

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 13 May 2024

Public Authority: The Governing Body of Rowan High School
Address: Sterrix Lane
Bootle
Liverpool
L21 0DA

Decision (including any steps ordered)

1. The complainant has requested information relating to the pupils' academic levels and their learning difficulties at Rowan High School. The Governing Body of Rowan High School (the school) relied on section 40(2) (third party personal information) to withhold the requested information.
2. The Commissioner's decision is that the school is entitled to rely on section 40(2) to withhold the requested information. However, he has recorded a procedural breach of section 17(1) of FOIA.
3. The Commissioner does not require the school to take any steps as a result of this decision notice.

Request and response

4. On 29 August 2023, the complainant submitted the following request for information to the school:

"I would like to make a freedom of information/subject access request for a profile picture of [name of complainant's child redacted] class peers academic levels and what level of learning disabilities if any? I am not asking for the names or individuals to be identified just the levels, the National Autistic Society say I am entitled to this information and it is not affecting GDPR rules.

Can I also have a copy of this year's and past year's GCSE results please for Rowan High, in terms of how many entered, what subjects, grade awarded, etc. Also, any A levels/alternative qualifications if taken in 6th form."

5. The school responded on 21 September 2023. In response to part one of the request, it advised the complainant that it was unable to provide a profile picture of the complainant's child's peers' academic levels and their learning difficulties, if any, but provided some general information about the pupils that attend the school. In response to part two of the request, the school provided the information it held falling within the scope of the request.
6. The complainant wrote to the school on 11 October 2023, requesting that it carry out an internal review of its decision to withhold the information requested in part one.
7. The school provided the outcome of its internal review on 21 December 2023 maintaining its original position.

Scope of the case

8. The complainant contacted the Commissioner on 5 December 2023 to initially complain about the school's failure to respond their internal review request.
9. As the internal review remained outstanding over 40 working days after it was requested, the Commissioner accepted the case for investigation to avoid further delays for the complainant.
10. Before the case was allocated for investigation, the school provided the complainant with the outcome of its internal review as described in paragraph 7 above.
11. The complainant contacted the Commissioner again on 27 December 2023, advising that they remained unhappy with the school's response to their request because it had failed to provide details of the peer groups as requested. The complainant confirmed that they were not asking for individuals to be identified or named and therefore did not believe the school's data protection reasons were viable.
12. As the information in part one of the request has been withheld on the basis that it is personal data, the Commissioner considers that the scope of his investigation is to establish whether it is exempt from disclosure under section 40(2) of FOIA.

Reasons for decision

Section 40(2) – third party personal information

13. Section 40(2) of FOIA allows a public authority to withhold information that constitutes the personal data of someone other than the requester, and if disclosing that information would contravene any of the data protection principles¹ set out under UK data protection law.
14. The Commissioner must therefore consider:
 - a. Whether the requested information is personal data and, if so;
 - b. Whether disclosing the information would constitute a contravention of data protection law.

Is the requested information personal data?

15. Personal data is defined in Article 4 of the UK General Data Protection Regulation (UK GDPR) and means any information relating to an identified or identifiable natural person.
16. The two main elements of personal data are that it must relate to a natural person (i.e. a living individual), and that the person must be identifiable from the information (either directly or indirectly).
17. In this case, the school considers that all the withheld information in part one of the request relates to the other pupils in the class because it consists of the learning level (ongoing assessment) and the learning needs (including medical information) of those pupils.
18. The Commissioner is satisfied that, in the hands of the school, the information does relate to and identify the pupils in question, and as such constitutes their personal data within the definition under section 3(2) of the DPA.
19. He has therefore gone on to consider whether the information can be effectively anonymised in order to allow disclosure.

¹ The data protection principles are set out in Article 5(1) of the UK General Data Protection Regulation and section 34(1) of the Data Protection Act 2018.

Can the information be effectively anonymised?

20. Where a public authority has received a request for third party personal data under FOIA, it may be able to release the information if the information is anonymised (i.e. any information that allows individuals to be identified is removed). However, simply removing names or other identifiers is not always sufficient for anonymisation to be effective.
21. As explained in the Commissioner's guidance on what constitutes personal data², information is personal data if it relates to an individual who is identifiable either directly (from that information) or indirectly. Public authorities must therefore consider not only whether an individual is identifiable directly from the information that has been requested, but also whether they can be identified when that information is combined with other information that may be available to members of the public.
22. When considering the possibility of identification, the Commissioner applies the "Motivated Intruder Test." This test starts with a hypothesis that there exists a person who wishes to identify the individuals covered by the disputed information. The person is willing to devote a considerable amount of time and resources to the process of identification. They may have some inside knowledge (i.e. information not already in the public domain) but will not resort to illegality – they are determined but not reckless. The Commissioner considers how such a person could go about identifying the individuals involved.
23. It must also be remembered that a disclosure under FOIA is a disclosure to the world at large. The motivated intruder does not therefore need to be the requester themselves; it could be a pupil or staff member at the school, or a parent of one of the pupils in the same class as the pupils to whom the data relates.
24. In its submissions to the Commissioner, the school explained that the information in question relates to a small number of pupils known to the requester (i.e. the peers of the requester's child). The Commissioner understands that the number of pupils in question is 11.
25. The school has indicated that because of the small number of individuals involved, it believes the requester would be able to identify one or more of the pupils to whom the information relates, even if the names of the pupils are not disclosed. It therefore believes that the information cannot be effectively anonymised.

² [What is personal information: a guide | ICO](#)

26. Whilst the fact that the information relates to a small numbers of individuals does not automatically mean that those individuals will be identifiable, this does carry a greater risk of identification than if the number of individuals was larger. Whether individuals can be identified in any particular case will depend on the particular facts, such as the size of the overall dataset, the number of data points that have been requested and the information already in the public domain that could potentially be cross-referenced with the disclosed information.
27. In this case, the Commissioner considers that it is possible for someone with some knowledge of the pupils in question, such as their particular learning disabilities or learning level, to work out who the information relates to in at least some cases – for example a parent of one of the pupils who has spoken with the parent of another pupil about aspects of their child’s disability or learning record.
28. The Commissioner is therefore satisfied that it would be possible for a motivated intruder to link the information in question to an identifiable living individual who attended the specific class, given the small number of pupils involved. He is therefore satisfied that the information cannot be effectively anonymised.
29. As the Commissioner is satisfied that the requested information could not be effectively anonymised, he has gone on to consider whether its disclosure would contravene the data protection principles.

Would disclosure contravene the data protection principles?

30. The fact that information constitutes personal data does not automatically exclude it from disclosure under FOIA. The second element of the test under section 40(2) is to determine whether disclosure would contravene any of the data protection principles.
31. The most relevant data protection principle in this case is the one under Article 5(1)(a) of the UK GDPR, which states:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject”.
32. 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 doing so would be lawful, fair and transparent.
33. For disclosure to be “lawful”, there must be a “lawful basis” for that processing. If there is no lawful basis under data protection law, the personal data cannot be disclosed. The available lawful bases for processing are listed in Article 6(1) of the UK GDPR. The disclosure must also be generally lawful (i.e. not in contravention of any other laws).

34. In addition, if the requested data is "special category" personal data, the public authority must also be able to satisfy one of the conditions listed in Article 9 of the UK GDPR in order for disclosure to be lawful.
35. Article 9 of the UK GDPR defines "special category" as being personal information which reveals racial, political, religious or philosophical beliefs, or trade union membership, and the genetic data, biometric data for the purpose of uniquely identifying a natural person, data concerning health or data concerning a natural person's sex life or sexual orientation. Because of the additional sensitivity of this kind of information, it is given special protection under the UK GDPR.
36. The school has explained that some of the withheld information is special category data as it includes medical information about the pupils.
37. Having considered the wording of the request, and viewed the withheld information, the Commissioner agrees that some of the withheld information does consist of special category personal data. He has reached this conclusion on the basis that some of the information, specifically the level of learning difficulties of the pupils, falls within the definition of health data.
38. Special category data is particularly sensitive and therefore warrants special protection. As stated above, it cannot be processed (including disclosure under FOIA) unless one of the stringent conditions listed in Article 9 can be met.
39. The Commissioner considers that the only Article 9 conditions that could be relevant to a disclosure of special category personal data under FOIA are:
 - (a) explicit consent from the data subject; or
 - (e) data manifestly made public by the data subject.
40. The Commissioner has seen no evidence or indication that the pupils concerned have explicitly consented to this information being disclosed to the world at large in response to the FOIA request, nor has he seen evidence to suggest that they had deliberately made this information public at the time of the request.
41. As none of the conditions required for processing special category data are satisfied, the Commissioner is satisfied that disclosing special category data relating to the learning difficulties of the pupils would breach principle (a) of the UK GDPR. This information is therefore exempt under section 40(2) of FOIA.

42. Having dealt with those elements of the withheld information which constitute special category data, there remains information relating to the academic levels of the pupils which does not fall within special category data but is nevertheless personal data.
43. When considering whether the disclosure of personal data would be lawful, the Commissioner must consider whether there is a legitimate interest in disclosing the information, whether disclosure of the information is necessary, and whether these interests override the rights and freedoms of the individuals to whom the information relates.
44. The Commissioner considers that the complainant is pursuing a legitimate interest (i.e. to establish whether the school is suitable for their child's needs), and that disclosure of the requested information is necessary to meet that legitimate interest.
45. The school has argued that the disclosure of the withheld information would reveal personal sensitive information about a small number of individuals known to the complainant, which would enable the complainant to identify one or more of the individuals leading to a potential data breach. The school stated that they were not prepared to share such information as it would put themselves and the individuals at risk of a possible data breach.
46. The Commissioner considers that the disclosure of the academic levels of the pupils would be needed in order to fully meet the legitimate interests identified. He is therefore satisfied that there are no less intrusive means of fully achieving the legitimate aims identified.
47. It is therefore 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 FOIA in response to the request, or if such disclosure would cause unjustified harm, their interests or rights are likely to override the legitimate interests in disclosure.
48. 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.
49. 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 and the purpose for which they provided their personal data. It is also important to consider whether disclosure would be likely to result in unwarranted damage or distress to that individual.
 50. The school has argued that the individuals have a reasonable expectation that the information provided by them or about them would not be shared with any other party. It confirmed that it had not sought the consent of the individuals concerned as it did not consider it to be appropriate in this case. It also believed that if consent of the individuals concerned were sought, it would be denied.
 51. In addition, the school believes that disclosing the withheld information could cause stress and anxiety to one or more of the individuals concerned.
 52. Based on the above factors, the Commissioner has determined that there is insufficient legitimate interest in disclosing the withheld information 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 withheld information would not be lawful.
 53. 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.
 54. The Commissioner has therefore decided that the school was entitled to withhold the requested information that constitutes personal data under section 40(2), by way of section 40(3A)(a).

Procedural matters

Section 17 – refusal of request

55. Section 17(1) of FOIA states that where a public authority intends to refuse a request for information on the grounds that it is subject to an exemption in Part II of FOIA, it must issue the requester with a refusal notice explaining the exemptions relied upon and why they apply (if not apparent), no later than 20 working days after the date on which the request was received.

56. In this case the school failed to specify which exemption under FOIA it was relying on to withhold the information requested in part one of the request.
57. The Commissioner has made a note of this breach for monitoring purposes.

Other matters

Internal review request

58. The Commissioner notes that the time taken for the school to respond to the internal review request exceeded 40 working days.
59. As explained in the ICO's guidance³, internal reviews should usually be completed within 20 working days. However, there may be circumstances where public authorities require more time to complete an internal review, for example to address complex issues, consult with third parties or consider substantial amounts of information.
60. In these circumstances, this should be no more than an additional 20 working days, unless there are legitimate reasons why a longer extension is necessary.

Further complaint

61. During the Commissioner's investigation, the complainant also raised concerns about the school's response to part two of their request for information.
62. Specifically, the complainant is concerned that the GCSE results provided are not officially published by the school or on the government website. The complainant is therefore of the view that this allows the school to provide whatever results it wants in response to part two of their request (i.e. there is no way to verify the accuracy of the information).
63. Whilst the Commissioner notes the complainant's concerns, he has not been provided with evidence to suggest that the GCSE results provided in response to part two of the request are not an accurate reflection of

³ [Request handling, Freedom of Information – Frequently Asked Questions | ICO](#)

the recorded information that the school holds. He does not consider that fact that the GCSE results are not published to be evidence of this.

64. Furthermore, questions of the accuracy of information released under FOIA do not fall under the Commissioner's regulatory remit (other than to the extent that the information disclosed accurately reflect the information that is held). Any such concerns about the accuracy of information held by the public authority would need to be resolved between the complainant and the public authority directly. He therefore does not consider this to be a relevant factor to this decision notice.

Right of appeal

65. 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: 0203 936 8963

Fax: 0870 739 5836

Email: grc@justice.gov.uk

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

66. 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.
67. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

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