it has not disappeared entirely and therefore "mosaic effect" arguments (whereby an individual can link small pieces of data from multiple sources to create a full picture) still carry weight - even a year on from when the request was responded to.
31. The process of connecting the documents back to an individual teacher would be time-consuming and would require additional information. However, the Commissioner is required to consider the possibility that an individual (or a group of individuals) may have the motive and the opportunity to do so.

32. She therefore finds that *all* the documents are the personal data of the teachers involved.

*Would disclosure contravene the Data Protection Act 1998?*

33. When personal data has been requested under FOIA, in order to satisfy herself that information can be disclosed, the Commissioner must first determine whether that disclosure would violate any of the data protection principles as set out in Schedule 1 of the Data Protection Act 1998.
34. The school has argued that to disclose the requested information would violate the First Data Protection Principle, which states that:
- "Personal data shall be processed fairly and lawfully and, in particular, shall not be processed unless....at least one of the conditions in Schedule 2 is met."*
35. The Commissioner's approach when considering the First Principle is to start by looking at whether the disclosure would be fair. If disclosure would be *unfair*, the exemption is engaged immediately. Only if the Commissioner finds that disclosure would be fair will she go on to look at lawfulness or whether a Schedule 2 condition can be satisfied.
36. In assessing whether disclosure would be unfair, and thus constitute a breach of the First Data Protection Principle, the ICO takes into account a number of factors, including the following:
- a. What reasonable expectations does the data subject(s) have about what will happen to their personal data?
  - b. What are the consequences of disclosure?
  - c. Are there any legitimate interests in disclosure which would outweigh the rights and freedoms of the data subject(s)?
37. The School has argued that the teachers involved would have a legitimate expectation that the information would be kept confidential. It has pointed out that, in the case of the Personalised Feedback Sessions, the teachers are under no obligation to be observed. All the forms have been stamped as "Confidential."
38. The Commissioner's view is that the data subjects would have a reasonable and legitimate expectation that the information would remain private given that it relates to their performance at work. The School has not sought consent from the teachers involved (though it was under no obligation to do so) and the Commissioner considers it unlikely that consent would have been given anyway.

39. Whilst it is possible that some of the information might have been shared amongst senior staff at the School in relation to performance management, there would be a legitimate expectation that that sharing would go no further.
40. The key point here is that disclosure under the FOIA is considered to be disclosure to the world at large. It is the equivalent of the School publishing the information on its website. The School must consider the detriment that might be caused to the individuals by disclosure of this material, not just to the complainant, but to the wider world.
41. Given the legitimate expectations of the data subjects, the Commissioner agrees with the School that the loss of privacy would cause distress to the individuals involved.
42. Finally, the Commissioner has considered whether there would be any legitimate interest which would outweigh the rights and freedoms of the data subject.
43. The Commissioner notes that the information involved relates to the *professional* as opposed to the *private* life of the individuals concerned.
44. She also notes that there would be some value to parents of children at the School in allowing them to assess the quality of the education their children are receiving. Releasing such information would also help the staff at the School understand the observation process and to judge their own performance against that of their peers.
45. However, the Commissioner is not persuaded that these arguments are sufficient to override the reasonable expectations of the data subjects that information which is personal to them will remain private.
46. The School will have its own internal monitoring programmes to ensure that staff are performing to the required standards and to identify areas where improvements can be made. In addition, Ofsted inspects all schools periodically and can carry out its own lesson observations. In the Commissioner's view, these systems are a much more proportionate use of personal data to measure teaching standards than publishing individual lesson observations.
47. The Commissioner has seen nothing within the withheld information which would suggest to her that there are exceptional issues at the School which would justify overriding the rights and freedoms of the data subjects.
48. For these reasons, the Commissioner finds that disclosure of the withheld information would be in breach of the first data protection principle. Her overall conclusion is, therefore, that the exemption

provided by section 40(2) is engaged and the School was not obliged to disclose the requested information.

## Right of appeal

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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@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)

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 .....**

**Ben Tomes  
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