

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 5 February 2025

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

Decision (including any steps ordered)

1. The Commissioner's decision is that the requested information about school attendance orders is exempt information under section 40(2) of FOIA, which concerns personal data.
2. It's not necessary for the Department for Education to take any corrective steps.

Background and context

3. In its submission to the Commissioner, the Department for Education (DfE) has explained that section 7 of the Education Act 1996 requires every parent of a child of compulsory school age to ensure that the child receives a full-time and efficient education suitable to their age, ability, aptitude, and special educational needs (if they have any). In a case where it isn't clear whether this is happening, the main statutory mechanism is the process that can result in a 'school attendance order' (SAO). An SAO is an order requiring a parent to have their child enrolled as a pupil at a specified school.
4. The parent can apply for the order to be revoked, which the Local Authority (LA) must do unless it considers that no satisfactory home education has been arranged; DfE's Secretary of State can be brought in to arbitrate if necessary.

5. The SAO process is mainly used in relation to children who are in home education (or, more precisely, who are not registered at a school). In principle, the SAO process can also be used where a child is registered at school but for some reason is not receiving a full-time, efficient, suitable education there; but this is very rare.

Request and response

6. The complainant made the following information request to DfE on 20 July 2024:
 - "1) In the last 12 months how many requests to revoke an SAO have been received.
 - 2) In the last 12 months from receiving the request to revoke an SAO to the requester receiving their final response (whether in favour of parent or LA) how long did the process take.
 - 3) How many requests in the last 12 months to revoke an SAO has the SoS revoked
 - 4) How many requests in the last 12 months to revoke an SAO has the SoS upheld the LA issued SAO.
 - 5) How many requests in the last 12 months to revoke an SAO has the SoS disposed of in another manner.
 - 6) In the last 5 years how many SAO has the SoS revoked."
7. DfE's final position was that the requested information was exempt from disclosure under section 40(2) of FOIA.

Reasons for decision

8. This reasoning covers DfE's application of section 40(2) to the complainant's request.
9. In their complaint to the Commissioner, the complainant has said:
 - "If the figure is 0 to Question 1 or Question 6 I can not see any valid reason for just confirming this or clarifying 0 is not an answer for any of the questions.
 - Q2 understanding the length of time this process takes is in the public interest as home educators are being taken to court on back of SAO's

issued by their LA and so it is important from a public interest perspective to understand how long this process takes in case a parent is in that process and believe the LA has failed to revoke their SAO when they should have and according to the law you can ask SoS to revoke, but there is not a clear mechanism on staying your current case whilst waiting for a SoS determination and no clear process around this even though the option of asking SoS is written into law.

There has been no attempt at transparency in the answers or even trying to assist with any of the 6 questions in a meaningful way, they have not responded with even a tiny parameter of what they mean by low numbers. Bearing in mind these requests could come from any LA in the country and no identifying factor about characteristics of the family requesting the SAO is asked for this appear to be an inappropriate refusal.”

10. Under section 40(2), information is exempt from disclosure if it's the personal data of an individual other than the applicant and disclosure would contravene any of the principles relating to the processing of personal data that are set out in Article 5 of the UK General Data Protection Regulation (UK GDPR).
11. The most relevant principle is Article 5(1)(a). This states that:

“Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject.”
12. The Commissioner has first considered whether the information DfE is withholding under section 40(2), which is numerical information, can be categorised as personal data. DfE has provided him the information it's withholding.
13. Personal data is defined as information that relates to a living individual and from which the individual can be identified.
14. The Commissioner agrees with DfE that discussing why the withheld information can be categorised as personal data, would, in effect, disclose that personal data. As such, the Commissioner doesn't intend to explain his or DfE's reasoning, suffice to say that he's satisfied that the withheld information is personal data – it relates to a living individual or individuals – the data subject(s) - and, in the circumstances of this case, identification would be possible. The data subject(s) is a child or are children.
15. The Commissioner has gone on to consider whether disclosing that data would breach Article 5(1)(a) which, as above, states that personal data must be processed lawfully.

16. Personal data is processed when it's disclosed in response to a FOIA request. In order to be lawful under Article 5(1)(a), the lawful basis under Article 6(1)(f) of the UK GDPR must apply to the processing. It must also be generally lawful.
17. Article 6(1)(f) states:

"...processing is necessary for the purposes of the legitimate interests pursued by the controller or by a third party except where such interests are overridden by the interests or fundamental rights and freedoms of the data subject which require protection of personal data, **in particular where the data subject is a child.**" [The Commissioner's emphasis.]
18. In order to determine whether disclosing the personal data would be lawful the Commissioner has considered three 'tests': the legitimate interest test, the necessity test, and the balancing test where the applicant's legitimate interests are balanced against the data subject's interests or fundamental rights and freedoms.
19. The complainant has an interest in SAOs for the 12 months preceding their request, and that's a legitimate interest for them to have. There's also a general interest in DfE demonstrating it's as open and transparent as possible about the SAO process.
20. The Commissioner considers that the general interest in transparency has been met to a satisfactory degree through the information about SAOs that DfE has advised that it already publishes, such as guidance for LAs and for parents, and related information on the GOV.UK website.
21. However, disclosure would be necessary to address the specifics of the complainant's request. The Commissioner has therefore gone on to carry out the balancing test.
22. In considering this balancing test, the Commissioner takes into account any or all of the following: 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 individuals expressed concern to the disclosure; and the reasonable expectations of the individuals.
23. A key issue is whether the individual(s) concerned have a reasonable expectation that their information won't be disclosed. These expectations can be shaped by factors such as the individual(s) general expectation of privacy, whether the information relates to employees in their professional role or to them as individuals, and the purpose for which they provided their personal data.

24. It's also important to consider whether disclosure would be likely to result in unwarranted damage or distress to those individuals.
25. The information in this case is the personal data of a child or children, which requires special protection. He's satisfied that the data subject(s) in this case would reasonably expect that their personal data – whether they'd been the subject of a SAO - wouldn't be disclosed to the world at large under FOIA. They haven't consented to disclosure and disclosure would therefore be likely to cause them harm and distress.
26. The complainant appears to be pursuing a purely private concern, in that they haven't presented any wider public interest arguments for this specific information's disclosure. Unrestricted disclosure of the personal data to the general public isn't therefore proportionate.
27. Based on the above factors, the Commissioner has determined that there's insufficient legitimate interest to outweigh the data subject(s) fundamental rights and freedoms. The Commissioner therefore considers that there's no Article 6 basis for processing and so disclosing the information wouldn't be lawful.
28. Given the above conclusion that disclosure would be unlawful, the Commissioner doesn't need to go on to consider separately whether disclosure would be fair or transparent.
29. The Commissioner's decision is that DfE was entitled to withhold the requested information under section 40(2) of FOIA.

Right of appeal

30. 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

31. 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.
32. Any Notice of Appeal should be served on the Tribunal within 28 (calendar) days of the date on which this decision notice is sent.

Cressida Woodall
Senior Case Officer
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
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SK9 5AF