

Freedom of Information Act 2000 (FOIA)

Decision notice

Date: 4 September 2019

Public Authority: Hertfordshire County Council
Address: County Hall
Pegs Lane
Hertford
Hertfordshire
SG13 8DE

Decision (including any steps ordered)

1. The complainant has requested information about complaints that she has made relating to a school. Hertfordshire County Council ('the Council') disclosed some information, and withheld the remainder under sections 40(2) and 41.
2. The Commissioner's decision is that the Council is entitled to withhold the information under sections 40(2) and 41, and has otherwise disclosed all held information. However, the Council breached section 10(1) by responding to the request outside the time for compliance.
3. The Commissioner does not require the Council to take any steps.

Request and response

4. On 14 March 2018, the complainant wrote to the Council and requested information in the following terms:

"In terms of providing the information that I ask for in this letter I would ask that you consider this as a request under the Freedom of Information Act and provide such documents as are available, save for those related to the judicial review over which you assert legal privilege. Such documents should cover all letters, memos, emails, notes of meetings and telephone conversations, whether typed or handwritten, between HCC and any staff, governors or representatives of the School during the period from 1st September 2016 to 1 January 2018, where such documents cover any matters raised between my husband and I and the School, the Schools policies and procedures or governance and the specific matters set out in this letter."

5. The Council handled the request as seeking the complainant's own personal data under the terms of the Data Protection Act 2018.
6. On 20 July 2018, the complainant resent the request, and reiterated that it sought official information under the terms of the FOIA.
7. The Council responded on 10 September 2018. It disclosed held information, and withheld some under the exemptions provided by sections 40(2) and 41.
8. On 18 September 2018 the complainant requested an internal review. This was on the basis that further information was held besides that disclosed, and that the application of sections 40(2) and 41 was incorrect.
9. Following an internal review the Council wrote to the complainant on 16 October 2018. It upheld its original position.

Scope of the case

10. The complainant contacted the Commissioner on 26 November 2018 to complain about the way their request for information had been handled.
11. The Commissioner considers the scope of the case to be the determination of whether the Council is entitled to withhold information under sections 40(2) and 41, and whether it has otherwise disclosed all relevant held information under section 1.

12. The Commissioner notes that the request seeks information that will represent the complainant's own personal data, and which is exempt under section 40(1) of the FOIA. The Council has handled that aspect of the request under the terms of the Data Protection Act 2018, and has disclosed the complainant's own personal data. The Commissioner has considered the Council's handling of that aspect of the request in a separate case in her role as regulator for that Act.

Reasons for decision

Section 40(2) - Personal information of third parties

13. Section 40(2) of the FOIA provides that information is exempt from disclosure if it is the personal data of an individual other than the requester and where one of the conditions listed in section 40(3A)(3B) or 40(4A) is satisfied.
14. In this case the relevant condition is contained in section 40(3A)(a)¹. This applies where the disclosure of the information to any member of the public would contravene any of the principles relating to the processing of personal data ('the DP principles'), as set out in Article 5 of the General Data Protection Regulation ('GDPR').
15. The first step for the Commissioner is to determine whether the withheld information constitutes personal data as defined by the Data Protection Act 2018 ('DPA'). If it is not personal data then section 40 of the FOIA cannot apply.
16. 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 DP principles.

Is the information personal data?

17. Section 3(2) of the DPA defines personal data as:

"any information relating to an identified or identifiable living individual".

18. The two main elements of personal data are that the information must relate to a living person and that the person must be identifiable.

¹ As amended by Schedule 19 Paragraph 58(3) DPA.

19. An identifiable living individual is one who can be identified, directly or indirectly, in particular by reference to an identifier such as a name, an identification number, location data, an online identifier or to one or more factors specific to the physical, physiological, genetic, mental, economic, cultural or social identity of the individual.
20. Information will relate to a person if it is about them, linked to them, has biographical significance for them, is used to inform decisions affecting them or has them as its main focus.
21. The withheld information in this case represents the names of council officers, St Andrew's Church of England Primary School employees, and biographical information directly relating to school pupils.
22. In the circumstances of this case, having considered the withheld information, the Commissioner is satisfied that the information relates to individuals. She is satisfied that this information both relates to and identifies the individuals concerned. This information therefore falls within the definition of 'personal data' in section 3(2) of the DPA.
23. The fact that information constitutes the personal data of an identifiable living individual does not automatically exclude it from disclosure under the FOIA. The second element of the test is to determine whether disclosure would contravene any of the DP principles.
24. The most relevant DP principle in this case is principle (a).

Would disclosure contravene principle (a)?

25. Article 5(1)(a) of the GDPR states that:

"Personal data shall be processed lawfully, fairly and in a transparent manner in relation to the data subject".

26. 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 to do so would be lawful, fair and transparent.
27. In order to be lawful, one of the lawful bases listed in Article 6(1) of the GDPR must apply to the processing. It must also be generally lawful.

Lawful processing: Article 6(1)(f) of the GDPR

28. Article 6(1) of the GDPR specifies the requirements for lawful processing by providing that *"processing shall be lawful only if and to the extent that at least one of the"* lawful bases for processing listed in the Article applies.

29. The Commissioner considers that the lawful basis most applicable is basis 6(1)(f) which 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"².

30. In considering the application of Article 6(1)(f) of the GDPR in the context of a request for information under the FOIA, it is necessary to consider the following three-part test:-

- i) **Legitimate interest test:** Whether a legitimate interest is being pursued in the request for information;
 - ii) **Necessity test:** Whether disclosure of the information is necessary to meet the legitimate interest in question;
 - iii) **Balancing test:** Whether the above interests override the legitimate interest(s) or fundamental rights and freedoms of the data subject.
31. The Commissioner considers that the test of 'necessity' under stage (ii) must be met before the balancing test under stage (iii) is applied.

Legitimate interests

32. In considering any legitimate interest(s) in the disclosure of the requested information under the FOIA, the Commissioner recognises that such interest(s) can include broad general principles of

² Article 6(1) goes on to state that:-

"Point (f) of the first subparagraph shall not apply to processing carried out by public authorities in the performance of their tasks".

However, section 40(8) FOIA (as amended by Schedule 19 Paragraph 58(8) DPA) provides that:-

"In determining for the purposes of this section whether the lawfulness principle in Article 5(1)(a) of the GDPR would be contravened by the disclosure of information, Article 6(1) of the GDPR (lawfulness) is to be read as if the second sub-paragraph (dis-applying the legitimate interests gateway in relation to public authorities) were omitted".

accountability and transparency for their own sakes, as well as case-specific interests.

33. Further, a wide range of interests may be legitimate interests. They can be the requester's own interests or the interests of third parties, and commercial interests as well as wider societal benefits. They may be compelling or trivial, but trivial interests may be more easily overridden in the balancing test.

Is disclosure necessary?

34. 'Necessary' means more than desirable but less than indispensable or absolute necessity. Accordingly, the test is one of reasonable necessity and involves consideration of alternative measures which may make disclosure of the requested information unnecessary. Disclosure under the FOIA must therefore be the least intrusive means of achieving the legitimate aim in question.
35. In the circumstances of this case, the Commissioner understands that the request has been made in relation to complaints that the complainant has submitted to the school, and subsequently, the Council. The Commissioner notes that these complaints have been considered under a Stage 1 and Stage 2 review by the school, and a response from the Council's Chief Executive. The Commissioner understands that the complainant remains dissatisfied with the outcomes of those complaints, and has sought a judicial review in respect of the substantive matter.
36. Whilst the Commissioner has noted the circumstances in which the request has been made, she does not perceive how the public disclosure of this information would resolve the complainant's concerns, or provide a wider social benefit. It is particularly noted that the involved Council officers and school employees are relatively junior in position, and that part of the withheld information represents the personal data of children, which is subject to enhanced protection under the DPA. Having considered these factors, and specifically the availability of a more suitable alternative measure by which the substantive matter can be reviewed, the Commissioner does not consider that disclosure of the individuals' personal data is necessary.
37. As the Commissioner has decided in this case that disclosure is not necessary to meet the legitimate interest in disclosure, she has not gone on to conduct the balancing test. As disclosure is not necessary, there is no lawful basis for this processing and it is unlawful. It therefore does not meet the requirements of principle (a).

The Commissioner's view

38. The Commissioner has therefore decided that the Council was entitled to withhold the information under section 40(2), by way of section 40(3A)(a).

Section 41 – Information provided in confidence

39. Section 41(1) of the FOIA states that:

Information is exempt information if–

- (a) it was obtained by the public authority from any other person (including another public authority), and*
- (b) the disclosure of the information to the public (otherwise than under this Act) by the public authority holding it would constitute a breach of confidence actionable by that or any other person.*

Was the information obtained from another person?

40. The first step is for the Commissioner to consider whether the information was obtained by the Council from any other person in order to satisfy the requirement of section 41(1)(a).
41. In her enquiries to the Council, the Commissioner asked it to identify which third party provided it with the withheld information.
42. The Council has confirmed that the withheld information represents a safeguarding audit that was provided to it by St Andrew's Church of England Primary School.
43. Having established that the withheld information was obtained from another person, the Commissioner must next consider whether or not its disclosure to the public (otherwise than under the FOIA), would constitute a breach of confidence 'actionable' by that or any other person.

Would disclosure constitute an actionable breach of confidence?

44. Whilst it is not the only test for establishing confidence, the Commissioner finds that the appropriate test for this case is that which is set out in the case of *Coco v Clark [1969] RPC 41*. According to the decision in this case a breach of confidence will be actionable if:
- a. The information has the necessary quality of confidence;
 - b. The information was imparted in circumstances importing an obligation of confidence; and

- c. There was an unauthorised use of the information to the detriment of the confider.

45. All three elements must be present for a claim to be made. However, for that claim to be 'actionable' within the meaning of section 41(1)(b) of the FOIA, a public authority must establish that an action for breach of confidence would, on the balance of probabilities, succeed. This requires consideration of whether or not there would be a public interest defence to such a claim.

The 'necessary quality of confidence' (a.)

- 46. Information will have the necessary quality of confidence if it is more than trivial and not otherwise accessible.
- 47. The Council has informed the Commissioner that the information represents a voluntary safeguarding audit undertaken as part of the school's own internal safeguarding process, and has been provided to the Council in order for the Council to reach a conclusion about safeguarding at the school. The Commissioner is satisfied that such information is not trivial.
- 48. However, as stated above, this alone is not sufficient to indicate that the material has the necessary 'quality of confidence'. Therefore the Commissioner has considered whether the information is otherwise accessible.
- 49. The Council has informed the Commissioner that the information is not known to be readily available. The information was provided directly to the Council by the school.
- 50. The Commissioner is therefore satisfied that the withheld information in this case has the necessary quality of confidence required to sustain an action for breach of confidence, and as such considers that this limb of the confidence test is met.

The 'obligation of confidence' (b.)

- 51. Even if information is to be regarded as confidential, a breach of confidence will not be actionable if it was not communicated in circumstances that created an obligation of confidence. An obligation of confidence may be expressed explicitly or implicitly.
- 52. The Council has informed the Commissioner that the purpose of the audit was to allow school staff to openly discuss issues relating to safeguarding, and to provide information and opinions to the Council. This Council considers that there is a clear expectation of confidence in such a situation, particularly in that such audits may include information

that may be prejudicial to the reputation of the school, and be intermixed with the personal data of school pupils.

53. Having considered the Council's explanation, and in particular the context in which the information was created and provided to the Council, the Commissioner accepts that there is an obligation of confidence in the case.

The 'detriment of the confider' (c.)

54. Having concluded that the information withheld in this case has the necessary quality of confidence, and was imparted in circumstances giving rise to an obligation of confidence, the Commissioner has proceeded to consider whether unauthorised disclosure could cause detriment to the confider.
55. The Council has informed the Commissioner that the audit relies upon school staff being able to openly discuss issues, and that such views, provided candidly in the expectation of confidence, may cause reputational damage to the School, as well as damage the relationship between the School and the community that it is part of.
56. Having considered the circumstances of the withheld information, the Commissioner accepts that its disclosure would cause detriment to the confider.

Is there a public interest defence?

57. Although section 41(1) is an absolute exemption, and does not need to be qualified by a public interest test under section 2 of the FOIA, case law suggests that a breach of confidence will not be actionable in circumstances where a public authority can rely on a public interest defence.
58. The Commissioner has therefore considered whether there is a public interest defence available should the Council disclose the information. The duty of confidence public interest defence assumes that the information should be withheld unless the public interest in disclosure exceeds the public interest in maintaining the confidence.
59. The Council considers that there is significant public interest in maintaining the exemption, and has explained that it relies upon school employees to be open and frank with auditing officers. If school employees perceived that such information may enter the public domain, this may discourage employees from being candid.
60. The Commissioner has considered the Council's argument, in addition to the circumstances of the case. It is recognised that the information has

been provided by the School as part of a safeguarding audit, and the Commissioner perceives that it is clearly important that such audits are able to function in an open and frank manner so that issues and needs can be identified and addressed. The Commissioner also notes that the resulting safeguarding report (the 'Annual Report to the Governing Body on Safeguarding Children'), which contains both the existing safeguarding provisions of the school and recommended steps for the School to take, has been disclosed. This disclosure provides significant transparency about the status of safeguarding at the school and areas in which it can improve.

61. Having considered the circumstances of this case, the Commissioner has concluded that there would be a limited public interest defence in disclosing the information. On this basis the Commissioner finds that section 41(1) has been correctly engaged.

Section 1(1) – General right of access to information

62. Section 1(1) of the FOIA states that any person making a request for information to a public authority is entitled to be informed in writing by the public authority whether it holds information relevant to the request, and if so, to have that information communicated to them. This is subject to any exclusions or exemptions that may apply.
63. Where there is a dispute between the information located by a public authority, and the information a complainant believes should be held, the Commissioner follows the lead of a number of First-tier Tribunal (Information Rights) decisions in applying the civil standard of the balance of probabilities.

The Council's position

64. The Council considers that all held information will be held by the three departments which have had involvement either with the complainant or the wider subject matter, namely:
- The 'Adults, Children and Education Legal Services'.
 - The 'Local Authority Designated Officer', who is part of the 'Child Protection and Statutory Review Service'.
 - The 'Complaints Team for Children's Services'.
65. The Adults, Children and Education Legal Service has identified that all held information is contained in a file in relation to the judicial review issued and served upon the School. This file was set up following a request for assistance from the School, and contains the information considered and created by Legal Services whilst handling the judicial

review. The Council notes that the complainant has specifically removed such information from the parameters of the request by stating “*and provide such documents as are available, save for those related to the judicial review over which you assert legal privilege*”. No further information besides this folder was identified.

66. The Local Authority Designated Officer has undertaken a search of all team members email accounts using the school name, as well as an education database, the team’s shared drive, and the particular team folder for the school. This search would have retrieved any correspondence and records involving the school that were not case specific. As a result of these searches, information about the audit was identified and disclosed.
67. The Complaints Team for Children’s Services has undertaken a search of all electronic records held in relation to the period 1 September 2016 to 1 January 2018; this search has utilised the keywords of the complainant, the complainant’s relevant family members, and the name of the school. A manual search of hardcopy records for the years 2016, 2017 and 2018 was also undertaken for any reference to the complainant, the complainant’s family, and the school.
68. In respect of specific correspondence that the Council cited in its internal review outcome, the Council has elaborated the following:
 - A letter dated 22 May 2018, has now been disclosed to the complainant.
 - A letter, understood to be from the School’s Chair of Governors to an MP, was not known to have been provided to the Council, and no copy has been retrieved though its searches.
 - A letter dated 30 October 2017, submitted by the School to the Council, is held within the legal file in respect of the judicial review.

The Commissioner’s analysis

69. The Commissioner understands that the Council has undertaken searches across all services with involvement in the substantive matter, and that these searches have been spanned all electronic and hardcopy resources that may hold relevant information. In particular, the Commissioner notes that thorough keyword searches have been undertaken using specific keywords relating to the complainant, the complainant’s family members, and the school.
70. Having considered the context that the request relates to, there is no evidence that indicates the Council’s searches have been inadequate.

The Commissioner is also mindful that the complainant has specifically removed that information that the Council has asserted legal privilege over.

71. Having considered the above factors, the Commissioner has concluded that all relevant information is likely to have been retrieved.

Section 10(1) – Time for compliance

72. Section 10(1) of the FOIA states that a public authority must comply with section 1(1) within 20 working days following the date of receipt. In this case the Council did not respond to either the original request, or the resubmitted request, until outside the time for compliance.

Right of appeal

73. 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@justice.gov.uk

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

74. 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.
75. 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

Andrew White
Group Manager
Information Commissioner's Office
Wycliffe House
Water Lane
Wilmslow
Cheshire
SK9 5AF