

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 12 August 2024

Public Authority: Department for Education
Address: Sanctuary Buildings
Great Smith Street
London
SW1P 3BT

Decision (including any steps ordered)

1. The complainant has requested copies of information provided to an independent barrister. The above public authority ("the public authority") refused to confirm or deny that the information was held.
2. The Commissioner's decision is that the information, if it were held, would be the complainant's own personal information. The public authority was therefore entitled to rely on section 40(5A) of FOIA to refuse to confirm or deny that this information was held. However, the public authority breached section 17 of FOIA because its refusal notice was inadequate.
3. The Commissioner does not require further steps to be taken.

Request and response

4. On 29 January 2024, the complainant wrote to the public authority and, referring to an opinion provided by an independent barrister, requested information in the following terms:

"Please treat this email as a FOI and SAR for all of the information sent to [the barrister] by the TRA (then NCTL) in the above matter."
5. The public authority responded on 15 February 2024. It stated that it was relying on "section 40(5)" of FOIA to neither confirm nor deny that

the information was held. It maintained that stance following an internal review.

Scope of the case

6. At the outset of his investigation, the Commissioner wrote to the complainant on 29 July 2024 to explain his provisional view of the complaint. He explained that any information the public authority held would be the complainant's own personal information. Therefore not only would the public authority have been entitled to refuse to confirm or deny that the information was held, it was obligated to do so. He suggested that the complainant should instead pursue the matter under SAR. The complainant requested a decision notice.
7. The analysis that follows explains why the Commissioner considers section 40(5A) applies in this situation. Given the issues involved, he is satisfied that he can reach a decision without consulting the public authority.

Reasons for decision

8. Section 40(5A) of FOIA allows a public authority to refuse to confirm or deny that it holds any information that is, or, if it were held, would be, the personal information of the person requesting it.
9. The request relates to a complaint that was made about the complainant. As part of the process of assessing that complaint and the actions that should result, an independent barrister was asked to review the evidence. It is this evidence that the complainant is seeking.
10. The Commissioner considers that this information, if it were held, would have the complainant as its focus. This is because the information would be about the complainant and her actions. It would therefore be the complainant's own personal information.
11. Some of the information may be **both** the complainant's personal information **and** the personal information of others. However, this is irrelevant for the purposes of the exemption. If the information is the requester's personal information, regardless of whether it is **solely** their personal information, the exemption will apply.
12. If the exemption applies, the public authority does not need to consider the public interest or the wishes of the requester.

13. The public authority was therefore entitled to rely on section 40(5A) of FOIA to refuse to confirm or deny that the information was held.

Procedural matters

14. The Commissioner finds that the public authority's refusal notice was inadequate as it failed to specify the exemption it was relying on, or to explain why that exemption applied.
15. The original refusal notice stated that the public authority was relying on "section 40(5)" of FOIA because:

"an individual has a legitimate expectation that, if there have been any communications with DfE with them or about them, these instances should neither be confirmed nor denied to the public as we believe that to do so would be regarded as unfair to the individual."
16. Section 40(5) of FOIA originally covered situations where a public authority could refuse to confirm or deny holding particular information when doing so could reveal anyone's personal information. However, this part of the legislation was repealed by the Data Protection Act 2018.
17. Instead two new separate subsections were inserted: section 40(**5A**) which deals with situations where the requested information is, or would be, the personal information **of the requester**; and section 40(**5B**) which deals with situations where providing a confirmation or denial would reveal the personal information of someone **other than the requester**.
18. The public authority's refusal notice should have explained that section 40(5A) of FOIA was being relied on, because the requested information, if it were held, would be the complainant's own personal information.
19. Instead, the refusal notice referred to a part of the legislation that no longer exists and the explanation was ambiguous about whether any information would relate to the complainant or to someone else. The public authority's internal review could have rectified this, but it did not.
20. The Commissioner therefore finds that the public authority breached section 17 of FOIA in its handling of this request.
21. The public authority may wish to check its templates to ensure that no further references to "section 40(5)" are included in future refusal notices.

Right of appeal

22. 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

23. 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.
24. 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

Roger Cawthorne
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF